TAB 1

2009 CarswellQue 10706, 2009 SCC 49, J.E. 2009-1958, 2009 G.T.C. 2036 (Eng.), [2009] G.S.T.C. 154, 394 N.R. 368, 60 C.B.R. (5th) 1, 312 D.L.R. (4th) 577, [2009] 3 S.C.R. 286

2009 CarswellQue 10706, 2009 SCC 49, J.E. 2009-1958, 2009 G.T.C. 2036 (Eng.), [2009] G.S.T.C. 154, 394 N.R. 368, 60 C.B.R. (5th) 1, 312 D.L.R. (4th) 577, [2009] 3 S.C.R. 286

Alternative granite & marbre inc., Re

Deputy Minister of Revenue of Quebec and Her Majesty The Queen, Appellants and Caisse populaire Desjardins de Montmagny and Raymond Chabot Inc., in its capacity as Trustee in bankruptcy of 9083-4185 Québec Inc., Respondents and Canadian Association of Insolvency and Restructuring Professionals, Intervener

Deputy Minister of Revenue of Quebec and Her Majesty The Queen, Appellants and Raymond Chabot Inc., in its capacity as Trustee for the estate of the debtor, Consortium Promecan Inc., Respondent

Deputy Minister of Revenue of Quebec and Her Majesty The Queen, Appellants and National Bank of Canada, Respondent and Canadian Association of Insolvency and Restructuring Professionals, Intervener

Supreme Court of Canada

McLachlin C.J.C.J., Abella, Binnie, Cromwell, LeBel, Rothstein JJ.

Heard: March 17, 2009
Judgment: October 30, 2009
Docket: 32486, 32489, 32492

Proceedings: affirming *9083-4185 Québec inc., Re* (2007), 2007 CarswellQue 12231, [2008] R.J.Q. 39, 2007 QCCA 1813, 2007 QCCA 1835, 2007 QCCA 1837, [2008] G.S.T.C. 3, 40 C.B.R. (5th) 18 (Que. C.A.); reversing *9083-418 Québec inc., Re* (2006), 2006 CarswellQue 4759, [2006] G.S.T.C. 123, 21 C.B.R. (5th) 289, 2006 QCCS 2656 (Que. S.C.); & reversing *9083-4185 Québec inc., Re* (2006), 34 C.B.R. (5th) 245, 2006 CarswellQue 3427, [2007] G.S.T.C. 185, 2006 QCCS 2108 (Que. S.C.)

Counsel: Christian Boutin, Michel Beauchamp, Jean-Yves Bernard, for Appellant, Deputy Minister of Revenue of Quebec

Pierre Cossette, Guy Laperrière, for Appellant, Her Majesty the Queen

Reynald Auger, Jean-Patrick Dallaire, for Respondents, Caisse populaire Desjardins de Montmagny, Raymond Chabot Inc., in its capacity as Trustee in bankruptcy of 9083-4185 Québec Inc. (32486)

Mason Poplaw, Miguel Bourbonnais, for Respondent, Raymond Chabot Inc., in its capacity as Trustee for the estate of the debtor Consortium Promecan Inc. (32489)

Marc Germain, for Respondent, National Bank of Canada (32492)

2009 CarswellQue 10706, 2009 SCC 49, J.E. 2009-1958, 2009 G.T.C. 2036 (Eng.), [2009] G.S.T.C. 154, 394 N.R. 368, 60 C.B.R. (5th) 1, 312 D.L.R. (4th) 577, [2009] 3 S.C.R. 286

Éric Vallières, Sidney Elbaz, for Intervener

Subject: Estates and Trusts; Goods and Services Tax (GST); Insolvency; Tax — Miscellaneous; Provincial Tax; Corporate and Commercial

Tax --- Goods and Services Tax — Collection and remittance — GST held in trust

In three distinct bankruptcy cases, Revenu Québec claimed it was owner of unremitted GST and QST — In first case, bank had security interest in accounts receivable of two bankrupt companies — In second case, trustee and debtor of another bankrupt company decided to keep sums of money in question in trust — In third case, another bankrupt company had hypothecated universality of its claims and accounts receivable in favour of credit union — Bank and trustee unsuccessfully brought motion in Superior Court denying Revenu Québec's claim — Bank and trustee's appeal was allowed — Quebec Court of Appeal found that GST and QST are direct taxes, paid by consumer, not by supplier and latter acts only as collector on behalf of Crown — Court of Appeal found that legislation created deemed trusts to give taxes prior claim status — Court of Appeal found that s. 67(2) of Bankruptcy and Insolvency Act expressly provides that property of bankrupt shall not be regarded as held in trust for Her Majesty by reason of statute — Court of Appeal found that when supplier sells goods or services to buyer, supplier collects tax, deducts input tax credits for tax payable to other suppliers and pays difference to government — Court of Appeal found that claiming that supplier had to remit to Crown amount of tax appearing on invoice was wrong — Crown appealed — APPEAL dismissed — Crown did not have ownership over tax that had been collected or was collectible — Crown had claim only against supplier — Amendments to Bankruptcy and Insolvency Act in 1992 indicated clear intention of Parliament to reduce Crown's priority in bankruptcy proceedings — Section 86(1) of BIA confirms that, in bankruptcy, Crown is only ordinary creditor — Trust claims for GST are ineffective in bankruptcy, as per s. 222(1.1) of Excise Tax Act — Although Quebec legislation governing QST does not contain similar provision, provincial legislation may not alter bankruptcy priorities as this is matter of federal jurisdiction — Trustee's role is not limited to representing bankrupt — Trustee manages bankrupt's estate, but also represents creditors and is responsible for orderly liquidation of assets — Fact that tax was borne by recipient did not mean that supplier or trustee collected tax as Crown's property — GST and QST are not required to be kept separate when collected — Recipient owes tax to Crown, but supplier who has remitted tax owed by recipient but has not collected it has cause of action against recipient — Deemed trusts on tax collected set out in s. 222 of Excise Tax Act and s. 20 of Act Respecting Ministère du Revenu do not continue to exist after bankruptcy — R.S.C. 1985, c. E-15, ss. 221(1), 222(1), 265(10(a).

Tax --- Goods and Services Tax — Special rules — Bankruptcy

In three distinct bankruptcy cases, Revenu Québec claimed it was owner of unremitted GST and QST — In first case, bank had security interest in accounts receivable of two bankrupt companies — In second case, trustee and debtor of another bankrupt company decided to keep sums of money in question in trust — In third case, another bankrupt company had hypothecated universality of its claims and accounts receivable in favour of credit union — Bank and trustee unsuccessfully brought motion in Superior Court denying Revenu Québec's claim — Bank and trustee's appeal was allowed — Quebec Court of Appeal found that GST and QST are direct taxes, paid by consumer, not by supplier and latter acts only as collector on behalf of Crown — Court of Appeal found that legislation created deemed trusts to give taxes prior claim status — Court of Appeal found that s. 67(2) of Bankruptcy and Insolvency Act expressly provides that property of bankrupt shall not be regarded as held in trust for Her Majesty by reason of statute — Court of Appeal found that when supplier sells goods or services to buyer, supplier collects tax, deducts input tax credits for tax payable to other suppliers and pays difference to government — Court of Appeal found that claiming that supplier had to remit to Crown amount of tax appearing on invoice was wrong — Crown appealed — APPEAL dismissed — Crown did not have ownership over tax that had been collected or was collectible — Crown had claim only against supplier — Amendments to Bankruptcy and Insolvency Act in 1992 indicated clear intention of Parliament to reduce Crown's priority in bankruptcy proceedings — Section 86(1) of BIA confirms

2009 CarswellQue 10706, 2009 SCC 49, J.E. 2009-1958, 2009 G.T.C. 2036 (Eng.), [2009] G.S.T.C. 154, 394 N.R. 368, 60 C.B.R. (5th) 1, 312 D.L.R. (4th) 577, [2009] 3 S.C.R. 286

that, in bankruptcy, Crown is only ordinary creditor — Trust claims for GST are ineffective in bankruptcy, as per s. 222(1.1) of Excise Tax Act — Although Quebec legislation governing QST does not contain similar provision, provincial legislation may not alter bankruptcy priorities as this is matter of federal jurisdiction — Trustee's role is not limited to representing bankrupt — Trustee manages bankrupt's estate, but also represents creditors and is responsible for orderly liquidation of assets — Fact that tax was borne by recipient did not mean that supplier or trustee collected tax as Crown's property — GST and QST are not required to be kept separate when collected — Recipient owes tax to Crown, but supplier who has remitted tax owed by recipient but has not collected it has cause of action against recipient — Deemed trusts on tax collected set out in s. 222 of Excise Tax Act and s. 20 of Act Respecting Ministère du Revenu do not continue to exist after bankruptcy — R.S.C. 1985, c. E-15, ss. 221(1), 222(1), 265(10(a).

Bankruptcy and insolvency --- Priorities of claims — Claims of Crown — Federal — Sales tax

In three distinct bankruptcy cases, Deputy Minister of Revenue of Quebec claimed it was owner of unpaid GST and QST — Bank and trustee unsuccessfully brought motion denying deputy minister's claim — Bank and trustee's appeal was allowed — Appellate court found that GST and QST are direct taxes, paid by consumer, not by supplier, and latter acts only as collector on behalf of Crown — Appellate court found that legislators created trusts to give taxes prior claim status — Appellate court found that s. 67(2) of Bankruptcy and Insolvency Act (BIA) expressly provides that property of bankrupt shall not be regarded as held in trust for Her Majesty by means of statute — Appellate court found that claiming that supplier had to remit amount of tax appearing on invoice to department was wrong — Crown appealed — Appeals dismissed — Crown did not have ownership over collectible tax — Crown had only claim against supplier — Amendments to bankruptcy and insolvency legislation in 1992 indicated intention of Parliament to reduce Crown's priority in bankruptcy proceedings — Section 86(1) of BIA confirms that Crown is only ordinary creditor in bankruptcy — Trust claims for GST are ineffective in bankruptcy, as per s. 222(1.1) of Excise Tax Act (ETA) — Although Quebec legislation governing QST does not contain similar provision, provincial legislation may not alter bankruptcy priorities — Trustee's role is not limited to representing bankrupt — Trustee not only manages bankrupt's patrimony, but also represents creditors and is responsible for orderly liquidation of assets — Fact that tax was borne by recipient did not mean that supplier or trustee collected and remitted tax as Crown's property or thing — GST and QST are not required to be kept separate — Recipient owes tax to Crown, but supplier who has remitted tax owed by recipient but has not collected it has cause of action against recipient — Deemed trusts on tax collected set out in s. 222 of ETA and s. 20 of Act respecting the Ministère du Revenu do not continue to exist after bankruptcy.

Bankruptcy and insolvency --- Priorities of claims — Claims of Crown — Provincial — General principles

In three distinct bankruptcy cases, Deputy Minister of Revenue of Quebec claimed it was owner of unpaid GST and QST — Bank and trustee unsuccessfully brought motion denying deputy minister's claim — Bank and trustee's appeal was allowed — Appellate court found that GST and QST are direct taxes, paid by consumer, not by supplier, and latter acts only as collector on behalf of Crown — Appellate court found that legislators created trusts to give taxes prior claim status — Appellate court found that s. 67(2) of Bankruptcy and Insolvency Act (BIA) expressly provides that property of bankrupt shall not be regarded as held in trust for Her Majesty by means of statute — Appellate court found that claiming that supplier had to remit amount of tax appearing on invoice to department was wrong — Crown appealed — Appeals dismissed — Crown did not have ownership over collectible tax — Crown had only claim against supplier — Amendments to bankruptcy and insolvency legislation in 1992 indicated intention of Parliament to reduce Crown's priority in bankruptcy proceedings — Section 86(1) of BIA confirms that Crown is only ordinary creditor in bankruptcy — Trust claims for GST are ineffective in bankruptcy, as per s. 222(1.1) of Excise Tax Act (ETA) — Although Quebec legislation governing QST does not contain similar provision, provincial legislation may not alter bankruptcy priorities — Trustee's role is not limited to representing bankrupt — Trustee not only manages bankrupt's patrimony, but also represents creditors and is responsible for orderly liquidation of assets — Fact that tax was borne by recipient did not mean that supplier or trustee collected and remitted tax as Crown's property or thing — GST and QST are not required to be kept separate — Recipient owes tax to Crown, but

2009 CarswellQue 10706, 2009 SCC 49, J.E. 2009-1958, 2009 G.T.C. 2036 (Eng.), [2009] G.S.T.C. 154, 394 N.R. 368, 60 C.B.R. (5th) 1, 312 D.L.R. (4th) 577, [2009] 3 S.C.R. 286

supplier who has remitted tax owed by recipient but has not collected it has cause of action against recipient — Deemed trusts on tax collected set out in s. 222 of ETA and s. 20 of Act respecting the Ministère du Revenu do not continue to exist after bankruptcy.

Bankruptcy and insolvency --- Bankruptcy and insolvency jurisdiction — Constitutional jurisdiction of Federal government and provinces — Paramountcy of Federal legislation

In three distinct bankruptcy cases, Deputy Minister of Revenue of Quebec claimed it was owner of unpaid GST and QST — Bank and trustee unsuccessfully brought motion denying deputy minister's claim — Bank and trustee's appeal was allowed — Appellate court found that GST and QST are direct taxes, paid by consumer, not by supplier, and latter acts only as collector on behalf of Crown — Appellate court found that legislators created trusts to give taxes prior claim status — Appellate court found that s. 67(2) of Bankruptcy and Insolvency Act (BIA) expressly provides that property of bankrupt shall not be regarded as held in trust for Her Majesty by means of statute — Appellate court found that claiming that supplier had to remit amount of tax appearing on invoice to department was wrong — Crown appealed — Appeals dismissed — Crown did not have ownership over collectible tax — Crown had only claim against supplier — Amendments to bankruptcy and insolvency legislation in 1992 indicated intention of Parliament to reduce Crown's priority in bankruptcy proceedings — Section 86(1) of BIA confirms that Crown is only ordinary creditor in bankruptcy — Trust claims for GST are ineffective in bankruptcy, as per s. 222(1.1) of Excise Tax Act (ETA) — Although Quebec legislation governing QST does not contain similar provision, provincial legislation may not alter bankruptcy priorities — Trustee's role is not limited to representing bankrupt — Trustee not only manages bankrupt's patrimony, but also represents creditors and is responsible for orderly liquidation of assets — Fact that tax was borne by recipient did not mean that supplier or trustee collected and remitted tax as Crown's property or thing — GST and QST are not required to be kept separate — Recipient owes tax to Crown, but supplier who has remitted tax owed by recipient but has not collected it has cause of action against recipient — Deemed trusts on tax collected set out in s. 222 of ETA and s. 20 of Act respecting the Ministère du Revenu do not continue to exist after bankruptcy.

Taxation --- Taxe sur les produits et services — Perception et versement — TPS détenue en fiducie

Dans trois dossiers de faillite distincts, le sous-ministre du Revenu du Québec prétendait être le propriétaire de montants impayés de TPS et de TVQ — Banque et le syndic ont déposé une requête en Cour supérieure contestant les prétentions du sous-ministre, sans succès — Appel interjeté par la banque et le syndic a été accueilli — Cour d'appel a conclu que la TPS et la TVQ étaient des taxes directes payées par le consommateur et non par le fournisseur de service, et que ce dernier ne fait que percevoir les montants au nom de sa Majesté — Cour d'appel a conclu que les législateurs ont créé des fiducies dans le but de donner aux taxes le statut de priorité — Cour d'appel a conclu que l'art. 67(2) de la Loi sur la faillite et l'insolvabilité (LFI) prévoit expressément que les biens d'un failli ne devraient pas être considérés comme étant détenus en fiducie au nom de sa Majesté en vertu de la loi — Cour d'appel a conclu qu'il était faux de prétendre que le fournisseur devait remettre le montant d'argent apparaissant sur la facture au ministère — État a formé un pourvoi — Pourvois rejetés — État ne détient pas un droit de propriété sur les taxes percevables — État n'a qu'un droit de réclamation à l'encontre du fournisseur — Modifications apportées en 1992 à la législation en matière de faillite indiquaient que l'intention du législateur était de minorer le statut prioritaire des créances de l'État dans les procédures de faillite — Article 86(1) de la LFI confirme que l'État n'est qu'un créancier ordinaire en cas de faillite — Fiducies destinées à garantir les créances relatives à la TPS n'ont aucun effet en cas de faillite, aux termes de l'art. 222(1.1) de la Loi sur la taxe d'accise (LTA) — Bien que la législation québécoise régissant la TVQ ne comporte pas de disposition similaire, la loi provinciale ne peut modifier l'ordre de priorité prévu en matière de faillite — Rôle du syndic ne se limite pas à représenter le failli — Non seulement le syndic gère-t-il le patrimoine du failli mais il représente aussi les créanciers et est responsable de la liquidation ordonnée de ce patrimoine — Fait que la taxe reposait sur l'acquéreur ne permettait pas de conclure que le fournisseur ou le syndic percevaient et remettaient la taxe en tant que bien ou chose de l'État — Il n'est pas requis de traiter la TPS et la TVQ à part — Acquéreur doit la taxe à l'État, mais le fournisseur qui a remis la taxe due par l'acquéreur mais ne l'a pas perçue a un recours à l'encontre de l'acquéreur — Fiducies présumées sur la taxe perçue établies à l'art. 222 de la

2009 CarswellQue 10706, 2009 SCC 49, J.E. 2009-1958, 2009 G.T.C. 2036 (Eng.), [2009] G.S.T.C. 154, 394 N.R. 368, 60 C.B.R. (5th) 1, 312 D.L.R. (4th) 577, [2009] 3 S.C.R. 286

LTA et à l'art. 20 de la Loi sur le ministère du Revenu cessent d'exister après une faillite.

Taxation --- Taxe sur les produits et services — Règles spéciales — Faillite

Dans trois dossiers de faillite distincts, le sous-ministre du Revenu du Québec prétendait être le propriétaire de montants impayés de TPS et de TVQ — Banque et le syndic ont déposé une requête en Cour supérieure contestant les prétentions du sous-ministre, sans succès — Appel interjeté par la banque et le syndic a été accueilli — Cour d'appel a conclu que la TPS et la TVQ étaient des taxes directes payées par le consommateur et non par le fournisseur de service, et que ce dernier ne fait que percevoir les montants au nom de sa Majesté — Cour d'appel a conclu que les législateurs ont créé des fiducies dans le but de donner aux taxes le statut de priorité — Cour d'appel a conclu que l'art. 67(2) de la Loi sur la faillite et l'insolvabilité (LFI) prévoit expressément que les biens d'un failli ne devraient pas être considérés comme étant détenus en fiducie au nom de sa Majesté en vertu de la loi — Cour d'appel a conclu qu'il était faux de prétendre que le fournisseur devait remettre le montant d'argent apparaissant sur la facture au ministère — État a formé un pourvoi — Pourvois rejetés — État ne détient pas un droit de propriété sur les taxes percevables — État n'a qu'un droit de réclamation à l'encontre du fournisseur — Modifications apportées en 1992 à la législation en matière de faillite indiquaient que l'intention du législateur était de minorer le statut prioritaire des créances de l'État dans les procédures de faillite — Article 86(1) de la LFI confirme que l'État n'est qu'un créancier ordinaire en cas de faillite — Fiducies destinées à garantir les créances relatives à la TPS n'ont aucun effet en cas de faillite, aux termes de l'art. 222(1.1) de la Loi sur la taxe d'accise (LTA) — Bien que la législation québécoise régissant la TVQ ne comporte pas de disposition similaire, la loi provinciale ne peut modifier l'ordre de priorité prévu en matière de faillite — Rôle du syndic ne se limite pas à représenter le failli — Non seulement le syndic gère-t-il le patrimoine du failli mais il représente aussi les créanciers et est responsable de la liquidation ordonnée de ce patrimoine — Fait que la taxe reposait sur l'acquéreur ne permettait pas de conclure que le fournisseur ou le syndic percevaient et remettaient la taxe en tant que bien ou chose de l'État — Il n'est pas requis de traiter la TPS et la TVQ à part — Acquéreur doit la taxe à l'État, mais le fournisseur qui a remis la taxe due par l'acquéreur mais ne l'a pas perçue a un recours à l'encontre de l'acquéreur — Fiducies présumées sur la taxe perçue établies à l'art. 222 de la LTA et à l'art. 20 de la Loi sur le ministère du Revenu cessent d'exister après une faillite.

Faillite et insolvabilité --- Priorité des réclamations — Réclamations de la Couronne — Fédérale — Taxe de vente

Dans trois dossiers de faillite distincts, le sous-ministre du Revenu du Québec prétendait être le propriétaire de montants impayés de TPS et de TVQ — Banque et le syndic ont déposé une requête en Cour supérieure contestant les prétentions du sous-ministre, sans succès — Appel interjeté par la banque et le syndic a été accueilli — Cour d'appel a conclu que la TPS et la TVQ étaient des taxes directes payées par le consommateur et non par le fournisseur de service, et que ce dernier ne fait que percevoir les montants au nom de sa Majesté — Cour d'appel a conclu que les législateurs ont créé des fiducies dans le but de donner aux taxes le statut de priorité — Cour d'appel a conclu que l'art. 67(2) de la Loi sur la faillite et l'insolvabilité (LFI) prévoit expressément que les biens d'un failli ne devraient pas être considérés comme étant détenus en fiducie au nom de sa Majesté en vertu de la loi — Cour d'appel a conclu qu'il était faux de prétendre que le fournisseur devait remettre le montant d'argent apparaissant sur la facture au ministère — État a formé un pourvoi — Pourvois rejetés — État ne détient pas un droit de propriété sur les taxes percevables — État n'a qu'un droit de réclamation à l'encontre du fournisseur — Modifications apportées en 1992 à la législation en matière de faillite indiquaient que l'intention du législateur était de minorer le statut prioritaire des créances de l'État dans les procédures de faillite — Article 86(1) de la LFI confirme que l'État n'est qu'un créancier ordinaire en cas de faillite — Fiducies destinées à garantir les créances relatives à la TPS n'ont aucun effet en cas de faillite, aux termes de l'art. 222(1.1) de la Loi sur la taxe d'accise (LTA) — Bien que la législation québécoise régissant la TVQ ne comporte pas de disposition similaire, la loi provinciale ne peut modifier l'ordre de priorité prévu en matière de faillite — Rôle du syndic ne se limite pas à représenter le failli — Non seulement le syndic gère-t-il le patrimoine du failli mais il représente aussi les créanciers et est responsable de la liquidation ordonnée de ce patrimoine — Fait que la taxe reposait sur l'acquéreur ne permettait pas de conclure que le fournisseur ou le syndic percevaient et remettaient la taxe en tant que bien ou chose de l'État — Il n'est pas requis de traiter la TPS et la TVQ à part — Acquéreur doit la taxe à l'État, mais le fournisseur qui a remis la taxe due par l'acquéreur mais ne l'a pas

2009 CarswellQue 10706, 2009 SCC 49, J.E. 2009-1958, 2009 G.T.C. 2036 (Eng.), [2009] G.S.T.C. 154, 394 N.R. 368, 60 C.B.R. (5th) 1, 312 D.L.R. (4th) 577, [2009] 3 S.C.R. 286

perçue a un recours à l'encontre de l'acquéreur — Fiducies présumées sur la taxe perçue établies à l'art. 222 de la LTA et à l'art. 20 de la Loi sur le ministère du Revenu cessent d'exister après une faillite.

Faillite et insolvabilité --- Priorité des réclamations — Réclamations de la Couronne — Provinciale — Principes généraux

Dans trois dossiers de faillite distincts, le sous-ministre du Revenu du Québec prétendait être le propriétaire de montants impayés de TPS et de TVQ — Banque et le syndic ont déposé une requête en Cour supérieure contestant les prétentions du sous-ministre, sans succès — Appel interjeté par la banque et le syndic a été accueilli — Cour d'appel a conclu que la TPS et la TVQ étaient des taxes directes payées par le consommateur et non par le fournisseur de service, et que ce dernier ne fait que percevoir les montants au nom de sa Majesté — Cour d'appel a conclu que les législateurs ont créé des fiducies dans le but de donner aux taxes le statut de priorité — Cour d'appel a conclu que l'art. 67(2) de la Loi sur la faillite et l'insolvabilité (LFI) prévoit expressément que les biens d'un failli ne devraient pas être considérés comme étant détenus en fiducie au nom de sa Majesté en vertu de la loi — Cour d'appel a conclu qu'il était faux de prétendre que le fournisseur devait remettre le montant d'argent apparaissant sur la facture au ministère — État a formé un pourvoi — Pourvois rejetés — État ne détient pas un droit de propriété sur les taxes percevables — État n'a qu'un droit de réclamation à l'encontre du fournisseur — Modifications apportées en 1992 à la législation en matière de faillite indiquaient que l'intention du législateur était de minorer le statut prioritaire des créances de l'État dans les procédures de faillite — Article 86(1) de la LFI confirme que l'État n'est qu'un créancier ordinaire en cas de faillite — Fiducies destinées à garantir les créances relatives à la TPS n'ont aucun effet en cas de faillite, aux termes de l'art. 222(1.1) de la Loi sur la taxe d'accise (LTA) — Bien que la législation québécoise régissant la TVQ ne comporte pas de disposition similaire, la loi provinciale ne peut modifier l'ordre de priorité prévu en matière de faillite — Rôle du syndic ne se limite pas à représenter le failli — Non seulement le syndic gère-t-il le patrimoine du failli mais il représente aussi les créanciers et est responsable de la liquidation ordonnée de ce patrimoine — Fait que la taxe reposait sur l'acquéreur ne permettait pas de conclure que le fournisseur ou le syndic percevaient et remettaient la taxe en tant que bien ou chose de l'État — Il n'est pas requis de traiter la TPS et la TVQ à part — Acquéreur doit la taxe à l'État, mais le fournisseur qui a remis la taxe due par l'acquéreur mais ne l'a pas perçue a un recours à l'encontre de l'acquéreur — Fiducies présumées sur la taxe perçue établies à l'art. 222 de la LTA et à l'art. 20 de la Loi sur le ministère du Revenu cessent d'exister après une faillite.

Faillite et insolvabilité --- Compétence en matière de faillite et d'insolvabilité — Compétence constitutionnelle du gouvernement fédéral et des provinces — Prépondérance de la compétence fédérale

Dans trois dossiers de faillite distincts, le sous-ministre du Revenu du Québec prétendait être le prop étaire de montants impayés de TPS et de TVQ — Banque et le syndic ont déposé une requête en Cour supérieure contestant les prétentions du sous-ministre, sans succès — Appel interjeté par la banque et le syndic a été accueilli — Cour d'appel a conclu que la TPS et la TVQ étaient des taxes directes payées par le consommateur et non par le fournisseur de service, et que ce dernier ne fait que percevoir les montants au nom de sa Majesté — Cour d'appel a conclu que les législateurs ont créé des fiducies dans le but de donner aux taxes le statut de priorité — Cour d'appel a conclu que l'art. 67(2) de la Loi sur la faillite et l'insolvabilité (LFI) prévoit expressément que les biens d'un failli ne devraient pas être considérés comme étant détenus en fiducie au nom de sa Majesté en vertu de la loi — Cour d'appel a conclu qu'il était faux de prétendre que le fournisseur devait remettre le montant d'argent apparaissant sur la facture au ministère — État a formé un pourvoi — Pourvois rejetés — État ne détient pas un droit de propriété sur les taxes percevables — État n'a qu'un droit de réclamation à l'encontre du fournisseur — Modifications apportées en 1992 à la législation en matière de faillite indiquaient que l'intention du législateur était de minorer le statut prioritaire des créances de l'État dans les procédures de faillite — Article 86(1) de la LFI confirme que l'État n'est qu'un créancier ordinaire en cas de faillite — Fiducies destinées à garantir les créances relatives à la TPS n'ont aucun effet en cas de faillite, aux termes de l'art. 222(1.1) de la Loi sur la taxe d'accise (LTA) — Bien que la législation québécoise régissant la TVQ ne comporte pas de disposition similaire, la loi provinciale ne peut modifier l'ordre de priorité prévu en matière de faillite — Rôle du syndic ne se limite pas à représenter le failli — Non seulement le syndic gère-t-il le patrimoine du failli mais il représente aussi les créanciers et est responsable de la liquidation ordonnée de ce patri-

2009 CarswellQue 10706, 2009 SCC 49, J.E. 2009-1958, 2009 G.T.C. 2036 (Eng.), [2009] G.S.T.C. 154, 394 N.R. 368, 60 C.B.R. (5th) 1, 312 D.L.R. (4th) 577, [2009] 3 S.C.R. 286

moine — Fait que la taxe reposait sur l'acquéreur ne permettait pas de conclure que le fournisseur ou le syndic percevaient et remettaient la taxe en tant que bien ou chose de l'État — Il n'est pas requis de traiter la TPS et la TVQ à part — Acquéreur doit la taxe à l'État, mais le fournisseur qui a remis la taxe due par l'acquéreur mais ne l'a pas perçue a un recours à l'encontre de l'acquéreur — Fiducies présumées sur la taxe perçue établies à l'art. 222 de la LTA et à l'art. 20 de la Loi sur le ministère du Revenu cessent d'exister après une faillite.

In three distinct bankruptcy cases, the Deputy Minister of Revenue of Quebec claimed it was the owner of unpaid GST and QST. In the first case, the bank had a security interest in the accounts receivable of two bankrupt companies; in the second case, the trustee and debtor of another bankrupt company decided to keep certain sums of money in trust; and in the third case, another bankrupt company had hypothecated the universality of its claims and accounts receivable in favour of a credit union.

The bank and the trustee unsuccessfully brought a motion in the Superior Court denying the deputy minister's claim. The appeal by the bank and the trustee was allowed. The appellate court found that the GST and QST are direct taxes, paid by the consumer, not by the supplier, and that the latter acts only as a collector on behalf of the Crown. The appellate court found that the legislators created deemed trusts to give taxes prior claim status. The appellate court found that s. 67(2) of the Bankruptcy and Insolvency Act (BIA) expressly provides that property of a bankrupt shall not be regarded as held in trust for Her Majesty by means of a statute. The appellate court found that when a supplier sells goods or services to a buyer, the supplier collects the tax, deducts tax already paid to other suppliers, and pays the difference to the government. The appellate court found that claiming that the supplier had to remit an amount of tax appearing on the invoice to the department was incorrect.

The Crown appealed.

Held: The appeals were dismissed.

The Crown did not have ownership over the tax which had been collected or was collectible. Rather, the Crown had only a claim against the supplier. Amendments to the bankruptcy and insolvency legislation in 1992 indicated that the intention of Parliament was to reduce the Crown's priority in bankruptcy proceedings. Section 86(1) of the BIA confirms that the Crown is only an ordinary creditor in bankruptcy.

Trust claims for GST are ineffective in bankruptcy, as per s. 222(1.1) of the Excise Tax Act (ETA). Although Quebec legislation governing QST does not contain a similar provision, provincial legislation may not alter bankruptcy priorities. The trustee's role is not limited to representing the bankrupt. The trustee not only manages the bankrupt's patrimony, but also represents creditors and is responsible for the orderly liquidation of assets.

The fact that the tax was borne by the recipient did not mean that the supplier or trustee collected and remitted tax as the Crown's property or thing. GST and QST are not required to be kept separate. The recipient owes tax to the Crown, but the supplier who has remitted tax owed by the recipient but has not collected it has a cause of action against the recipient. The deemed trust on tax collected as set out in s. 222 of the ETA and s. 20 of the Act respecting the Ministère du Revenu does not continue to exist after bankruptcy.

Dans trois dossiers de faillite distincts, le sous-ministre du Revenu du Québec prétendait être le propriétaire de montants impayés de TPS et de TVQ. Dans le premier cas, la banque détenait une sûreté sur les comptes à recevoir de deux compagnies faillies; dans le deuxième cas, le syndic et le débiteur d'une autre compagnie faillie ont décidé de conserver une certaine somme d'argent en fiducie; et dans le troisième cas, une autre compagnie faillie avait contracté une hypothèque universelle sur ses créances et ses comptes en faveur d'une caisse populaire.

La banque et le syndic ont déposé une requête en Cour supérieure contestant les prétentions du sous-ministre, sans succès. L'appel interjeté par la banque et le syndic a été accueilli. La Cour d'appel a conclu que la TPS et la TVQ

étaient des taxes directes payées par le consommateur et non par le fournisseur de service, et que ce dernier ne fait que percevoir les montants au nom de sa Majesté. La Cour d'appel a conclu que les législateurs ont créé des fiducies présumées dans le but de donner aux taxes le statut de priorité. La Cour d'appel a conclu que l'art. 67(2) de la Loi sur la faillite et l'insolvabilité (LFI) prévoit expressément que les biens d'un failli ne devraient pas être considérés comme étant détenus en fiducie au nom de sa Majesté en vertu de la loi. La Cour d'appel a conclu que lorsqu'un fournisseur vend des biens ou des services à un acheteur, le fournisseur perçoit la taxe, déduit la taxe déjà payée aux autres fournisseurs et verse la différence à l'État. La Cour d'appel a conclu qu'il était faux de prétendre que le fournisseur devait remettre le montant d'argent apparaissant sur la facture au ministère.

L'État a formé un pourvoi.

Arrêt: Les pourvois ont été rejetés.

L'État ne détient pas un droit de propriété sur les taxes perçues ou percevables; il n'a qu'un droit de réclamation à l'encontre du fournisseur. Des modifications apportées en 1992 à la législation en matière de faillite indiquaient que l'intention du législateur était de minorer le statut prioritaire des créances de l'État dans les procédures de faillite. L'article 86(1) de la LFI confirme que l'État n'est qu'un créancier ordinaire en cas de faillite.

Les fiducies destinées à garantir les créances relatives à la TPS n'ont aucun effet en cas de faillite, aux termes de l'art. 222(1.1) de la Loi sur la taxe d'accise (LTA). Bien que la législation québécoise régissant la TVQ ne comporte pas de disposition similaire, la loi provinciale ne peut modifier l'ordre de priorité prévu en matière de faillite. Le rôle du syndic ne se limite pas à représenter le failli. Non seulement le syndic gère-t-il le patrimoine du failli mais il représente aussi les créanciers et est responsable de la liquidation ordonnée de ce patrimoine.

Le fait que la taxe reposait sur l'acquéreur ne permettait pas de conclure que le fournisseur ou le syndic percevaient et remettaient la taxe en tant que bien ou chose de l'État. Il n'est pas requis de traiter la TPS et la TVQ à part. L'acquéreur doit la taxe à l'État, mais le fournisseur qui a remis la taxe due par l'acquéreur mais ne l'a pas perçue a un recours à l'encontre de l'acquéreur. Les fiducies présumées sur la taxe perçue établies à l'art. 222 de la LTA et à l'art. 20 de la Loi sur le ministère du Revenu cessent d'exister après une faillite.

Cases considered by *LeBel J.*:

British Columbia v. Henfrey Samson Belair Ltd. (1989), 1989 CarswellBC 711, [1989] 1 T.S.T. 2164, 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 CarswellBC 351 (S.C.C.) — referred to

Consortium Promecan inc., Re (2006), 2006 CarswellQue 11998, 2006 QCCS 6370 (Que. S.C.) — referred to

D.I.M.S. Construction inc., Re (2005), (sub nom. *D.I.M.S. Construction Inc. (Trustee of) v. Quebec (Attorney General))* [2005] 2 S.C.R. 564, 2005 SCC 52, 2005 CarswellQue 7955, 2005 CarswellQue 7956, 258 D.L.R. (4th) 213, 45 C.L.R. (3d) 161, (sub nom. *D.I.M.S. Construction Inc. (Bankrupt) v. Quebec (Attorney General))* 304 N.R. 161 (S.C.C.) — referred to

Lefebvre, Re (2004), (sub nom. *Lefebvre (Bankrupt), Re)* 326 N.R. 253 (Eng.), (sub nom. *Lefebvre (Bankrupt), Re)* 326 N.R. 353 (Fr.), 2004 SCC 63, 2004 CarswellQue 2831, 2004 CarswellQue 2832, (sub nom. *Lefebvre (Trustee of), Re)* 244 D.L.R. (4th) 513, (sub nom. *Lefebvre (Trustee of), Re)* [2004] 3 S.C.R. 326, 7 C.B.R. (5th) 243, 1 B.L.R. (4th) 19 (S.C.C.) — referred to

Ministre du Revenu national c. Caisse Populaire du bon Conseil (2009), 2009 CarswellNat 1568, 2009 CarswellNat 1569, 2009 SCC 29, (sub nom. *Caisse populaire Desjardins de l'Est de Drummond v. R.)* 2009

2009 CarswellQue 10706, 2009 SCC 49, J.E. 2009-1958, 2009 G.T.C. 2036 (Eng.), [2009] G.S.T.C. 154, 394 N.R. 368, 60 C.B.R. (5th) 1, 312 D.L.R. (4th) 577, [2009] 3 S.C.R. 286

D.T.C. 5951 (Eng.), [2009] 4 C.T.C. 330, (sub nom. *Caisse populaire Desjardins de l'Est de Drummond v. R.)* 2009 D.T.C. 5983 (Fr.), (sub nom. *Minister of National Revenue v. Caisse populaire du Bon Conseil)* 389 N.R. 199, 15 P.P.S.A.C. (3d) 35 (S.C.C.) — referred to

Reference re Excise Tax Act (Canada) (1992), (sub nom. *Reference re Goods & Services Tax)* [1992] 4 W.W.R. 673, (sub nom. *Reference re Goods & Services Tax)* 138 N.R. 247, (sub nom. *Reference re Goods & Services Tax)* 127 A.R. 161, (sub nom. *Reference re Goods & Services Tax)* [1992] 2 S.C.R. 445, (sub nom. *Reference re Goods & Services Tax (Alberta))* 94 D.L.R. (4th) 51, 1992 CarswellAlta 469, (sub nom. *Reference re GST Implementing Legislation)* 5 T.C.T. 4165, (sub nom. *Reference re Goods & Services Tax)* 2 Alta. L.R. (3d) 289, (sub nom. *Reference re Goods & Services Tax)* 20 W.A.C. 161, (sub nom. *Reference re Bill C-62)* [1992] G.S.T.C. 2, 1992 CarswellAlta 61 (S.C.C.) — referred to

Renvoi relatif à la taxe de vente du Québec (1994), 2 G.T.C. 7156, [1994] 2 S.C.R. 715, 1994 CarswellQue 935, 1994 CarswellQue 157, 169 N.R. 1, (sub nom. *Reference re Quebec Sales Tax)* [1994] G.S.T.C. 44, 62 Q.A.C. 81, (sub nom. *Reference re Quebec Sales Tax)* 115 D.L.R. (4th) 449 (S.C.C.) — referred to

Victuni Aktiengesellschaft v. Quebec (Minister of Revenue) (1980), [1980] 1 S.C.R. 580, 1980 CarswellQue 108, 1980 CarswellQue 108F, 32 N.R. 91, 112 D.L.R. (3d) 83 (S.C.C.) — referred to

Statutes considered:

Bank Act, S.C. 1991, c. 46

s. 427 — referred to

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

Generally — referred to

s. 67 — considered

s. 67(1)(a) — considered

s. 67(2) — considered

s. 67(3) — considered

s. 86(1) — considered

s. 87(1) — considered

Bankruptcy Act and to amend the Income Tax Act in consequence thereof, Act to amend the, S.C. 1992, c. 27

Generally — referred to

Constitution Act, 1867, (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5

s. 92 ¶ 2 — referred to

2009 CarswellQue 10706, 2009 SCC 49, J.E. 2009-1958, 2009 G.T.C. 2036 (Eng.), [2009] G.S.T.C. 154, 394 N.R. 368, 60 C.B.R. (5th) 1, 312 D.L.R. (4th) 577, [2009] 3 S.C.R. 286

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

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

s. 22 — considered

s. 141.01 [en. 1994, c. 9, s. 4(1)] — referred to

s. 165 [en. 1990, c. 45, s. 12(1)] — referred to

s. 165(1) [en. 1990, c. 45, s. 12(1)] — considered

s. 169(1) [en. 1990, c. 45, s. 12(1)] — referred to

s. 221(1) [en. 1990, c. 45, s. 12(1)] — referred to

s. 222 [en. 1990, c. 45, s. 12(1)] — considered

s. 222(1) [en. 1990, c. 45, s. 12(1)] — referred to

s. 222(1.1) [en. 1993, c. 27, s. 87(1)] — considered

s. 222(3) [en. 1990, c. 45, s. 12(1)] — considered

s. 223 [en. 1990, c. 45, s. 12(1)] — considered

s. 224 [en. 1990, c. 45, s. 12(1)] — considered

s. 228 [en. 1990, c. 45, s. 12(1)] — considered

s. 265 [en. 1990, c. 45, s. 12(1)] — considered

s. 296(1)(b) [en. 1990, c. 45, s. 12(1)] — referred to

Excise Tax Act, the Access to Information Act, the Canada Pension Plan, the Customs Act, the Federal Court Act, the Income Tax Act, the Tax Court of Canada Act, the Tax Rebate Discounting Act, the Unemployment Insurance Act and a related Act, Act to amend the, S.C. 1993, c. 27

Generally — referred to

Excise Tax Act, the Criminal Code, the Customs Act, the Customs Tariff, the Excise Act, the Income Tax Act, the Statistics Act and the Tax Court of Canada Act, Act to amend the, S.C. 1990, c. 45

Generally — referred to

Ministère du Revenu, Loi sur le, L.R.Q., c. M-31

2009 CarswellQue 10706, 2009 SCC 49, J.E. 2009-1958, 2009 G.T.C. 2036 (Eng.), [2009] G.S.T.C. 154, 394 N.R. 368, 60 C.B.R. (5th) 1, 312 D.L.R. (4th) 577, [2009] 3 S.C.R. 286

en général — referred to

art. 20 — referred to

art. 23 — considered

art. 24 — considered

Taxe de vente du Québec, Loi sur la, L.R.Q., c. T-0.1

en général — referred to

art. 16 — considered

art. 82 — considered

art. 302.1 [ad. 1997, c. 85, art. 599] — considered

art. 422 — considered

art. 425 — considered

art. 427 — considered

art. 437 — considered

Taxe de vente du Québec et modifiant diverses dispositions législatives d'ordre fiscal, Loi sur la, L.Q. 1991, c. 67

en général — referred to

APPEAL by Crown from judgment reported at 2007 QCCA 1813, 2007 QCCA 1835, 2007 QCCA 1837, 2007 CarswellQue 12231, [2008] G.S.T.C. 3, 40 C.B.R. (5th) 18, [2008] R.J.Q. 39, EYB 2007-127782 (Que. C.A.), allowing appeal by bank and trustees from motion regarding claim of Deputy Minister of Revenue regarding collection of tax.

POURVOI de l'État à l'encontre d'un jugement publié à 2007 QCCA 1813, 2007 QCCA 1835, 2007 QCCA 1837, 2007 CarswellQue 12231, [2008] G.S.T.C. 3, 40 C.B.R. (5th) 18, [2008] R.J.Q. 39, EYB 2007-127782 (Que. C.A.), ayant accueilli l'appel interjeté par la banque et le syndic à l'encontre d'une requête concernant la réclamation du sous-ministre du Revenu au sujet d'une perception de taxe.

***LeBel J.*:**

I. Introduction

1 In these three cases, the Canadian and Quebec tax authorities, on the one hand, and the trustees in bankruptcy of certain businesses and financial institutions holding various security interests in the property of the bankrupts, on the other, disagree about what should be done with taxes on consumption that had been collected but not remitted, or

2009 CarswellQue 10706, 2009 SCC 49, J.E. 2009-1958, 2009 G.T.C. 2036 (Eng.), [2009] G.S.T.C. 154, 394 N.R. 368, 60 C.B.R. (5th) 1, 312 D.L.R. (4th) 577, [2009] 3 S.C.R. 286

were collectible, as of the date of the bankruptcy. The tax authorities submit that they are entitled to the amounts in issue as the owners thereof The respondents contend that, under the law applicable in bankruptcy matters, the federal or provincial Crown is only an ordinary creditor and must be ranked as such with the debtors' other creditors. The financial institutions submit that their security interests can be set up against the Crown as against any ordinary creditor. The Quebec Superior Court found for the Crown. The Quebec Court of Appeal set aside the judgments and accepted the arguments of the trustees and financial institutions. In my view, that decision is well founded, and I would uphold it.

II. Origins of the Cases

2 These three cases result from the bankruptcies of a number of businesses and from problems that arose as a result of their insolvency in respect of the administration of the federal goods and services tax ("GST") imposed under the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), and the Quebec sales tax ("QST") payable under the *Act respecting the Québec sales tax*, R.S.Q., c. T-0.1 ("*AQST*"). To begin, I will summarize the facts that must be considered to understand these cases. The relevant statutory provisions are reproduced in the Appendix.

A. Deputy Minister of Revenue of Quebec and Her Majesty the Queen in Right of Canada v. Caisse populaire Desjardins de Montmagny and Raymond Chabot Inc., in its Capacity as Trustee for the Bankruptcy of 9083-4185 Québec inc.

3 In this case, a manufacturing company required, as a supplier, to collect the GST and the QST went bankrupt on September 7, 2005. Raymond Chabot Inc. was appointed trustee in bankruptcy. The debtor had hypothecated its claims and accounts receivable in favour of the respondent Caisse populaire Desjardins de Montmagny. Quebec's Deputy Minister of Revenue gave the trustee notice that he considered it to be his mandatary for the recovery of GST and QST amounts that had been collected but not remitted or were collectible. The tax authorities claimed that they owned the amounts in question. Furthermore, the record shows that some of the taxes that had been collected or were collectible at the time of the bankruptcy had been payable for more than 60 days. The Caisse populaire Desjardins de Montmagny claimed to hold valid security interests, which could be set up against the tax authorities, in the tax amounts related to the claims hypothecated in its favour. In view of these conflicting claims, the trustee asked the Superior Court to determine to whom the tax amounts belonged.

B. Deputy Minister of Revenue of Quebec and Her Majesty the Queen in Right of Canada v. Raymond Chabot Inc. in its Capacity as Trustee for the Estate of the Debtor Consortium Promecan inc.

4 In this case, Consortium Promecan inc. went bankrupt on March 20, 2004, and Raymond Chabot Inc. was appointed trustee. The debtor had not filed returns with respect to the GST and the QST since February 1, 2004. Quebec's Deputy Minister of Revenue asked the trustee to remit to him all GST and QST amounts in respect of the period between February 1 and March 20, 2004 that had been collected or were collectible. The trustee replied that, in its view, the Deputy Minister was only an ordinary creditor in the bankruptcy, and it denied his request. The Crown appealed that decision to the Superior Court.

C. Deputy Minister of Revenue of Quebec and Her Majesty the Queen in Right of Canada v. National Bank of Canada

5 The tax claims in this case result from the bankruptcies of two companies, Alternative Granite et Marbre inc. and Stone Vogue Resources inc., on November 5, 2004. The Crown claimed GST and QST amounts related to the accounts receivable of the bankrupt debtors. The National Bank of Canada had obtained, on those accounts, security under s. 427 of the *Bank Act*, S.C. 1991, c. 46, and movable hypothecs. It tried to exercise its rights under these various security interests and claimed the proceeds of the accounts receivable as well as the GST and QST amounts related to these claims. It then applied to the Superior Court to resolve the resulting dispute between itself and the

2009 CarswellQue 10706, 2009 SCC 49, J.E. 2009-1958, 2009 G.T.C. 2036 (Eng.), [2009] G.S.T.C. 154, 394 N.R. 368, 60 C.B.R. (5th) 1, 312 D.L.R. (4th) 577, [2009] 3 S.C.R. 286

tax authorities. In the meantime, the Bank's mandatary, the trustee and the Crown all collected portions of the disputed taxes and even of the accounts receivable.

III. Judicial History

A. Quebec Superior Court

6 The Superior Court heard the three cases separately. The result was the same in all of them. All three judges concluded that the Crown owned the disputed GST and QST amounts. If the trustee in bankruptcy collected them, it was as a mandatary of the tax authorities. Quebec's Deputy Minister of Revenue and the Minister of National Revenue could not be considered to be mere ordinary creditors. In essence, the Superior Court judges held that the GST and QST amounts were not part of the bankrupt's patrimony: 2006 QCCS 2108, 34 C.B.R. (5th) 245 (Que. S.C.) (*per* Boisvert J.), 2006 QCCS 6370 (Que. S.C.) (*per* St-Julien J.), 2006 QCCS 2656, 21 C.B.R. (5th) 289 (Que. S.C.) (*per* Bouchard J.). All three judgments were appealed to the Quebec Court of Appeal.

B. Quebec Court of Appeal, Forget, Doyon and Duval Hesler JJ.A.

7 Duval Hesler J.A., writing for the Court of Appeal, allowed the appeals and set aside the Superior Court's judgments: 2007 QCCA 1837, 2007 QCCA 1835, 2007 QCCA 1813, [2008] R.J.Q. 39 (Que. C.A.). She acknowledged that the QST and the GST are direct taxes payable by the recipient of the good or service. But in her view, as a result of the 1992 amendments to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), the tax authorities must be treated as an ordinary creditor in such a case. They do not own tax amounts payable by purchasers of goods and services that are subject to the GST and QST, but instead have a claim against the supplier. Furthermore, any deemed trust in favour of the tax authorities ended at the time of the bankruptcy. The tax amounts in issue were therefore part of the bankrupt's patrimony but remained subject to any security interests that had been validly granted to creditors like the Caisse populaire Desjardins de Montmagny and the National Bank of Canada. This Court granted leave for three appeals from that judgment.

IV. Analysis

A. Issues and Positions of the Parties

8 The issue is the nature of the rights of the tax authorities, the trustee in bankruptcy and the secured creditors to GST and QST amounts that have been collected but not remitted or are collectible at the time of the bankruptcy of a supplier within the meaning of the *AQST* and the *ETA*. In sum, the tax authorities submit that they own these amounts. In their opinion, the trustee collects the taxes on their behalf, as their mandatary, and these amounts are not part of the bankrupt's patrimony. The respondents reply that the amounts are part of the bankrupt's patrimony, subject to any validly granted security interests. In their view, the Crown does not have a right of ownership in the tax amounts and enjoys only the rights of an ordinary creditor in a bankruptcy situation. To resolve this issue, it will be necessary to begin by considering the nature of the two taxes in issue, the GST and the QST, and the mechanism for administering them. I will also need, before ruling on the legal characterization of the Crown's rights, to discuss the effect of the 1992 amendments to the *BIA*.

B. Nature of the GST and the QST

9 The GST and the QST are similar types of taxes on consumption. The legal framework for imposing them was established almost 20 years ago now. They are considered to be direct taxes, and the ultimate recipient of taxable goods and services is responsible for paying them. However, the taxes are collected, and credits apply, at each step of the manufacturing and marketing chains. In principle, the supplier acts only as a mandatary of the Crown in collecting and remitting these taxes (*Renvoi relatif à la taxe de vente du Québec*, [1994] 2 S.C.R. 715, [1994] G.S.T.C.

2009 CarswellQue 10706, 2009 SCC 49, J.E. 2009-1958, 2009 G.T.C. 2036 (Eng.), [2009] G.S.T.C. 154, 394 N.R. 368, 60 C.B.R. (5th) 1, 312 D.L.R. (4th) 577, [2009] 3 S.C.R. 286

44 (S.C.C.), at pp. 720-22).

10 The GST, which was implemented in 1990 by legislation that amended the *ETA* (S.C. 1990, c. 45), replaced the former federal manufacturers' sales tax. The GST can be regarded as a value-added tax. It is collected at every stage of the manufacturing and marketing of goods and services and is payable by the recipient, who is regarded as the debtor in respect of the tax liability to the Crown (s. 165 *ETA*). However, the supplier is responsible for collecting and remitting the tax (s. 221(1) *ETA*). The supplier is deemed to hold the amounts so collected in trust for Her Majesty (s. 222(1) and (3) *ETA*) and must periodically file returns and make remittances. In addition, the Act establishes a system under which input credits can be claimed, at each step of the marketing and supply of the good, in respect of the taxes the supplier has had to pay to his or her own suppliers (ss. 141.01 and 169(1) *ETA*). The ultimate recipient bears the full burden of the tax (R. Brakel & Associates Ltd., *Value-Added Taxation in Canada: GST, HST and QST* (2nd ed. 2003), at pp. 2-3). This Court has confirmed this as a valid exercise of the Parliament of Canada's taxing power (*Reference re Excise Tax Act (Canada)*, [1992] 2 S.C.R. 445, [1992] G.S.T.C. 2 (S.C.C.)).

11 In parallel with this federal tax reform, an in-depth review of the consumption tax system took place in Quebec. In 1991, the National Assembly enacted new sales tax legislation, the *Act respecting the Québec sales tax and amending various fiscal legislation*, S.Q. 1991, c. 67. The National Assembly's intention in enacting this statute was to achieve extensive harmonization with the GST and to align this aspect of Quebec's tax system with the model chosen by the Parliament of Canada. The legislation came into force on July 1, 1992 (Brakel, at pp. 3-4). Under an agreement with the Government of Canada, the Quebec government is responsible for collecting both the GST and the QST in Quebec (Brakel, at p. 4). Moreover, pursuant to s. 20 of the *Act respecting the Ministère du Revenu*, R.S.Q. c. M-31 ("*AMR*"), amounts collected by suppliers of goods and services are deemed to be held in trust for the "State". This Court held that this new sales tax falls within the provincial taxing power under s. 92(2) of the *Constitution Act, 1867* (*Reference re Quebec Sales Tax*).

C. Effects of the Amendments to the BIA on the Status of Claims of the Crown

12 In 1992, the Parliament of Canada also made extensive changes to the *BIA*, and those changes are of particular relevance to this issue of the nature and extent of the Crown's rights to recover the GST and QST amounts. The amendments in question were set out in the *Act to amend the Bankruptcy Act and to amend the Income Tax Act in consequence thereof*, S.C. 1992, c. 27. Some of these changes related to the Crown's priority in bankruptcy situations. The federal government seemed at the time to want to respond to criticisms that the system establishing the priority of the Crown's claims often left nothing for a bankrupt's ordinary creditors. A government spokesperson acknowledged these concerns at the time of the introduction of the legislation to revise the Crown priority system:

> We also took steps to limit the priority of the Crown, one of the more blatantly unfair aspect[s] of the present Bankruptcy Act.
>
> (*House of Commons Debates*, vol. II, 3rd Sess., 34th Parl., June 19, 1991, at p. 2106)

13 Felix Holtmann, the Chairman of the Standing Committee on Consumer and Corporate Affairs and Government Operations, also acknowledged the problems and injustices caused by the proliferation of deemed trusts developed to protect the Crown's claims. He stressed the need to reduce the extent of such trusts in order to achieve a better balance among creditors in bankruptcy situations:

> One of the main areas is Crown priority. Under the present Bankruptcy Act the Crown has a preferred claim for various types of taxes and ranks ahead of all unsecured creditors. In 1970 a study report made reference to Crown priority, then again in 1986 proposed bankruptcy amendments recommended the abolition of the Crown priority. With the Crown priority, creditors are less likely to participate in an insolvency, in a bankruptcy, and today rarely come out to meetings of creditors because there are no assets. The assets are fully secured to the

2009 CarswellQue 10706, 2009 SCC 49, J.E. 2009-1958, 2009 G.T.C. 2036 (Eng.), [2009] G.S.T.C. 154, 394 N.R. 368, 60 C.B.R. (5th) 1, 312 D.L.R. (4th) 577, [2009] 3 S.C.R. 286

> secured creditors, banks and major lenders as well as to Crowns. As a result there is virtually nothing left for the unsecureds. We recommend that the Crown priority be abolished and that if the Crown wants to contract directly with the debtor, it be entitled to a contractual priority but not a Crown priority.
>
> *(Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 9, September 5, 1991, at p. 9:5)

14 During the parliamentary debates on Bill C-22 regarding the amendment of the *BIA*, comments by the government spokesperson confirmed that the government intended to reduce the Crown to the rank of an ordinary creditor in bankruptcy situations:

> A second very important point in the legislation is that the Government of Canada, the Crown, does not put itself in a priority position. It stands in line with the unsecured creditors in almost all cases except for the deductions of tax and unemployment owed.
>
> (*House of Commons Debates*, vol. IV, 3rd Sess., 34th Parl., November 1, 1991, at p. 4354)

In the course of the discussions in the Standing Committee on Consumer and Corporate Affairs and Government Operations, the government spokesperson had clearly expressed the intention to abolish the deemed trust in respect of the GST in bankruptcy situations:

> As far as the GST is concerned, if there is a deemed trust for GST, it will not come under this particular provision so it will not survive. If there is a statutory lien or priority, or a statutory security interest for GST, it will not take priority under this legislation unless it is a registered interest.
>
> *(Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 10, September 5,1991, at p. 10:18)

15 The amendments to the bankruptcy legislation appear to be consistent with the legislative intention announced during the parliamentary debates. First of all, s. 67 *BIA* reinforces the principle that all the bankrupt's property is part of the estate of the bankrupt and constitutes the common pledge of the creditors, although with the exception of property held in trust for another person. However, s. 67(2) *BIA* provides that, with certain exceptions, property may not be regarded as held in trust unless it would be so regarded in the absence of a statutory provision. This renders statutory trusts ineffective without affecting trusts resulting from the common law or the civil law or statutory trusts that secure claims of the federal and provincial Crowns related to source deductions for income tax, a comprehensive pension plan or the federal employment insurance program (s. 67(3) *BIA*). No mention is made of trusts related to the GST or to provincial taxes such as the QST. Moreover, s. 86(1) *BIA* confirms that the Crown is only an ordinary creditor in a bankruptcy situation:

> **86. (1) Status of Crown claims** — In relation to a bankruptcy or proposal, all provable claims, including secured claims, of Her Majesty in right of Canada or a province or of any body under an Act respecting workers' compensation, in this section and in section 87 called a "workers' compensation body", rank as unsecured claims.

16 In addition, not long after these changes to the *BIA*, the Parliament of Canada enacted concordance amendments with regard to GST claims (S.C. 1993, c. 27). It added subsection (1.1) to s. 222 *ETA*. As a result of this provision, deemed trusts intended to secure GST claims are ineffective in bankruptcy situations:

> . . .

2009 CarswellQue 10706, 2009 SCC 49, J.E. 2009-1958, 2009 G.T.C. 2036 (Eng.), [2009] G.S.T.C. 154, 394 N.R. 368, 60 C.B.R. (5th) 1, 312 D.L.R. (4th) 577, [2009] 3 S.C.R. 286

> **222 (1.1) Amounts collected before bankruptcy** — Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the *Bankruptcy and Insolvency Act)*, to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

17 The Quebec legislation respecting the QST does not contain a provision similar to s. 222(1.1) *ETA* that renders the deemed trust in favour of the tax authorities ineffective in bankruptcy situations. However, according to a settled principle of constitutional law regarding the Parliament of Canada's legislative authority over bankruptcy and insolvency, the provincial legislatures may not modify the order of priority established in the *BIA*. In the event of conflict, the *BIA* will prevail and the provincial statute will be inapplicable regardless of the legislature's intention *D.I.M.S. Construction inc., Re*, 2005 SCC 52, [2005] 2 S.C.R. 564 (S.C.C.), at para. 12, *per* Deschamps J.).

18 The tax authorities do not dispute the clear terms of the statutory provisions. Rather, they argue that those provisions do not apply to the GST and the QST and that the Crown is not a creditor, but the owner of the tax amounts. Thus, the amounts collected or collectible at the time of the bankruptcy in respect of the GST or the QST do not form part of the bankrupt's patrimony. As a result, they are not included in the property that is to be liquidated in accordance with the order of priority established in the *BIA*. It will therefore be necessary to resolve the issue of the legal characterization of the Crown's rights with respect to the GST and QST amounts. The characterization of those rights will essentially resolve the dispute before this Court.

D. Legal Characterization of the Crown's Rights

19 In this analysis, it is important to abide by the fundamental rules of contemporary statutory interpretation. Parliament's intent must be ascertained, and to do this, it is often necessary to review the statutory provisions at issue in their overall context (R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 276). This approach casts doubt on the validity of the tax authorities' arguments.

20 The appellants' arguments consist of a few fundamental propositions. They submit, first, that the GST and the QST are direct taxes on consumption. They are imposed on the consumer, and more specifically on the ultimate recipient of a taxable good or service. The legislation establishes a direct link between the Crown and the recipient, as the former may claim the taxes payable directly from the latter if they have not been collected (s. 296(1)(b)*ETA*). The appellants contend that where the GST is collected by a trustee in bankruptcy, the trustee, like the bankrupt supplier, collects it as an agent of, and on behalf of, the Crown. And the Crown is in a similar legal situation where the QST is concerned. The recipient owes the sales tax to the Crown pursuant to ss. 16 and 82 *AQST*. The supplier collects the tax on the Crown's behalf and is deemed to be a mandatary of the Crown pursuant to s. 422 *AQST*. Moreover, under s. 23 *AMR*, a person who does not collect a tax he or she was required to collect becomes a debtor of the "State" for that amount The appellants further submit that, in the context of the *ETA* and the *AQST*, the supplier, a mandatary of the Crown, is responsible, after supplying a taxable service or good to a consumer, for the recovery of property — a GST or QST amount — that belongs to the Crown and that remains Crown property, until it is remitted to the Crown. The legal situation is the same regardless of whether the tax is collected by the supplier or by a trustee after its bankruptcy. In the appellants' view, when the collected tax is remitted, the mandatary does not settle a claim, but remits to the Crown its own property. Moreover, according to this argument, this Court has established a general principle that, in performing its obligation, the mandatary does not discharge a debt, but delivers over property belonging to the mandator (*Victuni Aktiengesellschaft v. Quebec (Minister of Revenue)*, [1980] 1 S.C.R. 580 (S.C.C.), at p. 584, *per* Pigeon J.).

21 This set of legal propositions disregards the mechanisms for administering the GST and the QST. The legal characterization of the relationships between the tax authorities and the suppliers and recipients of goods and services cannot be considered in isolation from the overall context of the system for the collection and remittance of these taxes and from the provisions of the *BIA*.

2009 CarswellQue 10706, 2009 SCC 49, J.E. 2009-1958, 2009 G.T.C. 2036 (Eng.), [2009] G.S.T.C. 154, 394 N.R. 368, 60 C.B.R. (5th) 1, 312 D.L.R. (4th) 577, [2009] 3 S.C.R. 286

22 An initial comment must be made about the impact of the federal bankruptcy legislation. The appellants are oversimplifying the trustee's role and, in particular, his or her legal situation vis-à-vis the bankrupt. This Court has noted the complexity of the trustee's duties in, for example, *Lefebvre, Re*, 2004 SCC 63, [2004] 3 S.C.R. 326 (S.C.C.), at paras. 35-37. The trustee's role is not limited to representing the bankrupt. The trustee manages the bankrupt's patrimony and is seised thereof as a result of the bankruptcy, but he or she also represents the creditors and is responsible to them for the liquidation and orderly distribution of the patrimony.

23 In the cases before the Court, the trustees were responsible for liquidating a patrimony that included the GST and QST amounts in issue, as the Court of Appeal concluded (see paras. 51-55). In her reasons, Duval Hesler J.A. clearly and correctly defined the nature of the trustee's role in this respect. The reason why the supplier was given the status of a mandatary was to ensure that the tax qualified as a direct tax so that the imposition, by the province of Quebec, of the QST in a form compatible with that of the federal GST would be constitutional (para. 50). However, the fact that this tax is ultimately borne by the recipient does not support a finding that the supplier and then the trustee, the bankrupt's representative, merely collect and remit the Crown's "property" or "thing". The nature of the collection mechanism for the two taxes suggests another interpretation of the legal situation.

24 This mechanism is designed to implement a direct tax that is also a tax on the value added at each stage of the production and marketing of the good or service until it is acquired by its ultimate recipient. In such a system, as Duval Hesler J.A. noted, [TRANSLATION] "[t]he dollar collected is not the dollar remitted" (para. 52).

25 First of all, the collection mechanism does not require separate invoices for the GST and the QST. These taxes are indicated and included in the invoice or other document given to the recipient (s. 223 *ETA*; s. 425 *AQST*). Next, the tax amounts collected by suppliers are remitted in accordance with the accrual, not cash, method of accounting. At periodic intervals, which vary depending on the individual supplier's sales and sometimes on the nature of the business, suppliers remit to the tax authorities amounts corresponding to the tax amounts that have been billed for and are collectible during the reporting period in question even if these collectible amounts have not in fact been collected from the recipients. When sending remittances, suppliers deduct from the amounts being remitted credits corresponding to their own inputs, that is, to the taxes they have paid to their own suppliers. Thus, they remit net tax amounts based on the difference between the taxes they have collected and the taxes they themselves have paid (s. 228 *ETA*; s. 437 *AQST*). At times, under this system, they can obtain rebates.

26 Moreover, nothing in the legislation respecting the GST and the QST requires suppliers to keep the taxes they collect separate. Until a bankruptcy occurs, only the deemed trusts established by s. 22 *ETA* and s. 20 *AMR* lead to this legal result by giving the tax authorities a right to equivalent amounts from the suppliers' assets. Finally, while it is true that the recipient owes the tax to the Crown, a supplier who has remitted the tax owed by the recipient but has not collected it has a cause of action against the recipient (s. 224 *ETA*; s. 427 *AQST*).

27 The statutory mandate imposed on the supplier to collect the GST and the QST differs from the mandate in issue in *Victuni*, which related to the acquisition and development of an immovable. The mandate with respect to the two taxes involves the performance of obligations to collect and then to remit, not the amounts collected, but a balance resulting from offsetting claims of the Crown and the supplier. The existence of these offsetting claims confirms that claims for the amounts collected by suppliers are fungible, as this Court in fact pointed out in *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24 (S.C.C.), at pp. 34-35.

28 I note that the appellants' position amounts to maintaining that the deemed trusts established by ss. 222 *ETA* and 20 *AMR* continue to exist after a bankruptcy. The appellants' argument is inconsistent with the nature of their rights under the system for the collection and remittance of the GST and QST. It also conflicts with Parliament's clear intent and with the very explicit wording of the relevant statutory provisions regarding what is to happen if a supplier goes bankrupt. Before 1992, the Crown held a priority where certain tax claims were concerned. These

2009 CarswellQue 10706, 2009 SCC 49, J.E. 2009-1958, 2009 G.T.C. 2036 (Eng.), [2009] G.S.T.C. 154, 394 N.R. 368, 60 C.B.R. (5th) 1, 312 D.L.R. (4th) 577, [2009] 3 S.C.R. 286

claims were often protected by an increasingly complex series of statutory deemed trusts. The 1992 amendments to the *BIA* rendered these trusts ineffective in a bankruptcy situation, although there were exceptions with respect, for example, to claims for income tax source deductions (see, for example, *Ministre du Revenu national c. Caisse Populaire du bon Conseil*, 2009 SCC 29, [2009] 2 S.C.R. 94 (S.C.C.)). Other than where these exceptions apply, when a debtor goes bankrupt, the Crown becomes an ordinary creditor. The trustee will give it the same priority as other creditors of the same rank. The trustee will be personally responsible for paying the GST or QST in respect of its own activities only (s. 265 *ETA*; s. 302.1 *AQST*).

29 Canadian tax authorities are bound by the choice of legislative policy now expressed in the *BIA*. The order of priority established in the *BIA* is also binding on the Quebec tax authorities, even though the *AMR* is silent on what happens to the deemed trust established in s. 20 thereof in the event of bankruptcy. The appellants' arguments conflict with both the words of the statutory provisions in question and their underlying legislative intent, and cannot be accepted.

V. Conclusion

30 For these reasons, I would affirm the decision of the Quebec Court of Appeal and dismiss the appellants' appeals with costs.

Appeals dismissed.

Pourvois rejetés.

APPENDIX

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

> **165. (1) Imposition of goods and services tax** — Subject to this Part, every recipient of a taxable supply made in Canada shall pay to Her Majesty in right of Canada tax in respect of the supply calculated at the rate of 5% on the value of the consideration for the supply.
>
> . . . . .
>
> **221. (1) Collection of tax** — Every person who makes a taxable supply shall, as agent of Her Majesty in right of Canada, collect the tax under Division II payable by the recipient in respect of the supply.
>
> . . . . .
>
> **222. (1) [Deemed] Trust for amounts collected** — Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).
>
> **(1.1) Amounts collected before bankruptcy** — Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the *Bankruptcy and Insolvency Act)*, to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

2009 CarswellQue 10706, 2009 SCC 49, J.E. 2009-1958, 2009 G.T.C. 2036 (Eng.), [2009] G.S.T.C. 154, 394 N.R. 368, 60 C.B.R. (5th) 1, 312 D.L.R. (4th) 577, [2009] 3 S.C.R. 286

...

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

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

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

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

165. (1) Taux de la taxe sur les produits et services — Sous réserve des autres dispositions de la présente partie, l'acquéreur d'une fourniture taxable effectuée au Canada est tenu de payer à Sa Majesté du chef du Canada une taxe calculée au taux de 5% sur la valeur de la contrepartie de la fourniture.

...

221. (1) Perception — La personne qui effectue une fourniture taxable doit, à titre de mandataire de Sa Majesté du chef du Canada, percevoir la taxe payable par l'acquéreur en vertu de la section H.

. . . . .

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

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

...

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

2009 CarswellQue 10706, 2009 SCC 49, J.E. 2009-1958, 2009 G.T.C. 2036 (Eng.), [2009] G.S.T.C. 154, 394 N.R. 368, 60 C.B.R. (5th) 1, 312 D.L.R. (4th) 577, [2009] 3 S.C.R. 286

tant sont réputés:

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

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

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

An Act respecting the Québec sales tax, R.S.Q., c. T-0.1

16. Every recipient of a taxable supply made in Québec shall pay to the Minister of Revenue a tax in respect of the supply calculated at the rate of 7.5% on the value of the consideration for the supply.

. . . . .

422. Every person who makes a taxable supply shall, as a mandatary of the Minister, collect the tax payable by the recipient under section 16 in respect of the supply.

16. Tout acquéreur d'une fourniture taxable effectuée au Québec doit payer au ministre du Revenu une taxe à l'égard de la fourniture calculée au taux de 7,5 % sur la valeur de la contrepartie de la fourniture.

. . . . .

422. Toute personne qui effectue une fourniture taxable doit, à titre de mandataire du ministre, percevoir la taxe payable par l'acquéreur en vertu de l'article 16 à l'égard de cette fourniture.

An Act respecting the Ministère du Revenu, R.S.Q., c. M-31

20. Every person who deducts, withholds or collects any amount under a fiscal law is deemed to hold it in trust for the State, separately from the person's patrimony and the person's own funds, for payment to the State in the manner and at the time provided under a fiscal law.

Where at any time an amount deemed by the first paragraph to be held by a person in trust for the State is not paid to the State in the manner and at the time provided under a fiscal law, an amount equal to the amount thus deducted, withheld or collected is deemed, from the time the amount is deducted, withheld or collected, to be held in trust for the State, separately from the person's patrimony and the person's own funds, and to form a separate fund not forming part of the property of that person, whether or not the amount has in fact been held separately from that person's patrimony or that person's own funds.

. . . . .

23. Every person who does not collect a duty that he was bound to collect as a mandatary of the Minister or does not withhold a duty that he was bound to withhold, under a fiscal law or a regulation made under such a

2009 CarswellQue 10706, 2009 SCC 49, J.E. 2009-1958, 2009 G.T.C. 2036 (Eng.), [2009] G.S.T.C. 154, 394 N.R. 368, 60 C.B.R. (5th) 1, 312 D.L.R. (4th) 577, [2009] 3 S.C.R. 286

law, shall become a debtor of the State for the amount of that duty, with the exception of the withholding provided for in section 1015 of the Taxation Act (chapter I-3), unless the withholding concerns a duty that a person was required to withhold from an amount paid to another person who is not resident in Canada for services performed in Québec.

. . . . .

24. Every person who deducts, withholds or collects an amount under a fiscal law is bound to pay to the Minister, at the date fixed by such law, or in accordance with the provision for such payment, an amount equal to that which the person must remit under the said Act.

. . . . .

20. Toute personne qui déduit, retient ou perçoit un montant quelconque en vertu d'une loi fiscale est réputée le détenir en fiducie pour l'État, séparé de son patrimoine et de ses propres fonds, et en vue de le verser à l'État selon les modalités et dans le délai prévus par une loi fiscale.

En cas de non-versement à l'État, selon les modalités et dans le délai prévus par une loi fiscale, d'un montant qu'une personne est réputée par le premier alinéa détenir en fiducie pour l'État, un montant égal au montant ainsi déduit, retenu ou perçu est réputé, à compter du moment où le montant est déduit, retenu ou perçu, être détenu en fiducie pour l'État, séparé de son patrimoine et de ses propres fonds, et former un fonds séparé ne faisant pas partie des biens de cette personne, que ce montant ait été ou non, dans les faits, tenu séparé du patrimoine de cette personne ou de ses propres fonds.

. . . . .

23. Toute personne qui ne perçoit pas un droit qu'elle était tenue de percevoir comme mandataire du ministre ou ne retient pas un droit qu'elle était tenue de retenir, en vertu d'une loi fiscale ou d'un règlement adopté en vertu d'une telle loi, devient débitrice envers l'État du montant de ce droit, à l'exception de la retenue prévue à l'article 1015 de la Loi sur les impôts (chapitre I-3), sauf si cette retenue concerne un droit qu'une personne devait retenir sur un montant payé à une autre personne qui ne réside pas au Canada pour services rendus au Québec.

. . . . .

24. Toute personne qui déduit, retient ou perçoit un montant en vertu d'une loi fiscale est tenue de payer au ministre, à la date fixée par cette loi ou conformément à la disposition prévue pour un tel paiement, un montant égal à celui qu'elle est tenue de remettre en vertu de cette loi.

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

67. (1) Property of bankrupt — The property of a bankrupt divisible among his creditors shall not comprise

(a) property held by the bankrupt in trust for any other person,

...

(2) Deemed trusts — Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded

2009 CarswellQue 10706, 2009 SCC 49, J.E. 2009-1958, 2009 G.T.C. 2036 (Eng.), [2009] G.S.T.C. 154, 394 N.R. 368, 60 C.B.R. (5th) 1, 312 D.L.R. (4th) 577, [2009] 3 S.C.R. 286

in the absence of that statutory provision.

(3) Exceptions — Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

86. (1) Status of Crown claims — In relation to a bankruptcy or proposal, all provable claims, including secured claims, of Her Majesty in right of Canada or a province or of any body under an Act respecting workers' compensation, in this section and in section 87 called a "workers' compensation body", rank as unsecured claims.

. . . . .

87. (1) Statutory Crown securities — A security provided for in federal or provincial legislation for the sole or principal purpose of securing a claim of Her Majesty in right of Canada or of a province or of a workers' compensation body is valid in relation to a bankruptcy or proposal only if the security is registered under a prescribed system of registration before the date of the initial bankruptcy event.

67. (1) Biens du failli — Les biens d'un failli, constituant le patrimoine attribué à ses créanciers, ne comprennent pas les biens suivants:

a) les biens détenus par le failli en fiducie pour toute autre personne;

(2) Fiducies présumées — Sous réserve du paragraphe (3) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens du failli ne peut, pour l'application de l'alinéa (1)*a*), être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

(3) Exceptions — Le paragraphe (2) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* (chacun étant appelé « disposition fédérale » au présent paragraphe) ou à l'égard des montants réputés détenus en fiducie aux termes de toute loi d'une province créant une fiducie présumée dans le seul but d'assurer à Sa Majesté du chef de cette province la remise de sommes déduites ou retenues aux termes d'une loi de cette province, dans la me-

2009 CarswellQue 10706, 2009 SCC 49, J.E. 2009-1958, 2009 G.T.C. 2036 (Eng.), [2009] G.S.T.C. 154, 394 N.R. 368, 60 C.B.R. (5th) 1, 312 D.L.R. (4th) 577, [2009] 3 S.C.R. 286

sure où, dans ce dernier cas, se réalise l'une des conditions suivantes:

a) la loi de cette province prévoit un impôt semblable, de par sa nature, à celui prévu par la *Loi de l'impôt sur le revenu*, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*;

b) cette province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) du *Régime de pensions du Canada*, la loi de cette province institue un « régime provincial de pensions » au sens de ce paragraphe, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 23(3) ou (4) du *Régime de pensions du Canada*.

Pour l'application du présent paragraphe, toute disposition de la loi provinciale qui crée une fiducie présumée est réputée avoir, à l'encontre de tout créancier du failli et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que la disposition fédérale correspondante, quelle que soit la garantie dont bénéficie le créancier.

86. (1) Réclamations de la Couronne — Dans le cadre d'une faillite ou d'une proposition, les réclamations prouvables — y compris les réclamations garanties — de Sa Majesté du chef du Canada ou d'une province ou d'un organisme compétent au titre d'une loi sur les accidents du travail prennent rang comme réclamations non garanties.

. . . . .

87. (1) Garanties créées par législation — Les garanties créées aux termes d'une loi fédérale ou provinciale dans le seul but — ou principalement dans le but — de protéger des réclamations mentionnées au paragraphe 86(1) ne sont valides, dans le cadre d'une faillite ou d'une proposition, que si elles ont été enregistrées, conformément à un système d'enregistrement prescrit, avant l'ouverture de la faillite.

END OF DOCUMENT

TAB 2

2007 CarswellQue 12231, 2007 QCCA 1813, EYB 2007-127782, [2008] G.S.T.C. 3, 40 C.B.R. (5th) 18, [2008] R.J.Q. 39

2007 CarswellQue 12231, 2007 QCCA 1813, EYB 2007-127782, [2008] G.S.T.C. 3, 40 C.B.R. (5th) 18, [2008] R.J.Q. 39

Alternative granite & marbre inc., Re

Banque Nationale du Canada (Appelante-requérante) c. Ministère du Revenu du Québec (Intimé-intimé) et Stones Vogues Ressources inc. et Alternative Granite et Marbre inc. (Mises en cause-débitrices) et Lemieux Nolet inc. ès qualités de syndic à la faillite de Alternative Granite, Marbre inc. et De Stones Ressources inc. (Mise en cause-syndic-Intimé) et Granite Moreau et Centre de Granite Beebe (Mises en cause-mises en cause) et L'Association canadienne des professionnels de l'insolvabilité et de la réorganisation (Intervenante)

Raymond Chabot Inc., ès qualités de syndic à l'actif de la débitrice Consortium Promecan inc. (Appelant / Syndic intimé) c. Le Sous-Ministre du Revenu du Québec (Intimé / Requérant) et Consortium Promecan inc., mise en cause / Débitrice et Mines Agnico Eagle Ltée et Banque Nationale du Canada (Mises en cause / Mises en cause)

Raymond Chabot inc., ès qualités de syndic à l'actif de 9083-4185 Québec inc., faillie (Appelant / Syndic requérant) et Caisse Populaire Desjardins de Montmagny (Appelante - Intervenante) c. Sous-Ministre du Revenu du Québec (Intimé / Intimé) et 9083-4185 Québec inc. (Mise en cause / Débitrice) et L'Association Canadienne des Professionnels de l'Insolvabilité et de la Réorganisation (Intervenante)

Cour d'appel du Québec

Duval Hesler J.C.A., Doyon J.C.A., Forget J.C.A.

Heard: 11 septembre 2007
Judgment: 18 décembre 2007
Docket: C.A. Québec 200-09-005607-061

Counsel: Marc Germain, pour l'appelante

Michel Beauchamp, Christian Boutin, pour l'intimé

Eric Vallières, pour l'intervenante

Raynald Auger, pour les appelants

Subject: Insolvency; Tax — Miscellaneous; Corporate and Commercial; Civil Practice and Procedure; Goods and Services Tax (GST)

Tax --- Goods and Services Tax — Collection and remittance — GST held in trust

2007 CarswellQue 12231, 2007 QCCA 1813, EYB 2007-127782, [2008] G.S.T.C. 3, 40 C.B.R. (5th) 18, [2008] R.J.Q. 39

In three distinct bankruptcy cases, deputy minister of Revenue claimed it was owner of unpaid GST and QST — In first case, bank had security interest in accounts receivable of two bankrupt companies — In second case, trustee and debtor of another bankrupt company decided to keep sums of money in question in trust — In third case, another bankrupt company had hypothecated universality of its claims and accounts receivable in favour of credit union — Bank and trustee unsuccessfully brought motion in Superior Court denying deputy minister's claim — Bank and trustee appealed — Appeal allowed — GST and QST are direct taxes, paid by consumer, not by supplier and latter acts only as collector on behalf of Crown — Legislators created deemed trusts to give taxes prior claim status — Section 67(2) of Bankruptcy and Insolvency Act expressly provides that property of bankrupt shall not be regarded as held in trust for Her Majesty by means of statute — When supplier sells goods or services to buyer, supplier collects tax, deducts tax already paid to other suppliers and pays difference to government — Therefore, claiming that supplier had to remit amount of tax appearing on invoice to department was wrong — Excise Tax Act, R.S.C. 1985, c. E-15, ss. 221(1), 222(1), 265(1)(a).

Tax --- Goods and Services Tax — Special rules — Bankruptcy

In three distinct bankruptcy cases, deputy minister of Revenue claimed it was owner of unpaid GST and QST — In first case, bank had security interest in accounts receivable of two bankrupt companies — In second case, trustee and debtor of another bankrupt company decided to keep sums of money in question in trust — In third case, another bankrupt company had hypothecated universality of its claims and accounts receivable in favour of credit union — Bank and trustee unsuccessfully brought motion in Superior Court denying deputy minister's claim — Bank and trustee appealed — Appeal allowed — GST and QST are direct taxes, paid by consumer, not by supplier and latter acts only as collector on behalf of Crown — Legislators created deemed trusts to give taxes prior claim status — Section 67(2) of Bankruptcy and Insolvency Act expressly provides that property of bankrupt shall not be regarded as held in trust for Her Majesty by means of statute — When supplier sells goods or services to buyer, supplier collects tax, deducts tax already paid to other suppliers and pays difference to government — Therefore, claiming that supplier had to remit amount of tax appearing on invoice to department was wrong.

Faillite et insolvabilité --- Priorité des réclamations — Réclamations de la Couronne — Fédérale — Taxe de vente

Dans trois dossiers de faillite distincts, le sous-ministre du Revenu a revendiqué des sommes dues en TPS et TVQ et se considérait propriétaire de ces sommes d'argent — Dans le premier dossier, une banque détenait une garantie sur les comptes recevables de deux compagnies en faillite — Dans le deuxième dossier, le syndic et la débitrice d'une autre compagnie en faillite ont décidé de conserver le montant concerné dans un compte en fidéicommis — Dans le troisième dossier, une autre compagnie en faillite avait hypothéqué en faveur d'une caisse populaire l'universalité de ses créances et comptes à recevoir — Banque et syndic ont vainement déposé une requête en Cour supérieure à l'encontre du sous-ministre — Banque et syndic ont interjeté appel — Appel accueilli — TPS et TVQ sont des taxes directes, payables par le consommateur, et non pas par le fournisseur, qui n'est que le mandataire de la Couronne pour les fins de leur perception — Pour conférer aux taxes un statut prioritaire parmi d'autres créances, les législateurs ont mis en place des fiducies présumées — Article 67(2) de la Loi sur la faillite et l'insolvabilité prévoit expressément qu'aucun des biens du failli ne peut être considéré comme détenu en fiducie pour Sa Majesté par le biais d'une disposition législative — Lorsque le fournisseur vend à l'acheteur le bien ou le service concerné, il perçoit le montant de la taxe, soustrait des montants de taxe qu'il perçoit les montants de TPS et TVQ qu'il a lui-même payés à ses propres fournisseurs, et ne verse au gouvernement que la différence — Il était, par conséquent, erroné de prétendre que le fournisseur doit remettre au ministère le montant de taxe indiqué à la facture.

Faillite et insolvabilité --- Priorité des réclamations — Réclamations de la Couronne — Provinciale — Principes généraux

Dans trois dossiers de faillite distincts, le sous-ministre du Revenu a revendiqué des sommes dues en TPS et TVQ et se considérait propriétaire de ces sommes d'argent — Dans le premier dossier, une banque détenait une garantie sur les comptes recevables de deux compagnies en faillite — Dans le deuxième dossier, le syndic et la débitrice d'une

autre compagnie en faillite ont décidé de conserver le montant concerné dans un compte en fidéicommis — Dans le troisième dossier, une autre compagnie en faillite avait hypothéqué en faveur d'une caisse populaire l'universalité de ses créances et comptes à recevoir — Banque et syndic ont vainement déposé une requête en Cour supérieure à l'encontre du sous-ministre — Banque et syndic ont interjeté appel — Appel accueilli — TPS et TVQ sont des taxes directes, payables par le consommateur ou l'acquéreur ultime, et non pas par le fournisseur, qui n'est que le mandataire de la Couronne pour les fins de leur perception — Pour conférer aux taxes un statut prioritaire parmi d'autres créances, les législateurs ont mis en place des fiducies présumées — Article 67(2) de la Loi sur la faillite et l'insolvabilité prévoit expressément qu'aucun des biens du failli ne peut être considéré comme détenu en fiducie pour Sa Majesté par le biais d'une disposition législative — Lorsque le fournisseur vend à l'acheteur le bien ou le service concerné, il perçoit le montant de la taxe, soustrait des montants de taxe qu'il perçoit les montants de TPS et TVQ qu'il a lui-même payés à ses propres fournisseurs, opère compensation et ne verse au gouvernement que la différence — Il est, par conséquent, erroné de prétendre que le fournisseur doit remettre au ministère le montant de taxe indiqué à la facture.

Créanciers et débiteurs --- Exécutions — Exigibilité — Argent et valeurs

Dans trois dossiers de faillite distincts, le sous-ministre du Revenu a revendiqué des sommes dues en TPS et TVQ et se considérait propriétaire de ces sommes d'argent — Dans le premier dossier, une banque détenait une garantie sur les comptes recevables de deux compagnies en faillite — Dans le deuxième dossier, le syndic et la débitrice d'une autre compagnie en faillite ont décidé de conserver le montant concerné dans un compte en fidéicommis — Dans le troisième dossier, une autre compagnie en faillite avait hypothéqué en faveur d'une caisse populaire l'universalité de ses créances et comptes à recevoir — Banque et syndic ont vainement déposé une requête en Cour supérieure à l'encontre du sous-ministre — Banque et syndic ont interjeté appel — Appel accueilli — Argent est un bien fongible et pour en revendiquer la propriété, il faut qu'il soit clairement identifiable — Lorsque le fournisseur vend à l'acheteur le bien ou le service concerné, il perçoit le montant de la taxe, soustrait des montants de taxe qu'il perçoit les montants de TPS et TVQ qu'il a lui-même payés à ses propres fournisseurs, opère compensation et ne verse au gouvernement que la différence — Schème législatif de perception de la TPS et de la TVQ ne permettait donc pas d'envisager la Couronne comme la propriétaire d'un droit réel dans les montants d'argent perçus ou percevables à ce titre.

Faillite et insolvabilité --- Compétence en matière de faillite et d'insolvabilité — Compétence constitutionnelle du gouvernement fédéral et des provinces — Prépondérance de la compétence fédérale

Dans trois dossiers de faillite distincts, le sous-ministre du Revenu a revendiqué des sommes dues en TPS et TVQ et se considérait propriétaire de ces sommes d'argent — Dans le premier dossier, une banque détenait une garantie sur les comptes recevables de deux compagnies en faillite — Dans le deuxième dossier, le syndic et la débitrice d'une autre compagnie en faillite ont décidé de conserver le montant concerné dans un compte en fidéicommis — Dans le troisième dossier, une autre compagnie en faillite avait hypothéqué en faveur d'une caisse populaire l'universalité de ses créances et comptes à recevoir — Banque et syndic ont vainement déposé une requête en Cour supérieure à l'encontre du sous-ministre — Banque et syndic ont interjeté appel — Appel accueilli — Article 67(2) de la Loi sur la faillite et l'insolvabilité (« LFI ») prévoit expressément qu'aucun des biens du failli ne peut être considéré comme détenu en fiducie pour Sa Majesté par le biais d'une disposition législative — Intention claire et nette du législateur fédéral était de faire de la TPS et de la TVQ, en cas de faillite, des créances ordinaires — LFI a priorité sur toute autre loi incompatible — Provinces ne peuvent établir leur propre ordre de priorité applicable à la Loi sur la faillite — Il en résulte que les lois provinciales qui entrent en conflit avec les dispositions de la LFI sont tout simplement inapplicables.

Bankruptcy and insolvency --- Priorities of claims — Claims of Crown — Federal — Sales tax

In three distinct bankruptcy cases, deputy minister of Revenue claimed it was owner of unpaid GST and QST — In first case, bank had security interest in accounts receivable of two bankrupt companies — In second case, trustee and debtor of another bankrupt company decided to keep sums of money in question in trust — In third case, an-

other bankrupt company had hypothecated universality of its claims and accounts receivable in favour of credit union — Bank and trustee unsuccessfully brought motion in Superior Court denying deputy minister's claim — Bank and trustee appealed — Appeal allowed — GST and QST are direct taxes, paid by consumer, not by supplier and latter acts only as collector on behalf of Crown — Legislators created deemed trusts to give taxes prior claim status — Section 67(2) of Bankruptcy and Insolvency Act expressly provides that property of bankrupt shall not be regarded as held in trust for Her Majesty by means of statute — When supplier sells goods or services to buyer, supplier collects tax, deducts tax already paid to other suppliers and pays difference to government — Therefore, claiming that supplier had to remit amount of tax appearing on invoice to department was wrong.

Bankruptcy and insolvency --- Priorities of claims — Claims of Crown — Provincial — General principles

In three distinct bankruptcy cases, deputy minister of Revenue claimed it was owner of unpaid GST and QST — In first case, bank had security interest in accounts receivable of two bankrupt companies — In second case, trustee and debtor of another bankrupt company decided to keep sums of money in question in trust — In third case, another bankrupt company had hypothecated universality of its claims and accounts receivable in favour of credit union — Bank and trustee unsuccessfully brought motion in Superior Court denying deputy minister's claim — Bank and trustee appealed — Appeal allowed — GST and QST are direct taxes, paid by consumer or end buyer, not by supplier and latter acts only as collector on behalf of Crown — Legislators created deemed trusts to give taxes prior claim status — Section 67(2) of Bankruptcy and Insolvency Act expressly provides that property of bankrupt shall not be regarded as held in trust for Her Majesty by means of statute — When supplier sells goods or services to buyer, supplier collects tax, deducts tax already paid to other suppliers, applies set-off and pays difference to government — Therefore, claiming that supplier had to remit amount of tax appearing on invoice to department was wrong.

Debtors and creditors --- Executions — Exigibility — Money and securities for money

In three distinct bankruptcy cases, deputy minister of Revenue claimed it was owner of unpaid GST and QST — In first case, bank had security interest in accounts receivable of two bankrupt companies — In second case, trustee and debtor of another bankrupt company decided to keep sums of money in question in trust — In third case, another bankrupt company had hypothecated universality of its claims and accounts receivable in favour of credit union — Bank and trustee unsuccessfully brought motion in Superior Court denying deputy minister's claim — Bank and trustee appealed — Appeal allowed — Money is fungible and it must be clearly identifiable to be claimed — When supplier sells goods or services to buyer, supplier collects tax, deducts tax already paid to other suppliers, applies set-off and pays difference to government — Therefore, given legislative scheme for collection of both GST and QST, there was no basis for Crown to consider itself owner of collected taxes or taxes owing.

Bankruptcy and insolvency --- Bankruptcy and insolvency jurisdiction — Constitutional jurisdiction of federal government and provinces — Paramountcy of federal legislation

In three distinct bankruptcy cases, deputy minister of Revenue claimed it was owner of unpaid GST and QST — In first case, bank had security interest in accounts receivable of two bankrupt companies — In second case, trustee and debtor of another bankrupt company decided to keep sums of money in question in trust — In third case, another bankrupt company had hypothecated universality of its claims and accounts receivable in favour of credit union — Bank and trustee unsuccessfully brought motion in Superior Court denying deputy minister's claim — Bank and trustee appealed — Appeal allowed — Section 67(2) of Bankruptcy and Insolvency Act ("BIA") expressly provides that property of bankrupt shall not be regarded as held in trust for Her Majesty by means of statute — Parliament's clear intent was that GST and QST, in case of bankruptcy, would be considered as ordinary claims — BIA is paramount to any conflicting Act — In bankruptcy matters, provinces do not have jurisdiction to create priorities of their own — As result, provincial laws which conflict with BIA's provisions are simply inapplicable.

2007 CarswellQue 12231, 2007 QCCA 1813, EYB 2007-127782, [2008] G.S.T.C. 3, 40 C.B.R. (5th) 18, [2008] R.J.Q. 39

Cases considered by *Duval Hesler*:

Boutiques San Francisco Incorporées, Re (2004), 2004 CarswellQue 1325 (Que. S.C.) — considered

British Columbia v. Henfrey Samson Belair Ltd. (1989), 1989 CarswellBC 711, [1989] 1 T.S.T. 2164, 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 CarswellBC 351 (S.C.C.) — considered

British Columbia v. National Bank of Canada (1994), 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, 1994 CarswellBC 639, 99 B.C.L.R. (2d) 358, [1995] 2 W.W.R. 305, 119 D.L.R. (4th) 669 (B.C. C.A.) — referred to

Deloitte, Haskins & Sells Ltd. v. Alberta (Workers' Compensation Board) (1985), [1985] 1 S.C.R. 785, 1985 CarswellAlta 319, 1985 CarswellAlta 613, 19 D.L.R. (4th) 577, [1985] 4 W.W.R. 481, 60 N.R. 81, 38 Alta. L.R. (2d) 169, 63 A.R. 321, 55 C.B.R. (N.S.) 241 (S.C.C.) — considered

Husky Oil Operations Ltd. v. Minister of National Revenue (1995), 1995 CarswellSask 739, 1995 CarswellSask 740, 188 N.R. 1, 24 C.L.R. (2d) 131, 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, [1995] 10 W.W.R. 161 (S.C.C.) — considered

Minister of National Revenue v. Williston Wildcatters Oil Corp. (Trustee of) (1997), (sub nom. *Williston Wildcatters Corp., Re)* [1997] G.S.T.C. 17, [1997] 5 W.W.R. 55, 45 C.B.R. (3d) 73, (sub nom. *Williston Wildcatters Oil Corp. (Bankrupt), Re)* 152 Sask. R. 179, (sub nom. *Williston Wildcatters Oil Corp. (Bankrupt), Re)* 140 W.A.C. 179, (sub nom. *R. v. Deloitte & Touche Inc.)* 5 G.T.C. 7107, 1997 CarswellSask 103 (Sask. C.A.) — considered

Québec (Commission de la santé & de la sécurité du travail) c. Banque fédérale de développement (1988), (sub nom. *Federal Business Development Bank v. Québec (Comm. de la santé & de la sécurité du travail))* [1988] 1 S.C.R. 1061, 1988 CarswellQue 142, 84 N.R. 308, [1988] R.D.I. 376, 50 D.L.R. (4th) 577, 14 Q.A.C. 140, 68 C.B.R. (N.S.) 209, 1988 CarswellQue 31 (S.C.C.) — considered

Quebec (Deputy Minister of Revenue) c. Rainville (1979), (sub nom. *Bourgeault, Re)* 33 C.B.R. (N.S.) 301, (sub nom. *Bourgeault's Estate v. Quebec (Deputy Minister of Revenue))* 30 N.R. 24, (sub nom. *Bourgault, Re)* 105 D.L.R. (3d) 270, 1979 CarswellQue 165, 1979 CarswellQue 266, (sub nom. *Quebec (Deputy Minister of Revenue) v. Bourgeault (Trustee of))* [1980] 1 S.C.R. 35 (S.C.C.) — referred to

423092 Ontario Ltd. v. Ontario (Minister of Revenue) (March 6, 1986), Doc. Belleville 490/84 (Ont. Bktcy.) — considered

Statutes considered:

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

Generally — referred to

s. 67 — considered

s. 67(2) — considered

s. 86(1) — considered

s. 141 — referred to

Code civil du Québec, L.Q. 1991, c. 64

art. 2646 — referred to

Employment Insurance Act, S.C. 1996, c. 23

Generally — referred to

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

Generally — referred to

s. 222 [en. 1990, c. 45, s. 18] — referred to

s. 222(1) [en. 1990, c. 45, s. 18] — considered

s. 222(1.1) [en. 1993, c. 27, s. 87(1)] — considered

Impôt sur le tabac, Loi concernant l', L.R.Q., c. I-2

en général — referred to

Ministère du Revenu, Loi sur le, L.R.Q., c. M-31

art. 15.3.1 [ad. 1993, c. 79, art. 35] — considered

APPEL de la banque et du syndic de faillite à l'encontre d'une décision rejetant leur requête à l'encontre des prétentions du sous-ministre du Revenu qui se considérait propriétaire des sommes dues en vertu de la TPS et de la TVQ.

La Cour:

ARRÊt

1 Statuant sur l'appel d'un jugement rendu le 5 mai 2006 par la Cour supérieure, district de Québec (l'honorable Jean Bouchard) qui a rejeté la requête de la Banque Nationale;

2 Après avoir étudié le dossier, entendu les parties et délibéré;

3 Pour les motifs exprimés par la juge Duval Hesler dans l'arrêt prononcé ce jour dans le dossier 200-09-005582-066, auxquels souscrivent les juges Forget et Doyon;

4 *ACCUEILLE* l'appel;

2007 CarswellQue 12231, 2007 QCCA 1813, EYB 2007-127782, [2008] G.S.T.C. 3, 40 C.B.R. (5th) 18, [2008] R.J.Q. 39

5 *INFIRME* le jugement de première instance;

6 *ACCUEILLE* la requête de l'appelante Banque Nationale du Canada en appel d'une décision du syndic;

7 *ORDONNE* au syndic de remettre à l'appelante toutes les sommes d'argent qu'il a reçues comme comptes à recevoir ou créances des débitrices en déduisant les sommes dues au ministère du Revenu du Québec pour les déductions à la source sur la paie des employés des débitrices, s'il y a lieu;

8 *ORDONNE* au ministère du Revenu du Québec de cesser toute perception;

9 *CONDAMNE* le ministère du Revenu du Québec à remettre à la requérante toutes les sommes d'argent qu'il a reçues comme comptes à recevoir ou créances des débitrices;

10 *DÉCLARE* que le jugement à intervenir annule toute lettre, toute demande de paiement par le ministère de même que tout avis de cotisation et tout recours de quelque nature que ce soit contre les débiteurs et les débitrices pour toute réclamation du ministère du Revenu du Québec comme créancier ordinaire des débitrices;

11 *DÉCLARE* que l'appelante a des droits de créancière de premier rang sur toutes les créances des débitrices;

12 *LE TOUT* avec dépens contre le ministère du Revenu du Québec, tant en première instance qu'en appel.

Appel accueilli.

END OF DOCUMENT

TAB 3

Indexed as:

Canada (Superintendent of Bankruptcy) v. Berthelette (Trustee of)

Between
Superintendent of Bankruptcy, (applicant) appellant, and
BDO Dunwoody Limited, Trustee of the Estate of Nicole Marie Berthelette, a bankrupt, (respondent) respondent, and
The Canadian Insolvency Practitioners Association (intervenor) respondent

[1999] M.J. No. 289

174 D.L.R. (4th) 577

[1999] 11 W.W.R. 67

138 Man.R. (2d) 109

11 C.B.R. (4th) 1

89 A.C.W.S. (3d) 433

Docket No. AI 98-30-03664

Manitoba Court of Appeal

Scott C.J.M., Philp and Monnin JJ.A.

Heard: January 19 and May 7, 1999.
Judgment: June 24, 1999.

(15 pp.)

Bankruptcy -- Discharge of debtor -- Effect of discharge -- Absolute discharge -- Payments made to trustee after discharge.

This was an appeal by the Superintendent of Bankruptcy questioning a payment to Berthelette's trustee. Berthelette was absolutely discharged from her bankrupt status and was required to pay $848.35 to her trustee in fees. However, there were insufficient funds to pay the trustee this amount. Berthelette agreed to later pay the trustee the balance of $196. The Superintendent raised concerns that the trustee had not obtained an order under the Bankruptcy and Insolvency Act to allow it to receive the post-bankruptcy payment of $196. It argued that the trustee had no right to receive this sum. The registrar found that there was no provision in the Act preventing the trustee from receiving payment after the bankruptcy.

HELD: Appeal allowed. Berthelette had no obligation to make any payments to the trustee following her

discharge and the trustee was ordered to return the $196 to Berthelette. Berthelette had not entered into any agreement stating that she would voluntarily repay the trustee for the shortfall and, in the absence of such an agreement, it was not possible for the trustee to require any post-bankruptcy payments.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, ss. 68(1), 68(2), 68(8), 121(1), 178(1), 178(2), 202(1)(h).

Appeal From:

Appeal from (1998), 124 Man. R. (2d) 261; See (1997), 120 Man. R. (2d) 302

Counsel:

H. Glinter and R.B. Lindey, for the appellant.
R.W. Schwartz, for the respondent BDO Dunwoody Limited.
D.W. Leslie, for the respondent The Canadian Insolvency Practitioners Association.

The judgment of the Court was delivered by

PHILP J.A.:--

INTRODUCTION

1 The amount in issue in this summary administration bankruptcy proceeding is $196.00. The Superintendent of Bankruptcy (the superintendent) argues, however, that important questions affecting the summary administration of estates under the Bankruptcy and Insolvency Act (the Act) are raised which have resulted in disparate judgments in the courts of other provinces.

THE FACTS

2 The issues arise out of uncomplicated factual circumstances that, apart from one inference the Court is invited to draw, are not disputed. On January 4, 1994, Nicole Marie Berthelette (the bankrupt), a first-time bankrupt, made an assignment in bankruptcy under the Act. On the same day, she signed a document entitled "Agreement Letter," which provided:

> I, Nicole Marie Bethelette [sic], hereby agree to pay David I. Guttman, Trustee in Bankruptcy, any deficiency in fees arising out of my Assignment in Bankruptcy.

3 The bankrupt's realizable assets were negligible, and the administration of her bankruptcy proceeded summarily. On March 29, 1995, she received an absolute discharge.

4 The trustee[1] filed its statement of receipts and disbursements on September 12, 1996. The statement disclosed receipts totalling $1,0080.25 and disbursements of $231.90, leaving $848.35 for the trustee's fees. The fees to which a trustee is entitled for the summary administration of an estate are calculated, pursuant to Rule 115(1) of the Bankruptcy and Insolvency Rules[2], on the receipts of the estate. On receipts of $1,080.25, the amount of the fees under the Rule is $1,011.84. (The trustee's statement erroneously shows this calculation to be $1,009.58)

5 There was, therefore, a shortfall or deficiency of $163.49 between the trustee's fees calculated pursuant to the Rule and the amount available for distribution.

6 On October 31, 1996, the trustee received a payment of $196.00 from the bankrupt pursuant to the agreement letter. Four days later, on November 4, 1996, the trustee filed an amended statement of receipts and disbursements, which included the payment of $196.00 as a receipt of the estate. In the amended statement, the receipts total $1,276.25 and the trustee's fee, calculated on those receipts pursuant to Rule 115(1), are shown as $1,080.44.

7 The amount available for payment of the trustee's fees in the amended statement has increased to $1,044.35 ($848.35, the amount available in the first statement, plus the payment of $196.00). The revised amount available is insufficient to pay his re-calculated fees, but more than sufficient to pay the fees calculated in the first statement on receipts of the estate before the payment of $196.00.

8 The superintendent raised concerns that the trustee had not obtained an order under s. 68 of the Act with respect to the post-bankruptcy payment of $196.00 and with regard to the trustee's authority to collect or receive that payment after the bankrupt's absolute discharge. The superintendent requested that the trustee's accounts be taxed.

9 To complete the factual circumstances, the superintendent invites the Court to make the finding not made by the registrar or the motions court judge that the payment of $196.00 came out of the bankrupt's modest monthly take-home pay. That is likely not an unreasonable inference to draw in light of her impecunious circumstances, but because of the conclusion I have reached with respect to the application of s. 68 of the Act, it is an inference I need not draw.

THE ISSUE

10 The registrar identified the issue before her as ((1997), 120 Man.R. (2d) 302, at para. 1):

> ...[W]hether the payment of $196 received from the bankrupt after her discharge should be included in the receipts on which the trustee's fee is based.

On appeal, Jewers J., the motions court judge, identified the issue in similar words. In this Court, the parties agree that the issue is:

> Did the Learned Motions Court Judge err in law in holding that there is no statutory provision, regulation, directive or policy which prevents the Trustee from accepting, and basing its fee upon, payments made by a bankrupt after the bankrupt's discharge pursuant to an agreement with the Trustee?

11 As we will see, broader questions than those that have been put before the courts emerge from the factual circumstances.

PERTINENT LEGISLATION

12 Sections 68(1), (2) and (8), 121(1), 178(1) and (2), and 202(1)(h) of the Act, as they were at the times relevant to the facts of this appeal, are set out in the appendix that follows these reasons. Section 68 was amended in 1997. A different regime for the attachment of bankrupt's post-assignment (or post-receiving order) remuneration now applies to bankruptcies in respect of which proceedings are commenced after April 30, 1998 (the date the new section came into force). The earlier version, which applies to the circumstances of this appeal, is set out in the appendix.

JUDGMENTS

13 The registrar concluded (at para. 9):

> ...[T]here is no statutory provision, regulation, directive or public policy which prevents the trustee from accepting, and basing its fee upon, payments made by a bankrupt after her discharge pursuant to an agreement with the trustee. Nor is there any judicial authority which binds or persuades me otherwise.

14 In arriving at that conclusion, the registrar reasoned, and the motions court judge agreed, that court approval under s. 68 of the Act was not required "if the trustee and the bankrupt are in agreement."

15 The registrar also reasoned (at para. 16) that any claim arising from the agreement letter arose "by reason of an obligation incurred on the day she became a bankrupt" and therefore "would not be a claim provable in a bankruptcy and would therefore not be released by s. 178(2)" (my emphasis). She declined to follow Privé, Re (1995), 36 C.B.R. (3d) 152 (Que. S.C.), in which Guthrie J. concluded (at para. 20) that s. 178(1) "must cover all debts' and not just claims provable in bankruptcy' (s. 178(2))" and the "[t] herefore, the debt' of the bankrupt towards the trustee, under the terms of their agreement, would also be released!"

16 The motions court judge adopted the reasons of the registrar with respect to the application of s. 68 of the Act and the effect of s. 178(2). He, too, declined to follow Privé, Re. He wrote ((1998), 124 Man.R. (2d) 261, at para. 28):

> However, I agree with [counsel for the intervenor] that the reference to all debts' must be to debts provable in bankruptcy. The trustee can only certify that the debts provable in bankruptcy are released because the discharge obviously cannot and does not affect debts which are not provable in bankruptcy.

ANALYSIS

Section 68

17 I agree that s. 68 of the Act has no application to the circumstances of this bankruptcy, but not for the reasons given by the registrar and adopted by motions court judge. The argument of the superintendent that "a trustee can only access [sic] a bankrupt's wages and salary for the purposes of making [sic] a deficiency in the minimum fees and disbursements that the trustee has set for its own internal purposes through a s. 68" order has no application to the facts before the Court. While it might be reasonable to infer that the payment of $196.00 came out of the bankrupt's wages or salary, it is not a reasonable inference that the payment, made 19 months after her discharge, was made out of her earnings after her assignment and prior to her discharge. The requirement for an order under s. 68 attaching post-assignment income of the bankrupt never arose in the factual circumstances of this appeal.

18 Parenthetically, it should be noted that s. 68 of the Act, as re-enacted in 1997, provide a quite different regime for the attachment of the post-assignment income of a bankrupt. The trustee is now required, without an application to the court, to fix the amount the bankrupt must pay to the bankrupt estate.

19 Marzetti v. Marzetti, [1994] 2 S.C.R. 765, it would appear, was not referred to the registrar or motions court judge, or considered by them. In that decision, Iacobucci J., writing for the Court,

concluded (at p. 794) that s. 68 (the 1992 version) is "a substantive provision, on e which is intended to operate as a complete code in respect of a bankrupt's salary, wages, or other remuneration."

20 The registrar and the motions court judge appear to have concluded that, notwithstanding s. 68, nothing in the Act prevented agreements between a bankrupt and his/her trustee relating to post-assignment remuneration. Courts in Quebec have reached a similar conclusion. See: Duquette (Trustee of) (Re), [1995] A.Q. no 296 (C.A.); Sinsofsky (Trustee of) (Re), [1998] A.Q. no 4007 (C.A.); and Vanderbanck (Trustee of) (Re), [1998] A.Q. no 3998 (C.A.). In Re Clark (Alta. Q.B., April 6, 1998, No. BK-01-0557970, Forsyth J. was of a different view. He rejected the conclusion of the motions court judge in this appeal and found "that agreements of this nature are not contemplated by the Bankruptcy Act."

21 Marzetti, it seems to me, resolves the dichotomy. I do not see how agreements relating to a bankrupt's post-assignment earnings can survive the Supreme Court's characterization of s. 68 as "a substantive provision, ... a complete code in respect of a bankrupt's salary, wages, or other remuneration." However, that is a conclusion that need not be made in the circumstances of this appeal.

Sections 121(1) and 178(2)

22 As noted above, the registrar concluded that the bankrupt's obligation under the agreement letter "would not be a claim provable in a bankruptcy and would therefore not be released by s. 178(2)." That is so, she reasoned, because the obligation was incurred on the day the bankrupt became a bankrupt. The registrar did not consider the other arm of claims provable under s. 121(1); namely, "[a]ll debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt" (my emphasis).

23 From information provided to the Court at the second hearing of the appeal, it would appear that the assignment, statement of affairs, and agreement letter were signed by the bankrupt at the same time and in that order, and that the assignment and statement of affairs were filed later the same day with the official receiver.

24 In Houlden & Morawetz, The 1999 Annotated Bankruptcy and Insolvency Act (1998), the authors acknowledge (at p. 436) that:

> The expression "the day on which the bankrupt becomes bankrupt" is ambiguous; presumably, it means the date on which the assignment is filed or the receiving order is made. A debt or liability incurred by the bankrupt after the filing of the petition but prior to the making of a receiving order is a provable claim: Re Tunnell (1924), 5 C.B.R. 73, 56 O.L.R. 100, [1924] 4 D.L.R. 862 (C.A.).

Other sections of the Act support that interpretation. Section 49(3) provides that an assignment "is inoperative until filed with [the] official receiver," and s. 71(1)[3] provides that "[a] bankruptcy shall be deemed to have relation back to, and to commence at the time ... of the filing of an assignment with the official receiver."

25 Applying that interpretation to the factual circumstances of this appeal, I conclude that whatever debt or liability arose under the agreement letter was one "to which the bankrupt [was] subject on the day on which the bankrupt becomes bankrupt." Assuming that the bankrupt's obligation under the agreement letter was enforceable at law - a conclusion questioned by counsel for the trustee at the appeal hearing, but not an issue before the Court for determination on the appeal - the obligation was a claim provable in bankruptcy pursuant to s. 121(1) of the Act. On the bankrupt's absolute discharge on March 29, 1995, her obligation under the agreement letter was released - s. 178(2). She was under no legal

obligation to pay any sum to the trustee under the agreement letter after her absolute discharge. The sum of $196.00 which the bankrupt paid to the trustee on October 31, 1996, was not a receipt of the estate for the purpose of calculating the fees of the trustee pursuant to Rule 115(1).

26 Permit me a few obiter comments that are prompted by the reasons of the registrar and the motions court judge and be the shifting arguments that were put before the Court by counsel as the appeal progressed.

27 Firstly, s. 202(1)(h) of the Act was cited to the Court by counsel for the superintendent. He argued that the motions court judge erred in concluding (at para. 18):

> ... [I]n this case the remuneration to which the trustee was entitled exceeded that actually charged and Parliament could not have intended to make it an offence for the trustee to agree with the bankrupt that the latter should make up any deficiency in the fees and disbursements properly payable under the Act.

He points out, as the motions court judge recognized, that "there is no minimum fee under Rule 115" and argues, therefore, "there can never be any deficiency' in the fees and disbursements properly' payable under the Act." However, whether or not the agreement letter constituted an offence under s. 202(1)(h) is a question that is not before the Court for determination on this appeal.

28 Secondly, the thrust of the argument of the trustee (and the intervenor) is that "[t]he payment of $196.00 is a voluntary payment made by the bankrupt to the Trustee pursuant to the agreement made on the date of the bankruptcy" (my emphasis). That is a contradiction in terms. The argument that the agreement letter was "collateral to the assignment" and was "inoperative until the assignment was filed" is simply an attempt to put too fine a point on an issue that need not be determined on this appeal.

29 Finally, the provisions in the Act for the summary administration of estates may invite a relaxed interpretation of the statutory duties and obligations imposed upon the trustee in the administration of a bankruptcy. Policy consideration - the ability of debtors like the bankrupt in this appeal, who possess few, if any, realizable assets, to obtain access to the scheme of the Act and to become rehabilitated unfettered by his/her past debts and liabilities - would seem to support that kind of interpretation. The registrar and the motion court judge concluded that the Act did not prevent payments by a bankrupt to his/her trustee pursuant to an agreement. However, Forsyth J. observed in Re. Clark:

> ...[I]f it is determined that such agreements are of benefit to the creditors as a whole, it is up to parliament and not to this court to make amendments to the Act sufficient to make it clear that arrangements of this nature are in order.

30 The trustee referred the Court to Directive No. 11, issued by the superintendent on October 23, 1986, entitled Bankruptcy Assistance Program. That directive outlines a program to accommodate "overburdened debtors [who] are unable to demonstrate to a trustee that sufficient funds will be available in the estate to cover administration cost" and are therefore "unable to secure services of a trustee to administer their bankruptcy." Paragraph 18 of the directive provides:

> In cases where a debtor's income is in excess of the amounts determined by the Superintendent's guidelines (which are based on the Senate Committee Poverty Lines (SCPL) as amended), the debtor is expected to provide voluntary payments to the estate in accordance with the SCPL guideline. In those circumstances where the debtor, without valid reasons, refuses to abide by these guidelines, the trustee may refuse to grant the debtor's request for bankruptcy service.

(my emphasis)

31 However commendable the purposes of the directive and the provision for "voluntary payments" by a bankrupt may be, the authority of a trustee to attach the earnings of a bankrupt , even by the expectation that the bankrupt will provide voluntary payments to the estate, has been put in doubt by the decision of the Supreme Court in Marzetti. In any event, the directive has no application to the circumstances in this appeal. There is no evidence that the bankrupt availed herself of the program or that the trustee was a "participating" trustee "designated" to act under the program in providing services to her. And the purpose of the agreement letter was not to have the bankrupt "provide voluntary payments to the estate in accordance with the SCPL guideline"; it was an agreement by the bankrupt to pay the trustee "any deficiency in fees arising out of my Assignment in Bankruptcy."

DISPOSITION

32 The appeal is allowed. The payment of $196.00 received by the trustee from the bankrupt is not a receipt upon which the trustee's fee is calculated and is to be returned to the bankrupt. There will be no order as to costs.

PHILP J.A.
SCOTT C.J.M.: -- I agree.
MONNIN J.A.: -- I agree.

* * * * *

APPENDIX

68. (1) Notwithstanding subsection 67(1), where a bankrupt

(a) is in receipt of, or is entitled to receive, any money as salary, wages or other remuneration from a person employing the bankrupt, or
(b) is in receipt of, or is entitled to receive from a person any money as payment for or commission in respect of any services performed by the bankrupt,

the trustee may, on the trustee's own initiative or, if directed by the inspectors or the creditors, shall, make an application to the court for an order directing the payment to the trustee of such part of the money as the court may determine, having regard to the family responsibilities and personal situation of the bankrupt.

(2) An order under subsection (1) shall be directed

(a) to the bankrupt, and
(b) to the person referred to in subsection (1) from whom the bankrupt is entitled to receive money, if the person is known,

and shall state that the order is in force for such time as the court may fix or until payment of a sum specified in the order is made and, unless otherwise stated in the order, that order ceases to have effect on the discharge of the bankrupt.

(8) An application referred to in subsection (1) shall, for the purposes of section 38, be deemed to be a proceeding for the benefit of the estate.

121. (1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

178. (1) An order of discharge does not release the bankrupt from

(a) any fine, penalty, restitution order or other order similar in nature of a fine, penalty or restitution order, imposed by a court in respect of an offence, or any debt arising out of a recognizance or bail;

(b) any debt or liability for alimony;

(c) any debt or liability under a support, maintenance or affiliation order or under an agreement for maintenance and support of a spouse or child living apart from the bankrupt;

(d) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity;

(e) any debt or liability for obtaining property by false pretences or fraudulent misrepresentation; or

(f) liability for the dividend that a creditor would have been entitled to receive on any provable claim not disclosed to the trustee, unless the creditor had notice or knowledge of the bankruptcy and failed to take reasonable action to prove his claim.

(2) Subject to subsection (1), an order of discharge releases the bankrupt from all claims provable in bankruptcy.

202. (1) A person who

. . . . .

(h) being a trustee, makes any arrangement under any circumstances with the bankrupt, or any solicitor, auctioneer or other person employed in connection with a bankruptcy, for any gift, remuneration or pecuniary or other consideration or benefit whatever beyond the remuneration payable out of the estate, or accepts any such consideration or benefit from any such person, or makes any arrangement for giving up, or gives up, any part of his remuneration, either as a receiver or trustee, to the bankrupt or any solicitor, auctioneer or other person employed in connection with the bankruptcy,

is guilty of an offence punishable on summary conviction and is liable to a fine not exceeding five thousand dollars, or to imprisonment for a term not exceeding one year, or to both.

cp/t/jpn

1 D.I. Guttman, the original trustee, was succeeded as trustee by the respondent, BDO Dunwoody Limited, in 1995.

2 Rule 115 was amended in 1998 and is now Rule 128.

3 Section 71(1) was repealed in 1997.

TAB 4

ALBERTA REGULATION 124/2010

Judicature Act

ALBERTA RULES OF COURT

Intervenor status

2.10 On application, a Court may grant status to a person to intervene in an action subject to any terms and conditions and with the rights and privileges specified by the Court.

TAB 5

Indexed as:

R. v. Morgentaler

Her Majesty The Queen, appellant;
v.
Henry Morgentaler, respondent, and
Canadian Abortion Rights Action League (CARAL),
intervener.

[1993] 1 S.C.R. 462

[1993] S.C.J. No. 48

File No.: 22578.

Supreme Court of Canada

1993: February 2.

Present: Sopinka J.

MOTION FOR AN ORDER PROHIBITING INTERVENER FROM ARGUING NEW ISSUES (5 paras.)

Practice -- Intervention -- New issues -- Supreme Court of Canada -- Motion to prohibit intervener from presenting argument on federal peace, order and good government power -- Intervener not entitled to widen or add to points in issue -- Motion granted.

Cases Cited

Referred to: Reference Re Workers' Compensation Act, 1983 (Nfld.), [1989] 2 S.C.R. 335.

Statutes and Regulations Cited

Medical Services Act, S.N.S. 1989, c. 9.

MOTION on behalf of appellant to prohibit an intervener from arguing new issues in an appeal. Motion granted.

Marian Tyson and Louise Walsh Poirier, for the motion.
Mary Eberts and Ian Godfrey, for the intervener Canadian Abortion Rights Action League (CARAL).

[page463]

Anne Derreck, for the respondent.

[Quicklaw note: Please see complete list of solicitors appended at the end of the judgment.]

The following is the judgment delivered by

1 **SOPINKA J.**:-- The motion brought by the appellant Attorney General of Nova Scotia to prohibit the intervener (respondent on the motion) Canadian Abortion Rights Action League (CARAL) from presenting argument on the federal peace, order and good government power (POGG) is granted. The purpose of an intervention is to present the court with submissions which are useful and different from the perspective of a non-party who has a special interest or particular expertise in the subject matter of the appeal. See Reference Re Workers' Compensation Act, 1983 (Nfld.), [1989] 2 S.C.R. 335.

2 An intervener is not entitled, however, to widen or add to the points in issue. Although it was brought to my attention that Dr. Morgentaler (the respondent in the appeal) raised the peace, order and good government issue in the Nova Scotia Provincial Court, the issue was not considered in the Provincial Court's decision nor did it arise in the Court of Appeal. Counsel for Dr. Morgentaler conceded at the hearing of this motion that the issue was not raised in the Court of Appeal or in this Court. It is not contested that the evidence in the case was culled for incorporation into the case on appeal on the basis that the federal criminal law power was the basis on which it was alleged that the impugned legislation is ultra vires.

3 The basis on which CARAL applied to intervene and on which its application was granted was that it would argue that the Medical Services Act, S.N.S. 1989, c. 9, and regulations made thereunder are in the nature of criminal law and therefore ultra vires the province. This is made very clear in the affidavit of Jane Holmes, sworn on June 11, 1992, filed in support of CARAL's application for leave to intervene. The constitutional questions framed by the Chief Justice in this case are restricted to the federal criminal law power and there is nothing in the constitutional questions that [page464] would give notice that POGG would be in issue. It can be assumed that the various Attorneys General based their decisions to intervene or not to intervene on the constitutional questions as framed. It is possible that their decisions would have been different had the POGG been put in issue in the constitutional questions. In any event, to introduce the issue without amending the constitutional questions would contravene this Court's rules with respect to constitutional questions, the main purpose of which is to give notice to Attorneys General as to the constitutional issue which the Court is asked to decide.

4 CARAL alleges that the challenged arguments are responsive to arguments raised by the appellant. The appellant argues (at paragraphs 77-78 of its factum in the appeal) that the impugned legislation is intra vires the province pursuant to the province's jurisdiction over health as a purely local and private matter. CARAL responds to this argument by saying that abortion as a health issue is not purely local and private but has a national dimension bringing it within POGG. The respondent, however, addresses this issue. He also disputes that the matter relates to a purely local and private matter and says that it is of national proportions. He has not, however, invoked POGG and does not attack the legislation on this basis. An intervener cannot introduce a new issue on the ground that it is a response to an argument made by the appellant if the respondent has chosen not to raise the issue.

5 There will be no costs on the motion.

Solicitor for the appellant: The Attorney General of Nova Scotia, Halifax.

[page465]

Solicitors for the intervener Canadian Abortion Rights Action League: Tory Tory DesLauriers & Binnington, Toronto.
Solicitors for the respondent: Buchan, Derrick & Ring, Halifax.

TAB 6

Case Name:

Telus Communications Inc. v. Telecommunications Workers Union

Between
Telus Communications Inc., Tele-Mobile Company and T M Mobile Inc., Appellants/Respondents on Cross-Appeal (Plaintiffs), and
Telecommunications Workers Union, its Officers, Members, Servants, Agents and Representatives, and John Doe, Jane Doe, and Other Persons Unknown to the Plaintiffs Acting as Pickets and/or Attending at or near the Premises of the Plaintiffs, Respondents/Appellants on Cross-Appeal (Defendants), and
Syncrude Canada Ltd. and Canadian National Railway Company, Applicants (Not Parties to the Action)

[2006] A.J. No. 1264

2006 ABCA 297

401 A.R. 57

153 A.C.W.S. (3d) 263

Dockets: 0501-0282-AC, 0501-0317-AC

Alberta Court of Appeal
Calgary, Alberta

Fruman, Paperny and Martin JJ.A.

Heard: September 21, 2006.
Oral judgment: September 21, 2006.
Filed: October 12, 2006.

(10 paras.)

Civil procedure -- Parties -- Intervenors -- Requirement of interest -- Application by Syncrude Canada and Canadian National Railway for leave to intervene in an appeal and cross-appeal arising from the picketing of Telus Communications, Tele-Mobile Company and T M Mobile (Telus) by the Telecommunications Workers Union -- Application dismissed -- Applicants failed to show that they could provide better information to the court on the matters in issue than the parties to the appeals -- No constitutional or legal issue that justified applying a lesser standard for granting leave to intervene.

Application by Syncrude Canada and Canadian National Railway for leave to intervene in an appeal and cross-appeal arising from the picketing of Telus Communications, Tele-Mobile Company and T M Mobile (Telus) by the Telecommunications Workers Union. In 2005, the Union commenced a strike to which Telus responded by locking out employees. A subsequent court order enjoined the Union from picketing near premises of Telus or its customers in Calgary and Edmonton in a manner that would unduly block or obstruct access or egress. That order permitted picketers to parade on sidewalks near Telus buildings but specified the manner in which they were to move out of the way of vehicles entering or leaving. The order was amended on October 5, 2005, adding a paragraph setting out guidelines for picketing Telus employees' homes. Telus appealed from the original order. The Union appealed and Telus cross-appealed from the October 5, 2005 order.

HELD: Application dismissed. The applicants failed to show that they could provide better information to the court on the matters in issue than the parties to the appeals. The issues in the appeals were fact specific and the law was reasonably well settled. There was no constitutional or legal issue that justified applying a lesser standard for granting leave to intervene.

Application to Intervene.

Counsel:

T.W. Wakeling Q.C. for the Applicants

A. Friend Q.C. for the Appellants/Respondents on Cross-Appeal

W.J. Johnson Q.C.for the Respondents/Appellants on Cross-Appeal

---

MEMORANDUM OF JUDGMENT
DELIVERED FROM THE BENCH

The judgment of the Court was delivered by

1 FRUMAN J.A. (orally):-- The applicants, Syncrude Canada Ltd. and Canadian National Railway Company, seek leave to intervene in an appeal and cross-appeal arising from the picketing of Telus Communications Inc., Tele-Mobile Company and T M Mobile Inc. (Telus) by the Telecommunications Workers Union (the Union).

2 In 2005, the Union commenced a strike to which Telus responded by locking out employees. A September 9, 2005 order of the Court of Queen's Bench, amending an earlier order, enjoined the Union from picketing near premises of Telus or its customers in Calgary and Edmonton in a manner that would unduly block or obstruct access or egress. In para. 1(a.1), the order permitted picketers to parade on sidewalks near Telus buildings, but specified the manner in which they were to move out of the way of vehicles entering or leaving. The order was amended on October 5, 2005, adding para. 1(f) that set out guidelines for picketing Telus employees' homes.

3 Telus appeals para. 1(a.1) of the September 9, 2005 order, and the Union appeals and Telus cross appeals para. 1(f) of the October 5, 2006 order. The issues are the terms of the picketing outside Telus buildings, and the terms of and failure to prohibit secondary picketing at Telus employees' homes. The appeals are scheduled to be heard in December 2006.

4 As a general principle, an intervention may be allowed when the proposed intervener is specially affected by the decision facing the court, or the proposed intervener has some special expertise or insight to bring to bear on the issues facing the court: ***Papaschase Indian Band (Descendants of) v. Canada (Attorney General)***, 2005 ABCA 320, [2005] A.J. No. 1273 at para. 2. As explained by the Supreme Court of Canada in ***R. v. Morgentaler***, [1993] 1 S.C.R. 462 at para. 1, "[t]he purpose of an intervention is to present the court with submissions which are useful and different from the perspective of a non-party who has a special interest or particular expertise in the subject matter of the appeal." Granting intervener status is discretionary and ought to be exercised sparingly: ***R. v. Neve*** (1996), 184 A.R. 359 (C.A.) at para. 16.

5 In their affidavits, the applicants recount interesting information about their past relationships with trade unions and infrequent contact with picketers. However, the applicants have not shown their situations to be sufficiently similar to these appeals that they will be specially affected by the decision of this Court. Indeed, the applicants' situations are no different than any company or employer whose employees are unionized, or who deal with contractors with unionized employees.

6 Equally important, the applicants have not shown they have some special expertise or insight to bring to bear on the issues facing this Court in these appeals. They submit that their experiences with picketers adversely affecting the efficiency of their businesses have forced them to carefully consider the relevant legal interests. However careful their considerations, the applicants have not shown that their research and submissions would amount to special expertise or insight.

7 The orders being appealed are highly fact specific. For example, para. 1(a.1) of the September 9, 2005 order attempts to balance the interest of picketers and vehicles on a sidewalk that served both as a pedestrian walkway and a passage for vehicles to the Telus buildings. The applicants have not shown they can provide better information to this Court on such fact-specific matters than the parties to these appeals. While they may wish to address broader issues, interveners are not permitted to do this: ***Alberta (Minister of Justice) v. Metis Settlements Appeal Tribunal*** (2005), 367 A.R. 34 (C.A.).

8 Although these appeals involve a constitutional dimension, the requirement that the proposed intervener will be specially affected by the decision or has some special expertise or insight remains the test in this case. The issues in these appeals are fact-specific and the law is reasonably well settled. See, for example, ***Retail, Wholesale and Department Store Union, Local 558 v. Pepsi-Cola Beverages (West) Ltd.***, [2002] 1 S.C.R. 156, 2002 SCC 8. There is no new constitutional or legal issue that justifies applying a lesser standard for granting leave to intervene.

9 The tests for granting intervener status are not met in this case and the application is dismissed.

(Discussion about costs)

10 There will be no award of costs in this application.

FRUMAN J.A.

cp/e/qw/qlcct/qlpwb/qltxp

TAB 7

Indexed as:

Ahyasou v. Lund

IN THE MATTER OF part 10 of the Mines and Mineral Act, R.S.A. 1980, c. M-15 and regulations thereunder regarding exploration approvals and the approval of the exploration activities of Rio Alto Exploration Ltd. within registered trapping areas 771 and 772 granted pursuant to such regulations
Between
Adolphus Ahyasou, Mike Orr, Francis Orr, the Athabasca Tribal Council, Chief Jim Boucher on his own behalf and on behalf of the Athabasca Tribal Council and on behalf of the Fort McKay First Nation, Chief Archie Cyprien on behalf of the Athabasca Tribal Council, Chief Archie Waquan on behalf of the Athabasca Tribal Council, Chief Bernice Cree on behalf of the Athabasca Tribal Council and Chief Walter Janvier on behalf of the Athabasca Tribal Council, applicants, and
The Honourable Ty Lund, Minister of Environmental Protection, the Honourable Steve West, Minister of Energy, the Province of Alberta and Rio Alto Exploration Ltd., respondents

[1998] A.J. No. 1154

1998 ABQB 875

[1999] 6 W.W.R. 20

67 Alta. L.R. (3d) 232

235 A.R. 387

13 Admin. L.R. (3d) 254

26 C.P.C. (4th) 98

83 A.C.W.S. (3d) 534

Action No. 9801-02161

Alberta Court of Queen's Bench
Judicial District of Calgary

Medhurst J.

October 27, 1998.

(10 pp.)

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, s. 1. Constitution Act, 1982, s. 35, 35(1).

Practice -- Parties -- Adding or substituting parties -- Intervenors -- Persons who may apply -- Re interest in subject matter.

Application by the Canadian Association of Petroleum Producers for leave to intervene in proceedings between the Athabasca Tribal Council and the Province of Alberta. The original action concerned exploration approvals that were granted to Rio Alto Exploration. The approvals were granted for lands within the registered trapping areas of the Council. The Council challenged the Province's land use decisions based on the Constitution Act and their Treaty rights. The Association represented 170 producer members who produced 95 per cent of the oil and gas produced in Canada. It claimed that its members would be substantially affected if the Council succeeded. Such relief would also have far-reaching impact on the industry. The Association further claimed that as the representative of the oil and gas industry as a whole, it could provide the court with submissions that would assist in the determination of the main action.

HELD: Application allowed. The Association was granted intervenor status. If the Council succeeded the decision would apply to future similar cases. The decision would determine the procedures that exploration companies would have to follow to obtain Ministerial approval for exploration activities on Treaty lands. This decision did not directly affect the Association. The decision would affect its constituent members. They could be adversely affected by it. The Association therefore had an interest in the litigation since its responsibility was to advance and protect the interests of its constituent members.

Counsel:

P.D. Feldberg, for the applicant.
J.R.W. Rath, for the Athabasca Tribal Council.
K.F. Miller, for the respondent, Rio Alto Exploration Ltd.
R.J. Normey, for the public respondents.

REASONS FOR JUDGMENT

MEDHURST J.:--

BACKGROUND

1 This is an application on behalf of the Canadian Association of Petroleum Producers, ("CAPP") for leave to intervene in the proceedings between The Athabasca Tribal Council ("ATC") and The Province of Alberta. The original action concerns exploration approvals granted to Rio Alto Exploration Ltd. ("Rio Alto") pursuant to the Mines and Minerals Act, R.S.A. 1980, c. M-15 and the accompanying regulations. The exploration approvals were granted in respect of lands within the registered trapping areas of the ATC. The ATC has challenged the land use decisions made by the Province based on their treaty rights and s. 35(1) of the Constitution. The issues in the main action are:

1. Whether the provincial government's right to allocate land for resource exploration and development is qualified or restricted by the Treaty or Aboriginal rights of the ATC as protected by s. 35(1) of the Constitution Act, 1982;
2. Whether the exploration activity infringes the Treaty or Aboriginal rights of the ATC;
3. If there has been an infringement, whether that infringement can be justified; and
4. If the infringement cannot be justified, what is the appropriate remedy for the ATC.

CAPP's Position

2 CAPP bases its application for intervenor status on the fact that it is an organization which represents 170 producer members who produce 95% of the oil and gas produced in Canada. CAPP claims that its members will be substantially affected if the relief sought by the ATC is granted and that any such relief will have far reaching impact on the industry. Furthermore, CAPP claims that as the representative of the oil and gas industry as a whole, it can provide the Court with submissions which will be of assistance in weighing the competing values and interests before the Court. According to CAPP, neither the Public Respondents nor Rio Alto can sufficiently represent the views and concerns of the industry as a whole with respect to the issues raised by this litigation. Finally, CAPP claims that the justification required in a s. 35(1) analysis is analogous to a s. 1 analysis under the Charter and, therefore, the Court should be more willing to grant the application for intervenor status.

ATC's Position

3 The ATC opposes CAPP's application. The ATC claims that CAPP has nothing to add to the action by virtue of its position in the industry. The ATC has characterized the issue before the Court as a very narrow one, affecting only the rights of the one named oil and gas exploration company, Rio Alto. The ATC further argues that any evidence regarding the oil and gas exploration regime in Alberta could effectively be put before the Court by Rio Alto, an experienced and sophisticated industry member. Simply put, the ATC maintains that the inclusion of CAPP as an intervenor in the action will complicate matters unnecessarily and serve no useful purpose. The ATC strongly disagrees with CAPP's assertion that the justification analysis required by s. 35(1) is analogous to a s. 1 consideration in Charter cases. The ATC argues that Treaty and Aboriginal rights are unique in nature and they are outside of the rights recognized by the Charter. Consequently, the same standards and issues should not be applied in this case as would be applied in a Charter case.

Analysis

4 Whether or not a party can intervene in an action is a matter that is to be decided at the discretion of the judge hearing the application. While many Canadian jurisdictions have rules which specify conditions in which intervenor status will be granted, Alberta has no such rules and reference must be had to the common law. The test developed in the common law is essentially that a party should only be granted intervenor status if the party will be directly affected by the ultimate decision of the case and/or where the presence of the party is necessary for the Court to properly decide the matter.

5 The ATC submits that the judicial review at issue will not directly affect the legal interests of CAPP and therefore CAPP should not be granted intervenor status. The ATC argues that the relief they claim is limited to relief against Rio Alto and the effects of the judicial review will go no further. CAPP asserts that if the relief sought in the judicial review is granted, it will affect the ability of individual CAPP

members to obtain approvals to conduct seismic activities on the lands covered by Treaty 8. Their position is that while the relief sought is as against only Rio Alto, the precedential effect of the granting of that relief will have wide reaching impact on all of the industry members that CAPP represents.

6 In making a determination on this issue, a two step approach is appropriate: "The first step is to characterize the subject-matter or the nature of the proceeding. The second step is to determine what interest the proposed intervenor has in it." (P. Muldoon Law of Intervention Status and Practice (Ontario: Canada Law Books Inc. 1989) at 40.) The subject matter of this proceeding is a series of exploration approvals granted by the Minister of Environmental Protection to Rio Alto. The ATC is seeking an order which would require the Minister to consult with the ATC with respect to the scope, nature and extent of the impact of exploration activities within the lands covered by Treaty 8. The ATC is essentially asking that no exploration approvals be granted by the Minister until they are consulted.

7 The ATC claims that CAPP has no interest in the subject matter because it only affects one exploration company, namely, Rio Alto. CAPP contends that the interests of all of its members could be affected by the outcome of the judicial review requested by the ATC if the ATC is successful.

8 If the ATC is successful against Rio Alto then, given the application of the Stare Decisis doctrine in our judicial system, it is likely that the decision would be determinative in future cases. For all intents and purposes, the decision in this case will determine what procedures exploration companies will have to follow in the future in order to get Ministerial approval for exploration activities on Treaty lands. If the ATC is successful and the orders they are requesting are granted, it is difficult to see how a different exploration company could then get Ministerial approval for exploration on Treaty land without going through the same consultations that were required of Rio Alto. Every exploration company that has interests in the expansive areas covered by Treaty 8 would likely be affected by a decision in favour of the ATC. CAPP therefor has an interest in the litigation by virtue of the fact that it is the organization responsible for advancing the interests of its constituent members.

9 It is true that the decision regarding the matter as between the ATC and Rio Alto will not have a direct affect on the legal rights of the corporate entity known as CAPP. CAPP does not itself engage in oil and gas exploration in Northern Alberta. It is a organization that is designed to protect and advance the interests of its members who are oil and gas exploration companies and, regardless of any orders granted in the matter between the ATC and Rio Alto, CAPP will continue to exist and operate just as before. Its constituent members however, may not be able to continue to operate as they did before. They may be adversely affected. Given that the members of CAPP have an interest in the litigation, and given that CAPP is a body designed to protect and advance the interests of its members, it appears logical to find that CAPP has an interest sufficient to grant it intervenor status. Comments made in the decision of the Ontario Court of Appeal in Re Schofield and Minister of Consumer & Corporate Relations (1980), 112 D.L.R. (3d) 132 at 141 apply to this point:

> "As an example of one such situation, one can envisage an applicant with no interest in the outcome of an appeal in any such direct sense but with an interest, because of the particular concerns which the applicant has or represents, such that the applicant is in an especially advantageous and perhaps even unique position to illuminate some aspect or facet of the appeal which ought to be considered by the Court in reaching its decision but which, but for the applicant's intervention, might not receive any attention or prominence, given the quite different interests of the immediate parties to the appeal."

10 In the present case, Rio Alto is going to be most concerned about its immediate predicament respecting the oil and gas exploration approvals that it had been granted and are now under scrutiny. It

may not be in the best position to inform the Court of the impact of any potential orders on the industry as a whole over an extended period of time. CAPP is in such a position and it is an important issue that represents the other side of the position advanced by the ATC. Based on the nature of this case and the fact that CAPP is the organization that represents affected industry members, it is reasonable that CAPP be granted intervenor status on the grounds that it has (or represents those who have) a direct interest in the outcome of the hearing.

11 CAPP advances the position that a s. 35 justification is analogous to the process in a s. 1 analysis under the Charter. Consequently, they argue, the Court should be more willing to grant intervenor status. The authorities are consistent in the application of the law with respect to intervenors in Charter matters. For example, in Alberta Sports Recreation Assn. For the Blind v. Edmonton (1993) 20 C.P.C. 101 (Alta. Q.B.) at 103, Ritter, J. said:

> "The courts have consistently stated that the application of s. 1 of the Charter requires evidence. If that evidence is either within the abilities of a proposed intervenor or its adduction can be assisted by the proposed intervenor, then it is not unreasonable to presume that the difficulties with application of s. 1 of the Charter can more readily be avoided."

Similarly in Re Canadian Labour Congress and Bhindi (1985), 17 D.L.R. (4th) 193 (B.C.C.A.) at 201, Anderson, J.A. stated:

> "In my view, it is imperative in dealing with important constitutional issues and, in particular, Charter issues requiring the production of an evidentiary record, that the trial court be empowered to grant "intervenor" status."

Further, at 204, he said:

> "I would add on this point, that it is important in dealing with Charter issues raised for the first time, that the courts have the assistance of argument from all segments of the community. The courts should not resist but should welcome such assistance."

Finally at 205, he said:

> "While no doubt the intervention of the appellant will add to the length and complexity of the trial, the additional expense is, on balance, justified. Issues relating to s. 1 of the Charter cannot and should not be addressed in a vacuum."

12 The ATC argues that principles which apply to Charter inquiries do not apply in the case of a s. 35 analysis. The ATC relies on authority which characterizes Treaty and Aboriginal rights as unique and they argue that this uniqueness prevents the application of any authority that deals expressly with the Charter and s. 1. In particular, the ATC sets out the Supreme Court of Canada's position on Aboriginal rights as articulated in R. v. Badger, [1996] 1 S.C.R. 771 at 821, where the Court approved the statement of Dickson, C.J. and LaForest, J. at p. 1110 in Sparrow (1990) 1 S.C.R. 1075, where it was stated:

> "By giving Aboriginal rights constitutional status and priority, Parliament and the provinces have sanctioned challenges to social and economic policy objectives embodied in legislation to the extent that Aboriginal rights are affected. Implicit in this constitutional scheme is the obligation of the legislature to satisfy the test of justification. The way in which a legislative objective is to be attained must uphold the honour of the Crown and must be in keeping with the unique contemporary

> relationship, grounded in history and policy, between the Crown and Canada's Aboriginal peoples. The extent of legislative or regulatory impact on existing Aboriginal rights may be scrutinized so as to ensure recognition and affirmation."
>
> (Emphasis added)

13 The test of justification is what CAPP argues is analogous to the s. 1 test in a Charter inquiry. The analogy is a valid one and therefore it is appropriate to apply a similar standard to intervenor applications in a s. 35 matter as would be applied in a Charter matter:

> "Because s. 35 is not part of the Charter of Rights, it is not subject to s. 1 of the Charter of Rights, which makes clear that the guaranteed rights are not absolute, but are subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'. However, the Court held [in R. v. Sparrow, [1990] 1 S.C.R. 1075] that the rights protected by s. 35 were not absolute either. They were subject to regulation by federal laws, provided the laws met the standard of justification not unlike that erected by the Court for s. 1 of the Charter. Any law that had the effect of impairing an existing aboriginal right would be subject to judicial review to determine whether it was a justified impairment. A justified impairment would have to pursue an objective that was compelling and substantial'. The conservation and management of a limited resource would be a justified objective, but the public interest' would be too vague to serve as a justification. If a sufficient objective was found, then the law had to employ means that were consistent with the special trust relationship' between government and the aboriginal peoples." P. Hogg Constitutional Law of Canada, 4th ed. (Ontario: Carswell, 1997) at 698.

The judgment in Sparrow (supra) makes it clear that many of the questions asked at the justification stage of a s. 35 matter are the same as those that would be asked in applying the Oakes test to a s. 1 inquiry. At 1119 of the judgment, the Court said:

> "Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include the questions of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group has been consulted with respect to the conservation measures being implemented."

Clearly, many of the same considerations come into play in determining whether there is a justification for an infringement on Aboriginal rights as in determining whether there is justification for an infringement on an individual's Charter rights. Consequently, the Courts should be more willing to permit intervenors where it would assist the Court in adducing evidence as to the justification or lack thereof.

14 Neither party would dispute the statement that these are important matters which have the potential for long term effects on the Aboriginals and the oil and gas industry. CAPP brings to the litigation a unique perspective, that of the industry as a whole. They are likely in the best position to inform the Court of the impact of any decision on the industry as a whole. That is important evidence for the Court to have in order to make a proper determination of the issue before it. Given that CAPP has an interest in the outcome of the litigation, and given the importance of the question to be determined, CAPP should be granted intervenor status in the present matter. The Order as requested is therefore granted.

MEDHURST J.

cp/d/drk/DRS

TAB 8

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

Court may appoint receiver

243. (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

(*a*) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

(*b*) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

(*c*) take any other action that the court considers advisable.

Restriction on appointment of receiver

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

(*a*) the insolvent person consents to an earlier enforcement under subsection 244(2); or

(*b*) the court considers it appropriate to appoint a receiver before then.

Definition of "receiver"

(2) Subject to subsections (3) and (4), in this Part, "receiver" means a person who

(*a*) is appointed under subsection (1); or

(*b*) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under

(i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or

(ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

Definition of "receiver" — subsection 248(2)

(3) For the purposes of subsection 248(2), the definition "receiver" in subsection (2) is to be read without reference to paragraph (*a*) or subparagraph (*b*)(ii).

Trustee to be appointed

(4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(*b*).

Place of filing

(5) The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

Orders respecting fees and disbursements

(6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

Meaning of "disbursements"

(7) In subsection (6), "disbursements" does not include payments made in the operation of a business of the insolvent person or bankrupt.

1992, c. 27, s. 89; 2005, c. 47, s. 115; 2007, c. 36, s. 58

TAB 9

Civil Enforcement Regulation, Alta. Reg. 276/1995

Receivers

32 Only the following persons are eligible to be appointed as receivers under the Act:

(a) a licensed trustee in bankruptcy;

(b) a person, other than a licensed trustee in bankruptcy, who

(i) to the satisfaction of the Court, is qualified to carry out the functions and duties of a receiver in the circumstances for which the receiver is being appointed, and

(ii) provides such security as may be required by the Court.

TAB 10

KERR AND HUNTER

on

RECEIVERS AND ADMINISTRATORS

EIGHTEENTH EDITION

BY

Muir Hunter Q.C.
M. A. (Oxon); LL.D (Hons); MRI

One of Her Majesty's Counsel and a
Bencher of Gray's Inn
Visiting Professor of Insolvency Law,
University of Bournemouth

LONDON
SWEET & MAXWELL
2005

CHAPTER 1

PRINCIPLES ON WHICH A RECEIVER IS APPOINTED BY THE COURT

The new procedure. The introduction of the "Woolf Rules", as CPR 1998, has abolished long-established court procedures and reconstructed others. In some fields, the former RSC and CCR have been retained, with or without amendments, as rules still to be generally applicable; they are referred to, and cited, as "CPR Schedule 1 (former RSC number)" or as "CPR Schedule 2 (former CCR number)". **1–1**

In other fields, the former RSC and CCR have been retained, on a transitional basis, for the purposes of continuing to regulate certain forms of proceeding which were already on foot, while the CPR, which were to replace them, have been prescribed for the regulation of proceedings commenced subsequently. Important relevant dates for this purpose were October 15, 2001 and December 2, 2002.[1]

Nature of the office. A receiver in a claim or other proceeding is an impartial person, appointed by the court to collect, protect and receive, pending the proceedings, the rents, issues and profits of land, personal estate or any other kind of asset, which it does not seem reasonable to the Court that either party should collect or receive, or for enabling the same to be distributed among the persons entitled. **1–2**

Jurisdiction. The jurisdiction of the Court of Chancery to appoint a receiver was founded on the inadequacy of the remedy to be obtained in the courts of ordinary jurisdiction; where that remedy was inadequate for the purposes of justice, the Court of Chancery would, on a proper case being made out, appoint a receiver.[2] **1–3**

The courts of common law had not, under the former procedure, jurisdiction to appoint a receiver. But under the Supreme Court of Judicature Act 1873, s.16 (see now Supreme Court Act 1981, s.19 preserving the same position), all the jurisdiction of the Court of Chancery became vested in the High Court of Justice; and under s.25(8) of that Act (now s.37(1), (2), of the Act of 1981) a receiver may be appointed by order (originally an "interlocutory order," but in the 1981 Act expressed as

---

[1] The dates of the coming into force of the Civil Procedure (Amendment) Rules, 2001 (SI 2001/256) and of the Civil Procedure (Amendment) Rules 2002 (SI 2002/2058).

[2] *Hopkins v Worcester, etc., Canal Co.* (1868) L.R. 6 Eq. 437, 447, *per* Giffard L.J.; *Cupit v Jackson* (1824) 13 Price 721, 734, *per* Alexander C.B.

"interlocutory or final"), in all cases in which it appears to the court to be just and convenient that such an order should be made; and any such order may be made either unconditionally, or upon such terms and conditions as the court thinks fit.

A receiver may now be appointed in any division of the High Court and also by the County Court. In one sense, the jurisdiction to appoint a receiver is enlarged[3]; inconvenient rules have been relaxed and there is no longer any limit to the jurisdiction to appoint a receiver upon application for an interim remedy.[4]

1–4 Principles governing the exercise of the jurisdiction. The question then arises as to the principles upon which the jurisdiction should be exercised. Until 1986, it was thought that this had been settled, in the sense that the principles were those upon which the Court of Chancery was accustomed to proceed.[5] In accordance with this view of the matter, a receiver could be appointed in any proceedings, without the commencement of special proceedings being necessary. It was no longer necessary for a judgment creditor to commence proceedings in the Chancery Division before obtaining the appointment of a receiver over an equitable interest,[6] but no receiver would be appointed in cases where the Court of Chancery would have had no jurisdiction to make the appointment, after the special proceedings had been instituted.[7] However, in *Parker v the London Borough of Camden,*[8] the Master of the Rolls departed from this view of the matter, and did not accept that the pre-Judicature Act practices of the Court of Chancery, or of any other court, "still ruled us from their graves", as he saw the matter, the jurisdiction, as a jurisdiction, was quite general, and in terms unlimited[9]; The other members of the court agreed with him as to the unlimited nature of the jurisdiction, and would have been ready and willing to appoint a receiver for the purpose of receiving rents due from a tenant, in order to enable breaches of landlords' covenants contained in the lease to be remedied, had not special circumstances been present affecting the landlord in that case.[10]

The question is unlikely to arise in this form in the future; but how far this approach will be followed is a matter of conjecture. The appointment of a receiver hitherto has always been for the purpose of getting in and holding, or securing, funds or other property for the benefit of those entitled to such property. There cannot be any question that tenants are in any way entitled to the rents which they pay to their landlord, although of course they may well have cross-claims which, established, might set-off

---

[3] *Anglo-Italian Bank v Davies* (1878) 9 Ch. D. 275, 293.
[4] CPR 23.
[5] *Holmes v Millage* [1893] 1 Q.B. 551; *Harris v Beauchamp* [1894] 1 Q.B. 801; *Edwards & Co. v Picard* [1909] 2 K.B. 903; *cf. Smith v Tsakyris* [1929] W.N. 39.
[6] *Smith v Cowell* (1880) 6 QBD 75.
[7] *Holmes v Millage,* n.5, above; *Morgan v Hart* [1914] 2 K.B. 183.
[8] *Parker v London Borough of Camden* [1986] Ch. 162, CA.
[9] *ibid.*, pp.172–3.
[10] *ibid.*, pp.177, 179.

CHAPTER 7

POWERS AND DUTIES OF A RECEIVER

7–1 The general duty of a receiver is to take possession of the estate, or othe property, the subject-matter of dispute in the action, in the room or plac of the owner thereof; and, under the sanction of the court, to do, as an when necessary, all such acts of ownership, in relation to the receipts o rents, compelling payment of them, management, letting lands and houses and otherwise making the property productive, or collecting and realising it for the benefit of the parties to be ultimately declared to be entitle thereto, as the owner himself could do if he were in possession.

It is the duty of a receiver, as soon as his appointment is effective or he i given leave to act, to require all tenants of freehold or leasehold property t pay their rents to him, and, where the appointment is over the estate of deceased person or the assets of a business or undertaking, to require a debtors to pay their debts to him. These topics, and the obligations of th receiver as to the application of money coming into his hands, are treate at length in this Chapter.

7–2 Parties required to deliver up possession. Where parties to an action ar directed by the order appointing a receiver to deliver up to him possessio of such parts of the property as are in their holding, the receiver, as soon a his appointment is complete, should apply to them to deliver possessio accordingly. If any of them refuse to do so, the receiver should report th refusal to the solicitor of the party having the conduct of the proceeding who should then serve the refusing parties or party personally with th order directing possession to be delivered up.[1] A time within which th delivery of possession is to be made must be specified in the order, and th order must be indorsed in the manner now prescribed by the CPR 2.[2]

If possession is still withheld from a receiver, application should be mad by application notice, for a writ of possession to put the receiver i possession pursuant to the order; the application should be supported by witness statement verified by a statement of truth, or an affidavit, of servic of the order, and of non-compliance.[3]

---

[1] *Green v Green* (1892) 2 Sim. 430.

[2] CPR Schs.1, 45, r.7; see, for the old procedeure, *Savage v Bentley* [1904] W.N. 89; 90 L.
641.

[3] *ibid.*, Sch.1, RSC, Ord.45, r.3.

TAB 11

BENNETT on RECEIVERSHIPS

Second Edition

by

Frank Bennett

L.S.M., LL.M.

Toronto, Canada

CARSWELL
Thomson Professional Publishing

The duties of a court-appointed receiver are well summarized in the leading case of *Parsons et al. v. Sovereign Bank of Canada*,[10] wherein Viscount Haldane stated:

> A receiver and manager appointed. . . . is the agent neither of the debenture-holders, whose credit he cannot pledge, nor of the company, which cannot control him. He is an officer of the Court put in to discharge certain duties prescribed by the order appointing him; duties which in the present case extended to the continuation and management of the business. The company remains in existence, but it has lost its title to control its assets and affairs.

In Canada, the duties are set out in *Ostrander v. Niagara Helicopters Ltd. et al.*:[11]

> A very clear distinction must be drawn between the duties and obligations of a receiver-manager . . . appointed by virtue of the contractual clauses of a mortgage deed and the duties and obligations of a receiver-manager who is appointed by the Court and whose sole authority is derived from that Court appointment and from the directions given him by the Court. In the latter case he is an officer of the Court; is very definitely in a fiduciary capacity to all parties involved in the contest.

The receiver is appointed by the court even though the motion is initiated by the security holder. The receiver as a court officer is therefore not an agent of a security holder nor that of the debtor. The court-appointed receiver has a general duty to preserve the goodwill and property of the debtor unless otherwise provided in the order.[12]

The receiver's duties are essentially to comply with the powers provided in the order. These duties are owed not only to the court but also to all interested parties, including the debtor and its shareholders.[13]

In view of the fiduciary relationship of the court-appointed receiver to the debtor and the creditors, the receiver has a duty to exercise such reasonable care, supervision and control of the debtor's property as an ordinary man would give to his or her own.[14] If the receiver fails to provide this standard of care, the receiver may be liable for negligence.

Federal legislation and many provincial statutes governing corporations contain prescribed duties, which are generally consistent with the duty of care to act honestly and in good faith as well as to deal with the debtor's property in a commercially reasonable manner.[15] These statutory duties govern:

(1) notice to the appropriate Registrar or Director of Companies of the appointment;

---

10 [1913] A.C. 160 at p.167, 9 D.L.R. 476 (P.C.).

11 (1973), 1 O.R. (2d) 281 at p. 286, 19 C.B.R. (N.S.) 5, 40 D.L.R. (3d) 161 (S.C.), followed in *Bank of Nova Scotia v. Sullivan Investments Ltd.* (1982), 21 Sask. R. 14 (Q.B.) and *Royal Bank v. Vista Homes Ltd.* (1984), 58 B.C.L.R. (2d) 354, 54 C.B.R. (N.S.) 124 (S.C.).

12 *Re Newdigate Colliery, Ltd.; Newdegate v. The Company*, [1912] 1 Ch. 468 (C.A.).

13 *Parsons et al. v. Sovereign Bank of Canada*, above, note 10; *T.D. Bank v. Fortin et al.* (1978), 26 C.B.R. (N.S.) 168, [1978] 2 W.W.R. 761, 85 D.L.R. (3d) 111 (B.C. S.C.). The above passages were referred to in *Canadian Commercial Bank v. Simmons Drilling Ltd.* (1989), 78 Sask. R. 87, 76 C.B.R. (N.S.) 241, 62 D.L.R. (4th) 243 (C.A.).

14 *Plisson v. Duncan* (1905), 36 S.C.R. 647.

15 See Chapter 13 "Specific Types of Receiverships".

TAB 12

1991 CarswellAlta 315, 8 C.B.R. (3d) 31, 81 Alta. L.R. (2d) 45, [1991] 5 W.W.R. 577, 81 D.L.R. (4th) 280, 7 C.E.L.R. (N.S.) 66, 117 A.R. 44, 2 W.A.C. 44

1991 CarswellAlta 315, 8 C.B.R. (3d) 31, 81 Alta. L.R. (2d) 45, [1991] 5 W.W.R. 577, 81 D.L.R. (4th) 280, 7 C.E.L.R. (N.S.) 66, 117 A.R. 44, 2 W.A.C. 44

Panamericana de Bienesy Servicios SA v. Northern Badger Oil & Gas Ltd.

PANAMERICANA DE BIENES Y SERVICIOS, S.A. v. NORTHERN BADGER OIL & GAS LIMITED; ENERGY RESOURCES CONSERVATION BOARD v. VENNARD JOHANNESEN INSOLVENCY INC. (Receiver and Manager of NORTHERN BADGER OIL AND GAS LIMITED); ATTORNEY GENERAL OF ALBERTA (Intervenor)

Alberta Court of Appeal

Laycraft C.J.A., Foisy and Irving JJ.A.

Judgment: June 12, 1991[FN*]
Judgment: December 20, 1991[FN**]
Docket: Docs. Calgary Appeal 11698, Calgary Appeal 11713

Counsel: *Stanley H. Rutwind* , for appellant (intervenor) Attorney General of Alberta.

W.J. Major, Q.C. , and *M.J. Major* , for appellant Energy Resources Conservation Board.

R.C. Wigham , for respondent Panamericana de Bienes y Servicios, S.A.

T.L. Czechowskyj , for respondent Vennard Johannesen Insolvency Inc.

J.D. McDonald , for Collins Barrow Limited, trustee in bankruptcy.

Subject: Corporate and Commercial; Insolvency; Environmental; Estates and Trusts; Constitutional; Civil Practice and Procedure

Bankruptcy --- Bankruptcy and insolvency jurisdiction — Constitutional jurisdiction of Dominion and provinces — Provincial jurisdiction — General.

Bankruptcy --- Priorities of claims — Secured claims — Dealings with security after bankruptcy — By secured creditor — Realization of security.

Bankruptcy --- Administration of estate — Trustees.

Bankruptcy --- Administration of estate.

1991 CarswellAlta 315, 8 C.B.R. (3d) 31, 81 Alta. L.R. (2d) 45, [1991] 5 W.W.R. 577, 81 D.L.R. (4th) 280, 7 C.E.L.R. (N.S.) 66, 117 A.R. 44, 2 W.A.C. 44

Constitutional Law --- Distribution of legislative powers — Areas of legislation — Commercial regulation — Licensing — Oil and gas.

Practice --- Costs — Effect of success of proceedings — General.

Bankruptcy of oil company not permitting receiver-manager to ignore order of Energy Resources Conservation Board to abandon wells.

Bankruptcy Act, R.S.C. 1985, c. B-1.

Trustee choosing to take sides not entitled to costs of unsuccessful argument.

An oil company, which was licensed to operate oil and gas wells in Alberta, granted floating charge debenture security over certain assets, including the wells, to the creditor. When the company defaulted under the debenture, the creditor applied for and obtained a court order appointing a receiver-manager. A receiving order was subsequently made, placing the company in bankruptcy.

The Energy Resources Conservation Board wrote to the company prior to the receiving order, demanding an undertaking that the wells would continue to be operated in accordance with the regulations and the conditions of the well licences, and in particular that the wells could be abandoned when production was complete. The board asked the receiver-manager to confirm that no permits, licences or approvals would remain before they applied to be discharged as receiver-manager, or at least that the board would be notified of any application for discharge.

The receiver-manager agreed to sell the company's remaining assets to S, which would become the licensee of the remaining wells. The agreement allowed S to back out of the sale of any assets that were worth less than the cost of their abandonment. The receiver-manager informed the board that all of the company's assets had been sold, but S had already invoked the back-out clause and passed seven wells back to the receiver-manager.

When the receiver-manager applied for an order approving its administration of the company's affairs and for a discharge from its responsibilities, the board discovered that the seven wells were still licensed to the company; only then was it made aware of the back-out clause and its results. The board ordered the abandonment of the seven remaining wells, having obtained an order in council authorizing it to do so. When the receiver-manager failed to comply, the board applied for an order requiring the receiver-manager to obey the board's order and abandon the wells. The application was dismissed. The board and the intervenor Attorney General appealed.

Held:

The appeal was allowed.

The board did not have a claim against the company that was provable in bankruptcy so as to rank as an ordinary creditor and behind the creditor claiming under the debenture. The company had an inchoate liability for the ultimate abandonment of the wells, which liability passed to the receiver-manager. The receiver-manager could not function as a licensee without assuming a licensee's obligations, including the obligation to abandon the wells properly.

Although the expense of abandoning the wells meant less money for distribution in the bankruptcy, the Alberta statutory requirements concerning abandonment did not directly conflict with the scheme of distribution under the *Bankruptcy Act* ; the doctrine of paramountcy did not apply and the receiver-manager was required to comply with

1991 CarswellAlta 315, 8 C.B.R. (3d) 31, 81 Alta. L.R. (2d) 45, [1991] 5 W.W.R. 577, 81 D.L.R. (4th) 280, 7 C.E.L.R. (N.S.) 66, 117 A.R. 44, 2 W.A.C. 44

the provincial requirements.

As the board was successful, it was entitled to its costs, to be payable by the oil company and receiver-manager. The trustee's argument had not added significantly to the burden of the board's litigation costs. However, having chosen to support an unsuccessful argument, the trustee was not entitled to costs.

Cases considered:

Alberta Treasury Branches v. Invictus Financial Corp. (1986), 61 C.B.R. (N.S.) 238, 42 Alta. L.R. (2d) 181, 68 A.R. 207 (Q.B.) [affirmed (1986), 61 C.B.R. (N.S.) 254, 47 Alta. L.R. (2d) 94 (C.A.)] — *considered*

Bank of Montreal v. Hall, [1990] 1 S.C.R. 121, [1990] 2 W.W.R. 193, 46 B.L.R. 161 , P.P.S.A.C. 177, 65 D.L.R. (4th) 361, 82 Sask. R. 120, 104 N.R. 110 — *applied*

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, 83 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, 97 N.R. 61 — *distinguished*

Canada Trust Co. v. Bulora Corp. (1980), 34 C.B.R. (N.S.) 145 (Ont. S.C.) , affirmed (1981), 39 C.B.R. (N.S.) 152 (Ont. C.A.) — *applied*

Canadian Commercial Bank v. Simmons Drilling Ltd. (1989), 76 C.B.R. (N.S.) 241, 35 C.L.R. 126, 62 D.L.R. (4th) 243, 78 Sask. R. 87 (C.A.) — *considered*

Canadian Pacific Railway v. Notre Dame de Bonsecours (Parish), [1989] A.C. 367 (P.C.) — *considered*

Deloitte, Haskins & Sells Ltd. v. Workers' Compensation Board, [1985] 1 S.C.R. 785, 55 C.B.R. (N.S.) 241, 38 Alta. L.R. (2d) 169, [1985] 4 W.W.R. 481, 19 D.L.R. (4th) 577, 63 A.R. 321, 60 N.R. 81 — *distinguished*

Federal Business Development Bank v. Quebec (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 — *considered*

Fotti v. 777 Management Inc., [1981] 5 W.W.R. 48, 2 P.P.S.A.C. 32, 9 Man. R. (2d) 142 (Q.B.) — *considered*

Midlantic National Bank v. New Jersey Department of Environmental Protection; Quanta Resources Corp. v. New York (City), 474 U.S. 494, 88 L. Ed. 2d 859, 106 S. Ct. 755 (1986) [rehearing denied (sub nom. *O'Neil v. New York (City); O'Neill v. New Jersey Department of Environmental Protection*) 475 U.S. 1091, 89 L. Ed. 736, 106 S. Ct. 1482 (1986)] — *considered*

Multiple Access Ltd. v. McCutcheon, [1982] 2 S.C.R. 161, 18 B.L.R. 138, 138 D.L.R. (3d) 1, 44 N.R. 181 — *referred to*

Ohio v. Kovacs, 469 U.S. 274, 83 L. Ed. 2d 649, 105 S. Ct. 705 (1985) — *considered*

Parsons v. Sovereign Bank of Canada, [1913] A.C. 160, 9 D.L.R. 476 (P.C.) — *referred to*

Penn Terra Ltd. v. Department of Environmental Resources, 733 F. 2d 267 (C.A. 3rd Circ., 1984) — *considered*

Plisson v. Duncan (1905), 36 S.C.R. 647 — *referred to*

Quebec (Deputy Minister of Revenue) v. Rainville, [1980] 1 S.C.R. 35, (sub nom. *Re Bourgault; Deputy Minister of Revenue Quebec v. Rainville)* 33 C.B.R. (N.S.) 301, 105 D.L.R. (3d) 270, (sub nom. *Bourgaul's Estate v. Deputy Minister of Revenue of Quebec)* 30 N.R. 24 — *distinguished*

Royal Bank v. Nova Scotia (Workmen's Compensation Board), [1936] S.C.R. 560, [1936] 4 D.L.R. 9 — *considered*

United States v. Whizco Inc., 841 F. 2d 147 (C.A. 6th Circ., 1988) — *considered*

Statutes considered:

Bank Act, R.S.C. 1927, c. 12.

Bank Act, R.S.C. 1985, c. B-1.

Bankruptcy Act, R.S.C. 1985, c. B-3 —

s. 2 "creditor"

s. 121(1)

Business Corporations Act, S.A. 1981, c. B-15 —

s. 92

s. 93

s. 94

s. 95

Energy Resources Conservation Act, R.S.A. 1980, c. E-1 —

s. 2

Limitation of Civil Rights Act, R.S.S. 1978, c. L-16.

Oil and Gas Conservation Act, R.S.A. 1980, c. O-5 —

s. 4(b) [am. 1983, c. O-5.5, s. 30]

s. 4(f) [am. 1983, c. O-5.5, s. 30]

s. 7

1991 CarswellAlta 315, 8 C.B.R. (3d) 31, 81 Alta. L.R. (2d) 45, [1991] 5 W.W.R. 577, 81 D.L.R. (4th) 280, 7 C.E.L.R. (N.S.) 66, 117 A.R. 44, 2 W.A.C. 44

s. 9

ss. 11-20

s. 11(1)(b)

s. 92(1)

s. 92(2) [re-en. 1988, c. 37, s. 12]

s. 95

Workers' Compensation Act, The, S.A. 1973, c. 87.

Regulations considered:

Oil and Gas Conservation Act, R.S.A. 1980, c. O-5 —

Oil and Gas Regulations,

Alta. Reg. 151/71,

s. 3.030(3)

Appeal from decision of MacPherson J., (1989), 80 C.B.R. (N.S.) 84, 75 Alta. L.R. (2d) 185 (Q.B.) , additional reasons at (April 27, 1990), Doc. Calgary 8701-08925 (Alta. Q.B.), ordering receiver-manager not to comply with order of Energy Resources Conservation Board.

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

1 The issue on this appeal [from 80 C.B.R. (N.S.) 84, 75 Alta. L.R. (2d) 185 additional reasons at (April 27, 1990), Doc. Calgary 8701-08925 (Alta. Q.B.)] is whether the *Bankruptcy Act* , R.S.C. 1985, c. B-3, prevents the court-appointed receiver-manager of an insolvent and bankrupt oil company from complying with an order of the Energy Resources Conservation Board of the province of Alberta. The order required the receiver-manager, in the interests of environmental safety, to carry out proper abandonment procedures on seven suspended oil wells. In Court of Queen's Bench, Mr. Justice MacPherson held [at p. 191 Alta. L.R.] that the order requiring "the abandonment and the securing of potentially dangerous well sites is at the expense of the secured creditors' entitlement" under the *Bankruptcy Act* and is "beyond the province's constitutional powers." He directed the receiver-manager not to comply with the order. For the reasons which follow, I respectfully disagree with that conclusion and would allow the appeal by the board.

2 "Abandonment" and "abandon" are terms with different meanings in the oil industry than when used in their usual legal sense. In the oil industry they refer to the process of sealing a hole which has been drilled for oil or gas, at the end of its useful life, to render it environmentally safe. In general terms, the process requires that the well bore be sealed at various points along its length to prevent cross-flows of liquids or gases between formations, or into aquifers or from the surface. The cost may vary from a few hundred dollars to tens of thousands of dollars depending on the circumstances.

1991 CarswellAlta 315, 8 C.B.R. (3d) 31, 81 Alta. L.R. (2d) 45, [1991] 5 W.W.R. 577, 81 D.L.R. (4th) 280, 7 C.E.L.R. (N.S.) 66, 117 A.R. 44, 2 W.A.C. 44

I Facts

3 Prior to May 1987, Northern Badger Oil and Gas Limited ("Northern Badger") carried on business in the exploration for, and the production of, oil and gas in Alberta and Saskatchewan. It was licensed to operate 31 oil and gas wells in Alberta of which 11 were producing wells. The remainder were suspended or standing in a non-producing condition. Northern Badger owned varying interests approximating 10 per cent in each well and was the operator of them on behalf of itself and other working interest owners.

4 On November 1, 1985, Northern Badger granted floating charge debenture security over certain oil and gas assets, including its interest in the 31 Alberta wells, to the respondent Panamericana. It defaulted under the debenture, and in May 1987 Panamericana applied for and obtained a court order appointing Vennard Johannesen Insolvency Inc. (the "receiver"):

> Receiver and Manager of all of the undertaking, property, and assets of the Defendant, Northern Badger Oil and Gas Limited with authority to manage, operate, and carry on the business and undertaking of the Defendant ....

5 On August 7, 1987, a receiving order, effective retroactively to July 7, 1987, placed Northern Badger in bankruptcy. Collins Barrow Limited was appointed trustee in bankruptcy.

6 On July 20, 1987, the Energy Resources Conservation Board wrote to Northern Badger referring to the insolvency and:

> requiring an undertaking that the wells will continue to be operated in adherence with the regulations and conditions of the well licences. Also it is essential that the licensee be capable of responding to any problems which may occur and properly abandoning the well once production is complete.

7 The board further suggested that "the solution to the problem" would be to transfer the wells to a party "who is prepared to take on the responsibilities of the licensee." The receiver responded to this letter on August 14, 1987. It reported that 21 of the wells had been transferred to other parties, but that 12 wells had not. It then said:

> The Receivership Manager is presently involved in negotiations to sell *all of the assets and liabilities* to a number of interested parties. Vennard Johannesen is therefore striving to pass on the obligations to the prospective purchaser.

[Emphasis added.]

8 The board wrote again to the receiver on December 11, 1987, pointing out that their records still showed Northern Badger to be the licensee of the wells. The letter asked the receiver to confirm that no permits, licences or approvals would be remaining before they applied for discharge "or alternatively that you give the Board notice of any application to be discharged."

9 During the interval between these two letters, the receiver had attempted to sell the Northern Badger properties to various prospective purchasers, including Senex Corporation. On November 13 Senex made an offer to purchase the remaining Northern Badger assets held by the receiver for $1,850,000 plus a carried interest of 17.5 per cent on certain undeveloped properties held by Northern Badger. Under this offer Senex would become the licensee of the remaining wells. However, the agreement had a clause which provided:

> The purchaser may elect to exclude any interest of the Vendor in any lands which has a value less than the costs

1991 CarswellAlta 315, 8 C.B.R. (3d) 31, 81 Alta. L.R. (2d) 45, [1991] 5 W.W.R. 577, 81 D.L.R. (4th) 280, 7 C.E.L.R. (N.S.) 66, 117 A.R. 44, 2 W.A.C. 44

> of abandonment as agreed by the parties, or, failing agreement by Sproule Associates Limited, on or before the closing date.

10 The receiver applied to the court for approval of the sale; the affidavit material filed in support of the application made no express reference to the "back out" clause. The receiver did not give notice to the board of the application. The court approved the transaction on December 18, 1987, and the closing date of the sale was set for January 15, 1988.

11 Prior to the closing, by an agreement dated on the same day, Senex exercised its rights under the "back out" clause and passed seven wells back to the receiver. This amending agreement did not vary the purchase price of the remaining assets. All the wells passed back must now be abandoned; two of them require minor expenditures, but the other five will require expenditures in the range of $40,000 each.

12 The court order of December 18, 1987, set aside five different funds to meet the claims of named claimants against Northern Badger for sums held in trust for them, or where claimants had rights of set-off, or to meet lien claims against the properties themselves. None of these funds made allowance for the abandonment of the wells. The remainder of the moneys were held by the receiver awaiting the outcome of litigation to determine whether Panamericana was entitled to priority over other creditors.

13 On January 27, 1988, the receiver advised the board that:

> [E]ffective January 15, 1988 Vennard Johannesen Insolvency Inc. in its capacity as Receiver and Manager of Northern Badger Oil and Gas Limited *has sold all of the assets of the company* to Senex corporation.
>
> Please cancel our account with you effective January 15, 1988. We will not be responsible for any charges or fees incurred after January 15, 1988 ...

[Emphasis added.]

14 After a six-day trial in May 1988 Panamericana obtained judgment against Northern Badger for $1,304,112, and also obtained a declaration that it had priority over all other creditors of Northern Badger for the payment of sums due under the debenture. Thereupon, on May 29, 1988, the receiver applied to Court of Queen's Bench for an order approving its administration of the receiving order and for a discharge from its responsibilities. The affidavit filed in support detailed the payment or settlement of all claims for which provision had been made by the five funds established in December 1987. It disclosed that, after all assets were distributed to Panamericana, there would still be a substantial deficiency in the payment of the debenture debt.

15 At the time of this application, the receiver had approximately $226,000 on hand which it sought to pay to Panamericana after deducting its fees and disbursements. It wished to deliver to Collins Barrow, as trustee in bankruptcy, what were termed "minor, unrealized receivables," including the interest of Northern Badger in the seven wells and the well licences relating to them. The affidavit did not refer specifically to the liability arising from the obligation to abandon the seven wells. An apparent indirect reference to these seven wells is contained in para. 18 of the supporting affidavit:

> The Receiver has determined that certain assets of Northern Badger were not marketable and were excluded by Senex Corporation in its purchase of the assets of Northern Badger, which assets shall remain with the estate of Northern Badger, subject to any further direction of this Honourable Court.

16 The record before this court makes only brief reference to events during the next year. However, the application by the receiver to be discharged remained in abeyance. In December 1988 the board wrote to the receiver point-

ing out that a number of wells were still licensed to Northern Badger. The receiver did not respond until May 3, 1989. It advised the board that five of the seven wells which now require to be abandoned had been deleted from the Senex sale.

17 The board's reaction to this information was, apparently, immediate. On June 1, 1989, an order in council of the Lieutenant Governor in Council purporting to be issued under s. 7 of the *Oil and Gas Conservation Act* , R.S.A. 1980, c. O-5, approved the issuance by the board of an order respecting the abandonment of those five wells and the two others.

18 The board order authorized by the order in council was issued on June 6, 1989. It required the receiver to submit abandonment programs for the seven wells by June 15, 1989, and to abandon them in accordance with an approved program on or before February 28, 1990. On June 13, 1989, the board moved in Court of Queen's Bench for an order requiring the receiver to comply with the board's order, and this litigation resulted.

19 While the board's motion was pending an effort was made to obtain contribution toward the cost of abandonment from other working interest owners. Upon the application of the board, on November 23, 1989, Mr. Justice MacPherson directed the receiver to take steps to collect from other working interest owners of the seven wells their proportionate share of abandonment costs totalling $202,500. The proportion of these costs attributable to the percentage interest of Northern Badger in the wells was estimated at $17,330. Nothing in the record before the court discloses whether, or the extent to which, this effort succeeded.

20 On this appeal, the respondents objected that a portion of the evidence presented on behalf of the board was inadmissible. They strongly urged that there was, in the result, no evidence that failure to abandon the wells presented any danger. The evidence in question was the affidavit of Mr. G.J. DeSorcy, Chairman of the Energy Resources Conservation Board. In that affidavit Mr. DeSorcy stated that he is a professional engineer and chairman of the board. He testified, on information and belief, as to a considerable amount of technical information about the five wells, the formations encountered, and the present condition of them. He expressed opinions as to the danger of cross-flows of liquids and gases, and as to hazards to the environment and to "public health and safety." The information was, apparently, derived from the records of the wells filed with the board; the expressions of opinion were his own.

21 In my opinion, it is not necessary to determine whether this information was admissible in this form or to consider the need for a new trial if it was not. Even if the information and expressions of opinion in this affidavit are ignored, there is ample evidence on the record in other affidavits, including those filed on behalf of the receiver, to establish the probable cost of abandonment of the wells and the need for that process. As will be discussed later in these reasons, the process of abandonment of oil and gas wells is part of the general law of Alberta enacted to protect the environment and for the health and safety of all citizens.

II The reasons for judgment

22 The learned chambers judge delivered extensive reasons for judgment. He held that the board order sanctioned by the order in council was within the board's jurisdiction under the general powers contained in ss. 4(*b*), 4(*f*) and 7 of the *Oil and Gas Conservation Act* . He held [at p. 189 Alta. L.R.], however, that the board:

> is a creditor seeking to have its claim to have the seven wells abandoned preferred to the claim of the secured creditor, and to the scheme of distribution set forth in s. 136 of the Bankruptcy Act.

He cited *Quebec (Deputy Minister of Revenue) v. Rainville*, [1980] 1 S.C.R. 35, (sub nom. *Re Bourgault; Deputy Minister of Revenue of Quebec v. Rainville)* 33 C.B.R. (N.S.) 301, 105 D.L.R. (3d) 270, (sub nom. *Bourgault's Estate v. Deputy Minister of Revenue of Quebec)* 30 N.R. 24 , and *British Columbia v. Henfrey Samson Belair Ltd.*,

1991 CarswellAlta 315, 8 C.B.R. (3d) 31, 81 Alta. L.R. (2d) 45, [1991] 5 W.W.R. 577, 81 D.L.R. (4th) 280, 7 C.E.L.R. (N.S.) 66, 117 A.R. 44, 2 W.A.C. 44

[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, 97 N.R. 61 , and said [at pp. 190-192 Alta. L.R.]:

> The E.R.C.B. orders in council in form relate to a constitutionally valid objective, that is, abandonment of gas wells. The genuine purpose is to do something beyond the province's constitutional powers. It is to take money directed, by the Bankruptcy Act, to be paid to a secured creditor, and apply it to another purpose.
>
> . . . . .
>
> Subject to the rights of secured creditors, everything in the nature of property of the bankrupt vests in the trustee in bankruptcy. The E.R.C.B. has the powers under the Oil and Gas Conservation Act to abandon the wells and collect the costs from the appropriate parties.
>
> This claim, whether done directly or ordered to be done, is a claim provable in bankruptcy.
>
> Section 121 of the Bankruptcy Act: 'All debts and liabilities, present or future, to which the bankrupt is subject', is surely wide enough to cover this liability.
>
> The proper approach to solving problems such as are raised in the case at bar is prescribed by the Supreme Court of Canada in *F.B.D.B. v. Que. (Comm. de la santé & de la sécurité du travail)*, [1988] 1 S.C.R. 1061, 68 C.B.R. (N.S.) 209 at 217 and following, 50 D.L.R. (4th) 577, 14 Q.A.C. 140, 84 N.R. 308 , a similar case of contest between preserving the secured creditors' rights as opposed to saving the public purse.
>
> The Bankruptcy Act has not been amended to deal with modern social problems of abandonment of contaminated property. Here the abandonment and the securing of potentially dangerous well sites is at the expense of the secured creditors' entitlement if the E.R.C.B. were to succeed.
>
> While I am aware that the Supreme Court of the United States of America split five to four in deciding a similar issue in the matter of *Midlantic Nat. Bank v. New Jersey Dept. of Env. Protection; Quanta Resources Corp. v. New York (City)*, 474 U.S. 494, 88 L. Ed. 2d 859, 106 S. Ct. 755 (1986), I am of the view that the law of Canada accords with the dissenting view of the Chief Justice of the United States when he said that it was for the legislature to change the law, not the courts, when it came to impairing otherwise valid security for societal purposes. One should see also *Lloyd's Bank Can. v. Int. Warranty Co.* , a decision of the Alberta Court of Appeal (1989) [now reported 68 Alta. L.R. (2d) 356, [1990] 1 W.W.R. 749, 76 C.B.R. (N.S.) 54, 60 D.L.R. (4th) 272, 97 A.R. 113 , leave to appeal to S.C.C. refused 70 Alta. L.R. (2d) liii, 102 A.R. 240, 104 N.R. 320] as to the need for clear legislative statements before destroying property rights.
>
> Accordingly, I must instruct the receiver-manager that he must not proceed to abandon the several wells directed to be abandoned by the order of the E.R.C.B. out of the moneys held for the secured creditors.

III The Regulatory Regime for Alberta Oil and Gas Wells

23 The regulatory scheme for oil and gas operations in Alberta is contained in the *Oil and Gas Conservation Act* , in the *Energy Resources Conservation Act* , R.S.A. 1980, c. E-11, and in the regulations under those acts. Each statute contains a statement of its purposes. Section 4 of the *Oil and Gas Conservation Act* provides:

> 4 The purposes of this Act are
>
> . . . . .

1991 CarswellAlta 315, 8 C.B.R. (3d) 31, 81 Alta. L.R. (2d) 45, [1991] 5 W.W.R. 577, 81 D.L.R. (4th) 280, 7 C.E.L.R. (N.S.) 66, 117 A.R. 44, 2 W.A.C. 44

(*b*) to secure the observance of safe and efficient practices in the locating, spacing, drilling, equipping, completing, reworking, testing, operating and abandonment of wells and in operations for oil and gas;

. . . . .

(*f*) to control pollution above, at or below the surface in the drilling of wells and in operations for the production of oil and gas and in other operations over which the Board has jurisdiction.

24 The board is given wide specific powers under the Act in the regulation of operations in the exploration for, and production of, oil and gas. Where a specific power is not given to the board to be exercised on its own volition, it has a wide general power to be exercised with the authorization of the Lieutenant Governor in Council. Section 7 provides:

7 The Board, with the approval of the Lieutenant Governor in Council, may make any just and reasonable orders and directions the Board considers necessary to effect the purposes of this Act and that are not otherwise specifically authorized by this Act.

25 Section 9 provides that a board order shall override the terms of any contract. Sections 11 to 20 provide for the licensing of oil and gas drilling and producing operations. Section 11 provides that no person shall continue any producing operations unless:

11(1) ...

(*b*) he is the licensee or is acting under the instructions of the licensee.

26 Section 13 provides that if it is established that a licensee does not have the right to produce oil or gas from land, the licence becomes "void for all purposes except as to the liability of the holder of the licence to complete or abandon the well ..." Section 3.030(3) of the regulations also provides, in some circumstances, for the board to direct a licensee to abandon a well. Section 18 provides that a well licence shall not be transferred without the consent of the board. Section 19 outlines circumstances in which the board may cancel a licence.

27 By s. 92(1) and (2) the board is empowered to enter a well site and to perform, itself, work needed for "control, completion, suspension or abandonment of the well." The cost of this work then becomes a "debt payable by the licensee of the well to the Board." Section 95 empowers the board to enforce any order by taking over the production, management and control of the well.

28 The *Energy Resources Conservation Act* , which establishes the board, has a similar statement of its purposes in s. 2. Among these purposes are:

2 ...

(*c*) to effect the conservation of, and to prevent the waste of, the energy resources of Alberta;

(*d*) to control pollution and ensure environment conservation in the exploration for, processing, development and transportation of energy resources and energy;

(*e*) to secure the observance of safe and efficient practices in the exploration for, processing, development and transportation of the energy resources of Alberta ...

1991 CarswellAlta 315, 8 C.B.R. (3d) 31, 81 Alta. L.R. (2d) 45, [1991] 5 W.W.R. 577, 81 D.L.R. (4th) 280, 7 C.E.L.R. (N.S.) 66, 117 A.R. 44, 2 W.A.C. 44

29 It is evident that the regulatory regime contained in these statutes and regulations contemplates that all wells drilled for oil or gas will one day be abandoned. That is so whether the well is unsuccessful or whether it produces large quantities of oil or gas. At some point, when further production is not possible or the cost of production of remaining quantities exceeds the revenue which could be obtained from it, the process of abandonment is required of the well licensee. In those situations where there is no solvent entity able to carry out the abandonment duties the wells become, in the descriptive vernacular of the oil industry, "orphan wells." Thus the direct issue in this litigation, in my opinion, is whether the *Bankruptcy Act* requires that the assets in the estate of an insolvent well licensee should be distributed to creditors leaving behind the duties respecting environmental safety, which are liabilities, as a charge to the public.

IV Did the Board have a Provable Claim in the Bankruptcy?

30 A basic premise of the respondents' position in Court of Queen's Bench, and in this court, is that the board has a provable claim as a creditor in the bankruptcy of Northern Badger. From this it is contended that, in enforcing the requirement for the proper abandonment of oil and gas wells, the board simply ranks as a creditor. Then, it is said, the scheme of distribution of the *Bankruptcy Act* gives priority to the secured creditors so that the trustee is unable to obey the law requiring abandonment of oil and gas wells. That is so, it is urged, because the requirement of the provincial legislation cannot subvert the scheme of distribution specified by the *Bankruptcy Act* . The respondents point to the definition of "creditor" in s. 2 of the *Bankruptcy Act* and to the elements of a "provable claim" set forth in s. 121.

31 Mr. Justice MacPherson agreed with these contentions, saying that the words in ss. 2 and 121 of the *Bankruptcy Act* were "surely wide enough to cover" Northern Badger's liability to abandon the wells. These sections provide:

> 2. In this Act,
>
> "creditor" means a person having a claim preferred, secured or unsecured, provable as a claim under this Act.
>
> . . . . .
>
> 121.(1) All debts and liabilities, present or future, to which the bankrupt is subject at the date of the bankruptcy or to which he may become subject before his discharge by reason of any obligation incurred before the date of the bankruptcy shall be deemed to be claims provable in proceedings under this Act.

32 There are two aspects to the question whether the board had a "provable claim" in the bankruptcy. The first is whether Northern Badger had a liability; the second is whether that liability is to the board so that it is the board which is the creditor. I respectfully agree that Northern Badger had a liability, inchoate from the day the wells were drilled, for their ultimate abandonment. It was one of the expenses, inherent in the nature of the properties themselves, taken over for management by the receiver. With respect, I do not agree, however, that the public officer or public authority given the duty of enforcing a public law thereby becomes a "creditor" of the person bound to obey it.

33 The statutory provisions requiring the abandonment of oil and gas wells are part of the general law of Alberta, binding every citizen of the province. All who become licensees of oil and gas wells are bound by them. Similar statutory obligations bind citizens in many other areas of modern life. Rules relating to health, or the prevention of fires, or the clearing of ice and snow, or the demolition of unsafe structures are examples which come to mind. But the obligation of the citizen is not to the peace officer, or public authority which enforces the law. The duty is owed as a public duty by all the citizens of the community to their fellow citizens. When the citizen subject to the

order complies, the result is not the recovery of money by the peace officer or public authority, or of a judgment for money, nor is that the object of the whole process. Rather, it is simply the enforcement of the general law. The enforcing authority does not become a "creditor" of the citizen on whom the duty is imposed.

34 It is true that this board has the power by statute to create in its own favour a statutory debt if it chooses to do so. It may, under s. 92(1) and (2) of the *Oil and Gas Conservation Act* (discussed above), do the work of abandonment itself and become a creditor for the sums expended. But the board has not done so in this case. Rather it is simply in the course of enforcing observance of a part of the general law of Alberta.

35 Counsel for Panamericana cited three authorities in support of its argument that the board is a creditor of Northern Badger: *Quebec (Deputy Minister of Revenue) v. Rainville* , supra; *Deloitte, Haskins & Sells Ltd. v. Workers' Compensation Board*, [1985] 1 S.C.R. 785, 55 C.B.R. (N.S.) 241, 38 Alta. L.R. (2d) 169, [1985] 4 W.W.R. 481, 19 D.L.R. (4th) 577, 63 A.R. 321, 60 N.R. 81 ; and *British Columbia v. Henfrey Samson Belair Ltd.* , supra. But in all these cases some actual impost had been levied against the citizen and a sum of money was due and owing to the specific public authority involved. In *Rainville* , Quebec had registered a "privilege" for $5,474.08 for sales tax which the company had failed to remit; in *Deloitte, Haskins & Sells* , the sum in dispute was a levy of $3,646.68 made under *The Workers' Compensation Act* , S.A. 1973, c. 87; in *Henfrey Samson Belair Ltd.* the company had collected, and failed to remit sales tax of $58,763.23. Thus in each case a specific sum was due to the Crown, or a Crown agency, as a debt. None of the cases is authority for the proposition that a public officer ordering a citizen to obey the general law thereby becomes a creditor for any amount the citizen may ultimately be required to spend in complying.

36 In my view, the board is not, at this point, a "creditor" of Northern Badger with a claim provable in its bankruptcy. The problem presented by this case is not to be solved, therefore, by determining whether the board ranks as a creditor of Northern Badger before or after the secured creditors. Rather it must be determined whether the receiver, which was the operator of the oil wells in question, had a duty to abandon them in accordance with the law.

V The Duties of the Receiver

37 Vennard Johannesen Insolvency Inc. assumed its duties as receiver in this case as an officer of the court. The nature of its duties has been determined by a long line of cases, now reinforced by the provisions of the *Business Corporations Act* , S.A. 1981, c. B-15. Sections 92 and 93 require the receiver to act in accordance with the directions of the court and of the instrument under which the appointment was made. Sections 94 and 95 provide:

> 94 A receiver or receiver-manager of a corporation appointed under an instrument shall
>
> (*a*) act honestly and in good faith, and
>
> (*b*) deal with any property of the corporation in his possession or control in a commercially reasonable manner.
>
> 95 On an application by a receiver or receiver-manager, whether appointed by the Court or under an instrument, or on an application by any interested person, the Court may make any order it thinks fit including, without limiting the generality of the foregoing, any or all of the following:
>
> (*a*) an order appointing, replacing or discharging a receiver or receiver-manager and approving his accounts;
>
> (*b*) an order determining the notice to be given to any person or dispensing with notice to any person;
>
> (*c*) an order fixing the remuneration of the receiver or receiver-manager;

1991 CarswellAlta 315, 8 C.B.R. (3d) 31, 81 Alta. L.R. (2d) 45, [1991] 5 W.W.R. 577, 81 D.L.R. (4th) 280, 7 C.E.L.R. (N.S.) 66, 117 A.R. 44, 2 W.A.C. 44

(*d*) an order

(i) requiring the receiver or receiver-manager, or a person by or on behalf of whom he is appointed, to make good any default in connection with the receiver's or receiver-manager's custody or management of the property and business of the corporation;

(ii) relieving any of those persons from any default on any terms the Court thinks fit;

(iii) confirming any act of the receiver or receiver-manager;

(*d* .1) an order that the receiver or receiver-manager make available to the applicant any information from the accounts of his administration that the Court specifies;

(*e*) an order giving directions on any matter relating to the duties of the receiver or receiver-manager.

38 A receiver appointed by the court must act fairly and honestly as a fiduciary on behalf of all parties with an interest in the debtor's property and undertaking. The receiver is not the agent of the debtor or the creditor or of any other party, but has the duty of care, supervision and control which a reasonable person would exercise in the circumstances. The receiver may be liable for failure to exercise an appropriate standard of care. These points have been made in many cases starting in 1905 with *Plisson v. Duncan* (1905), 36 S.C.R. 647 . The decision of Viscount Haldane in *Parsons v. Sovereign Bank of Canada*, [1913] A.C. 160, 9 D.L.R. 476 (P.C.) , which has been fre quently quoted, emphasizes the independence of the receiver from those who procured the appointment.

39 It is also clear that the receiver takes full responsibility for the management, operation and care of the debtor's assets, but does not take legal title to them. That point has been made in a number of decisions including that of Lamer J. (as he then was) speaking for the court in *Federal Business Development Bank v. Quebec (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 . At p. 315 [N.R.] he said:

[T]he immoveable in the case at bar is property of the bankrupt within the meaning of the *Bankruptcy Act* . Even if the trustee takes possession of the immoveable before the bankruptcy, the bankrupt remains owner of his property. The trustee who has seized an encumbered immoveable cannot claim to have a right of ownership over that property: he has only the rights of a creditor under a pledge or hypothec. This Court has ruled this way twice in *Laliberté v. Larue*, [1931] S.C.R. 7 and *Trust général du Canada v. Roland Chalifoux Ltée*, [1962] S.C.R. 456 .

40 A further factor affecting the obligation of a court-appointed receiver is the receiver's status as an officer of the court; the standard required because of that status is one of meticulous correctness. In *Alberta Treasury Branches v. Invictus Financial Corp.* (1986), 61 C.B.R. (N.S.) 238, 42 Alta. L.R. (2d) 181, 68 A.R. 207 (Q.B.) , Stratton J. (as he then was) said that the receiver's obligations "reach further than merely acting honestly." He quoted with approval the statement of Wilson J. in *Fotti v. 777 Management Inc.*, [1981] 5 W.W.R. 48, 2 P.P.S.A.C. 32, 9 Man. R. (2d) 142 (Q.B.) , at p. 54 [W.W.R.]:

[T]he receiver 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.

1991 CarswellAlta 315, 8 C.B.R. (3d) 31, 81 Alta. L.R. (2d) 45, [1991] 5 W.W.R. 577, 81 D.L.R. (4th) 280, 7 C.E.L.R. (N.S.) 66, 117 A.R. 44, 2 W.A.C. 44

41 The same concern for proper conduct by the court's appointed officer may be seen in the judgment of the Saskatchewan Court of Appeal in *Canadian Commercial Bank v. Simmons Drilling Ltd.* (1989), 76 C.B.R. (N.S.) 241, 35 C.L.R. 126, 62 D.L.R. (4th) 243, 78 Sask. R. 87 . In that case the receiver undertook a lengthy review of the debtor's records, and discovered that some subcontractors, who had not registered liens in time, were unpaid. In some cases, the time for filing liens had expired after the receiver had been appointed. The court affirmed the duty of a receiver to ascertain his obligations within a reasonable time and noted that the receiver's actions in the discharge of those obligations are the actions of the court which appointed him. It held that, whether by intention or by default, an officer of the court cannot be permitted to change the relative rights of those for whom he is acting. Sherstobitoff J.A. said at p. 249 [C.B.R.]:

> The receiver, and through it the bank, must bear responsibility for the consequences of the failure to act with sufficient diligence to discover the claims within a reasonable time, thereby permitting lapse of the limitation period.
>
> What is clear is that, when the receiver was appointed, the subcontractors were entitled to payment from the trust fund. The failure to make payment to the subcontractors within a reasonable time thereafter, an obligation imposed by s. 89 of the Business Corporations Act and s. 7 of the Builders' Lien Act taken together, was in default of those statutory obligations. If the receiver had applied to the court for directions for payment out of the moneys on that date or within a reasonable time thereafter, the money would have been ordered paid to the subcontractors. The result is that the default of the receiver in failing to act with sufficient promptness and diligence to discover and pay the claims against the trust before expiration of the limitation period has deprived the subcontractors of the right to realize their claims from the trust fund.
>
> The bank now seeks to benefit from that default and the receiver supports its position. That position is untenable. While it may not be improper for a private debtor to withhold payment of a debt due and owing, whether deliberately or by neglect or oversight, and thereby benefit from an intervening limitation period, the same is not true of a receiver, *for he is an officer of the court* . The receiver's action is the action of the court and the court will not permit or approve any action on the part of its officer which has the effect of changing the rights of competing creditors, whether deliberately or by default.

[Emphasis added.]

42 In the present case it is clear that almost from the commencement of the receivership, the receiver was aware of the obligation, in law, of Northern Badger to see the oil and gas wells properly aban doned. The correspondence from the board detailed the obligation for the proper operation of the wells and the ultimate abandonment of them.

43 As one reviews the sequence of events leading to the sale of the assets to Senex, it is difficult to escape the conclusion that the "back out" clause was deliberately negotiated to achieve the very result for which the respondents now contend. The "back out" clause contemplates the situation that the costs of abandonment of some wells may exceed the revenue to be gained from them. Of course, no matter what wealth a well has produced in the past, there comes a time, in the last days of its life, when little oil remains and the well must be abandoned. At that point it is a liability with the cost of abandonment exceeding the revenue that could be obtained. In this case, the parties even provided for an arbitrator to determine, if need be, whether that moment had arrived. All wells with some value were to be sold; the remainder were to be left in the bankrupt estate when the receiver obtained a discharge from its duties.

44 Moreover, whether by accident or design, the board was not made aware of the developing situation. Despite the correspondence, the board was not aware that Senex was able to exercise a "back out" clause in the sale agreement. The board was first told of the effort "to sell *all the assets and liabilities* ." It was then told that "*all the assets* have been sold." Only the most alert reader would detect the subtle difference in the two quoted portions of the re-

1991 CarswellAlta 315, 8 C.B.R. (3d) 31, 81 Alta. L.R. (2d) 45, [1991] 5 W.W.R. 577, 81 D.L.R. (4th) 280, 7 C.E.L.R. (N.S.) 66, 117 A.R. 44, 2 W.A.C. 44

ceiver's letters. On the material filed, it is also difficult to escape the conclusion that the court approved the sale to Senex without being aware of the prospect that some wells were to be left as "orphans."

VI Conclusion

45 In my opinion the board had the power, when authorized by the Lieutenant Governor in Council, to order the abandonment of the wells by some person. The order was clearly within the general regulatory scheme, and within the expressed purposes, of both of the statutes regulating the oil and gas industry. Indeed, the contrary was not argued. What was contended is that the board should have directed its order to Northern Badger or to the trustee in bankruptcy rather than to the receiver. What was further contended is that the receiver or trustee in bankruptcy is unable to obey the general law enacted by the provincial legislature to govern oil wells because to do so would subvert the scheme Parliament has devised for distribution of assets in a bankruptcy.

46 The parties referred the court to some cases in the United States and to one in Canada where a debtor's legal duties on environmental matters conflicted with the potential distribution of the estate on insol vency. In each case, however, the response of the court was to some degree determined by statutory provisions. The cases are not easy to reconcile.

47 In *Ohio v. Kovacs*, 469 U.S. 274, 83 L. Ed. 2d 649, 105 S. Ct. 705 (1985), a state obtained an injunction ordering an individual to clean up a hazardous site, and later a receiver was appointed to seize property of the debtor and perform the duty. The individual filed for bankruptcy and the issue was whether his subsequent discharge from bankruptcy cleared the obligation. It was held in the Sixth Circuit Court of Appeals that the claim was essentially a monetary "liability on a claim" under the bankruptcy statute, and that the debtor was discharged. The United States Supreme Court affirmed.

48 In *Penn Terra Ltd. v. Department of Environmental Resources*, 733 F. 2d 267 (1984), the Third Circuit Court of Appeals was required to decide whether an exemption clause in the bankruptcy legislation should be construed to exempt from discharge an order requiring the debtor to complete restoration of the sites after coal operations. The court observed that the judgment obtained was not in the form of a traditional money judgment as for a tort or other claim. It then held that the debtor was not discharged and was required to perform the restoration.

49 In *Midlantic National Bank v. New Jersey Department of Environmental Protection; Quanta Resources Corp. v. New York (City)*, 474 U.S. 494, 88 L. Ed. 2d 859, 106 S. Ct. 755 (1986), a corporation filed for bankruptcy after it was discovered to have stored oil contaminated with a carcinogen at a site in New Jersey and another in New York. The trustee proposed to abandon the sites on the ground that they were of "inconsequential value" to the estate. In New Jersey, state environmental officials ordered the site cleaned up. A majority of the United States Supreme Court held that a bankruptcy trustee may not abandon property in contravention of state law. The minority would have held that the abandonment might be barred in emergency conditions, which did not yet exist in the case.

50 A similar problem arose again after both the above cases had been decided in *United States v. Whizco Inc.*, 841 F. 2d 147 (C.A. 6th Circ., 1988). The United States sought an injunction to force obedience to a statutory obligation to abandon a worked out coal mine. The Sixth Circuit Court of Appeals held, following the *Kovacs* case, that the operator's discharge under the *Bankruptcy Act* discharged the operator's liability to the extent that it would require the expenditure of money.

51 One similar case has arisen in Canada. In *Canada Trust Co. v. Bulora Corp.* (1980), 34 C.B.R. (N.S.) 145 (Ont. S.C.) , the receiver, as in the present case, had been appointed to receive *and manage* the company. The fire marshall ordered the receiver to demolish certain housing units which were in a "serious and hazardous" condition. It was urged that, despite the appointment of the receiver, the company continued to exist and to hold title to its assets. Thus, it was said, the proper recipient of the demolition order was the company, itself, and not the receiver.

1991 CarswellAlta 315, 8 C.B.R. (3d) 31, 81 Alta. L.R. (2d) 45, [1991] 5 W.W.R. 577, 81 D.L.R. (4th) 280, 7 C.E.L.R. (N.S.) 66, 117 A.R. 44, 2 W.A.C. 44

Cory J., then a judge of the High Court of Ontario, summarized the argument in these terms at p. 151:

> It was contended that the nature of the position of the receiver, although it might paralyze the power of the company for which it was appointed, did not extinguish the legal existence of that company. Thus Bulora continued to exist and continued as the entity responsible for the required demolition. It was said that, as the Fire Marshal had every right to recover from the municipality, the receiver should not and could not be required to undertake the demolition, which would have the effect of reducing the amount recovered by Canada Trust, the secured creditor.

52 Cory J. then summarized the powers of the receiver under the order appointing it, which gave it very wide powers of management and control similar to those given the receiver in this case. He then said at p. 152:

> There remains the major problem of determining who should bear the costs of the demolition. The order of the Fire Marshal is of vital concern for the safety of residents of the units adjacent to and close by the abandoned units. The safety of those persons occupying such units should be of paramount importance. If the receiver is given wide and sweeping powers in the management of the company, surely in the course of such management it has a duty to comply with a demolition order where the safety of individuals is so vitally concerned. It is indeed unfortunate that a creditor must suffer the loss resulting from the demolition. Nevertheless, the asset to be managed by the receiver must, in my opinion, be managed with a view to the safety of those residing in and beside that asset. Receivership cannot and should not be guided solely by the recovery of assets. In my view, there is a social duty to comply with an order such as this which deals with the safety of individuals affected by an asset the receiver is managing.
>
> The direction then will be that the receiver is to comply with the order of the Fire Marshal and proceed with the demolition of the specified units.

53 The Court of Appeal affirmed the judgment of Cory J. ((1981), 39 C.B.R. (N.S.) 152). The endorsement on the record was as follows:

> There was an order made by the fire marshall the legality and appropriateness of which is not challenged by the appellant. We are of the view that under the circumstances it was not only within the jurisdiction of the learned judge to direct that the court-appointed receiver-manager carry out that order but those circumstances necessitated that the receiver-manager be so directed. Although Cory J. referred to a "social duty" to comply with the order that language, with deference, was inappropriate. The duty involved was a statutory one and it was unnecessary for him to consider the social implications of the order. The appeal is dismissed with costs.

54 As in *Canada Trust Co. v. Bulora Corp.* , supra, it is urged in this case that Northern Badger is the licensee of the wells; the receiver has never had legal title to them and is not the licensee. Therefore, it is said, the abandonment order should be directed to Northern Badger and not to the receiver. In my opinion, that contention is not valid.

55 The receiver has had complete control of the wells and has operated them since May 1987, when it was appointed receiver and manager of them. It has carried out for more than three years activities with respect to the wells which only a licensee is authorized to do under the provisions of the *Oil and Gas Conservation Act* . In that position, it cannot pick and choose as to whether an operation is profitable or not in deciding whether to carry it out. If one of the wells of which a receiver has chosen to take control should blow out of control or catch fire, for example, it would be a remarkable rule of law which would permit him to walk away from the disaster saying simply that remedial action would diminish distribution to secured creditors.

56 While the receiver was in control of the wells, there was no other entity with whom the board could deal. An order addressed to Northern Badger would have been fruitless. That is so because, by order of the court, upon the

1991 CarswellAlta 315, 8 C.B.R. (3d) 31, 81 Alta. L.R. (2d) 45, [1991] 5 W.W.R. 577, 81 D.L.R. (4th) 280, 7 C.E.L.R. (N.S.) 66, 117 A.R. 44, 2 W.A.C. 44

application of the debenture holder, neither Northern Badger nor its trustee in bankruptcy had any right even to enter the well sites or to undertake any operation with respect to them. Moreover, under the regulatory scheme for Alberta oil wells, only a licensee is entitled to produce oil and gas. The receiver cannot be heard to say that, while functioning as a licensee to produce the wells and to profit from them, it assumed none of a licensee's obligations.

57 I must also consider the contention, which found favour in the Court of Queen's Bench, that the receiver or bankruptcy trustee managing and operating oil and gas wells need not, and, indeed, is forbidden, to obey the general provincial law governing property of that description. Put another way, this argument states that the general provincial law regulating the operation of oil and gas wells in Alberta is invalid to the extent that it purports to govern a receiver or bankruptcy trustee in possession of such wells.

58 Conflict between federal and provincial legislation is, of course, a classic Canadian problem. A number of cases have considered the situation where either a federal or provincial law, validly enacted within the constitutional power reserved to the enacting body, also touches upon or affects a heading of power reserved to the other level of government. These cases have been extensively reviewed and commented upon in the recent decision of the Supreme Court of Canada in *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121, [1990] 2 W.W.R. 193, 46 B.L.R. 161, 9 P.P.S.A.C. 177, 65 D.L.R. (4th) 361, 82 Sask. R. 120, 104 N.R. 110 .

59 Provincial legislation has often been upheld despite incidental effects on a subject under the federal power. Where there is direct confrontation (as where one statute says "yes" and the other says "no") — as Dickson J. (as he then was) expressed it in *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, 18 B.L.R. 138, 138 D.L.R. (3d) 1, 44 N.R. 181 , the doctrine of paramountcy may force a conclusion of invalidity of the provincial legislation.

60 That the two statutes affect the same subject matter does not necessarily mean that one or the other of them is invalid. An early case of this type was *Canadian Pacific Railway v. Notre Dame de Bonsecours (Parish)*, [1899] A.C. 367 . In that case the Privy Council held that since Parliament has the exclusive right to prescribe regulations for the construction, repair and alteration of a railway, a provincial legislature could not regulate the structure of a ditch forming part of the works. But it held intra vires a municipal code which prescribed the cleaning of the ditch and the removal of obstructions to prevent flooding.

61 Similarly, in *Royal Bank v. Nova Scotia (Workmen's Compensation Board)*, [1936] S.C.R. 560, [1936] 4 D.L.R. 9 , the Supreme Court of Canada held valid a levy for worker's compensation which adversely affected security granted under the *Bank Act* [R.S.C. 1927, c. 12]. La Forest J., giving the judgment of the court in *Bank of Montreal v. Hall* , supra, quoted the judgment of Davis J. in the Nova Scotia case (at pp. 568-69 [S.C.R.]) as follows (at p. 148 [S.C.R.]):

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

[Emphasis added by La Forest J.]

62 In *Bank of Montreal v. Hall* the provincial legislation in conflict with valid federal legislation was forced to

1991 CarswellAlta 315, 8 C.B.R. (3d) 31, 81 Alta. L.R. (2d) 45, [1991] 5 W.W.R. 577, 81 D.L.R. (4th) 280, 7 C.E.L.R. (N.S.) 66, 117 A.R. 44, 2 W.A.C. 44

give way. The bank sought to enforce security granted to it under the *Bank Act* , R.S.C. 1985, c. B-1, and the issue was whether it was required to follow the procedures and experience delays prescribed by the Saskatchewan *Limitation of Civil Rights Act* , R.S.S. 1978, c. L-16. After a review of the case law and of the two enactments La Forest J. was "led inescapably to the conclusion" that there was an "actual conflict in operation" between them. The provincial legislation was held inoperative in respect of security taken by the bank.

63 In my view, there is no such direct conflict in this case. The Alberta legislation regulating oil and gas wells in this province is a statute of general application within a valid provincial power. It is general law regulating the operation of oil and gas wells, and safe practices relating to them, for the protection of the public. It is not aimed at subversion of the scheme of distribution under the *Bankruptcy Act* though it may incidentally affect that distribution in some cases. It does so, not by a direct conflict in operation, but because compliance by the receiver with the general law means that less money will be available for distribution.

64 I respectfully agree with the decision in *Canada Trust Co. v. Bulora Corp.* , supra. In my opinion, the receiver, the manager of the wells with operating control of them, was bound to obey the provincial law which governed them.

65 I would not attempt to define the limits of provincial regulatory authority in relation to the federal powers respecting insolvency and bankruptcy. The various levels of government regulate business in a myriad of ways. The extent to which these levels of government may, in the exercise of their powers, affect in an incidental way the distribution of insolvent estates must depend, to a considerable extent, on the facts of the particular case.

66 I would allow the appeal and direct the receiver to comply with the board order. The parties may speak to costs.

. . . . .

Memorandum of judgment (supplemental reasons on costs):

67 The issue decided in this memorandum of judgment is the question of costs between the parties, Panamericana de Bienes y Servicios, S.A. and its receiver, Vennard Johannesen Insolvency Inc., the Energy Resources Conservation Board ("E.R.C.B.") and Collins Barrow Limited, Trustee in Bankruptcy of Northern Badger Oil and Gas Limited.

68 In Court of Queen's Bench, Mr. Justice MacPherson held that the receiver was not obliged to comply with an E.R.C.B. order of June 6, 1989 respecting the abandonment of seven oil wells. Subsequently he directed the board to pay to Panamericana costs of $15,000 plus proper disbursements and to the trustee in bankruptcy costs of $1,500 plus proper disbursements. On June 12, 1991 the court issued its judgment in this case allowing the appeal of the E.R.C.B. and directing the receiver to comply with the board's order. Subsequently, the parties made written submissions as to costs.

69 The receiver took possession of the seven wells when it obtained a receiving order of the assets of Northern Badger in May 1987. It had operated the wells for a considerable time and still had control of them at the time of the board's order on June 6, 1989. The issue in this litigation was the contest between Panamericana and its receiver on the one hand, and the board on the other as to whether the receiver was bound to obey the order.

70 The trustee in bankruptcy was brought into the litigation by the direction of Mr. Justice MacPherson presumably to protect the estate in bankruptcy. There was, however, very little if any estate in the bankruptcy which was not already subject to the receiving order obtained by the receiver. Nevertheless, once it was involved in the litigation the trustee in bankruptcy actively supported the position of the receiver that it was not bound to comply

1991 CarswellAlta 315, 8 C.B.R. (3d) 31, 81 Alta. L.R. (2d) 45, [1991] 5 W.W.R. 577, 81 D.L.R. (4th) 280, 7 C.E.L.R. (N.S.) 66, 117 A.R. 44, 2 W.A.C. 44

with the board order.

71 These positions were essentially unchanged in the argument before this court. The principal issue continued to be the contest between Panamericana and its receiver-manager on the one hand and the board on the other. The trustee in bankruptcy continued to support the position of Panamericana and its receiver. Nevertheless, there was one significant difference. The receiver, while continuing to argue that it was not bound to comply with the board's order, in this court suggested that the obligation to abandon the wells passed to the trustee in bankruptcy. The trustee vehemently resisted this contention.

72 The receiver and Panamericana now contend that each party should bear its own costs urging that the litigation involved a novel issue of great public significance. For its part the trustee in bankruptcy argues that it should be entitled to costs throughout on a solicitor-and-client basis to be paid by the receiver from the moneys remaining under its administration in the receivership. The board seeks its costs from the opposing parties.

73 We are all of the view that the board should be entitled to one set of costs in this litigation. Those costs should be paid by Panamericana and its receiver from the assets under administration. The argument made by the trustee in bankruptcy did not, in our view, add significantly to the burden of the litigation. On the other hand the trustee in bankruptcy chose to take sides in the argument between the receiver and the Board and should not be entitled to the costs of this unsuccessful argument.

74 Accordingly we direct that the Energy Resources Conservation Board will have its costs from Panamericana and the receiver in the lump sum of $15,000 plus proper disbursements for the proceedings in Court of Queen's Bench and its party-and-party costs to be taxed under Column 5 of the *Rules of Court* for the appeal. The trustee in bankruptcy should neither pay nor receive costs of the litigation either in Court of Queen's Bench or in this court.

Appeal allowed.

Order accordingly.

FN* On November 5, 1991, the court issued an amendment to the judgment, which has been incorporated herein.

FN** Leave to appeal to S.C.C. refused (January 16, 1992), Doc. 22655, Lamer C.J.C., Sopinka, McLachlin JJ. (S.C.C.).

END OF DOCUMENT

TAB 13

2004 CarswellOnt 2653, 50 C.B.R. (4th) 258, 35 C.L.R. (3d) 31, 242 D.L.R. (4th) 689, 23 R.P.R. (4th) 64, 188 O.A.C. 97, 71 O.R. (3d) 355

H

2004 CarswellOnt 2653, 50 C.B.R. (4th) 258, 35 C.L.R. (3d) 31, 242 D.L.R. (4th) 689, 23 R.P.R. (4th) 64, 188 O.A.C. 97, 71 O.R. (3d) 355

Regal Constellation Hotel Ltd., Re

In the Matter of the Receivership of Regal Constellation Hotel Limited, of the City of Toronto, in the Province of Ontario

And In the Matter of s. 41 of the Mortgages Act, R.S.O. 1990 c. M.40

HSBC Bank of Canada (Applicant) and Deloitte & Touche Inc. (Receiver / Respondent in Appeal) and Regal Pacific (Holdings) Limited (Respondent / Appellant) and 2031903 Ontario Inc. (Purchaser / Respondent in Appeal) and Aareal Bank A.G. (Intervenor)

Ontario Court of Appeal

Laskin, Feldman, Blair JJ.A.

Heard: May 13, 14, 2004
Judgment: June 28, 2004
Docket: CA C41258, C41257

Proceedings: affirming *Regal Constellation Hotel Ltd., Re* (2004), 2004 CarswellOnt 428 (Ont. S.C.J. [Commercial List])

Counsel: J. Brian Casey, John J. Pirie for Deloitte & Touche Inc.

Robert Rueter, A. Chan for Regal Pacific (Holdings) Limited

Tim Gilbert, Sandra Barton for 2031903 Ontario Inc.

James P. Dube for Aareal Bank A.G.

Subject: Contracts; Property; Corporate and Commercial; Insolvency

Sale of land --- Judicial sale — Vesting order

Vesting order is court order allowing court to effect change of title directly — Vesting order is also conveyance of title vesting interest in real or personal property in party entitled thereto under order — In its capacity as order, vesting order is in ordinary course subject to appeal — In Ontario, filing of notice of appeal does not automatically stay

2004 CarswellOnt 2653, 50 C.B.R. (4th) 258, 35 C.L.R. (3d) 31, 242 D.L.R. (4th) 689, 23 R.P.R. (4th) 64, 188 O.A.C. 97, 71 O.R. (3d) 355

order and, in absence of stay, it remains effective and may be registered on title under the land titles system — Once vesting order that has not been stayed is registered on title, it is effective as registered instrument and it cannot be attacked except by means that apply to any other instrument transferring absolute title and registered under land titles system.

Cases considered by *Blair J.A.*:

Boucher v. Public Accountants Council (Ontario) (2004), 2004 CarswellOnt 2521 (Ont. C.A.) — referred to

Chippewas of Sarnia Band v. Canada (Attorney General) (2000), 2000 CarswellOnt 4836, 51 O.R. (3d) 641, 195 D.L.R. (4th) 135, 139 O.A.C. 201, 41 R.P.R. (3d) 1, [2001] 1 C.N.L.R. 56 (Ont. C.A.) — considered

Durrani v. Augier (2000), 2000 CarswellOnt 2807, 190 D.L.R. (4th) 183, 50 O.R. (3d) 353, 36 R.P.R. (3d) 261 (Ont. S.C.J.) — considered

Foulis v. Robinson (1978), 21 O.R. (2d) 769, 92 D.L.R. (3d) 134, 8 C.P.C. 198, 1978 CarswellOnt 466 (Ont. C.A.) — referred to

National Life Assurance Co. of Canada v. Brucefield Manor Ltd. (February 23, 1999), Doc. C24863, M20859 (Ont. C.A.) — followed

R.A. & J. Family Investment Corp. v. Orzech (1999), 121 O.A.C. 312, 1999 CarswellOnt 1829, 44 O.R. (3d) 385, 27 R.P.R. (3d) 230 (Ont. C.A.) — referred to

Regal Constellation Hotel Ltd., Re (July 4, 2003), Cumming J. (Ont. S.C.J.) — referred to

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — considered

Royal Trust Corp. of Canada v. Karenmax Investments Inc. (1998), 1998 CarswellAlta 959, 231 A.R. 101, 71 Alta. L.R. (3d) 307 (Alta. Q.B. [In Chambers]) — referred to

Toronto Dominion Bank v. Usarco Ltd. (2001), 2001 CarswellOnt 525, 196 D.L.R. (4th) 448, 17 M.P.L.R. (3d) 57, 142 O.A.C. 70, 24 C.B.R. (4th) 303 (Ont. C.A.) — considered

Statutes considered:

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 100 — considered

Land Titles Act, R.S.A. 2000, c. L-4

s. 191 — referred to

Land Titles Act, R.S.O. 1990, c. L.5

Generally — referred to

2004 CarswellOnt 2653, 50 C.B.R. (4th) 258, 35 C.L.R. (3d) 31, 242 D.L.R. (4th) 689, 23 R.P.R. (4th) 64, 188 O.A.C. 97, 71 O.R. (3d) 355

Pt. IX — referred to

Pt. X — referred to

s. 25 — referred to

s. 57 — referred to

s. 57(13) — referred to

s. 69 — referred to

s. 69(1) — considered

s. 78 — referred to

s. 78(4) — considered

ss. 155-157 — referred to

Regulations considered:

Land Titles Act, R.S.O. 1990, c. L.5

General, O. Reg. 26/99

Generally

s. 4

APPEAL by company from judgment reported at *Regal Constellation Hotel Ltd., Re* (2004), 2004 CarswellOnt 428, 50 C.B.R. (4th) 253 (Ont. S.C.J. [Commercial List]), approving conduct of receiver.

***Blair J.A.*:**

1 Regal Pacific (Holdings) Limited is the 100% shareholder of Regal Constellation Hotel Limited, the company that operated the Regal Constellation Hotel near Pearson Airport in Toronto. The hotel is bankrupt and in receivership.[FN1]

2 Deloitte & Touche Inc., the receiver, has agreed to sell the assets of the hotel to 2031903 Ontario Inc. ("203"). The sale was approved, and a vesting order issued, by Sachs J. on December 19, 2003. Following a hearing on January 15, 2004, Farley J. approved the payment of $23,500,000 from the sale proceeds to the hotel's secured creditor, HSBC Bank of Canada ("HSBC"), and as well approved the conduct of the receiver in the receivership and passed its accounts.

3 This appeal involves an attempt by Regal Pacific, in its capacity as shareholder of the bankrupt hotel, to set aside the orders of Sachs J. and Farley J., and thus to set aside the sale transaction between the receiver and 203. It is

based upon the argument that the receiver failed to disclose to Regal Pacific and to Sachs J. the name of one of the members of the consortium lying behind the purchaser, 203, and that this failure to disclose tainted the fairness and integrity of the receivership process to such an extent that it must be set aside. Farley J. was made aware of the information. However, his failure to grant an adjournment of the hearing respecting approval of the receiver's conduct in the face of Regal Pacific's fresh discovery of the information, and his conclusion that the information was irrelevant to the receiver's duties with respect to the sale process, are said to constitute reversible error.

4 In a separate motion 203 also seeks to quash the appeal on the ground it is moot.

5 For the reasons that follow, I would quash the appeal from the vesting order and I would otherwise dismiss the appeals.

Facts

6 The hotel has been in financial difficulties for some time. It is old and in need of repair and renovation. Because the premises no longer comply with the requisite fire code regulations, and because liability insurance is difficult to obtain, they have been closed for some time. In addition, the hotel has suffered from the decrease in air passenger traffic following the events of September 11, 2001, and the aftermath of the SARS outbreak in Toronto in early 2003. It is thus an asset of declining value.

7 At the time of the appointment of the receiver, the hotel was in default in its payments to HSBC, which was owed $33,850,000. In fact, HSBC had made demand for repayment in November 2001 and as a result Regal Pacific and the hotel had commenced searching for a purchaser. They retained Colliers International Hotels ("Colliers") to market the hotel.

8 Several bids were received, and in the fall of 2002 a share-purchase transaction was entered into between Regal Pacific and a company controlled by the Orenstein Group. The purchase price was $45 million and included the purchase of Regal Pacific's shares in the hotel together with other assets. The transaction was not completed, however, and Regal Pacific and the Orenstein Group are presently in litigation as a result. The existence of this litigation is not without significance in these proceedings.

9 When the foregoing transaction failed to close, in June 2003, the bank commenced its application for the appointment of a receiver. On July 4, 2003, Cumming J. granted the receivership order [*Regal Constellation Hotel Ltd., Re* (July 4, 2003), Cumming J. (Ont. S.C.J.)].

10 The receiver and Colliers continued the efforts to market the hotel. The receiver's supplemental report indicates that "an investment profile of the hotel was distributed to more than five hundred potential investors, a Confidential Information Memorandum was distributed to eighty potential purchasers, tours of the Hotel were conducted for twenty-three parties, and a Standard Offer to Purchase Form was provided to 42 purchasers". As of August 28, 2003, the deadline for the submission of binding offers, 13 offers had been received. After reviewing these offers with HSBC, the receiver accepted an offer from 203 to purchase the assets of the hotel for $25 million, subject to court approval (the "First 203 Offer").

11 A summary of the thirteen bids setting out their proposed purchase prices, the deposits made with them, and their conditions, is set out in Appendix 1 of the receiver's supplemental report. Five of the bids were not accompanied by a deposit, as required by the terms of the sale process approved by the court. The receiver went back to each of the bidders who had not provided a deposit and gave them a few more days to submit the deposit. None of them did so.

12 The First 203 Offer was for the fourth highest purchase price. It was accompanied by a $1 million deposit, as

required, and it was unconditional. The second and third highest bids were not accompanied by the requisite deposit. The highest bid, by Hospitality Investors Group LLC ("HIG") was for $31 million. While the HIG bid was accompanied by a $1 million non-certified deposit cheque, however, the receiver was advised that the deposit cheque submitted could not be honoured if presented for payment, and the offer was withdrawn by HIG.

13 HIG is a company controlled by the Orenstein Group. The withdrawal of its $31 million offer is the subject of some controversy in the proceedings, and I shall return to that turn of events in a moment.

14 Of the remaining bids, one was rejected as inordinately low. Three of the remaining six were for the same $25 million purchase price as that offered by 203. They were rejected because they were subject to conditions and the First 203 Offer was not. The rest were rejected because their proposed purchase price was lower.

15 On September 9, 2003, Cameron J. approved the sale to 203. At this hearing Regal Pacific expressed a concern that 203 might be connected to the Orenstein Group. Counsel for Regal Pacific states that Cameron J. was advised by counsel for the receiver that there was no such connection. It is not clear on the record whether this statement was accurate in fact, but there is no suggestion that counsel for the receiver was at that time aware of any Orenstein Group connection to 203. Mr. Orenstein's personal involvement did not seem to come until sometime later in October, following the failure of the First 203 Offer to close.

16 At the receiver's request Cameron J. also granted an order sealing the receiver's supplemental report respecting the sale process in order to protect the confidential information regarding the pricing and terms of the other bids outlined above, in case the First 203 Offer did not close and it proved necessary for the receiver to renegotiate with the other offerors. This meant that Regal Pacific was not privy to the information contained in it.

17 The First 203 Offer did not close, as scheduled, on October 10. This led to proceedings by the receiver to terminate the agreement and for the return of the $2 million in deposit funds that had been submitted by 203. These proceedings were settled, with the commercial list assistance of Farley J. But the settled transaction did not close either. As a result of the minutes of settlement, the First 203 Offer was terminated and 203 forfeited a $2.5 million deposit plus $500,000 in carrying costs.

18 The receiver renewed its efforts to find a purchaser for the hotel. In what was intended to be a second round of bidding, it instructed Colliers to continue its search. Between Colliers and the receiver all thirteen of the original bidders referred to above, including 203, were canvassed again in an effort to generate new offers. Except for a second proposal from 203 ("the Second 203 Offer"), none was forthcoming.

19 The Second 203 Offer was for $24 million. It was again unconditional and this time was buttressed by a $20 million credit facility provided by the intervenor, Aareal Bank A.G. It was also accompanied by a certified and non-refundable deposit cheque for $2 million. The receiver was concerned that the market for the hotel was in a state of steady decline and that the creditors' positions would only worsen if a sale could not be completed expeditiously. With a purchase price of $24 million, HSBC would be suffering a shortfall on its secured debt of approximately $9 million; in addition there are unsecured creditors of the hotel with claims exceeding $2 million. As the receiver had not been able to generate any other new offers at a price comparable to the $24 million, and Colliers had not been able to identify any new purchasers, the receiver accepted the Second 203 Offer and entered into a new agreement with 203 on December 9, 2003, with a projected closing date of January 5, 2004. Given the $3 million in deposits that 203 had previously forfeited, the receiver views the purchase price as being the equivalent of $27 million.

20 On December 19, 2003, Sachs J. approved the sale of the hotel to 203. She also granted a vesting order pursuant to which title to the hotel would be conveyed to 203 on closing. The transaction closed on January 6, 2004. 203 paid the receiver $24 million and registered the vesting order on title. Aareal Bank's $20 million advance is secured on title based on that vesting order. The hotel's indebtedness to HSBC Bank of Canada has been paid down by

2004 CarswellOnt 2653, 50 C.B.R. (4th) 258, 35 C.L.R. (3d) 31, 242 D.L.R. (4th) 689, 23 R.P.R. (4th) 64, 188 O.A.C. 97, 71 O.R. (3d) 355

$20.5 million from the sale proceeds.

21 A few days later Regal Pacific learned from an article in the Toronto Star newspaper that the hotel had been sold "to the Orenstein Group". A motion was pending before Farley J. on January 15, 2004, for approval of the receiver's conduct and related relief. Regal sought an adjournment of that motion on the basis of the prior non-disclosure of the Orenstein Group's involvement in the 203 offers. When the adjournment request was taken under advisement, Regal Pacific opposed approval of the receiver's conduct on the basis that the failure to advise it and Sachs J. of the Orenstein Group's involvement tainted the fairness and integrity of the process. Farley J. refused the adjournment request, and approved the receiver's conduct and accounts. He concluded that the identity of the principals behind the purchaser was not material. In this regard he said:

> While Mr. Rueter alludes to "the sales process was manipulated", I do not see that anything that the Receiver did was in aid of, or assisted such (as alleged). The identity of who the principals were was not in issue so long as a deal could be closed without a vendor take back mortgage.
>
> . . . . .
>
> It seems to me that the Receiver acted properly and within the mandate given it from time to time by the court. It fulfilled its prime purpose of obtaining as high a value [as] it could for the hotel after an approved marketing campaign. Vis-à-vis the Receiver and that duty, it does not appear to me that the identity of the principals, but more importantly that there was an overlap regarding the aborted purchaser from Holdings prior to the receivership, HIG and 203, is of any moment.

Standard of Review

22 The orders appealed from are discretionary in nature. An appeal court will only interfere with such an order where the judge has erred in law, seriously misapprehended the evidence, or exercised his or her discretion based upon irrelevant or erroneous considerations or failed to give any or sufficient weight to relevant considerations.

23 Underlying these considerations are the principles the courts apply when reviewing a sale by a court-appointed receiver. They exercise considerable caution when doing so, and will interfere only in special circumstances - particularly when the receiver has been dealing with an unusual or difficult asset. Although the courts will carefully scrutinize the procedure followed by a receiver, they rely upon the expertise of their appointed receivers, and are reluctant to second-guess the considered business decisions made by the receiver in arriving at its recommendations. The court will assume that the receiver is acting properly unless the contrary is clearly shown. See *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.).

24 In *Soundair*, at p. 6, Galligan J.A. outlined the duties of a court when deciding whether a receiver who has sold a property has acted properly. Those duties, in no order of priority, are to consider and determine:

(a) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;

(b) the interests of the parties;

(c) the efficacy and integrity of the process by which offers are obtained; and

(d) whether there has been unfairness in the working our of the process.

25 In *Soundair* as well, McKinlay J.A. emphasized the importance of protecting the integrity of the procedures

business persons in their dealings with receivers".

26 A court-appointed receiver is an officer of the court. It has a fiduciary duty to act honestly and fairly on behalf of all claimants with an interest in the debtor's property, including the debtor (and, where the debtor is a corporation, its shareholders). It must make candid and full disclosure to the court of all material facts respecting pending applications, whether favourable or unfavourable. See *Toronto Dominion Bank v. Usarco Ltd.* (2001), 196 D.L.R. (4th) 448 (Ont. C.A.), per Austin J.A. at paras. 28 - 31, and the authorities referred to by him, for a more elaborate outline of these principles. It has been said with respect to a court-appointed receiver's standard of care that the receiver "must act with meticulous correctness, but not to a standard of perfection": *Bennett on Receiverships*, 2nd ed. (Toronto: Carswell, 1999) at p. 181, cited in *Toronto Dominion Bank v. Usarco Ltd.*, *supra*, at p. 459.

27 The foregoing principles must be kept in mind when considering the exercise of discretion by the motions judges in the context of these proceedings.

Analysis

The Vesting Order and the Motion to Quash

28 Aareal Bank A.G. and 203 sought to quash the appeal on the basis that it is moot. They argue that once the vesting order granted by Sachs J. was registered on title - no stay having been obtained - its effect was spent, the court's power to set it aside is extinguished, and no appeal can lie from it. Because all the parties were prepared to argue the appeal, we heard the submissions on the motion to quash during the argument of the appeal on the merits.

29 In my opinion the appeal from the vesting order should be quashed because the appeal is moot.

30 Sachs J.'s order of December 19, 2003 granted a vesting order directing the land registrar at Toronto, in the land titles system, to record 203 as the owner of the hotel. The order was subject to two conditions, namely, that 203 pay the purchase price and comply with all of its obligations on closing of the transaction and that the vesting order be delivered to 203. These conditions were complied with on January 6, 2004, and the vesting order was registered on title on that date. Aareal Bank registered its $20 million mortgage against the title to the hotel property following registration of the vesting order.

31 In Ontario, the power to grant a vesting order is conferred by the *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 100, which provides as follows:

> A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.

32 The vesting order itself is a creature of statute, although it has its origins in equitable concepts regarding the enforcement of remedies granted by the Court of Chancery. Vesting orders were discussed by this court in *Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), 195 D.L.R. (4th) 135 (Ont. C.A.), at 227, where it was observed that:

> Vesting orders are equitable in origin and discretionary in nature. The Court of Chancery made *in personam* orders, directing parties to deal with property in accordance with the judgment of the court. Judgments of the Court of Chancery were enforced on proceedings for contempt, followed by imprisonment or sequestration. *The statutory power to make a vesting order supplemented the contempt power by allowing the Court to effect the change of title directly*: see McGhee, *Snell's Equity* 30th ed., (London: Sweet and Maxwell, 2000) at 41-42 [emphasis added].

2004 CarswellOnt 2653, 50 C.B.R. (4th) 258, 35 C.L.R. (3d) 31, 242 D.L.R. (4th) 689, 23 R.P.R. (4th) 64, 188 O.A.C. 97, 71 O.R. (3d) 355

33 A vesting order, then, has a dual character. It is on the one hand a court order ("allowing the court to effect the change of title directly"), and on the other hand a conveyance of title (vesting "an interest in real or personal property" in the party entitled thereto under the order). This duality has important ramifications for an appeal of the original court decision granting the vesting order because, in my view, once the vesting order has been registered on title its attributes as a conveyance prevail and its attributes as an order are spent; the change of title has been effected. Any appeal from it is therefore moot.

34 I reach this conclusion for the following reasons.

35 In its capacity as an order, a vesting order is in the ordinary course subject to appeal. In Ontario, however, the filing of a notice of appeal does not automatically stay the order and, in the absence of such a stay, it remains effective and may be registered on title under the land titles system - indeed, the land registrar is required to register it on a proper application to do so: see the *Land Titles Act*, R.S.O. 1990, c. L.5, ss.25 and 69. In this respect, an application for registration based on a judgment or court order need only be supported by an affidavit of a solicitor deposing that the judgment or order is still in full force and effect and has not been stayed; there is no requirement - as there is in some other jurisdictions[FN2] - to show that no appeal is pending and that all appeal rights have terminated: see *Ontario Land Titles Regulations*, O. Reg 26/99, s. 4.

36 Appeal rights may be protected by obtaining a stay, which precludes registration of the vesting order on title pending the disposition of the appeal. Do those appeal rights remain alive, however, where no stay has been obtained and the order has been registered?

37 In answering that question I start with the provisions of ss. 69 and 78 of the *Land Titles Act*, which deal, respectively, with vesting orders (specifically) and the effect of registration (generally). They state in part, as follows:

> 69(1) Where by order of a court of competent jurisdiction ... registered land or any interest therein is stated by the order ... to vest, be vested or become vested in, or belong to ... any person other than the registered owner of the land, the registered owner shall be deemed for the purposes of this Act to remain the owner thereof,
>
> (a) until an application to be registered as owner is made by or on behalf of the ... other person in or to whom the land is stated to be vested or to belong; or
>
> (b) until the land is transferred to the ... person by the registered owner, as the case may be, in accordance with the order or Act.
>
> 78 (4) *When registered, an instrument shall be deemed to be embodied in the register and to be effective according to its nature and intent, and to create, transfer, charge or discharge, as the case requires, the land or estate or interest therein mentioned in the register* [italics added].

38 Upon registration, then, a vesting order is deemed "to be embodied in the register and to be effective according to its nature and intent". Here the nature and effect of Sachs J.'s vesting order is to transfer absolute title in the hotel to 203, free and clear of encumbrances.[FN3] When it is "embodied in the register" it becomes a creature of the land titles system and subject to the dictates of that regime.

39 Once a vesting order that has not been stayed is registered on title, therefore, it is effective as a registered instrument and its characteristics as an order are, in my view, overtaken by its characteristics as a registered conveyance on title. In a way somewhat analogous to the merger of an agreement of purchase and sale into the deed on the closing of a real estate transaction, the character of a vesting order as an "order" is merged into the instrument of conveyance it becomes on registration. It cannot be attacked except by means that apply to any other instrument

transferring absolute title and registered under the land titles system. Those means no longer include an attempt to impeach the vesting order by way of appeal from the order granting it because, as an order, its effect is spent. Any such appeal would accordingly be moot.

40 This interpretation of the effect of registration of a vesting order is consistent with the purpose of the land titles regime and the philosophy lying behind it. It ensures that disputes respecting the registered title are resolved under the rubric of that regime and within the scheme provided by the *Land Titles Act*. This promotes confidence in the system and enhances the certainty required in commercial and real estate transactions that must be able to rely upon the integrity of the register.

41 Donald H.L. Lamont described the purposes of the land titles system very succinctly in his text, *Lamont on Real Estate Conveyancing*, 2nd ed. looseleaf (Toronto: Carswell, 1991) vol. 1 at 1-10, as follows:

> The basis of the system is that the Act authoritatively establishes title by declaring, under a guarantee of indemnity, that a certain parcel of land is vested in a named person, subject to some special circumstances. Early defects are cured when the land is brought under the land titles system, and thenceforth investigation of the prior history of the title is not necessary.
>
> *No transfer is effective until recorded; once recorded, however, the title cannot, apart from fraud, be upset* [italics added].

42 Epstein J. elaborated further on the origins, purpose and philosophy behind the regime in *Durrani v. Augier* (2000), 50 O.R. (3d) 353 (Ont. S.C.J.). At paras. 40 - 42 she observed:

> [40] The land titles system was established in Ontario in 1885, and was modeled on the English Land Transfer Act of 1875. It is currently known as the Land Titles Act, R.S.O. 1990, c. L.5. Most Canadian provinces have similar legislation.
>
> [41] The essential purpose of land titles legislation is to provide the public with the security of title and facility of transfer: Di Castri, Registration of Title to Land, vol. 2 looseleaf (Toronto: Carswell, 1987) at p. 17-32. The notion of title registration establishes title by setting up a register and guaranteeing that a person named as the owner has perfect title, subject only to registered encumbrances and enumerated statutory exceptions.
>
> [42] The philosophy of land titles system embodies three principles, namely, the mirror principle, where the register is a perfect mirror of the state of title; the curtain principle, which holds that a purchaser need not investigate the history of past dealings with the land, or search behind the title as depicted on the register; and the insurance principle, where the state guarantees the accuracy of the register and compensates any person who suffers loss as the result of an inaccuracy. These principles form the doctrine of indefeasibility of title and is the essence of the land titles system: Marcia Neave,
>
> "Indefeasibility of Title in the Canadian Context" (1976), 26 U.T.L.J. 173 at p. 174.

43 Certainty of title and the ability of a bona fide purchaser for valuable consideration to rely upon the title as registered, without going behind it to examine the conveyance, are, therefore, the hallmarks of the land titles system. The transmogrification of a vesting order into a conveyance upon registration is consistent with these hallmarks. It does not mean that such an order, once registered on title, is absolutely immune from attack. It simply means that any such attack must be made within the parameters of the *Land Titles Act*.

44 That legislation does present a scheme of remedies in circumstances where there has been a wrongful entry on the registry by reason of fraud or of misdescription or because of other errors of certification of title or entry on

the registry. The remedies take the form of damages or compensation from the assurance fund established under the Act or, in some instances, rectification of the register by the Director of Titles and/or the court: see, for example, s. 57 (Claims against the Fund), Part IX (Fraud) and Part X (Rectification). In this scheme, good faith purchasers or mortgagees who have taken an interest in the land for valuable consideration and in reliance on the register, are protected,[FN4] in keeping with the motivating principles underlying the land titles system. It has been held that there is no jurisdiction to rectify the register if to do so would interfere with the registered interest of a *bona fide* purchaser for value in the interest as registered: see *R.A. & J. Family Investment Corp. v. Orzech* (1999), 44 O.R. (3d) 385 (Ont. C.A.); and *Durrani v. Augier*, *supra*, at paras. 49, 75 and 76.

45 Vesting orders properly registered on title, then - like other conveyances - are not immune from attack. However, any such attack is limited to the remedies provided under the *Land Titles Act* and no longer may lie by way of appeal from the original decision granting the vesting order. Title has effectively been changed and innocent third parties are entitled to rely upon that change. The effect of the vesting order *qua* order has been spent.

46 Johnstone J., of the Alberta Court of Queens Bench, came to a similar conclusion -although not based upon the same reasoning - in *Royal Trust Corp. of Canada v. Karenmax Investments Inc.* (1998), 71 Alta. L.R. (3d) 307 (Alta. Q.B. [In Chambers]). She refused to interfere with a vesting order granted by the master in the context of a receivership sale, stating (at para. 22, as amended):

> Accordingly, because the Order of Master Funduk has been entered, and no stay of execution was sought nor granted, the Order acts as a transfer of title, which having been registered at the Land Titles Office, extinguishes my ability to set aside the Order, absent any err [*sic*] in fact or law by the learned Master. ....

47 In a brief three-paragraph endorsement this court granted an unopposed motion to quash an appeal from an order approving a sale by a receiver in *National Life Assurance Co. of Canada v. Brucefield Manor Ltd.*, [1999] O.J. No. 1175 (Ont. C.A.). While a vesting order was involved, it does not appear to have been the subject of the appeal. The appeal was quashed. The sale order had been made in May 1996, a motion to stay the order pending appeal had been dismissed in August, and the sale had closed and a vesting order had been granted in November of that year. The proceeds of sale had been distributed. "Against this background", Catzman J.A. noted, "we agree with [the] submission that the order under appeal is spent".

48 This decision was based on the global situation before the court, not on the narrower premise that the vesting order had been registered and the appeal was therefore moot. I am satisfied, based on the foregoing analysis, however, that the narrower premise is sound.

49 I do not mean to suggest by this analysis that a litigant's legitimate rights of appeal from a vesting order should be prejudiced simply because the successful party is able to run to the land titles office and register faster than the losing party can run to the appeal court, file a notice of appeal and a stay motion and obtain a stay. These matters ought not to be determined on the basis that "the race is to the swiftest". However, there is no automatic stay of such an order in this province, and a losing party might be well advised to seek a stay pending appeal from the judge granting the order, or at least seek terms that would enable a speedy but proper appeal and motion for a stay to be launched. Whether the provisions of s. 57 of the *Land Titles Act* (Remedy of person wrongfully deprived of land), or the rules of professional conduct, would provide a remedy in situations where a successful party registers a vesting order immediately and in the face of knowledge that the unsuccessful party is launching an appeal and seeking a timely stay, is something that will require consideration should the occasion arise. It may be that the appropriate authorities should consider whether the Act should be amended to bring its provisions in line with those contained in the Alberta legislation, and referred to in footnote 2 above.

50 The foregoing concerns do not change the legal analysis of the effect of registration of a vesting order outlined above, however, and I conclude that the appeal from the vesting order is moot.

2004 CarswellOnt 2653, 50 C.B.R. (4th) 258, 35 C.L.R. (3d) 31, 242 D.L.R. (4th) 689, 23 R.P.R. (4th) 64, 188 O.A.C. 97, 71 O.R. (3d) 355

The Appeals on the Merits

51 Even if I am in error respecting the mootness of the appeal from the vesting order, the appeal from it and from the approval orders must be dismissed on their merits. On behalf of Regal Pacific, Mr. Rueter highlights the facts concerning the Orenstein Group's involvement in the failed $45 million share purchase transaction, which was followed by the receivership, the sudden withdrawal by HIG (also an Orenstein company) of its $31 million bid on September 2, 2003 - just the day before the First 203 Offer for $25 million was submitted - and the involvement of the Orenstein Group in that First (and subsequent) 203 Offer. He forcefully argues that the Orenstein participation in the 203 Offers should have been disclosed to Regal Pacific and to Sachs J., and submits that had that disclosure been made Sachs J. may have declined to approve the Second 203 Offer. The non-disclosure tainted the receivership sale process to the extent that its fairness and integrity have been jeopardized, he concludes, and accordingly the sale must be set aside.

52 On behalf of the receiver, Mr. Casey acknowledges that the Orenstein involvement was not disclosed, even after the receiver became aware of it (which, he submits, was not until the time of the Second 203 Offer). He concedes that "it would have been nice" if the receiver had disclosed the information, but submits it was under no legal obligation to do so as, in its view, the information was not material to the sale process. The sale process was carried out in good faith in accordance with the duties and obligations of the receiver, and both of the 203 Offers represented the best offers available at the time of their acceptance - and, in the case of the Second 203 Offer, the *only* offer available. The transaction is in the best interests of all concerned, he contends. The orders should not be set aside.

53 203 and the intervenor, Aareal Bank A.G., support the receiver's position. On behalf of 203 Mr. Gilbert argues in addition that 203 is a *bona fide* purchaser of the hotel for value, that it has paid its deposit and purchase price and registered its interest through the vesting order on title, and that $20 million has been advanced by Aareal Bank A.G. on the strength of the registered vesting order. The transaction cannot be overturned because once the vesting order has been registered it is spent and any appeal from the order is therefore moot. Mr. Dube advanced a similar argument on behalf of Aareal Bank A.G.

54 I do not accept the argument advanced by the appellant.

55 In my view, the fact that the Orenstein Group is involved in the 203 bid is not material to the sale process conducted by the receiver. I agree with the conclusions of Farley J., recited above, in that regard.

56 Whatever may be the rights and obligations between Regal Pacific and the Orenstein Group with respect to the $45 million share purchase transaction, as determined in the pending litigation between them, the facts relating to that transaction are of little more than historical interest in the context of the receivership sale. The hotel was not bankrupt and in receivership, or closed, at that time. For the various reasons outlined earlier, the hotel is an asset progressively declining in value, and it is not surprising that the business may have attracted a higher offer in mid-2002 than it did in mid-2003. Moreover, the $45 million transaction involved the purchase of the shares of Regal Pacific rather than the assets of the hotel and, as well, the acquisition of certain other assets. None of the thirteen bids elicited by the receiver remotely approached a purchase price of $45 million. Apart from its indication that the Orenstein Group has an interest in acquiring the hotel, I do not see the significance of this earlier transaction to the sale process conducted by the receiver.

57 I turn, then, to the $31 million HIG bid. It, too, confirms an interest by the Orenstein Group in the Hotel. Mr. Rueter argues that the withdrawal of that bid the day before the First 203 Offer was presented at the lower $25 million price is suspicious, and that the court should have been apprised of what exchange of information occurred between the receiver, HIG and 203 that resulted in the HIG bid being withdrawn and the lower 203 offer going for-

ward as the offer recommended by the receiver. In my view, however, this argument does not assist Regal Pacific.

58 First, there is not a scintilla of evidence to suggest that the receiver participated in any such discussions. Secondly, when the receiver inquired whether the deposit cheque that had been submitted with the HIG offer - and which had not been certified, as required by the court-approved bidding process - could be cashed, the receiver was told the cheque would not be honoured if presented for payment. The receiver would have been derelict in its duties if it had accepted the HIG bid in those circumstances. Finally, in the absence of some provision in an offer or the terms of the bidding process to the contrary - which was not the case here - a potential purchaser is entitled to withdraw its offer at any time prior to acceptance for any reason, including the belief that the purchaser may be able to obtain the property at a better price by another means. Mr. Rueter conceded that the receiver was not obliged to accept the HIG offer and that he was not asserting a kind of improvident-sale claim for damages based upon the difference in price between the HIG offer and the 203 bid.

59 The stark reality is that after nearly two years of marketing efforts by Colliers, and latterly by Colliers and the receiver, there were no other offers available to the receiver that were superior to the unconditional $25 million First 203 Offer at the time of its acceptance by the receiver and approval by the court. After the failure of the First 203 Offer to close, and in spite of renewed efforts by both Colliers and the receiver, there were *no other* offers available apart from the $24 million Second 203 Offer, which was accepted by the receiver and approved by Sachs J.

60 A persuasive measure of the realistic nature of the 203 offers is the fact that they are supported by HSBC, which stands to incur a shortfall on its security of $9 million. In addition, there are outstanding unsecured creditors with over $2 million in claims. No one except Regal Pacific has opposed the sale.

61 There is simply nothing on the record to suggest that the hotel assets are likely to fetch a price that will come anywhere close to providing any recovery for Regal Pacific in its capacity as shareholder of the hotel. Regal Pacific, therefore, has little, if anything, to gain from re-opening the sale process. Apart from a liability to make some interest payments as part of an earlier agreement in the proceedings, Regal Pacific is not liable under any guarantees for the indebtedness of the hotel. It therefore has little, if anything to lose from opposing the sale, as well. This lends some credence to the respondents' argument that Regal Pacific's opposition to the sale, and this appeal, are driven by tactical motives extraneous to these proceedings and relating to the separate litigation between it and the Orenstein Group concerning the aborted $45 million share purchase transaction.

62 In the circumstances of this case, then, and given the principles courts must apply when reviewing a sale by a court-appointed receiver, as outlined above, I can find no error on the part of Sachs J. or Farley J. in the exercise of their discretion when granting the orders under appeal.

63 I would dismiss the appeals for the foregoing reasons.

Disposition

The Appeals

64 For all of the foregoing reasons, the appeal from the vesting order granted by Sachs J. is quashed, and the appeals from the orders of Sachs J. dated December 19, 2003 approving the sale, and the order of Farley J. dated January 14, 2004, are dismissed.

Costs

65 The respondents and the intervenor are entitled to their costs of the appeal, including the motion to quash, which was included in the argument of the appeal.

66 The receiver and 203 requested that costs be fixed on a substantial indemnity basis - the receiver on the ground that the allegations raised impugned its integrity in the conduct of the receivership, and 203 on the ground that the appeal was futile and brought solely for tactical purposes in an attempt to extract a settlement and at great expense to 203 in terms of uncertainty and carrying costs. I would not accede to these requests. Without in any way questioning the integrity of the receiver in the conduct of the receivership, it seems to me that some of the problems could have been avoided had the receiver revealed the involvement of the Orenstein Group in the 203 transactions when it first learned that was the case. While I understand 203's frustration at the delay in finalizing the results of the transaction, it cannot be said that the appeal was frivolous and there is nothing in the circumstances to justify an award of costs on the higher scale: see *Foulis v. Robinson* (1978), 21 O.R. (2d) 769 (Ont. C.A.). I would therefore award costs on a partial indemnity scale.

67 Counsel provided us with bills of costs. Regal Constellation sought $57,123.25 on a partial indemnity basis if successful. The receiver asks for $61,919.00 and Aareal Bank requests $12,224.75. These amounts are inclusive of fees, disbursements and GST and seem somewhat high to me. The draft bill submitted by 203 appears to me to be exceedingly high, given the amounts sought by other parties who carried a similar burden, and notwithstanding the importance of the case for 203. 203 asks us to fix its costs in the amount of $137,444.68. Such an award is not justified and would simply not be fair and reasonable in the circumstances, in my view, given the nature and length of the appeal and the issues involved: see *Boucher v. Public Accountants Council (Ontario)*, [2004] O.J. No. 2634 (Ont. C.A.).

68 Costs are awarded, on a partial indemnity basis, as follows:

a) To the receiver, in that amount of $40,000;

b) To 203, in the amount of $40,000; and,

c) To Aareal Bank, in the amount of $12,225.

69 These amounts are inclusive of fees, disbursements and GST.

***Laskin J.A.*:**

I agree.

***Feldman J.A.*:**

I agree.

Appeal dismissed.

FN1 I shall refer to Regal Constellation Hotel Limited as "the Hotel" throughout these reasons.

FN2 See, for example, the Alberta *Land Titles Act* R.S.A. 2000, c. L-4, s. 191, which precludes registration of a judgment or order in the absence of consent, an undertaking not to appeal, or proof that all appeal rights have expired.

FN3 Except certain encumbrances that must remain on title by virtue of the *Land Titles Act*.

2004 CarswellOnt 2653, 50 C.B.R. (4th) 258, 35 C.L.R. (3d) 31, 242 D.L.R. (4th) 689, 23 R.P.R. (4th) 64, 188 O.A.C. 97, 71 O.R. (3d) 355

FN4 For instance, where an instrument would have been absolutely void if unregistered and rectification is ordered, a person suffering by the rectification is entitled to compensation as provided: s. 57(13). Persons fraudulently procuring an entry on the registry may be convicted of an offence under the Act, and where an innocent purchaser has acquired a charge or interest in the lands while the wrongful entry was subsisting on the lands the land registrar may revest the lands in the rightful owner but subject to the interests so acquired: ss 155-157.

END OF DOCUMENT