Court File No.: CV-23-00703933-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as Amended

AND IN THE MATTER of a Plan of Compromise or Arrangement of Quality Rugs of Canada Limited and the Other Group Listed in Schedule "A" Hereto (the "**Applicants**")

FACTUM OF THE CARPENTERS' REGIONAL COUNCIL OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA (the "CARPENTERS' UNION)

Date: September 21, 2023

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TO: **THE SERVICE LIST**

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PART I – OVERVIEW

1. The Carpenters' Union seeks directions from the Court relating to the $95,028.00 (the "**Holdback Funds**") held back from the earned wages of the pieceworkers who are now members of the Carpenters' Union (the "**Carpenter Pieceworkers**"). The Carpenters' Union seeks to ensure that the Holdback Funds are held separate and apart from the Applicants' (hereinafter referred to as "**QSG**") assets during the CCAA restructuring process.

2. The Carpenters' Union submits that the Holdback Funds were collected from the rightfully earned wages of the Carpenter Pieceworkers and were intended to be held in a separate trust account pursuant to the applicable collective agreements. The Carpenters' Union further submits that it is in the interests of the Court to preserve the Holdback Funds for the sole benefit of the Carpenter Pieceworkers in light of the significant prejudice that would befall the Carpenter Pieceworkers if the Holdback Funds become part of QSG's assets.

3. If there is a dispute about the interpretation of the applicable collective agreements, the Carpenters' Union submits that this Court order the creation of a reserve for the Holdback Funds pending a determination by the Ontario Labour Relations Board ("**OLRB**").

PART II – SUMMARY OF FACTS

THE CARPENTERS' UNION

4. The Carpenters' Union is a trade union that represents more than 30,000 construction workers across Ontario, including more than 20,000 construction workers in the Greater Toronto Area. The Carpenters' Union is the exclusive bargaining agent for its members who perform work under the applicable collective agreements with QSG.

5. QSG is bound to the Collective Agreement between the Resilient Flooring Contractors Association of Ontario and the Carpenters' Union (specifically its constituent Local Union 27) effective May 1, 2022 to April 30, 2025, and any renewals thereof (the "**Carpenters' Flooring Collective Agreement**").[1] QSG is also bound to the Carpenters' Provincial ICI Collective Agreement, effective May 1, 2022 to April 30, 2025, and any renewals thereof (the "**Carpenters' Provincial ICI Collective Agreement**").[2]

6. Article 8 of the Carpenters' Flooring Collective Agreement provides that Carpenter Pieceworkers may be employed for carpet, hardwood, and resilient floor covering piecework. Wages for Carpenter Pieceworkers are broken down in Schedule B and Schedule C of the Carpenters' Flooring Collective Agreement. Carpenter Pieceworkers are paid hourly wages, production wages, and benefits.

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[1] See the *Responding Motion Record of Carpenters' Union*, dated September 11, 2023, at Exhibit "B" [*Carpenters' Responding MR*].
[2] *Ibid* at Exhibit "C".

7. Carpenter Pieceworkers are subject to a holdback provided in Article 23 of the Carpenters' Flooring Collective Agreement. Up to $2,000.00 may be held back from the wages of each Carpenter Pieceworker on account of potential deficiencies and back charges (the **"Holdback"**). The Holdback is drawn directly from the Pieceworkers' wages, cannot exceed $2,000.00 per Pieceworker.

HOLDBACK REGIME AND CHANGE IN REPRESENTATION

8. Prior to May 2, 2023, QSG was bound to the Residential Carpet, Hardwood, Laminate and Floor Coverings Collective Agreement between QSG and LIUNA Local 183 ("**Local 183**"), effective May 1, 2019 to April 30, 2022 (the "**Local 183 Flooring Collective Agreement**").[3] Schedule "C" and Schedule "D" of the Local 183 Flooring Collective Agreement provide for carpet and hardwood Pieceworkers, respectively. Article 4 of Schedule "C" and Article 7 of Schedule "E" set out the holdback regime for Pieceworkers, which has been maintained pre and post change in union representation (collectively, the "**Holdback Regime**"). Article 4 of Schedule "C" is nearly identical in language to Article 7 of Schedule "E".

9. Excerpts from Article 4 of Schedule "C" is set out below:

> **ARTICLE 4 - HOLDBACKACCOUNTS**
> …
>
> 4.02 The Company is entitled to create a holdback fund, not to exceed $2000, for each piecework/subcontractor crew engaged after the introduction of this Collective Agreement. The **holdback account** may be established by the Company as soon as pieceworker /subcontractor commences work for the Company. **The Company shall be entitled to deduct money owing to the pieceworker /subcontractor to fund the holdback account and shall clearly indicate such deductions on the pieceworker invoice**. However, in no circumstance shall the Company deduct more than fifteen percent (15%) of any invoice for holdback and/or back charges.
>
> …

[3] See *supra* note 1, the *Carpenters' Responding MR* at Exhibit "E".

> 4.04 **The Company acknowledges that the holdback accounts belong to the pieceworkers/subcontractors and that any such monies are held in trust by the Company. The Company will keep all holdback monies in a designated holdback account.** By no later than the 15th day of each month each **Company which maintains a holdback account for any pieceworker/subcontractor covered by this Collective Agreement shall provide a Holdback Summary Notice to the Union**. **The Holdback Summary Notice shall list the names of each pieceworkers/subcontractors for whom the Company has a holdback account; together with the balance of the holdback account** as of the last day of the month. The Holdback Summary Notice shall stipulate a final total of the holdback amounts held back by the Company for all pieceworkers/subcontractors.

10. Notably:

    a. the Holdback Regime describes a "designate holdback account";

    b. the funds within the holdback account are solely comprised of money owed to the Pieceworkers;

    c. the funds deducted from each Pieceworker are clearly indicated on each invoice;

    d. the funds within the holdback account "belong to the pieceworkers"; and

    e. the funds are "**held in trust by the Company**".

11. A portion of the wages payable to approximately 55 Pieceworkers were held back pursuant to the Holdback Regime described above. The total amount held back under the Holdback Regime is $95,028.00 (the "**Holdback Funds**").[4]

12. On May 2, 2023, the Ontario Labour Relations Board (OLRB) issued a Decision which declared construction employees of QSG, including Pieceworkers engaged in carpet, hardwood, and other floor covering services, are represented by the Carpenters' Union (the "**May 2023 OLRB Decision**").[5] The May 2023 OLRB Decision effectively changed union representation of all 55 above-noted Pieceworkers from Local 183 to the Carpenters' Union.

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[4] See the *Second Responding Motion Record of the Carpenters' Union*, dated September 21, 2023 at Exhibit "B".
[5] See *supra* note 1, the *Carpenters' Responding MR* at Exhibit "D".

13. Notwithstanding the change of union representation, QSG continues to retain the Holdback Funds on account of each Pieceworker. Whether the Pieceworkers were working under the Local 183 Flooring Collective Agreement or the Carpenters' Flooring Collective Agreement, the Holdback Funds belong to the same Pieceworkers and are held by QSG for the same Pieceworkers.

QSG CCAA APPLICATION

14. On August 3, 2023, QSG filed an Application under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, C. C-36 (the "**CCAA**") to facilitate the sale of the company and related DIP financing. The CCAA application was intended to stabilize interim operations and carryout a claims process and distribution of resulting proceeds.[6]

15. A going concern of the Carpenters' Union is whether the Holdback Funds will form part of QSG's assets during the CCAA restructuring process. The Carpenters' Union inquired whether the Holdback Funds are held separate and apart from QSG's assets as per QSG's obligations under the applicable collective agreements. As of the date of this factum, the Carpenters' Union has not received any confirmation from QSG that the Holdback Funds will be preserved on behalf of the Carpenter Pieceworkers.

PART III – ISSUES

16. The Carpenters' Union submits that primary issue is whether this Honourable Court should preserve the Holdback Funds; and if so, how?

PART IV – LAW AND ARGUMENT

[6] See the *Application Record of QSG*, dated August 3, 2023 at paragraph 32.

17. The Carpenters' Union adopts and relies on much of the law and argument put forth by the Labourers' International Union of North America, Local 183 ("**Local 183**") in its Factum served on September 20, 2023. The Carpenter Pieceworkers are in a substantially similar position to the Local 183 Pieceworkers in these CCAA proceedings. In order to avoid duplication of time and Court resources, the Carpenters' Union accepts and adopts certain portions of Local 183's law and argument, as specified below.

18. The Carpenters' Union specifically adopts and relies on the law and argument respecting the following positions:

a. Any dispute between QSG and Local 183 and/or the Carpenters' Union (collectively, the "**Unions**") about the Holdback must be dealt with in the grievance and arbitration process set out in the applicable collective agreements (paragraph 48 of Local 183's Factum);

b. Repayment of the Holdback Funds to the Pieceworkers is a post-filing obligation (paragraphs 49-57 of Local 183's Factum);

c. Collective agreements are to be enforced during CCAA proceedings (paragraphs 58-62 of Local 183's Factum);

d. The Court is permitted to preserve the Holdback Funds under Rule 45.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (paragraphs 63-67 of Local 183's Factum); and

e. There is a serious issue to be tried as to whether the Holdback Funds under the applicable collective agreements are trust funds (paragraphs 68-84 of Local 183's Factum); and,

f. This Court has discretion to lift the stay of proceedings as against the directors

and officers of QSG (paragraphs 95-105 of Local 183's Factum).

19. In addition to the above, the Carpenters' Union relies on the following fact-specific arguments.

CHANGE IN UNION REPRESENTATION

20. Specific to the circumstances of the Carpenter Pieceworkers in these CCAA proceedings is the change in union representation. The entirety of the Holdback Funds was deducted from the earned wages of Pieceworkers under the Local 183 Holdback Regime. On May 2, 2023, all 55 Pieceworkers who were previously represented by Local 183 became members of the Carpenters' Union. Notwithstanding the change in union representation, QSG never released any of the Holdback Funds to the Pieceworkers and the Holdback Funds remain held in trust by QSG.

21. Funds held in trust for the benefit of union members continue to be held in trust following a change in union representation.[7] In an Ontario arbitration decision, *AEU and PSAC (Retiree Benefits), Re*, employee benefits were collected from employees/union members. Under the applicable collective agreement, benefits were held in trust by the employer. Union representation for the employees changed but the benefits held in trust were not released. The question for the arbitrator was whether the benefits held in trust under the previous union's collective agreement continue to be held in trust for the same members represented by a new union under a new collective agreement. The arbitrator held that the benefits continue to be held in trust by the employer, as trustee, on behalf of its unionized employees, as beneficiaries, and notwithstanding the change in union representation. Notably, the arbitrator wrote:[8]

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[7] See *AEU and PSAC (Retiree Benefits), Re*, 2013 CarswellOnt 4489, 114 CLAS 155 [*AEU*].
[8] See *AEU*, *supra* note 8 at para 75.

> "…the best interpretation of the trust in this case is **one that ensures the rights of all employees who have contributed to the fund are protected. This interpretation is consistent with the understanding of a reasonable employee reading the collective agreements** and the various documents relating to the [benefits plan]" (emphasis added).

22. In the present situation, the Holdback Funds were collected from the Pieceworkers under the Local 183 Flooring Collective Agreement. The Holdback Regime within the Local 183 Flooring Collective Agreement establishes the creation of an express trust for the benefit of the Pieceworkers. Irrespective of the change in union representation following the May 2023 OLRB Decision, the Holdback Funds continue to be held in trust for the benefit of the Pieceworkers. The process for dealing with the Holdback Funds remains the same despite the change in union representation. Furthermore, it is consistent with the understanding of the Carpenter Pieceworkers that the portion of their earned wages which are held back by QSG continues to be held in trust.

23. Furthermore, in *AEU*, it was held that a "trust is irrevocable in the absence of an express power of revocation".[9] Therefore, QSG cannot extinguish the trust without express language in the applicable collective agreements, or an order by a labour arbitrator or the OLRB.

THE HOLDBACK FUNDS ARE HELD IN TRUST

24. As asserted in Local 183's Factum, there is a serious issue to be tried that the Holdback Funds are trust funds. Therefore, it is prudent for this Honourable Court to preserve the Holdback Funds pursuant to Rule 45.02 of the *Rules of Civil Procedure*. It is also necessary to explore the application of some of the facts specific to Carpenter Pieceworkers with respect to the three certainties of trust law.

25. The Holdback Regime intended for the creation of an express trust. In order for an express

[9] *Ibid* at para 78.

trust to exist, the three certainties of trust law must be found: [10]

I. Intention;

II. Subject-matter or trust

III. Object of trust

25. The legal characterization of the Holdback Funds must be determined by the intent of the parties to the collective agreement as evidenced by the plain meaning of the words used in the relevant sections of the agreements and considered in the context of the agreement as a whole.[11]

26. The Holdback Regime satisfies all three certainties of trust law.

27. First, the intention of the parties is evidenced by the express language in the applicable collective agreements. The Holdback Regime clearly states that the Holdback Funds are held in trust.

28. Second, the subject-matter, or trust property, is defined as monies not to exceed $2,000.00 on behalf of each Pieceworker. The Holdback Regime also provides that the Holdback Funds shall be held in a designated holdback account, which makes the funds clearly identifiable. Furthermore, the Holdback Funds are recorded on every Pieceworker invoice, which makes the funds traceable.

29. Third, the beneficiaries of the trust are the Pieceworkers. The Holdback Regime specifically states that the Holdback Funds belong to the Pieceworkers.

30. In the event that QSG has commingled the Holdback Funds with other its assets, the Pieceworkers' trust should not fail for lack of certainty. The Ontario Court of Appeal has found that commingling funds into a single account does not deprive the trust property of the required element of certainty of subject matter.[12] The Pieceworker invoices are time-stamped with a date,

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[10] Waters, *Law of Trusts in Canada*, 2nd ed. (1984), p. 140-141.
[11] See *Northwest Angle 33 First Nation. v. Razar Contracting Services Ltd.et al.*, 2023 ONSC 1233 at para 66.
[12] See *The Guarantee Company of North America v Royal Bank of Canada*, 2019 ONCA 9 at paras 58-87.

identify the individual pieceworker, and identify the wages that were deducted from to form the associated Holdback Funds.

PREJUDICE AND BALANCE OF CONVENIENCE

31. It is paramount to recognize the prejudice that would be inflicted upon the Carpenter Pieceworkers if the Holdback Funds owed to them became part of QSG's assets. Union Pieceworkers are undoubtedly the most vulnerable parties with a stake in these CCAA proceedings as they rely on these wages to support themselves and their families.

32. The Holdback Funds are essential income that was held back for the mere purpose of correcting potential deficiencies. The Holdback Funds never belonged to QSG. Attaching the Holdback Funds to QSG's assets would immediately deprive the Carpenter Pieceworkers of their rightful wages, causing substantial hardship, including potential financial instability, inability to meet basic needs, and potential harm to their overall well-being.

33. In assessing the balance of convenience, it is essential to consider the equities of the situation. On one hand, preserving the Holdback Funds for the Carpenter Pieceworkers ensures that those who have rightfully earned their wages are not unduly harmed. On the other hand, attaching the Holdback Funds to QSG's assets would be insignificant with respect to the total funds available to QSG. The amount of the Holdback Funds is $95,028.00. The DIP Financing provided to QSG is $7,000,000.00. Therefore, the Holdback Funds amount to less than 1.4% in comparison to the DIP Financing provided to QSG. Thus, there would be minimal prejudice to QSG and competing creditors if the Holdback Funds are reserved for the Carpenter Pieceworkers.

34. In light of the aforementioned points, it is clear that preserving the Holdback Funds owed to the Carpenter Pieceworkers is in the interest of the balance of convenience and the consideration

of potential prejudices.

35. If the Holdback Funds are not preserved for the benefit of the Carpenter Pieceworkers, then there is no incentive for the Pieceworkers to fix deficiencies noted on QSG projects. QSG would then be required to find new Pieceworkers, likely at a higher cost, to remediate any deficient work. Allowing QSG to attach the Holdback Funds to their assets would be tantamount to breaching the applicable collective agreements and thereby depriving QSG of able tradesmen and depriving Pieceworkers of their earned and unpaid wages.

PART V – ORDER REQUESTED

36. The Carpenters' Union respectfully requests the following:

a. An Order requiring QSG to confirm whether the Holdback Funds are being held separate and apart from the assets of QSG's estate, and to provide particulars of the same;

b. If the Holdback Funds are being held separate and apart:

    i. An Order that the Holdback Funds continue to be held separate and apart and do not form part of the assets of QSG's estate; and be distributed and used only as set out in the applicable collective agreements, and that this Order survives the termination of these CCAA proceedings and/or any future insolvency proceedings.

c. If the Holdback Funds are not being held in trust pursuant to the applicable collective agreements:

    i. An Order that the issue of interpretation of the Holdback provisions should be allowed to be dealt with by way of a new grievance (the

"**Grievance**");

ii. An Order to lift the stay to allow the Carpenters' Union to proceed against the directors and officers for breach of trust, breach of fiduciary duty and breach of the applicable collective agreements;

iii. An Order to create a reserve of $95,028.00 (the "**Reserve**") held separate and apart from the assets of QSG pending the final disposition of the Grievance;

iv. A Declaration that the Reserve does not form part of the assets of QSG's estate and is distributed upon further order of this Court after the conclusion of the Grievance;

v. An Order that the Reserve be funded from any and all accounts receivable collected during these proceedings and/or from any sales proceeds, and/or from the Deferred Purchase Price and the A/R Collections in excess of the Specified Amount (as those terms are defined at paragraph 17 of the Monitor's August 25, 2023 Second Supplemental Pre-Filing Report); and

vi. A Declaration that any purchaser of QSG's assets not be absolved of the liability for the Holdback.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of September, 2023.

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Joiners of America

2013 CarswellOnt 4489
Ontario Arbitration

AEU and PSAC (Retiree Benefits), Re

2013 CarswellOnt 4489, 114 C.L.A.S. 155

In the Matter of an arbitration regarding the Retiree Benefits Grievance (Policy Grievance), dated July 19, 2011

Alliance Employees Union of Canada, (the Union) and The Public Service Alliance of Canada, (the Employer) and Communications, Energy and Paperworkers Union of Canada Local 2025, (the Intervenor)

John Manwaring Member

Heard: June 19, 2012; October 5, 2012
Judgment: April 9, 2013
Docket: MPA/Z300062

Counsel: Fiona J. Campbell, Kristen Allen (Student-at-law), for Union
Charles Hofley, Lisa Mills, for Employer
J. James Nyman, for Intervenor

Table of Authorities

Cases considered by *John Manwaring Member*:

Becker v. Pettkus (1980), 1980 CarswellOnt 299, 1980 CarswellOnt 644, [1980] 2 S.C.R. 834, 117 D.L.R. (3d) 257, 34 N.R. 384, 8 E.T.R. 143, 19 R.F.L. (2d) 165 (S.C.C.) — referred to

Collins v. Ontario (Pension Commission) (1986), 1986 C.E.B. & P.G.R. 8019, 56 O.R. (2d) 274, 16 O.A.C. 24, 33 B.L.R. 265, 21 Admin. L.R. 186, *(*sub nom. *Collins v. Pension Commission (Ontario))* 31 D.L.R. (4th) 86, 1986 CarswellOnt 155 (Ont. Div. Ct.) — referred to

Electrical Industry of Ottawa Pension Plan v. Cybulski (2001), 2001 C.E.B. & P.G.R. 8396 (note), [2001] O.T.C. 835, 2001 CarswellOnt 4214, 30 C.C.P.B. 95 (Ont. S.C.J.) — followed

Howitt v. Howden Group Canada Ltd. (1999), 170 D.L.R. (4th) 423, 1999 CarswellOnt 659, 26 E.T.R. (2d) 1, 20 C.C.P.B. 250, 1999 C.E.B. & P.G.R. 8356 (headnote only) (Ont. C.A.) — referred to

IBEW, Local 804 v. IBEW, Local 120 (January 26, 2010), G.T. Surdykowski Member (Ont. Arb.) — referred to

Lewis v. Union of B.C. Performers (1996), 11 E.T.R. (2d) 137, 18 B.C.L.R. (3d) 382, [1996] 6 W.W.R. 588, 70 B.C.A.C. 99, 115 W.A.C. 99, 1996 CarswellBC 160 (B.C. C.A.) — considered

Nortel Networks Corp., Re (2010), 2010 ONSC 5584, 2010 CarswellOnt 8462, 85 C.C.P.B. 161 (Ont. S.C.J. [Commercial List]) — referred to

Provincial Plasterers' Benefit Trust Fund (Trustee of) v. Provincial Plasterers' Benefit Trust Fund (1990), 65 D.L.R. (4th) 723, 1990 CarswellOnt 475, 71 O.R. (2d) 558, 36 E.T.R. 157 (Ont. H.C.) — referred to

Schmidt v. Air Products of Canada Ltd. (1994), *(*sub nom. *Stearns Catalytic Pension Plans, Re)* 155 A.R. 81, *(*sub nom. *Stearns Catalytic Pension Plans, Re)* 73 W.A.C. 81, 1994 C.E.B. & P.G.R. 8173, 1994 CarswellAlta 138, [1995] O.P.L.R. 283, 1994 CarswellAlta 746, 3 C.C.P.B. 1, 20 Alta. L.R. (3d) 225, *(*sub nom. *Stearns Catalytic Pension Plans, Re)* 168 N.R. 81, [1994] 8 W.W.R. 305, 3 E.T.R. (2d) 1, 4 C.C.E.L. (2d) 1, [1994] 2 S.C.R. 611, 115 D.L.R. (4th) 631 (S.C.C.) — considered

Soulos v. Korkontzilas (1997), [1997] 2 S.C.R. 217, 212 N.R. 1, 1997 CarswellOnt 1490, 1997 CarswellOnt 1489, 9 R.P.R. (3d) 1, 46 C.B.R. (3d) 1, 17 E.T.R. (2d) 89, 32 O.R. (3d) 716 (headnote only), 146 D.L.R. (4th) 214, 100 O.A.C. 241 (S.C.C.) — referred to

***John Manwaring Member*:**

1 The Alliance Employees Union (AEU or the Union) filed a policy grievance dated July 19, 2011 alleging that the Public Service Staff Alliance (PSAC or the Employer) proposal that the retiree benefit obligations for individuals who were AEU Unit 1 members (whether they retire before or after June 14 th , 2010) would be the responsibility of the Communications, Energy and Paperworkers Union of Canada, Local 2025 (CEP 2025 or the Intervenor) and that the funds associated with such individuals would be allocated to the CEP 2025 division of the PSAC Staff Benefits Plan Trust Fund contravenes the provisions of the collective agreement including article 27 in its entirety and specifically, articles 27.08, 27.12 and 27.13. The AEU also relied on any other related and relevant articles of the collective agreement. I was appointed by agreement of the parties to hear this policy grievance.

2 At the outset of the hearing, CEP 2025 requested Intervenor status and the right to participate in the hearing. The Award in this case will clearly have an impact on the retirement benefit rights of the employees in Unit 1. CEP 2025 has been their bargaining agent since June 14, 2010. The other parties agreed to this request. CEP 2025 agreed to pay one-third of the costs of the arbitration.

Introduction

3 The Public Service Alliance of Canada (the Employer) has a complex organizational structure with national office and seven regional offices. It is organized into branches providing services to members. There are other components such the PSAC Holdings Ltd. that, for example, owns the PSAC building on Gilmore Street in Ottawa. This complexity is reflected in its relationships with the unions representing its employees. There are multiple bargaining units represented by different unions.

4 It is not necessary for this Award to describe either the organizational structure or the collective bargaining framework in great detail as neither has any consequences for the grievance. What is important is the framework for the collective bargaining that resulted in the creation of the Retirement Benefit Plan that is the focus of this policy grievance. The AEU was certified as bargaining agent for Unit 1 in 1978, for Unit 2 in 1979 and for Unit 10 in 1984. There are three separate certificates for three bargaining units. Unit 1 has approximately 100 members while Units 2 and 10 include fewer employees. At the time of the hearing, there were eight (8) employees in Unit 10. These units initially negotiated separately. However, in the 1990s, the AEU decided, for efficiency reasons, to negotiate one collective agreement that would apply to all three units. Each unit continued to ratify the collective agreement separately. In theory, if one unit rejected a collective agreement approved by the other two, the collective agreement would only bind the units that approved it. This has never happened.

5 In 2004, the AEU negotiated a Retirement Benefit Plan (RBP). The plan was identical for the three units. The RBP is described in detail below. For the moment, I only need say that the RBP is a self-insured plan paid for by active and retired employees. Prior to June 14, 2010, all active employees in Units 1, 2 and 10 contributed through payroll deductions to the negotiated RBP. Unit 1 Retirees who retired on or after May 1, 2004 also contributed to the RBP in the form of premiums.

6 The issue in this case arises because the PSAC employees in Unit 1 decided to replace their bargaining agent — the AEU — with another bargaining agent — the CEP 2025 — as of June 14, 2010, as is their legal right. Prior to this change, all active Unit 1 employees contributed to the Retirement Benefit Plan (RBP) negotiated by the AEU through payroll deductions. After June 14, 2010 with the certification of CEP 2025, Unit 1 employees were no longer covered by the collective agreement. Only a few extracts of the new collective agreement negotiated by CEP 2025 for Unit 1 were put into evidence but they show that the new bargaining agent negotiated a similar RBP for Unit 1.

7 After June 14, 2010, the Employer continued to make RBP payroll deductions for Unit 1 employees. There is no dispute as to the right to the monies paid into the RBP account (Division 30 of the PSAC Staff Benefits Plan Trust Fund) after June 14, 2010 in the name of Unit 1 employees. These monies are held for the benefit of current Unit 1 employees as well as Unit 1 employees who have retired since the date of the change of bargaining agent.

8 The dispute related to the monies accumulated in the RBP account (or Division 30 of the PSAC Staff Trust Fund) that represent the current balance of the contributions of Unit 1 employees and retirees between May 1, 2004 and June 14, 2010. According to the information provided by the parties, the amount in question is approximately two-thirds of $276,000. I will not make any finding as to the precise amount at stake because I was not asked to decide this issue. The Employer indicated that it has kept track of contributions on an individual basis and that it can determine the exact amount if necessary.

Issue

9 As will be seen below, the RBP is relatively complicated but the issue I have to decide is, as the AEU stated, relatively straightforward: are the funds deposited in Division 30 of the PSAC Staff Trust Fund as a result of payroll deductions from the wages of Unit 1 employees between May 1, 2004 and June 14, 2010 held for the sole benefit of AEU members or for the benefit of Unit 1 employees and retirees? If they are held for the benefit of AEU members, these monies will fund the RBP for Units 2 and 10, the bargaining units that the AEU represents. If they are held for the benefit of Unit 1 employees, these monies will fund the RBP for Unit 1 even though it is no longer represented by the AEU.

10 In order to determine the answer to this issue, I will first set out the relevant provisions of the collective agreements. Then I will describe the RBP. Once the context has been established, I will summarize the arguments of the parties. I will conclude by giving the reasons for my decision.

Decision

11 I conclude on the basis of the evidence and the arguments of the parties that the contributions of Unit 1 employees to the RBP deposited into Division 30 of the PSAC Staff Benefit Plans Trust Fund are held in trust. The trustee is the Employer, PSAC. The settlors of this trust are the active employees who contribute through payroll deductions and retired employees who contribute through the payment of premiums. The beneficiaries of the trust are persons employed in Unit 1 who retire after May 2, 2004, are between the ages of 55 and 65 and opt into the RBP. The beneficiaries are not solely AEU members. Therefore, the Employer proposal attribute that portion of the funds in the RBP account representing the balance of the contributions of active Unit 1 employees to the CEP 2025 Unit 1 account is not a breach of trust. Nor does the Employer proposal violate the collective agreement. Therefore, the grievance is dismissed.

Reference Note

12 The Employer and the AEU put into evidence two collective agreements. For ease of reference, the Collective Agreement between the AEU and the Employer signed July 8, 2005 that expired on April 30, 2007 will be referred to as Collective Agreement #1. The Collective Agreement signed by the AEU and the Employer on November 13, 2008 that expired on April 30, 2010 will be referred to as Collective Agreement #2.

13 The parties put into evidence three versions of the Plan Document for the Public Service Alliance of Canada AEU Retiree Benefit Arrangement. Plan Document #1 is dated September, 2005. Plan Document #2 is dated January 1, 2009 and Plan Document #3 is dated May 1, 2010. These documents are given to retirees at the time of retirement to help them understand their entitlements.

Relevant Collective Agreement Provisions

a) Collective Agreement #1

14 Article 27 of the Collective Agreement #1 is titled Welfare Plans and Benefits. The articles relating to the RBP are 27.12, 27.13 and 27.14. They read as follows:

> 27.12 a) An employee who terminates employment and who is eligible to receive an immediate or deferred pension in accordance with the PSAC pension regulations on or after May 1, 2004. and retiring prior to age 65 may elect to continue coverage in the extended health plan and will pay the total of 100% of the premiums which is equal to the rate that the

Employer pays on behalf of employees for the extended health benefit plus the amount paid by the employees identified in 27.13b). In addition, these employees may elect to continue coverage in the life insurance plan and will pay 100% of the premiums.

b) The Employer agrees to provide an employee who terminates employment and who is eligible to receive an immediate or deferred pension in accordance with the PSAC pension regulations on or after May 1, 2004. and at age 55, is entitled to receive an annual retirement allowance of $1.500 for a maximum of 10 years and up to age 65. This annual retirement allowance is deposited into an individual Health Care Spending Account (HCSA). The retiree may submit receipts in accordance with the provisions of the Income Tax Act, or receipts for the premiums of the PSAC extended health benefit plan or receipts for premiums for an external Retiree Benefit Plan and these expenses will be reimbursed from their individual HCSA up to the amount deposited. Any unused amounts at the end of twenty-four months shall revert and be deposited into an AEU Trust Fund Health Care Account to be used at the sole discretion of the AEU for health care expenditures.

c) The employee described in (a) may elect to participate in the PSAC extended health benefit and/or life insurance plan. This election must be made within 30 days of retirement date.

27.13 a) Employees will pay an amount that will be applied to the cost of retiree benefits and this amount will be paid through payroll deductions. The Employer will provide the Union with semi-annual reports on the funding of the PSAC extended health benefit plan.

b) Employee payroll deductions shall be the following amount until April 30, 2007. Payroll deductions from May 1, 2007 shall be the amounts determined by the funding review conducted by the Joint Retirement Benefits Committee. The funding review shall commence at least 90 days prior to April 30, 2007. The payroll deduction may change as a result of the funding review, The employer shall assume no funding liability as a result of this retiree benefit.

Bands 1-7: $17 per month

Bands 8-12: $27 per month

27.14 The Employer and the Union agree to establish a joint retirement benefits committee, The mandate of this committee will be in Memorandum of Agreement # 19.

(The subsections of articles 27.12 and 27.13 underlined above are underlined in the copy of Collective Agreement #1 put into evidence.)

15 Memorandum of Agreement #19 annexed to Collective Agreement #1 and also signed on July 8, 2005 creates, pursuant to article 27.14, a Joint Retirement Benefits Committee consisting of two union members and two employer representatives. It was given the mandate "... to explore options to fund the gap between the active and the retiree participants in the benefit plan, and to make recommendations prior to the expiry of ..." the Collective Agreement on April 30, 2007.

16 The AEU also referred to article 27.08 that states:

The Employer agrees that it will not amend the Welfare and Benefit Plans described in Article 27.01 (Dental Plan). 27.03 (Extended Health Care Plan) and 27.05 (Vision Care benefit) of the AEU collective agreement without prior negotiated consent of the Union.

(underlining in original)

17 Article 27.03 creates the Extended Health Care plan:

The Employer will pay one hundred percent (100%) if the premium for the current Extended Health Care Plan (equal to or better that the plan in effect at the date of signing of this Collective Agreement).

(underlining in original)

18 Article 8.03 states:

> All benefits which the employees now enjoy or receive shall continue and may be modified by mutual agreement between the Employer and the Union.

b) Collective Agreement#2

19 Article 27 of the Collective Agreement dated November 13, 2008 and expiring on April 30, 2010 deals with welfare plans and benefits. Article 27.12 creates the RBP:

> 27.12 a) An employee who terminates employment and who is eligible to receive an immediate or deferred pension in accordance with the PSAC pension regulations on or after May 1, 2004, and retiring prior to age 65 may elect to continue coverage in the extended health plan and will pay the total of 100% of the premiums which is equal to the rate that the Employer pays on behalf of employees for the extended health benefit plus the amount paid by the employees identified in 27.13b). In addition, these employees may elect to continue coverage in the life insurance plan and will pay 100% of the premiums.
>
> b) The Employer agrees to provide an employee who terminates employment and who is eligible to receive an immediate or deferred pension in accordance with the PSAC pension regulations on or after May 1, 2004, and at age 55, is entitled to receive an annual retirement allowance of $1.800 for a maximum of 10 years and up to age 65. This annual retirement allowance is deposited into an individual Health Care Spending Account (HCSA). The retiree may submit receipts in accordance with the provisions of the Income Tax Act, or receipts for the premiums of the PSAC extended health benefit plan or receipts for premiums for an external Retiree Benefit Plan and these expenses will be reimbursed from their individual HCSA up to the amount deposited. Any unused amounts at the end of twenty-four months shall revert and be deposited into an AEU Trust Fund Health Care Account to be used at the sole discretion of the AEU for health care expenditures.
>
> c) The employee described in (a) may elect to participate in the PSAC extended health benefit and/or life insurance plan. This election must be made within 30 days of retirement date.
>
> d) The Employer agrees to allow those persons who retire prior to the age of fifty-five, and who elect not to immediately opt in to the PSAC Benefit Plan, the right to elect, at age fifty-five (55). to join the PSAC Benefit Plan, as a retiree. This election must be provided to the Employer in writing within 30 days of the date the person turns fifty-five (55).
>
> 27.13 a) Employees will pay an amount that will be applied to the cost of retiree benefits and this amount will be paid through payroll deductions. The Employer will provide the Union with semi-annual reports on the funding of the PSAC extended health benefit plan.
>
> b) Effective the date of signing of this collective agreement, employee payroll deductions shall be equal to .4% of the employee's base salary (or salary at retirement).
>
> c) A joint Sub-committee of the UMC shall be established to periodically review the funding of the retiree benefit. The Payroll deduction may change as a result of the funding review. The employer shall assume no funding liability as a result of this retiree benefit.
>
> (The subsections of articles 27.12 and 27.13 underlined above are underlined in the copy of Collective Agreement #2 put into evidence. They highlight sections of articles 27.12 and 27.13 that were revised in collective bargaining)
>
> (Note: The reference in art. 27.13c) to the UMC relates to the Joint Union-Employer Committee established according to article 26.)

20 Article 27.08 of Collective Agreement #2 states:

> The Employer agrees that it will not amend the Welfare and Benefit Plans described in Article 27.01 (Dental Plan), 27.03 (Extended Health Care Plan) and 27.05 (Vision Care benefit) of the AEU collective agreement without prior negotiated consent of the Union.

21 Article 27.03 creates the Extended Health Care plan:

> The Employer will pay one hundred percent (100%) if the premium for the current Extended Health Care Plan (equal to or better that the plan in effect at the date of signing of this Collective Agreement).

22 Article 8.03 states:

> All benefits which the employees now enjoy or receive shall continue and may be modified by mutual agreement between the Employer and the Union.

c) Changes Between Collective Agreement #1 and Collective Agreement #2

23 The language and wording used in the two collective agreements is substantially the same. The major change in 2008 was to the formula for determining the amount of the payroll deduction. It shifted from a set amount — $17 or $27 — depending on the salary band (article 27.13b) of Collective Agreement #1) to a percentage (0.4%) of base salary (article 27.13b) of Collective agreement #2). Also article 27.14 of Collective Agreement #1 was incorporated into article 27.13 as subsection c). The Collective Agreement #2 does not include a Memorandum of Understanding creating, or renewing the mandate of, the Joint Retirement Benefits Committee. No changes were made to articles 27.03 and 27.08.

Retirement Benefit Plan

24 The Retirement Benefit Plan (RBP) was negotiated by the union and the employer in the negotiations leading to Collective Agreement #1. One of the incentives for these negotiations was the potential employer liability if the model of fully-funded lifetime retiree benefits was retained, a model which from the Employer perspective could not be sustained. The Employer and Union discussed the creation of a plan similar to that used by another bargaining unit represented by another union (CULE) that was union-administered. However, the Union rejected that suggestion, in part at least because it did not want responsibility for the administration of the plan. The RBP developed by the parties is not "off-the-shelf" but rather "made-to-measure". As a result, as Ms. Bonnie O'Keefe states in her memo to Ms. Luccette Charron dated January 22, 2010, "... the plan is difficult for employees and bargaining teams to understand."

25 According to the Retirement Benefits Plan (RBP) negotiated by the parties, an employee who retires at the age of 55 or later (on or after May 1, 2004) but before the age of 65 receives benefits that provide a bridge between the benefit plan available to all active employees (27.03) and the benefits provided by provincial drug coverage for which retirees become eligible at the age of 65. All coverage under the plan ceases at the date the retiree reaches the age of 65.

26 An employee who retires before the age of 55 is not eligible to participate in the Retirement Benefits Plan. He or she can opt to continue participation in the Employee Benefits Plan but must pay the premiums out of his or her pocket. However, he or she can opt into the plan on reaching the age of 55 (27.12d)). This election must be made within 30 days of his or her fiftieth birthday.

27 The coverage under the RBP is based on the extended health coverage provided to current active employees (article 27.03). The health coverage is extensive but does not include dental or vision. The plan is a form of self-insurance in that claims submitted are paid out of the funds accumulated from the various sources of revenue. The parties were very concerned about the long-term viability of the RBP. Given the rising cost of health care in general and of drugs in particular, the parties wanted to create a plan that could be sustained.

28 Under the RBP, all qualified retirees have an annually funded Health Care Spending Account (HCSA). The amount in this account is determined by negotiation. In Collective Agreement #1, the amount was set at $1500. In Collective Agreement #2, it was set at $1800.00. The amount has since been increased to $2200.

29 On retirement on, or after, age 55 but before 65, the retiree can elect to do one of two things with the money in her account. Firstly, she can opt for a "self-managed" account. This means that she will handle her own medical costs and submit receipts for eligible expenses, as defined under CRA rules, to the plan administrator who will reimburse those costs up to the maximum allowed under the plan. Not all retirees need the benefits provided by the RBP because they are covered under their spouse's benefit plans. Others may opt to purchase benefit plans from other providers. This first option provides the flexibility to take personal circumstances into consideration.

30 Secondly, the retiree can opt to continue his participation in the PSAC extended health plan at his own expense. If he chooses this option, the money in the HCSA is used to pay the health plan premium. The money in the account is not sufficient to cover that premium in its entirety. When the account is exhausted, the retiree must pay the balance of the premiums out of his own pocket.

31 The Employer's contribution to the funding of the RBP is the amount deposited in the HCSA. Some retirees opt for the "self-managed" approach. The funds in these accounts are not pooled with other funding streams unless they are unused at the end of twenty-four months (article 27.12b)). Otherwise, the RBP is funded through employee contributions in the form of compulsory payroll deductions and retiree premiums. The Collective Agreement is very clear that the Employer assumes no funding liability as a result of the negotiated RBP. (See article 27.13c) of Collective Agreement #2.) All claims are paid out of the pooled resources in the fund. If the income from the premiums and payroll deductions is not sufficient to cover liabilities under the plan such that the amount of total claims exceeds available funds, the Collective Agreement provides that the funding formula will have to change (article 27.15c)).

32 The funding for the RBP comes from four sources. First, the RBP is funded by payroll deductions from the salaries of all active employees in the bargaining unit. This reflects the principle of intergenerational solidarity by which active employees contribute to the benefits of retirees. At indicated above, the contributions were first defined as set amounts depending by salary band. This has now been changed to a contribution of 0.4% of base salary per employee. Second, retirees pay premiums drawing on their HCSA until their account is exhausted and then paying out of their own pocket. Third, any unused amounts remaining in the individual HCSAs at the end of twenty-four months are paid to the plan administrator and deposited into Division 30 of the PSAC Staff Benefit Plan Trust Fund. Fourth, the monies on deposit earn interest. The AEU does not contribute in any way to the funding of the RBP.

33 The Employer pays the amounts deducted from payroll to Coughlin & Associates Ltd, the administrator of the PSAC Staff Benefit Plans. The parties agreed that Coughlin is not a trustee. It administers the plans on the basis of a contract with the Employer. I was given an unsigned copy of the Consulting, Administration, and Claims Payment Services Agreement and it stipulates that Coughlin & Associates is the third-party administrator of the Employee Benefit Plan and Trust Fund. The monies received by Coughlin are deposited into Division 30 of the PSAC Staff Plan.

34 The contributions of active employees to the RBP fund are non-refundable. An employee who resigns her position at PSAC and takes employment elsewhere cannot ask that her contributions be reimbursed. An employee who leaves a position in a bargaining unit participating in the RBP and transfers to a position in another PSAC bargaining unit whose collective agreement does not include the RBP cannot ask that her contributions be reimbursed.

Arguments

35 According to the AEU, the issue is straightforward — can the Employer take money from a benefit plan set up for AEU retirees and use it to fund a different plan negotiated by a different bargaining agent and embodied in a different collective agreement? The AEU argued that the contributions deposited in Division 30 are held in trust for the exclusive benefit of AEU members and retirees. As such, the Employer proposal to attribute the monies to Unit 1 now composed of employees who are

no longer members of the AEU is contrary to articles 27.12 and 27.13 of the collective agreement and violates articles 8.03 and 27.08 that state that the Employee will not amend the benefits of employees without the agreement of the AEU.

36 The AEU RBP remains responsible for all Unit 1 retirees who retired between May 1, 2004 and June 14, 2010. The CEP plan for Unit 1 is a new independent plan responsible for all Unit 1 retirees as of June 14, 2010.

37 According to the AEU, the Division 30 is a trust. In order to establish a trust, it is necessary to establish the three certainties;

1. certainty of intention;

2. certainty of subject matter; and

3. certainty of objects or beneficiaries.

All three certainties are present in this case. The Employer and the AEU had the intention to create a trust. Intention to create a trust can be express or implied. There is no magic in the word "trust" and it is not necessary to use it. There is no requirement for a formal trustee. Intention must be derived from the context, or the factual and legal matrix, in which the plan was set up. Sometimes the intention will be obvious given the wording used to create the plan. In other cases, the required intention is implied from the documents, the structure of the plan and the way it is administered. Representations made to employees can be relevant in determining intention. Regard should be had in particular to the language used in collective agreements 1 and 2 and in Plan Documents 1, 2, and 3.

38 In this case, the intention is clearly present. The funds have been deposited into what is described in Plan Documents 1, 2, and 3 as the PSAC Staff Benefits Trust Fund, the PSAC Staff Plan in Trust and the AEU Retirees Division of the PSAC Benefit Plan Trust Fund Account. The Employer acknowledges that this is a trust. The trustee is either the Employer or Coughlin & Associates. The Plan Documents state clearly that the funds will be used exclusively for the purchase of benefits. The Collective Agreements #1 and #2 state that the RBP cannot be amended without the consent of the AEU. Ms. O'Keefe described this fund as a trust fund in her memorandum to Louise Charron, AEU President. In her PowerPoint presentation to the UTE component employees, she also described this fund as a trust. These are clear representations that Division 30 is a trust. Louise Charron relied on these representations when communicating with members.

39 The certainties of subject matter and objects or beneficiaries tend to be factual matters. It is necessary to determine if the monies held in trust are identified. There is no doubt that they are identified in this case because the monies have been paid to Coughlin & Associates and deposited into Division 30. There is a particular pot of money. There has been no commingling of funds.

40 The objects or beneficiaries are also identified. According to the AEU, the sole beneficiaries are AEU members. There are references in many places to AEU retirees, statements that the plan is limited to AEU retirees and references to the AEU retirement division. These statements show that the beneficiaries of the trust are AEU members only.

41 Therefore, the AEU argued that the Employer proposal to reallocate the funds contributed by Unit 1 employees when they were AEU members for the benefit of Unit 1 employees who are now CEP members violates the Collective Agreement and the trust.

42 The Employer took a very different approach to this case. The Employer agreed that the monies at stake in this case are held in trust. However, there is no express trust in the Collective Agreement and there is no trust instrument. The Collective Agreement in article 27.12 only mentions a trust for the unused portions of the HCSA. It does not create a trust for all contributions. It is still fair to say that there is a trust. The three certainties required to prove a trust are present. In the alternative, the Employer argued that if there is no trust because one of the certainties is not met, it would be appropriate to conclude that there is a constructive trust to avoid unjust enrichment.

43 The PSAC Staff Benefit Plan must be interpreted by accepted trust principles. The RBP is a unique plan and, because it is a form of self-insurance, it has one important feature — all active employees contribute to the fund but receive no benefit until retirement. It is important to take this feature into account when interpreting the trust.

44 The Employer's interest is to ensure that its employees have sustainable retirement benefits. The Employer is not suggesting that the monies be removed from the fund. The issue is how to divide the monies in the fund between three bargaining units. This is not a trust for AEU members solely. This is not a trust for the benefit of the AEU. It is a trust for PSAC employees who, prior to June 14, 2010, were represented by the same bargaining agent but are now represented by two different bargaining agents. The funds should be used for the benefit of all retirees. Unit 1 employees have changed bargaining agent but they have not changed their status under the fund. The funds in Division 30 should be attributed on a pro rata basis based on the historical contributions of the three units. This treats everyone in an even-handed fashion, and ensures that each bargaining unit is funded in a way to provide sustainable benefits for the foreseeable future. Assets should flow with liabilities. CEP 2025 is now responsible for Unit 1 benefits. The assets set aside to fund retirement benefits for Unit 1 employees should stay with Unit 1 and be used to meet Unit 1 liabilities.

45 In the 2004 negotiations, the AEU rejected a union-sponsored benefit plan comparable to the CULE plan where the union controls its terms. The AEU did not want that and should not get control over the fund indirectly. If the AEU interpretation is accepted, the benefit plan is only available to those who retire when an AEU member. This would mean that the AEU determines who is eligible to receive retirement benefits, giving the AEU the control that it rejected when negotiating the plan. The AEU rejected the CULE union-sponsored, union-controlled model and cannot now maintain that the AEU gets to determine who is eligible for benefits.

46 The disagreement with the AEU is over the description of the beneficiaries of the trust. Unit 1 employees made the contributions. AEU members from other bargaining units do not own the contributions made by former AEU members. If the AEU position is accepted, this would mean that if Unit 2 changed bargaining agent, the entire fund would then benefit Unit 10. If Units 2 and 10 changed bargaining agents, there would be a substantial fund with no beneficiaries.

47 The Employer takes the position that the beneficiaries of the trust are all PSAC employees who contribute to the RBP regardless of the bargaining agent. The goal of a sustainable retirement plan for the employees who contribute to that plan is best achieved through the allocation of the funds on a pro rata basis according to contribution history. Further, this treats all employees who contributed to the fund in an even-handed manner. Employees who change bargaining agent should not have to forfeit retirement security. Therefore, the grievance should be dismissed.

48 The Intervenor adopted the Employer's submissions. It pointed out that Unit 1 employees contributed approximately 70% of the funds in Division 30 for the purpose of securing their retirement benefits. The active employees contribute to this plan because the Employer assumed no liability for the benefits. The Employer's liability is limited to the HCSA amounts. In the absence of individual contributions by active employees, the plan would not be sustainable because liabilities would exceed income.

49 If the AEU position is accepted, AEU's current members will be receive a windfall because they will get the benefit of the Unit 1 contributions without assuming any of the corresponding liabilities. They would be placed in an extremely advantageous position. However, it makes no sense to conclude that the Employer established a RBP designed in such a way that employees who made substantial contributions would derive no benefit from those contributions even though they remain employees. This would be a clear case of unjust enrichment involving 1) enrichment, 2) deprivation and 3) absence of juridical reason.

50 The Intervenor argued that the AEU's interpretation of the trust should be rejected. The Collective Agreement does not create a trust except for a residual trust. The other documents referred to by the AEU do not create a trust. There was no reliance on these documents. It is not reasonable to conclude that the Employer had the intention of creating a trust that would disenfranchise a group of employees. Therefore, there was no intention to create a trust.

51 In reply, the AEU argued that both the Employer and the AEU accept that there is a trust in this case. The AEU and the Employer negotiated the AEU RBP. The Intervenor negotiated a new plan that could have been completely different. The Employer is now proposing to move funds from the benefit plan negotiated with AEU to another fund negotiated with the Intervenor. This violates the Collective Agreement and the trust.

52 It is not unfair to conclude that employees who contributed cannot benefit from the plan. Many people who contribute will not benefit such as those who resign before retirement, opt out of the RBP or work until 65. The same principle applies to a situation where employees change bargaining agents. Indeed some who contribute to Pension Plans will never see the benefits. This is how pension plans are set up. Therefore, there is no unjust enrichment.

55 The parties were not able to find any case-law directly on point. In making their arguments, the parties referred to the following cases. The AEU cited *Collins v. Ontario (Pension Commission)* (1986), 56 O.R. (2d) 274 (Ont. Div. Ct.); *Howitt v. Howden Group Canada Ltd.* (1999), 170 D.L.R. (4th) 423 (Ont. C.A.); *Lewis v. Union of B.C. Performers*, [1996] 6 W.W.R. 588 (B.C. C.A.); and *Schmidt v. Air Products of Canada Ltd.*, [1994] 2 S.C.R. 611 (S.C.C.) (Schmidt). The Employer referred to *Electrical Industry of Ottawa Pension Plan v. Cybulski*, [2001] O.J. No. 4593 (Ont. S.C.J.); *Provincial Plasterers' Benefit Trust Fund (Trustee of) v. Provincial Plasterers' Benefit Trust Fund*, [1990] O.J. No. 98, 71 O.R. (2d) 558 (Ont. H.C.); *Nortel Networks Corp., Re*, 2010 ONSC 5584 (Ont. S.C.J. [Commercial List]); and *IBEW, Local 804 v. IBEW, Local 120* [(January 26, 2010), G.T. Surdykowski Member (Ont. Arb.)], 2010 Canlii 4945 (Surdykowski). The Intervenor referred to *Becker v. Pettkus*, [1980] 2 S.C.R. 834 (S.C.C.) and *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 (S.C.C.).

Reasons

54 The onus is on the AEU as grievor to establish that the Employer's proposal to allocate funds contributed by active Unit 1 employees to the RBP prior to the change of bargaining agent to the Unit 1 RBP negotiated by the new bargaining agent, CEP 2025, breaches the Collective Agreement #2. The AEU argued that the Employer proposal breaches articles 8.03, 27.03, 27.12 and 17.13 because the unilateral action of the Employer changes the extended benefits plan and the RBP without the consent of the AEU. However, the Employer has not changed the Extended Benefit Plan in any way. Nor has it changed the RBP. It continues to apply the provisions of the collective agreement, make payroll deductions and pay the funds to Coughlin & Associates for deposit into Division 30 of the PSAC Staff Benefit Plan Trust Fund for the benefit of Units 2 and 10.

55 The issue I have to decide is what is to happen to funds contributed by Unit 1 employees to the RBP fund prior to the change of bargaining agent now that they have changed bargaining agent. Collective Agreement #2 contains no provisions dealing with this situation. In order to show that there is a breach of the Collective Agreement, the AEU has to establish a contractual or equitable limit on what the Employer can do with the funds.

56 The AEU and the Employer agree that there is a trust in this case. The Intervenor disagrees. If the Intervenor is right, the decision as to entitlement is purely a matter of contract interpretation. If the AEU and the Employer are right, the issue must be decided according to the principles of trust law (See *Schmidt*).

57 The choice between the "contract" or "trust" approach has consequences. As Cory, J, states in the *Schmidt* case at par. 47 "A pension fund is created pursuant to the plan, either by way of contract or by way of trust. Whether or not any given fund is subject to a trust is determined by the principles of trust law." He goes on in par. 48 to state that "... when a trust is created, the funds which form the corpus are subjected to the requirements of trust law. The terms of the pension plan are relevant to distribution issues only to the extent that those terms are incorporated by reference in the instrument which creates the trust. The contract or pension plan may influence the payment of trust funds but its terms cannot compel a result which is at odds with the existence of the trust." Therefore, if there is a trust, the terms of the collective agreement cannot "... compel a result at odds with the existence of the trust."

58 In order to prove that the parties have created a trust, they must establish the three certainties of a trust: 1) certainty of intention, 2) certainty of subject matter; and 3) certainty of objects or beneficiaries. (See *Nortel Networks Corp., Re*, cited above.) There is no controversy as to the requirements of a trust.

59 The argument that the parties did not create a trust in this case is premised on the absence of the required intention. There is no mention of a trust fund in either Collective Agreement #1 or #2. The only reference to a trust fund is found in article 27.12b) that states "Any unused amounts at the end of twenty-four months shall revert and be deposited into an AEU Trust Fund Health Care Account to be used at the sole discretion of the AEU for health care expenditures." This is a residual trust fund for the unused amounts in HCSAs at the end of the twenty-four month period. These amounts do not come from payroll deductions paid by active Unit 1 employees but rather from the HCSAs of retirees who choose not to participate in the RBP. There is no other reference in Collective Agreements #1 and #2 to a trust fund. The AEU did not ask the Employer to create an AEU Trust Fund Health Care Account. No such trust exists.

60 Further, the Employer and the AEU did not create any other trust fund for the sole benefit of AEU members. There is no trust instrument or document. There is no trustee. The Employer transfers the monies deducted from the salaries of active employees to Coughlin & Associates, the administrator of the benefit and retirement plans, who deposits them into Division 30. Both the Employer and the AEU agreed that Coughlin & Associates is not a trustee. Division 30 is an account that is part of a general fund called the PSAC Staff Benefit Plan Trust Fund. This trust fund is for the benefit of all eligible employees and not limited to AEU members. According to this argument, there is no evidence that the parties intended to create a trust for the sole benefit of AEU members.

61 A finding that there is no trust because the Employer and the AEU did not have the requisite intention would not mean that the Employer may allocate the funds in question at its own discretion. Active employees contribute to the RBP because they are required to do so under their collective agreement. They contribute for a specific purpose. When money is paid into a fund for a specific purpose under a contract, the Employer would breach the contract if it used those monies for a different purpose. However, the conclusion that there is no trust would not resolve the issue of the proper allocation of the funds. It would be necessary to interpret the collective agreement to determine the specific purposes for which the employees are required to make the payroll contributions. I would then be required to identify the intended beneficiaries of the fund, the same question that must be decided if there is a trust.

62 I find that the argument that there is no trust in this case is unpersuasive. While the Employer and the AEU did not take any specific actions to create a separate trust for the RBP and there is no trust instrument, the lack of formality is not in itself proof that there was no intention to create a trust. As the British Columbia Court of Appeal states at par. 23 in *Lewis v. Union of B.C. Performers*, cited above, "... the words "trust" and "trustee" are neither conclusive nor indispensible." In this case, the required intention can be implied from the structure of the RBP.

63 The plan is a form of self-insurance. This means that the settlor of the trust is neither the Employer nor the AEU. The Employer's contributions are limited to the funds deposited in the HCSA. The AEU makes no contribution to the financing of the plan. The RBP is financed primarily by the payroll deductions from the wages of active employees. Secondarily, it is financed by premiums paid by retirees who opt into the plan. This is a benefit that the employees are financing out of their wages. It is part of their wage package.

64 Employees would not agree to contribute to a plan if they thought that the monies deducted from their wages could be used for other purposes. The principle of intergenerational solidarity underlying the RBP is that active employees contribute to the fund today in the knowledge that their contributions will be used to ensure that the RBP will be sustainable. This means that, on retirement, the benefit will be available to them in accordance with plan eligibility rules.

65 It is reasonable in these circumstances to conclude that the implied intention is that the funds have been paid in order to finance the RBP. Because the funds are set aside for a specific purpose, there is the required intention to create a trust. This conclusion is consistent with the reasonable expectations of the employees who are the settlors of the trust through their contributions.

66 Furthermore, the payroll deductions are deposited in the PSAC Staff Benefit Plan Trust Fund. They are paid to Coughlin & Associates in accordance with the Consulting, Administration and Claims Payment Services Agreement which requires that

Coughlin & Associates deposit them into a trust account. No one argued before me that the PSAC Staff Benefit Plan Trust Fund is not a trust fund. Such an argument would not be plausible in the circumstances. Payment into a trust fund and account clearly indicates an intention to create a trust.

67 The second requirement of a trust — certainty of subject matter — is also established. There is no difficulty in identifying the funds that are held in trust. The payroll deductions are deposited into Division 30 of the PSAC Staff Benefit Plan Trust Fund. The Employer stated that records of individual contributions have been carefully maintained. The precise amount of the contributions of Unit 1 active employees between May 1, 2004 and June 14, 2010 can be identified without difficulty.

68 The third certainty — certainty of objects or beneficiaries — was the focus of the debate between the Employer and the AEU. They disagreed as to the definition of the beneficiaries of the trust. The AEU argues that the trust is for the sole benefit of AEU members. If an employee ceases to be a member of the AEU because she changes job or because there is a change of bargaining agent, she is no longer a beneficiary of the trust. The Employer argues that the beneficiaries of the trust are all employees in Unit 1 who have contributed through payroll deductions to the fund regardless of their union membership or the identity of their bargaining agent.

69 In the absence of trust documents or clear contractual provisions, certainty of objects or beneficiaries must be determined in light of the legal and factual matrix within which the trust was created. The AEU relies on the fact that it negotiated the RBP in Collective Agreements #1 and #2. When negotiating these collective agreements, its intention was to benefit its members. Collective agreements do not confer benefits on employees in other bargaining units represented by other bargaining agents.

70 The AEU also argues that Ms. O'Keefe made numerous references to monies paid to Coughlin & Associates in Trust for AEU Retiree Benefit Plan, to AEU Retiree Benefits, to the AEU account (See the December 2009 PowerPoint presentation on AEU Retiree Medical Benefits) and to the AEU Retiree Trust Fund (handwritten notes given by Ms. O'Keefe to Ms. Charron). Plan Documents #1, #2, and #3 also refer to the AEU Retirees Division. According to the AEU, these representations establish the intention to designate AEU members as sole beneficiaries of the trust fund.

71 However, in my opinion, neither the negotiation context nor Ms. O'Keefe's references are conclusive. When negotiating the collective agreement, the AEU undoubtedly intended to benefit its members but, at that time, the issue of the rights of beneficiaries in the case of a change of bargaining agent was not considered. There is no provision of the collective agreements #1 and #2 dealing with this situation. Further, the bargaining framework suggests that the relevant intention was to benefit Unit 1 employees. The AEU was certified as the bargaining agent for Unit 1 in 1978. The AEU decided to negotiate simultaneously for Units 1, 2 and 3 but the units ratify the agreement separately. Technically, there are three RBPs and each would constitute a separate trust. In any case, the AEU's intention is not determinative. The AEU is neither settler nor beneficiary of the trust. The settlors of the trust are the active employees. Their intention must be determined.

72 The references made in the various documents put into evidence are not so clear and unequivocal as to constitute representations that AEU members are the sole beneficiaries of the RBP. First, there is nothing in these documents that states clearly that only AEU members are eligible to receive benefits. The Plan Documents refer to the PSAC Staff Benefit Plan Trust Fund (see page 2 of Plan Document #3) and state that the AEU retiree plan will be administered under Division 30 of the PSAC Staff Plan in Trust. (page 3 of Plan Document #3). All employees are beneficiaries of this trust fund. An employee reading these documents would not necessarily understand that his right to benefit from the RBP to which he was contributing part of his wages was dependent on membership in the AEU given that all plans for all units are administered through this trust fund. He would not necessarily understand that the RBP funds would be held in a separate, more restrictive trust.

73 There is no evidence of the impact of these representations of Unit 1 employees. (See generally *Howitt v. Howden Group Canada Ltd.* and the *Schmidt* case at par. 138.) Ms. O'Keefe's PowerPoint presentation was used in discussions with employees of a different component (UTE) at a time when they were considering opting out of the RBP. In the January 22, 2010 memorandum to which this presentation was attached, there is no discussion of the trust aspects of the RBP or of the plan's beneficiaries. The Plan Documents are given to employees at the time of their retirement. Ms. O'Keefe's hand-written notes prepared to assist in making an oral presentation and shared only at the request of the AEU president were not intended to

define the trust. These documents were not distributed to all active employees in Unit 1. Thus, the evidence that the Employer made representations to employees that the money in the RBP would belong solely to AEU members is ambiguous at best.

74 In *Electrical Industry of Ottawa Pension Plan v. Cybulski*, cited above, Roy, J., states at par. 19 that "Trustees are obliged to interpret Trust Agreements in a way that is evenhanded as between beneficiaries." He also states at par. 20 that "Where the suggested interpretation of a pension document creates extra benefits for some members, it must be kept in mind that this extra benefit also creates a corresponding burden on others, including other beneficiaries ...". I find these comments helpful. An interpretation of the trust that ensures that all beneficiaries are treated in an even-handed way should be preferred to an interpretation that gives some beneficiaries greater benefits at the expense of others in the absence of clear language supporting the second interpretation.

75 In my opinion, the best interpretation of the trust in this case is one that ensures the rights of all employees who have contributed to the fund are protected. This interpretation is consistent with the understanding of a reasonable employee reading the collective agreements and the various documents relating to the RBP. It ensures that the employees who are contributing to the RBP have access to a sustainable RBP at the time of their retirement according to the plan's eligibility rules.

76 If the AEU interpretation was adopted the result would be that Units 2 and 10 would benefit from a well-funded plan but the Unit 1 RBP would be underfunded because Unit 1 contributions would be used for the benefit of Units 2 and 10. In the absence of clear language in the collective agreement or in trust documents that would favour the AEU interpretation, the Employer's interpretation avoids creating a funding surplus in the RBP of Units 2 and 10 and a funding deficit in the RBP of Unit 1 employees. The Employer's interpretation of the beneficiaries of the trust does not disadvantage Unit 2 and 10 employees who continue to get the full benefit of their contributions but ensures that Unit 1 employees also get the benefit of their contributions.

77 This conclusion is reinforced by the fact that the active employees in Unit 1 are the settlors of the trust. Justice Cory states in the *Schmidt* case that the contract cannot trump the principles of trust law. (See paragraph 57 above.) The AEU argument that the collective agreement only confers benefits on its members is accurate. However, the contract argument cannot not trump trust principles protecting the rights of settlors and beneficiaries. The AEU is neither a settlor nor a beneficiary. The Employer is neither a settlor nor a beneficiary but the trustee. The active employees are the settlors. The category of beneficiaries is both determined and contingent. Only active employees who retire between the ages of 55 and 65 and opt into the plan benefit from the trust. Current and future retirees are the beneficiaries of the RBP funds.

78 The right of the employees who are funding the plan to benefit from their contributions should not be limited unless very clear language in the trust documents so requires. In this case, there is no trust document and there is no language in the collective agreement that clearly requires the forfeiture of contributions with the change of bargaining agent. The fact that employees who resign their position or transfer to a position in another bargaining unit cannot ask for the reimbursement of their contributions is consistent with a trust. A trust is irrevocable in the absence of an express power of revocation (See the *Schmidt* case, cited above.) A settler cannot ask that the property put into trust be returned unless the trust instrument gives her that right. However, the fact that a settler cannot revoke the trust does not mean that beneficiaries can be deprived of the benefits of the trust without their consent.

79 If I had concluded that there was no trust in this case, I would have concluded that there was a constructive trust. In order to establish a constructive trust it is necessary to prove 1) that one party was enriched, 2) that this enrichment is at the expense of another party and 3) the absence of juridical reason. (See *Becker v. Pettkus* and *Soulos v. Korkontzilas*, cited above.) In this case, the employees of Units 2 and 10 would be enriched at the expense of Unit 1 employees. The AEU argued that the collective agreement establishes the juridical reason for this enrichment but, as stated above, no provision of the collective agreement states that Units 2 and 10 have a right to Unit 1 contributions. This conclusion is reinforced by the fact that there are technically three collective agreements for three separate units that ratify the agreement separately. It would be unjust to use funds contributed by a large group of employees for the benefit of a much smaller group of employees when there is no clear contract language supporting this result.

80 For all of the forgoing reasons, the Union's policy grievance is dismissed. I remain seized in the event that issues arise relating to the interpretation or implementation of this award.

I. INTRODUCTION

For a trust to come into existence, it must have three essential characteristics. As Lord Langdale M.R. remarked in *Knight v. Knight*,[1] in words adopted by Barker J. in *Renehan v. Malone*[2] and considered fundamental in common law Canada,[3] (1) the language of the alleged settlor must be imperative; (2) the subject-matter or trust property must be certain; (3) the objects of the trust must be certain. This means that the alleged settlor, whether he is giving the property on the terms of a trust or is transferring property on trust in exchange for consideration, must employ language which clearly shows his intention that the recipient should hold on trust. No trust exists if the recipient is to take absolutely, but he is merely put under a moral obligation as to what is to be done with the property. If such imperative language exists, it must, second, be shown that the settlor has so clearly described the property which is to be subject to the trust that it can be definitively ascertained.[4] Third, the objects of the trust must be equally and clearly delineated. There must be no uncertainty as to whether a person is, in fact, a beneficiary. If any one of these three certainties does not exist, the trust fails to come into existence or, to put it differently, is void.

The principle of the three certainties has been fundamental at least since the days of Lord Eldon, and no one today could seek to challenge the principle; the problems that exist concern the issue of what constitutes certainty.

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1 (1840), 3 Beav. 148, 49 E.R. 58 (Eng. Ch.).

2 (1897), 1 N.B. Eq. 506 (N.B. S.C. [In Equity]).

3 Numerous Canadian cases have referred to the three certainties as essential to the existence of an express trust. A few relatively recent examples include *Goodman Estate v. Geffen* (1987), (sub nom. *Goodman v. Geffen*) 52 Alta. L.R. (2d) 210 (Alta. Q.B.), reversed (1989), 68 Alta. L.R. (2d) 289 (Alta. C.A.), additional reasons at (1990), 80 Alta. L.R. (2d) 289 (Alta. C.A.), reversed (1991), 80 Alta. L.R. (2d) 293 (S.C.C.), leave to appeal allowed (1989), 101 A.R. 160 (note) (S.C.C.); *Quesnel & District Credit Union v. Smith* (1987), 19 B.C.L.R. (2d) 105 (B.C. C.A.); *Bank of Nova Scotia v. Société Générale (Canada)* (1988), 58 Alta. L.R. (2d) 193 (Alta. C.A.); *Faucher v. Tucker Estate* (1993), [1994] 2 W.W.R. 1 (Man. C.A.); *Howitt v. Howden Group Canada Ltd.* (1999), 170 D.L.R. (4th) 423, 26 E.T.R. (2d) 1 (Ont. C.A.); *Canada Trust Co. v. Price Waterhouse Ltd.* (2001), 288 A.R. 387 (Alta. Q.B.); *Arkay Casino Management & Equipment (1985) Ltd. v. Alberta (Attorney General)* (1998), 227 A.R. 280, (sub nom. *Arkay Casino Ltd. v. Alberta (Attorney General)*) 64 Alta. L.R. (3d) 368, [1999] 4 W.W.R. 334 (Alta. Q.B.); *Parsons v. Cook* (2004), 238 Nfld. & P.E.I.R. 16, 7 E.T.R. (3d) 92 (N.L. T.D.); *McMillan v. Hughes* (2004), 11 E.T.R. (3d) 290 (B.C. S.C.); *Saugestad v. Saugestad*, 2006 CarswellBC 3170, 28 E.T.R. (3d) 210 (B.C. S.C.) at para. 82, reversed in part on other grounds 2008 CarswellBC 123, 37 E.T.R. (3d) 19, 77 B.C.L.R. (4th) 170 (B.C. C.A.); *Re Graphicshoppe Ltd.*, 2005 CarswellOnt 7008, 78 O.R. (3d) 401 (Ont. C.A.) at para. 10; *VanDenBussche v. Craig VanDenBussche Trust (Trustee of)*, 2009 CarswellMan 557, (sub nom. *VanDenBussche v. VanDenBussche Trust*) 247 Man. R. (2d) 174, 55 E.T.R. (3d) 179 (Man. Q.B.); and *Sun Life Assurance Co. of Canada v. Taylor* (2008), 2008 CarswellSask 678, 322 Sask. R. 153, [2009] 2 W.W.R. 286 (Sask. Q.B.).

4 The property interest which each beneficiary is to take must also be clearly defined. See *infra*, Part III D.

II. CERTAINTY OF INTENTION

There is no need for any technical words or expressions for the creation of a trust.[5] Equity is concerned with discovering the intention to create a trust; provided it can be established that the transferor had such an intention,[6] a trust is set up. There are indeed certain evidentiary requirements which the law regards as mandatory for the transfer of certain kinds of property. For example, the *Statute of Frauds* in 1677, reproduced in common law Canada, required all trusts of land to be evidenced in writing, and under the wills legislation of the common law provinces and the territories a person's last will and testament must be in writing, which means, of course, that a testamentary trust must be in writing, and form part of the will.[7] But these are requirements of the law of evidence, not of the law of trusts, though, as we shall see, the effect of these statutory evidentiary rules has created a variety of problems for trust lawyers.[8]

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[5] See, e.g., *Royal Bank v. Eastern Trust Co.*, 32 C.B.R. 111, [1951] 3 D.L.R. 828 (P.E.I. T.D.) where it was noted that language need not be technical so long as the intention to create a trust can be inferred with certainty.

[6] For an unusual case, see *No. 382 v. Minister of National Revenue* (1957), 16 Tax A.B.C. 274, 57 D.T.C. 48 (Can. Tax App. Bd.) at 282-3 [Tax A.B.C.]. If tax avoidance is the object of a transaction, the courts are likely to be particularly concerned with whether there was indeed an intention to create a trust, or merely a desire to give that appearance. See *Minister of National Revenue v. Ablan Leon (1964) Ltd.*, [1976] C.T.C. 506, 76 D.T.C. 6280 (Fed. C.A.). The fact that the alleged settlor of a number of trusts, purportedly created at the same time, did not know all the details of the scheme in which he was taking part, and that the amount of property initially assigned to the trustees for each trust was minimal, were found to be evidence of a desire only to create appearances. See further, *infra*, chapter 6, note 2.

The question of certainty of intention to create a trust can arise in a wide variety of contexts. One such context that has been considered on several occasions occurs where an employer seeks access to surplus pension funds. If the pension plan is construed such that the employer's contributions are to be held in trust *for the employees* then the employer will not be able to take back surplus contributions. Cases dealing with this issue include *Burke v. Hudson's Bay Co.*, 2010 CarswellOnt 7451, [2010] S.J. No. 34 (S.C.C.); *Mifsud v. Owens Corning Canada Inc.* (2004), 41 C.C.P.B. 81 (Ont. S.C.J.); *Schmidt v. Air Products of Canada Ltd.*, [1994] 2 S.C.R. 611, 3 E.T.R. (2d) 1, 115 D.L.R. (4th) 631 (S.C.C.); *LaHave Equipment Ltd. v. Nova Scotia (Superintendent of Pensions)* (1994), 121 D.L.R. (4th) 67 (N.S. C.A.); *Bathgate v. National Hockey League Pension Society* (1992), 98 D.L.R. (4th) 326 (Ont. Gen. Div.), additional reasons at (1992), 98 D.L.R. (4th) 326 at 411 (Ont. Gen. Div.), affirmed (1994), 16 O.R. (3d) 761 (Ont. C.A.), leave to appeal refused (1994), 4 E.T.R. (2d) 36 (S.C.C.); *Howitt v. Howden Group Canada Ltd.* (1997), 152 D.L.R. (4th) 185 (Ont. Div. Ct.), leave to appeal allowed (1997), 1997 CarswellOnt 4662 (Ont. C.A.), affirmed (1999), 26 E.T.R. (2d) 1 (Ont. C.A.); *Central Guaranty Trust Co. (Liquidator of) v. Spectrum Pension Plan (5) (Administrator of)* (1997), (sub nom. *Central Guaranty Trust Co. (Liquidator of) v. Spectrum Pension Plan (5)*) 149 D.L.R. (4th) 200 (N.S. C.A.); *Crownx Inc. v. Edwards* (1994), 20 O.R. (3d) 710, 120 D.L.R. (4th) 270 (Ont. C.A.).

[7] On the requirement of writing, see chapter 7.

[8] But for the formal requirements in cases such as those involving wills or trusts of land, no formal document is required. A trust may arise simply from the words used (see, e.g., *Lev v. Lev* (1992), 40 R.F.L. (3d) 404 (Man. C.A.); and *Bathgate v. National Hockey League Pension Society* (1992), 98 D.L.R. (4th) 326 (Ont. Gen. Div.), additional reasons at (1992), 98 D.L.R. (4th) 326 at 411 (Ont. Gen. Div.), affirmed (1994), 16 O.R. (3d) 761 (Ont. C.A.), leave to appeal refused (1994), 4 E.T.R. (2d) 36 (S.C.C.)) or from conduct or circumstances (see note 9 below and the accompanying text). In

CITATION: Northwest Angle 33 First Nation. v. Razar Contracting Services Ltd.et al. 2023 ONSC 1233
COURT FILE NO.: CV-22-0462-00
DATE: February 21, 2023

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	
Northwest Angle 33 First Nation	*G. Banfai and D. Hashem*, for the Applicant
Applicant	
- and -	
Razar Contracting Services Ltd. *et al.* Pro-Gen (Thunder Bay) Inc. Canada Revenue Agency A.D. Hanslip Ltd. Delco Automation Inc. Long Beach Construction Ltd. Kako Investments Ltd. Crane Steel Structures Ltd. Ainsworth Inc. Agassiz Drilling (2000) Ltd. Bells Contracting 2018 Ltd. Bestway Rental and Sales Dominion Divers (2003) Ltd. Iconix Waterworks LP. 2343432 Ontario Inc. O/A Mike Neniska Contracting Mr. Gravel Inc. Stonhard Division, RPM Canada Breaking Ground Drilling and Blasting Inc.	*P. Halamandris*, for the Respondent, Razar Contracting Services Ltd. *N. Wainwright*, for Pro-Gen (Thunder Bay) Inc. *J. Blackett and F. D'Alessandro*, for Canada Revenue Agency *R. Lepere*, for A.D. Hanslip Ltd. *A. Imbessi*, for Delco Automation Inc. *R. Walichnowski*, for Long Beach Construction *D. Beynon*, for Solid Silver Construction Ltd. *K. Schade*, for Kako Investments Ltd. *A. Heal*, for Crane Steel Structures Ltd. *S. Daly*, for Agassiz Drilling (2000) Ltd. *C. Roy*, for Mr. Gravel Inc. *M. Smiley*, for Breaking Ground Drilling and Blasting Inc.
Respondents	
	HEARD: In Thunder Bay by Zoom January 23, 2023

Mr. Justice J.S. Fregeau

ENDORSEMENT

INTRODUCTION

[1] The applicant ("NWA 33" or the "First Nation") seeks an interpleader order pursuant to r. 43.02(1) of the *Rules of Civil Procedure* ordering the First Nation to pay the amount of $1,204,516.55 (the "Fund") into Court.

[2] The First Nation further seeks an order pursuant to r. 43.04(1) establishing a procedure for the orderly distribution of the Fund among the respondents in accordance with their entitlements, as may be found by the Court.

[3] The Fund is held by the First Nation in relation to a construction project that is ongoing on lands reserved to the First Nation. The respondent, Razar Contracting Services Ltd. ("Razar"), was the original general contractor on the construction project. The First Nation seeks to pay the Fund into Court and for a claims process to be established to ensure the orderly and equitable distribution of the Fund.

[4] The request for an interpleader order is opposed by the respondents Pro-Gen (Thunder Bay) Inc. ("Pro-Gen") and Canada Revenue Agency ("CRA"), two creditors of the Razar. Pro-Gen and CRA have asserted priority claims to the Fund and seek orders directing payment of their claims from the Fund prior to it being paid into Court.

[5] As a result of the positions taken by Pro-Gen and CRA, the First Nation also seeks an order determining its obligation to disburse from the Fund, prior to the Funds being paid into Court, the sums of:

1. $207,637.68 to Pro-Gen in response to the Pro-Gen Notice of Garnishment naming Razar as debtor and the First Nation as garnishee; and

2. $247,180.35, plus penalties and interest to the date of payment, claimed as owing by Razar to CRA in relation to unremitted payroll source deductions, in response to a Requirement to Pay ("RTP") issued by CRA.

[6] The remaining respondents, comprised of various suppliers and subcontractors of Razar, all of whom claim amounts they submit remain unpaid and owing to them by Razar, oppose the priority claims of Pro-Gen and CRA. These respondents endorse the request for the payment of the Fund into Court and support an order for a reasonable claims process to be established by the Court with respect to the distribution of the Fund.

BACKGROUND

[7] On February 5, 2020, the First Nation contracted with Razar for the construction of the Angle Inlet Water System (the "Contract") to provide safe drinking water to the residents of NWA 33 (the "Project"). Pursuant to the Contract, the First Nation was required to retain a 10% "statutory holdback" and a 2% "maintenance holdback" from progress payments owing to Razar.

[8] On May 18, 2022, the First Nation exercised its right under the contract and took the balance of the Contract work out of Razar's hands due to uncorrected defaults by Razar. Pursuant to the terms of the Contract, if any part of the work is taken out of Razar's hands, Razar's right to any further payment under the contract is extinguished.

[9] As of May 18, 2022, the accrued 10% statutory holdback was $1,003,768.80 and the accrued maintenance holdback was $200,752.75. The Fund consists of a total of these two amounts, being $1,204,516.55. The Project is ongoing and has not been deemed substantially complete.

[10] Starting in mid-2021, the Project Engineer, JR Cousins Consultants Ltd., began receiving written notices from various of Razar's suppliers and subcontractors who had not been paid by Razar. As of the hearing of this application, the amounts claimed in these notices were in the sum of $1,913,038.14.

[11] Pro-Gen was a subcontractor on the Project. Pro-Gen commenced a claim against Razar in relation to amounts owing for work performed on the project and obtained a default judgment on July 26, 2022 (the "Judgment"). On September 8, 2022, Pro-Gen obtained a Notice of Garnishment in the amount of $207,637.68 in relation to the Judgment and served it on the First Nation.

[12] On October 17, 2022, the First Nation was served with the CRA RTP, pursuant to which CRA demands payment of $281,473.77 from any amounts the First Nation would otherwise pay Razar.

[13] The amounts claimed by Pro-Gen and CRA are in addition to the $1,913,038.14 claimed by Razar's other suppliers and subcontractors.

[14] Razar has not commenced legal proceedings against the First Nation. Razar appeared at the hearing of this application but did not file any material or take any position on the issues, other than commenting on the terms of the draft order submitted by the First Nation.

THE ISSUES

1. Is an Order to interplead the Fund available in the circumstances?

2. Are the trust provisions of the *Construction Act*, R.S.O. 1990, c. C. 30 applicable to the Project, given that the Project was on a First Nation?

3. If the trust provisions of the *Construction Act* apply, is the Fund a trust fund pursuant to Part II of the *Construction Act*?

4. If not, is the Fund otherwise impressed with a trust for the benefit of Razar's unpaid subcontractors and suppliers?

5. Is Pro-Gen entitled to payment from the fund in priority to the other claimants pursuant to the Notice of Garnishment?

6. Is CRA entitled to payment from the fund in priority to the other claimants pursuant to the RTP?

THE POSITIONS OF THE PARTIES

Northwest Angle 33 First Nation

[15] The First Nation disclaims any beneficial interest in the Fund. The First Nation takes no position respecting the right of Pro-Gen and/or CRA to receive payment from the Fund in priority to any payment to other claimants.

[16] The First Nation seeks to interplead the Fund to allow for its orderly distribution among the respondents and any other subcontractors and suppliers of Razar who may come forward, in accordance with their entitlements as found by the Court.

[17] The First Nation submits that this fact situation falls squarely within the provisions of r. 43.02(1)(a) and (b) and that the remedy of interpleader, together with an order establishing a process to determine the rights of the claimants in a summary manner, is appropriate in all the circumstances.

Pro-Gen

[18] Pro-Gen submits that the *Construction Act* does not apply to construction projects on lands reserved for First Nations. Pro-Gen further submits that the trust provisions found in s. 8 of the *Construction Act* are inconsistent with s. 89(1) of the *Indian Act*, R.S.C. 1985, c. I-5, as am., and are therefore not applicable to the Fund.

[19] Pro-Gen submits that section 8 of the Construction Act does not apply to First Nations. Where an improvement is on lands reserved for First Nations, the imposition of the trust is the equivalent of seizing "the personal property of an Indian or a band situated on a reserve", which is inconsistent with and prohibited by s. 89(1) of the *Indian Act*, according to Pro-Gen.

[20] Pro-Gen contends that the Fund created by the Contract is not a trust fund, but rather a contractual holdback created for the benefit of subcontractors and suppliers. It allows the First Nation, in their discretion, to pay subcontractors and suppliers directly. Unless and until paid out, the contractual holdback remains the property of the First Nation, according to Pro-Gen.

[21] However, given that NWA 33 has disclaimed any beneficial interest in the Fund on this application, Pro-Gen submits that the Fund must be money or a debt payable to Razar pursuant to the contract and therefore subject to Pro-Gen's Notice of Garnishment in priority to the claims of the other respondents.

Canada Revenue Agency

[22] CRA requests that the Court determine, on this Application and in a summary manner, that CRA has priority to the Fund over any other party and that funds in the amount of $247,180.35, plus interest and penalties to the date of payment, be paid directly to CRA prior to the Fund being interpleaded.

[23] CRA submits that it issued an RTP to the First Nation on October 17, 2022, in the amount of $272,034.64, being the source withholding tax debt owed by Razar to CRA. The RTP directed the First Nation that any money otherwise payable to Razar, up to the amount set out in the RTP, must be paid to CRA. As of the date of the hearing of the application, the debt owed by Razar to CRA has been reduced to the lower figure set out above.

[24] CRA submits that source withholding amounts are deemed to be held in trust for His Majesty pursuant to s. 227(4) of the *Income Tax Act (Canada)* ("*ITA*"). CRA further submits

that s. 227(4.1) of the *ITA* provides that where a source withholding amount is not paid to the Crown, property of the taxpayer equal to the source withholding amount payable is subject to the trust under s. 227(4.1), forms no part of the property of the taxpayer and is beneficially owned by and payable to His Majesty in priority to all security interests.

[25] CRA contends that these provisions of the *ITA* confer a priority to CRA in respect of all property and assets of a tax debtor. CRA suggests that this priority includes the Fund. CRA submits that no creditor or claimant in this application can assert a claim that is equal to or greater than CRA's claim pursuant to the RTP. CRA submits that when it issued the RTP on October 17, 2022, it retained a priority over all other creditors with a claim against Razar.

[26] CRA submits that there is no authority supporting the submission that a trust created pursuant to s. 8 of the *Construction Act*, or any other provincial construction lien legislation, prevails over the deemed trust created by the *ITA* in respect of source withholding amounts.

[27] In any event, the doctrine of paramountcy dictates that the *ITA*, being federal legislation, prevails in the event of conflict with provincial legislation (the *Construction Act*) according to CRA.

[28] CRA submits that it is entitled to an order requiring payment of an amount out of the Fund equal to the balance of the unremitted and outstanding source deduction debt owing by Razar to CRA prior to the Fund being interpleaded and in priority to all other creditors and claimants in this application.

A.D. Hanslip Ltd.

[29] A.D. Hanslip ("Hanslip") is a subcontractor on the project and submits that it is owed $268,523.51 by Razar for work performed pursuant to a subcontract.

[30] Hanslip agrees with the position of the First Nation and submits that it is appropriate for the Fund to be interpleaded and for an orderly claims process to be determined by the Court to regulate the distribution of the Fund amongst claimants.

[31] Hanslip disputes the priority claims of Pro-Gen and CRA. Hanslip submits that the positions of both Pro-Gen and CRA are premised on the Fund being either the property of Razar or a debt payable to Razar. Hanslip submits that for the priority claims of Pro-Gen and CRA to succeed they must establish that this is in fact the case. Hanslip contends that the facts do not support that conclusion.

[32] Hanslip submits that pursuant to the terms of the Contract, the Fund is comprised of "statutory holdbacks" and "maintenance holdbacks" retained from progress payments and to be paid to Razar "not later than 60 days after the date the [P]roject has been deemed substantially complete".

[33] Hanslip submits that it is not in issue that the Project has not yet been deemed substantially complete. Hanslip contends that no portion of the Fund is therefore, according to the terms of the Contract, payable to Razar.

[34] Hanslip further submits that it is not in issue that the Project has been taken out of Razar's hands. Hanslip submits that, pursuant to the terms of the Contract, if the work is taken out of Razar's hands, Razar's right to any further payment that is due under the contract,

including any portion of the Fund, "is extinguished". As such, the Fund is not property of Razar or a debt payable to Razar by the First Nation and the First Nation therefore has no obligation to remit payment to Pro-Gen pursuant to the Notice of Garnishment, according to Hanslip.

[35] Hanslip submits that for CRA to be entitled to payment from the Fund in priority to the other respondents on the basis of a deemed trust pursuant to the provisions of the *ITA*, CRA must establish that the Fund is the property of Razar. Hanslip submits that until it has been determined that the Fund, or a portion of it, is the property of Razar or payable to Razar, CRA has no claim to the Fund and the First Nation has no obligation to remit payment to CRA from the Fund pursuant to the RTP.

[36] Hanslip contends that it and the other respondents are not asserting priority over CRA to the property of Razar. Hanslip submits that all claimants are beneficiaries of the Fund and that the total claims exceed the balance of the Fund such that it is highly unlikely that Razar will realize anything from the Fund. Hanslip does not dispute that CRA's deemed trust attaches to Razar's property. Hanslip's position is that it has not been established that the Fund, or any portion of it, is Razar's property and that until that determination is made, CRA's claim (and Pro-Gen's) is premature.

[37] In the alternative, Hanslip submits that the Fund constitutes a trust fund, pursuant to s. 8(1) of the *Construction Act*, for the benefit of subcontractors and suppliers who are owed money by Razar. As such, the Fund is neither the property of Razar nor a debt payable to Razar and is therefore not subject to the priority claims of Pro-Gen and CRA.

[38] Hanslip submits that the trust remedy in the *Construction Act* is a separate and distinct remedy applicable to the Project and the Fund independent of a right to lien, which is conceded to be unavailable in this case because the Project is on federal lands reserved for the First Nation. Hanslip submits that Ontario jurisprudence has established that s. 8(1) of the *Construction Act* applies to construction projects on federal lands held for First Nations.

[39] Hanslip disputes Pro-Gen's assertion that s. 8(1) of the *Construction Act* is inconsistent with s. 89(1) of the *Indian Act*. Hanslip notes that the First Nation has disclaimed any interest in the Fund and that, but for the claims of the Respondents in this application, the Fund is otherwise payable to Razar. Hanslip submits that the Fund is therefore not "the real or personal property of an Indian or a band situate on a reserve" within the meaning of s. 89(1) of the *Indian Act.*

[40] Hanslip also disputes CRA's assertion that the doctrine of paramountcy applies, such that CRA's claim to the fund pursuant to the *ITA* prevails over the provisions of the *Construction Act,* which deem the Fund to be a trust fund. Hanslip contends that CRA's deemed trust applies only to the property of Razar and that the Fund is not the property of Razar, such that there is no conflict between the *ITA* and *Construction Act* in these circumstances.

[41] Hanslip submits that the priority claims of Pro-Gen and CRA should be dismissed and that the First Nation's request to interplead the Fund should be granted and a claims process established.

Delco Automation Inc.

[42] Delco Automation Inc. ("Delco") supports the First Nation's request to interplead the Fund. Delco adopts and endorses the position of Hanslip and other respondents in opposing the priority claims of Pro-Gen and CRA.

[43] Delco opposes Pro-Gen's assertion that the *Construction Act* has no application to the Project. Delco submits that the *Construction Act* is a provincial statute of general application which applies to the Project except to the extent that it is inconsistent with the *Indian Act*. As a result, as acknowledged by all parties, the lien remedy in the *Construction Act* is not available to unpaid subcontractors and suppliers to the Project given the federal nature of the First Nations lands.

[44] However, Delco joins with Hanslip in submitting that Ontario jurisprudence confirms that the trust provisions of the *Construction Act* apply to construction projects on First Nations lands. Delco submits that the case law relied upon by Pro-Gen does not support the general proposition advanced by Pro-Gen that the *Construction Act* does not apply to projects on land reserved for First Nations. These authorities simply confirm that the lien remedy cannot be exercised in respect of reserve lands, according to Delco.

[45] Delco submits that the Fund is comprised of funds the First Nation is required to have retained as a contractual holdback from progress payments owing to Razar. As the First Nation has disclaimed any interest in the Fund, Delco submits that the Fund is comprised of amounts owing to Razar and which constitute a trust fund pursuant to Part II of the *Construction Act* for the benefit of Razar's unpaid subcontractors and suppliers.

[46] Granting the First Nation's request to interplead the Fund and to establish a procedure allowing entitled beneficiaries to share in the Fund would be a fair and expeditious manner of proceeding, according to Delco.

Long Beach Construction

[47] Long Beach Construction ("Long Beach") is a subcontractor to Razar and submits that it is owed approximately $437,000.00 on the Project. Long Beach takes no position with respect to the First Nation's interpleader application. Long Beach opposes the positions of Pro-Gen and CRA as to their entitlement to be paid from the Fund in priority to other respondents.

[48] Long Beach endorses the position of Hanslip opposing Pro-Gen's and CRA's priority claims to the Fund. Long Beach submits that the positions of Pro-Gen and CRA fail to recognize that the First Nation, pursuant to the express terms of the Contract, retains the Fund for the benefit of parties other than Razar.

[49] If it is ultimately determined that Razar is entitled to a portion of the Fund, it is only that portion of the Fund which is properly subject to Pro-Gen's Notice of Garnishment and CRA's RTP, according to Long Beach. Simply put, Long Beach submits that Pro-Gen's and CRA's entitlement to the Fund is only as strong as Razar's and unless and until it is determined that a portion of the Fund is Razar's property, the claims of Pro-Gen and CRA are premature.

Solid Silver Construction Ltd.

[50] Solid Silver Construction Ltd. ("Solid Silver") agrees with the First Nation that an order to interplead the Fund is appropriate and would lead to an equitable and effective resolution of this matter.

[51] Solid Silver adopts the position of Hanslip in relation to the priority claims of Pro-Gen and CRA. Solid Silver submits that the First Nation and Razar deliberately chose to use language in the Contract that mirrored the trust provisions of the *Construction Act*, specifically the requirement of a holdback from monies otherwise payable to Razar for progress payments for the benefit of subcontractors and suppliers.

[52] Solid Silver contends that the Fund is impressed with trust obligations pursuant to the Contract such that the Fund is trust property which cannot be subject to either Pro-Gen's Notice of Garnishment or CRA's RTP, unless and until a determination is made as to Razar's entitlement to the Fund, if any, in light of the claims of unpaid subcontractors and suppliers.

Kako Investments

[53] Kako Investments ("Kako") submits that it is owed approximately $30,000.00 by Razar for the supply of products to the Project. Kako agrees with the First Nation that the Fund should be interpleaded. Kako also adopts the position of Hanslip in opposition to the priority claims of Pro-Gen and CRA.

Crane Steel Structures Ltd.

[54] Crane Steel Structures Ltd. ("Crane Steel") agrees that the Fund should be interpleaded as requested by the First Nation. Crane Steel adopts and endorses the positions taken by other respondents in opposing the priority claims of Pro-Gen and CRA.

[55] Crane Steel submits that the Fund consists of unpaid trust funds within the meaning of s. 8 of the *Construction Act*, held for the benefit of unpaid subcontractors and suppliers to the Project. In the alternative, Crane Steel submits that the terms of the Contract create a contractual holdback from progress payments owing to Razar.

[56] In either case, the Fund is a trust fund and not the property of Razar and therefore not, at this time, subject to Pro-Gen's Notice of Garnishment or CRA's RTP, according to Crane Steel.

DISCUSSION

[57] Rule 43.02(1) provides:

> **Application or Motion under Subrule 43.02 (1)**
>
> **43.02** (1) A person may seek an interpleader order (Form 43A) in respect of property if,
>
> (a) two or more other persons have made adverse claims in respect of the property; and
>
> (b) the first-named person,
>
> (i) claims no beneficial interest in the property, other than a lien for costs, fees or expenses, and
>
> (ii) is willing to deposit the property with the court or dispose of it as the court directs. O. Reg. 42/05, s. 3.

[58] Rule 43.04(1) provides:

Disposition

Powers of Court

43.04 (1) On the hearing of an application or motion for an interpleader order, the court may,

(a) order that the applicant or moving party deposit the property with an officer of the court, sell it as the court directs or, in the case of money, pay it into court to await the outcome of a specified proceeding;

(b) declare that, on compliance with an order under clause (a), the liability of the applicant or moving party in respect of the property or its proceeds is extinguished; and

(c) order that the costs of the applicant or moving party be paid out of the property or its proceeds. O. Reg. 42/05, s. 3.

[59] Sections 88 and 89(1) of the *Indian Act* provide:

General provincial laws applicable to Indians

88 Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or the *First Nations Fiscal Management Act*, or with any order, rule, regulation or law of a band made under those Acts, and except to the extent that those provincial laws make provision for any matter for which provision is made by or under those Acts.

Restriction on mortgage, seizure, etc., of property on reserve

89 (1) Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band.

[60] Sections 8(1) and (2) of the *Construction Act* provide:

Contractor's and subcontractor's trust
Amounts received a trust

8 (1) All amounts,

(a) owing to a contractor or subcontractor, whether or not due or payable; or

(b) received by a contractor or subcontractor,

on account of the contract or subcontract price of an improvement constitute a trust fund for the benefit of the subcontractors and other persons who have supplied services or materials to the improvement who are owed amounts by the contractor or subcontractor. R.S.O. 1990, c. C.30, s. 8 (1); 2017, c. 24, s. 66.

Obligations as trustee

(2) The contractor or subcontractor is the trustee of the trust fund created by subsection (1) and the contractor or subcontractor shall not appropriate or convert any part of the fund to the contractor's or subcontractor's own use or to any use inconsistent with the trust until all subcontractors and other persons who supply services or materials to the improvement are paid all amounts related to the improvement owed to them by the contractor or subcontractor. R.S.O. 1990, c. C.30, s. 8 (2); 2017, c. 24, s. 66.

[61] Sections 227(4) and (4.1) of the *ITA* provide:

Trust for moneys deducted

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

Extension of trust

(4.1) Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person and property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for a security interest (as defined in subsection 224(1.3)) would be property of the person, equal in value to the amount so deemed to be held in trust is deemed

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

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

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

[62] The relevant terms of the Contract between the First Nation and Razar are as follows:

TP4 TIME OF PAYMENT

.4 Subject to TP1 and TP4.5 the Band Council shall, not later than 30 days after the receipt by the Engineer of a progress claim referred to in TP4.2, pay the Contractor

.1 an amount that is equal to the value that is indicated in the progress report referred to in TP4.3.2 if a labour and material payment bond has been furnished by the Contractor, minus:

.1 an amount that is equal to 10% of the amount referred to in TP4.3.2, which will be retained as a statutory holdback to be paid to the Contractor not later than 60 days after the date that the project has been deemed substantially complete, in described herein; and

.2 an amount that is equal to 2% of the amount referred to in TP4.3.2, which will be retained as a maintenance holdback to be paid to the Contractor not later than 30 days after the end of the warranty period described in GC32.1.2.

GC 38 TAKING THE WORK OUT OF THE CONTRACTOR'S HANDS

.1 The Band Council may, at its sole discretion, by giving a notice in writing to the Contractor in accordance with GC11, take all or any part of the work out of the Contractor's hands, and may employ such means as it sees fit to have the work completed if the Contractor

.1 has not, within six days of the Band Council or the Engineer giving notice to the Contractor in writing in accordance with GC11, remedied any delay in the commencement or any default in the diligent performance of the work to the satisfaction of the Engineer;

.2 has defaulted in the completion of any part of the work within the time fixed for its completion by the contract;

.3 has become insolvent;

.4 has committed an act of bankruptcy;

.5 has abandoned the work;

.6 has made an assignment of the contract without the consent required by GC3.1; or

.7 has otherwise failed to observe or perform any of the provisions of the contract.

.2 If the whole or any part of the work is taken out of the Contractor's hands pursuant to GC38.1,

.1 the Contractor's right to any further payment that is due or accruing due under the contract is, subject only to GC38.4, extinguished, and

.2 the Contractor is liable to pay the Band Council, upon demand, an amount that is equal to the amount of all loss and damage incurred or sustained by the Band Council in respect of the Contractor's failure to complete the work.

GC 42 CLAIMS AGAINST AND OBLIGATIONS OF THE CONTRACTOR OR SUBCONTRACTOR

.5 To the extent that the circumstances of the work being performed for the Band Council permit, the Contractor shall comply with all laws in force in the Province or Territory where the work is being performed relating to payment period, mandatory holdbacks, and creation and enforcement of mechanics' liens, builders' liens or similar legislation or in the Province of Quebec, the law relating to privileges.

[63] On May 18, 2022, NWA 33 exercised its right under section GC 38.1 of the Contract and took the balance of the work on the Project out of Razar's hands. As a result, pursuant to section GC 38.2 of the Contract, Razar's right to any further payment due or accruing due under the Contract was extinguished. Razar has not demanded any further payment from the First Nation subsequent to the work being taken out of its hands, including any claim to the Fund the First Nation now seeks to interplead.

[64] As of May 18, 2022, the date the work was taken out of Razar's hands, the total of the "statutory holdback" and the "maintenance holdback" required to be retained by the First Nation pursuant to section TP4.4.1 of the Contract was $1,204,516.55. The Project has not been deemed substantially complete and the First Nation disclaims any beneficial interest in the Fund.

[65] I accept the submissions of the respondents opposing the priority claims of Pro-Gen and CRA that the legal characterization of the Fund is determinative of their right to priority. If the Fund is the property of Razar or a debt payable to Razar, Pro-Gen's and CRA's claims to priority prevail. If the Fund is not the property of Razar or a debt payable to Razar, their claims to priority fail at this stage in the proceedings.

[66] In my view, the legal characterization of the Fund must be determined by the intent of the parties to the Contract as evidenced by the plain meaning of the words used in the relevant sections of the Contract, considered in the context of the Contract as a whole.

[67] The First Nation and Razar agreed, as set out in section TP4.4 of the Contract, that the progress payment obligations of the First Nation to Razar would be subject to a 10% "statutory holdback" and a 2% "maintenance holdback". The First Nation and Razar further agreed, as set out in section TP4.4.1, that a condition precedent to the First Nation's obligation to pay the Fund to Razar, and to Razar's right to demand payment from the Fund, was that the Project be deemed substantially complete, which has not yet occurred.

[68] In my view, it is clear from the express terms of the Contract that the First Nation and Razar intended the Fund to be retained by the First Nation and to remain available as a holdback to unpaid subcontractors and suppliers of Razar pending substantial completion of the Project.

[69] The First Nation and Razar also agreed, as set out in section GC 38.2, that if work on the Project is taken out of Razar's hands, Razar's right to any further payment from the Fund is extinguished. The First Nation exercised its rights under the Contract and the work was taken out of Razar's hands on May 18, 2022.

[70] As a result, Razar's right to *any payment* from the Fund was extinguished on that date. In my view, the parties clearly intended that Razar would have no claim to the Fund in the event the Project was taken out of Razar's hands prior to substantial completion.

[71] I find that it is reasonable to infer that the parties intended, should Razar's right to any payment from the Fund be extinguished pursuant to section GC 38.2, that the Fund, being a holdback from progress payments pending substantial completion, be available for unpaid subcontractors and suppliers of Razar. To suggest that the Fund is, in these circumstances, either the property of Razar or a debt owing to Razar, is contrary to the clear intention of the parties, in my opinion.

[72] I find that pursuant to the terms of the Contract and specifically the First Nation's exercise of their contractual rights pursuant to section GC 38, the Fund is neither the property of Razar nor a debt payable to Razar.

[73] In the event I am incorrect in my conclusion that the parties intended the Fund to be a contractual holdback and not the property of Razar or a debt payable to Razar pending substantial completion, I also conclude that the Fund is a trust fund for the benefit of the unpaid subcontractors and suppliers of Razar, pursuant to section 8(1) of the *Construction Act*.

[74] I reject the submission of Pro-Gen that the trust provisions of the *Construction Act* do not apply to the Fund because the Project is on federal lands reserved for First Nations. Wright J. considered this issue in *Skukowski v. James Conci Holdings Inc.*, 1998 CarswellOnt 4119 (Ont. Gen. Div.). Wright J. held that section 8 of the *Construction Act* was provincial legislation of general application and therefore applicable on First Nations pursuant to section 88 of the *Indian Act.* He further held that a trust claim can be advanced in relation to an improvement on federal land, including land reserved for First Nations. In my view, *Skukowski* remains good law.

[75] I also reject Pro-Gen's submission that the application of the lien provisions of the *Construction Act* are inconsistent with section 89(1) of the *Indian Act* and therefore inapplicable to the Fund. Pro-Gen argues that the imposition of a trust on the Fund pursuant to section 8 of the *Construction Act* amounts to a seizure of the personal property of an "Indian or band" and is therefore prohibited by section 89(1) of the *Indian Act.*

[76] However, on this Application the First Nation has expressly disclaimed any interest in the Fund. Further, the intention of the parties to the Contract is that the Fund be held by the First Nation as a holdback for the benefit of the unpaid subcontractors and suppliers of Razar's, not that ownership of the Fund somehow revert to the First Nation. In any event, in the circumstances of this case, I fail to see how the Fund can be characterized as the personal property of the First Nation within the meaning of section 89(1) of the *Indian Act* and therefore exempt from the application of section 8 of the *Construction Act.*

[77] Rule 60.08(1) provides that a creditor under an order for the payment of money may enforce the order by garnishment of debts payable to the debtor by other persons. For Pro-Gen

to be entitled to priority pursuant to the Notice of Garnishment, it must establish that the Fund is a debt payable to Razar by the First Nation.

[78] For the reasons stated above, the Fund is neither the property of Razar nor a debt payable to Razar by the First Nation. The First Nation therefore is not required to remit payment to Pro-Gen pursuant to Pro-Gen's Notice of Garnishment.

[79] It is not in dispute that Razar is indebted to CRA on account of unremitted source deductions. CRA submits that the deemed trust provisions of section 227 of the *ITA* confer a priority to CRA in respect of all property and assets of Razar as a tax debtor. This submission is consistent with *First Vancouver Finance v. M.N.R.,* 2002 SCC 49 cited by CRA and is not disputed by any of the respondents.

[80] CRA further submits, citing *Royal Bank of Canada v. Saskatchewan Power Corp et al,* 1990 DTC 6330, that its claim to priority on account of unremitted source deductions takes priority over the secured creditors of Razar. Once again, that submission is not in dispute.

[81] However, CRA's claim to the Fund in priority to all other claimants is premised, as is Pro-Gen's, on the Fund being property of Razar or a debt payable to Razar. CRA is only entitled to the Fund if the Fund, or a portion of it, is found to be payable to Razar. Absent a determination of Razar's entitlement to the Fund, if any, CRA's (and Pro-Gen's) entitlement to the Fund cannot be determined.

[82] The British Columbia Supreme Court's decision in *PCL Constructors Westcoast Inc. v. Norex Civil Contractors Inc.* 2009 BCSC 95 ("*Norex*") dealt with this very issue.

[83] The contract provided that Norex would undertake construction services for PCL. Norex hired subcontractors to carry out the work under the contract. Before the work was completed, Norex defaulted on its obligations and PCL terminated the contract.

[84] Before the contract was terminated, PCL paid Norex about $1,100,000. PCL held back 10% of this amount pursuant to British Columbia's *Builder's Lien Act,* S.B.C. 1997, c. 45. Two of Norex's subcontractors filed liens seeking payment from this holdback amount.

[85] As in this case, Norex owed CRA for unpaid tax liabilities. CRA's position was that the holdback is subject to a deemed trust pursuant to the *ITA.* Since the amount of the deemed trust exceeded the holdback, CRA submitted that it was owed the entire holdback. One of the central issues before the court was how the holdback provisions of British Columbia's *Builder's Lien Act* interact with the deemed trust provisions in ss. 227(4) and (4.1) of the *ITA.*

[86] The court determined that a holdback does not create an ordinary trust. Instead, the holdback creates a fund to which the contractor, for whom it is held in trust, "*may* eventually become entitled" (*Norex* at para 62). The CRA's deemed trust could not result in CRA having a greater beneficial ownership than the contractor. The deemed trust *only gives the CRA a beneficial right to the property of the contractor which the contractor actually holds.* If the contractor has no claim to any portion of the holdback, neither does the CRA (*Norex* at para. 79).

[87] The ratio of *Norex* has also been adopted in Ontario: see *Thompson v. Carleton University,* 2019 ONSC 4336 at para 7, 50.

[88] In my view, the legal principles in *Norex* apply to the present case. Razar owes CRA for tax liabilities. CRA seeks payment from Razar out of the Fund. It has not yet been established that any part of the fund is Razar's property. Therefore, CRA's claim cannot succeed at this time.

[89] As set out above, as a result of the First Nation exercising its rights pursuant to section GC 38 of the Contract, Razar's claim to the Fund has been extinguished. The Fund is therefore not the property of Razar and the First Nation has no obligation to honour the RTP from the Fund in priority to other claimants prior to the Fund being paid into Court pursuant to an interpleader order.

[90] I accept the submission of Long Beach that granting Pro-Gen and CRA priority to the Fund prior to the Fund being paid into Court runs the risk of Pro-Gen and/or CRA potentially receiving funds to which they do not have a legal right. I further accept the submission of Long Beach that accepting Pro-Gen's and CRA's priority claims would negate any purpose or function of the holdback provisions of the Contract, which clearly cannot have been the intention of the First Nation and Razar when the Contract was entered into.

[91] For the reasons set out above, the priority claims to the Fund advanced by Pro-Gen and CRA, pursuant to their Notice of Garnishment and RTP respectively, are dismissed.

[92] An interpleader order shall issue permitting and requiring the First Nation to deposit the Fund, being the amount of $1,204,526.55, with the Accountant of this Court.

[93] The First Nation has filed a draft order for the court's consideration. The respondents, but for Razar, are content with the terms of the draft order filed.

[94] Razar takes issue with para. 14 of the draft order, specifically the right of the First Nation to retain the balance of the Fund, if any, remaining after the determination of the rights of the respondents to the Fund. Razar submits that this is inconsistent with r. 43.02(1) and with the position of the First Nation on this application. I agree. That provision in para. 14 of the draft order shall be deleted.

[95] The First Nation shall file an amended draft order for my consideration, consistent with these reasons and my decision as to the priority claims of Pro-Gen and CRA. For greater certainty:

1. Paragraphs 4 and 5 shall be deleted;
2. Paragraph 9 shall be amended such that the date set out therein is 4 weeks subsequent to the date of release of this decision;
3. Paragraph 14 shall be amended as indicated above; and
4. Providing for the costs of the application as set out below.

[96] The First Nation is entitled to their reasonable costs, on a partial indemnity basis, in respect of this application. Pursuant to r. 43.04(1)(c)**,** I order that the First Nation's costs, as fixed by this court, shall constitute a first charge upon the Fund.

[97] The First Nation shall file Costs Submissions, not to exceed three pages, exclusive of its Bill of Costs and Costs Outline, within 14 days of the release of this decision. The First Nation's Costs Submissions shall be served on all respondents who made submissions on this application.

[98] These respondents shall file responding submissions, preferably through a single representative respondent, as to the costs claimed by the First Nation, within 10 days following receipt of the First Nation's Costs submissions.

[99] The costs of the respondents, if any should be claimed, are reserved to be addressed at the summary hearing.

"Original signed by"
The Honourable Mr. Justice J.S. Fregeau

Released: February 21, 2023

CITATION: Northwest Angle 33 First Nation v. Razar Contracting Services Ltd. et al., 2023 ONSC 1233
COURT FILE NO.: CV-22-0462-00
DATE: February 21, 2023

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

Northwest Angle 33 First Nation

Applicant

- and –

Razar Contracting Services Ltd. et al.

Respondents

ENDORSEMENT

Fregeau J.

Released: February 21, 2023

/dg

The Guarantee Company of North America et al. v. Royal Bank of Canada et al.

[Indexed as: Guarantee Company of North America v. Royal Bank of Canada]

Ontario Reports

Court of Appeal for Ontario

Hoy A.C.J.O., Doherty, Sharpe, L.B. Roberts and Fairburn JJ.A.

January 14, 2019

144 O.R. (3d) 225 | 2019 ONCA 9

Case Summary

Bankruptcy and insolvency — Property of bankrupt — Trusts — Provincially created statutory trusts preserving bankrupt's assets from distribution to ordinary creditors under s. 67(1)(a) of Bankruptcy and Insolvency Act so long as statutory trust satisfies general principles of trust law — Statutory trust created by s. 8(1) of Construction Lien Act ("CLA") satisfying requirement for certainty of intention — Debts for construction project choses in action that supply requisite certainty of subject matter — Commingling of CLA funds from various projects not negating certainty of subject matter where funds were identifiable and traceable — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 67(1) (a) — Construction Lien Act, R.S.O. 1990, c. C.30, s. 8(1).

Constitutional law — Distribution of legislative authority — Paramountcy — No operational conflict existing between s. 8(1) of Construction Lien Act and s. 67(1)(a) of Bankruptcy and Insolvency Act — Doctrine of paramountcy not applying — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 67(1)(a) — Construction Lien Act, R.S.O. 1990, c. C.30, s. 8(1).

Construction law — Trust fund — Trust funds under s. 8(1) of Construction Lien Act excluded from distribution to bankrupt contractor's creditors pursuant to s. 67(1)(a) of Bankruptcy and Insolvency Act — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 67(1)(a) — Construction Lien Act, R.S.O. 1990, c. C.30, s. 8(1).

A priority dispute arose between Royal, a secured creditor of a bankrupt construction contractor, GCNA, a bond company and secured creditor of the bankrupt, and certain employees of the bankrupt, represented by the unions. RBC took the position that funds paid to the receiver by owners that were "trust funds" within the meaning of s. 8 of the *Construction Lien Act* formed part of the bankrupt's estate available to creditors. GCNA and the unions took the position that the funds were trust funds that had to be excluded from the bankrupt's property pursuant to s. 67(1)(*a*) of the *Bankruptcy and Insolvency Act* ("*BIA*"). The receiver brought a motion for advice

and directions to resolve the dispute. The motion judge found that the funds were not excluded under s. 67(1)(*a*) and were available for distribution to creditors. GCNA appealed.

Held, the appeal should be allowed.

The decision of the Supreme Court of Canada in *British Columbia v. Henfrey Samson Belair Ltd.* contemplates provincially created statutory trusts preserving assets from distribution to ordinary creditors under s. 67(1)(*a*) of the *BIA*, provided the statutory trust satisfies the general principles of trust law. A statutory provision that deems a trust into existence can give rise to the certainty of intention required to create a trust. The statutory trust created by s. 8(1) of the *CLA* satisfies the requirement for certainty of intention. There is no operational conflict [page226] between s. 8(1) of the *CLA* and s. 67(1) (*b*) of the *BIA*. Section 8(1) is not in pith and substance legislation in relation to bankruptcy and insolvency. Rather, it is an integral part of the scheme of holdbacks, liens and trusts, designed to protect the rights and interests of those engaged in the construction industry and to avoid the unjust enrichment of those higher up the construction pyramid. That purpose exists outside the bankruptcy context. In the absence of an operational conflict, the doctrine of paramountcy did not apply. Debts for a project subject to the *CLA* are choses in action that supply the required certainty of subject matter. The commingling of *CLA* funds from various projects in this case did not mean that the required certainty of subject matter was not present because the funds remained identifiable and traceable. The funds were not property of the bankrupt available for distribution to the bankrupt's creditors.

British Columbia v. Henfrey Samson Belair Ltd., [1989] 2 S.C.R. 24, [1989] S.C.J. No. 78, 59 D.L.R. (4th) 726, 97 N.R. 61, [1989] 5 W.W.R. 577, J.E. 89-1098, 38 B.C.L.R. (2d) 145, 75 C.B.R. (N.S.) 1, 34 E.T.R. 1, 2 T.C.T. 4263; *Deloitte Haskins & Sells Ltd. v. Alberta (Workers' Compensation Board)*, [1985] 1 S.C.R. 785, [1985] S.C.J. No. 35, 19 D.L.R. (4th) 577, 60 N.R. 81, [1985] 4 W.W.R. 481, 38 Alta. L.R. (2d) 169, 63 A.R. 321, 55 C.B.R. (N.S.) 241, 31 A.C.W.S. (2d) 297; *Duraco Window Industries (Sask.) Ltd. v. Factory Window & Door Ltd. (Trustee of)*, [1995] S.J. No. 452, [1995] 9 W.W.R. 498, 135 Sask. R. 235, 34 C.B.R. (3d) 196, 23 C.L.R. (2d) 239, 57 A.C.W.S. (3d) 541 (Q.B.); *Federal Business Development Bank v. Québec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 1061, [1988] S.C.J. No. 44, 50 D.L.R. (4th) 577, 84 N.R. 308, J.E. 88-745, 14 Q.A.C. 140, 68 C.B.R. (N.S.) 209, EYB 1988-67858, 9 A.C.W.S. (3d) 397; *GMAC Commercial Credit Corp. -- Canada v. TCT Logistics Inc*. (2005), 74 O.R. (3d) 382, [2005] O.J. No. 589, 194 O.A.C. 360, 7 C.B.R. (5th) 202, 137 A.C.W.S. (3d) 247 (C.A.); *Husky Oil Operations Ltd. v. M.N.R*., [1995] 3 S.C.R. 453, [1995] S.C.J. No. 77, 128 D.L.R. (4th) 1, 188 N.R. 1, [1995] 10 W.W.R. 161, J.E. 95-1945, 137 Sask. R. 81, 35 C.B.R. (3d) 1, 24 C.L.R. (2d) 131, EYB 1995-67967, 58 A.C.W.S. (3d) 182; *Iona Contractors Ltd. v. Guarantee Co. of North America*, [2015] A.J. No. 787, 2015 ABCA 240, 19 Alta. L.R. (6th) 87, 26 C.B.R. (6th) 173, 44 C.L.R. (4th) 165, [2015] 9 W.W.R. 469, 387 D.L.R. (4th) 67, 602 A.R. 295, 255 A.C.W.S. (3d) 30 [Leave to appeal to S.C.C. refused [2015] S.C.C.A. No. 404]; *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, [2006] O.J. No. 4152, 275 D.L.R. (4th) 132, 26 B.L.R. (4th) 43, 25 C.B.R. (5th) 176, 56 C.C.P.B. 1, 151 A.C.W.S. (3d) 1004 (C.A.) [Leave to appeal to S.C.C. granted [2006] S.C.C.A. No. 490, appeal discontinued on October 31, 2007]; *Quebec (Deputy Minister of Revenue) v. Rainville*, [1980] 1 S.C.R. 35, [1979] S.C.J. No. 93, 105 D.L.R. (3d) 270, 30 N.R. 24, 33 C.B.R. (N.S.) 301, [1979] 3 A.C.W.S. 707; *Roscoe Enterprises Ltd. v. Wasscon*

Construction Inc., [1998] S.J. No. 487, 161 D.L.R. (4th) 725, [1999] 2 W.W.R. 564, 169 Sask. R. 240, 41 C.L.R. (2d) 54, 80 A.C.W.S. (3d) 1147 (Q.B.), **consd**

British Columbia v. National Bank of Canada, [1994] B.C.J. No. 2584, 119 D.L.R. (4th) 669, [1995] 2 W.W.R. 305, 52 B.C.A.C. 180, 99 B.C.L.R. (2d) 358, 30 C.B.R. (3d) 215, 6 E.T.R. (2d) 109, 51 A.C.W.S. (3d) 766 (C.A.) [Leave to appeal to S.C.C. refused [1995] S.C.C.A. No. 18, 34 C.B.R. (3d) 302], **distd**

Other cases referred to

0409725 B.C. Ltd. (Re), [2015] B.C.J. No. 714, 2015 BCSC 561, 3 P.P.S.A.C. (4th) 278; *Alberta (Attorney General) v. Moloney*, [2015] 3 S.C.R. 327, [2015] S.C.J. No. 51, 2015 SCC 51, 476 N.R. 318, 85 M.V.R. (6th) 37, 2015EXP-3202, J.E. 2015-1777, EYB 2015-258559, [2015] 12 W.W.R. 1, 29 C.B.R. (6th) 173, 22 Alta. L.R. (6th) 287, 391 D.L.R. (4th) 189, 606 A.R. 123, 259 A.C.W.S. (3d) 20; *Angus v. Port Hope (Municipality)*, [2017] O.J. No. 3481, 2017 ONCA 566, 28 E.T.R. (4th) 169, 64 M.P.L.R. (5th) 202, 280 A.C.W.S. (3d) 626 [Leave to appeal to S.C.C. refused [2017] S.C.C.A. No. 382]; [page227] *Bank of Montreal v. Kappeler Masonry Corp*., [2017] O.J. No. 5928, 2017 ONSC 6760 (S.C.J.); *B.M.P. Global Distribution Inc. v. Bank of Nova Scotia*, [2009] 1 S.C.R. 504, [2009] S.C.J. No. 15, 2009 SCC 15, [2009] 8 W.W.R. 428, 94 B.C.L.R. (4th) 1, 268 B.C.A.C. 1, 386 N.R. 296, EYB 2009-156805, J.E. 2009-613, 304 D.L.R. (4th) 292, 58 B.L.R. (4th) 1; *Citadel General Assurance Co. v. Lloyds Bank Canada*, [1997] 3 S.C.R. 805, [1997] S.C.J. No. 92, 152 D.L.R. (4th) 411, 219 N.R. 323, J.E. 97-2034, 66 Alta. L.R. (3d) 241, 206 A.R. 321, 35 B.L.R. (2d) 153, 47 C.C.L.I. (2d) 153, 19 E.T.R. (2d) 93, 74 A.C.W.S. (3d) 898; *Dietrich Steel Ltd. v. Shar-Dee Towers (1987) Ltd*. (1999), 42 O.R. (3d) 749, [1999] O.J. No. 245, 170 D.L.R. (4th) 475, 119 O.A.C. 69, 45 C.L.R. (2d) 178, 85 A.C.W.S. (3d) 750 (C.A.); *Fanshawe College of Applied Arts and Technology v. AU Optronics Corp.* (2016), 129 O.R. (3d) 391, [2016] O.J. No. 779, 2016 ONCA 131 (in Chambers); *Graphicshoppe Ltd. (Re)* (2005), 78 O.R. (3d) 401, [2005] O.J. No. 5184, 260 DL.R. (4th) 713, 205 O.A.C. 113, 15 C.B.R. (5th) 207, 49 C.C.P.B. 63, 21 E.T.R (3d) 1, 144 A.C.W.S. (3d) 355 (C.A.); *Hallett's Estate (Re)* (1880), 13 Ch. D. 696 (C.A.); *Imor Capital Corp. v. Horizon Commercial Development Corp*., [2018] A.J. No. 43, 2018 ABQB 39, 64 Alta. L.R. (6th) 385, 56 C.B.R. (6th) 323, [2018] 4 W.W.R. 601, 287 A.C.W.S. (3d) 425; *John M.M. Troup Ltd. v. Royal Bank of Canada*, [1962] S.C.R. 487, [1962] S.C.J. No. 29, 34 D.L.R. (2d) 556, 3 C.B.R. (N.S.) 224; *Kayford Ltd. (Re)*, [1975] 1 W.L.R. 279, [1975] 1 All E.R. 604 (Ch.); *Kel-Greg Homes Inc. (Re)*, [2015] N.S.J. No. 417, 2015 NSSC 274, 49 C.L.R. (4th) 322, 365 N.S.R. (2d) 274, 259 A.C.W.S. (3d) 217; *Kerr Interior Systems Ltd. v. Kenroc Building Materials Co*., [2009] A.J. No. 675, 2009 ABCA 240, 80 C.L.R. (3d) 169, [2009] 8 W.W.R. 1, 54 C.B.R. (5th) 173, 6 Alta. L.R. (5th) 279, 457 A.R. 274; *Lipkin Gorman v. Karpnale Ltd*., [1991] 3 W.L.R. 10, [1991] 2 A.C. 548 (H.L.); *Minneapolis-Honeywell Regulator Co. v. Empire Brass Manufacturing Co*., [1955] S.C.R. 694, [1955] S.C.J. No. 48, [1955] 3 D.L.R. 561; *Norame Inc. (Re)* (2008), 90 O.R. (3d) 303, [2008] O.J. No. 1580, 2008 ONCA 319, 235 O.A.C. 273, 41 C.B.R. (5th) 179, 166 A.C.W.S. (3d) 1041; *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny*, [2009] 3 S.C.R. 286, [2009] S.C.J. No. 49, 2009 SCC 49, 312 D.L.R. (4th) 577, 2009 G.T.C. 2036, EYB 2009-165544, J.E. 2009-1958, 394 N.R. 368, 60 C.B.R. (5th) 1, 182 A.C.W.S. (3d) 261; *R. v. Perka*, [1984] 2 S.C.R. 232, [1984] S.C.J. No. 40, 13 D.L.R. (4th) 1, 55 N.R. 1, [1984] 6 W.W.R. 289, J.E. 84-1013, 28

B.C.L.R. (2d) 205, 14 C.C.C. (3d) 385, 42 C.R. (3d) 113, EYB 1984-149792, 13 W.C.B. 33; *Royal Bank of Canada v. A-1 Asphalt Maintenance Ltd*., [2018] O.J. No. 911, 2018 ONSC 1123, 77 C.L.R. (4th) 149, 57 C.B.R. (6th) 103, 289 A.C.W.S. (3d) 17 (S.C.J.); *Royal Bank of Canada v. Atlas Block Co*., [2014] O.J. No. 2936, 2014 ONSC 3062, 15 C.B.R. (6th) 272, 37 C.L.R. (4th) 286, 241 A.C.W.S. (3d) 532 (S.C.J.); *Royal Bank of Canada v. Sparrow Electric Corp*., [1997] 1 S.C.R. 411, [1997] S.C.J. No. 25, 143 D.L.R. (4th) 385, 208 N.R. 161, [1997] 2 W.W.R. 457, J.E. 97-523, 46 Alta. L.R. (3d) 87, 193 A.R. 321, 44 C.B.R. (3d) 1, 8 C.P.C. (4th) 68, 97 D.T.C. 5089, 12 P.P.S.A.C. (2d) 68, 69 A.C.W.S. (3d) 295; *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd*., [2015] 3 S.C.R. 419, [2015] S.C.J. No. 53, 2015 SCC 53, 2015EXP-3203, J.E. 2015-1778, EYB 2015-258560, 31 C.B.R. (6th) 1, 391 D.L.R. (4th) 383, [2016] 1 W.W.R. 423, 477 N.R. 26, 467 Sask. R. 1, 259 A.C.W.S. (3d) 215; *Sunview Doors Ltd. v. Pappas* (2010), 101 O.R. (3d) 285, [2010] O.J. No. 1043, 2010 ONCA 198, 265 O.A.C. 363, 317 D.L.R. (4th) 471, 63 C.B.R. (5th) 159, 87 C.L.R. (3d) 163, 186 A.C.W.S. (3d) 605

Statutes referred to

An Act to amend the Bankruptcy Act and to amend the Income Tax Act in consequence thereof, S.C. 1992, c. 27, s. 33

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

Bankruptcy Act, R.S.C. 1970, c. B-3 [rep.], s. 47(*a*)

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 67 [as am.], (1)(*a*), (2), (3), 72 [as am.], 136(1) (*d*) [page228]

Builders' Lien Act, R.S.A. 2000, c. B-7, s. 22

Constitution Act, 1867, 30 & 31 Vict., c. 3, ss. 91(21), 92(13)

Construction Act,R.S.O. 1990, c. C.30, s. 8 [as am.], (1) [as am.], (a), (b), (2) [as am.]

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), s. 227(4), (5)

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

Social Service Tax Act,R.S.B.C. 1979, c. 388 [rep.], s. 18

The Builders' Lien Act, S.S. 1984-85-86, c. B-7.1 [as am.]

Tobacco Tax Act, R.S.B.C. 1979, c. 404 [rep.], s. 15

Truck Transportation Act, R.S.O. 1990, c. T.22 [rep.]

Rules and regulations referred to

Load Brokers, O. Reg. 556/92 [rep.], s. 15

Authorities referred to

Gillese, Eileen E., *The Law of Trusts*, 3rd ed. (Toronto: Irwin Law, 2014)

McGuinness, Kevin, "Trust Obligations Under the *Construction Lien Act*" (1994), 15 C.L.R. 208

Ontario Ministry of the Attorney General, *Discussion Paper on the Draft Construction Lien Act* (Toronto: Ministry of the Attorney General, November 1980)

Ontario Ministry of the Attorney General, *Report of the Attorney General's Advisory Committee on the Draft Construction Lien Act* (Toronto: Ministry of the Attorney General, April 1982)

Oosterhoff, A.H., Robert Chambers and Mitchell McInnes, *Oosterhoff on Trusts: Text, Commentary and Materials*, 8th ed. (Toronto: Carswell, 2014)

Sullivan, Ruth, *Sullivan on the Construction of Statutes*, 6th ed. (Toronto: LexisNexis, 2014)

Waters, Donovan W.M., Mark R. Gillen and Lionel D. Smith, *Waters' Law of Trusts in Canada*, 4th ed. (Toronto: Carswell, 2012)

APPEAL from the order of B.A. Conway J., [2018] O.J. No. 911, 2018 ONSC 1123, 57 C.B.R. (6th) 103 (S.C.J.) on a motion for advice and directions.

Josh Hunter and *Hayley Pitcher*, for appellant Attorney General of Ontario.

Matthew B. Lerner and *Scott M.J. Rollwagen*, for appellant Guarantee Company of North America.

Sam Babe and *Miranda Spence*, for respondent Royal Bank of Canada.

Raymond M. Slattery, for respondent A-1 Asphalt Maintenance Ltd. (receiver of).

Paul Cavalluzzo and *Alex St. John*, for intervenor LIUNA Local 183.

The judgment of the court was delivered by

[1] **SHARPE J.A.**: — This appeal arises from a priority dispute between certain creditors and employees of a bankrupt company, A-1 Asphalt Maintenance Ltd. ("A-1"). The issue is whether the funds owing to or received by a bankrupt contractor and [page229] impressed with a statutory trust created by s. 8(1) of the *Construction Lien Act*,R.S.O. 1990, c. C.30 ("*CLA*") are

excluded from distribution to the contractor's creditors, pursuant to s. 67(1)(*a*) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*").

[2] As I will explain, to decide this issue it is necessary to give careful consideration to several decisions of the Supreme Court of Canada, in particular, *British Columbia v. Henfrey Samson Belair Ltd.*,[1989] 2 S.C.R. 24, [1989] S.C.J. No. 78, and to the decision of this court in *GMAC Commercial Credit Corp. -- Canada v. T.C.T. Logistics Inc.* (2005), 74 O.R. (3d) 382, [2005] O.J. No. 589 (C.A.).

[3] For the following reasons, I conclude that *Henfrey* contemplates provincially created statutory trusts preserving assets from distribution to ordinary creditors under the *BIA*, s. 67(1)(*a*), provided the statutory trust satisfies the general principles of trust law. The general principles of trust law require certainty of intention to create a trust and certainty of subject matter in addition to certainty of object. I conclude that the statutory trust created by the *CLA*, s. 8(1) satisfies the requirement for certainty of intention to create a trust. I reject the contention that by creating the required element of certainty of intention, the *CLA*, s. 8(1) creates an operational conflict between the *CLA*, s. 8(1) and the *BIA*, s. 67(1)(*a*), triggering the doctrine of federal paramountcy. I conclude that debts for a project subject to the *CLA* are choses in action that supply the required certainty of subject matter. I further conclude that the commingling of *CLA* funds from various projects does not mean that the required certainty of subject matter was not present because the funds remained identifiable and traceable.

Facts

[4] A-1 is an Ontario corporation, engaged in the paving business. A-1 filed a notice of intention to make a proposal under the *BIA* on November 21, 2014. It subsequently failed to file a proposal and was deemed bankrupt on December 22, 2014.

[5] At the time of A-1's bankruptcy, it had four major ongoing paving projects, three with the City of Hamilton (the "city") and one with the Town of Halton Hills (the "town"). All four contracts had outstanding accounts receivable for work performed by A-1. The bankruptcy judge directed the receiver to establish a "paving projects account" and a general post-receivership account. The order provided that all receipts from the four paving projects were to be deposited into the paving projects account. It also provided that the "segregation of receipts by the Receiver [page230] between the two Post Receivership Accounts shall be without prejudice to the existing rights of any party and shall not create any new rights in favour of any party". A subsequent order directed that receipts from other paving projects were also to be deposited in the paving projects account.

[6] The city and the town paid $675,372.27 (the "funds") to the receiver, who deposited the funds into the paving projects account. That amount represented debts owing to A-1 by the city and the town when A-1 filed its notice of intention to make a proposal. While the receiver commingled the trust funds received from A-1's various paving projects in the paving projects account, the allocation of the funds in the paving projects account to each specific project is identifiable because of the receiver's careful accounting.

[7] It is common ground that the funds are "trust funds" within the meaning of s. 8 of the *CLA*, which provides:

> 8(1) All amounts,
>
> (*a*) owing to a contractor or subcontractor, whether or not due or payable; or
>
> (*b*) received by a contractor or subcontractor,
>
> on account of the contract or subcontract price of an improvement constitute a trust fund for the benefit of the subcontractors and other persons who have supplied services or materials to the improvement who are owed amounts by the contractor or subcontractor.
>
> (2) The contractor or subcontractor is the trustee of the trust fund created by subsection (1) and the contractor or subcontractor shall not appropriate or convert any part of the fund to the contractor's or subcontractor's own use or to any use inconsistent with the trust until all subcontractors and other persons who supply services or materials to the improvement are paid all amounts related to the improvement owed to them by the contractor or subcontractor.

[8] There is a priority dispute between

(1) Royal Bank of Canada ("RBC") as a secured creditor of A-1 pursuant to a general security agreement;

(2) Guarantee Company of North America ("GCNA"), a bond company and secured creditor of A-1 that had paid out 20 *CLA* lien claims (totalling $1,851,852.39) to certain suppliers and subcontractors of A-1 and is subrogated to those claims; and

(3) certain employees that worked on the four projects, as represented by LIUNA Local 183 and IUOE Local 793 (together, the "unions") (claiming a total of $511,949.14). [page231]

[9] RBC takes the position that the funds form part of A-1's estate available to creditors. GCNA and the unions take the position that the funds were s. 8(1) *CLA* trust funds that must be excluded from A-1's property on bankruptcy, pursuant to s. 67(1)(*a*) of the *BIA*. That section provides:

> 67(1) The property of a bankrupt divisible among his creditors shall not comprise
>
> (*a*) property held by the bankrupt in trust for any other person[.]

[10] The receiver brought a motion for advice and directions to resolve the priority dispute and served a notice of constitutional question identifying the potential conflict between the *CLA* and *BIA*. The Attorney General of Ontario intervened in response.

[11] On the motion, it was common ground that if the funds were not trust funds, pursuant to s. 67(1)(*a*), RBC and GCNA would share the remaining funds pro rata as secured creditors. The unions could make a claim to any remaining funds under s. 136(1)(*d*) of the *BIA*.

Decision of the Motion Judge: [2018] O.J. No. 911, 2018 ONSC 1123 (S.C.J.)

[12] The motion judge delivered a handwritten endorsement at the conclusion of argument holding that the funds were not excluded from A-1's estate available for distribution to creditors.

[13] She noted that the constitutional issue of the validity of provincial statutory trusts in bankruptcy had been resolved by the Supreme Court of Canada in *British Columbia v. Henfrey Samson Belair Ltd*. That case held that trusts established by provincial law that meet the general principles of the law of trusts will be excluded from the bankrupt's estate pursuant to s. 67(1)(*a*) of the *BIA*. It is common ground that those principles are certainty of intention, object and subject matter.

[14] The motion judge stated [at para. 9] that she was not suggesting that the statutory trust created by the *CLA* could never be recognized as "a true trust for purposes of . . . the *BIA*". However, the motion judge concluded that on the facts of this case GCNA had failed to establish sufficient certainty of subject matter and that the funds were not therefore held in trust within the meaning of s. 67(1) (*a*). She reached that conclusion for two reasons. First, she stated, at para. 6, that the "funds owed to A-1 by the City/Town are not necessarily identifiable, do not necessarily come from any particular fund or account and are simply payable by the City/Town from its own revenues or other sources". Second, she found, at para. 7, that once the funds were paid, "there was no established means for [page232] [A-1] to hold these monies separate from other funds and maintain their character as trust funds". The orders of the bankruptcy judge were [at para. 2] "completely neutral" and "did not create any rights nor did they take away any rights, as explicitly stated in the orders".

[15] The motion judge was of the view that *GMAC Commercial Credit Corporation -- Canada v. T.C.T. Logistics Inc.* required a form of segregation of funds to maintain a trust. She relied on that case to reject the proposition that the receiver's careful accounting records that were capable of identifying the funds in the paving projects account could establish certainty of subject matter. As the amounts owing for the various projects had been commingled, the absence of segregation was sufficient to destroy the certainty of subject matter required under the general principles of trust law.

[16] The motion judge concluded that the s. 67(1)(*a*) exemption for property held in trust did not apply. She therefore found that GCNA was only entitled to a *pro rata* share of the funds as a secured creditor and that the unions were entitled to their share as unsecured creditors.

Issues

[17] The following issues arise on this appeal:

(1) Can a statutory deeming provision give rise to certainty of intention?

(2) Were the debts of the city and the town choses in action that supplied the required certainty of subject matter for a trust?

(3) Did commingling of the funds mean that the required certainty of subject matter was not present?

(4) Does RBC's security interest have priority even if the trust created by s. 8(1) of the *CLA* survives in bankruptcy?

Analysis

Statutory trusts

[18] As a preliminary matter, it will be helpful to define the terminology involving statutory trusts. In *Henfrey*, McLachlin J. referred to a "deemed statutory trust": p. 34 S.C.R. A "deemed statutory trust" is a trust that legislation brings into existence by constituting certain property as trust property and a certain person as the trustee of that property. The legislation purports to deem the trust into existence independently of the subjective intentions of or actions taken by the trustee. For example, the [page233] legislation at issue in *Henfrey*, s. 18 of the *Social Service Tax Act*,R.S.B.C. 1979, c. 388, established that a merchant who collected sales tax was [at p. 38 S.C.R.] "deemed to hold it in trust" for the provincial Crown. Deemed statutory trusts may be in favour of either the Crown or private parties: *GMAC*, para. 14. The subject matter of deemed statutory trusts also varies. Some statutes establish a trust over specific sums of property owing to or received by the trustee. In contrast, other statutes purport to establish a general floating charge over the assets of the trustee for the sum of the trust moneys.

[19] Even if a statute does not deem a trust into existence, it may impose a "statutory trust obligation", namely, an obligation on a person to hold in trust certain property: *GMAC*, paras. 13, 17, 21-22. Statutes that create deemed statutory trusts often also impose statutory trust obligations, such as an obligation to segregate the trust property or hold it in a trust account: *GMAC*, at para. 17.

[20] Section 8 of the *CLA* both creates a deemed statutory trust and imposes statutory trust obligations on the contractor or subcontractor. The language of s. 8 makes clear that it deems a trust into existence independently of the trustee's actions or intentions. Section 8(1) provides that the amounts in ss. 8(1)(*a*) and (*b*) "*constitute* a trust fund" and s. 8(2) establishes that the contractor or subcontractor "*is* the trustee of the trust fund *created by subsection (1)*" (emphasis added). Thus, s. 8(1) purports to deem a trust into existence independently of any actions by the contractor or subcontractor. Section 8(2) also imposes a statutory trust obligation on the contractor or subcontractor not to appropriate or convert any part of the trust fund until all subcontractors and suppliers have been fully paid for their work.

Positions of the parties

[21] It is common ground on this appeal that to qualify as a "trust" that is excluded from A-1's property for distribution to creditors pursuant to s. 67(1)(*a*) of the *BIA*, the deemed statutory trust created by s. 8(1) of the *CLA* must satisfy the general principles of trust law: *Henfrey*. The general principle of trust law we must consider is that to establish a trust, three elements must be present, certainty of intention, certainty of subject matter and certainty of object: see Eileen E. Gillese, *The Law of Trusts*, 3rd ed. (Toronto: Irwin Law, 2014), at pp. 41-47.

[22] GCNA, supported by the Attorney General of Ontario and LIUNA Local 183, submits that the three certainties are present in s. 8(1). Certainty of intention is clear from the language of the [page234] statute that the amounts specified "constitute a trust fund". Certainty of object is spelled out as the statute specifies that the trust fund is "for the benefit of the subcontractors and other persons who have supplied services or materials to the improvement who are owed

amounts by the contractor or subcontractor". Certainty of subject matter is made out as the statute clearly specifies that the subject of the trust is "all amounts, owing to a contractor or subcontractor" and "all amounts, received by a contractor or subcontractor . . . on account of the contract or subcontract price of an improvement".

[23] RBC disputes both certainty of intention and certainty of subject matter.

(1) Can a statutory deeming provision give rise to certainty of intention?

[24] The motion judge did not deal with the issue of certainty of intention in her reasons. She appears to have assumed that it was created by s. 8(1). However, on appeal, RBC's principal argument to uphold the motion judge's decision is that s. 8(1) cannot supply that element. RBC argues that under the general principles of trust law, it is necessary to prove that the settlor had the actual subjective intention to create a trust.

[25] RBC's argument in relation to certainty of intention appears to rest upon a broad proposition, namely, that the three elements of certainty of subject matter, object and, in particular, intention, must be established on facts independent of any statutory deeming provisions.

[26] This argument requires some consideration of the relationship between the provincial power to legislate in relation to property and civil rights in the province (*Constitution Act, 1867*,30 & 31 Vict., c. 3, s. 92(13)) and the federal head of power in relation to bankruptcy and insolvency (*Constitution Act, 1867*, s. 91(21)).

(a) *Constitutional validity of s. 8(1) of the CLA*

[27] While RBC did not explicitly challenge the constitutional validity of s. 8(1) and accepted that it applies outside of the bankruptcy context, it did assert that the purpose of s. 8(1) is to alter priorities upon bankruptcy. The implication of RBC's argument about the purpose of s. 8(1) of the *CLA* is that the provision is unconstitutional because its pith and substance fits within the federal power of bankruptcy and insolvency in s. 91(21) of the *Constitution Act, 1867*.

[28] There is no issue that the *CLA* as a whole is valid provincial legislation in relation to property and civil rights in the [page235] province. The *CLA* aims to ensure that parties who supply services and materials to construction projects are paid by creating an integrated scheme of holdbacks, liens and trusts. This scheme protects subcontractors who are vulnerable due to their lack of privity of contract with the owner who benefits from the improvements they perform. Holdbacks require the owner and other contractors to withhold payments in order to ensure that funds are available to pay subcontractors and suppliers. Liens give subcontractors and suppliers the right to assert a claim directly against the property they have improved. Trusts protect the interests of subcontractors and suppliers by protecting funds owing to or received by those to whom they have supplied their services or materials.

[29] In support of its submission that the purpose of the s. 8(1) statutory trust is to alter priorities in bankruptcy, RBC cites statements from two documents prepared by Ontario's Ministry of the Attorney General prior to the legislature's enactment of the *CLA* in 1983: *Discussion Paper on the Draft Construction Lien Act* (Toronto: Ministry of the Attorney General, November 1980) and the *Report of the Attorney General's Advisory Committee on the Draft*

Construction Lien Act (Toronto: Ministry of the Attorney General, April 1982). In particular, RBC relies on the statement in the *Report of the Attorney General's Advisory Committee*, at p. xxxiv, suggesting that the primary purpose of the s. 8(1) trust is to "prevent contract monies from being misappropriated, and protect those monies from the claims of other creditors in the event of a bankruptcy".

[30] While the s. 8(1) trust may have the effect of protecting construction contract moneys in the event of bankruptcy, I cannot agree that s. 8(1) is in pith and substance legislation in relation to bankruptcy and insolvency. The statement in the *Report of the Attorney General's Advisory Committee* is admissible but "must not be given inappropriate weight": Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Toronto: LexisNexis, 2014), at para. 23.58. A broader and more general protective purpose has been recognized both in academic writing and in the decisions of this court. Kevin McGuinness, "Trust Obligations Under the *Construction Lien Act*" (1994), 15 C.L.R. 208, at p. 227, states that the purpose of the s. 8(1) trust is to "isolate the contract moneys as they flow down the construction pyramid" and serve to preserve that pool of funds "during the period while payments are trickling down the pyramid to the persons ultimately entitled to the money concerned". As this court explained in *Dietrich Steel Ltd. v. Shar-Dee Towers (1987) Ltd.* (1999), 42 O.R. (3d) 749, [1999] O.J. No. 245 (C.A.), at p. 755 O.R., these statutory trusts [page236] "exist by statute at each level of the contract pyramid for the benefit of those adding value to the land involved". They are "superimposed" on the contacts entered into by the "owner, contactor and subcontractors . . . for the benefit of all those on the next level in the pyramid below the trustee". Similarly, in *Sunview Doors Ltd. v. Pappas* (2010), 101 O.R. (3d) 285, [2010] O.J. No. 1043, 2010 ONCA 198, at para. 99, this court explained:

> The object of the Act is to prevent unjust enrichment of those higher up in the construction pyramid by ensuring that money paid for an improvement flows down to those at the bottom. In seeking to protect persons on the lower rungs from financial hardship and unfair treatment by those above, the Act is clearly remedial in nature . . . The purpose of s. 8 is to impress money owing to or received by contractors or subcontractors with a statutory trust, a form of security, to ensure payment of suppliers to the construction industry.

[31] RBC argues that the trust provisions are separate and independent from other provisions of the *CLA.* This submissionfails to recognize that the trust provisions complement the other *CLA* remedies even outside of bankruptcy or insolvency. As this court stated in *Sunview Doors*, at para. 51, citing the Supreme Court's decision in *Minneapolis-Honeywell Regulator Co. v. Empire Brass Manufacturing Co.*, [1955] S.C.R. 694, [1955] S.C.J. No. 48, at p. 696 S.C.R., the legislature enacted the trust provisions because it recognized that the lien provisions only provided a partial form of security to suppliers. The lien provisions failed to protect suppliers at the bottom of the pyramid in situations where the owner of the land had already paid the contractor. The trust provisions complement the lien provisions by providing security to suppliers at the bottom of the pyramid in these situations.

[32] I agree with the Attorney General of Ontario and LIUNA Local 183 that the s. 8(1) trust must be seen as an integral part of the scheme of holdbacks, liens and trusts, designed to protect the rights and interests of those engaged in the construction industry and to avoid the unjust enrichment of those higher up the construction pyramid. That purpose exists outside the bankruptcy context. As Slatter J.A. recognized in *Iona Contractors Ltd. v. Guarantee Co. of*

North America, [2015] A.J. No. 787, 2015 ABCA 240, 387 D.L.R. (4th) 67, leave to appeal to S.C.C. dismissed [2015] S.C.C.A. No. 404, the trust provisions of construction lien legislation cannot be seen in isolation and are part of a comprehensive package to protect construction subcontractors: paras. 21-22. Any effects that s. 8(1) may have on protecting contract moneys in the event of bankruptcy are purely incidental and do not detract from the provision's provincial pith and substance: see *Lacombe*,at para. 36. Accordingly, the s. 8(1) trust is a matter that is the proper subject [page237] of legislation relating to property and civil rights in the province: *John M.M. Troup Ltd. v. Royal Bank of Canada*, [1962] S.C.R. 487, [1962] S.C.J. No. 29, at p. 494 S.C.R.

(b) *Does the doctrine of paramountcy apply?*

[33] As valid provincial legislation, the *CLA* benefits from a presumption of constitutionality and should be interpreted to avoid conflict with federal legislation where possible. If there is conflict, the doctrine of paramountcy applies, the federal legislation prevails and the provincial legislation is inoperative. Paramountcy is triggered by a conflict between provincial and federal legislation, namely, where there is an operational conflict such that it is impossible to comply with both laws or where the operation of the provincial law frustrates the purpose of the federal enactment: *Alberta (Attorney General) v. Moloney*, [2015] 3 S.C.R. 327, [2015] S.C.J. No. 51, 2015 SCC 51, at para. 18.

[34] Determining whether there is operational conflict requires analyzing how s. 8(1) of the *CLA* intersects with the *BIA*. The *BIA* is valid federal legislation dealing with bankruptcy and insolvency. It has the dual purpose of ensuring the orderly and equitable distribution of the assets in the event of insolvency and enabling the rehabilitation of those who have suffered bankruptcy: *Husky Oil Operations Ltd. v. M.N.R.*, [1995] 3 S.C.R. 453, [1995] S.C.J. No. 77, at para. 7. A central element of the *BIA*'s regime for the orderly and equitable distribution of assets is a scheme that stipulates what property is available for distribution to creditors and provides for an appropriate ranking of priorities among creditors.

[35] The *BIA* establishes a national regime of insolvency and bankruptcy law. Parliament has the authority under s. 91(21) to define terms in the *BIA* without reference to provincial law: *Husky Oil*, at para. 32. As McLachlin J. held in *Henfrey*, the definition of "trust" which is operative for the purposes of the *BIA* is that of Parliament, not the provincial legislatures: p. 35 S.C.R. I agree with the motion judge's conclusion that *Henfrey* "squarely addressed" the paramountcy issue. *Henfrey* held that Parliament only intended s. 67(1)(*a*) of the *BIA* to apply to trusts arising under general principles of law, namely, trusts that meet the three certainties: p. 34 S.C.R.

[36] It follows that if a province purports to legislate into existence a trust that lacks one or more of the three certainties, the trust will not survive in bankruptcy: *Henfrey*, at p. 35 S.C.R. A provincial deemed statutory trust that lacks one or more of the three certainties would be in operational conflict with the meaning of trust in s. 67(1)(*a*). Section 67(1)(*a*) would include the [page238] property subject to the deemed statutory trust in the property of the bankrupt divisible among its creditors but the provincial deemed statutory trust would remove the property from the bankrupt's estate. This would make it impossible for the receiver to comply with both the *BIA*

and the provincial legislation deeming the trust into existence. By virtue of paramountcy, the provincial legislation in question would be inoperative in bankruptcy.

[37] The question is whether allowing the *CLA* to establish certainty of intention is contrary to *Henfrey*. If it is, then the deemed statutory trust under s. 8(1) lacks certainty of intention, the statutory deemed trust is in operational conflict with s. 67(1)(*a*) of the *BIA* as interpreted by *Henfrey*, the paramountcy doctrine applies and the s. 8(1) *CLA* trust is inoperative in bankruptcy.

[38] In my view, *Henfrey* contemplates and requires courts to look to the deeming language of a statute to determine whether there is certainty of intention. Accordingly, no conflict between the s. 8(1) *CLA* trust and the *BIA* arises, and the paramountcy doctrine is not triggered, on the basis that the deemed statutory trust lacks certainty of intention. I reach this conclusion for five reasons, which I outline below.

(i) *It is appropriate to look to provincial statutory law to determine the content of BIA categories*

[39] First, it is appropriate to look to provincial statutory law to determine whether a trust satisfies the three certainties required under *Henfrey*.

[40] RBC submits that allowing a statute to supply certainty of intention would run contrary to the policy concern expressed in *Henfrey* about avoiding a "differential scheme of distribution" from province to province: *Henfrey*, at p. 33 S.C.R.

[41] I would reject this submission. The Supreme Court has recognized that the application of the national regime of insolvency and bankruptcy will vary to some extent from province to province due to differences in provincial law in relation to property and civil rights: *Husky Oil*, at para. 38. Because property and civil rights are determined by provincial law, the *BIA* cannot and does not operate as a water-tight compartment. Its application to a significant degree depends upon provincial law definitions of various forms of property. As stated in *Husky Oil*, at para. 30, the *BIA* "is contingent on the provincial law of property for its operation" and "is superimposed on those provincial schemes when a debtor declares bankruptcy". This means that "provincial law necessarily affects the 'bottom line'" in bankruptcy, and this, said the court, "is contemplated by the [*BIA*] itself". [page239]

[42] Accordingly, it is appropriate to look to provincial law to determine whether a trust satisfies the three certainties required for it to operate in bankruptcy. The *BIA* refers to but does not define what is meant by "a trust", yet the category of "trust" is recognized by the *BIA*'s scheme of priorities. As the Supreme Court of Canada stated in *Husky*, it is the "substance of the interest created" by the provincial law that is "relevant for the purpose of applying the *Bankruptcy Act*": at para. 40. Section 72 of the *BIA* contemplates the integration of the *BIA* with provincial legislation by providing that the *BIA* "shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with [the *BIA*]". The Supreme Court has held that this provision demonstrates that Parliament intends provincial law to continue to operate in the bankruptcy and insolvency context unless it is inconsistent with the *BIA*: *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, [2015] 3 S.C.R. 419, [2015] S.C.J. No. 53, 2015 SCC 53, at para. 49.

[43] In my view, the rules, principles and concepts of provincial law must include provincial statutory law. There is nothing in the *BIA* that would exclude provincial statutory law from consideration. This means that a court dealing with bankruptcy will necessarily apply provincial statutory law relating to property and civil rights.

(ii) *Henfrey contemplates that the statute can supply certainty of intention*

[44]Second, *Henfrey* itself contemplates that the statute deeming the trust into existence can provide the required certainty of intention. At issue in *Henfrey* was whether the deemed statutory trust created by s. 18 of the *Social Service Tax Act* gave the province priority over the claims of secured and other creditors in bankruptcy. The Act required a merchant to collect the sales tax, *deemed* the tax collected to be held in trust and *deemed* the taxes collected "to be held separate from and form no part of the person's money, assets or estate, whether or not" these tax moneys were held in a segregated account. The merchant in *Henfrey* went into bankruptcy and the province claimed priority over other creditors by virtue of the deemed statutory trust. The issue was whether the deemed statutory trust was a "trust" that removed the property from the estate of the bankrupt available for general distribution to creditors pursuant to s. 47(*a*) of the *Bankruptcy Act*, R.S.C. 1970, c. B-3 (what is now s. 67(1)(*a*) of the *BIA*).

[45] Writing for the 6-1 majority, McLachlin J. recognized, at p. 32 S.C.R., "the principle that provinces cannot create priorities [page240] under the *Bankruptcy Act* by their own legislation". McLachlin J. added, at p. 33 S.C.R.:

> To interpret s. 47(*a*) as applying not only to trusts as defined by the general law, but to statutory trusts created by the provinces lacking the common law attributes of trusts, would be to permit the provinces to create their own priorities under the *Bankruptcy Act* and to invite a differential scheme of distribution on bankruptcy from province to province.

[46] McLachlin J. concluded, at p. 34 S.C.R., "that s. 47(*a*) should be confined to trusts arising under general principles of law . . .". Applying that proposition to the case before her, she found, at p. 34 S.C.R.:

> *At the moment of collection of the tax, there is a deemed statutory trust. At that moment the trust property is identifiable and the trust meets the requirements for a trust under the principles of trust law.* The difficulty in this, as in most cases, is that the trust property soon ceases to be identifiable. The tax money is mingled with other money in the hands of the merchant and converted to other property so that it cannot be traced. At this point it is no longer a trust under general principles of law. In an attempt to meet this problem, s. 18(1)(*b*) states that tax collected shall be deemed to be held separate from and form no part of the collector's money, assets or estate. But, as the presence of the deeming provision tacitly acknowledges, the reality is that after conversion the statutory trust bears little resemblance to a true trust. There is no property which can be regarded as being impressed with a trust. Because of this, s. 18(2) goes on to provide that the unpaid tax forms a lien and charge on the entire assets of the collector, an interest in the nature of a secured debt.

(Emphasis added)

[47] This passage supports the proposition that provinces can create trusts by statute that will survive bankruptcy by legislating the requirements for a trust under the general principles of trust law. When the tax in *Henfrey* was collected, the requirements for a trust under the principles of trust law were met. Had the province been able to assert its claim at that moment, before conversion of the trust property, it would have succeeded.

[48] RBC does not accept that *Henfrey* supports the proposition that a statute can establish any of the three certainties. RBC points out that in *Henfrey*, it was "conceded that the statute establishes certainty of intention and of object" (at p. 44 S.C.R., *per* Cory J. dissenting). The reasons in *Henfrey* do not explain the basis for this concession. However, RBC contends that the merchant's subjective intent to create a trust must have been inferred from the fact that, as required by statute, the merchant had registered with the province and that registration amounted to an intentional act from which an intention to create a trust may be inferred.

[49] I find this argument unpersuasive for two reasons. First, it played no role in the majority's reasons, a fact that RBC conceded [page241] in oral argument. As GCNA submitted in oral argument, if the majority wanted to adopt the position RBC is arguing for, it would have said so directly. Second, even if the merchant's intention was relevant, the merchant had no choice. If he wanted to carry on business as a merchant in British Columbia, he had to register and he had to collect the tax. By doing so, he was simply complying with the law. It seems to me entirely artificial to suggest that his actions were any more voluntary than the actions of a contractor under Ontario's *CLA* regime who is deemed by statute to be a trustee of certain funds and required by statute not to convert or appropriate them.

[50] As Gillese explains, at p. 42: "To satisfy the certainty of intention requirement, the court must find an intention that the trustee is placed under an imperative obligation to hold property on trust for the benefit of another." The essential point is that the trustee is placed under an imperative obligation. I can see no reason in principle why that imperative obligation cannot be created by statute for the purposes of s. 67(1)(*a*) of the *BIA*.

[51] GCNA's position finds support in the decision of Slatter J.A. in *Iona Contractors*. At issue in that case were holdback funds, impressed with a statutory trust under Alberta's *Builders' Lien Act*, R.S.A. 2000, c. B-7, s. 22. After carefully considering *Husky Oil*, *Henfrey* and several other cases dealing with the interaction of the *BIA* and provincial law, Slatter J.A., at para. 35, rejected the contention that as statutory trusts are "in one sense 'involuntary'", they cannot qualify as trusts "arising under general principles of law". He found that proposition to be incompatible with *Henfrey* where McLachlin J. stated, at p. 34 S.C.R., that at the moment the tax was collected, "the trust meets the requirements for a trust under the principles of trust law". Slatter J.A. added, at para. 36:

> In most statutory trust situations, only the third certainty will be in play. Certainty of intention and certainty of objects will usually be satisfied by the terms of the statute. If the statute uses the word "trust", the intention is clear . . . Usually the intended beneficiary of the trust will also be obvious. The only potential for uncertainty is over the assets that are covered by the trust.

(Citation omitted)

(iii) *The CLA trust neither creates an operational conflict nor engages the Henfrey policy concerns*

[52] Third, the s. 8(1) *CLA* trust neither creates an operational conflict with the *BIA* nor engages the *Henfrey* policy concerns. I draw this conclusion because the s. 8(1) trust neither attempts to create a general floating charge over all of the bankrupt's [page242] assets nor attempts to obtain a higher priority for the provincial Crown.

[53] RBC's argument centres on the policy concern about provinces reordering priorities in the *BIA*. RBC submits that the *Henfrey* court was concerned to prevent a province from elevating the priority of a Crown claim by deeming it to be a trust claim: *Henfrey*, at p. 33 S.C.R. RBC maintains that the court resolved this concern by holding that the provincial Crown could only obtain a higher priority by benefiting from rights that could be "obtained by anyone under general rules of law": *Henfrey*, at pp. 31-32 S.C.R., quoting *Quebec (Deputy Minister of Revenue) v. Rainville*, [1980] 1 S.C.R. 35, [1979] S.C.J. No. 93, at p. 45 S.C.R. RBC argues that this excludes consideration of statutory intention because private parties cannot legislate certainty of intention into existence like the provincial legislature can.

[54] There is a well-established line of cases holding that an operational conflict arises where the application of provincial legislation would reorder the priorities prescribed by Parliament in the *BIA*. The leading case is *Husky Oil*,where a provincial statute deemed a debtor of a bankrupt to be a guarantor of money owed by the bankrupt to the Worker's Compensation Board. If the debtor was called upon to pay, it could set-off the amount it paid against the debt it owed to the bankrupt. As this had the effect of diverting funds from the bankrupt's estate to pay the board it created an operational conflict with the *Bankruptcy and Insolvency Act*, and was held to be inoperative. Similarly, Québec statutes that deemed debts for unpaid provincial taxes or worker's compensation claims to be "privileged" conflicted with the priority given the debt in the *Bankruptcy Act*, R.S.C. 1970, c. B-3, and were therefore inoperative: *Rainville*; *Federal Business Development Bank v. Québec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 1061, [1988] S.C.J. No. 44. In another case, a provincial statute that created a charge on all an employer's property for unpaid worker's compensation claims conflicted with the priority the *Bankruptcy Act*, R.S.C. 1970, c. B-3gave to such a claim and was therefore inoperative: *Deloitte Haskins and Sells Ltd. v. Alberta (Workers' Compensation Board)*, [1985] 1 S.C.R. 785, [1985] S.C.J. No. 35.

[55] In my opinion, these cases do not support RBC's contention that provincial legislation cannot supply the three certainties of a trust, including certainty of intention. None of those cases involved a statutory trust conferring a trust interest in specific property related to a valid scheme under provincial legislation. Nor did those cases involve a deemed statutory trust in favour of private parties. In each case, the effect of the provincial statute [page243] was to give the province or a provincial agency a general charge and priority over all of the property of the bankrupt. That created an operational conflict with the *BIA* scheme of priorities and, under the doctrine of paramountcy, the provincial law was inoperative.

[56] The amendments Parliament has made to s. 67 of the *BIA* confirm the distinction that I have drawn between provincial legislation that creates a priority in favour of the province and the type of statutory trust at issue in this case. In 1992, Parliament amended s. 67 to add s. 67(2), a provision that deals with deemed trusts: *An Act to amend the Bankruptcy Act and to amend the*

Income Tax Act in consequence thereof, S.C. 1992, c. 27, s. 33. Section 67(2) provides that subject to certain exceptions set out in s. 67(3), "any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty" shall not exclude the property under s. 67(1)(*a*) unless it would be excluded "in the absence of that statutory provision". The Supreme Court has held that this amendment reflects Parliament's intention to rank the Crown with ordinary creditors in most bankruptcy scenarios: *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny*, [2009] 3 S.C.R. 286, [2009] S.C.J. No. 49, 2009 SCC 49, at paras. 12-15.It is significant that Parliament singled out deemed trusts in favour of the Crown for exclusion from the protection s. 67(1)(*a*) offers and left untouched deemed trusts in favour of other parties.

[57] Nor is the policy concern about the reordering of priorities in favour of the province that the *Henfrey* court identified relevant to the trust that s. 8(1) of the *CLA* creates.

[58] *Husky Oil* holds that an intention to intrude into the federal sphere of bankruptcy is not required for provincial legislation to be inapplicable. Provinces are not entitled to indirectly improve the priority of a claim and the provincial legislation will be inapplicable if its effect is to conflict with the order of priorities in the *BIA*. Accordingly, the fact that the purpose of s. 8(1) is not to intrude into the federal sphere of bankruptcy or to alter priorities is not determinative.

[59] The concern in *Husky Oil* is with provincial attempts to "create a general priority": para. 34. The majority explained *Deloitte Haskins* and *Henfrey* as cases in which the province had sought to create a "general priority . . . which had the *effect* of altering bankruptcy priorities" (emphasis in original).

[60] As the majority in *Husky Oil* noted, the problem in *Henfrey* was that the effect of the statute was to attach the label "trust" to all of the debtor's assets. The statute did not give the province a trust claim in relation to a specific fund or in relation to [page244] specific property but rather a priority based upon what amounted to a general charge to the extent of its claim over all the merchant's assets: *Husky Oil*, at paras. 27, 35-36, 40. The province's claim was not based upon a trust that complied with the general principles of trust law but rather on a provincially created priority that was incompatible with Parliament's scheme under the *BIA*.

[61] The deemed statutory trust that s. 8(1) of the *CLA* creates benefits private parties in the Ontario construction industry, not the provincial Crown. Ontario is thus not creating any "personal preference" for itself: *Henfrey*, at p. 32 S.C.R., quoting *Rainville*, at p. 45 S.C.R. To the contrary, any subcontractor or supplier in the construction industry can obtain trust protection under s. 8(1) in accordance with the "general rules of law" that the *CLA* establishes. Significantly, the passage from *Rainville* that *Henfrey* quotes refers to "a builder's privilege" as a security interest that "may be obtained by anyone under general rules of law": *Henfrey*, at p. 32 S.C.R., quoting *Rainville*, at p. 45. The builder's privilege was a security interest that Quebec legislation, art. 2013 of the *Civil Code of Lower Canada*, created over immoveable property in favour of construction industry participants who performed work on that property. It arose independently of the subjective intentions of the parties in the construction transaction, and was thus similar to the deemed statutory trust that s. 8(1) of the *CLA* creates.

[62] Moreover, s. 8(1) of the *CLA* impresses specific property with the trust and does not create a general priority. The court in *Henfrey* referred to "cases where no specific property

impressed with a trust can be identified" as raising policy considerations that weighed against protecting such deemed statutory trusts under the predecessor provision to s. 67(1)(*a*) of the *BIA*: p. 33 S.C.R. However, the trust that s. 8(1) of the *CLA* creates does not attempt to create a general floating charge over the bankrupt's assets that would constitute a prohibited "general priority". Instead, it impresses specific property -- the funds owing to or received by the contractor or subcontractor -- with the trust.

[63] Accordingly, I conclude that there is no operational conflict between s. 8(1) of the *CLA* and the *BIA*. I agree with and adopt as applicable to the case at bar Slatter J.A.'s conclusion in *Iona Contractors*, at para. 37:

> [T]he provisions of s. 22 meet the requirements of a common law trust. There is no deliberate attempt to reorder priorities in bankruptcy, and the province is not attempting to achieve indirectly what it cannot do directly. These considerations, coupled with the fact that the trust provisions of s. 22 are merely a collateral part of a complex regime designed to create security for unpaid subcontractors, leads to the conclusion that there is no operational conflict. [page245]
>
> The decision of the British Columbia Supreme Court in *0409725 B.C. Ltd. (Re)*, [2015] B.C.J. No. 714, 2015 BCSC 561, 3 P.P.S.A.C. (4th) 278, at para. 22, is to a similar effect:
>
> Applying the analysis of McLachlin J in *Henfrey*, certainty of intention is sufficiently provided by the statute in the circumstances of this case. That conclusion in no way intrudes into federal jurisdiction, and indeed, all parties conducted themselves on that basis.

(iv) *The CLA trust does not frustrate the purpose of the BIA*

[64] There is no frustration of the purpose of the *BIA* that would render s. 8(1) of the *CLA* inoperative. I agree with LIUNA Local 183 that excluding s. 8(1) *CLA* trust funds from distribution to A-1's creditors is consistent with the objective of the *BIA* to provide for the equitable distribution of the bankrupt's remaining assets. As I have already mentioned, the purpose of the *CLA* trust is to create a "closed system" to protect those suppliers and contractors down the construction pyramid and to ensure that the funds are not diverted prior to reaching their beneficial owner. The *CLA* scheme is directed at equity and at preventing the "unjust enrichment of those higher up in the construction pyramid": *Sunview Doors Ltd.*, at para. 99.To allow s. 8(1) *CLA* trust funds to be distributed to creditors of a bankrupt contractor would provide an "unexpected and unfair windfall" to those creditors: see *Norame Inc. (Re)* (2008), 90 O.R. (3d) 303, [2008] O.J. No. 1580, 2008 ONCA 319, at para. 18.

(v) *The cases RBC relies on are distinguishable*

[65] Fifth, the cases that RBC relies upon are distinguishable.

[66] RBC submits that this court held in *GMAC* that deemed statutory trusts can never survive in bankruptcy.

[67] At issue in *GMAC* was a regulation, *Load Brokers*, O. Reg. 556/92, under the *Truck Transportation Act*, R.S.O. 1990, c. T.22. Section 15 of the *Load Brokers* regulation stated that load brokers "shall hold in trust" money received by the load broker on account of carriage

charges and "shall" maintain separate trust accounts for such funds. TCT, the bankrupt, had failed to maintain separate accounts, and a priority dispute arose between the carriers who claimed a trust and TCT's secured creditor.

[68] RBC relies on para. 17 of the *GMAC* decision. There, the court stated that a "consistent line of cases from the Supreme Court of Canada", including *Henfrey*, "excludes statutory deemed trusts from the ambit of s. 67(1) (a)". The court also stated that Parliament had only elected to carve out exceptions from this exclusion for certain deemed trusts in favour of the Crown by [page246] enacting s. 67(3). Accordingly, it concluded that even if s. 15 of the Regulation created a deemed trust in addition to a mere statutory trust obligation, this trust would not be a trust under s. 67(1) (*a*) of the *BIA*.

[69] In my view, the passage that RBC relies on from *GMAC* is distinguishable for the following three reasons.

[70] First, the passage from *GMAC* that RBC relies on was not a necessary basis for the court's decision. The court in fact declined to decide whether s. 15 of the Regulation even created a deemed statutory trust: para. 17. It instead decided the case on the basis that commingling destroyed the required element of certainty of subject matter, an issue discussed later in these reasons: *GMAC*, paras. 18-20.

[71] Second, the statements in para. 17 of *GMAC* must be read in light of the court's previous discussion of the holding in *Henfrey*. At para. 15, the *GMAC* court described *Henfrey* as holding that deemed statutory trusts do not operate in bankruptcy only if they "do not conform to general trust principles". Thus, the court did not intend to state that deemed statutory trusts are never operative in bankruptcy. Indeed, as I will explain later in these reasons, the *Load Brokers* regulation did not create a deemed statutory trust but merely a statutory trust obligation that TCT did not comply with.

[72] Third, the court's reliance on s. 67(2) and (3) of the *BIA* must be read in light of the Supreme Court's subsequent interpretation of those provisions in *Desjardins*. The *GMAC* court took the view that Parliament intended to allow only certain deemed statutory trusts in favour of the Crown to survive in bankruptcy by enacting s. 67(3). The court thus seems to have assumed that Parliament intended to only protect deemed statutory trusts in favour of the Crown and not those in favour of private parties. Such an assumption runs contrary to *Desjardins*, where the Supreme Court held that Parliament enacted s. 67(2) and (3) to limit the Crown's priority and rank the Crown with ordinary creditors in most bankruptcy scenarios: at paras. 12-15. Properly interpreted, s. 67(2) thus excludes deemed statutory trusts in favour of the Crown that would otherwise qualify as trusts under *Henfrey* principles from protection under s. 67(1)(*a*). Section 67(3) sets out an exception to this exclusion. The s. 67(2) exclusion does not apply to deemed statutory trusts in favour of private parties, which may thus qualify as trusts under s. 67(1)(*a*) if they satisfy the requirements of *Henfrey*.

[73] RBC also relies on *British Columbia v. National Bank of Canada*, [1994] B.C.J. No. 2584, 119 D.L.R. (4th) 669 (C.A.), leave to appeal to S.C.C. refused [1995] S.C.C.A. No. 18, 34 C.B.R. (3d) 302, [page247] where the court stated, at p. 685 D.L.R., that provincial legislation cannot "create the facts necessary to establish a trust under general principles of trust law". The court

accordingly rejected the province's argument that the provincial legislation supplied certainty of intention.

[74] However, this blanket statement from *National Bank* cannot be reconciled with *Henfrey* itself. The effect of taking this statement at face value would be that provincial deemed statutory trusts could never exist in bankruptcy. However, as *Iona Contractors* recognized, *Henfrey* affirmed that provincial statutory trusts can survive in bankruptcy and that the statute at issue in *Henfrey* did create a valid trust at the moment of collection: *Iona Contractors*, at para. 35, citing *Henfrey*, at p. 34 S.C.R.

[75] Moreover, *National Bank* is distinguishable on the facts. The statute at issue in that case, the *Tobacco Tax Act*, R.S.B.C. 1979, c. 404, s. 15, purported to create a lien and charge in favour of the provincial Crown in respect of amounts collected for a tobacco tax "on the entire assets" of the person and "having priority over all other claims of any person". That plainly could not survive under the general principles of trust law because it lacked certainty of subject matter and is precisely the type of charge that has been held to interfere with the *BIA* scheme: see *Husky Oil*, at paras. 35-36, 41. As McLachlin J. stated in *Henfrey*, such a general floating charge in fact "tacitly acknowledges" that there is no certainty of subject matter: p. 34 S.C.R.

[76] In addition, RBC relies on two Saskatchewan Court of Queen's Bench decisions which purported to apply *Henfrey* to find that deemed statutory trusts for the construction industry, established by Saskatchewan's *The Builders' Lien Act*, S.S. 1984-85-86, c. B-7.1,did not operate in bankruptcy: see *Duraco Window Industries (Sask.) Ltd. v. Factory Window & Door Ltd. (Trustee of)*, [1995] S.J. No. 452, 34 C.B.R. (3d) 196 (Q.B.); *Roscoe Enterprises Ltd. v. Wasscon Construction Inc.*, [1998] S.J. No. 487, 161 D.L.R. (4th) 725 (Q.B.). However, the court in *Duraco* only reached this conclusion because it interpreted *Henfrey* as requiring courts to analyze whether the three certainties were met "without regard" to the terms of the statute: at para. 9. The court then held that the deemed trust did not survive in bankruptcy because the parties did not subjectively intend to create a trust: paras. 11-13. The *Roscoe* court simply followed the *Duraco* court's analysis: at paras. 25-31. For the reasons stated above, this is a misreading of *Henfrey*. The court in *Henfrey* did look to the terms of the statute when it analyzed whether the deemed statutory trust satisfied the general principles of trust law: p. 34 S.C.R. [page248]

[77] RBC also cites *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, [2006] O.J. No. 4152 (C.A.), at para. 46, leave to appeal to S.C.C. granted [2006] S.C.C.A. No. 490, appeal discontinued on October 31, 2007, where this court described a deemed statutory trust as "a legal fiction". There again, however, the statutory "trust" was a fiction as it amounted to nothing more than a general floating charge on all assets and could not satisfy the general principles of trust law.

8,12,00(vi) *Conclusion*

[78] I conclude, accordingly, that *Henfrey* contemplates that a provincial statute can supply the required element of certainty of intention for a statutory trust and that the trust created by the

CLA, s. 8(1) does not give rise to an operational conflict with the *BIA*, s. 67(1) (*a*). Accordingly, the doctrine of paramountcy does not apply.

(2) *Were the debts of the city and the town choses in action that supplied the required certainty of subject matter for a trust?*

[79] As I have mentioned, the problem frequently encountered with deemed statutory trusts is that while they use the label "trust", they do not actually create a trust but rather purport to confer a priority over all of the bankrupt's assets. For the following reasons, I conclude that the motion judge erred by finding that the requirement of certainty of subject matter was not met in this case.

[80] Gillese explains the requirement for certainty of subject matter as follows, at p. 43:

> It must be possible to determine precisely what property the trust is meant to encompass. The subject matter is ascertained when it is a fixed amount or a specified piece of property; it is ascertainable when a method by which the subject matter can be identified is available from the terms of the trust or otherwise.

To a similar effect is this court's decision in *Angus v. Port Hope (Municipality)*, [2017] O.J. No. 3481, 2017 ONCA 566, at para. 112, leave to appeal to S.C.C.C. refused [2017] S.C.C.A. No. 382.

[81] The motion judge ruled [at para. 6] that because the funds the city and the town owed to A-1 "do not necessarily come from any particular fund or account and are simply payable by the City/Town from its own revenues or other sources", the requisite certainty of subject matter to establish a trust at common law was absent.

[82] The amounts owed by the city and the town on account of the paving projects were debts. It is well-established that a debt is [page249] a chose in action which can properly be the subject matter of a trust. In *Citadel General Assurance Co. v. Lloyds Bank Canada*, [1997] 3 S.C.R. 805, [1997] S.C.J. No. 92, at para. 29, the court stated: "A debt obligation is a chose in action and, therefore, property over which one can impose a trust." This proposition is supported by the decision of the House of Lords in *Lipkin Gorman v. Karpnale Ltd*., [1991] 3 W.L.R. 10, [1991] 2 A.C. 548 (H.L.). See, also, Donovan W.M. Waters, Mark R. Gillen and Lionel D. Smith, *Waters' Law of Trusts in Canada*, 4th ed. (Toronto: Carswell, 2012), at p. 161.

[83] It follows that it does not matter that neither the city nor the town had created segregated accounts or specifically earmarked the source of the funds they would use to pay the debts they owed for the paving projects. The statutory trust attaches to the property of the contractor or subcontractor, namely, the debt, not to the funds the debtor will use to pay that debt.

[84] Section 8(1) embraces "all amounts, owing to a contractor or subcontractor, whether or not due or payable". That language designated precisely what property the trust is meant to encompass. A-1 owned those debts. They constituted choses in action which are a form of property over which a trust may be imposed. It follows that at the moment of A-1's bankruptcy, the trust created by s. 8(1) was imposed on the debts owed by the city and the town to A-1.

(3) *Did commingling of the funds mean that the required*

certainty of subject matter was not present?

[85] In my respectful view, the motion judge erred by ruling that because the money paid to satisfy the individual debts owing to A-1 on account of the paving projects had been commingled with the money paid to satisfy other paving project debts in the paving projects account, the requisite certainty of subject matter was not made out.

[86] The evidence clearly establishes that the funds paid for each paving project were readily ascertainable and identifiable. They were commingled only to the extent they had all been paid into the same account, but they had not been converted to other uses and they did not cease to be traceable to the specific project for which they had been paid.

[87] Commingling of this kind does not deprive trust property of the required element of certainty of subject matter. Commingling of trust money with other money can destroy the element of certainty of subject matter, but only where commingling makes it impossible to identify or trace the trust property. [page250]

[88] McLachlin J. explained this in *Henfrey* when she stated in relation to the deemed statutory trust imposed on money collected by a merchant under British Columbia's *Social Service Tax Act* that the trust attached the moment the tax is collected. Accordingly, "[i]f the money collected for tax is identifiable or traceable, then the true state of affairs conforms with the ordinary meaning of 'trust' and the money is exempt from distribution to creditors" in the merchant's bankruptcy: pp. 34-35 S.C.R. McLachlin J. went on to explain that the problem with deemed statutory trusts is that very often, the trust property "ceases to be identifiable": p. 34 S.C.R. She then stated, at pp. 34-35 S.C.R., that the property ceases to be identifiable in the following circumstances:

> The tax money is mingled with other money in the hands of the merchant *and converted to other property so that it cannot be traced.* At this point it is no longer a trust under general principles of law . . . [If] the money has been converted to other property and cannot be traced, there is "no property . . . held in trust" under [the predecessor provision to s. 67(1)(a) of the *BIA*].

(Emphasis added)

[89] Subsequent jurisprudence confirms this statement of the law. In *Husky Oil*, the majority confirmed that *Henfrey* identified the key question as whether the trust property could be identified and traced: para. 25. This court also followed McLachlin J.'s statement of the law in *Graphicshoppe (Re)* (2005), 78 O.R. (3d) 401, [2005] O.J. No. 5184 (C.A.), where Moldaver J.A. (as he then was) stated, at para. 123:

> For present purposes, I am prepared to accept that *Henfrey Samson* falls short of holding that commingling of trust and other funds is, by itself, fatal to the application of s. 67(1)(a) of the *BIA*. Once however, the trust funds have been converted into property that cannot be traced, that is fatal. And that is what occurred here.

[90] The motion judge considered herself bound by the decision of this court in *GMAC* to find that any commingling of trust property was fatal to certainty of subject matter. In fairness to the

motion judge, I agree that there are *dicta* in *GMAC* that could be taken to support that proposition, and it appears that it has been read in the same way in other cases: *Bank of Montreal v. Kappeler Masonry Corp.*, [2017] O.J. No. 5928, 2017 ONSC 6760 (S.C.J.), at para. 3; and *Royal Bank of Canada v. Atlas Block Co.*, [2014] O.J. No. 2936, 2014 ONSC 3062, 15 C.B.R. (6th) 272 (S.C.J.), at paras. 35-36. However, for the following reasons, it is my view that GMAC should not be read as standing for the proposition that any commingling will be fatal to the existence of a trust.

[91] As described previously, the issue in *GMAC* concerned s. 15 of the *Load Brokers* regulation, which required load brokers to hold in trust for carriers' money received by the load broker on [page251] account of carriage charges and to maintain separate accounts for such funds. TCT, the bankrupt, had failed to maintain separate accounts, and a priority dispute arose between the carriers who claimed a trust and TCT's secured creditor. The court held that, as TCT had not maintained a separate account but had commingled the money it received for carriage charges, there was no trust for the purposes of s. 67(1)(*a*) of the *BIA*. The court stated, at para. 19: "Once the purported trust funds are co-mingled with other funds, they can no longer be said to be 'effectively segregated' for the purpose of constituting a trust at common law." Significantly, the authority cited for that proposition is *Henfrey*, and the court goes on to cite the same passage from *Henfrey* that I have referred to above, at para. 46, stating that when the "tax money is mingled with other money in the hands of the merchant and converted to other property so that it cannot be traced", it ceases to be subject to any trust. The *GMAC* court went on to state, at para. 20, that the facts before the court were not distinguishable from those of *Henfrey* and that the legal result must also be the same.

[92] In my view, *GMAC* is distinguishable from the case at bar.

[93] First, the *Load Brokers* regulation at issue in *GMAC* did not create a deemed statutory trust. Admittedly, the *GMAC* court did not find it necessary to decide this point: para. 17. However, this conclusion clearly follows from examining the text of s. 15 of the regulation and comparing it to other provisions that create deemed statutory trusts. The regulation did not use deeming language such as found in s. 18 of the *Social Service Tax Act* at issue in *Henfrey*. Instead, it used the obligatory language of "shall", stating that the load broker "shall" hold in trust money received and "shall" maintain a trust account. This language indicates the regulation obligates the load broker to take steps that will bring a trust into existence but the regulation itself does not bring the trust into existence.

[94] This distinction between deemed statutory trusts and statutory trust obligations explains the result in *GMAC*. The regulation only obligated the load broker to hold the funds received in a separate account. If TCT complied with this obligation, that would give rise to a trust. However, TCT did not comply with this obligation and instead deposited all funds received into a single account. Accordingly, TCT did not perform the actions required to create a trust. The fact that the moneys TCT received may have been capable of being traced due to the computerized accounting records it maintained does not alter the conclusion that no trust arose. As GCNA submitted in oral argument, while tracing is available once a trust exists, tracing is incapable of creating a trust. [page252]

[95] The distinction between deemed statutory trusts and mere statutory trust obligations also explains why a trust did attach to moneys received by the receiver on behalf of TCT following

the receiver's appointment. The receiver had deposited payments received into a separate account pursuant to court orders: *GMAC*, para. 33. The court found that the receiver was required to comply with s. 15 of the regulation and hold the funds on trust: *GMAC*, para. 36. Accordingly, the court found that the payments the receiver collected were held on trust because the receiver was required to comply with the regulation and did in fact comply with it by holding the funds in a separate account: *GMAC*, para. 38. The receiver's action of complying with the statutory trust obligation by depositing the funds into a separate account thus brought the trust into existence.

[96] In contrast, s. 8(1) of the *CLA* operates quite differently than s. 15 of the *Load Brokers* regulation. It does impose a deemed statutory trust rather than merely create a statutory trust obligation on the contractor to hold money on trust in a separate account. Section 8(1) declares that the amounts owing to the contractor "constitute a trust fund" independently of the contractor's subjective intention or actions. The s. 8(1) trust is imposed from the time the moneys are owed to the contractor, not just after they are received. Accordingly, the fact that s. 8(1) and (2) did not require the segregation of amounts received is not determinative because the statute itself, not the act of complying with a statutory obligation to segregate funds, created the trust.

[97] Second, the statement that once the purported trust funds are commingled with other funds, they cease to be trust funds must be read in the light of the fact that when making it, the court was explicitly following *Henfrey.* In *Henfrey*, as I have explained, McLachlin J. made it clear that it was only when commingling is accompanied by conversion and tracing becomes impossible that the required element of certainty of subject matter is lost.

[98] In my view, *GMAC* should not be read as standing for the proposition that all deemed statutory trusts cease to exist if there is any commingling of the trust funds.

[99] I am fortified in that conclusion by a considerable body of authority in addition to *Henfrey* that stands for the proposition that commingling alone will not destroy the element of certainty of subject matter under the general principles of trust law. I have already mentioned *Graphicshoppe,* where this court clearly rejected that proposition. A.H. Oosterhoff, Robert Chambers and Mitchell McInnes, *Oosterhoff on Trusts: Text, Commentary and Materials*, 8th ed. (Toronto: Carswell, 2014), at pp. 207-208, [page253] states that when trust property is deposited into a mixed account, "the trust is not necessarily defeated. The rules of tracing allow the beneficiary to assert a proprietary interest in the account." In *B.M.P. Global Distribution Inc. v. Bank of Nova Scotia*, [2009] 1 S.C.R. 504, [2009] S.C.J. No. 15, 2009 SCC 15, the Supreme Court held that mixing of the funds does not necessarily bar recovery and that it is possible to trace money into bank accounts as long as it is possible to identify the funds: at para. 85. The funds are identifiable if it can be established that the money deposited in the account was the product of, or substitute for, the original thing: at para. 86. As the Alberta Court of Queen's Bench recently held, in *Imor Capital Corp. v. Horizon Commercial Development Corp.*, [2018] A.J. No. 43, 2018 ABQB 39, 56 C.B.R. (6th) 323, at para. 58:

> . . . [the bankrupt's] co-mingling of trust funds with its own is not fatal to the trust. It must be determined whether, despite the co-mingling, the trust funds can be identified or traced.

The following cases are to the same effect: *Hallett's Estate (Re)* (1880), 13 Ch. D. 696 (C.A.); *Kayford Ltd. (Re)*, [1975] 1 W.L.R. 279, [1975] 1 All E.R. 604 (Ch.); *Kel-Greg Homes Inc. (Re)*, [2015] N.S.J. No. 417, 2015 NSSC 274, 365 N.S.R. (2d) 274, at paras. 51-59; *0409725 B.C. Ltd.*, at paras. 24-34; *Kerr Interior Systems Ltd. v. Kenroc Building Materials Co.*, [2009] A.J. No. 675, 2009 ABCA 240, 54 C.B.R. (5th) 173, at para. 18.

(4) *Does RBC's security interest have priority even if the trust created by s. 8(1) of the CLA survives in bankruptcy?*

[100] On appeal, RBC submits that its security interest takes priority over the deemed statutory trust in s. 8(1) of the *CLA* even if this court finds that the *CLA* trust is valid under s. 67(1)(*a*) of the *BIA*. RBC relies on the Supreme Court's decision in *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411, [1997] S.C.J. No. 25 in support of this argument. In that case, the majority found that a bank's security interest under the *Bank Act*, S.C. 1991, c. 46 and the *Personal Property Security Act*, S.A. 1988, c. P-4.05 took priority over a deemed statutory trust in favour of the federal Crown established by s. 227(4) and (5) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.).

[101] RBC did not advance this argument before the motion judge. Nor did RBC introduce its general security agreement with A-1 into the record.

[102] Accordingly, I would decline to consider this argument. A respondent on appeal cannot seek to sustain an order on a basis [page254] that is both an entirely new argument and in relation to which it might have been necessary to adduce evidence before the lower court: see *R. v. Perka*, [1984] 2 S.C.R. 232, [1984] S.C.J. No. 40, at p. 240 S.C.R.; *Fanshawe College of Applied Arts and Technology v. AU Optronics Corp.* (2016), 129 O.R. (3d) 391, [2016] O.J. No. 779, 2016 ONCA 131 (in Chambers), at para. 9. RBC's proposed argument is both new and requires evidence that RBC has not adduced. In both *Sparrow Electric* and *GMAC*, the court considered the specific provisions of the security agreement in determining whether the security attached to the trust funds: see *Sparrow Electric*, at paras. 71-72, 90; *GMAC*, at para. 26. This court is unable to consider the specific provisions of RBC's security agreement with A-1 because it is not part of the record.

Disposition

[103] For these reasons, I would allow the appeal, set aside the order below and make an order

(1) that by operation of s. 67(1)(*a*) of the *BIA*, the funds satisfy the requirements for a trust at law and so are not property of A-1 available for distribution to A-1's creditors; and

(2) that the balance of the motion concerning GCNA's priority dispute with the unions be remitted to the Superior Court for disposition.

[104] GCNA is entitled to costs awarded against RBC fixed at $30,000 for the motion and at $45,000 for this appeal, both amounts inclusive of disbursements and taxes.

Appeal allowed.

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IN THE MATTER of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as Amended

AND IN THE MATTER of a Plan of Compromise or Arrangement of Quality Rugs of Canada Limited and the Other Group Listed in Schedule "A"

Court File No.: CV-23-00703933-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at TORONTO

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