Clerk's Stamp

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	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PLAINTIFF	ALBERTA TREASURY BRANCHES
DEFENDANT	COGI LIMITED PARTNERSHIP, CANADIAN OIL & GAS INTERNATIONAL INC., CONSERVE OIL GROUP INC. and CONSERVE OIL FIRST CORPORATION
DOCUMENT	**AUTHORITIES OF KNEEHILL COUNTY, RED DEER COUNTY, MUNICIPAL DISTRICT OF BONNYVILLE, NO. 87, RED DEER COUNTY, MUNICIPAL DISTRICT OF TABER, and MUNICIPAL DISTRICT OF GREENVIEW NO. 16**

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MUNICIPAL GOVERNMENT ACT

Chapter M-26

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Preamble

WHEREAS Alberta's municipalities, governed by democratically elected officials, are established by the Province, and are empowered to provide responsible and accountable local governance in order to create and sustain safe and viable communities;

WHEREAS Alberta's municipalities play an important role in Alberta's economic, environmental and social prosperity today and in the future;

WHEREAS the Government of Alberta recognizes the importance of working together with Alberta's municipalities in a spirit of partnership to co-operatively and collaboratively advance the interests of Albertans generally; and

WHEREAS the Government of Alberta recognizes that Alberta's municipalities have varying interests and capacity levels that

require flexible approaches to support local, intermunicipal and regional needs;

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

Interpretation

1(1) In this Act,

(a) "ALSA regional plan" means a regional plan as defined in the *Alberta Land Stewardship Act*;

(a.1) "business" means

(i) a commercial, merchandising or industrial activity or undertaking,

(ii) a profession, trade, occupation, calling or employment, or

(iii) an activity providing goods or services,

whether or not for profit and however organized or formed, including a co-operative or association of persons;

(b) "by-election" means an election to fill a vacancy on a council other than at a general election;

(c) "chief administrative officer" means a person appointed to a position under section 205;

(d) "chief elected official" means the person elected or appointed as chief elected official under section 150;

(e) "council" means

(i) the council of a city, town, village, summer village, municipal district or specialized municipality,

(ii) repealed 1995 c24 s2,

(iii) the council of a town under the *Parks Towns Act*, or

(iv) the council of a municipality incorporated by a special Act;

(f) "council committee" means a committee, board or other body established by a council under this Act but does not include an assessment review board established under

section 454 or a subdivision and development appeal board established under section 627;

(g) "councillor" includes the chief elected official;

(h) "designated officer" means a person appointed to a position established under section 210(1);

(i) "elector" means a person who is eligible to vote in the election for a councillor under the *Local Authorities Election Act*;

(j) "enactment" means

(i) an Act of the Legislature of Alberta and a regulation made under an Act of the Legislature of Alberta, and

(ii) an Act of the Parliament of Canada and a statutory instrument made under an Act of the Parliament of Canada,

but does not include a bylaw made by a council;

(k) "general election" means an election held to fill vacancies on council caused by the passage of time, and includes a first election;

(k.1) "growth management board" means a growth management board established under Part 17.1;

(k.2) "Indian band" means a band within the meaning of the *Indian Act* (Canada);

(k.3) "Indian reserve" means a reserve within the meaning of the *Indian Act* (Canada);

(l) "Land Compensation Board" means the Land Compensation Board established under the *Expropriation Act*;

(m) "local authority" means

(i) a municipal authority,

(ii) a regional health authority under the *Regional Health Authorities Act*,

(iii) a regional services commission, and

(iv) the board of trustees of a district or division as defined in the *School Act*;

(n) "market value" means the amount that a property, as defined in section 284(1)(r), might be expected to realize if it is sold on the open market by a willing seller to a willing buyer;

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

(p) "municipal authority" means a municipality, improvement district and special area and, if the context requires, in the case of an improvement district and special area,

(i) the geographical area of the improvement district or special area, or

(ii) the Minister, where the improvement district or special area is authorized or required to act;

(q) "Municipal Government Board" means the Municipal Government Board established under Part 12, and includes any panel of the Board;

(r) "municipal purposes" means the purposes set out in section 3;

(s) "municipality" means

(i) a city, town, village, summer village, municipal district or specialized municipality,

(ii) repealed 1995 c24 s2,

(iii) a town under the *Parks Towns Act*, or

(iv) a municipality formed by special Act,

or, if the context requires, the geographical area within the boundaries of a municipality described in subclauses (i) to (iv);

(t) "natural person powers" means the capacity, rights, powers and privileges of a natural person;

(u) "owner" means

(i) in respect of unpatented land, the Crown,

(ii) in respect of other land, the person who is registered under the *Land Titles Act* as the owner of the fee simple estate in the land, and

(iii) in respect of any property other than land, the person in lawful possession of it;

(v) "parcel of land" means

(i) where there has been a subdivision, any lot or block shown on a plan of subdivision that has been registered in a land titles office;

(ii) where a building affixed to the land that would without special mention be transferred by a transfer of land has been erected on 2 or more lots or blocks shown on a plan of subdivision that has been registered in a land titles office, all those lots or blocks;

(iii) a quarter section of land according to the system of surveys under the *Surveys Act* or any other area of land described on a certificate of title;

(w) "pecuniary interest" means pecuniary interest within the meaning of Part 5, Division 6;

(x) "population" means population as defined and determined in accordance with the regulations;

(y) "public utility" means a system or works used to provide one or more of the following for public consumption, benefit, convenience or use:

(i) water or steam;

(ii) sewage disposal;

(iii) public transportation operated by or on behalf of the municipality;

(iv) irrigation;

(v) drainage;

(vi) fuel;

(vii) electric power;

(viii) heat;

(ix) waste management;

(x) residential and commercial street lighting,

and includes the thing that is provided for public consumption, benefit, convenience or use;

(y.1) "regional services commission" means a regional services commission under Part 15.1;

(z) "road" means land

(i) shown as a road on a plan of survey that has been filed or registered in a land titles office, or

(ii) used as a public road,

and includes a bridge forming part of a public road and any structure incidental to a public road;

(z.1) "summer village residence" means a parcel of land having at least one building the whole or any part of which was designed or intended for, or is used as, a residence by one person or as a shared residence by 2 or more persons, whether on a permanent, seasonal or occasional basis;

(aa) "tax" means

(i) a property tax,

(ii) a business tax,

(iii) a business improvement area tax,

(iii.1) a community revitalization levy,

(iv) a special tax,

(v) a well drilling equipment tax,

(vi) a local improvement tax, and

(vii) a community aggregate payment levy;

(bb) "taxpayer" means a person liable to pay a tax;

(cc) "whole council" means

(i) all of the councillors that comprise the council under section 143,

(ii) if there is a vacancy on council and the council is not required to hold a by-election under section 162 or 163, the remaining councillors, or

(iii) if there is a vacancy on council and the Minister orders that the remaining councillors constitute a quorum under section 160 or 168, the remaining councillors.

(1.1) The Minister may make regulations defining "meeting" for the purposes of one or more provisions of this Act and the regulations.

(1.2) In this Act, a reference to a body of water is to be interpreted as a reference to

(a) a permanent and naturally occurring water body, or

(b) a naturally occurring river, stream, watercourse or lake.

(2) For the purposes of this Act, a municipality or group of municipalities controls a corporation if

(a) the municipality or group of municipalities hold, other than by way of security only, securities of the corporation to which are attached more than 50% of the votes that may be cast to elect directors of the corporation and, if exercised, are sufficient to elect a majority of the directors of the corporation, or

(b) all or a majority of its members or directors are appointed by the municipality or group of municipalities.

(2.1) For the purposes of the definition of "summer village residence" in subsection (1)(z.1), "building" includes a manufactured home, mobile home, modular home or travel trailer but does not include a tent.

(3) For the purposes of this Act, a meeting or part of a meeting is considered to be closed to the public if

(a) any members of the public are not permitted to attend the entire meeting or part of the meeting,

(b) the council, committee or other body holding the meeting instructs any member of the public to leave the meeting or part of the meeting, other than for improper conduct, or

(c) the council, committee or other body holding the meeting holds any discussions separate from the public during the meeting or part of the meeting.

RSA 2000 cM-26 s1;2005 c14 s2;2013 c17 s2;
2015 c8 s2;2016 c24 s4;2017 c13 s1(2);2017 c22 s38

Application of Act

2(1) This Act applies to all municipalities and improvement districts.

(2) If there is an inconsistency between this Act and

(a) repealed 1995 c24 s3,

(b) the *Parks Towns Act*, or

(c) a special Act forming a municipality,

the other Act prevails.

1994 cM-26.1 s2;1995 c24 s3

Indian reserves

2.1 No municipality, improvement district or special area constituted under the *Special Areas Act* includes land set apart as an Indian reserve.

2016 c24 s5;2017 c13 s2(2)

Part 1
Purposes, Powers and Capacity of Municipalities

Municipal purposes

3 The purposes of a municipality are

(a) to provide good government,

(a.1) to foster the well-being of the environment,

(b) to provide services, facilities or other things that, in the opinion of council, are necessary or desirable for all or a part of the municipality,

(c) to develop and maintain safe and viable communities, and

(d) to work collaboratively with neighbouring municipalities to plan, deliver and fund intermunicipal services.

RSA 2000 cM-26 s3;2016 c24 s6;2017 c13 s1(3)

Corporation

4 A municipality is a corporation.

1994 cM-26.1 s4

Powers, duties and functions

5 A municipality

(a) has the powers given to it by this and other enactments,

(b) has the duties that are imposed on it by this and other enactments and those that the municipality imposes on itself as a matter of policy, and

(c) has the functions that are described in this and other enactments.

1994 cM-26.1 s5

Natural person powers

6 A municipality has natural person powers, except to the extent that they are limited by this or any other enactment.

1994 cM-26.1 s6

Part 2
Bylaws

Division 1
General Jurisdiction

General jurisdiction to pass bylaws

7 A council may pass bylaws for municipal purposes respecting the following matters:

(a) the safety, health and welfare of people and the protection of people and property;

(b) people, activities and things in, on or near a public place or place that is open to the public;

(c) nuisances, including unsightly property;

(d) transport and transportation systems;

(e) businesses, business activities and persons engaged in business;

(f) services provided by or on behalf of the municipality;

(g) public utilities;

(h) wild and domestic animals and activities in relation to them;

(i) the enforcement of bylaws made under this or any other enactment, including any or all of the following:

(i) the creation of offences;

(ii) for each offence, imposing a fine not exceeding $10 000 or imprisonment for not more than one year, or both;

(g) whether the property is assessable for public school purposes or separate school purposes, if notice has been given to the municipality under section 156 of the *School Act*;

(g.1) repealed 2016 c24 s34;

(h) if the property is fully or partially exempt from taxation under Part 10, a notation of that fact;

(h.1) if a deferral of the collection of tax under section 364.1 is in effect for the property, a notation of that fact;

(i) any other information considered appropriate by the municipality or required by the Minister, as the case may be.

RSA 2000 cM-26 s303;2002 c19 s7; 2005 c14 s6; 2016 c24 s34;2017 c13 s1(22)

Contents of provincial assessment roll

303.1 The provincial assessment roll must show, for each assessed designated industrial property, the following:

(a) a description of the type of designated industrial property;

(b) a description sufficient to identify the location of the designated industrial property;

(c) the name and mailing address of the assessed person;

(d) the assessment;

(e) the assessment class or classes;

(f) repealed 2017 c13 s2(9);

(g) whether the designated industrial property is assessable for public school purposes or separate school purposes, if notice has been given to the municipality under section 156 of the *School Act*;

(h) if the designated industrial property is exempt from taxation under Part 10, a notation of that fact;

(i) any other information considered appropriate by the provincial assessor.

2016 c24 s35;2017 c13 s2(9)

Recording assessed persons

304(1) The name of the person described in column 2 must be recorded on the assessment roll as the assessed person in respect of the assessed property described in column 1.

	Column 1 Assessed property		Column 2 Assessed person
(a)	a parcel of land, unless otherwise dealt with in this subsection;	(a)	the owner of the parcel of land;
(b)	a parcel of land and the improvements to it, unless otherwise dealt with in this subsection;	(b)	the owner of the parcel of land;
(c)	a parcel of land, an improvement or a parcel of land and the improvements to it held under a lease, licence or permit from the Crown in right of Alberta or Canada or a municipality;	(c)	the holder of the lease, licence or permit or, in the case of a parcel of land or a parcel of land and the improvements to it, the person who occupies the land with the consent of that holder or, if the land that was the subject of a lease, licence or permit has been sold under an agreement for sale, the purchaser under that agreement;
(d)	a parcel of land forming part of the station grounds of, or of a right of way for, a railway other than railway property, or a right of way for, irrigation works as defined in the *Irrigation Districts Act* or drainage works as defined in the *Drainage Districts Act*, that is held under a lease, licence or permit from the person who operates the railway, or from the irrigation district or the board of trustees of the drainage district;	(d)	the holder of the lease, licence or permit or the person who occupies the land with the consent of that holder;

	Column 1 Assessed property		Column 2 Assessed person
(d.1)	railway property;	(d.1)	the owner of the railway property;
(e)	a parcel of land and the improvements to it held under a lease, licence or permit from a regional airports authority, where the land and improvements are used in connection with the operation of an airport;	(e)	the holder of the lease, licence or permit or the person who occupies the land with the consent of that holder;
(f)	a parcel of land, or a part of a parcel of land, and the improvements to it held under a lease, licence or permit from the owner of the land where the land and the improvements are used for (i) drilling, treating, separating, refining or processing of natural gas, oil, coal, salt, brine or any combination, product or by-product of any of them, (ii) pipeline pumping or compressing, or (iii) working, excavating, transporting or storing any minerals in or under the land referred to in the lease, licence or permit or under land in the vicinity of that land.	(f)	the holder of the lease, licence or permit;

	Column 1 Assessed property		Column 2 Assessed person
(g)	machinery and equipment used in the excavation or transportation of coal or oil sands as defined in the *Oil Sands Conservation Act*;	(g)	the owner of the machinery and equipment;
(h)	improvements to a parcel of land listed in section 298 for which no assessment is to be prepared;	(h)	the person who owns or has exclusive use of the improvements;
(i)	linear property;	(i)	the operator of the linear property;
(j)	a designated manufactured home on a site in a manufactured home community and any other improvements located on the site and owned or occupied by the person occupying the designated manufactured home;	(j)	the owner of (i) the designated manufactured home, or (ii) the manufactured home community if the municipality passes a bylaw to that effect;
(k)	a designated manufactured home located on a parcel of land that is not owned by the owner of the designated manufactured home together with any other improvements located on the site that are owned or occupied by the person occupying the designated manufactured home.	(k)	the owner of the designated manufactured home if the municipality passes a bylaw to that effect.

(2) When land is occupied under the authority of a right of entry order as defined in the *Surface Rights Act* or an order made under any other Act, it is, for the purposes of subsection (1), considered to be occupied under a lease or licence from the owner of the land.

(3) A person who purchases property or in any other manner becomes liable to be shown on the assessment roll as an assessed person

(a) must provide to the provincial assessor, in the case of designated industrial property, or

(b) must provide to the municipality, in the case of property other than designated industrial property,

written notice of a mailing address to which notices under this Part and Part 10 may be sent.

(4) Despite subsection (1)(c), no individual who occupies housing accommodation under a lease, licence or permit from a management body under the *Alberta Housing Act* is to be recorded as an assessed person if the sole purpose of the lease, licence or permit is to provide housing accommodation for that individual.

(5) Repealed 2016 c24 s36.

(6) A bylaw passed under subsection (1)(j)(ii)

(a) must be advertised,

(b) has no effect until the beginning of the year commencing at least 12 months after the bylaw is passed,

(c) must indicate the criteria used to designate the assessed person, and

(d) may apply to one or more manufactured home communities.

(7) When a bylaw is passed under subsection (1)(j)(ii), the owner of the designated manufactured home is the assessed person for the purpose of making a complaint under section 460(1) relating to the designated manufactured home.

RSA 2000 cM-26 s304;2005 c14 s7;2008 c37 s3;
2016 c24 s36;2017 c13 s1(23)

Correction of roll

305(1) If it is discovered that there is an error, omission or misdescription in any of the information shown on the assessment roll,

(a) the assessor may correct the assessment roll for the current year only, and

(b) on correcting the roll, an amended assessment notice must be prepared and sent to the assessed person.

Minister's power to quash assessments

324(1) If, after an inspection under section 571 or an audit under the regulations is completed, the Minister is of the opinion that an assessment

(a) has not been prepared in accordance with the rules and procedures set out in this Part and the regulations,

(b) is not fair and equitable, taking into consideration assessments of similar property, or

(c) does not meet the standards required by the regulations,

the Minister may quash the assessment and direct that a new assessment be prepared.

(2) On quashing an assessment, the Minister must provide directions as to the manner and times in which

(a) the new assessment is to be prepared,

(a.1) a new notice of assessment date is to be established,

(b) the new assessment is to be placed on the assessment roll, and

(c) amended assessment notices are to be sent to the assessed persons.

(3) The Minister must specify the effective date of a new assessment prepared under this section.

RSA 2000 cM-26 s324;2002 c19 s15;2017 c13 s1(28)

Minister's power to alter an equalized assessment

325 Despite anything in this Act, the Minister may adjust an equalized assessment at any time.

Part 10
Taxation

Division 1
General Provisions

Definitions

326(1) In this Part,

(a) "requisition" means

(i) repealed 1995 c24 s45,

(ii) any part of the amount required to be paid into the Alberta School Foundation Fund under section 174 of the *School Act* that is raised by imposing a rate referred to in section 174 of the *School Act*,

(iii) any part of the requisition of school boards under Part 6, Division 3 of the *School Act*,

(iv) repealed 2008 cE-6.6 s55,

(v) the amount required to be paid to a management body under section 7 of the *Alberta Housing Act*, or

(vi) the amount required to recover the costs incurred for matters related to

(A) the assessment of designated industrial property, and

(B) any other matters related to the provincial assessor's operations;

(b) "student dormitory" means a housing unit

(i) that is used in connection with a purpose referred to in section 362(1)(c), (d) or (e) or with a college incorporated under a private Act of the Legislature, and

(ii) the residents of which are students of a facility used in connection with a purpose referred to in section 362(1)(c), (d) or (e) or with a college incorporated under a private Act of the Legislature,

but does not include a single family residence and the land attributable to that residence;

(c) "tax arrears" means taxes that remain unpaid after December 31 of the year in which they are imposed.

(2) For purposes of Divisions 3 and 4, "business" does not include a constituency office of a Member of the Legislative Assembly or any other office used by one or more Members of the Legislative Assembly to carry out their duties and functions as Members.

RSA 2000 cM-26 s326;2008 cE-6.6 s55; 2015 c8 s48;2016 c24 s48

Tax roll

327(1) Each municipality must prepare a tax roll annually.

(2) The tax roll may consist of one roll for all taxes imposed under this Part or a separate roll for each tax imposed under this Part.

(3) The tax roll for property tax may be a continuation of the assessment roll prepared under Part 9 or may be separate from the assessment roll.

(4) The fact that any information shown on the tax roll contains an error, omission or misdescription does not invalidate any other information on the roll or the roll itself.

1994 cM-26.1 s327

Duty to provide information

328 Taxpayers must provide, on request by the municipality, any information necessary for the municipality to prepare its tax roll.

1994 cM-26.1 s328

Contents of tax roll

329 The tax roll must show, for each taxable property or business, the following:

(a) a description sufficient to identify the location of the property or business;

(b) the name and mailing address of the taxpayer;

(c) the assessment;

(d) the name, tax rate and amount of each tax imposed in respect of the property or business;

(e) the total amount of all taxes imposed in respect of the property or business;

(f) the amount of tax arrears, if any;

(g) if any property in the municipality is the subject of an agreement between the taxpayer and the municipality under section 347(1) relating to tax arrears, a notation of that fact;

(g.1) if any property in the municipality is the subject of a bylaw or agreement under section 364.1 to defer the collection of tax, a notation of the amount deferred and the taxation year or years to which the amount relates;

(h) any other information considered appropriate by the municipality.

RSA 2000 cM-26 s329;2016 c24 s49

Correction of roll

330(1) If it is discovered that there is an error, omission or misdescription in any of the information shown on the tax roll, the municipality may correct the tax roll for the current year only and

on correcting the roll, it must prepare and send an amended tax notice to the taxpayer.

(2) If it is discovered that no tax has been imposed on a taxable property or business, the municipality may impose the tax for the current year only and prepare and send a tax notice to the taxpayer.

(3) If exempt property becomes taxable or taxable property becomes exempt under section 368, the municipality must correct the tax roll and on correcting the roll, it must send an amended tax notice to the taxpayer.

(4) The date of every entry made on the tax roll under this section must be shown on the roll.

1994 cM-26.1 s330

Person liable to pay taxes

331(1) Subject to the regulations, the person liable to pay a property tax imposed under this Part is the person who

(a) at the time the assessment is prepared under Part 9, is the assessed person, or

(b) subsequently becomes the assessed person.

(2) The person liable to pay any other tax imposed under this Part is the person who

(a) at the time the tax is imposed, is liable in accordance with this Part or a regulation made under this Part to pay the tax, or

(b) subsequently becomes liable in accordance with this Part or a regulation made under this Part to pay it.

RSA 2000 cM-26 s331;2005 c14 s11

Taxes imposed on January 1

332 Taxes imposed under this Part, other than a supplementary property tax and a supplementary business tax, are deemed to have been imposed on January 1.

1994 cM-26.1 s332

Tax notices

333(1) Each municipality must annually

(a) prepare tax notices for all taxable property and businesses shown on the tax roll of the municipality, and

(b) send the tax notices to the taxpayers.

(2) A tax notice may include a number of taxable properties and taxable businesses if the same person is the taxpayer for all of them.

(3) A tax notice may consist of one notice for all taxes imposed under this Part, a separate notice for each tax or several notices showing one or more taxes.

(4) The assessment notice and the tax notice relating to the same property may be sent together or may be combined on one notice.

1994 cM-26.1 s333

Tax agreements

333.1(1) The council of a municipality may make a tax agreement with an assessed person who occupies or manages

(a) the municipality's property, including property under the direction, control and management of

(i) the municipality, or

(ii) a non-profit organization that holds the property on behalf of the municipality,

or

(b) property for the purpose of operating a professional sports franchise.

(2) A tax agreement may provide that, instead of paying the taxes imposed under this Part and any other fees or charges payable to the municipality, the assessed person may make an annual payment to the municipality calculated under the agreement.

(3) A tax agreement under this section must provide that the municipality accepts payment of the amount calculated under the agreement in place of the taxes and other fees or charges specified in the agreement.

1998 c24 s24

Contents of tax notice

334(1) A tax notice must show the following:

(a) the same information that is required to be shown on the tax roll;

(b) the date the tax notice is sent to the taxpayer;

(c) the amount of the requisitions, any one or more of which may be shown separately or as part of a combined total;

(d) except when the tax is a property tax, the date by which a complaint must be made, which date must not be less than 30 days after the tax notice is sent to the taxpayer;

(e) the name and address of the designated officer with whom a complaint must be filed;

(f) the dates on which penalties may be imposed if the taxes are not paid;

(f.1) information on how to request a receipt for taxes paid;

(g) any other information considered appropriate by the municipality.

(2) A tax notice may show

(a) one tax rate that combines all of the tax rates set by the property tax bylaw, or

(b) each of the tax rates set by the property tax bylaw.

(3) Despite subsection (2), a tax notice must show, separately from all other tax rates shown on the notice, the tax rates set by the property tax bylaw to raise the revenue to pay the requisitions referred to in section 326(1)(a)(ii) or (vi).

RSA 2000 cM-26 s334;2016 c24 s50;2017 c13 s1(29)

Sending tax notices

335(1) The tax notices must be sent before the end of the year in which the taxes are imposed.

(2) If the mailing address of a taxpayer is unknown

(a) a copy of the tax notice must be sent to the mailing address of the taxable property or business, and

(b) if the mailing address of the taxable property or business is also unknown, the tax notice must be retained by the municipality and is deemed to have been sent to the taxpayer.

1994 cM-26.1 s335

Certification of date of sending tax notice

336(1) A designated officer must certify the date the tax notices are sent under section 335.

(2) The certification of the date referred to in subsection (1) is evidence that the tax notices have been sent and that the taxes have been imposed.

1994 cM-26.1 s336

Deemed receipt of tax notice

337 A tax notice is deemed to have been received 7 days after it is sent.

1994 cM-26.1 s337

Correction of tax notice

338 If it is discovered that there is an error, omission or misdescription in any of the information shown on a tax notice, the municipality may prepare and send an amended tax notice to the taxpayer.

1994 cM-26.1 s338

Incentives

339 A council may by bylaw provide incentives for payment of taxes by the dates set out in the bylaw.

1994 cM-26.1 s339

Instalments

340(1) A council may by bylaw permit taxes to be paid by instalments, at the option of the taxpayer.

(2) A person who wishes to pay taxes by instalments must make an agreement with the council authorizing that method of payment.

(3) When an agreement under subsection (2) is made, the tax notice, or a separate notice enclosed with the tax notice, must state

(a) the amount and due dates of the instalments to be paid in the remainder of the year, and

(b) what happens if an instalment is not paid.

1994 cM-26.1 s340

Deemed receipt of tax payment

341 A tax payment that is sent by mail to a municipality is deemed to have been received by the municipality on the date of the postmark stamped on the envelope.

1994 cM-26.1 s341

Receipt for payment of taxes

342 When taxes are paid to a municipality and the assessed person requests a receipt, the municipality must provide a receipt.

RSA 2000 cM-26 s342;2017 c13 s1(30)

Application of tax payment

343(1) A tax payment must be applied first to tax arrears.

(2) If a person does not indicate to which taxable property or business a tax payment is to be applied, a designated officer must decide to which taxable property or business owned by the taxpayer the payment is to be applied.

1994 cM-26.1 s343

Penalty for non-payment in current year

344(1) A council may by bylaw impose penalties in the year in which a tax is imposed if the tax remains unpaid after the date shown on the tax notice.

(2) A penalty under this section is imposed at the rate set out in the bylaw.

(3) The penalty must not be imposed sooner than 30 days after the tax notice is sent out.

1994 cM-26.1 s344

Penalty for non-payment in other years

345(1) A council may by bylaw impose penalties in any year following the year in which a tax is imposed if the tax remains unpaid after December 31 of the year in which it is imposed.

(2) A penalty under this section is imposed at the rate set out in the bylaw.

(3) The penalty must not be imposed sooner than January 1 of the year following the year in which the tax was imposed or any later date specified in the bylaw.

1994 cM-26.1 s345

Penalties

346 A penalty imposed under section 344 or 345 is part of the tax in respect of which it is imposed.

1994 cM-26.1 s346

Cancellation, reduction, refund or deferral of taxes

347(1) If a council considers it equitable to do so, it may, generally or with respect to a particular taxable property or business or a class of taxable property or business, do one or more of the following, with or without conditions:

(a) cancel or reduce tax arrears;

(b) cancel or refund all or part of a tax;

(c) defer the collection of a tax.

(2) A council may phase in a tax increase or decrease resulting from the preparation of any new assessment.

1994 cM-26.1 s347

Tax becomes debt to municipality

348 Taxes due to a municipality

(a) are an amount owing to the municipality,

(b) are recoverable as a debt due to the municipality,

(c) take priority over the claims of every person except the Crown, and

(d) are a special lien

(i) on land and any improvements to the land, if the tax is a property tax, a community revitalization levy, a special tax, a local improvement tax or a community aggregate payment levy, or

(ii) on goods, if the tax is a business tax, a community revitalization levy, a well drilling equipment tax, a community aggregate payment levy or a property tax imposed in respect of a designated manufactured home in a manufactured home community.

RSA 2000 cM-26 s348;2005 c14 s12

Fire insurance proceeds

349(1) Taxes that have been imposed in respect of improvements are a first charge on any money payable under a fire insurance policy for loss or damage to those improvements.

(2) Taxes that have been imposed in respect of a business are a first charge on any money payable under a fire insurance policy for loss or damage to any personal property

(a) that is located on the premises occupied for the purposes of the business, and

(b) that is used in connection with the business and belongs to the taxpayer.

1994 cM-26.1 s349

Tax certificates

350 On request, a designated officer must issue a tax certificate showing

(a) the amount of taxes imposed in the year in respect of the property or business specified on the certificate and the amount of taxes owing,

(b) the total amount of tax arrears, if any, and

(c) the total amount of tax, if any, in respect of which collection is deferred under this Part.

RSA 2000 cM-26 s350;2016 c24 s51

Non-taxable property

351(1) The following are exempt from taxation under this Part:

(a) property listed in section 298;

(b) any property or business in respect of which an exemption from assessment or taxation, or both, was granted before January 1, 1995

(i) by a private Act, or

(ii) by an order of the Lieutenant Governor in Council based on an order of the Local Authorities Board.

(2) A council may by bylaw cancel an exemption referred to in subsection (1)(b), with respect to any property or business.

(3) A council proposing to pass a bylaw under subsection (2) must notify the person or group that will be affected of the proposed bylaw.

(4) A bylaw under subsection (2) has no effect until the expiration of one year after it is passed.

(5) A copy of a bylaw under subsection (2) must be sent to the Minister and if the bylaw amends a private Act the Minister must send a copy to the clerk of the Legislative Assembly.

1994 cM-26.1 s351

Limitation on time for starting proceedings

352(1) An action, suit or other proceedings for the return by a municipality of any money paid to the municipality, whether under protest or otherwise, as a result of a claim by the municipality, whether valid or invalid, for payment of taxes or tax arrears must be started within 6 months after the payment of the money to the municipality.

(2) If no action, suit or other proceeding is started within the period referred to in subsection (1), the payment made to the municipality is deemed to have been a voluntary payment.

1994 cM-26.1 s352

Division 2
Property Tax

Property tax bylaw

353(1) Each council must pass a property tax bylaw annually.

(2) The property tax bylaw authorizes the council to impose a tax in respect of property in the municipality to raise revenue to be used toward the payment of

(a) the expenditures and transfers set out in the budget of the municipality, and

(b) the requisitions.

(3) The tax must not be imposed in respect of property

(a) that is exempt under section 351, 361 or 362, or

(b) that is exempt under section 363 or 364, unless the bylaw passed under that section makes the property taxable.

1994 cM-26.1 s353

Tax rates

354(1) The property tax bylaw must set and show separately all of the tax rates that must be imposed under this Division to raise the revenue required under section 353(2).

(2) A tax rate must be set for each assessment class or sub-class referred to in section 297.

(3) The tax rate may be different for each assessment class or sub-class referred to in section 297.

(3.1) Despite subsection (3), the tax rate for the class referred to in section 297(1)(d) and the tax rate for the sub-classes referred to in section 297(2.1) must be set in accordance with the regulations.

(4) The tax rates set by the property tax bylaw must not be amended after the municipality sends the tax notices to the taxpayers unless subsection (5) applies.

(5) If after sending out the tax notices the municipality discovers an error or omission that relates to the tax rates set by the property tax bylaw, the Minister may by order permit a municipality to revise the property tax bylaw and send out a revised tax notice.

RSA 2000 cM-26 s354;2016 c24 s52

Calculating tax rates

355 A tax rate is calculated by dividing the amount of revenue required by the total assessment of all property on which that tax rate is to be imposed.

1994 cM-26.1 s355;1995 c24 s47

Calculating amount of tax

356 The amount of tax to be imposed under this Division in respect of a property is calculated by multiplying the assessment for the property by the tax rate to be imposed on that property.

1994 cM-26.1 s356

Special provision of property tax bylaw

357(1) Despite anything in this Division, the property tax bylaw may specify a minimum amount payable as property tax.

(1.1) Despite section 353, a council may pass a bylaw separate from the property tax bylaw that provides for compulsory tax instalment payments for designated manufactured homes.

(2) If the property tax bylaw specifies a minimum amount payable as property tax, the tax notice must indicate the tax rates set by the property tax bylaw that raise the revenue required to pay the requisition referred to in section 326(1)(a)(ii).

RSA 2000 cM-26 s357;2016 c24 s53

Tax rate for residential property

357.1 The tax rate to be imposed by a municipality on residential property or on any sub-class of residential property must be greater than zero.

2016 c24 s54

358 Repealed 2016 c24 s55.

Maximum tax ratio

358.1(1) In this section,

(a) "non-conforming municipality" means a municipality that has a tax ratio greater than 5:1 as calculated using the property tax rates set out in its most recently enacted property tax bylaw as at May 31, 2016;

(b) "non-residential" means non-residential as defined in section 297(4);

(c) "tax ratio", in respect of a municipality, means the ratio of the highest non-residential tax rate set out in the municipality's property tax bylaw for a year to the lowest

residential tax rate set out in the municipality's property tax bylaw for the same year.

(2) No municipality other than a non-conforming municipality shall in any year have a tax ratio greater than 5:1.

(3) A non-conforming municipality shall not in any year have a tax ratio that is greater than the tax ratio as calculated using the property tax rates set out in its most recently enacted property tax bylaw as at May 31, 2016.

(3.1) If in any year after 2016 a non-conforming municipality has a tax ratio that is greater than 5:1, the non-conforming municipality shall reduce its tax ratio for subsequent years in accordance with the regulations.

(4) If in any year after 2016 a non-conforming municipality has a tax ratio that is less than the tax ratio it had in the previous year but greater than 5:1, the non-conforming municipality shall not in any subsequent year have a tax ratio that is greater than that new tax ratio.

(5) If in any year after 2016 a non-conforming municipality has a tax ratio that is equal to or less than 5:1, the non-conforming municipality shall not in any subsequent year have a tax ratio greater than 5:1.

(6) Where an order to annex land to a municipality contains provisions respecting the tax rate or rates that apply to the annexed land, the tax rate or rates shall not be considered for the purposes of determining the municipality's tax ratio.

(7) For the purposes of this section,

(a) the tax set out in a municipality's property tax bylaw to raise revenue to be used toward the payment of

(i) the expenditures and transfers set out in the budget of the municipality, and

(ii) the requisitions,

shall be considered to be separate tax rates, and

(b) the tax rate for the requisitions shall not be considered for the purposes of determining the municipality's tax ratio.

(8) The Lieutenant Governor in Council may, for the purposes of subsection (3.1), make regulations establishing one or more ranges of tax ratios that must be reduced to 5:1 within a specified period.

2016 c24 s56;2017 c13 s1(31)

Requisitions

359(1) When a requisition applies to only part of a municipality, the revenue needed to pay it must be raised by imposing a tax under this Division in respect of property in that part of the municipality.

(2) In calculating the tax rate required to raise sufficient revenue to pay the requisitions, a municipality may include an allowance for non-collection of taxes at a rate not exceeding the actual rate of taxes uncollected from the previous year's tax levy as determined at the end of that year.

(3) If in any year the property tax imposed to pay the requisitions results in too much or too little revenue being raised for that purpose, the council must accordingly reduce or increase the amount of revenue to be raised for that purpose in the next year.

1994 cM-26.1 s359;1995 c24 s49

Alberta School Foundation Fund requisitions

359.1(1) In this section, "Alberta School Foundation Fund requisition" means a requisition referred to in section 326(1)(a)(ii).

(2) In 1995 and subsequent years, when an Alberta School Foundation Fund requisition applies only to

(a) one of the assessment classes referred to in section 297,

(b) a combination of the assessment classes referred to in section 297, or

(c) designated industrial property,

the revenue needed to pay it must be raised by imposing a tax under this Division only in respect of property to which that one assessment class has been assigned, property to which any assessment class in that combination has been assigned or designated industrial property, as the case may be.

(3) Despite subsection (2), if a council has passed bylaws under sections 364(1.1) and 371, the council may apply an appropriate amount received under the business tax to the payment of the Alberta School Foundation Fund requisition on the non-residential assessment class referred to in section 297 to offset the increase in the tax rate applicable to that class that would otherwise result.

(4) The tax rate required to raise the revenue needed to pay the Alberta School Foundation Fund requisition

(a) must be the same within the assessment class to which the requisition applies if it applies to only one class,

(b) must be the same for all assessment classes that are to be combined if the requisition applies to a combination of assessment classes, and

(c) must be the same for all designated industrial property.

(5), (6) Repealed by Revision.

(7) In calculating the tax rate required to raise sufficient revenue to pay an Alberta School Foundation Fund requisition, a municipality

(a) must not include the allowances referred to in section 359(2),

(b) may impose a separate tax to raise the revenue to pay for the allowances referred to in section 359(2), and

(c) may include the amounts referred to in section 359(3).

(8) Section 354 does not apply to tax rates required to raise revenue needed to pay an Alberta School Foundation Fund requisition.

RSA 2000 cM-26 s359.1;2016 c24 s135;2017 c13 s1(32)

School board requisitions

359.2(1) In this section, "school board requisition" means a requisition referred to in section 326(1)(a)(iii).

(2) In 1995 and subsequent years, when a school board requisition applies only to

(a) one of the assessment classes referred to in section 297,

(b) a combination of the assessment classes referred to in section 297, or

(c) designated industrial property,

the revenue needed to pay it must be raised by imposing a tax under this Division only in respect of property to which that one assessment class has been assigned, property to which any assessment class in that combination has been assigned or designated industrial property, as the case may be.

(3) Despite subsection (2), if a council has passed bylaws under sections 364(1.1) and 371, the council may apply an appropriate amount received under the business tax to the payment of the school board requisition on the non-residential assessment class referred to in section 297 to offset the increase in the tax rate applicable to that class that would otherwise result.

(4) The tax rate required to raise the revenue needed to pay the school board requisitions

(a) must be the same within the assessment class to which the requisition applies if it applies to only one class,

(b) must be the same for all assessment classes that are to be combined if the requisition applies to a combination of assessment classes, and

(c) must be the same for all designated industrial property.

(5), (6) Repealed by Revision.

(7) In calculating the tax rate required to raise sufficient revenue to pay a school board requisition, a municipality

(a) may include the allowances referred to in section 359(2), and

(b) may include the amounts referred to in section 359(3).

(8) Section 354 does not apply to tax rates required to raise revenue needed to pay school board requisitions.

RSA 2000 cM-26 s359.2;2016 c24 s135;2017 c13 s1(33)

Designated industrial property assessment requisitions

359.3(1) In this section, "designated industrial property requisition" means a requisition referred to in section 326(1)(a)(vi).

(2) The Minister must set the property tax rate for the designated industrial property requisition.

(3) The property tax rate for the designated industrial property requisition must be the same for all designated industrial property.

2016 c24 s57

Cancellation, reduction, refund or deferral of taxes

359.4 If the Minister considers it equitable to do so, the Minister may, generally or with respect to a particular municipality, cancel or reduce the amount of a requisition payable under section 326(1)(a)(vi).

2016 c24 s57

Tax agreement

360(1) A council may make a tax agreement with an operator of a public utility or of linear property who occupies the municipality's property, including property under the direction, control and management of the municipality.

(2) Instead of paying the tax imposed under this Division and any other fees or charges payable to the municipality, the tax agreement may provide for an annual payment to the municipality by the operator calculated as provided in the agreement.

(3) A tax agreement must provide that the municipality accepts payment of the amount calculated under the agreement in place of the tax and other fees or charges specified in the agreement.

(4) If a tax agreement with the operator of a public utility that supplies fuel provides for the calculation of the payment as a percentage of the gross revenue of the public utility, that gross revenue is the aggregate of

gr + (qu.ns x vpu)

where:

"gr" is the gross revenue of the public utility for the year;

"qu.ns" is the quantity of fuel in respect of which transportation service was provided during the year by means of the fuel distribution system of the provider of the public utility;

"vpu" is the deemed value per unit quantity of fuel determined by the Alberta Utilities Commission for that year for the fuel in respect of which transportation service was so provided.

(4.1) If a tax agreement with the operator of a public utility that transports electricity by way of a transmission system, an electric distribution system, or both, provides for the calculation of the payment as a percentage of the gross revenue of the public utility, that gross revenue is

(a) gr, or

(b) gr + (qu.ns x vpu),

where:

"gr" is the gross revenue received by the public utility under its distribution tariff for the year;

"qu.ns" is the quantity of electricity in respect of which system access service, electric distribution service, or both, were provided during the year by means of the transmission system, the electric distribution system, or both, of the provider of the public utility;

"vpu" is the deemed value per unit quantity of electricity determined by the Alberta Utilities Commission for that year for the electricity in respect of which system access service, electric distribution service, or both, were so provided.

(4.2) In subsection (4.1), "electric distribution service", "electric distribution system", "electricity", "system access service" and "transmission system" have the meanings given to them in the *Electric Utilities Act*.

(5) An agreement under this section with an operator who is subject to regulation by the Alberta Utilities Commission is of no effect unless it is approved by the Alberta Utilities Commission.

RSA 2000 cM-26 s360; 2007 cA-37.2 s82(17)

Exemptions based on use of property

361 The following are exempt from taxation under this Division:

(a) repealed 1996 c30 s27;

(b) residences and farm buildings to the extent prescribed in the regulations;

(c) environmental reserves, conservation reserves, municipal reserves, school reserves, municipal and school reserves and other undeveloped property reserved for public utilities.

RSA 2000 cM-26 s361;2017 c13 s1(34)

Exemptions for Government, churches and other bodies

362(1) The following are exempt from taxation under this Division:

(a) any interest held by the Crown in right of Alberta or Canada in property other than property that is held by a Provincial corporation as defined in the *Financial Administration Act*;

(b) property held by a municipality, except the following:

(i) property from which the municipality earns revenue and which is not operated as a public benefit;

(ii) property that is operated as a public benefit but that has annual revenue that exceeds the annual operating costs;

(iii) an electric power system;

(iv) a telecommunications system;

(v) a natural gas or propane system located in a hamlet, village, summer village, town or city or in a school district that is authorized under the *School Act* to impose taxes and has a population in excess of 500 people;

(c) property, other than a student dormitory, used in connection with school purposes and held by

(i) the board of trustees of a school district, school division or regional division,

(i.1) the Regional authority for a Francophone Education Region established under the *School Act*,

(i.2) the operator of a charter school established under the *School Act*, or

(ii) the operator of a private school registered under the *School Act*;

(d) property, other than a student dormitory, used in connection with educational purposes and held by any of the following:

(i) the board of governors of a university, technical institute or public college under the *Post-secondary Learning Act*;

(ii) the governing body of an educational institution affiliated with a university under the *Post-secondary Learning Act*;

(iii) a students association or graduate students association of a university under the *Post-secondary Learning Act*;

(iv) a students association of a technical institute or public college under the *Post-secondary Learning Act*;

(v) the board of governors of the Banff Centre under the *Post-secondary Learning Act*;

(e) property, other than a student dormitory, used in connection with hospital purposes and held by a hospital board that receives financial assistance from the Crown;

(f) property held by a regional services commission;

(g) repealed by RSA 2000;

(g.1) property used in connection with health region purposes and held by a health region under the *Regional Health Authorities Act* that receives financial assistance from the Crown under any Act;

(h) property used in connection with nursing home purposes and held by a nursing home administered under the *Nursing Homes Act*;

(i) repealed 1998 c24 s29;

(j) property used in connection with library purposes and held by a library board established under the *Libraries Act*;

(k) property held by a religious body and used chiefly for divine service, public worship or religious education and any parcel of land that is held by the religious body and used only as a parking area in connection with those purposes;

(l) property consisting of any of the following:

(i) a parcel of land, to a maximum of 10 hectares, that is used as a cemetery as defined in the *Cemeteries Act*;

(ii) any additional land that has been conveyed by the owner of the cemetery to individuals to be used as burial sites;

(iii) any improvement on land described in subclause (i) or (ii) that is used for burial purposes;

(m) property held by

(i) a foundation constituted under the *Senior Citizens Housing Act*, RSA 1980 cS-13, before July 1, 1994, or

(ii) a management body established under the *Alberta Housing Act*,

and used to provide senior citizens with lodge accommodation as defined in the *Alberta Housing Act*;

(n) property that is

(i) owned by a municipality and held by a non-profit organization in an official capacity on behalf of the municipality,

(ii) held by a non-profit organization and used solely for community games, sports, athletics or recreation for the benefit of the general public,

(iii) used for a charitable or benevolent purpose that is for the benefit of the general public, and owned by

(A) the Crown in right of Alberta or Canada, a municipality or any other body that is exempt from taxation under this Division and held by a non-profit organization, or

(B) by a non-profit organization,

(iv) held by a non-profit organization and used to provide senior citizens with lodge accommodation as defined in the *Alberta Housing Act*, or

(v) held by and used in connection with a society as defined in the *Agricultural Societies Act* or with a community association as defined in the regulations,

and that meets the qualifications and conditions in the regulations and any other property that is described and that meets the qualifications and conditions in the regulations;

(o) property

(i) owned by a municipality and used solely for the operation of an airport by the municipality, or

(ii) held under a lease, licence or permit from a municipality and used solely for the operation of an airport by the lessee, licensee or permittee;

(p) a municipal seed cleaning plant constructed under an agreement authorized by section 7 of the *Agricultural Service Board Act*, to the extent of 2/3 of the assessment prepared under Part 9 for the plant, but not including the land attributable to the plant.

(2) Except for properties described in subsection (1)(n)(i), (ii) or (iv), a council may by bylaw make any property that is exempt from taxation under subsection (1)(n) subject to taxation under this Division to any extent the council considers appropriate.

(3) A council proposing to pass a bylaw under subsection (2) must notify, in writing, any person or group that will be affected of the proposed bylaw.

(4) A bylaw under subsection (2) has no effect until one year after it is passed.

RSA 2000 cM-26 s362;2003 cP-19.5 s142;2017 c13 s1(35)

Electric energy generation systems exemptions

362.1 Despite sections 359.1(4) and 359.2(4), the Minister may by order exempt, in respect of a taxation year, to any extent the Minister considers appropriate, one or more electric power systems used or intended for use in the generation or gathering of electricity from taxation for the purpose of raising the revenue needed to pay the requisitions referred to in section 326(1)(a)(ii) and (iii).

2017 c13 s1(36)

Exempt property that can be made taxable

363(1) The following are exempt from taxation under this Division:

(a) property held by and used in connection with Ducks Unlimited (Canada) under a lease, licence or permit from the Crown in right of Alberta or Canada;

(b) property held by and used in connection with

(i) the Canadian Hostelling Association -- Northern Alberta District,

(ii) the Southern Alberta Hostelling Association,

(iii) Hostelling International -- Canada -- Northern Alberta, or

(iv) Hostelling International -- Canada -- Southern Alberta,

unless the property is operated for profit or gain;

(c) property held by and used in connection with a branch or local unit of the Royal Canadian Legion, the Army, Navy and Air Force Veterans in Canada or other organization of former members of any allied forces;

(d) student dormitories.

(2) A council may by bylaw make any property listed in subsection (1)(a), (b) or (c) subject to taxation under this Division to any extent the council considers appropriate.

(3) A council may by bylaw make any property referred to in subsection (1)(d) subject to taxation to any extent the council considers appropriate other than for the purpose of raising revenue needed to pay the requisitions referred to in section 326(1)(a).

(4) A council proposing to pass a bylaw under subsection (2) must notify, in writing, the person or group that will be affected of the proposed bylaw.

(5) A bylaw under subsection (2) has no effect until the expiration of one year after it is passed.

RSA 2000 cM-26 s363;2017 c13 s1(37)

Exemptions granted by bylaw

364(1) A council may by bylaw exempt from taxation under this Division property held by a non-profit organization.

(1.1) A council may by bylaw exempt from taxation under this Division machinery and equipment used for manufacturing or processing.

(2) Property is exempt under this section to any extent the council considers appropriate.

1994 cM-26.1 s364;1995 c24 s53

Brownfield tax incentives

364.1(1) In this section, "brownfield property" means property, other than designated industrial property, that

(a) is a commercial or industrial property when a bylaw under subsection (2) is made or an agreement under subsection (11) is entered into in respect of the property, or was a commercial or industrial property at any earlier time, and

(b) in the opinion of the council making the bylaw,

(i) is, or possibly is, contaminated,

(ii) is vacant, derelict or under-utilized, and

(iii) is suitable for development or redevelopment for the general benefit of the municipality when a bylaw under subsection (2) is made or an agreement under subsection (11) is entered into in respect of the property.

(2) A council may by bylaw, for the purpose of encouraging development or redevelopment for the general benefit of the municipality, provide for

(a) full or partial exemptions from taxation under this Division for brownfield properties, or

(b) deferrals of the collection of tax under this Division on brownfield properties.

(3) A bylaw under subsection (2)

(a) must identify the brownfield properties in respect of which an application may be made for a full or partial exemption or for a deferral,

(b) may set criteria to be met for a brownfield property to qualify for an exemption or deferral,

(c) must specify the taxation year or years for which the identified brownfield properties may qualify for an exemption or deferral, and

(d) must specify any conditions the breach of which cancels an exemption or deferral and the taxation year or years to which the condition applies.

(4) Before giving second reading to a bylaw proposed to be made under subsection (2), a council must hold a public hearing with respect to the proposed bylaw in accordance with section 230 after giving notice of it in accordance with section 606.

(5) An owner of brownfield property identified in a bylaw under subsection (2) may apply in the form and manner required by the municipality for an exemption or deferral in respect of the property.

(6) If after reviewing the application a designated officer of the municipality determines that the brownfield property meets the requirements of the bylaw for a full or partial exemption or for a deferral of the collection of tax under this Division, the designated officer may issue a certificate granting the exemption or deferral.

(7) The certificate must set out

(a) the taxation years to which the exemption or deferral applies, which must not include any tax year earlier than the tax year in which the certificate is issued,

(b) in the case of a partial exemption, the extent of the exemption, and

(c) all criteria, conditions and taxation years specified in the bylaw in accordance with subsection (3).

(8) If at any time after an exemption or deferral is granted under a bylaw under this section a designated officer of the municipality determines that the property did not meet or has ceased to meet a criterion referred to in subsection (3)(b) or that a condition referred to in subsection (3)(d) has been breached, the designated officer must cancel the exemption or deferral for the taxation year or years in which the criterion was not met or to which the condition applies.

(9) Where a designated officer refuses to grant an exemption or deferral, a written notice of the refusal must be sent to the applicant stating the reasons for the refusal and the date by which any complaint must be made, which date must be 60 days after the written notice of refusal is sent.

(10) An exemption or deferral granted under a bylaw under this section remains valid, subject to subsection (8) and the criteria and conditions on which it was granted, regardless of whether the bylaw is subsequently amended or repealed or otherwise ceases to have effect.

(11) Despite subsections (2) to (10), a council may enter into an agreement with the owner of a brownfield property

(a) exempting, either fully or partially, the brownfield property from taxation under this Division, or

(b) deferring the collection of tax under this Division on the brownfield property.

(12) The agreement must specify

(a) the taxation years to which the exemption or deferral applies, which must not include any tax year earlier than the one in which the agreement is entered into,

(b) the conditions on which the exemption or deferral is granted, and

(c) the consequences, rights and remedies arising in the event of any breach.

(13) Before voting on a resolution to enter into an agreement referred to in subsection (11), a council must hold a public hearing with respect to the proposed agreement in accordance with section 230 after giving notice of it in accordance with section 606.

2016 c24 s58

Licensed premises

365(1) Property that is licensed under the *Gaming, Liquor and Cannabis Act* is not exempt from taxation under this Division, despite sections 351(1)(b) and 361 to 364.1 and any other Act.

(2) Despite subsection (1), property listed in section 362(1)(n) in respect of which a licence that is specified in the regulations has been issued is exempt from taxation under this Division.

RSA 2000 cM-26 s365;2016 c24 s59;2017 c21 s28

Grants in place of taxes

366(1) Each year a municipality may apply to the Crown for a grant if there is property in the municipality that the Crown has an interest in.

(2) The Crown may pay to the municipality a grant not exceeding the amount that would be recoverable by the municipality if the property that the Crown has an interest in were not exempt from taxation under this Division.

(3) When calculating a grant under this section, the following must not be considered as Crown property unless subsection (4) applies:

(a) property listed in section 298;

(b) museums and historical sites;

(c) public works reserves;

(d) property used in connection with academic, trade, forestry or agricultural schools, colleges or universities, including student dormitories;

(e) property used in connection with hospitals and institutions for mentally disabled persons;

(f) property owned by an agent of the Crown in respect of which another enactment provides for payment of a grant in place of a property tax;

(g) property in respect of which the Crown is not the assessed person.

(4) If any of the property listed in subsection (3) is a single family residence, the property must be considered as Crown property when calculating a grant under this section.

(5) The Crown may pay a grant under this section in respect of property referred to in subsection (3)(g) if in the Crown's opinion it is appropriate to do so.

1994 cM-26.1 s366;1996 c30 s31

Property that is partly exempt and partly taxable

367 A property may contain one or more parts that are exempt from taxation under this Division, but the taxes that are imposed against the taxable part of the property under this Division are recoverable against the entire property.

1994 cM-26.1 s367

Changes in taxable status of property

368(1) An exempt property or part of an exempt property becomes taxable if

(a) the use of the property changes to one that does not qualify for the exemption, or

(b) the occupant of the property changes to one who does not qualify for the exemption.

(2) A taxable property or part of a taxable property becomes exempt if

(a) the use of the property changes to one that qualifies for the exemption, or

(b) the occupant of the property changes to one who qualifies for the exemption.

(3) If the taxable status of property changes, a tax imposed in respect of it must be prorated so that the tax is payable only for the part of the year in which the property, or part of it, is not exempt.

(4) When a designated manufactured home is moved out of a municipality,

(a) it becomes exempt from taxation by that municipality when it is moved, and

(b) it becomes taxable by another municipality when it is located in that other municipality.

1994 cM-26.1 s368;1996 c30 s32;1998 c24 s31

Supplementary property tax bylaw

369(1) If in any year a council passes a bylaw authorizing supplementary assessments to be prepared in respect of property, the council must, in the same year, pass a bylaw authorizing it to impose a supplementary tax in respect of that property.

(2) A council that passes a bylaw referred to in subsection (1) must use the tax rates set by its property tax bylaw as the supplementary tax rates to be imposed.

(2.01) A council may pass a bylaw authorizing it to impose a supplementary tax for designated industrial property only if it passes a bylaw authorizing it to impose a supplementary tax in respect of all other property in the municipality.

(2.1) Despite subsection (2), the tax rates required to raise the revenue to pay requisitions referred to in sections 192 and 194 of the *School Act* must not be applied as supplementary tax rates.

(3) The municipality must prepare a supplementary property tax roll, which may be a continuation of the supplementary property assessment roll prepared under Part 9 or may be separate from that roll.

(4) A supplementary property tax roll must show

(a) the same information that is required to be shown on the property tax roll, and

(b) the date for determining the tax that may be imposed under the supplementary property tax bylaw.

(5) Sections 327(4), 328, 330 and 331 apply in respect of a supplementary property tax roll.

(6) The municipality must

(a) prepare supplementary property tax notices for all taxable property shown on the supplementary property tax roll of the municipality, and

(b) send the supplementary property tax notices to the persons liable to pay the taxes.

(7) Sections 333(4), 334, 335, 336, 337 and 338 apply in respect of supplementary property tax notices.

RSA 2000 cM-26 s369;2016 c24 s60

Regulations

370 The Minister may make regulations

(a) prescribing the extent to which residences and farm buildings are exempt from taxation under this Division;

(b) respecting the calculation of a tax rate to be imposed on linear property;

(b.1) respecting the setting of tax rates referred to in section 354(3.1);

(c) describing other property that is exempt from taxation pursuant to section 362(1)(n), and respecting the qualifications and conditions required for the purposes of section 362(1)(n);

(c.1) respecting tax rolls and tax notices including, without limitation, regulations

(i) respecting the information to be shown on a tax roll and a tax notice;

(ii) providing for the method of determining the person liable to pay a property or other tax imposed under this Part;

(iii) respecting the sending of tax notices;

(c.2) respecting designated industrial property assessment requisitions and designated industrial property requisition tax bylaws, including, without limitation, regulations respecting the application of any provision of this Act, with or without modification, to a designated industrial property assessment requisition or a designated industrial property requisition tax bylaw, or both;

(c.3) respecting tax exemptions and deferrals under section 364.1;

(d) specifying licences for the purposes of section 365(2);

(e) defining a community association for the purposes of this Act;

(f) respecting the circumstances in which property is to be considered to be used in connection with a purpose, activity or other thing for the purposes of one or more provisions of this Part;

(g) respecting the circumstances in which property is to be considered to be held by a person or entity for the purposes of one or more provisions of this Part.

RSA 2000 cM-26 s370;2005 c14 s13;
2016 c24 s61;2017 c13 s1(38)

Division 3
Business Tax

Business tax bylaw

371(1) Each council may pass a business tax bylaw.

(2) A business tax bylaw or any amendment to it applies to the year in which it is passed, only if it is passed before May 1 of that year.

1994 cM-26.1 s371

Taxable business

372(1) The business tax bylaw authorizes the council to impose a tax in respect of all businesses operating in the municipality except businesses that are exempt in accordance with that bylaw.

(2) The tax must not be imposed in respect of a business that is exempt under section 351, 375 or 376.

1994 cM-26.1 s372

Person liable to pay business tax

373(1) A tax imposed under this Division must be paid by the person who operates the business.

(2) A person who purchases a business or in any other manner becomes liable to be shown on the tax roll as a taxpayer must give the municipality written notice of a mailing address to which notices under this Division may be sent.

1994 cM-26.1 s373

Contents of business tax bylaw

374(1) The business tax bylaw must

(a) require assessments of businesses operating in the municipality to be prepared and recorded on a business assessment roll;

(b) specify one or more of the following methods of assessment as the method or methods to be used to prepare the assessments:

(i) assessment based on a percentage of the gross annual rental value of the premises;

(i.1) assessment based on a percentage of the net annual rental value of the premises;

(ii) assessment based on storage capacity of the premises occupied for the purposes of the business;

(iii) assessment based on floor space, being the area of all of the floors in a building and the area outside the building that are occupied for the purposes of that business;

(iv) assessment based on a percentage of the assessment prepared under Part 9 for the premises occupied for the purposes of the business;

(c) specify the basis on which a business tax may be imposed by prescribing the following:

(i) for the assessment method referred to in clause (b)(i), the percentage of the gross annual rental value;

(i.1) for the assessment method referred to in clause (b)(i.1), the percentage of the net annual rental value;

(ii) for the assessment method referred to in clause (b)(ii), the dollar rate per unit of storage capacity;

(iii) for the assessment method referred to in clause (b)(iii), the dollar rate per unit of floor space;

(iv) for the assessment method referred to in clause (b)(iv), the percentage of the assessment;

(d) establish a procedure for prorating and rebating business taxes.

(2) A business tax bylaw may

(a) establish classes of business for the purpose of grouping businesses,

(b) specify classes of business that are exempt from taxation under this Division,

(c) require that taxes imposed under this Division be paid by instalments, or

(d) include any other information considered appropriate by the municipality.

(3) A business tax bylaw may provide that when a lessee who is liable to pay the tax imposed under this Division in respect of any leased premises sublets the whole or part of the premises, the municipality may require the lessee or the sub-lessee to pay the tax in respect of the whole or part of the premises.

1994 cM-26.1 s374;1999 c11 s19

Assessment not required

374.1 Despite section 374(1)(a), a municipality is not required to prepare an assessment for any business in a class of business that is exempt from taxation under the business tax bylaw.

1998 c24 s33

Exempt businesses

375 The following are exempt from taxation under this Division:

(a) a business operated by the Crown;

(b) an airport operated by a regional airports authority created under section 5(2) of the *Regional Airports Authorities Act*;

(c) property

(i) owned by a municipality and used solely for the operation of an airport by the municipality, or

(ii) held under a lease, licence or permit from a municipality and used solely for the operation of an airport by the lessee, licensee or permittee;

(d) a business operated by a non-profit organization on property that is exempt from taxation under section 362(1)(n).

1994 cM-26.1 s375;1995 c24 s57;1998 c24 s34

Exemption when tax is payable under Division 2

376(1) When machinery and equipment or linear property is located on premises occupied for the purposes of a business and a property tax has been imposed in respect of the machinery and equipment or linear property under Division 2 of this Part in any year, the premises on which that property is located are exempt from taxation under this Division in that year.

(2) If in any year the activities that result from the operation of the machinery and equipment or linear property are not the chief business carried on at the premises, the premises on which that property is located are not exempt from taxation under this Division in that year.

1994 cM-26.1 s376

Business tax rate bylaw

377(1) Each council that has passed a business tax bylaw must pass a business tax rate bylaw annually.

(2) The business tax rate bylaw must set a business tax rate.

(3) If the business tax bylaw establishes classes of business, the business tax rate bylaw must set a business tax rate for each class.

(4) The business tax rate may be different for each class of business established by the business tax bylaw.

(5) The tax rates set by the business tax rate bylaw must not be amended after the municipality sends the tax notices to the taxpayers.

1994 cM-26.1 s377

Calculating amount of tax

378 The amount of tax to be imposed under this Division in respect of a business is calculated by multiplying the assessment for the business by the tax rate to be imposed on that business.

1994 cM-26.1 s378

Supplementary business tax bylaw

379(1) If in any year a council passes a bylaw authorizing supplementary assessments to be prepared in respect of businesses,

the council must, in the same year, pass a bylaw authorizing it to impose a supplementary tax in respect of those businesses.

(2) A council that passes a bylaw referred to in subsection (1) must use the tax rates set by its business tax rate bylaw as the supplementary tax rates to be imposed.

(3) The supplementary business tax must be imposed

(a) on each person who operates a business for a temporary period and whose name is not entered on the business tax roll,

(b) on each person who moves into new premises or opens new premises or branches of an existing business, although the person's name is entered on the business tax roll,

(c) on each person who begins operating a business and whose name is not entered on the business tax roll, and

(d) on each person who increases the storage capacity or floor space of the premises occupied for the purposes of a business after the business tax roll has been prepared.

(4) The municipality must prepare a supplementary business tax roll, which may be a continuation of the supplementary business assessment roll or may be separate from that roll.

(5) A supplementary business tax roll must show

(a) the same information that is required to be shown on the business tax roll, and

(b) the date for determining the tax that may be imposed under the supplementary business tax bylaw.

(6) Sections 327(4), 328, 330 and 331 apply in respect of a supplementary business tax roll.

(7) The municipality must

(a) prepare supplementary business tax notices for all taxable businesses shown on the supplementary business tax roll of the municipality, and

(b) send the supplementary business tax notices to the persons liable to pay the taxes.

(8) Sections 333(4), 334, 335, 336, 337 and 338 apply in respect of supplementary business tax notices.

1994 cM-26.1 s379

Grants in place of taxes

380(1) Each year a municipality may apply to the Crown for a grant if there is a business in the municipality operated by the Crown.

(2) The Crown may pay to the municipality a grant not exceeding the amount that would be recoverable by the municipality if the business operated by the Crown were not exempt from taxation under this Division.

1994 cM-26.1 s380

Division 4
Business Improvement Area Tax

Regulations

381 The Minister may make regulations respecting a business improvement area tax.

RSA 2000 cM-26 s381;2015 c8 s50

Division 4.1
Community Revitalization Levy

Definitions

381.1 In this Division,

(a) "incremental assessed value" means the increase in the assessed value of property located in a community revitalization levy area after the date the community revitalization levy bylaw is approved by the Lieutenant Governor in Council under section 381.2(3);

(b) "levy" means a community revitalization levy imposed under section 381.2(2).

2005 c14 s14

Community revitalization levy bylaw

381.2(1) Each council may pass a community revitalization levy bylaw.

(2) A community revitalization levy bylaw authorizes the council to impose a levy in respect of the incremental assessed value of property in a community revitalization levy area to raise revenue to be used toward the payment of infrastructure and other costs associated with the redevelopment of property in the community revitalization levy area.

(3) A community revitalization levy bylaw has no effect unless it is approved by the Lieutenant Governor in Council.

(4) The Lieutenant Governor in Council may approve a community revitalization levy bylaw in whole or in part or with variations and subject to conditions.

2005 c14 s14

Person liable to pay levy

381.3 A levy imposed under this Division must be paid by the assessed persons of the property in the community revitalization levy area.

2005 c14 s14

Incremental assessed value not subject to equalized assessment or requisition

381.4(1) Subject to subsection (2), the incremental assessed value of property in a community revitalization levy area shall not be included for the purpose of calculating

(a) an equalized assessment under Part 9, or

(b) the amount of a requisition under Part 10.

(2) Subsection (1) applies in respect of property in a community revitalization levy area

(a) for a period of 20 years, or

(b) for such other period as determined by the Lieutenant Governor in Council under section 381.5(1)(e.1), which period may not exceed 40 years,

from the year in which the community revitalization levy bylaw is made.

2005 c14 s14;2018 c20 s12

Regulations

381.5(1) The Lieutenant Governor in Council may make regulations

(a) establishing any area in Alberta as a community revitalization levy area;

(b) respecting a levy including, without limitation, regulations respecting the minimum and maximum levy that may be imposed and the application of the levy;

(c) respecting the assessment of property, including identifying or otherwise describing the assessed person in respect of the property, in a community revitalization levy area;

(d) respecting assessment rolls, assessment notices, tax rolls and tax notices in respect of property in a community revitalization levy area;

(e) respecting the application of any provision of this Act, with or without modification, to a community revitalization levy bylaw or a community revitalization levy, or both;

(e.1) determining the period for which section 381.4(1) applies to a community revitalization levy area;

(f) respecting any other matter necessary or advisable to carry out the intent and purpose of this Division.

(2) A regulation under subsection (1) may be specific to a municipality or general in its application.

2005 c14 s14;2018 c20 s12

Division 5
Special Tax

Special tax bylaw

382(1) Each council may pass a special tax bylaw to raise revenue to pay for a specific service or purpose by imposing one or more of the following special taxes:

(a) a waterworks tax;

(b) a sewer tax;

(c) a boulevard tax;

(d) a dust treatment tax;

(e) a paving tax;

(f) a tax to cover the cost of repair and maintenance of roads, boulevards, sewer facilities and water facilities;

(g) repealed 2008 cE-6.6 s55;

(h) a tax to enable the municipality to provide incentives to health professionals to reside and practice their professions in the municipality;

(i) a fire protection area tax;

(j) a drainage ditch tax;

(k) a tax to provide a supply of water for the residents of a hamlet;

(l) a recreational services tax.

(2) A special tax bylaw must be passed annually.

RSA 2000 cM-26 s382;2008 cE-6.6 s55

Taxable property

383(1) The special tax bylaw authorizes the council to impose the tax in respect of property in any area of the municipality that will benefit from the specific service or purpose stated in the bylaw.

(2) The tax must not be imposed in respect of property that is exempt under section 351.

1994 cM-26.1 s383

Contents of special tax bylaw

384 The special tax bylaw must

(a) state the specific service or purpose for which the bylaw is passed,

(b) describe the area of the municipality that will benefit from the service or purpose and in which the special tax is to be imposed,

(c) state the estimated cost of the service or purpose, and

(d) state whether the tax rate is to be based on

(i) the assessment prepared in accordance with Part 9,

(ii) each parcel of land,

(iii) each unit of frontage, or

(iv) each unit of area,

and set the tax rate to be imposed in each case.

1994 cM-26.1 s384

Condition

385 A special tax bylaw must not be passed unless the estimated cost of the specific service or purpose for which the tax is imposed is included in the budget of the municipality as an estimated expenditure.

1994 cM-26.1 s385

Use of revenue

386(1) The revenue raised by a special tax bylaw must be applied to the specific service or purpose stated in the bylaw.

(2) If there is any excess revenue, the municipality must advertise the use to which it proposes to put the excess revenue.

1994 cM-26.1 s386

Person liable to pay special tax

387 The person liable to pay the tax imposed in accordance with a special tax bylaw is the owner of the property in respect of which the tax is imposed.

1994 cM-26.1 s387;1999 c11 s20

Division 6
Well Drilling Equipment Tax

Well drilling equipment tax bylaw

388(1) Each council may pass a well drilling equipment tax bylaw.

(2) The well drilling equipment tax bylaw authorizes the council to impose a tax in respect of equipment used to drill a well for which a licence is required under the *Oil and Gas Conservation Act*.

1994 cM-26.1 s388

Person liable to pay the tax

389 A tax imposed under this Division must be paid by the person who holds the licence required under the *Oil and Gas Conservation Act* in respect of the well being drilled.

1994 cM-26.1 s389

Calculation of the tax

390(1) The Minister may make regulations prescribing the well drilling equipment tax rate.

(2) A tax imposed under this Division must be calculated in accordance with the tax rate prescribed under subsection (1).

1994 cM-26.1 s390

Division 7
Local Improvement Tax

Definition

391 In this Division, "local improvement" means a project

(a) that the council considers to be of greater benefit to an area of the municipality than to the whole municipality, and

(b) that is to be paid for in whole or in part by a tax imposed under this Division.

1994 cM-26.1 s391

Petitioning rules

392(1) Sections 222 to 226 apply to petitions under this Division, except as they are modified by this section.

(2) A petition is not a sufficient petition unless

(a) it is signed by 2/3 of the owners who would be liable to pay the local improvement tax, and

(b) the owners who sign the petition represent at least 1/2 of the value of the assessments prepared under Part 9 for the parcels of land in respect of which the tax will be imposed.

(3) If a parcel of land is owned by more than one owner, the owners are considered as one owner for the purpose of subsection (2).

(4) If a municipality, school division, school district or health region under the *Regional Health Authorities Act* is entitled to sign a petition under this Division, it may give notice to the council prior to or at the time the petition is presented to the council that its name and the assessment prepared for its land under Part 9 are not to be counted in determining the sufficiency of a petition under subsection (2), and the council must comply with the notice.

(5) If a corporation, church, organization, estate or other entity is entitled to sign a petition under this Division, the petition may be signed on its behalf by a person who

(a) is at least 18 years old, and

(b) produces on request a certificate authorizing the person to sign the petition.

1994 cM-26.1 s392;1994 cR-9.07 s25(24)

Proposal of local improvement

393(1) A council may on its own initiative propose a local improvement.

(2) A group of owners in a municipality may petition the council for a local improvement.

1994 cM-26.1 s393

Local improvement plan

394 If a local improvement is proposed, the municipality must prepare a local improvement plan.

1994 cM-26.1 s394

Contents of plan

395(1) A local improvement plan must

(a) describe the proposed local improvement and its location,

(b) identify

(i) the parcels of land in respect of which the local improvement tax will be imposed, and

(ii) the person who will be liable to pay the local improvement tax,

(c) state whether the tax rate is to be based on

(i) the assessment prepared in accordance with Part 9,

(ii) each parcel of land,

(iii) each unit of frontage, or

(iv) each unit of area,

(d) include the estimated cost of the local improvement,

(e) state the period over which the cost of the local improvement will be spread,

(f) state the portion of the estimated cost of the local improvement proposed to be paid

(i) by the municipality,

(ii) from revenue raised by the local improvement tax, and

(iii) from other sources of revenue,

and

(g) include any other information the proponents of the local improvement consider necessary.

(2) The estimated cost of a local improvement may include

(a) the actual cost of buying land necessary for the local improvement,

(b) the capital cost of undertaking the local improvement,

(c) the cost of professional services needed for the local improvement,

(d) the cost of repaying any existing debt on a facility that is to be replaced or rehabilitated, and

(e) other expenses incidental to the undertaking of the local improvement and to the raising of revenue to pay for it.

1994 cM-26.1 s395

Procedure after plan is prepared

396(1) When a local improvement plan has been prepared, the municipality must send a notice to the persons who will be liable to pay the local improvement tax.

(2) A notice under subsection (1) must include a summary of the information included in the local improvement plan.

(3) Subject to subsection (3.1), if a petition objecting to the local improvement is filed with the chief administrative officer within 30 days from the notices' being sent under subsection (1) and the chief administrative officer declares the petition to be sufficient, the council must not proceed with the local improvement.

(3.1) The council may, after the expiry of one year after the petition is declared to be sufficient, re-notify in accordance with subsections (1) and (2) the persons who would be liable to pay the local improvement tax.

(4) If a sufficient petition objecting to the local improvement is not filed with the chief administrative officer within 30 days from sending the notices under subsection (1), the council may undertake the local improvement and impose the local improvement tax at any time in the 3 years following the sending of the notices.

(5) When a council is authorized under subsection (4) to undertake a local improvement and

(a) the project has not been started, or

(b) the project has been started but is not complete,

the council may impose the local improvement tax for one year, after which the tax must not be imposed until the local improvement has been completed or is operational.

1994 cM-26.1 s396;1995 c24 s58

Local improvement tax bylaw

397(1) A council must pass a local improvement tax bylaw in respect of each local improvement.

(2) A local improvement tax bylaw authorizes the council to impose a local improvement tax in respect of all land in a particular area of the municipality to raise revenue to pay for the local improvement that benefits that area of the municipality.

(2.1) Despite subsection (2), where the local improvement that is the subject of a local improvement tax bylaw of a council of a municipality is a road to benefit Crown land within an area of the municipality, the local improvement tax bylaw does not authorize the council to impose a local improvement tax to raise revenue to pay for the local improvement unless, before it receives second reading, the bylaw is approved by the Minister responsible for the administration of the Crown land.

(3) Despite section 351(1), no land is exempt from taxation under this section.

RSA 2000 cM-26 s397;2015 c8 s51

Contents of bylaw

398(1) A local improvement tax bylaw must

(a) include all of the information required to be included in the local improvement plan,

(b) provide for equal payments during each year in the period over which the cost of the local improvement will be spread,

(c) set a uniform tax rate to be imposed on

(i) the assessment prepared in accordance with Part 9,

(ii) each parcel of land,

(iii) each unit of frontage, or

(iv) each unit of area,

based on the cost of the local improvement less any financial assistance provided to the municipality by the Crown in right of Canada or Alberta, and

(d) include any other information the council considers necessary.

(2) The local improvement tax bylaw may set the uniform tax rate based on estimated average costs throughout the municipality for a similar type of local improvement and that rate applies whether the actual cost of the local improvement is greater or less than the uniform tax rate.

1994 cM-26.1 s398

Start-up of a local improvement

399 The undertaking of a local improvement may be started, the local improvement tax bylaw may be passed and debentures may

be issued before or after the actual cost of the local improvement has been determined.

1994 cM-26.1 s399

Person liable to pay local improvement tax

400 The person liable to pay the tax imposed in accordance with a local improvement tax bylaw is the owner of the parcel of land in respect of which the tax is imposed.

1994 cM-26.1 s400

Paying off a local improvement tax

401(1) The owner of a parcel of land in respect of which a local improvement tax is imposed may pay the tax at any time.

(2) If the local improvement tax rate is subsequently reduced under section 402 or 403, the council must refund to the owner the appropriate portion of the tax paid.

1994 cM-26.1 s401

Variation of local improvement tax bylaw

402(1) If, after a local improvement tax has been imposed, there is

(a) a subdivision affecting a parcel of land, or

(b) a consolidation of 2 or more parcels of land,

in respect of which a local improvement tax is payable, the council, with respect to future years, must revise the local improvement tax bylaw so that each of the new parcels of land bears an appropriate share of the local improvement tax.

(2) If, after a local improvement tax has been imposed,

(a) there is a change in a plan of subdivision affecting an area that had not previously been subject to a local improvement tax, and

(b) the council is of the opinion that as a result of the change the new parcels of land receive a benefit from the local improvement,

the council, with respect to future years, must revise the local improvement tax bylaw so that each benefitting parcel of land bears an appropriate share of the local improvement tax.

1994 cM-26.1 s402

Variation of local improvement tax rate

403(1) If, after a local improvement tax rate has been set, the council

(a) receives financial assistance from the Crown in right of Canada or Alberta or from other sources that is greater than the amount estimated when the local improvement tax rate was set, or

(b) refinances the debt created to pay for the local improvement at an interest rate lower than the rate estimated when the local improvement tax rate was set,

the council, with respect to future years, may revise the rate so that each benefitting parcel of land bears an appropriate share of the actual cost of the local improvement.

(2) If, after a local improvement tax rate has been set, an alteration is necessary following a complaint under Part 11 or an appeal under Part 12 that is sufficient to reduce or increase the revenue raised by the local improvement tax bylaw in any year by more than 5%, the council, with respect to future years, may revise the rate so that the local improvement tax bylaw will raise the revenue originally anticipated for those years.

(3) If, after a local improvement tax rate has been set, it is discovered that the actual cost of the local improvement is higher than the estimated cost on which the local improvement tax rate is based, the council may revise, once only over the life of the local improvement, the rate with respect to future years so that the local improvement tax bylaw will raise sufficient revenue to pay the actual cost of the local improvement.

1994 cM-26.1 s403;1999 c11 s21

Unusual parcels

404 If some parcels of land in respect of which a local improvement tax is to be imposed appear to call for a smaller or larger proportionate share of the tax because they are corner lots or are differently sized or shaped from other parcels, those parcels may be assigned the number of units of measurement the council considers appropriate to ensure that they will bear a fair portion of the local improvement tax.

1994 cM-26.1 s404

Municipality's share of the cost

405(1) A council may by bylaw require the municipality to pay the cost of any part of a local improvement that the council considers to be of benefit to the whole municipality.

(2) A bylaw under subsection (1) must be advertised if the cost to be paid by the municipality exceeds 50% of the cost of the local improvement less any financial assistance provided to the municipality by the Crown in right of Canada or Alberta.

(3) If financial assistance is provided to the municipality by the Crown in right of Canada or Alberta for a local improvement, the council must apply the assistance to the cost of the local improvement.

1994 cM-26.1 s405

Land required for local improvement

406(1) If a parcel of land is required before a local improvement can be proceeded with, the council may agree with the owner of the parcel that in consideration of

(a) the dedication or gift to the municipality of the parcel of land required, or

(b) a release of or reduction in the owner's claim for compensation for the parcel of land,

the remainder of the owner's land is exempt from all or part of the local improvement tax that would otherwise be imposed.

(2) The tax roll referred to in section 327 must be prepared in accordance with an agreement under this section, despite anything to the contrary in this Act.

1994 cM-26.1 s406

Exemption from local improvement tax

407(1) If a sanitary or storm sewer or a water main is constructed along a road or constructed in addition to or as a replacement of an existing facility

(a) along which it would not have been constructed except to reach some other area of the municipality, or

(b) in order to provide capacity for future development and the existing sanitary and storm sewers and water mains are sufficient for the existing development in the area,

the council may exempt from taxation under the local improvement tax bylaw, to the extent the council considers fair, the parcels of land abutting the road or place.

(2) If a local improvement tax is imposed for a local improvement that replaces a similar type of local improvement,

(a) the balance owing on the existing local improvement tax must be added to the cost of the new local improvement, or

(b) the council must exempt the parcels of land in respect of which the existing local improvement tax is imposed from

the tax that would be imposed for the new local improvement.

1994 cM-26.1 s407

Sewers

408(1) A municipality may construct a local improvement for sewer if

(a) the council approves the construction,

(b) the construction is recommended by the Minister of Health or the medical health officer, and

(c) the council considers it to be in the public interest to do so.

(2) The owners of the parcels of land that benefit from a local improvement for sewer have no right to petition against its construction.

RSA 2000 cM-26 s408;2013 c10 s37

Private connection to a local improvement

409(1) If a local improvement for sewer or water has been constructed, the municipality may construct private connections from the local improvement to the street line if the council approves the construction.

(2) The cost of constructing a private connection must be imposed against the parcel of land that benefits from it and the owner of the parcel has no right to petition against its construction.

1994 cM-26.1 s409

Division 7.1
Community Aggregate Payment Levy

Community aggregate payment levy bylaw

409.1(1) Each council may pass a community aggregate payment levy bylaw.

(2) A community aggregate payment levy bylaw authorizes the council to impose a levy in respect of all sand and gravel businesses operating in the municipality to raise revenue to be used toward the payment of infrastructure and other costs in the municipality.

2005 c14 s15

Person liable to pay levy

409.2 A levy imposed under this Division must be paid by the persons who operate sand and gravel operations in the municipality.

2005 c14 s15

Regulations

409.3(1) The Minister may make regulations

(a) respecting a levy referred to in section 409.1(2), including, without limitation, regulations respecting the maximum levy that may be imposed and the application of the levy;

(b) respecting the application of any provision of this Act, with or without modification, to a community aggregate payment levy bylaw or a community aggregate payment levy, or both;

(c) respecting any other matter necessary or advisable to carry out the intent and purpose of this Division.

(2) A regulation under subsection (1) may be specific to a municipality or general in its application.

2005 c14 s15

Division 8
Recovery of Taxes Related to Land

Definitions

410 In this Division,

(a) "encumbrance" means an encumbrance as defined in the *Land Titles Act*;

(b) "encumbrancee" means the owner of an encumbrance;

(b.1) "parcel of land" means a parcel of land and the improvements on it;

(c) "Registrar" means the Registrar, as defined in the *Land Titles Act*, of the appropriate Land Titles Office;

(c.1) "remedial costs" means all expenses incurred by the Government of Alberta to perform work under an environmental protection order or an enforcement order issued under the *Environmental Protection and Enhancement Act*;

(d) "reserve bid" means the minimum price at which a municipality is willing to sell a parcel of land at a public auction;

(e) "tax" means a property tax, a community revitalization levy, a special tax, a local improvement tax or a community aggregate payment levy;

(f) "tax recovery notification" means a notice, in writing, that part or all of the taxes imposed in respect of a parcel of land by a municipality are in arrears.

RSA 2000 cM-26 s410;2005 c14 s16

Methods of recovering taxes in arrears

411(1) A municipality may attempt to recover tax arrears in respect of a parcel of land

(a) in accordance with this Division, and

(b) subject to subsection (2), in accordance with any other Act or common law right.

(2) A municipality may start an action under subsection (1)(b) at any time before

(a) the parcel is sold at a public auction under section 418, or

(b) the parcel is disposed of in accordance with section 425,

whichever occurs first.

1994 cM-26.1 s411

Tax arrears list

412(1) A municipality must annually, not later than March 31,

(a) prepare a tax arrears list showing the parcels of land in the municipality in respect of which there are tax arrears for more than one year,

(b) send 2 copies of the tax arrears list to the Registrar,

(b.1) send a copy of the tax arrears list to the Minister responsible for the *Unclaimed Personal Property and Vested Property Act*, and

(c) post a copy of the tax arrears list in a place that is accessible to the public during regular business hours.

(2) A tax arrears list must not include a parcel of land in respect of which there is in existence a tax recovery notification from previous years, unless that notification has been removed from the certificate of title for that parcel.

(3) The municipality must notify the persons who are liable to pay the tax arrears that a tax arrears list has been prepared and sent to the Registrar.

RSA 2000 cM-26 s412;2007 cU-1.5 s73

Tax recovery notification

413(1) The Registrar must endorse on the certificate of title for each parcel of land shown on the tax arrears list a tax recovery notification.

(2) The Registrar must certify, on a copy of the tax arrears list, that tax recovery notifications have been endorsed in accordance with subsection (1) and return the certified copy of the tax arrears list to the municipality with a statement of the costs payable to the Land Titles Office by the municipality.

(3) The municipality is responsible for the payment of the costs referred to in subsection (2) but may add the costs to the taxes owing in respect of the parcels of land shown on the tax arrears list.

(4) The Registrar must not remove a tax recovery notification from a certificate of title until the municipality at whose request it was endorsed on the certificate of title requests its removal.

1994 cM-26.1 s413

Removal of improvements

414 When a tax recovery notification has been endorsed on a certificate of title for a parcel of land, the person who is liable to pay the taxes must not remove from the parcel, unless the municipality at whose request the notification was endorsed on the certificate of title consents, any improvements for which that person is also liable to pay the taxes.

1994 cM-26.1 s414

Right to pay tax arrears

415(1) After a tax recovery notification has been endorsed on the certificate of title for a parcel of land, any person may pay the tax arrears in respect of the parcel.

(2) On payment of the tax arrears under subsection (1), the municipality must ask the Registrar to remove the tax recovery notification.

(3) Subject to section 423(3), a person may exercise the right under subsection (1) at any time before the municipality disposes of the parcel in accordance with section 425.

1994 cM-26.1 s415

Right to collect rent to pay tax arrears

416(1) After a tax recovery notification has been endorsed on the certificate of title for a parcel of land, the municipality may send a notice to any person who holds the parcel under a lease from the owner, requiring that person to pay the rent as it becomes due to the municipality until the tax arrears have been paid.

(2) Not less than 14 days before a municipality sends a notice under subsection (1), it must send a notice to the owner of the parcel of land advising the owner of the municipality's intention to proceed under subsection (1).

(2.1) When a parcel of land shown on a tax arrears list is land described in section 304(1)(c) in respect of another municipality, or in section 304(1)(d) or (e), the municipality may send a notice to any person who holds the parcel or a portion of it under a lease, licence or permit from the assessed person to pay the rent, licence fees or permit fees, as the case may be, to the municipality as they become due until the tax arrears have been paid.

(2.2) Not less than 14 days before a municipality sends a notice under subsection (2.1), it must send a notice to the assessed person advising the person of the municipality's intention to proceed under subsection (2.1).

(2.3) Where a parcel of land described in section 304(1)(c) is held under a lease, licence or permit from the Crown in right of Alberta,

(a) the Crown must, on a quarterly basis, notify the municipality in which the parcel is located of any changes in the status of the lease, licence or permit, as the case may be, and

(b) the municipality must send to the Crown that portion of the tax arrears list showing the parcels of land described in section 304(1)(c) that are held by the Crown.

(3) This section does not prevent the municipality from exercising any other right it has to collect the tax arrears.

RSA 2000 cM-26 s416;2015 c8 s52

Warning of sale

417(1) Not later than the August 1 following receipt of a copy of the tax arrears list, the Registrar must, in respect of each parcel of land shown on the tax arrears list, send a notice to

(a) the owner of the parcel of land,

(b) any person who has an interest in the parcel that is evidenced by a caveat registered by the Registrar, and

(c) each encumbrancee shown on the certificate of title for the parcel.

(2) The notice must state

(a) that if the tax arrears in respect of the parcel of land are not paid before March 31 in the next year, the

municipality will offer the parcel for sale at a public auction, and

(b) that the municipality may become the owner of the parcel after the public auction if the parcel is not sold at the public auction.

(3) The notice must be sent to the address shown on the records of the Land Titles Office for each person referred to in subsection (1).

1994 cM-26.1 s417;1995 c24 s61

Offer of parcel for sale

418(1) Each municipality must offer for sale at a public auction any parcel of land shown on its tax arrears list if the tax arrears are not paid.

(2) Unless subsection (4) applies, the public auction must be held in the period beginning on the date referred to in section 417(2)(a) and ending on March 31 of the year immediately following that date.

(3) Subsection (1) does not apply to a parcel in respect of which the municipality has started an action under section 411(2) to recover the tax arrears before the date of the public auction.

(4) The municipality may enter into an agreement with the owner of a parcel of land shown on its tax arrears list providing for the payment of the tax arrears over a period not exceeding 3 years, and in that event the parcel need not be offered for sale under subsection (1) until

(a) the agreement has expired, or

(b) the owner of the parcel breaches the agreement,

whichever occurs first.

1994 cM-26.1 s418;1995 c24 s62;1996 c30 s35

Reserve bid and conditions of sale

419 The council must set

(a) for each parcel of land to be offered for sale at a public auction, a reserve bid that is as close as reasonably possible to the market value of the parcel, and

(b) any conditions that apply to the sale.

1994 cM-26.1 s419

Right to possession

420(1) From the date on which a parcel of land is offered for sale at a public auction, the municipality is entitled to possession of the parcel.

(2) For the purposes of obtaining possession of a parcel of land, a designated officer may enter the parcel and take possession of it for and in the name of the municipality and, if in so doing resistance is encountered, the municipality may apply to the Court of Queen's Bench for an order for the possession of the parcel.

RSA 2000 cM-26 s420;2009 c53 s119

Advertisement of public auction

421(1) The municipality must advertise the public auction

(a) in one issue of The Alberta Gazette, not less than 40 days and not more than 90 days before the date on which the public auction is to be held, and

(b) in one issue of a newspaper having general circulation in the municipality, not less than 10 days and not more than 20 days before the date on which the public auction is to be held.

(2) The advertisement must specify the date, time and location of the public auction, the conditions of sale and a description of each parcel of land to be offered for sale.

(3) The advertisement must state that the municipality may, after the public auction, become the owner of any parcel of land not sold at the public auction.

(4) Not less than 4 weeks before the date of the public auction, the municipality must send a copy of the advertisement referred to in subsection (1)(a) to

(a) the owner of each parcel of land to be offered for sale,

(b) each person who has an interest in any parcel to be offered for sale that is evidenced by a caveat registered by the Registrar, and

(c) each encumbrancee shown on the certificate of title for each parcel to be offered for sale.

1994 cM-26.1 s421;1995 c24 s63

Adjournment of auction

422(1) The municipality may adjourn the holding of a public auction to any date within 2 months after the advertised date.

(2) If a public auction is adjourned, the municipality must post a notice in a place that is accessible to the public during regular business hours, showing the new date on which the public auction is to be held.

(3) If a public auction is cancelled as a result of the tax arrears being paid, the municipality must post a notice in a place that is accessible to the public during regular business hours stating that the auction is cancelled.

1994 cM-26.1 s422

Right to a clear title

423(1) A person who purchases a parcel of land at a public auction acquires the land free of all encumbrances, except

(a) encumbrances arising from claims of the Crown in right of Canada,

(b) irrigation or drainage debentures,

(c) caveats referred to in section 39(12) of the *Condominium Property Act*,

(d) registered easements and instruments registered pursuant to section 69 of the *Land Titles Act*,

(e) right of entry orders as defined in the *Surface Rights Act* registered under the *Land Titles Act*,

(e.1) a caveat that, pursuant to section 3.1(6)(f)(iv) of the *New Home Buyer Protection Act*, remains registered against the certificate of title to the land,

(f) a notice of lien filed pursuant to section 38 of the *Rural Utilities Act*,

(g) a notice of lien filed pursuant to section 20 of the *Rural Electrification Loan Act*, and

(h) liens registered pursuant to section 21 of the *Rural Electrification Long-term Financing Act*.

(2) A parcel of land is sold at a public auction when the person who is acting as the auctioneer declares the parcel sold.

(3) There is no right under section 415 to pay the tax arrears in respect of a parcel after it is declared sold.

RSA 2000 cM-26 s423;2015 c8 s53

Transfer of parcel to municipality

424(1) The municipality at whose request a tax recovery notification was endorsed on the certificate of title for a parcel of

land may become the owner of the parcel after the public auction, if the parcel is not sold at the public auction.

(2) If the municipality wishes to become the owner of the parcel of land, it must request the Registrar to cancel the existing certificate of title for the parcel of land and issue a certificate of title in the name of the municipality.

(3) A municipality that becomes the owner of a parcel of land pursuant to subsection (1) acquires the land free of all encumbrances, except

(a) encumbrances arising from claims of the Crown in right of Canada,

(b) irrigation or drainage debentures,

(c) registered easements and instruments registered pursuant to section 69 of the *Land Titles Act*,

(d) right of entry orders as defined in the *Surface Rights Act* registered under the *Land Titles Act*,

(e) a notice of lien filed pursuant to section 38 of the *Rural Utilities Act*,

(f) a notice of lien filed pursuant to section 20 of the *Rural Electrification Loan Act*, and

(g) liens registered pursuant to section 21 of the *Rural Electrification Long-term Financing Act*.

(4) A certificate of title issued to the municipality under this section must be marked "Tax Forfeiture" by the Registrar.

1994 cM-26.1 s424;1995 c24 s64;1996 c30 s36;1998 c24 s38; 1999 c11 s23

Right to dispose of parcel

425(1) A municipality that becomes the owner of a parcel of land pursuant to section 424 may dispose of the parcel

(a) by selling it at a price that is as close as reasonably possible to the market value of the parcel, or

(b) by depositing in the account referred to in section 427(1)(a) an amount of money equal to the price at which the municipality would be willing to sell the parcel under clause (a).

(2) The municipality may grant a lease, licence or permit in respect of the parcel.

(3) Repealed 1995 c24 s65.

(4) If a parcel of land is disposed of under subsection (1), the municipality must request the Registrar to delete the words "Tax Forfeiture" from the certificate of title issued in the name of the municipality for the parcel.

1994 cM-26.1 s425;1995 c24 s65

Minister's authority to transfer parcel

425.1(1) The Minister may administer, transfer to another Minister, transfer to the municipality in which the land is situated or, subject to section 425, dispose of any parcel of land acquired by the Minister under this Part or a predecessor of this Part.

(2) The Minister may cancel the tax arrears on any land referred to in subsection (1) and require the Registrar to remove the tax recovery notification caveat respecting those tax arrears.

1995 c24 s66

Revival of title on payment of arrears

426(1) If the tax arrears in respect of a parcel of land are paid after the municipality becomes the owner of the parcel under section 424 but before the municipality disposes of the parcel under section 425(1), the municipality must notify the Registrar.

(2) The Registrar must cancel the certificate of title issued under section 424(2) and revive the certificate of title that was cancelled under section 424(2).

(3) A certificate of title revived by the Registrar is subject

(a) to the same notifications, charges and encumbrances to which it would have been subject if it had not been cancelled under section 424(2), and

(b) to any estate, interest or encumbrance created while the parcel was registered in the name of the municipality.

1994 cM-26.1 s426;1996 c30 s37

Separate account for sale proceeds

427(1) The money paid for a parcel of land at a public auction or pursuant to section 425

(a) must be deposited by the municipality in an account that is established solely for the purpose of depositing money from the sale or disposition of land under this Division, and

(b) must be paid out in accordance with this section and section 428.

(2) The following must be paid first and in the following order:

(a) any remedial costs relating to the parcel;

(a.1) the tax arrears in respect of the parcel;

(b) any lawful expenses of the municipality in respect of the parcel;

(c) any expenses owing to the Crown that have been charged against the parcel of land under section 553;

(d) an administration fee of 5% of the amount paid for the parcel, payable to the municipality.

(3) If there is any money remaining after payment of the tax arrears and costs listed in subsection (2), the municipality must notify the previous owner that there is money remaining.

(3.1) Subject to subsection (3.3), if the municipality is satisfied that there are no debts that are secured by an encumbrance on the certificate of title for the parcel of land, the municipality may pay the money remaining to the previous owner.

(3.2) If the municipality is not satisfied that there are no debts that are secured by an encumbrance on the certificate of title for the parcel of land, the municipality must notify the previous owner that an application may be made under section 428(1) to recover all or part of the money.

(3.3) For the purposes of this Division, "previous owner" includes the Crown in right of Alberta if the municipality has been notified by the Minister responsible for the *Unclaimed Personal Property and Vested Property Act* that the land has vested in the Crown, and any money remaining after payment of the tax arrears and costs set out in subsection (2) must be paid to the Minister responsible for the *Unclaimed Personal Property and Vested Property Act.*

(4) Money paid to a municipality under a lease, licence or permit granted under section 425(2) must be placed in the account referred to in subsection (1) and distributed in accordance with this section and section 428.

RSA 2000 cM-26 s427;2007 cU-1.5 s73

Distribution of surplus sale proceeds

428(1) A person may apply to the Court of Queen's Bench for an order declaring that the person is entitled to a part of the money in the account referred to in section 427(1).

(2) An application under this section must be made within 10 years after

(a) the date of the public auction, if the parcel was sold at a public auction, or

(b) the date of a sale under section 425, if the parcel was sold at a sale under that section.

(3) The Court must decide if notice must be given to any person other than the applicant and in that event the hearing must be adjourned to allow notice to be given.

(4) In making an order, the Court must have regard to the priorities in which sale proceeds are distributed in a foreclosure action.

RSA 2000 cM-26 s428;2009 c53 s119

Payment of undistributed money to municipality

428.1 If no application is made under section 428 within the 10-year period referred to in section 428(2), the municipality may, for any purpose, use the money deposited in accordance with section 427 that remains undistributed.

1995 c24 s68

Transfer to municipality after 15 years

428.2(1) Despite anything in this Division, where a parcel of land has been offered for sale but not sold at a public auction and the certificate of title for the parcel has been marked "Tax Forfeiture" by the Registrar, the municipality may request the Registrar to cancel the existing certificate of title for the parcel of land and issue a certificate of title in the name of the municipality on the expiry of 15 years following the date of the public auction.

(1.1) This section does not apply to land respecting which the Minister responsible for the *Unclaimed Personal Property and Vested Property Act* has notified the municipality that the land has vested in the Crown.

(2) On the issuance of a certificate of title in the name of the municipality, all responsibilities of the municipality under this Division to the previous owner of the parcel of land cease.

(3) Where a certificate of title is issued to a municipality under subsection (1) and there are remedial costs owing in respect of the parcel of land, the municipality must deposit in the Environmental Protection and Enhancement Fund established under the *Environmental Protection and Enhancement Act* the lesser of

(a) the fair market value of the parcel of land, and

(b) the amount of the remedial costs.

(4) A municipality that becomes the owner of a parcel of land pursuant to subsection (1) acquires the land free of all encumbrances, except

(a) encumbrances arising from claims of the Crown in right of Canada,

(b) irrigation or drainage debentures,

(c) registered easements and instruments registered pursuant to section 69 of the *Land Titles Act*,

(d) right of entry orders as defined in the *Surface Rights Act* registered under the *Land Titles Act*,

(e) a notice of lien filed pursuant to section 38 of the *Rural Utilities Act*,

(f) a notice of lien filed pursuant to section 20 of the *Rural Electrification Loan Act*, and

(g) liens registered pursuant to section 21 of the *Rural Electrification Long-term Financing Act*.

RSA 2000 cM-26 s428.2;2007 cU-1.5 s73

Prohibited bidding and buying

429(1) When a municipality holds a public auction or another sale under section 425, the auctioneer, the councillors, the chief administrative officer and the designated officers and employees of the municipality must not bid for or buy, or act as an agent in buying, any parcel of land offered for sale, unless subsection (2) applies.

(2) A municipality may direct a designated officer or employee of the municipality to bid for or buy a parcel of land that the municipality wishes to become the owner of.

1994 cM-26.1 s429

Right to place tax arrears on new parcels of land

429.1 When there are tax arrears in respect of a parcel of land that is to be subdivided, the municipality may distribute the tax arrears and any taxes that may be imposed in respect of the parcel among the parcels of land that are created by the subdivision in a manner the municipality considers appropriate.

1995 c24 s69

Minerals

430 If, as a result of proceedings under this Act or any other Act providing for the forfeiture of land or minerals, or both, for arrears of taxes, minerals are vested in the Minister or in a municipality that later passed or passes to the control of the Minister, the

minerals are the property of the Crown and no person has any claim to or interest in them, despite anything in this Act or the Act under which the minerals were forfeited.

1994 cM-26.1 s430

Acquisition of minerals

431(1) In respect of any parcel of land or minerals

(a) acquired by a municipality before or after March 5, 1948, pursuant to a tax recovery notification or caveat endorsed on the certificate of title by the Registrar, and

(b) subsequently registered in the name of the municipality,

the municipality is deemed to have taken or to take title only to those minerals that the municipality was authorized and empowered to assess at the time of the issuance of the certificate of title in the name of the municipality, and any corrections to the records of any Land Titles Office made before March 5, 1948 to effect this purpose are hereby confirmed and validated.

(2) A municipality must not transfer, lease, mortgage or otherwise dispose of or deal in any minerals or any interest in minerals without first obtaining the written consent of the Minister, and any disposition or dealing made without the consent of the Minister has no effect.

(3) Any certificate of title issued in the name of a municipality before or after March 5, 1948 to or including any minerals, other than minerals that the municipality was authorized and empowered to assess at the time of the acquisition, may be corrected under the *Land Titles Act* to limit the certificate of title to the minerals the municipality was authorized and empowered to acquire, and all other necessary corrections may be made under the *Land Titles Act* on other certificates of title.

(4) This section does not affect an interest in minerals acquired by any person from a municipality before March 5, 1948.

1994 cM-26.1 s431

Right of way

432 After the date on which a municipality becomes the owner of a parcel of land under section 424, if an application is made to a municipality

(a) for a right of entry by an operator entitled to apply for a right of entry order under the *Surface Rights Act*, or

(b) for a right of way for a railway, pipeline, transmission line, pole line, conduit, irrigation or drainage ditch or

other similar purpose, by an applicant entitled to expropriate for that purpose under any Act,

the municipality may grant the right of entry or right of way.

1994 cM-26.1 s432

When parcel becomes part of another municipality

433(1) If proceedings affecting a parcel of land have been started under this Division and the parcel of land later becomes part of another municipality, the proceedings must be continued by that municipality as if the parcel had always been included in it, and that municipality must pay to the municipality that started the proceedings, to the extent that municipality receives sufficient money to do so, the costs incurred by the original municipality in connection with the parcel.

(2) When a parcel of land becomes part of another municipality, the Registrar must, on receipt of an order of the Minister, issue a new certificate of title showing the parcel to be registered in the name of that municipality.

1994 cM-26.1 s433

Non-liability for condition of land

434 If the Minister becomes the owner of a parcel of land pursuant to this Division, the Minister is not liable in respect of the state and condition of the parcel or any improvements to it.

1994 cM-26.1 s434

Action for condition of land prohibited

434.1(1) No action for damages may be commenced against a municipality with respect to the state and condition of a parcel of land, or any improvements to it, shown on the tax arrears list of the municipality unless

(a) after the date on which the municipality is entitled to possession of the parcel under section 420, or

(b) after the date on which the municipality becomes the owner of the parcel under section 424,

the municipality releases on that parcel a new or additional substance into the environment that may cause, is causing or has caused an adverse effect or the municipality aggravates the adverse effect of the release of a substance into the environment on that parcel.

(2) Subsection (1) does not relieve a municipality of liability respecting a parcel of land, or any improvement to it, that was owned by the municipality before the parcel was placed on the municipality's tax arrears list.

1996 c30 s40

Continuation of proceedings

435(1) With respect to Edmonton, Calgary and Medicine Hat, all proceedings taken or that were required to be taken under any predecessor of this Act, as modified or varied by any special provisions of the charters of the respective cities, must be continued or taken, as the case may be, under this Division wherever possible.

(2) The Minister may make regulations or orders for the purpose of overcoming any procedural or other difficulty occasioned by the differences between this Division and the charters of Edmonton, Calgary and Medicine Hat.

1994 cM-26.1 s435

Deemed compliance with Act

436 Any municipality that acquired land under a predecessor of this Act is deemed to have complied with the requirements of that Act.

1994 cM-26.1 s436

Division 8.1
Recovery of Taxes Related to Designated Manufactured Homes

Definitions

436.01 In this Division,

(a) "financing change statement" means a financing change statement as defined in the *Personal Property Security Act*;

(b) "financing statement" means a financing statement as defined in the *Personal Property Security Act*;

(c) "register", except where the context otherwise requires, means to register by means of a financing statement in the Registry in accordance with the *Personal Property Security Act* and the regulations made under that Act;

(d) "Registry" means the Personal Property Registry;

(e) "reserve bid" means the minimum price at which a municipality is willing to sell a designated manufactured home at a public auction;

(f) "security interest" means a security interest as defined in the *Personal Property Security Act*;

(g) "tax" means a property tax or a community revitalization levy imposed in respect of property referred to in section 304(1)(j)(i) or (k);

(h) "tax arrears list" means a tax arrears list prepared by a municipality under section 436.03(1)(a);

(i) "tax recovery lien" means a charge to secure the amount of taxes owing to a municipality in respect of a designated manufactured home.

RSA 2000 cM-26 s436.01;2005 c14 s17

Methods of recovering taxes in arrears

436.02(1) A municipality may attempt to recover tax arrears in respect of a designated manufactured home

(a) in accordance with this Division, or

(b) subject to subsection (2), in accordance with Division 9 or with any other Act or common law right.

(2) A municipality may start an action under subsection (1)(b) at any time before

(a) the designated manufactured home is sold at a public auction under section 436.09, or

(b) the designated manufactured home is disposed of in accordance with section 436.15(a),

whichever occurs first.

1998 c24 s40

Tax arrears list

436.03(1) A municipality must annually, not later than March 31,

(a) prepare a tax arrears list that shows the designated manufactured homes in the municipality in respect of which there are tax arrears for more than one year, and that may also show the designated manufactured homes in the municipality in respect of which there are tax arrears for less than one year,

(b) register a tax recovery lien against each designated manufactured home shown on the tax arrears list, and

(c) post a copy of the tax arrears list in a place that is accessible to the public during regular business hours.

(2) A municipality must not register a tax recovery lien against a designated manufactured home in respect of which there exists a tax recovery lien registered from previous years unless that lien has first been discharged.

(3) If a subsequent tax recovery lien is registered in error, it is deemed to be of no effect.

(4) The municipality must give written notice to the owner of each designated manufactured home shown on the tax arrears list that a tax recovery lien has been registered against the designated manufactured home.

(5) The municipality must give written notice to the owner of each manufactured home community containing one or more designated manufactured homes shown on the tax arrears list that a tax recovery lien has been registered against the designated manufactured home or homes.

1998 c24 s40

Costs of recovery

436.04(1) A municipality is responsible for the payment of the costs it incurs in carrying out the measures referred to in section 436.03, but it may add the costs to the tax roll in respect of the designated manufactured home shown on the tax arrears list.

(2) No person shall register a financing change statement to discharge the registration of a tax recovery lien against a designated manufactured home without the authorization of the municipality in whose favour the lien is registered.

(3) If a tax recovery lien is discharged in error, the municipality may, within 30 days after the discharge and without any administration fee charged by the Government of Alberta, re-register the tax recovery lien, which has the same effect as if the original tax recovery lien had not been discharged.

1998 c24 s40

Removal of designated manufactured home or improvements

436.05 When a tax recovery lien has been registered against a designated manufactured home, no person shall remove from the site the designated manufactured home or any other improvements located on the site for which the owner of the designated manufactured home is also liable to pay the taxes, unless the municipality that registered the lien consents.

1998 c24 s40

Right to pay tax arrears

436.06(1) When a tax recovery lien has been registered against a designated manufactured home, any person may pay the tax arrears in respect of that designated manufactured home.

(2) On payment of the tax arrears under subsection (1), the municipality must register a financing change statement to discharge the registration of the tax recovery lien.

(3) A person may exercise the right under subsection (1) at any time before

(a) the designated manufactured home is sold at a public auction under section 436.09, or

(b) the designated manufactured home is disposed of in accordance with section 436.15(a).

1998 c24 s40

Right to collect rent to pay tax arrears

436.07(1) When a tax recovery lien has been registered against a designated manufactured home, the municipality may send a written notice to any person who rents or leases the designated manufactured home from the owner of the designated manufactured home, requiring that person to pay the rent or lease payments, as the case may be, to the municipality until the tax arrears have been paid.

(2) Not less than 14 days before a municipality sends a notice under subsection (1), it must send a notice to the owner of the designated manufactured home advising the owner of the municipality's intention to proceed under subsection (1).

(3) The municipality must send a copy of the notice under subsection (2) to the owner of the manufactured home community where the designated manufactured home is located.

(4) This section does not prevent the municipality from exercising any other right it has to collect the tax arrears.

1998 c24 s40

Warning of sale

436.08(1) Not later than August 1 following preparation of the tax arrears list, the municipality must, in respect of each designated manufactured home shown on the tax arrears list, send a written notice to

(a) the owner of the designated manufactured home,

(b) the owner of the manufactured home community where the designated manufactured home is located, and

(c) each person who has a security interest in or a lien, writ, charge or other encumbrance against the designated manufactured home as disclosed by a search of the Registry using the serial number of the designated manufactured home.

(2) The notice must state that if the tax arrears in respect of the designated manufactured home are not paid before March 31 in the next year, the municipality will offer the designated manufactured home for sale at a public auction.

(3) The notice under subsection (1) must be sent to the address shown on the records of the Registry for each person referred to in subsection (1)(c).

1998 c24 s40;1999 c11 s25

Offer of designated manufactured home for sale

436.09(1) Each municipality must offer for sale at a public auction any designated manufactured home shown on its tax arrears list if the tax arrears are not paid.

(2) Unless subsection (4) applies, the public auction must be held in the period beginning on the date referred to in section 436.08(2) and ending on March 31 of the year immediately following that date.

(3) Subsection (1) does not apply to a designated manufactured home in respect of which the municipality has started an action under section 436.02(2) to recover the tax arrears before the date of the public auction.

(4) The municipality may enter into an agreement with the owner of a designated manufactured home shown on its tax arrears list providing for the payment of the tax arrears over a period not exceeding 3 years, and in that event the designated manufactured home need not be offered for sale under subsection (1) until

(a) the agreement has expired, or

(b) the owner of the designated manufactured home breaches the agreement,

whichever occurs first.

1998 c24 s40

Reserve bid and conditions for sale

436.1 The council must set for each designated manufactured home to be offered for sale at a public auction,

(a) a reserve bid that is as close as reasonably possible to the market value of the designated manufactured home, and

(b) any conditions that apply to the sale.

1998 c24 s40

Right to possession

436.11(1) From the date on which a designated manufactured home is offered for sale at a public auction, the municipality is entitled to possession of the designated manufactured home.

(2) For the purpose of obtaining possession of a designated manufactured home, a designated officer may enter the designated

manufactured home and take possession of it for and in the name of the municipality, and if in so doing the designated officer encounters resistance, the municipality may apply to the Court of Queen's Bench for an order for possession of the designated manufactured home.

RSA 2000 cM-26 s436.11;2009 c53 s119

Advertisement of public auction

436.12(1) The municipality must advertise the public auction in at least one issue of a newspaper having general circulation in the municipality, not less than 10 days and not more than 30 days before the date on which the public auction is to be held.

(2) The advertisement must specify the date, time and location of the public auction, the conditions of sale and a description of each designated manufactured home to be offered for sale.

(3) Not less than 4 weeks before the date of the public auction, the municipality must send a copy of the advertisement referred to in subsection (1) to each person referred to in section 436.08(1).

1998 c24 s40

Adjournment of auction

436.13(1) The municipality may adjourn the holding of a public auction to any date within 2 months after the advertised date.

(2) If a public auction is adjourned, the municipality must

(a) post a notice in a place that is accessible to the public during regular business hours, showing the new date on which the public auction is to be held, and

(b) send a copy of the notice to each person referred to in section 436.08(1).

(3) If a public auction is cancelled as a result of the payment of the tax arrears, the municipality must

(a) post a notice in a place that is accessible to the public during regular business hours stating that the auction is cancelled, and

(b) send a copy of the notice to each person referred to in section 436.08(1).

1998 c24 s40

Unencumbered ownership

436.14(1) A person who purchases a designated manufactured home at a public auction or pursuant to section 436.15(a) acquires the designated manufactured home free of all security interests, liens, writs, charges and other encumbrances, except encumbrances

arising from claims of the Crown in right of Canada, and all obligations secured by the security interests, liens, writs, charges and other encumbrances are, as regards the purchaser, deemed performed.

(2) When a person purchases a designated manufactured home at a public auction or pursuant to section 436.15(a), the municipality must, in respect of any security interest in or lien, writ, charge or other encumbrance against the designated manufactured home that exists on the date of sale as disclosed by a search of the Registry using the serial number of the designated manufactured home, register a financing change statement

(a) to amend the collateral description in the registration to exclude the designated manufactured home, or

(b) if the designated manufactured home is the only collateral described in the registration, to discharge the registration.

(3) Subsection (2) does not apply to a registration for which the purchaser is named as a debtor in a registered financing statement.

(4) Subsection (2) operates despite section 68 of the *Personal Property Security Act*.

(5) A designated manufactured home is sold at a public auction when the person who is acting as the auctioneer declares the designated manufactured home sold.

1998 c24 s40

Right to sell or dispose of designated manufactured home

436.15 If a designated manufactured home is not sold at a public auction under section 436.09, the municipality may

(a) dispose of it

(i) by selling it at a price that is as close as reasonably possible to the market value of the designated manufactured home, or

(ii) by depositing in the account referred to in section 436.17(1)(a) an amount of money equal to the price at which the municipality would be willing to sell the designated manufactured home under subclause (i),

or

(b) grant a lease in respect of it.

1998 c24 s40

Payment of tax arrears

436.16(1) If the tax arrears in respect of a designated manufactured home are paid before the municipality disposes of it under section 436.15(a) or while the designated manufactured home is being leased under section 436.15(b), the municipality must return the designated manufactured home to its owner.

(2) Before returning the designated manufactured home to its owner under subsection (1), the municipality must send a written notice

(a) to each person referred to in section 436.08(1), and

(b) if the municipality has leased the designated manufactured home under section 436.15(b), to the person leasing it.

(3) The notice must state that

(a) the designated manufactured home will be returned to the owner after 30 days from the date of the notice, and

(b) despite any provision to the contrary in a lease agreement in respect of the designated manufactured home, the lease expires 30 days after the date of the notice.

(4) Subsection (3) applies despite anything contained in the *Residential Tenancies Act.*

1998 c24 s40

Separate account for sale proceeds

436.17(1) The money paid for a designated manufactured home at a public auction or pursuant to section 436.15(a)

(a) must be deposited by the municipality in an account that is established solely for the purpose of depositing money from the sale or disposition of designated manufactured homes under this Division, and

(b) must be paid out in accordance with this section and section 436.18.

(2) Money paid to a municipality as rent under a lease granted under section 436.15(b) must be placed in the account referred to in subsection (1) and distributed in accordance with this section and section 436.18.

(3) The following must be paid first and in the following order:

(a) the tax arrears in respect of the designated manufactured home;

(b) any lawful expenses of the municipality in respect of the designated manufactured home;

(c) an administration fee of 5% of the amount deposited in respect of the designated manufactured home pursuant to subsection (1), payable to the municipality.

(4) If there is any money remaining after payment of the tax arrears and costs listed in subsection (3), the municipality must notify the previous owner of the designated manufactured home that there is money remaining.

(5) If the municipality is satisfied after a search of the Registry using the serial number of the designated manufactured home that there are no security interests in or liens, writs, charges or other encumbrances against the designated manufactured home, the municipality may pay the money remaining after the payments under subsection (3) to the previous owner of the designated manufactured home.

(6) If the municipality is not satisfied after a search of the Registry using the serial number of the designated manufactured home that there are no security interests in or liens, writs, charges or other encumbrances against the designated manufactured home, the municipality must notify the previous owner that an application may be made under section 436.18 to recover all or part of the money.

1998 c24 s40

Distribution of surplus sale proceeds

436.18(1) A person may apply to the Court of Queen's Bench for an order declaring that the person is entitled to a part of the money in the account referred to in section 436.17(1).

(2) An application under this section must be made within 5 years after

(a) the date of the public auction, if the designated manufactured home was sold at a public auction, or

(b) the date of a sale under section 436.15(a), if the designated manufactured home was sold under that section.

(3) The Court must decide if notice must be given to any person other than the applicant and in that event the hearing must be adjourned to allow notice to be given.

RSA 2000 cM-26 s436.18;2009 c53 s119

Payment of undistributed money to municipality

436.19 If no application is made under section 436.18 within the 5-year period referred to in section 436.18, the municipality may, for any purpose, use the money deposited in accordance with section 436.17 that remains undistributed.

1998 c24 s40

Transfer to municipality after 10 years

436.2(1) Despite anything in this Division, where a designated manufactured home has been offered for sale but not sold at a public auction and the municipality has not disposed of it under section 436.15(a) within 10 years following the date of the public auction,

(a) sections 436.16, 436.17 and 436.18 cease to apply with respect to that designated manufactured home, and

(b) the municipality becomes the owner of the designated manufactured home free of all security interests, liens, writs, charges and other encumbrances, except encumbrances arising from claims of the Crown in right of Canada, and all obligations secured by the security interests, liens, writs, charges or encumbrances are, as regards the municipality, deemed performed.

(2) When the municipality becomes the owner of a designated manufactured home under subsection (1), the municipality may, in respect of any security interest in or lien, writ, charge or other encumbrance against the designated manufactured home as disclosed by a search of the Registry using the serial number of the designated manufactured home, register a financing change statement

(a) to amend the collateral description in the registration to exclude the designated manufactured home, or

(b) if the designated manufactured home is the only collateral described in the registration, to discharge the registration.

(3) Subsection (2) operates despite section 68 of the *Personal Property Security Act*.

1998 c24 s40

Prohibited bidding and buying

436.21(1) When a municipality holds a public auction under section 436.09 or a sale under section 436.15(a), the auctioneer, the councillors, the chief administrative officer and the designated officers and employees of the municipality must not bid for or buy, or act as an agent in buying, any designated manufactured home offered for sale, unless subsection (2) applies.

(2) A municipality may direct a designated officer or employee of the municipality to bid for or buy a designated manufactured home of which the municipality wishes to become the owner.

1998 c24 s40

Manufactured home moved to another municipality

436.22 If, after tax recovery proceedings affecting a designated manufactured home are started under this Division, the designated manufactured home is moved to another municipality or its site becomes part of another municipality,

(a) the proceedings must be continued by that other municipality as if the designated manufactured home had always been included in it, and

(b) the other municipality must pay to the municipality that commenced the proceedings, to the extent that the other municipality receives sufficient money to do so, the costs incurred by the original municipality in connection with the tax recovery proceedings.

1998 c24 s40

Regulations

436.23 The Minister may make regulations

(a) respecting the rights and obligations of a municipality in relation to its possession of a designated manufactured home under this Division;

(b) respecting any other matter related to the recovery of taxes under this Division that the Minister considers necessary to carry out the intent of this Division.

1998 c24 s40

Reporting requirements

436.24(1) Unless a municipality passes a bylaw to the contrary, the owner of a manufactured home community must provide monthly reports to the chief administrative officer or a designated officer of the municipality regarding

(a) the ownership of all designated manufactured homes in the manufactured home community, including the serial numbers of the designated manufactured homes, and

(b) the movement of all designated manufactured homes in and out of the manufactured home community.

(2) Despite subsection (1), a municipality may pass a bylaw requiring the owner of the manufactured home community to provide the reports required under subsection (1) to the

municipality on the dates specified by the municipality, but not more than once a month.

1998 c24 s40

Division 9
Recovery of Taxes Not Related to Land

Definitions

437 In this Division,

(a) "distress warrant" means a written instruction to seize goods of the person named in the warrant;

(b) "period for payment" means

(i) if the person liable to pay the tax is a resident of the municipality, the 14 days following the sending of the tax notice by the municipality, or

(ii) if the person liable to pay the tax is not a resident of the municipality, the 30 days following the sending of the tax notice by the municipality;

(c) "tax" means

(i) a business tax,

(ii) a well drilling equipment tax,

(ii.1) a community aggregate payment levy, or

(iii) a property tax or community revitalization levy imposed in respect of property referred to in section 304(1)(c), (f), (g), (h), (i), (j)(i) or (k);

(d) "tax arrears" means taxes that remain unpaid after the expiry of the period for payment.

RSA 2000 cM-26 s437;2005 c14 s18

Methods of recovering taxes in arrears

438(1) A municipality may attempt to recover tax arrears

(a) in accordance with this Division, and

(b) subject to subsection (2), in accordance with any other Act or common law right.

(2) A municipality may start an action under subsection (1)(b) at any time before the goods are sold at a public auction or the municipality becomes the owner of the goods under section 448, whichever occurs first.

1994 cM-26.1 s438

Right to issue distress warrant

439(1) A municipality wishing to recover tax arrears pursuant to this Division may issue a distress warrant.

(2) Each municipality may, in writing, authorize a designated officer or appoint a person to the position of designated officer to prepare and issue distress warrants and seize goods pursuant to distress warrants on behalf of the municipality.

1994 cM-26.1 s439

Seizure of goods

440(1) When a distress warrant has been issued, a civil enforcement agency or a person referred to in section 439(2) must place sufficient goods under seizure to satisfy the amount of the claim shown in the warrant.

(2) The person placing goods under seizure may ask the person who owns or has possession of the seized goods to sign a bailee's undertaking agreeing to hold the seized goods for the municipality.

(3) If a person refuses to sign a bailee's undertaking, the person placing goods under seizure may remove the goods from the premises.

(4) When a bailee's undertaking has been signed under subsection (2), the goods specified in it are deemed to have been seized.

(5) A seizure under this section continues until the municipality

(a) abandons the seizure by written notice, or

(b) sells the goods.

(6) The municipality is not liable for wrongful or illegal seizure or for loss of or damage to goods held under a seizure under this section if a bailee's undertaking relating to the seized goods has been signed pursuant to subsection (2).

1994 cM-26.1 s440;1994 cC-10.5 s146;1997 c19 s3

Goods affected by distress warrant

441(1) A person may seize the following goods pursuant to a distress warrant:

(a) goods belonging to the person who is liable to pay the tax arrears or in which that person has an interest;

(b) goods of a business that is liable to pay business tax arrears, even if the goods have been sold to a purchaser of the business;

(c) goods of a corporation that are in the hands of

(i) a receiver appointed for the benefit of creditors,

(ii) an authorized trustee in bankruptcy, or

(iii) a liquidator appointed under a winding-up order.

(2) If a person who is liable to pay tax arrears is in possession of goods belonging to others for the purpose of storing the goods, those goods must not be seized pursuant to the distress warrant.

1994 cM-26.1 s441

Date for issuing distress warrant

442(1) A distress warrant must not be issued until the period for payment expires, unless subsection (2) applies.

(2) If, before the period for payment expires, a municipality has reason to believe that a person is about to move out of the municipality goods that are to be seized under a distress warrant, the municipality may apply to a justice of the peace for an order authorizing the municipality to issue the distress warrant before the period for payment expires.

1994 cM-26.1 s442

Right to pay tax arrears

443(1) After goods have been seized under a distress warrant, any person may pay the tax arrears.

(2) On payment of the tax arrears under subsection (1), the municipality must release the goods from seizure.

(3) A person may exercise the right under subsection (1) at any time before the municipality sells the goods at a public auction or becomes the owner of the goods under section 448.

1994 cM-26.1 s443

Right to collect rent to pay tax arrears

444(1) If a distress warrant has been issued to recover tax arrears in respect of a business and the person who is liable to pay the business tax arrears owns property that is leased to one or more tenants, the municipality may send a notice to each tenant requiring the tenant to pay the rent as it becomes due to the municipality until the business tax arrears have been paid.

(2) Not less than 14 days before a municipality sends a notice under subsection (1), it must send a notice to the owner of the property advising the owner of the municipality's intention to proceed under subsection (1).

(3) This section does not prevent the municipality from exercising any other right it has to collect the tax arrears.

1994 cM-26.1 s444

Sale of property

445(1) The municipality must offer for sale at a public auction goods that have been seized under a distress warrant if the tax arrears are not paid, unless the municipality starts an action under section 438(2) to recover the tax arrears before the date of the public auction.

(2) The municipality must advertise a public auction by posting a notice in at least 3 public places in the municipality near the goods to be sold not less than 10 days before the date of the auction.

(3) The advertisement must specify the date, time and location of the public auction, the conditions of sale, a description of the goods to be sold and the name of the person whose goods are to be sold.

(4) The advertisement must state that the municipality will become the owner of any goods not sold at the public auction, immediately after the public auction.

1994 cM-26.1 s445

Date of public auction

446(1) The public auction must be held not more than 60 days after the goods are seized under the distress warrant.

(2) The municipality may adjourn the holding of a public auction but must post a notice in accordance with section 445(2) showing the new date on which the public auction is to be held.

1994 cM-26.1 s446

Exception to sale at auction

447 Despite section 445(1), a municipality may have grain seized under a distress warrant hauled to the nearest elevator or other convenient place of storage and may dispose of the grain at the current market price.

1994 cM-26.1 s447

Transfer to municipality

448 The municipality becomes the owner of any goods offered for sale but not sold at a public auction, immediately after the public auction and may dispose of the goods by selling them.

1994 cM-26.1 s448

Separate account for sale proceeds

449(1) The money paid for goods at a public auction or pursuant to section 448

(a) must be deposited by the municipality in an account that is established solely for the purpose of depositing money from the sale of goods under this Division, and

(b) must be paid out in accordance with this section and section 450.

(2) The following must be paid first and in the following order:

(a) the tax arrears;

(b) any lawful expenses of the municipality in respect of the goods.

(3) If there is any money remaining after payment of the tax arrears and expenses listed in subsection (2), the municipality must notify the previous owner that there is money remaining and that an application may be made under section 450 to recover all or part of the money.

1994 cM-26.1 s449

Distribution of surplus sale proceeds

450(1) A person may apply to the Court of Queen's Bench for an order declaring that the person is entitled to a part of the money in the account referred to in section 449(1).

(2) An application under this section may be made within 5 years after the date of the public auction.

(3) The Court must decide if notice must be given to any person other than the applicant and in that event the hearing must be adjourned to allow notice to be given.

RSA 2000 cM-26 s450;2009 c53 s119

Seizure of designated manufactured home

451 Part 10 of the *Civil Enforcement Act* does not apply to a designated manufactured home in a manufactured home community that has been seized under a distress warrant.

1994 cM-26.1 s451;1994 cC-10.5 s146;1998 c24 s41

Regulations

452 The Minister may make regulations respecting any other matter related to the recovery of taxes under this Division that is considered necessary to carry out the intent of this Division.

1994 cM-26.1 s452

Part 11
Assessment Review Boards

Division 1
Establishment and Function of Assessment Review Boards

Interpretation

453(1) In this Part,

TAB 2

COURT FILE NUMBER	1501-12220
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PLAINTIFF	ALBERTA TREASURY BRANCHES
DEFENDANT	COGI LIMITED PARTNERSHIP, CANADIAN OIL & GAS INTERNATIONAL INC., CONSERVE OIL GROUP INC. AND CONSERVE OIL 1ST CORPORATION
DOCUMENT	**ORDER**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	McMillan LLP 1700, 421 – 7th Ave SW Calgary, AB T2P 4K9 Adam Maerov / Richard Jones t. 403.531.4700 f. 403.531.4720 File No. 239960

JUDICIAL CENTRE OF CALGARY
FILED
Clerk's Stamp
DEC 18 2018
CLERK OF THE COURT

I hereby certify this to be a true copy of the original Order
dated this 18 day of Dec 20 18
for Clerk of the Court

DATE ON WHICH ORDER WAS PRONOUNCED: **December 18, 2018**

LOCATION WHERE ORDER WAS PRONOUNCED: **Calgary Courts Centre**

NAME OF JUSTICE WHO MADE THIS ORDER: **The Honourable Justice K.M. Eidsvik**

UPON THE APPLICATION by DEL Canada GP Ltd. (**DEL**" or "**Purchaser**") for an order to determine the amount of the Municipal Taxes Fund set out in paragraph 8 of the Approval and Vesting Order dated June 6, 2018 ("**Approving and Vesting Order**") and to obtain advice and direction with respect to the claims process for the determination of a municipality's entitlement to Municipal Taxes Fund;

AND UPON HAVING READ the Approval and Vesting Order, the Affidavit of Charles W. Chapman, filed, and the Affidavit of Service; **AND UPON HEARING** the submissions of counsel for the Purchaser, counsel for the Receiver, and counsel for certain municipalities, and no one appearing for any other person on the service list, although properly served as appears from the Affidavit of Service, filed;

IT IS HEREBY ORDERED AND DECLARED THAT:

SERVICE

[1] Service of notice of this application and supporting materials is hereby declared to be good and sufficient, and no other person is required to have been served with notice of this application, and time for service of this application is abridged to that actually given.

SCOPE OF THE MUNICIPAL TAXES FUND (PARAGRAPH 8 OF THE APPROVING AND VESTING ORDER)

[2] Paragraph 8 of the Approval and Vesting Order is amended to include:

> A claim, ~~Asserted~~ Claim, Late Claim ~~or the entitlement~~ of a municipality to the Municipal Taxes Fund is limited to ~~property~~ (land, improvements and goods) within the geographic boundaries ~~of the~~ municipality. Section 348 of the ~~*Municipal* Government Act~~ only applies to property within the geographical boundaries of the municipality.

CLAIMS PROCEDURE – MUNICIPAL TAXES FUND (PARAGRAPH 8 OF THE APPROVING AND VESTING ORDER)

[3] The below claims procedure is approved and shall be followed by the Receiver and any municipal claimant who desires to advance a claim against the Municipal Taxes Fund.

a. The Receiver is authorized and directed to provide notice ("Claims Notice") in prescribed form[1] by not later than January 15, 2019 to the municipalities listed in Schedule "A".

b. Recipients of a Claims Notice may file a dispute notice ("Dispute Notice")[2] in prescribed form on or before 5:00 p.m. (Calgary) on February 15, 2019 ("Claims Bar Date").[3]

c. The claim of any municipality that does not file a Dispute Notice on before the Claims Bar Date shall be finally determined to be as set out in the Claims Notice.

d. The Receiver in consultation with DEL/ATB will work to resolve claims subject to any Dispute Notice ("Disputed Claims") on or before March 8, 2019.

e. On or before March 22, 2019, the Receiver shall file an application to the Court for the determination of any outstanding Disputed Claims.

MISCELLANEOUS MATTERS

[4] This Order must be served only upon those interested parties attending or represented at the within application and service may be effected by facsimile, electronic mail, personal delivery or courier.

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[1] Claims Notice form set out in Schedule "B".

[2] Dispute Notice form set out in Schedule "C".

Service is deemed to be effected the next business day following the transmission or delivery of such documents.

[5] Service of this Order on any party not attending this application is hereby dispensed with, other than the municipalities listed in Schedule "A".

(6) The rest of the application is adjourned to the week of Jan 21st 2019 before Justice Romaine or another time that is convenient.

J.C.C.Q.B.A.

(7) Cross-examination of Mr. Chapman and any affidavits that need to be filed by the Municipalities in reply to this application must be done by Friday Jan 11 2019.

(8) The Municipalities shall file their reply briefs by Jan 14 2019 @ 4pm.

Schedule "A"

LIST OF MUNICIPALITIES

(a) City of Cold Lake;

(b) City of Red Deer;

(c) Clear Hills County;

(d) Clearwater County;

(e) Kneehill County;

(f) Lacombe County;

(g) Paintearth County No. 18;

(h) Red Deer County;

(i) Saddle Hills County;

(j) Stettler County;

(k) Municipal District of Bonnyville No. 87;

(l) Municipal District of Greenview No. 87;

(m) Special Areas Board.

SCHEDULE "B"

CLAIMS NOTICE - SECURED CLAIMS SECTION 348 *MUNICIPAL GOVERNMENT ACT*

IN COURT OF QUEEN'S BENCH OF ALBERTA ACTION NO. 1501-12220 (the "ACTION"), ALBERTA TREASURY BRANCHES (the "PLAINTIFF") and COGI LIMITED PARTNERSHIP, CANADIAN OIL & GAS INTERNATIONAL INC., CONSERVE OIL GROUP INC., CONSERVE OIL 1ST CORPORATION (the "DEFENDANTS"), and MNP LTD. (the "RECEIVER") and DEL CANADA GP LTD. (THE "APPLICANT")

By order of the Court of Queen's Bench of Alberta (the "**Court**") dated December 18, 2018, in the Action (as may be amended, restated or supplemented from time to time (the "**Claims Procedure Order**")), pursuant to an application brought by the Applicant, the Receiver has been authorized to conduct a claims procedure (the "**Claims Procedure**"). A copy of the Claims Procedure Order, with all schedules, may be found on the website of the Receiver at: [**] (the "**Website**"). Capitalized terms used in this Claims Notice and not otherwise defined in this Claims Notice shall have the meaning given to them in the Claims Procedure Order

Regarding the Secured Claim of _____
(referred to in this form as "the Claimant") *(name of Claimant)*

Notice from the Receiver:

Your secured claim pursuant to section 348 of the *Municipal Government Act* has been assessed at: $_____.

This amount will be rank *pari passu* with other secured claims for payment from the Municipal Taxes Fund (as defined in the Claims Procedure Order).

If you do not agree with this amount, please provide details of your secured claim in the Dispute Notice (as defined in the Claims Procedure Order).

If you fail to deliver the Dispute Notice according to its terms by January 25, 2019, you will be deemed to accept this amount.

All notices or correspondence regarding this secured claim are to be forwarded to the Claimant at the following address:

_____

_____

Telephone Number: _____

Facsimile Number: _____

Attention (Contact Person): _____

Email Address: _____

(All future correspondence will be delivered to the designated email address unless the Claimant specifically requests that hard copies be provided)

☐ Please provide hard copies of materials to the address above.

DATED this _____ day of _____, 2018

_____
Witness

Per: _____

Print name of Claimant:

_____
If Claimant is other than an individual, print name and title of authorized signatory

Name: _____

Title: _____

SCHEDULE "C"

DISPUTE NOTICE

IN COURT OF QUEEN'S BENCH OF ALBERTA ACTION NO. 1501-12220, ALBERTA TREASURY BRANCHES (the "PLAINTIFF") and COGI LIMITED PARTNERSHIP, CANADIAN OIL & GAS INTERNATIONAL INC., CONSERVE OIL GROUP INC., CONSERVE OIL 1ST CORPORATION (the "DEFENDANTS"), and MNP LTD. (the "RECEIVER") and DEL CANADA GP LTD. (THE "APPLICANT")

By order of the Court of Queen's Bench of Alberta (the "**Court**") dated December 18, 2018, in the Action (as may be amended, restated or supplemented from time to time (the "**Claims Procedure Order**")), pursuant to an application brought by the Applicant, the Receiver has been authorized to conduct a claims procedure (the " **Claims Procedure**"). A copy of the Claims Procedure Order, with all schedules, may be found on the website of the Receiver at: [**] (the "**Website**"). Capitalized terms used in this Dispute Notice not otherwise defined in this Dispute Notice shall have the meaning given to them in the Claims Procedure Order.

Name of Claimant: _____

Address: _____

_____

_____

Telephone Number: _____

Facsimile Number: _____

Email Address: _____

You are not required to complete a Dispute Notice if you agree with the amount assessed for your secured claim in the Claims Notice (as defined in the Claims Procedure Order)

For Claimants who Dispute the Determination of their secured claim in the Claims Notice:

I, _____ (name of the Claimant or representative of the Claimant), of _____ (City, Province or State) do hereby certify that:

4. I am the Claimant;

   OR

   I am _____ *(state position/title)* of the Claimant.

5. I have knowledge of all the circumstances connected with the Secured Claim referred to in this form.

The Defendants are indebted to the Claimant in the sum of CDN$ _____ (*insert CDN $ value of claim*) as shown by the statement of account attached hereto and marked Schedule "A"

which constitutes a secured claim entitled to payment from the Municipal Taxes Fund (as defined in the Claims Procedure Order).

The nature of this secured claim is as follows *(check all that apply)*:

☐ municipal realty, municipal business or other taxes, assessments or levies of any kind or nature attributable to or in respect of the carrying on of the Defendants' business accrued and unpaid by the Defendants which are required at law to be paid in priority to claims of secured creditors under section 348 of the *Municipal Government Act* and which are within the geographical boundaries of the municipality claiming such amounts

☐ any other claim that is entitled to payment from Municipal Taxes Fund (as defined in the Claims Procedure Order)

The legal basis upon which this secured claim, or a portion thereof, is entitled to payment from the Municipal Taxes Fund is as follows:

_____

_____

_____

_____

_____

_____

_____

The statement of account must include evidence in support of the Secured Claim.

PLEASE TAKE NOTICE THAT, pursuant to the Claims Procedure Order, I Claimant hereby dispute the amount of my secured claim as set out in the Claims Notice dated _____, 2018 issued by the Receiver, and I assert a secured claim as follows:

	Claim Determination Amount:	Amount claimed by Claimant:
Secured Claim	$	$

Reason for the dispute (attach copies of any supporting documentation):

_____

_____

_____

Address for Service of Dispute Notice:

DLA PIPER
Counsel to MNP Ltd., Receiver of COGI Limited Partnership, Canadian Oil & Gas International Inc., Conserve Oil Group Inc., and Conserve Oil 1st Corporation
1000 250 2 St. S.W.
Calgary, Alberta T2P 0C1

Attention: G. Brian Davison, Q.C.

Tel: 403-294-3590
Fax: 403-213-4481
Email: brian.davison@dlapiper.com

With a copy to (which shall not constitute notice):

McMILLAN LLP
Counsel to DEL Canada GP Ltd., Applicant
Suite 1700, 421 7th Avenue SW
Calgary, Alberta T2P 4K9

Attention: Richard Jones & Adam Maerov
Tel:403-531-4700
Fax:403-531-4720
Email: richard.jones@mcmillan.ca / adam.maerov@mcmillan.ca

THIS FORM AND ANY REQUIRED SUPPORTING DOCUMENTATION MUST BE RETURNED TO THE RECEIVER AND THE APPLICANT BY REGISTERED MAIL, PERSONAL SERVICE, EMAIL (IN PDF FORMAT), FACSIMILE OR COURIER TO THE ADDRESS INDICATED ABOVE AND MUST BE ACTUALLY RECEIVED BY THE RECEIVER AND THE APPLICANT BY 5:00 P.M. (CALGARY TIME) ON JANUARY 25, 2019.

DATED this _____ day of _____ 2018

_____ Per: _____
Witness

Name of Claimant:

_____
If Claimant is other than an individual, print name and title of authorized signatory

Name: _____

Title: _____

TAB 3

Philippe Adrien, Emilia Berardi, Paul Creador, Lorenzo Abel Vasquez and Lindy Wagner on their own behalf and on behalf of the other former employees of Rizzo & Rizzo Shoes Limited *Appellants*

v.

Zittrer, Siblin & Associates, Inc., Trustees in Bankruptcy of the Estate of Rizzo & Rizzo Shoes Limited *Respondent*

and

The Ministry of Labour for the Province of Ontario, Employment Standards Branch *Party*

INDEXED AS: RIZZO & RIZZO SHOES LTD. (RE)

File No.: 24711.

1997: October 16; 1998: January 22.

Present: Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Employment law — Bankruptcy — Termination pay and severance available when employment terminated by the employer — Whether bankruptcy can be said to be termination by the employer — Employment Standards Act, R.S.O. 1980, c. 137, ss. 7(5), 40(1), (7), 40a — Employment Standards Amendment Act, 1981, S.O. 1981, c. 22, s. 2(3) — Bankruptcy Act, R.S.C., 1985, c. B-3, s. 121(1) — Interpretation Act, R.S.O. 1990, c. I.11, ss. 10, 17.

A bankrupt firm's employees lost their jobs when a receiving order was made with respect to the firm's property. All wages, salaries, commissions and vacation pay were paid to the date of the receiving order. The province's Ministry of Labour audited the firm's records to determine if any outstanding termination or severance pay was owing to former employees under the *Employment Standards Act* ("*ESA*") and delivered a proof of claim to the Trustee. The Trustee disallowed the claims on the ground that the bankruptcy of an employer does not constitute dismissal from employment and accordingly creates no entitlement to sever-

Philippe Adrien, Emilia Berardi, Paul Creador, Lorenzo Abel Vasquez et Lindy Wagner en leur propre nom et en celui des autres anciens employés de Rizzo & Rizzo Shoes Limited *Appelants*

c.

Zittrer, Siblin & Associates, Inc., syndic de faillite de Rizzo & Rizzo Shoes Limited *Intimée*

et

Le ministère du Travail de la province d'Ontario, Direction des normes d'emploi *Partie*

RÉPERTORIÉ: RIZZO & RIZZO SHOES LTD. (RE)

Nº du greffe: 24711.

1997: 16 octobre; 1998: 22 janvier.

Présents: Les juges Gonthier, Cory, McLachlin, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Employeur et employé — Faillite — Indemnités de licenciement et de cessation d'emploi payables en cas de licenciement par l'employeur — Faillite peut-elle être assimilée au licenciement par l'employeur? — Loi sur les normes d'emploi, L.R.O. 1980, ch. 137, art. 7(5), 40(1), (7), 40a — Employment Standards Amendment Act, 1981, L.O. 1981, ch. 22, art. 2(3) — Loi sur la faillite, L.R.C. (1985), ch. B-3, art. 121(1) — Loi d'interprétation, L.R.O. 1990, ch. I.11, art. 10, 17.

Les employés d'une entreprise en faillite ont perdu leur emploi lorsqu'une ordonnance de séquestre a été rendue à l'égard des biens de l'entreprise. Tous les salaires, les traitements, toutes les commissions et les paies de vacances ont été versés jusqu'à la date de l'ordonnance de séquestre. Le ministère du Travail de la province a vérifié les dossiers de l'entreprise pour déterminer si des indemnités de licenciement ou de cessation d'emploi devaient encore être versées aux anciens employés en application de la *Loi sur les normes d'emploi* (la «*LNE*») et il a remis une preuve de réclamation au syndic. Ce dernier a rejeté les réclamations pour le

ance, termination or vacation pay under the *ESA*. The Ministry successfully appealed to the Ontario Court (General Division) but the Ontario Court of Appeal overturned that court's ruling and restored the Trustee's decision. The Ministry sought leave to appeal from the Court of Appeal judgment but discontinued its application. Following the discontinuance of the appeal, the Trustee paid a dividend to Rizzo's creditors, thereby leaving significantly less funds in the estate. Subsequently, the appellants, five former employees of Rizzo, moved to set aside the discontinuance, add themselves as parties to the proceedings, and requested and were granted an order granting them leave to appeal. At issue here is whether the termination of employment caused by the bankruptcy of an employer give rise to a claim provable in bankruptcy for termination pay and severance pay in accordance with the provisions of the *ESA*.

Held: The appeal should be allowed.

At the heart of this conflict is an issue of statutory interpretation. Although the plain language of ss. 40 and 40*a* of the *ESA* suggests that termination pay and severance pay are payable only when the employer terminates the employment, statutory interpretation cannot be founded on the wording of the legislation alone. The words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. Moreover, s. 10 of Ontario's *Interpretation Act* provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".

The objects of the *ESA* and of the termination and severance pay provisions themselves are broadly premised upon the need to protect employees. Finding ss. 40 and 40*a* to be inapplicable in bankruptcy situations is incompatible with both the object of the *ESA* and the termination and severance pay provisions. The legislature does not intend to produce absurd consequences and such a consequence would result if employees dismissed before the bankruptcy were to be entitled to these benefits while those dismissed after a bankruptcy would not be so entitled. A distinction would be made between employees merely on the basis of the timing of their dismissal and such a result would arbi-

motif que la faillite d'un employeur ne constituant pas un congédiement, aucun droit à une indemnité de cessation d'emploi, à une indemnité de licenciement ni à une paie de vacances ne prenait naissance sous le régime de la *LNE*. En appel, le ministère a eu gain de cause devant la Cour de l'Ontario (Division générale) mais la Cour d'appel de l'Ontario a infirmé ce jugement et a rétabli la décision du syndic. Le ministère a demandé l'autorisation d'interjeter appel de l'arrêt de la Cour d'appel mais il s'est désisté. Après l'abandon de l'appel, le syndic a versé un dividende aux créanciers de Rizzo, réduisant de façon considérable l'actif. Par la suite, les appelants, cinq anciens employés de Rizzo, ont demandé et obtenu l'annulation du désistement, l'obtention de la qualité de parties à l'instance et une ordonnance leur accordant l'autorisation d'interjeter appel. En l'espèce, il s'agit de savoir si la cessation d'emploi résultant de la faillite de l'employeur donne naissance à une réclamation prouvable en matière de faillite en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi conformément aux dispositions de la *LNE*.

Arrêt: Le pourvoi est accueilli.

Une question d'interprétation législative est au centre du présent litige. Bien que le libellé clair des art. 40 et 40*a* de la *LNE* donne à penser que les indemnités de licenciement et de cessation d'emploi doivent être versées seulement lorsque l'employeur licencie l'employé, l'interprétation législative ne peut pas être fondée sur le seul libellé du texte de loi. Il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur. Au surplus, l'art. 10 de la *Loi d'interprétation* ontarienne dispose que les lois «sont réputées apporter une solution de droit» et qu'elles doivent «s'interpréter de la manière la plus équitable et la plus large qui soit pour garantir la réalisation de leur objet selon leurs sens, intention et esprit véritables».

L'objet de la *LNE* et des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi elles-mêmes repose de manière générale sur la nécessité de protéger les employés. Conclure que les art. 40 et 40*a* sont inapplicables en cas de faillite est incompatible tant avec l'objet de la *LNE* qu'avec les dispositions relatives aux indemnités de licenciement et de cessation d'emploi. Le législateur ne peut avoir voulu des conséquences absurdes mais c'est le résultat auquel on arriverait si les employés congédiés avant la faillite avaient droit à ces avantages mais pas les employés congédiés après la faillite. Une distinction serait établie entre les employés sur la seule base de la date de leur

trarily deprive some of a means to cope with economic dislocation.

The use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise. Section 2(3) of the *Employment Standards Amendment Act, 1981* exempted from severance pay obligations employers who became bankrupt and lost control of their assets between the coming into force of the amendment and its receipt of royal assent. Section 2(3) necessarily implies that the severance pay obligation does in fact extend to bankrupt employers. If this were not the case, no readily apparent purpose would be served by this transitional provision. Further, since the *ESA* is benefits-conferring legislation, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant.

When the express words of ss. 40 and 40*a* are examined in their entire context, the words "terminated by an employer" must be interpreted to include termination resulting from the bankruptcy of the employer. The impetus behind the termination of employment has no bearing upon the ability of the dismissed employee to cope with the sudden economic dislocation caused by unemployment. As all dismissed employees are equally in need of the protections provided by the *ESA*, any distinction between employees whose termination resulted from the bankruptcy of their employer and those who have been terminated for some other reason would be arbitrary and inequitable. Such an interpretation would defeat the true meaning, intent and spirit of the *ESA*. Termination as a result of an employer's bankruptcy therefore does give rise to an unsecured claim provable in bankruptcy pursuant to s. 121 of the *Bankruptcy Act* for termination and severance pay in accordance with ss. 40 and 40*a* of the *ESA*. It was not necessary to address the applicability of s. 7(5) of the *ESA*.

Cases Cited

Distinguished: *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725; *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1; *Mills-Hughes v. Raynor* (1988), 63 O.R. (2d) 343; **referred to:** *U.F.C.W., Loc. 617P v. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86; *R. v. Hydro-Québec*, [1997] 1 S.C.R. 213;

congédiement et un tel résultat les priverait arbitrairement de certains des moyens dont ils disposent pour faire face à un bouleversement économique.

Le recours à l'historique législatif pour déterminer l'intention du législateur est tout à fait approprié. En vertu du par. 2(3) de l'*Employment Standards Amendment Act, 1981*, étaient exemptés de l'obligation de verser des indemnités de cessation d'emploi, les employeurs qui avaient fait faillite et avaient perdu la maîtrise de leurs biens entre le moment où les modifications sont entrées en vigueur et celui où elles ont reçu la sanction royale. Le paragraphe 2(3) implique nécessairement que les employeurs en faillite sont assujettis à l'obligation de verser une indemnité de cessation d'emploi. Si tel n'était pas le cas, cette disposition transitoire semblerait ne poursuivre aucune fin. En outre, comme la *LNE* est une loi conférant des avantages, elle doit être interprétée de façon libérale et généreuse. Tout doute découlant de l'ambiguïté des textes doit se résoudre en faveur du demandeur.

Lorsque les mots exprès employés aux art. 40 et 40*a* sont examinés dans leur contexte global, les termes «l'employeur licencie» doivent être interprétés de manière à inclure la cessation d'emploi résultant de la faillite de l'employeur. Les raisons qui motivent la cessation d'emploi n'ont aucun rapport avec la capacité de l'employé congédié de faire face au bouleversement économique soudain causé par le chômage. Comme tous les employés congédiés ont également besoin des protections prévues par la *LNE*, toute distinction établie entre les employés qui perdent leur emploi en raison de la faillite de leur employeur et ceux qui sont licenciés pour quelque autre raison serait arbitraire et inéquitable. Une telle interprétation irait à l'encontre des sens, intention et esprit véritables de la *LNE*. La cessation d'emploi résultant de la faillite de l'employeur donne effectivement naissance à une réclamation non garantie prouvable en matière de faillite au sens de l'art. 121 de la *LF* en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi en conformité avec les art. 40 et 40*a* de la *LNE*. Il était inutile d'examiner la question de l'applicabilité du par. 7(5) de la *LNE*.

Jurisprudence

Distinction d'avec les arrêts: *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725; *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1; *Mills-Hughes c. Raynor* (1988), 63 O.R. (2d) 343; **arrêts mentionnés:** *U.F.C.W., Loc. 617P c. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86; *R. c. Hydro-Québec*,

Royal Bank of Canada v. Sparrow Electric Corp., [1997] 1 S.C.R. 411; *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550; *Friesen v. Canada*, [1995] 3 S.C.R. 103; *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986; *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701; *R. v. TNT Canada Inc.* (1996), 27 O.R. (3d) 546; *Re Telegram Publishing Co. v. Zwelling* (1972), 1 L.A.C. (2d) 1; *R. v. Vasil*, [1981] 1 S.C.R. 469; *Paul v. The Queen*, [1982] 1 S.C.R. 621; *R. v. Morgentaler*, [1993] 3 S.C.R. 463; *Abrahams v. Attorney General of Canada*, [1983] 1 S.C.R. 2; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513; *British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25; *R. v. Z. (D.A.)*, [1992] 2 S.C.R. 1025.

Statutes and Regulations Cited

Bankruptcy Act, R.S.C., 1985, c. B-3 [now the *Bankruptcy and Insolvency Act*], s. 121(1).
Employment Standards Act, R.S.O. 1970, c. 147, s. 13(2).
Employment Standards Act, R.S.O. 1980, c. 137, ss. 7(5) [rep. & sub. 1986, c. 51, s. 2], 40(1) [rep. & sub. 1987, c. 30, s. 4(1)], (7), 40*a*(1) [rep. & sub. *ibid*., s. 5(1)].
Employment Standards Act, 1974, S.O. 1974, c. 112, s. 40(7).
Employment Standards Amendment Act, 1981, S.O. 1981, c. 22, s. 2.
Interpretation Act, R.S.O. 1980, c. 219 [now R.S.O. 1990, c. I.11], ss. 10, 17.
Labour Relations and Employment Statute Law Amendment Act, 1995, S.O. 1995, c. 1, ss. 74(1), 75(1).

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Christie, Innis, Geoffrey England and Brent Cotter. *Employment Law in Canada*, 2nd ed. Toronto: Butterworths, 1993.
Côté, Pierre-André. *The Interpretation of Legislation in Canada*, 2nd ed. Cowansville, Que.: Yvon Blais, 1991.
Driedger, Elmer A. *Construction of Statutes*, 2nd ed. Toronto: Butterworths, 1983.
Ontario. *Legislature of Ontario Debates*, 1st sess., 32nd Parl., June 4, 1981, pp. 1236-37.
Ontario. *Legislature of Ontario Debates*, 1st sess., 32nd Parl., June 16, 1981, p. 1699.
Sullivan, Ruth. *Driedger on the Construction of Statutes*, 3rd ed. Toronto: Butterworths, 1994.

[1997] 1 R.C.S. 213; *Banque Royale du Canada c. Sparrow Electric Corp.*, [1997] 1 R.C.S. 411; *Verdun c. Banque Toronto-Dominion*, [1996] 3 R.C.S. 550; *Friesen c. Canada*, [1995] 3 R.C.S. 103; *Machtinger c. HOJ Industries Ltd.*, [1992] 1 R.C.S. 986; *Wallace c. United Grain Growers Ltd.*, [1997] 3 R.C.S. 701; *R. c. TNT Canada Inc.* (1996), 27 O.R. (3d) 546; *Re Telegram Publishing Co. c. Zwelling* (1972), 1 L.A.C. (2d) 1; *R. c. Vasil*, [1981] 1 R.C.S. 469; *Paul c. La Reine*, [1982] 1 R.C.S. 621; *R. c. Morgentaler*, [1993] 3 R.C.S. 463; *Abrahams c. Procureur général du Canada*, [1983] 1 R.C.S. 2; *Hills c. Canada (Procureur général)*, [1988] 1 R.C.S. 513; *British Columbia (Director of Employment Standards) c. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25; *R. c. Z. (D.A.)*, [1992] 2 R.C.S. 1025.

Lois et règlements cités

Employment Standards Act, R.S.O. 1970, ch. 147, art. 13(2).
Employment Standards Act, 1974, S.O. 1974, ch. 112, art. 40(7).
Employment Standards Amendment Act, 1981, L.O. 1981, ch. 22, art. 2.
Loi d'interprétation, L.R.O. 1980, ch. 219 [maintenant L.R.O. 1990, ch. I-11], art. 10, 17.
Loi de 1995 modifiant des lois en ce qui concerne les relations de travail et l'emploi, L.O. 1995, ch. 1, art. 74(1), 75(1).
Loi sur la faillite, L.R.C. (1985), ch. B-3 [maintenant la *Loi sur la faillite et l'insolvabilité*], art. 121(1).
Loi sur les normes d'emploi, L.R.O. 1980, ch. 137, art. 7(5) [abr. & rempl. 1986, ch. 51, art. 2], 40(1) [abr. & rempl. 1987, ch. 30, art. 4(1)], (7), 40*a*(1) [abr. & rempl. *ibid*., art. 5(1)].

Doctrine citée

Christie, Innis, Geoffrey England and Brent Cotter. *Employment Law in Canada*, 2nd ed. Toronto: Butterworths, 1993.
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Ontario. *Legislature of Ontario Debates*, 1st sess., 32nd Parl., June 4, 1981, pp. 1236-37.
Ontario. *Legislature of Ontario Debates*, 1st sess., 32nd Parl., June 16, 1981, p. 1699.
Sullivan, Ruth. *Driedger on the Construction of Statutes*, 3rd ed. Toronto: Butterworths, 1994.

Sullivan, Ruth. *Statutory Interpretation*. Concord, Ont.: Irwin Law, 1997.

APPEAL from a judgment of the Ontario Court of Appeal (1995), 22 O.R. (3d) 385, 80 O.A.C. 201, 30 C.B.R. (3d) 1, 9 C.C.E.L. (2d) 264, 95 C.L.L.C. ¶210-020, [1995] O.J. No. 586 (QL), reversing a judgment of the Ontario Court (General Division) (1991), 6 O.R. (3d) 441, 11 C.B.R. (3d) 246, 92 C.L.L.C. ¶14,013, ruling that the Ministry of Labour could prove claims on behalf of employees of the bankrupt. Appeal allowed.

Steven M. Barrett and *Kathleen Martin*, for the appellants.

Raymond M. Slattery, for the respondent.

David Vickers, for the Ministry of Labour for the Province of Ontario, Employment Standards Branch.

The judgment of the Court was delivered by

IACOBUCCI J. — This is an appeal by the former employees of a now bankrupt employer from an order disallowing their claims for termination pay (including vacation pay thereon) and severance pay. The case turns on an issue of statutory interpretation. Specifically, the appeal decides whether, under the relevant legislation in effect at the time of the bankruptcy, employees are entitled to claim termination and severance payments where their employment has been terminated by reason of their employer's bankruptcy.

1. Facts

Prior to its bankruptcy, Rizzo & Rizzo Shoes Limited ("Rizzo") owned and operated a chain of retail shoe stores across Canada. Approximately 65 percent of those stores were located in Ontario. On April 13, 1989, a petition in bankruptcy was filed against the chain. The following day, a receiving

Sullivan, Ruth. *Statutory Interpretation*. Concord, Ont.: Irwin Law, 1997.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (1995), 22 O.R. (3d) 385, 80 O.A.C. 201, 30 C.B.R. (3d) 1, 9 C.C.E.L. (2d) 264, 95 C.L.L.C. ¶210-020, [1995] O.J. nº 586 (QL), qui a infirmé un jugement de la Cour de l'Ontario (Division générale) (1991), 6 O.R. (3d) 441, 11 C.B.R. (3d) 246, 92 C.L.L.C. ¶14,013, statuant que le ministère du Travail pouvait prouver des réclamations au nom des employés de l'entreprise en faillite. Pourvoi accueilli.

Steven M. Barrett et *Kathleen Martin*, pour les appelants.

Raymond M. Slattery, pour l'intimée.

David Vickers, pour le ministère du Travail de la province d'Ontario, Direction des normes d'emploi.

Version française du jugement de la Cour rendu par

LE JUGE IACOBUCCI — Il s'agit d'un pourvoi interjeté par les anciens employés d'un employeur maintenant en faillite contre une ordonnance qui a rejeté les réclamations qu'ils ont présentées en vue d'obtenir une indemnité de licenciement (y compris la paie de vacances) et une indemnité de cessation d'emploi. Le litige porte sur une question d'interprétation législative. Tout particulièrement, le pourvoi tranche la question de savoir si, en vertu des dispositions législatives pertinentes en vigueur à l'époque de la faillite, les employés ont le droit de réclamer une indemnité de licenciement et une indemnité de cessation d'emploi lorsque la cessation d'emploi résulte de la faillite de leur employeur. 1

1. Les faits

Avant sa faillite, la société Rizzo & Rizzo Shoes Limited («Rizzo») possédait et exploitait au Canada une chaîne de magasins de vente au détail de chaussures. Environ 65 pour 100 de ces magasins étaient situés en Ontario. Le 13 avril 1989, une pétition en faillite a été présentée contre la 2

order was made on consent in respect of Rizzo's property. Upon the making of that order, the employment of Rizzo's employees came to an end.

chaîne de magasins. Le lendemain, une ordonnance de séquestre a été rendue sur consentement à l'égard des biens de Rizzo. Au prononcé de l'ordonnance, les employés de Rizzo ont perdu leur emploi.

3 Pursuant to the receiving order, the respondent, Zittrer, Siblin & Associates, Inc. (the "Trustee") was appointed as trustee in bankruptcy of Rizzo's estate. The Bank of Nova Scotia privately appointed Peat Marwick Limited ("PML") as receiver and manager. By the end of July 1989, PML had liquidated Rizzo's property and assets and closed the stores. PML paid all wages, salaries, commissions and vacation pay that had been earned by Rizzo's employees up to the date on which the receiving order was made.

Conformément à l'ordonnance de séquestre, l'intimée, Zittrer, Siblin & Associates, Inc. (le «syndic») a été nommée syndic de faillite de l'actif de Rizzo. La Banque de Nouvelle-Écosse a nommé Peat Marwick Limitée («PML») comme administrateur séquestre. Dès la fin de juillet 1989, PML avait liquidé les biens de Rizzo et fermé les magasins. PML a versé tous les salaires, les traitements, toutes les commissions et les paies de vacances qui avaient été gagnés par les employés de Rizzo jusqu'à la date à laquelle l'ordonnance de séquestre a été rendue.

4 In November 1989, the Ministry of Labour for the Province of Ontario, Employment Standards Branch (the "Ministry") audited Rizzo's records to determine if there was any outstanding termination or severance pay owing to former employees under the *Employment Standards Act*, R.S.O. 1980, c. 137, as amended (the "*ESA*"). On August 23, 1990, the Ministry delivered a proof of claim to the respondent Trustee on behalf of the former employees of Rizzo for termination pay and vacation pay thereon in the amount of approximately $2.6 million and for severance pay totalling $14,215. The Trustee disallowed the claims, issuing a Notice of Disallowance on January 28, 1991. For the purposes of this appeal, the relevant ground for disallowing the claim was the Trustee's opinion that the bankruptcy of an employer does not constitute a dismissal from employment and thus, no entitlement to severance, termination or vacation pay is created under the *ESA*.

En novembre 1989, le ministère du Travail de la province d'Ontario, Direction des normes d'emploi (le «ministère») a vérifié les dossiers de Rizzo afin de déterminer si des indemnités de licenciement ou de cessation d'emploi devaient encore être versées aux anciens employés en application de la *Loi sur les normes d'emploi*, L.R.O. 1980, ch. 137 et ses modifications (la «*LNE*»). Le 23 août 1990, au nom des anciens employés de Rizzo, le ministère a remis au syndic intimé une preuve de réclamation pour des indemnités de licenciement et des paies de vacances (environ 2,6 millions de dollars) et pour des indemnités de cessation d'emploi (14 215 $). Le syndic a rejeté les réclamations et a donné avis du rejet le 28 janvier 1991. Aux fins du présent pourvoi, les réclamations ont été rejetées parce que le syndic était d'avis que la faillite d'un employeur ne constituant pas un congédiement, aucun droit à une indemnité de cessation d'emploi, à une indemnité de licenciement ni à une paie de vacances ne prenait naissance sous le régime de la *LNE*.

5 The Ministry appealed the Trustee's decision to the Ontario Court (General Division) which reversed the Trustee's disallowance and allowed the claims as unsecured claims provable in bankruptcy. On appeal, the Ontario Court of Appeal overturned the trial court's ruling and restored the decision of the Trustee. The Ministry sought leave

Le ministère a interjeté appel de la décision du syndic devant la Cour de l'Ontario (Division générale) laquelle a infirmé la décision du syndic et a admis les réclamations en tant que réclamations non garanties prouvables en matière de faillite. En appel, la Cour d'appel de l'Ontario a cassé le jugement de la cour de première instance et rétabli la

to appeal from the Court of Appeal judgment, but discontinued its application on August 30, 1993. Following the discontinuance of the appeal, the Trustee paid a dividend to Rizzo's creditors, thereby leaving significantly less funds in the estate. Subsequently, the appellants, five former employees of Rizzo, moved to set aside the discontinuance, add themselves as parties to the proceedings, and requested an order granting them leave to appeal. This Court's order granting those applications was issued on December 5, 1996.

2. Relevant Statutory Provisions

The relevant versions of the *Bankruptcy Act* (now the *Bankruptcy and Insolvency Act*) and the *Employment Standards Act* for the purposes of this appeal are R.S.C., 1985, c. B-3 (the "*BA*"), and R.S.O. 1980, c. 137, as amended to April 14, 1989 (the "*ESA*") respectively.

Employment Standards Act, R.S.O. 1980, c. 137, as amended:

7. —

(5) Every contract of employment shall be deemed to include the following provision:

> All severance pay and termination pay become payable and shall be paid by the employer to the employee in two weekly instalments beginning with the first full week following termination of employment and shall be allocated to such weeks accordingly. This provision does not apply to severance pay if the employee has elected to maintain a right of recall as provided in subsection 40a (7) of the *Employment Standards Act.*

40. — (1) No employer shall terminate the employment of an employee who has been employed for three months or more unless the employee gives,

(a) one weeks notice in writing to the employee if his or her period of employment is less than one year;

(b) two weeks notice in writing to the employee if his or her period of employment is one year or more but less than three years;

décision du syndic. Le ministère a demandé l'autorisation d'en appeler de l'arrêt de la Cour d'appel, mais il s'est désisté le 30 août 1993. Après l'abandon de l'appel, le syndic a versé un dividende aux créanciers de Rizzo, réduisant de façon considérable l'actif. Par la suite, les appelants, cinq anciens employés de Rizzo, ont demandé l'annulation du désistement, l'obtention de la qualité de parties à l'instance et une ordonnance leur accordant l'autorisation d'interjeter appel. L'ordonnance de notre Cour faisant droit à ces demandes a été rendue le 5 décembre 1996.

2. Les dispositions législatives pertinentes

Aux fins du présent pourvoi, les versions pertinentes de la *Loi sur la faillite* (maintenant la *Loi sur la faillite et l'insolvabilité*) et de la *Loi sur les normes d'emploi* sont respectivement les suivantes: L.R.C. (1985), ch. B-3 (la *«LF»*) et L.R.O. 1980, ch. 137 et ses modifications au 14 avril 1989 (la *«LNE»*). 6

Loi sur les normes d'emploi, L.R.O. 1980, ch. 137 et ses modifications:

7 . . .

(5) Tout contrat de travail est réputé comprendre la disposition suivante:

> L'indemnité de cessation d'emploi et l'indemnité de licenciement deviennent exigibles et sont payées par l'employeur à l'employé en deux versements hebdomadaires à compter de la première semaine complète suivant la cessation d'emploi, et sont réparties sur ces semaines en conséquence. La présente disposition ne s'applique pas à l'indemnité de cessation d'emploi si l'employé a choisi de maintenir son droit d'être rappelé, comme le prévoit le paragraphe 40a (7) de la *Loi sur les normes d'emploi.*

40 (1) Aucun employeur ne doit licencier un employé qui travaille pour lui depuis trois mois ou plus à moins de lui donner:

a) un préavis écrit d'une semaine si sa période d'emploi est inférieure à un an;

b) un préavis écrit de deux semaines si sa période d'emploi est d'un an ou plus mais de moins de trois ans;

(c) three weeks notice in writing to the employee if his or her period of employment is three years or more but less than four years;

(d) four weeks notice in writing to the employee if his or her period of employment is four years or more but less than five years;

(e) five weeks notice in writing to the employee if his or her period of employment is five years or more but less than six years;

(f) six weeks notice in writing to the employee if his or her period of employment is six years or more but less than seven years;

(g) seven weeks notice in writing to the employee if his or her period of employment is seven years or more but less than eight years;

(h) eight weeks notice in writing to the employee if his or her period of employment is eight years or more,

and such notice has expired.

. . .

(7) Where the employment of an employee is terminated contrary to this section,

(a) the employer shall pay termination pay in an amount equal to the wages that the employee would have been entitled to receive at his regular rate for a regular non-overtime work week for the period of notice prescribed by subsection (1) or (2), and any wages to which he is entitled;

. . .

40*a* . . .

(1a) Where**,**

(a) fifty or more employees have their employment terminated by an employer in a period of six months or less and the terminations are caused by the permanent discontinuance of all or part of the business of the employer at an establishment; or

(b) one or more employees have their employment terminated by an employer with a payroll of $2.5 million or more,

the employer shall pay severance pay to each employee whose employment has been terminated and who has been employed by the employer for five or more years.

c) un préavis écrit de trois semaines si sa période d'emploi est de trois ans ou plus mais de moins de quatre ans;

d) un préavis écrit de quatre semaines si sa période d'emploi est de quatre ans ou plus mais de moins de cinq ans;

e) un préavis écrit de cinq semaines si sa période d'emploi est de cinq ans ou plus mais de moins de six ans;

f) un préavis écrit de six semaines si sa période d'emploi est de six ans ou plus mais de moins de sept ans;

g) un préavis écrit de sept semaines si sa période d'emploi est de sept ans ou plus mais de moins de huit ans;

h) un préavis écrit de huit semaines si sa période d'emploi est de huit ans ou plus,

et avant le terme de la période de ce préavis.

. . .

(7) Si un employé est licencié contrairement au présent article:

a) l'employeur lui verse une indemnité de licenciement égale au salaire que l'employé aurait eu le droit de recevoir à son taux normal pour une semaine normale de travail sans heures supplémentaires pendant la période de préavis fixée par le paragraphe (1) ou (2), de même que tout salaire auquel il a droit;

. . .

40*a* . . .

[TRADUCTION] (1a) L'employeur verse une indemnité de cessation d'emploi à chaque employé licencié qui a travaillé pour lui pendant cinq ans ou plus si, selon le cas:

a) l'employeur licencie cinquante employés ou plus au cours d'une période de six mois ou moins et que les licenciements résultent de l'interruption permanente de l'ensemble ou d'une partie des activités de l'employeur à un établissement;

b) l'employeur dont la masse salariale est de 2,5 millions de dollars ou plus licencie un ou plusieurs employés.

Employment Standards Amendment Act, 1981, S.O. 1981, c. 22

2. — (1) Part XII of the said Act is amended by adding thereto the following section:

. . .

(3) Section 40*a* of the said Act does not apply to an employer who became a bankrupt or an insolvent person within the meaning of the *Bankruptcy Act* (Canada) and whose assets have been distributed among his creditors or to an employer whose proposal within the meaning of the *Bankruptcy Act* (Canada) has been accepted by his creditors in the period from and including the 1st day of January, 1981, to and including the day immediately before the day this Act receives Royal Assent.

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

121. (1) All debts and liabilities, present or future, to which the bankrupt is subject at the date of the bankruptcy or to which he may become subject before his discharge by reason of any obligation incurred before the date of the bankruptcy shall be deemed to be claims provable in proceedings under this Act.

Interpretation Act, R.S.O. 1990, c. I.11

10. Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of anything that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

. . .

17. The repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law.

3. Judicial History

A. *Ontario Court (General Division)* (1991), 6 O.R. (3d) 441

Employment Standards Amendment Act, 1981, L.O. 1981, ch. 22

[TRADUCTION]

2. (1) La partie XII de la loi est modifiée par adjonction de l'article suivant:

. . .

(3) L'article 40*a* de la loi ne s'applique pas à l'employeur qui a fait faillite ou est devenu insolvable au sens de la *Loi sur la faillite* (Canada) et dont les biens ont été distribués à ses créanciers ou à l'employeur dont la proposition au sens de la *Loi sur la faillite* (Canada) a été acceptée par ses créanciers pendant la période qui commence le 1er janvier 1981 et se termine le jour précédant immédiatement celui où la présente loi a reçu la sanction royale inclusivement.

Loi sur la faillite, L.R.C. (1985), ch. B-3

121. (1) Toutes créances et tous engagements, présents ou futurs, auxquels le failli est assujetti à la date de la faillite, ou auxquels il peut devenir assujetti avant sa libération, en raison d'une obligation contractée antérieurement à la date de la faillite, sont réputés des réclamations prouvables dans des procédures entamées en vertu de la présente loi.

Loi d'interprétation, L.R.O. 1990, ch. I.11

10 Les lois sont réputées apporter une solution de droit, qu'elles aient pour objet immédiat d'ordonner l'accomplissement d'un acte que la Législature estime être dans l'intérêt public ou d'empêcher ou de punir l'accomplissement d'un acte qui lui paraît contraire à l'intérêt public. Elles doivent par conséquent s'interpréter de la manière la plus équitable et la plus large qui soit pour garantir la réalisation de leur objet selon leurs sens, intention et esprit véritables.

. . .

17 L'abrogation ou la modification d'une loi n'est pas réputée constituer ou impliquer une déclaration portant sur l'état antérieur du droit.

3. L'historique judiciaire

A. *La Cour de l'Ontario (Division générale)* (1991), 6 O.R. (3d) 441

7 Having disposed of several issues which do not arise on this appeal, Farley J. turned to the question of whether termination pay and severance pay are provable claims under the *BA*. Relying on *U.F.C.W., Loc. 617P v. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86 (Ont. S.C. in Bankruptcy), he found that it is clear that claims for termination and severance pay are provable in bankruptcy where the statutory obligation to provide such payments arose prior to the bankruptcy. Accordingly, he reasoned that the essential matter to be resolved in the case at bar was whether bankruptcy acted as a termination of employment thereby triggering the termination and severance pay provisions of the *ESA* such that liability for such payments would arise on bankruptcy as well.

Après avoir tranché plusieurs points non soulevés dans le présent pourvoi, le juge Farley est passé à la question de savoir si l'indemnité de licenciement et l'indemnité de cessation d'emploi sont des réclamations prouvables en application de la *LF*. S'appuyant sur la décision *U.F.C.W., Loc. 617P c. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86 (C.S. Ont. en matière de faillite), il a conclu que manifestement, l'indemnité de licenciement et l'indemnité de cessation d'emploi sont prouvables en matière de faillite lorsque l'obligation légale d'effectuer ces versements a pris naissance avant la faillite. Par conséquent, il a estimé que le point essentiel à résoudre en l'espèce était de savoir si la faillite était assimilable au licenciement et entraînait l'application des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi de la *LNE* de manière que l'obligation de verser ces indemnités prenne naissance également au moment de la faillite.

8 In addressing this question, Farley J. began by noting that the object and intent of the *ESA* is to provide minimum employment standards and to benefit and protect the interests of employees. Thus, he concluded that the *ESA* is remedial legislation and as such it should be interpreted in a fair, large and liberal manner to ensure that its object is attained according to its true meaning, spirit and intent.

Le juge Farley a abordé cette question en faisant remarquer que l'objet et l'intention de la *LNE* étaient d'établir des normes minimales d'emploi et de favoriser et protéger les intérêts des employés. Il a donc conclu que la *LNE* visait à apporter une solution de droit et devait dès lors être interprétée de manière équitable et large afin de garantir la réalisation de son objet selon ses sens, intention et esprit véritables.

9 Farley J. then held that denying employees in this case the right to claim termination and severance pay would lead to the arbitrary and unfair result that an employee whose employment is terminated just prior to a bankruptcy would be entitled to termination and severance pay, whereas one whose employment is terminated by the bankruptcy itself would not have that right. This result, he stated, would defeat the intended working of the *ESA*.

Le juge Farley a ensuite décidé que priver les employés en l'espèce du droit de réclamer une indemnité de licenciement et une indemnité de cessation d'emploi aurait pour conséquence injuste et arbitraire que l'employé licencié juste avant la faillite aurait droit à une indemnité de licenciement et à une indemnité de cessation d'emploi, alors que celui qui a perdu son emploi en raison de la faillite elle-même n'y aurait pas droit. Ce résultat, a-t-il dit, irait à l'encontre du but visé par la loi.

10 Farley J. saw no reason why the claims of the employees in the present case would not generally be contemplated as wages or other claims under the *BA*. He emphasized that the former employees in the case at bar had not alleged that termination pay and severance pay should receive a priority in

Le juge Farley ne voyait pas pourquoi les réclamations des employés en l'espèce ne seraient pas généralement considérées comme des réclamations concernant les salaires ou comme d'autres réclamations présentées en application de la *LF*. Il a souligné que les anciens employés en l'espèce

the distribution of the estate, but merely that they are provable (unsecured and unpreferred) claims in a bankruptcy. For this reason, he found it inappropriate to make reference to authorities whose focus was the interpretation of priority provisions in the *BA*.

n'avaient pas soutenu que les indemnités de licenciement et de cessation d'emploi devaient être prioritaires dans la distribution de l'actif, mais tout simplement qu'elles étaient des réclamations prouvables en matière de faillite (non garanties et non privilégiées). Pour ce motif, il a conclu qu'il ne convenait pas d'invoquer la jurisprudence et la doctrine portant sur l'interprétation des dispositions relatives à la priorité de la *LF*.

Even if bankruptcy does not terminate the employment relationship so as to trigger the *ESA* termination and severance pay provisions, Farley J. was of the view that the employees in the instant case would nevertheless be entitled to such payments as these were liabilities incurred prior to the date of the bankruptcy by virtue of s. 7(5) of the *ESA*. He found that s. 7(5) deems every employment contract to include a provision to provide termination and severance pay following the termination of employment and concluded that a contingent obligation is thereby created for a bankrupt employer to make such payments from the outset of the relationship, long before the bankruptcy.

11 Même si la faillite ne met pas fin à la relation entre l'employeur et l'employé de façon à faire jouer les dispositions relatives aux indemnités de licenciement et de cessation d'emploi de la *LNF*, le juge Farley était d'avis que les employés en l'espèce avaient néanmoins droit à ces indemnités, car il s'agissait d'engagements contractés avant la date de la faillite conformément au par. 7(5) de la *LNE*. Il a conclu d'une part qu'aux termes du par. 7(5), tout contrat de travail est réputé comprendre une disposition prévoyant le versement d'une indemnité de licenciement et d'une indemnité de cessation d'emploi au moment de la cessation d'emploi et d'autre part que l'employeur en faillite est assujetti à l'obligation conditionnelle de verser ces indemnités depuis le début de la relation entre l'employeur et l'employé, soit bien avant la faillite.

Farley J. also considered s. 2(3) of the *Employment Standards Amendment Act, 1981*, S.O. 1981, c. 22 (the "*ESAA*"), which is a transitional provision that exempted certain bankrupt employers from the newly introduced severance pay obligations until the amendments received royal assent. He was of the view that this provision would not have been necessary if the obligations of employers upon termination of employment had not been intended to apply to bankrupt employers under the *ESA*. Farley J. concluded that the claim by Rizzo's former employees for termination pay and severance pay could be provided as unsecured and unpreferred debts in a bankruptcy. Accordingly, he allowed the appeal from the decision of the Trustee.

12 Le juge Farley a également examiné le par. 2(3) de l'*Employment Standards Amendment Act, 1981*, L.O. 1981, ch. 22 («l'*ESAA*»), qui est une disposition transitoire exemptant certains employeurs en faillite des nouvelles obligations relatives au paiement de l'indemnité de cessation d'emploi jusqu'à ce que les modifications aient reçu la sanction royale. Il était d'avis que cette disposition n'aurait pas été nécessaire si le législateur n'avait pas voulu que les obligations auxquelles sont tenus les employeurs au moment d'un licenciement s'appliquent aux employeurs en faillite en vertu de la *LNE*. Le juge Farley a conclu que la réclamation présentée par les anciens employés de Rizzo en vue d'obtenir des indemnités de licenciement et de cessation d'emploi pouvait être traitée comme une créance non garantie et non privilégiée dans une faillite. Par conséquent, il a accueilli l'appel formé contre la décision du syndic.

B. *Ontario Court of Appeal* (1995), 22 O.R. (3d) 385

13 Austin J.A., writing for a unanimous court, began his analysis of the principal issue in this appeal by focussing upon the language of the termination pay and severance pay provisions of the *ESA*. He noted, at p. 390, that the termination pay provisions use phrases such as "[n]o employer shall terminate the employment of an employee" (s. 40(1)), "the notice required by an employer to terminate the employment" (s. 40(2)), and "[a]n employer who has terminated or who proposes to terminate the employment of employees" (s. 40(5)). Turning to severance pay, he quoted s. 40*a*(1)(*a*) (at p. 391) which includes the phrase "employees have their employment terminated by an employer". Austin J.A. concluded that this language limits the obligation to provide termination and severance pay to situations in which the employer terminates the employment. The operation of the *ESA*, he stated, is not triggered by the termination of employment resulting from an act of law such as bankruptcy.

14 In support of his conclusion, Austin J.A. reviewed the leading cases in this area of law. He cited *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725 (S.C. in bankruptcy), wherein Houlden J. (as he then was) concluded that the *ESA* termination pay provisions were not designed to apply to a bankrupt employer. He also relied upon *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1 (Ont. S.C. in bankruptcy), for the proposition that the bankruptcy of a company at the instance of a creditor does not constitute dismissal. He concluded as follows at p. 395:

> The plain language of ss. 40 and 40*a* does not give rise to any liability to pay termination or severance pay except where the employment is terminated by the employer. In our case, the employment was terminated, not by the employer, but by the making of a receiving order against Rizzo on April 14, 1989, following a peti-

B. *La Cour d'appel de l'Ontario* (1995), 22 O.R. (3d) 385

Au nom d'une cour unanime, le juge Austin a commencé son analyse de la question principale du présent pourvoi en s'arrêtant sur le libellé des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi de la *LNE*. Il a noté, à la p. 390, que les dispositions relatives à l'indemnité de licenciement utilisent des expressions comme «[a]ucun employeur ne doit licencier un employé» (par. 40(1)), «le préavis qu'un employeur donne pour licencier» (par. 40(2)) et les «employés qu'un employeur a licenciés ou se propose de licencier» (par. 40(5)). Passant à l'indemnité de cessation d'emploi, il a cité l'al. 40*a*(1)*a*), à la p. 391, lequel contient l'expression «l'employeur licencie cinquante employés». Le juge Austin a conclu que ce libellé limite l'obligation d'accorder une indemnité de licenciement et une indemnité de cessation d'emploi aux cas où l'employeur licencie des employés. Selon lui, la cessation d'emploi résultant de l'effet de la loi, notamment de la faillite, n'entraîne pas l'application de la *LNE*.

À l'appui de sa conclusion, le juge Austin a examiné les arrêts de principe dans ce domaine du droit. Il a cité *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725 (C.S. en matière de faillite), dans lequel le juge Houlden (maintenant juge de la Cour d'appel) a statué que les dispositions relatives à l'indemnité de licenciement de la *LNE* n'étaient pas conçues pour s'appliquer à l'employeur en faillite. Il a également invoqué *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1 (C.S. Ont. en matière de faillite), à l'appui de la proposition selon laquelle la faillite d'une compagnie à la demande d'un créancier ne constitue pas un congédiement. Il a conclu ainsi, à la p. 395:

> [TRADUCTION] Le libellé clair des art. 40 et 40*a* ne crée une obligation de verser une indemnité de licenciement ou une indemnité de cessation d'emploi que si l'employeur licencie l'employé. En l'espèce, la cessation d'emploi n'est pas le fait de l'employeur, elle résulte d'une ordonnance de séquestre rendue à l'encontre de Rizzo le 14 avril 1989, à la suite d'une pétition présentée par l'un de ses créanciers. Le droit à une indemnité

tion by one of its creditors. No entitlement to either termination or severance pay ever arose.

Regarding s. 7(5) of the *ESA*, Austin J.A. rejected the trial judge's interpretation and found that the section does not create a liability. Rather, in his opinion, it merely states when a liability otherwise created is to be paid and therefore it was not considered relevant to the issue before the court. Similarly, Austin J.A. did not accept the lower court's view of s. 2(3), the transitional provision in the *ESAA*. He found that that section had no effect upon the intention of the Legislature as evidenced by the terminology used in ss. 40 and 40*a*.

Austin J.A. concluded that, because the employment of Rizzo's former employees was terminated by the order of bankruptcy and not by the act of the employer, no liability arose with respect to termination, severance or vacation pay. The order of the trial judge was set aside and the Trustee's disallowance of the claims was restored.

4. Issues

This appeal raises one issue: does the termination of employment caused by the bankruptcy of an employer give rise to a claim provable in bankruptcy for termination pay and severance pay in accordance with the provisions of the *ESA*?

5. Analysis

The statutory obligation upon employers to provide both termination pay and severance pay is governed by ss. 40 and 40*a* of the *ESA*, respectively. The Court of Appeal noted that the plain language of those provisions suggests that termination pay and severance pay are payable only when the employer terminates the employment. For example, the opening words of s. 40(1) are: "No employer shall terminate the employment of an employee. . . ." Similarly, s. 40*a*(1a) begins with

de licenciement ou à une indemnité de cessation d'emploi n'a jamais pris naissance.

15 En ce qui concerne le par. 7(5) de la *LNE*, le juge Austin a rejeté l'interprétation du juge de première instance et a estimé que cette disposition ne créait pas d'engagement. Selon lui, elle ne faisait que préciser quand l'engagement contracté par ailleurs devait être acquitté et ne se rapportait donc pas à la question dont la cour était saisie. Le juge Austin n'a pas accepté non plus l'opinion exprimée par le tribunal inférieur au sujet du par. 2(3), la disposition transitoire de l'*ESAA*. Il a jugé que cette disposition n'avait aucun effet quant à l'intention du législateur, comme l'attestait la terminologie employée aux art. 40 et 40*a*.

16 Le juge Austin a conclu que, comme la cessation d'emploi subie par les anciens employés de Rizzo résultait d'une ordonnance de faillite et n'était pas le fait de l'employeur, il n'existait aucun engagement en ce qui concerne l'indemnité de licenciement, l'indemnité de cessation d'emploi ni la paie de vacances. L'ordonnance du juge de première instance a été annulée et la décision du syndic de rejeter les réclamations a été rétablie.

4. Les questions en litige

17 Le présent pourvoi soulève une question: la cessation d'emploi résultant de la faillite de l'employeur donne-t-elle naissance à une réclamation prouvable en matière de faillite en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi conformément aux dispositions de la *LNE*?

5. Analyse

18 L'obligation légale faite aux employeurs de verser une indemnité de licenciement ainsi qu'une indemnité de cessation d'emploi est régie respectivement par les art. 40 et 40*a* de la *LNE*. La Cour d'appel a fait observer que le libellé clair de ces dispositions donne à penser que les indemnités de licenciement et de cessation d'emploi doivent être versées seulement lorsque l'employeur licencie l'employé. Par exemple, le par. 40(1) commence par les mots suivants: «Aucun employeur ne doit

the words, "Where . . . fifty or more employees have their employment terminated by an employer. . . ." Therefore, the question on which this appeal turns is whether, when bankruptcy occurs, the employment can be said to be terminated "by an employer".

19 The Court of Appeal answered this question in the negative, holding that, where an employer is petitioned into bankruptcy by a creditor, the employment of its employees is not terminated "by an employer", but rather by operation of law. Thus, the Court of Appeal reasoned that, in the circumstances of the present case, the *ESA* termination pay and severance pay provisions were not applicable and no obligations arose. In answer, the appellants submit that the phrase "terminated by an employer" is best interpreted as reflecting a distinction between involuntary and voluntary termination of employment. It is their position that this language was intended to relieve employers of their obligation to pay termination and severance pay when employees leave their jobs voluntarily. However, the appellants maintain that where an employee's employment is involuntarily terminated by reason of their employer's bankruptcy, this constitutes termination "by an employer" for the purpose of triggering entitlement to termination and severance pay under the *ESA*.

20 At the heart of this conflict is an issue of statutory interpretation. Consistent with the findings of the Court of Appeal, the plain meaning of the words of the provisions here in question appears to restrict the obligation to pay termination and severance pay to those employers who have actively terminated the employment of their employees. At first blush, bankruptcy does not fit comfortably into this interpretation. However, with respect, I believe this analysis is incomplete.

21 Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legisla-*

licencier un employé . . .» Le paragraphe 40*a*(1a) contient également les mots: «si [. . .] l'employeur licencie cinquante employés ou plus . . .» Par conséquent, la question dans le présent pourvoi est de savoir si l'on peut dire que l'employeur qui fait faillite a licencié ses employés.

La Cour d'appel a répondu à cette question par la négative, statuant que, lorsqu'un créancier présente une pétition en faillite contre un employeur, les employés ne sont pas licenciés par l'employeur mais par l'effet de la loi. La Cour d'appel a donc estimé que, dans les circonstances de l'espèce, les dispositions relatives aux indemnités de licenciement et de cessation d'emploi de la *LNE* n'étaient pas applicables et qu'aucune obligation n'avait pris naissance. Les appelants répliquent que les mots «l'employeur licencie» doivent être interprétés comme établissant une distinction entre la cessation d'emploi volontaire et la cessation d'emploi forcée. Ils soutiennent que ce libellé visait à dégager l'employeur de son obligation de verser des indemnités de licenciement et de cessation d'emploi lorsque l'employé quittait son emploi volontairement. Cependant, les appelants prétendent que la cessation d'emploi forcée résultant de la faillite de l'employeur est assimilable au licenciement effectué par l'employeur pour l'exercice du droit à une indemnité de licenciement et à une indemnité de cessation d'emploi prévu par la *LNE*.

Une question d'interprétation législative est au centre du présent litige. Selon les conclusions de la Cour d'appel, le sens ordinaire des mots utilisés dans les dispositions en cause paraît limiter l'obligation de verser une indemnité de licenciement et une indemnité de cessation d'emploi aux employeurs qui ont effectivement licencié leurs employés. À première vue, la faillite ne semble pas cadrer très bien avec cette interprétation. Toutefois, en toute déférence, je crois que cette analyse est incomplète.

Bien que l'interprétation législative ait fait couler beaucoup d'encre (voir par ex. Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3e éd. 1994) (ci-après «*Construction of Statutes*»); Pierre-André Côté, *Interprétation des lois* (2e éd.

tion in Canada (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Recent cases which have cited the above passage with approval include: *R. v. Hydro-Québec*, [1997] 1 S.C.R. 213; *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411; *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550; *Friesen v. Canada*, [1995] 3 S.C.R. 103.

I also rely upon s. 10 of the *Interpretation Act*, R.S.O. 1980, c. 219, which provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".

Although the Court of Appeal looked to the plain meaning of the specific provisions in question in the present case, with respect, I believe that the court did not pay sufficient attention to the scheme of the *ESA*, its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized. I now turn to a discussion of these issues.

In *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at p. 1002, the majority of this Court recognized the importance that our society accords to employment and the fundamental role that it has assumed in the life of the individual. The manner in which employment can be terminated was said to be equally important (see also *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701). It was in this context that the majority in *Machtinger* described, at p. 1003, the object of the *ESA* as being the protection of "... the interests of employees by requiring employers to comply with

1990)), Elmer Driedger dans son ouvrage intitulé *Construction of Statutes* (2e éd. 1983) résume le mieux la méthode que je privilégie. Il reconnaît que l'interprétation législative ne peut pas être fondée sur le seul libellé du texte de loi. À la p. 87, il dit:

> [TRADUCTION] Aujourd'hui il n'y a qu'un seul principe ou solution: il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur.

Parmi les arrêts récents qui ont cité le passage ci-dessus en l'approuvant, mentionnons: *R. c. Hydro-Québec*, [1997] 1 R.C.S. 213; *Banque Royale du Canada c. Sparrow Electric Corp.*, [1997] 1 R.C.S. 411; *Verdun c. Banque Toronto-Dominion*, [1996] 3 R.C.S. 550; *Friesen c. Canada*, [1995] 3 R.C.S. 103.

22 Je m'appuie également sur l'art. 10 de la *Loi d'interprétation*, L.R.O. 1980, ch. 219, qui prévoit que les lois «sont réputées apporter une solution de droit» et doivent «s'interpréter de la manière la plus équitable et la plus large qui soit pour garantir la réalisation de leur objet selon leurs sens, intention et esprit véritables».

23 Bien que la Cour d'appel ait examiné le sens ordinaire des dispositions en question dans le présent pourvoi, en toute déférence, je crois que la cour n'a pas accordé suffisamment d'attention à l'économie de la *LNE*, à son objet ni à l'intention du législateur; le contexte des mots en cause n'a pas non plus été pris en compte adéquatement. Je passe maintenant à l'analyse de ces questions.

24 Dans l'arrêt *Machtinger c. HOJ Industries Ltd.*, [1992] 1 R.C.S. 986, à la p. 1002, notre Cour, à la majorité, a reconnu l'importance que notre société accorde à l'emploi et le rôle fondamental qu'il joue dans la vie de chaque individu. La manière de mettre fin à un emploi a été considérée comme étant tout aussi importante (voir également *Wallace c. United Grain Growers Ltd.*, [1997] 3 R.C.S. 701). C'est dans ce contexte que les juges majoritaires dans l'arrêt *Machtinger* ont défini, à la p. 1003, l'objet de la *LNE* comme étant la protection «. . . [d]es intérêts des employés en exigeant que

certain minimum standards, including minimum periods of notice of termination". Accordingly, the majority concluded, at p. 1003, that, ". . . an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protections to as many employees as possible, is to be favoured over one that does not".

les employeurs respectent certaines normes minimales, notamment en ce qui concerne les périodes minimales de préavis de licenciement». Par conséquent, les juges majoritaires ont conclu, à la p. 1003, qu'«. . . une interprétation de la Loi qui encouragerait les employeurs à se conformer aux exigences minimales de celle-ci et qui ferait ainsi bénéficier de sa protection le plus grand nombre d'employés possible est à préférer à une interprétation qui n'a pas un tel effet».

25 The objects of the termination and severance pay provisions themselves are also broadly premised upon the need to protect employees. Section 40 of the *ESA* requires employers to give their employees reasonable notice of termination based upon length of service. One of the primary purposes of this notice period is to provide employees with an opportunity to take preparatory measures and seek alternative employment. It follows that s. 40(7)(a), which provides for termination pay in lieu of notice when an employer has failed to give the required statutory notice, is intended to "cushion" employees against the adverse effects of economic dislocation likely to follow from the absence of an opportunity to search for alternative employment. (Innis Christie, Geoffrey England and Brent Cotter, *Employment Law in Canada* (2nd ed. 1993), at pp. 572-81.)

L'objet des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi elles-mêmes repose de manière générale sur la nécessité de protéger les employés. L'article 40 de la *LNE* oblige les employeurs à donner à leurs employés un préavis de licenciement raisonnable en fonction des années de service. L'une des fins principales de ce préavis est de donner aux employés la possibilité de se préparer en cherchant un autre emploi. Il s'ensuit que l'al. 40(7)a), qui prévoit une indemnité de licenciement tenant lieu de préavis lorsqu'un employeur n'a pas donné le préavis requis par la loi, vise à protéger les employés des effets néfastes du bouleversement économique que l'absence d'une possibilité de chercher un autre emploi peut entraîner. (Innis Christie, Geoffrey England et Brent Cotter, *Employment Law in Canada* (2e éd. 1993), aux pp. 572 à 581.)

26 Similarly, s. 40*a*, which provides for severance pay, acts to compensate long-serving employees for their years of service and investment in the employer's business and for the special losses they suffer when their employment terminates. In *R. v. TNT Canada Inc.* (1996), 27 O.R. (3d) 546, Robins J.A. quoted with approval at pp. 556-57 from the words of D. D. Carter in the course of an employment standards determination in *Re Telegram Publishing Co. v. Zwelling* (1972), 1 L.A.C. (2d) 1 (Ont.), at p. 19, wherein he described the role of severance pay as follows:

De même, l'art. 40*a*, qui prévoit l'indemnité de cessation d'emploi, vient indemniser les employés ayant beaucoup d'années de service pour ces années investies dans l'entreprise de l'employeur et pour les pertes spéciales qu'ils subissent lorsqu'ils sont licenciés. Dans l'arrêt *R. c. TNT Canada Inc.* (1996), 27 O.R. (3d) 546, le juge Robins a cité en les approuvant, aux pp. 556 et 557, les propos tenus par D. D. Carter dans le cadre d'une décision rendue en matière de normes d'emploi dans *Re Telegram Publishing Co. c. Zwelling* (1972), 1 L.A.C. (2d) 1 (Ont.), à la p. 19, où il a décrit ainsi le rôle de l'indemnité de cessation d'emploi:

Severance pay recognizes that an employee does make an investment in his employer's business — the extent of this investment being directly related to the length of

[TRADUCTION] L'indemnité de cessation d'emploi reconnaît qu'un employé fait un investissement dans l'entreprise de son employeur — l'importance de cet investis-

the employee's service. This investment is the seniority that the employee builds up during his years of service. . . . Upon termination of the employment relationship, this investment of years of service is lost, and the employee must start to rebuild seniority at another place of work. The severance pay, based on length of service, is some compensation for this loss of investment.

sement étant liée directement à la durée du service de l'employé. Cet investissement est l'ancienneté que l'employé acquiert durant ses années de service [. . .] À la fin de la relation entre l'employeur et l'employé, cet investissement est perdu et l'employé doit recommencer à acquérir de l'ancienneté dans un autre lieu de travail. L'indemnité de cessation d'emploi, fondée sur les années de service, compense en quelque sorte cet investissement perdu.

In my opinion, the consequences or effects which result from the Court of Appeal's interpretation of ss. 40 and 40*a* of the *ESA* are incompatible with both the object of the Act and with the object of the termination and severance pay provisions themselves. It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to Côté, *supra*, an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile (Sullivan, *Construction of Statutes*, *supra*, at p. 88).

27 À mon avis, les conséquences ou effets qui résultent de l'interprétation que la Cour d'appel a donnée des art. 40 et 40*a* de la *LNE* ne sont compatibles ni avec l'objet de la Loi ni avec l'objet des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi elles-mêmes. Selon un principe bien établi en matière d'interprétation législative, le législateur ne peut avoir voulu des conséquences absurdes. D'après Côté, *op. cit.*, on qualifiera d'absurde une interprétation qui mène à des conséquences ridicules ou futiles, si elle est extrêmement déraisonnable ou inéquitable, si elle est illogique ou incohérente, ou si elle est incompatible avec d'autres dispositions ou avec l'objet du texte législatif (aux pp. 430 à 432). Sullivan partage cet avis en faisant remarquer qu'on peut qualifier d'absurdes les interprétations qui vont à l'encontre de la fin d'une loi ou en rendent un aspect inutile ou futile (Sullivan, *Construction of Statutes*, *op. cit.*, à la p. 88).

The trial judge properly noted that, if the *ESA* termination and severance pay provisions do not apply in circumstances of bankruptcy, those employees "fortunate" enough to have been dismissed the day before a bankruptcy would be entitled to such payments, but those terminated on the day the bankruptcy becomes final would not be so entitled. In my view, the absurdity of this consequence is particularly evident in a unionized workplace where seniority is a factor in determining the order of lay-off. The more senior the employee, the larger the investment he or she has made in the employer and the greater the entitlement to termination and severance pay. However, it is the more senior personnel who are likely to be employed up

28 Le juge de première instance a noté à juste titre que, si les dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi de la *LNE* ne s'appliquent pas en cas de faillite, les employés qui auraient eu la «chance» d'être congédiés la veille de la faillite auraient droit à ces indemnités, alors que ceux qui perdraient leur emploi le jour où la faillite devient définitive n'y auraient pas droit. À mon avis, l'absurdité de cette conséquence est particulièrement évidente dans les milieux syndiqués où les mises à pied se font selon l'ancienneté. Plus un employé a de l'ancienneté, plus il a investi dans l'entreprise de l'employeur et plus son droit à une indemnité de licenciement et à une indemnité de cessation d'emploi est fondé. Pourtant, c'est le personnel ayant le plus d'ancienneté qui risque de travailler

until the time of the bankruptcy and who would thereby lose their entitlements to these payments.

29 If the Court of Appeal's interpretation of the termination and severance pay provisions is correct, it would be acceptable to distinguish between employees merely on the basis of the timing of their dismissal. It seems to me that such a result would arbitrarily deprive some employees of a means to cope with the economic dislocation caused by unemployment. In this way the protections of the *ESA* would be limited rather than extended, thereby defeating the intended working of the legislation. In my opinion, this is an unreasonable result.

30 In addition to the termination and severance pay provisions, both the appellants and the respondent relied upon various other sections of the *ESA* to advance their arguments regarding the intention of the legislature. In my view, although the majority of these sections offer little interpretive assistance, one transitional provision is particularly instructive. In 1981, s. 2(1) of the *ESAA* introduced s. 40*a*, the severance pay provision, to the *ESA*. Section 2(2) deemed that provision to come into force on January 1, 1981. Section 2(3), the transitional provision in question provided as follows:

2. . . .

(3) Section 40*a* of the said Act does not apply to an employer who became a bankrupt or an insolvent person within the meaning of the *Bankruptcy Act* (Canada) and whose assets have been distributed among his creditors or to an employer whose proposal within the meaning of the *Bankruptcy Act* (Canada) has been accepted by his creditors in the period from and including the 1st day of January, 1981, to and including the day immediately before the day this Act receives Royal Assent.

31 The Court of Appeal found that it was neither necessary nor appropriate to determine the intention of the legislature in enacting this provisional

jusqu'au moment de la faillite et de perdre ainsi le droit d'obtenir ces indemnités.

Si l'interprétation que la Cour d'appel a donnée des dispositions relatives à l'indemnité de licenciement et de l'indemnité de cessation d'emploi est correcte, il serait acceptable d'établir une distinction entre les employés en se fondant simplement sur la date de leur congédiement. Il me semble qu'un tel résultat priverait arbitrairement certains employés d'un moyen de faire face au bouleversement économique causé par le chômage. De cette façon, les protections de la *LNE* seraient limitées plutôt que d'être étendues, ce qui irait à l'encontre de l'objectif que voulait atteindre le législateur. À mon avis, c'est un résultat déraisonnable.

En plus des dispositions relatives à l'indemnité de licenciement et de l'indemnité de cessation d'emploi, tant les appelants que l'intimée ont invoqué divers autres articles de la *LNE* pour appuyer les arguments avancés au sujet de l'intention du législateur. Selon moi, bien que la plupart de ces dispositions ne soient d'aucune utilité en ce qui concerne l'interprétation, il est une disposition transitoire particulièrement révélatrice. En 1981, le par. 2(1) de l'*ESAA* a introduit l'art. 40*a*, la disposition relative à l'indemnité de cessation d'emploi. En application du par. 2(2), cette disposition entrait en vigueur le 1er janvier 1981. Le paragraphe 2(3), la disposition transitoire en question, était ainsi conçue:

[TRADUCTION]

2. . . .

(3) L'article 40*a* de la loi ne s'applique pas à l'employeur qui a fait faillite ou est devenu insolvable au sens de la *Loi sur la faillite* (Canada) et dont les biens ont été distribués à ses créanciers ou à l'employeur dont la proposition au sens de la *Loi sur la faillite* (Canada) a été acceptée par ses créanciers pendant la période qui commence le 1er janvier 1981 et se termine le jour précédant immédiatement celui où la présente loi a reçu la sanction royale inclusivement.

La Cour d'appel a conclu qu'il n'était ni nécessaire ni approprié de déterminer l'intention qu'avait le législateur en adoptant ce paragraphe

subsection. Nevertheless, the court took the position that the intention of the legislature as evidenced by the introductory words of ss. 40 and 40*a* was clear, namely, that termination by reason of a bankruptcy will not trigger the severance and termination pay obligations of the *ESA*. The court held that this intention remained unchanged by the introduction of the transitional provision. With respect, I do not agree with either of these findings. Firstly, in my opinion, the use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise and one which has often been employed by this Court (see, e.g., *R. v. Vasil*, [1981] 1 S.C.R. 469, at p. 487; *Paul v. The Queen*, [1982] 1 S.C.R. 621, at pp. 635, 653 and 660). Secondly, I believe that the transitional provision indicates that the Legislature intended that termination and severance pay obligations should arise upon an employers' bankruptcy.

provisoire. Néanmoins, la cour a estimé que l'intention du législateur, telle qu'elle ressort des premiers mots des art. 40 et 40*a*, était claire, à savoir que la cessation d'emploi résultant de la faillite ne fera pas naître l'obligation de verser l'indemnité de cessation d'emploi et l'indemnité de licenciement qui est prévue par la *LNE*. La cour a jugé que cette intention restait inchangée à la suite de l'adoption de la disposition transitoire. Je ne puis souscrire ni à l'une ni à l'autre de ces conclusions. En premier lieu, à mon avis, l'examen de l'historique législatif pour déterminer l'intention du législateur est tout à fait approprié et notre Cour y a eu souvent recours (voir, par ex., *R. c. Vasil*, [1981] 1 R.C.S. 469, à la p. 487; *Paul c. La Reine*, [1982] 1 R.C.S. 621, aux pp. 635, 653 et 660). En second lieu, je crois que la disposition transitoire indique que le législateur voulait que l'obligation de verser une indemnité de licenciement et une indemnité de cessation d'emploi prenne naissance lorsque l'employeur fait faillite.

In my view, by extending an exemption to employers who became bankrupt and lost control of their assets between the coming into force of the amendment and its receipt of royal assent, s. 2(3) necessarily implies that the severance pay obligation does in fact extend to bankrupt employers. It seems to me that, if this were not the case, no readily apparent purpose would be served by this transitional provision.

32 À mon avis, en raison de l'exemption accordée au par. 2(3) aux employeurs qui ont fait faillite et ont perdu la maîtrise de leurs biens entre le moment où les modifications sont entrées en vigueur et celui où elles ont reçu la sanction royale, il faut nécessairement que les employeurs faisant faillite soient de fait assujettis à l'obligation de verser une indemnité de cessation d'emploi. Selon moi, si tel n'était pas le cas, cette disposition transitoire semblerait ne poursuivre aucune fin.

I find support for my conclusion in the decision of Saunders J. in *Royal Dressed Meats Inc.*, *supra*. Having reviewed s. 2(3) of the *ESAA*, he commented as follows (at p. 89):

33 Je m'appuie sur la décision rendue par le juge Saunders dans l'affaire *Royal Dressed Meats Inc.*, précitée. Après avoir examiné le par. 2(3) de l'*ESAA*, il fait l'observation suivante (à la p. 89):

> . . . any doubt about the intention of the Ontario Legislature has been put to rest, in my opinion, by the transitional provision which introduced severance payments into the E.S.A. . . . it seems to me an inescapable inference that the legislature intended liability for severance payments to arise on a bankruptcy. That intention would, in my opinion, extend to termination payments which are similar in character.

> [TRADUCTION] . . . tout doute au sujet de l'intention du législateur ontarien est dissipé, à mon avis, par la disposition transitoire qui introduit les indemnités de cessation d'emploi dans la L.N.E. [. . .] Il me semble qu'il faut conclure que le législateur voulait que l'obligation de verser des indemnités de cessation d'emploi prenne naissance au moment de la faillite. Selon moi, cette intention s'étend aux indemnités de licenciement qui sont de nature analogue.

This interpretation is also consistent with statements made by the Minister of Labour at the time

34 Cette interprétation est également compatible avec les déclarations faites par le ministre du

he introduced the 1981 amendments to the *ESA*. With regard to the new severance pay provision he stated:

> The circumstances surrounding a closure will govern the applicability of the severance pay legislation in some defined situations. For example, a bankrupt or insolvent firm will still be required to pay severance pay to employees to the extent that assets are available to satisfy their claims.
>
> . . .
>
> . . . the proposed severance pay measures will, as I indicated earlier, be retroactive to January 1 of this year. That retroactive provision, however, will not apply in those cases of bankruptcy and insolvency where the assets have already been distributed or where an agreement on a proposal to creditors has already been reached.

(*Legislature of Ontario Debates*, 1st sess., 32nd Parl., June 4, 1981, at pp. 1236-37.)

Moreover, in the legislative debates regarding the proposed amendments the Minister stated:

> For purposes of retroactivity, severance pay will not apply to bankruptcies under the Bankruptcy Act where assets have been distributed. However, once this act receives royal assent, employees in bankruptcy closures will be covered by the severance pay provisions.

(*Legislature of Ontario Debates*, 1st sess., 32nd Parl., June 16, 1981, at p. 1699.)

35 Although the frailties of Hansard evidence are many, this Court has recognized that it can play a limited role in the interpretation of legislation. Writing for the Court in *R. v. Morgentaler*, [1993] 3 S.C.R. 463, at p. 484, Sopinka J. stated:

> . . . until recently the courts have balked at admitting evidence of legislative debates and speeches. . . . The main criticism of such evidence has been that it cannot represent the "intent" of the legislature, an incorporeal body, but that is equally true of other forms of legisla-

Travail au moment de l'introduction des modifications apportées à la *LNE* en 1981. Au sujet de la nouvelle disposition relative à l'indemnité de cessation d'emploi, il a dit ce qui suit:

> [TRADUCTION] Les circonstances entourant une fermeture régissent l'applicabilité de la législation en matière d'indemnité de cessation d'emploi dans certains cas précis. Par exemple, une société insolvable ou en faillite sera encore tenue de verser l'indemnité de cessation d'emploi aux employés dans la mesure où il y a des biens pour acquitter leurs réclamations.
>
> . . .
>
> . . . les mesures proposées en matière d'indemnité de cessation d'emploi seront, comme je l'ai mentionné précédemment, rétroactives au 1er janvier de cette année. Cette disposition rétroactive, toutefois, ne s'appliquera pas en matière de faillite et d'insolvabilité dans les cas où les biens ont déjà été distribués ou lorsqu'une entente est déjà intervenue au sujet de la proposition des créanciers.

(*Legislature of Ontario Debates*, 1re sess., 32e Lég., 4 juin 1981, aux pp. 1236 et 1237.)

De plus, au cours des débats parlementaires sur les modifications proposées, le ministre a déclaré:

> [TRADUCTION] En ce qui a trait à la rétroactivité, l'indemnité de cessation d'emploi ne s'appliquera pas aux faillites régies par la Loi sur la faillite lorsque les biens ont été distribués. Cependant, lorsque la présente loi aura reçu la sanction royale, les employés visés par des fermetures entraînées par des faillites seront visés par les dispositions relatives à l'indemnité de cessation d'emploi.

(*Legislature of Ontario Debates*, 1re sess., 32e Lég., 16 juin 1981, à la p. 1699.)

Malgré les nombreuses lacunes de la preuve des débats parlementaires, notre Cour a reconnu qu'elle peut jouer un rôle limité en matière d'interprétation législative. S'exprimant au nom de la Cour dans l'arrêt *R. c. Morgentaler*, [1993] 3 R.C.S. 463, à la p. 484, le juge Sopinka a dit:

> . . . jusqu'à récemment, les tribunaux ont hésité à admettre la preuve des débats et des discours devant le corps législatif. [. . .] La principale critique dont a été l'objet ce type de preuve a été qu'elle ne saurait représenter «l'intention» de la législature, personne morale, mais

tive history. Provided that the court remains mindful of the limited reliability and weight of Hansard evidence, it should be admitted as relevant to both the background and the purpose of legislation.

c'est aussi vrai pour d'autres formes de contexte d'adoption d'une loi. À la condition que le tribunal n'oublie pas que la fiabilité et le poids des débats parlementaires sont limités, il devrait les admettre comme étant pertinents quant au contexte et quant à l'objet du texte législatif.

Finally, with regard to the scheme of the legislation, since the *ESA* is a mechanism for providing minimum benefits and standards to protect the interests of employees, it can be characterized as benefits-conferring legislation. As such, according to several decisions of this Court, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant (see, e.g., *Abrahams v. Attorney General of Canada*, [1983] 1 S.C.R. 2, at p. 10; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513, at p. 537). It seems to me that, by limiting its analysis to the plain meaning of ss. 40 and 40*a* of the *ESA*, the Court of Appeal adopted an overly restrictive approach that is inconsistent with the scheme of the Act.

36 Enfin, en ce qui concerne l'économie de la loi, puisque la *LNE* constitue un mécanisme prévoyant des normes et des avantages minimaux pour protéger les intérêts des employés, on peut la qualifier de loi conférant des avantages. À ce titre, conformément à plusieurs arrêts de notre Cour, elle doit être interprétée de façon libérale et généreuse. Tout doute découlant de l'ambiguïté des textes doit se résoudre en faveur du demandeur (voir, par ex., *Abrahams c. Procureur général du Canada*, [1983] 1 R.C.S. 2, à la p. 10; *Hills c. Canada (Procureur général)*, [1988] 1 R.C.S. 513, à la p. 537). Il me semble que, en limitant cette analyse au sens ordinaire des art. 40 et 40*a* de la *LNE*, la Cour d'appel a adopté une méthode trop restrictive qui n'est pas compatible avec l'économie de la Loi.

The Court of Appeal's reasons relied heavily upon the decision in *Malone Lynch*, *supra*. In *Malone Lynch*, Houlden J. held that s. 13, the group termination provision of the former *ESA*, R.S.O. 1970, c. 147, and the predecessor to s. 40 at issue in the present case, was not applicable where termination resulted from the bankruptcy of the employer. Section 13(2) of the *ESA* then in force provided that, if an employer wishes to terminate the employment of 50 or more employees, the employer must give notice of termination for the period prescribed in the regulations, "and until the expiry of such notice the terminations shall not take effect". Houlden J. reasoned that termination of employment through bankruptcy could not trigger the termination payment provision, as employees in this situation had not received the written notice required by the statute, and therefore could not be said to have been terminated in accordance with the Act.

37 La Cour d'appel s'est fortement appuyée sur la décision rendue dans *Malone Lynch*, précité. Dans cette affaire, le juge Houlden a conclu que l'art. 13, la disposition relative aux mesures de licenciement collectif de l'ancienne *ESA*, R.S.O. 1970, ch. 147, qui a été remplacée par l'art. 40 en cause dans le présent pourvoi, n'était pas applicable lorsque la cessation d'emploi résultait de la faillite de l'employeur. Le paragraphe 13(2) de l'*ESA* alors en vigueur prévoyait que, si un employeur voulait licencier 50 employés ou plus, il devait donner un préavis de licenciement dont la durée était prévue par règlement [TRADUCTION] «et les licenciements ne prenaient effet qu'à l'expiration de ce délai». Le juge Houlden a conclu que la cessation d'emploi résultant de la faillite ne pouvait entraîner l'application de la disposition relative à l'indemnité de licenciement car les employés placés dans cette situation n'avaient pas reçu le préavis écrit requis par la loi et ne pouvaient donc pas être considérés comme ayant été licenciés conformément à la Loi.

Two years after *Malone Lynch* was decided, the 1970 *ESA* termination pay provisions were

38 Deux ans après que la décision *Malone Lynch* eut été prononcée, les dispositions relatives à l'in-

amended by *The Employment Standards Act, 1974*, S.O. 1974, c. 112. As amended, s. 40(7) of the 1974 *ESA* eliminated the requirement that notice be given before termination can take effect. This provision makes it clear that termination pay is owing where an employer fails to give notice of termination and that employment terminates irrespective of whether or not proper notice has been given. Therefore, in my opinion it is clear that the *Malone Lynch* decision turned on statutory provisions which are materially different from those applicable in the instant case. It seems to me that Houlden J.'s holding goes no further than to say that the provisions of the 1970 *ESA* have no application to a bankrupt employer. For this reason, I do not accept the *Malone Lynch* decision as persuasive authority for the Court of Appeal's findings. I note that the courts in *Royal Dressed Meats*, *supra*, and *British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25 (B.C.S.C.), declined to rely upon *Malone Lynch* based upon similar reasoning.

demnité de licenciement de l'*ESA* de 1970 ont été modifiées par *The Employment Standards Act, 1974*, S.O. 1974, ch. 112. Dans la version modifiée du par. 40(7) de l'*ESA* de 1974, il n'était plus nécessaire qu'un préavis soit donné avant que le licenciement puisse produire ses effets. Cette disposition vient préciser que l'indemnité de licenciement doit être versée lorsqu'un employeur omet de donner un préavis de licenciement et qu'il y a cessation d'emploi, indépendamment du fait qu'un préavis régulier ait été donné ou non. Il ne fait aucun doute selon moi que la décision *Malone Lynch* portait sur des dispositions législatives très différentes de celles qui sont applicables en l'espèce. Il me semble que la décision du juge Houlden a une portée limitée, soit que les dispositions de l'*ESA* de 1970 ne s'appliquent pas à un employeur en faillite. Pour cette raison, je ne reconnais à la décision *Malone Lynch* aucune valeur persuasive qui puisse étayer les conclusions de la Cour d'appel. Je souligne que les tribunaux dans *Royal Dressed Meats*, précité, et *British Columbia (Director of Employment Standards) c. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25 (C.S.C.-B.), ont refusé de se fonder sur *Malone Lynch* en invoquant des raisons similaires.

39 The Court of Appeal also relied upon *Re Kemp Products Ltd.*, *supra*, for the proposition that although the employment relationship will terminate upon an employer's bankruptcy, this does not constitute a "dismissal". I note that this case did not arise under the provisions of the *ESA*. Rather, it turned on the interpretation of the term "dismissal" in what the complainant alleged to be an employment contract. As such, I do not accept it as authoritative jurisprudence in the circumstances of this case. For the reasons discussed above, I also disagree with the Court of Appeal's reliance on *Mills-Hughes v. Raynor* (1988), 63 O.R. (2d) 343 (C.A.), which cited the decision in *Malone Lynch*, *supra*, with approval.

La Cour d'appel a également invoqué *Re Kemp Products Ltd.*, précité, à l'appui de la proposition selon laquelle, bien que la relation entre l'employeur et l'employé se termine à la faillite de l'employeur, cela ne constitue pas un «congédiement». Je note que ce litige n'est pas fondé sur les dispositions de la *LNE*. Il portait plutôt sur l'interprétation du terme «congédiement» dans le cadre de ce que le plaignant alléguait être un contrat de travail. J'estime donc que cette décision ne fait pas autorité dans les circonstances de l'espèce. Pour les raisons exposées ci-dessus, je ne puis accepter non plus que la Cour d'appel se fonde sur l'arrêt *Mills-Hughes c. Raynor* (1988), 63 O.R. (2d) 343 (C.A.), qui citait la décision *Malone Lynch*, précitée, et l'approuvait.

40 As I see the matter, when the express words of ss. 40 and 40*a* of the *ESA* are examined in their entire context, there is ample support for the con-

Selon moi, l'examen des termes exprès des art. 40 et 40*a* de la *LNE*, replacés dans leur contexte global, permet largement de conclure que les

clusion that the words "terminated by the employer" must be interpreted to include termination resulting from the bankruptcy of the employer. Using the broad and generous approach to interpretation appropriate for benefits-conferring legislation, I believe that these words can reasonably bear that construction (see *R. v. Z. (D.A.)*, [1992] 2 S.C.R. 1025). I also note that the intention of the Legislature as evidenced in s. 2(3) of the *ESAA*, clearly favours this interpretation. Further, in my opinion, to deny employees the right to claim *ESA* termination and severance pay where their termination has resulted from their employer's bankruptcy, would be inconsistent with the purpose of the termination and severance pay provisions and would undermine the object of the *ESA*, namely, to protect the interests of as many employees as possible.

mots «l'employeur licencie» doivent être interprétés de manière à inclure la cessation d'emploi résultant de la faillite de l'employeur. Adoptant l'interprétation libérale et généreuse qui convient aux lois conférant des avantages, j'estime que ces mots peuvent raisonnablement recevoir cette interprétation (voir *R. c. Z. (D.A.)*, [1992] 2 R.C.S. 1025). Je note également que l'intention du législateur, qui ressort du par. 2(3) de l'*ESAA*, favorise clairement cette interprétation. Au surplus, à mon avis, priver des employés du droit de réclamer une indemnité de licenciement et une indemnité de cessation d'emploi en application de la *LNE* lorsque la cessation d'emploi résulte de la faillite de leur employeur serait aller à l'encontre des fins visées par les dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi et minerait l'objet de la *LNE*, à savoir protéger les intérêts du plus grand nombre d'employés possible.

In my view, the impetus behind the termination of employment has no bearing upon the ability of the dismissed employee to cope with the sudden economic dislocation caused by unemployment. As all dismissed employees are equally in need of the protections provided by the *ESA*, any distinction between employees whose termination resulted from the bankruptcy of their employer and those who have been terminated for some other reason would be arbitrary and inequitable. Further, I believe that such an interpretation would defeat the true meaning, intent and spirit of the *ESA*. Therefore, I conclude that termination as a result of an employer's bankruptcy does give rise to an unsecured claim provable in bankruptcy pursuant to s. 121 of the *BA* for termination and severance pay in accordance with ss. 40 and 40*a* of the *ESA*. Because of this conclusion, I do not find it necessary to address the alternative finding of the trial judge as to the applicability of s. 7(5) of the *ESA*.

41 À mon avis, les raisons qui motivent la cessation d'emploi n'ont aucun rapport avec la capacité de l'employé congédié de faire face au bouleversement économique soudain causé par le chômage. Comme tous les employés congédiés ont également besoin des protections prévues par la *LNE*, toute distinction établie entre les employés qui perdent leur emploi en raison de la faillite de leur employeur et ceux qui ont été licenciés pour quelque autre raison serait arbitraire et inéquitable. De plus, je pense qu'une telle interprétation irait à l'encontre des sens, intention et esprit véritables de la *LNE*. Je conclus donc que la cessation d'emploi résultant de la faillite de l'employeur donne effectivement naissance à une réclamation non garantie prouvable en matière de faillite au sens de l'art. 121 de la *LF* en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi en conformité avec les art. 40 et 40*a* de la *LNE*. En raison de cette conclusion, j'estime inutile d'examiner l'autre conclusion tirée par le juge de première instance quant à l'applicabilité du par. 7(5) de la *LNE*.

I note that subsequent to the Rizzo bankruptcy, the termination and severance pay provisions of the *ESA* underwent another amendment. Sections

42 Je fais remarquer qu'après la faillite de Rizzo, les dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi de la

74(1) and 75(1) of the *Labour Relations and Employment Statute Law Amendment Act, 1995*, S.O. 1995, c. 1, amend those provisions so that they now expressly provide that where employment is terminated by operation of law as a result of the bankruptcy of the employer, the employer will be deemed to have terminated the employment. However, s. 17 of the *Interpretation Act* directs that, "[t]he repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law". As a result, I note that the subsequent change in the legislation has played no role in determining the present appeal.

LNE ont été modifiées à nouveau. Les paragraphes 74(1) et 75(1) de la *Loi de 1995 modifiant des lois en ce qui concerne les relations de travail et l'emploi*, L.O. 1995, ch. 1, ont apporté des modifications à ces dispositions qui prévoient maintenant expressément que, lorsque la cessation d'emploi résulte de l'effet de la loi à la suite de la faillite de l'employeur, ce dernier est réputé avoir licencié ses employés. Cependant, comme l'art. 17 de la *Loi d'interprétation* dispose que «[l]'abrogation ou la modification d'une loi n'est pas réputée constituer ou impliquer une déclaration portant sur l'état antérieur du droit», je précise que la modification apportée subséquemment à la loi n'a eu aucune incidence sur la solution apportée au présent pourvoi.

6. Disposition and Costs

43 I would allow the appeal and set aside paragraph 1 of the order of the Court of Appeal. In lieu thereof, I would substitute an order declaring that Rizzo's former employees are entitled to make claims for termination pay (including vacation pay due thereon) and severance pay as unsecured creditors. As to costs, the Ministry of Labour led no evidence regarding what effort it made in notifying or securing the consent of the Rizzo employees before it discontinued its application for leave to appeal to this Court on their behalf. In light of these circumstances, I would order that the costs in this Court be paid to the appellant by the Ministry on a party-and-party basis. I would not disturb the orders of the courts below with respect to costs.

6. Dispositif et dépens

Je suis d'avis d'accueillir le pourvoi et d'annuler le premier paragraphe de l'ordonnance de la Cour d'appel. Je suis d'avis d'y substituer une ordonnance déclarant que les anciens employés de Rizzo ont le droit de présenter des demandes d'indemnité de licenciement (y compris la paie de vacances due) et d'indemnité de cessation d'emploi en tant que créanciers ordinaires. Quant aux dépens, le ministère du Travail n'ayant produit aucun élément de preuve concernant les efforts qu'il a faits pour informer les employés de Rizzo ou obtenir leur consentement avant de se désister de sa demande d'autorisation de pourvoi auprès de notre Cour en leur nom, je suis d'avis d'ordonner que les dépens devant notre Cour soient payés aux appelants par le ministère sur la base des frais entre parties. Je suis d'avis de ne pas modifier les ordonnances des juridictions inférieures à l'égard des dépens.

Appeal allowed with costs.

Pourvoi accueilli avec dépens.

Solicitors for the appellants: Sack, Goldblatt, Mitchell, Toronto.

Procureurs des appelants: Sack, Goldblatt, Mitchell, Toronto.

Solicitors for the respondent: Minden, Gross, Grafstein & Greenstein, Toronto.

Procureurs de l'intimée: Minden, Gross, Grafstein & Greenstein, Toronto.

Solicitor for the Ministry of Labour for the Province of Ontario, Employment Standards Branch: The Attorney General for Ontario, Toronto.

Procureur du ministère du Travail de la province d'Ontario, Direction des normes d'emploi: Le procureur général de l'Ontario, Toronto.

TAB 4

Court of Queen's Bench of Alberta

Citation: Canada North Group Inc (*Companies' Creditors Arrangement Act*), 2017 ABQB 550

Date: 20170911
Docket: 1703 12327
Registry: Edmonton

In the Matter of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended

AND

In the Matter of a Plan of Arrangement of
Canada North Group Inc, Canada North Camps Inc, Campcorp Structures Ltd, DJ Catering Ltd, 816956 Alberta Ltd, 1371047 Alberta Ltd, and 1919209 Alberta Ltd

Applicants

Reasons for Judgment
of the
Honourable Madam Justice J.E. Topolniski

Introduction

[1] This case is about whether Court ordered "super-priority" security interests granted in a *Companies' Creditor Arrangement Act* [1](*CCAA*) proceeding can take priority over statutory deemed trusts in favour of Her Majesty the Queen in Right of Canada, as represented by the Minister of National Revenue (CRA) for unremitted source deductions.

[2] Acknowledging that its success on this motion would cause a chill on commercial restructuring, CRA relies on the comeback provision in an initial *CCAA* Order made July 5, 2017 (Initial Order) to vary "super-priority" charges made in favour of an interim financier, the directors of the debtor companies, and the Monitor and its counsel (Priority Charges), which

[1] RSC 1985, c C-36 as amended, ss 11.2, 11.4, 11.51 11.52.

subordinate its deemed trust claims arising under the *Income Tax Act (ITA)*[2], *Canada Pension Plan Act*[3] *(CPP Act)*, and *Employment Insurance Act*[4] *(EI Act*) (collectively, the Fiscal Statutes)[5].

[3] CRA's view is that the deemed trusts give it a proprietary, rather than a secured interest in the Debtors' assets that cannot be subordinated. Alternatively, if it is a secured creditor, its first place position under the Fiscal Statutes cannot be undermined by the Priority Charges. Canada North Group Inc, Canada North Camps Inc, Camcorp Structures Ltd, DJ Catering Ltd, 816956 Alberta Ltd, 1371047 Alberta Ltd and 1919209 Alberta Inc (the Debtors), the Monitor, and the interim financer, Business Development Bank of Canada (BDC), strenuously oppose the motion.

[4] In addition to the priority issue, there are a number of interconnected, subsidiary issues including: Whether the subject is proper for variance, the onus on a comeback motion, technical service versus actual notice, and delay prejudice.

[5] For the reasons that follow, CRA's interest arising under the Fiscal Statutes is properly subordinated by the Priority Charges. Concerning the subsidiary issues, I have (obviously given the foregoing) found that the question is appropriate for a comeback hearing. I have also found that CRA bears the onus and that, even if CRA had prevailed, it would have been inappropriate to disturb the Priority Charges for the period between the Initial Order and this hearing on August 11, 2017, because of the delay prejudice.

The Factual Landscape

[6] No surprise given the nature of the proceedings, matters have unfolded quickly.

[7] The Debtor's restructuring plan began with s 50.4(1) *Bankruptcy and Insolvency Act* (*BIA*)[6] notice of intention to make a proposal to creditors that very quickly changed to a plea for *CCAA* relief.

[8] The originating *CCAA* materials were served on CRA via courier at its Edmonton office (CRA Office) on June 28. The service package included:

a. The originating application returnable July 5, 2017 seeking a stay of proceedings and basket of other relief, including the Priority Charges;

b. A draft form of initial order that set out the sought after charges: Interim financier charge of $1,000,000, administrative charge of $1,000,000, and the director's indemnity charge of $50,000,000; and

c. An affidavit of a director of the Debtors attesting to a $1,140,000 debt to CRA for source deductions and GST (the evidence does not breakdown what is owed for source deductions, which is the only remittance in issue).

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[2] RSC, 1985, c 1 (5th Supp) 6.
[3] RSC 1985, c C-8.
[4] SC 1996, c 23.
[5] Para 44 of the Initial Order provides that the Priority Charges constitute a charge on all of the debtors' property which, subject to s 34(11) of the *CCAA*, rank in priority to all other security interests, including trusts, liens, and encumbrances, statutory or otherwise.
[6] RSC 1985, c B-3.

[85] Moir J in ***Rosedale Farms*** disagreed finding instead that:

- The analogy of the deemed trust to a floating charge in ***First Vancouver*** was not about creating security, but rather, sales made in the ordinary course of business. Iacobucci J's statement that the question of priority of secured creditors did not arise is noted.[35]
- The "notwithstanding" language of *ITA* s 227(4.1) expressly overrides the *BIA* and all other enactments thereby giving priority to the deemed trust.[36]
- Reliance on the *ITA* definition of "secured interest" is misguided.[37]

[86] Moir J correctly notes Justice Iacobucci's observation that the creation of secured creditor priority did not arise in ***First Vancouver***. However, as I read ***Temple City***, the analysis did not rest on the floating charge analogy. Rather, like the *ITA* definition of "secured creditor," it was but one of several features supporting the result. That said the fact that a floating charge permits alienation of secured property resonates in all *CCAA* restructurings.

[87] ***Rosedale Farms*** is distinguishable in that it concerned a *BIA* scenario. Nevertheless, even if it were otherwise, like Romaine J, I accept that the definitions of secured creditor and security interest in the *CCAA* and Fiscal Statutes support finding that the interests arising from the deemed trusts are security interests, not property interests. In particular, I note that s 224(1.3) defines a security interest as "any interest in property that secures payment ... and includes a ... deemed or actual trust ... ."

[88] Indeed, it would seem inconsistent to interpret the interest they create in a way contrary to their enabling statutes.

[89] For these reasons, I conclude that CRA's interest is a security interest, not a proprietary interest. The impact and interplay of the "notwithstanding" language in *ITA* s 227(4.1), the discussion of which follows, does not change my conclusion.

Does CRA's statutorily secured status elevate it above the Priority Charges?

[90] It may appear that *CCAA* ss 11.2, 11.51, or 11.52 conflict with the deemed trust sections in the Fiscal Statutes, and that a strict "black letter" reading of only ss 227(4) and (4.1) may support CRA's interpretation. However, one must not read these provisions in a vacuum. The Fiscal Statutes, the *BIA*, and the *CCAA* are part of complex legislative schemes that operate concurrently and must "be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[38] Each references the other, expressly or impliedly, and it would be an error to focus on only one section in one piece of the entire scheme.

[91] *ITA* s 227(4.1) opens with these words:

> **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

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[35] ***Rosedale Farms***, at para 39.
[36] *Ibid*, para 35.
[37] *Ibid*, para 29.
[38] ***Rizzo & Rizzo Shoes Ltd. (Re),*** [1998] 1 SCR 27 at para 21.

> 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 notwithstanding any security interest in such property … . [emphasis added] (Notwithstanding Provision)

[92] CRA points to the *obiter dicta* of Fish J (in his separate concurring reasons) in ***Century Services*** (at para 104) finding that Parliament intended deemed trusts to prevail in insolvency proceedings as a complete answer. The other members of the Court did not adopt his reasoning. For that reason, I cannot find his *obiter dicta* to be "the answer."

[93] While the *CCAA* preserves the operation of the Fiscal Statutes deemed trusts, it also authorizes the reorganization of priorities through Court ordered priming.

[94] CRA urges that the Fiscal Statutes and the *CCAA* can be 'stitched together' to read:

> Notwithstanding [sections 11, 11.2, 11.51, and 11.52 of the *Companies' Creditors Arrangements Act*,] property of [the Applicants] equal in value to the [unremitted source deductions] … is beneficially owned by Her Majesty notwithstanding any security interest in such property [including security interests granted pursuant to ss. 11.2, 11.51, or 11.52 of the *CCAA*] 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.

[95] The problem with "stitching" in this way is that incorporating these sections into the Notwithstanding Provision implies that they are somehow in conflict with it. The Supreme Court of Canada has taken a restrictive view of what constitutes a conflict between statutory provisions of the same legislature.

[96] In ***Thibodeau v Air Canada***,[39] the Court addressed whether there was a conflict between the *Official Languages Act* and the *Convention for the Unification of Certain Rules for International Carriage by Air*, concluding that there is a conflict between two provisions of the same legislature "**only** when the existence of the conflict, in the restrictive sense of the word, **cannot be avoided by interpretation**"[40] [emphasis added]. Nothing in these *CCAA* sections directly conflict with s 227(4.1) and thus, one must attempt to interpret these provisions without conflict.

[97] Further, in ***ATCO Gas & Pipelines Ltd v Alberta (Energy & Utilities Board)***,[41] the Supreme Court of Canada, dealing with another complex legislative scheme, said:

> The provisions at issue are found in statutes which are themselves components of a larger statutory scheme **which cannot be ignored**:
>
> > As the product of a rational and logical legislature, the statute is considered to form a system. **Every component contributes to the meaning as a whole**, and the whole gives meaning to its parts: "each legal provision should be considered in relation to other provisions, as parts of a whole" ... .

[39] ***Thibodeau v Air Canada***, 2014 SCC 67, [2014] 3 SCR 340.
[40] ***Thibodeau*** at para 92.
[41] ***ATCO Gas & Pipelines Ltd v Alberta (Energy & Utilities Board)***, 2006 SCC 4, [2006] 1 SCR 140.

> (P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p 308)
>
> As in any statutory interpretation exercise ... courts need to examine **the context that colours the words and the legislative scheme**. The ultimate goal is to discover the clear intent of the legislature and the true purpose of the statute **while preserving the harmony, coherence and consistency of the legislative sch**eme (***Bell ExpressVu***, at para. 27; see also *Interpretation Act*, R.S.A. 2000, c. I-8, s. 10 (in Appendix)). "[S]tatutory interpretation is the art of finding the legislative spirit embodied in enactments": ***Bristol-Myers Squibb Co***., at para. 102.[42] [emphasis added]

[98] Deschamps J observed in ***Century Services***, at para. 15:

> ... the purpose of the *CCAA* ... is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets.

[99] She also quoted with approval the reasons of Doherty JA in ***Elan Corp v Comiskey***[43] (Doherty JA was dissenting):

> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.

[100] In a survey of *CCAA* cases, Dr. Janis Sarra found that 75% of the restructurings required the aid of interim lenders.[44]

[101] In ***Indalex***, the Supreme Court of Canada observed the phenomenon, citing Sarra, and said:

> … case after case has shown that "the priming of the DIP facility is a key aspect of the debtor's ability to attempt a workout" (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 97). The harsh reality is that lending is governed by the commercial imperatives of the lenders, not by the interests of the plan members or the policy considerations that lead provincial governments to legislate in favour of pension fund beneficiaries.[45]

[102] The interim financiers' charge provides both an incentive and guarantee to the lender that funds advanced in the course of the restructuring will be recovered. Without this charge such financing would simply end, and with that, so too would end the hope of positive *CCAA* outcomes. Here, I digress to note the increasing prevalence of interim financiers having no prior relationship to the debtor. It does not take a stretch of imagination to forecast that this practice will diminish if not end altogether without the comfort of super-priority charges.

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[43] ***Elan Corp v Comiskey*** (1990), 41 OAC 282 (ONCA) at para 57.
[44] Janis P Sarra, *Rescue!: Companies' Creditors Arrangement Act*, 2nd ed (Toronto: Carswell, 2013) at 199.
[45] ***Indalex*** at para 59.

[103] Similarly, the charge in favour of directors is important. The charge is intended to keep the captains aboard the sinking ship. Without the benefit of this charge, directors will be inclined to abandon the ship, and it would be remarkably difficult, if not impossible, to recruit replacements.

[104] Likewise, the priority charge for administrative fees is critical to a successful restructuring. Indeed, it is the only protection the Monitor has to ensure that its bills are paid. While the debtor's counsel has the option of resigning if its accounts go unpaid, the Monitor does not have that luxury. As a Court officer, the Monitor's job is to see the proceeding through to completion or failure and would need Court approval to be relieved of that duty. Finally, insolvency practitioners well know that they typically do not have to look to the administrative charge for their initial work – where it has the most significance is at the end.

[105] Further, the 2009 amendments codifying and elaborating on priority charges that had previously been granted under the Court's residual, inherent jurisdiction, shows Parliament's intention that secured creditors' interests could be eroded if the Court was satisfied of the need.

[106] Had Parliament wanted to limit the Court's ability to give priority to these charges, it could have drafted s 11.52(2) (and the mirror provisions) to expressly provide:

> ... priority over the claim of any secured creditor **except the claim of Her Majesty over deemed trusts under s. 227(4) and (4.1) of the Income Tax Act**.

[107] CRA's interpretation recognizes the obvious, underlying policy reason favouring the collection of unremitted source deductions, which is described as being "at the heart" of income tax collection in Canada": ***First Vancouver*** at para 22. However, it fails to reconcile that objective with the Canadian insolvency restructuring regime and Parliament's continued commitment (as evidenced by the 2009 amendments) to facilitating complex corporate *CCAA* restructurings, even if erosion of security is required.

[108] The *CCAA*'s aim is to facilitate business survival and avoid the multiple traumas occasioned by business failure. Interim financiers are an integral part of the restructuring process. Without them, most *CCAA* restructurings could not get off the ground. Likewise, directors and insolvency professionals are essential to the process, and they too need the comfort of primed charges to fully engage in the process. Surely, Parliament knew all of these things when it passed the 2009 amendments authorizing primed charges.

[109] CRA's position, which it acknowledges will cause a chill on complex restructurings, undermines the *CCAA*'s purpose for the sake of tax collection. It disregards the rather obvious, that successful corporate restructurings result in continued jobs to fuel and fund its source deduction tax base. Notably, its interpretation fails to reconcile these purposes.

[110] The Fiscal Statutes and the *CCAA* should, if possible, be interpreted harmoniously to ensure that Parliament's intention in the entire scheme is fulfilled.

[111] It is logical to infer that Parliament intended to create a co-existing statutory scheme that accomplished the goals of both the Fiscal Statues and the *CCAA*. In my view, it is possible to construe these legislative provisions in a manner that preserves the harmony, coherence, and consistency of the entire legislative scheme.

[112] I conclude that it is the Court's order that sets the priority of the charges at issue. The relevant *CCAA* sections allow the Court, where appropriate, to grant priority **only** to those

charges necessary for restructuring. The purpose of the deemed trusts in the Fiscal Statutes is still met as deemed trusts maintain their priority status over **all other** security interests, but those ordered under ss 11.2, 11.51, and 11.52.

[113] A harmonious interpretation respecting both sets of statutory goals is one that preserves the deemed priority status over all security interests, subject to a Court order under *CCAA* ss 11.2, 11.51, and 11.52 granting a "super priority' to those charges.

[114] For these reasons, I find that the *CCAA* gives the Court the ability to rank the Priority Charges ahead of CRA's security interest arising out of the deemed trusts.

Heard on the 11th day of August, 2017.
Dated at the City of Edmonton, Alberta this 11th day of September, 2017.

J.E. Topolniski
J.C.Q.B.A.

Appearances:

Darren R Bieganek, QC
Duncan Craig LLP
for Monitor, Ernst & Young

George F Body
Department of Justice Canada
for Her Majesty the Queen in Right of Canada, as represented by the Minister of National Revenue

Jeffrey Oliver
Cassels Brock & Blackwell LLP
for the Business Development Bank of Canada

Stephanie A Wanke
DLA Piper (Canada) LLP
for the Applicants, Canada North Group Inc, Canada North Camps Inc, Campcorp Structures Ltd, DJ Catering Ltd, 816956 Alberta Ltd, 1371047 Alberta Ltd, and 1919209 Alberta Ltd

TAB 5

SULLIVAN
ON THE
CONSTRUCTION OF STATUTES

Sixth Edition

by

Ruth Sullivan

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THE PRESUMPTION OF CONSISTENT EXPRESSION

§8.32 It is presumed that the legislature uses language carefully and consistently so that within a statute or other legislative instrument the same words have the same meaning and different words have different meanings. Another way of understanding this presumption is to say that the legislature is presumed to avoid stylistic variation. Once a particular way of expressing a meaning has been adopted, it is used each time that meaning is intended. Given this practice, it follows that where a different form of expression is used, a different meaning is intended.

§8.33 The presumption of consistent expression applies not only within statutes but across statutes as well, especially statutes or provisions dealing with the same subject matter.

§8.34 ***Same words, same meaning.*** In *R. v. Zeolkowski*, Sopinka J. wrote: "Giving the same words the same meaning throughout a statute is a basic principle of statutory interpretation."[52] Reliance on this principle is illustrated in the majority judgment of the Supreme Court of Canada in *Thomson v. Canada (Deputy Minister of Agriculture)*.[53] The issue there was whether a Deputy Minister of the federal government could deny security clearance to a person, contrary to the recommendation made by the Security Intelligence Review Committee after reviewing the person's file. The governing provision was s. 52(2) of the *Canadian Security Intelligence Act* which provided that on completion of its investigation, the Review Committee shall provide the Minister "with a report containing any recommendations that the Committee considers appropriate". The majority held that the ordinary meaning of the word "recommendations" is advice or counsel and that mere advice or counsel is not binding on the Minister. However, Cory J. added:

> There is another basis for concluding that 'recommendations' should be given its usual meaning in s. 52(2).
>
> The word is used in other provisions of the Act. Unless the contrary is clearly indicated by the context, a word should be given the same interpretation or meaning whenever it appears in an Act. Section 52(1) directs the Committee to provide the Minister and Director of CSIS with a report ... and any "recommendations" that the Committee considers appropriate....
>
> It would be obviously inappropriate to interpret 'recommendations' in s. 52(1) as a binding decision. This is so, since it would result in the Committee encroaching on the management powers of CSIS. Clearly, in s. 52(1) 'recommendations' has its ordinary and plain meaning of advising or counselling. Parliament could not have intended the word 'recommendations' in the subsequent

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52 [1989] S.C.J. No. 50, [1989] 1 S.C.R. 1378, at 1387 (S.C.C.).

53 [1992] S.C.J. No. 13, [1992] 1 S.C.R. 385 (S.C.C.).

CHAPTER 13

The Act as a Whole, the Statute Book as a Whole and Related Legislation

INTRODUCTION

§13.1 The context of a legislative provision includes both the whole of the Act in which the provision appears and also any related legislation that may cast light on the meaning or effect of the provision. Traditionally, the category of related legislation consisted of statutes *in pari materia,* that is, statutes enacted by the same legislature and relating to the same subject matter. In current practice, however, the courts look more broadly to the whole of the statute book produced by the enacting legislature and to legislation enacted by other jurisdictions as well. They determine on a case-by-case basis the relationships between the provisions to be interpreted and the provisions of other legislative texts, the inferences that may be drawn from those relationships and the weight that should attach to the inferences.

§13.2 This chapter looks first at the way in which the provision to be interpreted is considered in the context of the Act or regulations in which it appears as well as the interaction between regulations and the enabling Act. It then looks at reliance on other legislation under the following headings: (1) related legislation; (2) the statute book as a whole; (3) related legislation of other jurisdictions; (4) case law interpreting related legislation; (5) the weight to be given to these contextual elements.

THE ACT AS A WHOLE

§13.3 The governing principle. In *A.G. v. Prince Ernest Augustus of Hanover,* Viscount Simonds wrote:

> ... the elementary rule must be observed that no one should profess to understand any part of a statute or of any other document before he has read the whole of it. Until he has done so he is not entitled to say that it or any part of it is clear and unambiguous.'

In *Canada (Attorney General) v. Xuan,* Robertson J.A. wrote:

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[1] [1957] A.C. 436, at 463 (H.L.).

> ... a statutory word or expression can be fully grasped only in relation to the whole of which it is a constituent part.[2]

In *Greenshield v. The Queen,* Locke J. wrote:

> The broad general rule for the construction of statutes is that a section or enactment must be construed as a whole, each portion throwing light, if need be, on the rest.[3]

In *Burchill v. Canada,* speaking of the federal *Income Tax Act,* Stratas J.A. wrote:

> Subsection 56(1)(a)(i) does not stand in splendid isolation in the Act; rather, it is part of an interconnected, harmonious web of provisions.[4]

When words are read in their immediate context, the reader forms an initial impression of their meaning, which is more or less clear and precise. The modern principle requires this initial impression to be tested against the inferences that may be drawn from considering other provisions of the Act, its components' and its overall scheme.

§13.4 *Amendments.* The Act as a whole includes any amendments that have come into force before the relevant facts arose. As explained by Houlden J.A. in *G.T. Campbell & Assoc. Ltd. v. Hugh Carson Co.:*

> ... amendments to a statute are to be construed together with the original Act to which they relate as constituting one law and as part of a coherent system of legislation; the provisions of the amendatory and amended Acts are to be harmonized, if possible, so as to give effect to each....[6]

When a court interprets a provision in the context of the Act as a whole, it looks to the Act as it existed when the facts arose. Subsequently added amendments are ignored.?

§13.5 Sometimes the meaning of a word or expression appears to change as a result of an amendment to another part of the Act. Ordinarily such changes are presumed to have been intended.[8] However, this presumption is easily rebutted,

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2 [1994] F.C.J. No. 76, [1994] 2 F.C. 348, at para. 13 (F.C.A.).

3 [1958] S.C.J. No. 12, [1958] S.C.R. 216, at 225 (S.C.C.). See also *Canadian Pacific Airlines Ltd. v. British Columbia,* [1983] B.C.J. No. 2128, 46 B.C.L.R. 213, at 230 (B.C.C.A.), revd [1989] S.C.J. No. 43, [1989] 1 S.C.R. 1133 (S.C.C.); *Hampson v. Department of Education and Science,* [1991] 1 A.C. 171, at 181 (H.L.).

4 [2010] F.C.J. No. 726, 2010 FCA 145, at para. 11 (F.C.A.).

5 Reliance on the components of an enactment is examined in Chapter 14.

6 [1979] O.J. No. 4248, 99 D.L.R. (3d) 529, at 539 (Ont. C.A.). Houlden J.A. relied on 82 C.J.S., §394, at pp. 896-97. For discussion of merger, see Chapter 24, at §24.76-24.78.

7 For discussion of reliance on subsequently enacted amendments, see Chapter 23, at §23.42-23.52.

8 In *Drummond Estate v. Reid Estate,* [1993] O.J. No. 2452, 16 O.R. (3d) 105, at 116-17 (Ont. Gen. Div.), Granger J. refused to rely on cases interpreting a provision in the *Fatal Accidents Act* after it was re-enacted in the *Family Law Act* because the former was a distinct statute deal-

TAB 6

City of Calgary *Appellant*

v.

United Taxi Drivers' Fellowship of Southern Alberta, Rashpal Singh Gosal, Haringer Singh Dhesi, Aero Cab Ltd. and Air Linker Cab Ltd. *Respondents*

and

Attorney General of Alberta *Intervener*

Ville de Calgary *Appelante*

c.

United Taxi Drivers' Fellowship of Southern Alberta, Rashpal Singh Gosal, Haringer Singh Dhesi, Aero Cab Ltd. et Air Linker Cab Ltd. *Intimés*

et

Procureur général de l'Alberta *Intervenant*

INDEXED AS: UNITED TAXI DRIVERS' FELLOWSHIP OF SOUTHERN ALBERTA *v.* CALGARY (CITY)

Neutral citation: 2004 SCC 19.

File No.: 29321.

2003: December 8; 2004: March 25.

Present: McLachlin C.J. and Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps and Fish JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Municipal law — Bylaws — Jurisdiction to pass bylaws — Municipal bylaw regulating taxi industry by stipulating licence requirements and freezing number of licences — Proper approach to interpretation of statutes empowering municipalities — Whether bylaw ultra vires municipality under its governing legislation — Municipal Government Act, S.A. 1994, c. M-26.1, ss. 7, 8, 9.

Administrative law — Judicial review — Standard of review applicable to decision of municipality delineating its jurisdiction.

The City of Calgary regulates its taxi industry by virtue of the *Taxi Business Bylaw* which requires that all taxis have a taxi plate licence. In 1993, the bylaw froze the number of taxi plate licences issued. The following year, the provincial government enacted a new *Municipal Government Act*. The respondents challenged the validity of the freeze on the issuance of taxi plate licences on the basis that the freeze is *ultra vires* the City under its governing legislation, the *Municipal Government Act*. The trial judge held that the City had authority under the new

RÉPERTORIÉ : UNITED TAXI DRIVERS' FELLOWSHIP OF SOUTHERN ALBERTA *c.* CALGARY (VILLE)

Référence neutre : 2004 CSC 19.

N^{o} du greffe : 29321.

2003 : 8 décembre; 2004 : 25 mars.

Présents : La juge en chef McLachlin et les juges Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps et Fish.

EN APPEL DE LA COUR D'APPEL DE L'ALBERTA

Droit municipal — Règlements — Compétence en matière d'adoption de règlement — Règlement municipal régissant le secteur des taxis en prévoyant des exigences en matière de permis et le gel du nombre de permis — Démarche à adopter pour l'interprétation des lois habilitant les municipalités — Le règlement outrepasse-t-il la compétence conférée à la municipalité par la loi habilitante? — Municipal Government Act, S.A. 1994, ch. M-26.1, art. 7, 8, 9.

Droit administratif — Contrôle judiciaire — Norme de contrôle applicable à la décision de la municipalité de définir sa compétence.

La Ville de Calgary réglemente son secteur des taxis en l'assujettissant au *Taxi Business Bylaw*, qui exige que tous les taxis aient une plaque de taxi. En 1993, le règlement gèle le nombre de plaques de taxi pouvant être délivrées. L'année suivante, le gouvernement de la province a édicté une nouvelle *Municipal Government Act*. Les intimés contestent la validité du gel de la délivrance de plaques de taxi au motif qu'il outrepasse la compétence conférée à la municipalité par la loi habilitante, la *Municipal Government Act*. Selon le juge de première

Act to limit the number of taxi plate licences. A majority of the Court of Appeal reversed that decision.

Held: The appeal should be allowed.

The City of Calgary was authorized under the *Municipal Government Act* to enact the bylaw and to limit the number of taxi plate licences. Municipalities must always be correct in delineating their jurisdiction. Such questions will always be subject to a standard of review of correctness.

The evolution of the municipality has produced a shift in the proper approach to interpreting statutes that empower municipalities. A broad and purposive approach to the interpretation of municipal legislation reflects the true nature of modern municipalities which require greater flexibility in fulfilling their statutory purposes and is consistent with the Court's approach to statutory interpretation generally. The *Municipal Government Act* reflects the modern method of drafting municipal legislation which must be construed using this broad and purposive approach.

Under the *Municipal Government Act* the City still has the power to limit the issuance of taxi plate licences. There is no indication in the Act that the legislature intended to remove the municipality's power to limit the number of taxi plate licences. To the contrary, s. 9(b) indicates that the legislature sought to enhance the City's powers under the Act. Further, the respondents' narrow interpretation cannot be reconciled with the language of the Act. Section 7 which empowers municipalities to pass bylaws respecting business must be read with s. 8 of the Act illustrating some of the broad powers exercisable by a municipality. The power to limit the number of licences could fall under either s. 8(a), the power to regulate, or s. 8(c), the power to provide for a system of licences. Thus, the City has the power under the Act to pass bylaws limiting the number of taxi plate licences.

Cases Cited

Referred to: *Nanaimo (City) v. Rascal Trucking Ltd.*, [2000] 1 S.C.R. 342, 2000 SCC 13; *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231; *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42; *Merritt v. City of Toronto* (1895), 22 O.A.R. 205.

Statutes and Regulations Cited

Alberta Bill of Rights, R.S.A. 2000, c. A-14, s. 1.
Canadian Charter of Rights and Freedoms, ss. 6, 7, 15.

instance, la nouvelle loi accorde à la Ville le pouvoir de limiter le nombre de plaques de taxi. La Cour d'appel, à la majorité, infirme cette décision.

Arrêt : Le pourvoi est accueilli.

La *Municipal Government Act* accorde à la Ville de Calgary le pouvoir d'édicter le règlement et de limiter le nombre de plaques de taxi. Les décisions des municipalités doivent toujours être correctes quand il s'agit de délimiter leur compétence. L'examen de telles questions devra toujours se faire selon la norme de la décision correcte.

L'évolution de la municipalité a entraîné un virage dans la démarche à adopter pour interpréter les lois habilitant les municipalités. Une interprétation téléologique large des lois sur les municipalités reflète la véritable nature des municipalités modernes, qui ont besoin de plus de souplesse pour réaliser les objets de leur loi habilitante et est compatible avec l'approche générale adoptée par la Cour en matière d'interprétation législative. La *Municipal Government Act* reflète la méthode moderne de rédaction des lois sur les municipalités, auxquelles il faut donner une interprétation téléologique large.

En vertu de la *Municipal Government Act*, la Ville a encore le pouvoir de limiter le nombre de plaques de taxi. Rien dans la loi n'indique que le législateur avait l'intention de supprimer le pouvoir des municipalités de limiter le nombre de plaques de taxi. Au contraire, l'al. 9b) indique que le législateur cherchait à accroître les pouvoirs de la Ville en vertu de la loi. De plus, l'interprétation restrictive proposée par les intimés ne peut se concilier avec le libellé de la loi. L'article 7, qui habilite les municipalités à prendre des règlements sur les activités commerciales, doit être interprété conjointement avec l'art. 8 de la loi, qui donne quelques exemples du pouvoir général dont est dotée une municipalité. Le pouvoir de limiter le nombre de permis pourrait découler soit du pouvoir de réglementer, prévu à l'al. 8a), soit du pouvoir d'établir un régime de permis, prévu à l'al. 8c). Ainsi, la Ville est habilitée par la loi à édicter des règlements limitant le nombre de plaques de taxi.

Jurisprudence

Arrêts mentionnés : *Nanaimo (Ville) c. Rascal Trucking Ltd.*, [2000] 1 R.C.S. 342, 2000 CSC 13; *Produits Shell Canada Ltée c. Vancouver (Ville)*, [1994] 1 R.C.S. 231; *Bell ExpressVu Limited Partnership c. Rex*, [2002] 2 R.C.S. 559, 2002 CSC 42; *Merritt c. City of Toronto* (1895), 22 O.A.R. 205.

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City of Calgary, Bylaw No. 91/77, *Taxi Business Bylaw* (April 18, 1977), ss. 7(1), 9.1(a), (b) [am. 23M93], 9.2(a), (b), 9.3(a).
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Municipal Act, S.M. 1996, c. 58, C.C.S.M. c. M225.
Municipal Act, 2001, S.O. 2001, c. 25.
Municipal Government Act, R.S.A. 1980, c. M-26, ss. 234(1) [am. 1991, c. 23, s. 3(13)], (2)(a) [*idem*], (b) [*idem*], 8.
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Leila J. Gosselin, *Brand R. Inlow*, *Q.C.*, and *R. Shawn Swinn*, for the appellant.

Dale Gibson and *Sandra Anderson*, for the respondents United Taxi Drivers' Fellowship of Southern Alberta, Rashpal Singh Gosal and Haringer Singh Dhesi.

No one appeared for the respondent Aero Cab Ltd.

Gabor I. Zinner, for the respondent Air Linker Cab Ltd.

Cities Act, S.S. 2002, ch. C-11.1.
Gaming and Liquor Act, R.S.A. 2000, ch. G-1, art. 37(1)d).
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POURVOI contre un arrêt de la Cour d'appel de l'Alberta, [2002] 8 W.W.R. 51, 3 Alta. L.R. (4th) 211, 303 A.R. 249, 273 W.A.C. 249, 94 C.R.R. (2d) 290, 30 M.P.L.R. (3d) 155, [2002] A.J. No. 694 (QL), 2002 ABCA 131, qui a infirmé un jugement de la Cour du Banc de la Reine (1998), 60 Alta. L.R. (3d) 165, 217 A.R. 1, 45 M.P.L.R. (2d) 16, [1998] A.J. No. 1478 (QL), 1998 ABQB 184. Pourvoi accueilli.

Leila J. Gosselin, *Brand R. Inlow*, *c.r.*, et *R. Shawn Swinn*, pour l'appelante.

Dale Gibson et *Sandra Anderson*, pour les intimés United Taxi Drivers' Fellowship of Southern Alberta, Rashpal Singh Gosal et Haringer Singh Dhesi.

Personne n'a comparu pour l'intimée Aero Cab Ltd.

Gabor I. Zinner, pour l'intimée Air Linker Cab Ltd.

Lorne Merryweather, for the intervener.

The judgment of the Court was delivered by

Bastarache J. —

I. Overview

1 The City of Calgary (the "City") regulates its taxi industry by virtue of Bylaw No. 91/77, the *Taxi Business Bylaw* (the "bylaw"), which sets out several licensing requirements. Among them is a requirement that all taxi vehicles have a taxi plate licence. In 1986, the City's Taxi Commission adopted a restricted entry system for the taxi business to increase efficiency and stability, and accordingly froze the number of taxi plate licences. The freeze was continued in 1993 under s. 9.1 of the bylaw. Other sections of the bylaw permitted the transfer of licences and the creation of a lottery system to distribute revoked or relinquished licences. The following year, the provincial government enacted a new *Municipal Government Act*, S.A. 1994, c. M-26.1 (now R.S.A. 2000, c. M-26). Section 715 of the new Act deemed the existing bylaw to have the same effect as if it had been passed under the new Act.

2 The respondents, the United Taxi Drivers' Fellowship of Southern Alberta, Rashpal Singh Gosal, Haringer Singh Dhesi, Aero Cab Ltd. and Air Linker Cab Ltd., challenged the validity of the freeze and the lottery process. The respondents sought a declaration that the City's actions were: *ultra vires* the City's governing legislation, the *Municipal Government Act*; a violation of the common law rule prohibiting municipalities from enacting discriminatory legislation; and an unconstitutional violation of their mobility rights, their right to liberty and their right to be free from discrimination as guaranteed by ss. 6, 7 and 15 of the *Canadian Charter of Rights and Freedoms*. The only issue before this Court is whether the City's freeze on the issuance of taxi plate licences

Lorne Merryweather, pour l'intervenant.

Version française du jugement de la Cour rendu par

Le juge Bastarache —

I. Survol

La Ville de Calgary (la « Ville ») réglemente son secteur des taxis en l'assujettissant au règlement nº 91/77, le *Taxi Business Bylaw* (le « règlement »), qui prévoit plusieurs exigences en matière de permis, notamment l'obligation pour tous les véhicules servant au transport par taxi d'avoir une plaque de taxi. En 1986, la commission des taxis de la Ville a instauré un régime d'entrée restreinte dans le secteur des taxis afin d'en améliorer l'efficacité et la stabilité et a, donc, gelé le nombre de plaques de taxi. Le gel s'est poursuivi en 1993 en vertu de l'art. 9.1 du règlement. D'autres dispositions du règlement autorisent le transfert de permis de taxi et la création d'un système de loterie permettant la distribution de ceux qui ont été révoqués ou délaissés. L'année suivante, le gouvernement de la province a édicté une nouvelle *Municipal Government Act*, S.A. 1994, ch. M-26.1 (maintenant R.S.A. 2000, ch. M-26). Selon l'art. 715 de la nouvelle loi, le règlement existant est réputé avoir le même effet que s'il avait été pris en vertu de la nouvelle loi.

Les intimés, la United Taxi Drivers' Fellowship of Southern Alberta, Rashpal Singh Gosal, Haringer Singh Dhesi, Aero Cab Ltd. et Air Linker Cab Ltd., ont contesté la validité du gel et du système de loterie. Ils ont sollicité un jugement déclarant que les mesures prises par la Ville outrepassent la compétence que lui confère sa loi habilitante, la *Municipal Government Act*, violent la règle de common law interdisant aux municipalités de prendre des règlements discriminatoires et portent atteinte à leur liberté de circulation et d'établissement, à leur droit à la liberté et à leur droit d'être protégés contre la discrimination, contrairement aux art. 6, 7 et 15 de la *Charte canadienne des droits et libertés*. La seule question dont est saisie la Cour consiste à savoir si le gel

was *ultra vires* the City under the *Municipal Government Act*.

The trial judge concluded that the City had the authority under the *Municipal Government Act* to limit the number of taxi plate licences: (1998), 60 Alta. L.R. (3d) 165, 1998 ABQB 184. The majority of the Court of Appeal disagreed: [2002] 8 W.W.R. 51, 2002 ABCA 131. Wittmann J.A., writing for the majority, concluded that while the old *Municipal Government Act* expressly granted the City the power to limit the number of taxi plate licences, the new Act did not. O'Leary J.A., in dissent, held that the new *Municipal Government Act* expressly and impliedly authorized the limit on the issuance of taxi plate licences.

II. Relevant Statutory Provisions

City of Calgary, Bylaw No. 91/77 (*Taxi Business Bylaw*)

7. (1) The Commission may limit the number of taxi licenses, which may be issued in any one-license period.

. . .

9.1 (a) The prohibition on the issuance of any new taxi licenses for the operation of a regular class taxi instituted by the Taxi Commission as of February 6, 1986, and continued by the Taxi Commission up to the date of the passage of this Bylaw, is hereby continued and the Taxi Commission shall issue no new licenses for the operation of a regular class taxi but only renew to licensees, in accordance with the Taxi Business Bylaw, such regular class taxi licenses as were issued to such licensees for the previous license year.

(b) Notwithstanding subsection (a) the Taxi Commission may issue licenses in accordance with the lottery provisions described in Section 9(28) . . . .

9.2 (a) "immediate family member" means the spouse, siblings or children of the taxi licensee.

de la délivrance de plaques de taxi imposé par la Ville outrepasse la compétence que lui confère la *Municipal Government Act*.

3 Selon le juge de première instance, la *Municipal Government Act* habilite la Ville à limiter le nombre de plaques de taxi : (1998), 60 Alta. L.R. (3d) 165, 1998 ABQB 184. La Cour d'appel, à la majorité, exprime son désaccord : [2002] 8 W.W.R. 51, 2002 ABCA 131. Le juge Wittmann, au nom de la majorité, conclut que l'ancienne *Municipal Government Act*, contrairement à la nouvelle loi, accorde expressément à la Ville le pouvoir de limiter le nombre de plaques de taxi. Le juge O'Leary, dissident, conclut que la nouvelle *Municipal Government Act* autorise expressément et implicitement le contingentement des plaques de taxis.

II. Dispositions législatives pertinentes

4 Règlement n^{o} 91/77 de la Ville de Calgary (*Taxi Business Bylaw*)

[TRADUCTION]

7. (1) La Commission peut limiter le nombre de permis d'exploitation de taxis qui peuvent être délivrés dans une période de permis donnée.

. . .

9.1 a) L'interdiction de délivrer de nouveaux permis d'exploitation de taxis de catégorie ordinaire imposée par la commission des taxis le 6 février 1986 et réitérée jusqu'à la date de prise du présent règlement demeure en vigueur; la commission des taxis ne délivre pas de nouveaux permis d'exploitation de taxis de catégorie ordinaire et ne renouvelle au titulaire, conformément au règlement Taxi Business, que celui délivré pour l'année de permis précédente.

b) Malgré l'alinéa a), la commission des taxis peut délivrer des permis en application des dispositions sur la loterie énoncées au paragraphe 9(28) . . .

9.2 a) « membre de la famille immédiate » Conjoint, frère ou sœur ou enfant du titulaire du permis de taxi.

(b) Notwithstanding section 9(15) a taxi license held by a deceased taxi licensee shall be capable of being transferred to the estate of the deceased licensee, or to an immediate family member of the deceased, if the transfer occurs without remuneration from the estate of the deceased to the transferee.

. . .

9.3 (a) The licensee of a taxi license shall not transfer or otherwise dispose of a taxi license unless:

(1) the licensee does so in accordance with this Bylaw and the regulations; and

(2) the licensee pays the license transfer fee as set out in this Bylaw.

Municipal Government Act, R.S.A. 1980, c. M-26

234(1) A council may pass by-laws licensing, regulating and controlling the taxi and limousine business.

(2) Without restricting the generality of the foregoing a council may pass by-laws to

(a) establish and specify the rates or fares that may be charged for hire of taxis and limousines;

(b) limit the number of taxi and limousine licences that may be issued in the municipality having regard to its population or the area to be served in it or by any other means the council considers to be just and equitable;

. . .

(8) A council, by by-law, may establish a commission to be known as the taxi commission

(a) which shall be composed of the number of resident electors the council selects including, if it seems desirable, any members of council or officials of the municipality who are considered appropriate, and

(b) which may exercise any power or make any decisions which the council may make pursuant to this section as the by-law provides.

b) Malgré le paragraphe 9(15), le permis de taxi du titulaire décédé peut être transféré à sa succession, ou à un membre de sa famille immédiate, si le transfert lui est effectué par la succession à titre gratuit.

. . .

9.3 a) Le titulaire du permis de taxi ne peut l'aliéner, notamment par transfert, sauf si les conditions suivantes sont réunies :

(1) il le fait conformément au présent règlement et à la réglementation;

(2) il acquitte les droits de transfert prévus dans le présent règlement.

Municipal Government Act, R.S.A. 1980, ch. M-26

[TRADUCTION]

234(1) Le conseil peut, par règlement, assortir de conditions les permis d'exploitation des services de taxi et de limousine ainsi que régir et contrôler l'exploitation de ces services.

(2) Il peut, par règlement, notamment :

a) fixer les tarifs ou les prix des courses de taxi ou de limousine;

b) limiter le nombre de permis de taxi et de limousine qui peuvent être délivrés dans la municipalité compte tenu de sa population ou de la région à desservir, ou selon tout autre critère qu'il estime juste et équitable;

. . .

(8) Il peut, par règlement, établir une commission, la commission des taxis, qui :

a) est formée du nombre d'électeurs résidents de son choix, y compris, si cela semble souhaitable, tout membre du conseil ou fonctionnaire de la municipalité dont la présence est jugée appropriée;

b) peut exercer tout pouvoir ou prendre toute décision qu'il est habilité à exercer ou prendre en vertu du présent article de la façon prévue au règlement.

Municipal Government Act, S.A. 1994, c. M-26.1

3 The purposes of a municipality are

(a) to provide good government,

(b) to provide services, facilities or other things that, in the opinion of council, are necessary or desirable for all or a part of the municipality, and

(c) to develop and maintain safe and viable communities.

. . .

7 A council may pass bylaws for municipal purposes respecting the following matters:

(a) the safety, health and welfare of people and the protection of people and property;

. . .

(d) transport and transportation systems;

(e) businesses, business activities and persons engaged in business; . . .

8 Without restricting section 7, a council may in a bylaw passed under this Division

(a) regulate or prohibit;

(b) deal with any development, activity, industry, business or thing in different ways, divide each of them into classes and deal with each class in different ways;

(c) provide for a system of licences, permits or approvals, including . . . :

. . .

(iii) prohibiting any development, activity, industry, business or thing until a licence, permit or approval has been granted;

(iv) providing that terms and conditions may be imposed on any licence, permit or approval,

Municipal Government Act, S.A. 1994, ch. M-26.1

[TRADUCTION]

3 La municipalité a pour objets :

a) d'assurer un bon gouvernement;

b) de fournir les services, les installations ou autres choses qui, selon le conseil, sont nécessaires ou utiles à l'ensemble ou à une partie de la collectivité,

c) de créer et de maintenir des collectivités sûres et viables.

. . .

7 Le conseil peut, par règlement, régir au niveau municipal les domaines suivants :

a) la sécurité, la santé et le bien-être des personnes et la protection des personnes et des biens;

. . .

d) le transport et les systèmes de transport;

e) les entreprises, les activités commerciales et les personnes qui exercent des activités commerciales; . . .

8 Sans que soit limitée la portée générale de l'article 7, il peut, par règlement pris en vertu de la présente section :

a) réglementer une activité ou l'interdire;

b) prendre des mesures à l'égard de tout développement ou de toute activité, industrie, entreprise ou chose de différentes façons, les classer par catégorie et prendre des mesures différentes pour chaque catégorie;

c) établir un régime de licences, de permis ou d'agréments, notamment [. . .];

. . .

(iii) interdire tout développement ou toute activité, industrie, entreprise ou chose jusqu'à l'obtention d'une licence, d'un permis ou d'un agrément;

(iv) prévoir que les licences, permis ou agréments peuvent être assortis de conditions,

the nature of the terms and conditions and who may impose them;

(v) setting out the conditions that must be met before a licence, permit or approval is granted or renewed, the nature of the conditions and who may impose them;

(vi) providing for the duration of licences, permits and approvals and their suspension or cancellation for failure to comply with a term or condition of the bylaw or for any other reason specified in the bylaw;

. . .

9 The power to pass bylaws under this Division is stated in general terms to

(a) give broad authority to councils and to respect their right to govern municipalities in whatever way the councils consider appropriate, within the jurisdiction given to them under this or any other enactment, and

(b) enhance the ability of councils to respond to present and future issues in their municipalities.

. . .

715 A bylaw passed by a council under the former *Municipal Government Act* . . . continues with the same effect as if it had been passed under this Act.

énoncer ces conditions et préciser qui peut les imposer;

(v) définir les conditions d'octroi ou de renouvellement de licences, permis ou agréments et préciser qui peut les imposer;

(vi) prévoir la durée de validité des licences, permis ou agréments et leur suspension ou annulation pour défaut de se conformer à une condition du règlement ou pour tout autre motif prévu par le règlement;

. . .

9 Le pouvoir de prendre des règlements en vertu de la présente section est formulé en termes généraux dans les buts suivants :

a) conférer un pouvoir général aux conseils et respecter leur droit de gouverner les municipalités de la façon qu'ils jugent appropriée, dans les limites de la compétence qui leur est conférée par la présente loi ou tout autre texte;

b) renforcer la capacité des conseils de régler les questions qui se posent et se poseront dans leur municipalité.

. . .

715 Tout règlement pris par le conseil en vertu de l'ancienne *Municipal Government Act* . . . continue à s'appliquer comme s'il avait été pris en vertu de la présente loi.

III. Analysis

A. *The Standard of Review*

5 The only question in this case is whether the freeze on the issuance of taxi plate licences was *ultra vires* the City under the *Municipal Government Act*. Municipalities do not possess any greater institutional competence or expertise than the courts in delineating their jurisdiction. Such a question will always be reviewed on a standard of correctness: *Nanaimo (City) v. Rascal Trucking Ltd.*, [2000] 1 S.C.R. 342, 2000 SCC 13, at para. 29. There is no need to engage in the pragmatic and functional approach in a review for *vires*; such an inquiry is

III. Analyse

A. *La norme de contrôle*

En l'espèce, il faut seulement se demander si, en vertu de la *Municipal Government Act*, la Ville a commis un excès de pouvoir en gelant la délivrance des plaques de taxi. Les municipalités ne possèdent pas une expertise ou compétence institutionnelle plus grande que les tribunaux pour délimiter leur compétence. L'examen d'une telle question devra toujours se faire selon la norme de la décision correcte : *Nanaimo (Ville) c. Rascal Trucking Ltd.*, [2000] 1 R.C.S. 342, 2000 CSC 13, par. 29. Il n'est pas nécessaire de procéder à une analyse

only required where a municipality's adjudicative or policy-making function is being exercised.

B. *The Proper Approach to the Interpretation of Municipal Powers*

The evolution of the modern municipality has produced a shift in the proper approach to the interpretation of statutes empowering municipalities. This notable shift in the nature of municipalities was acknowledged by McLachlin J. (as she then was) in *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231, at pp. 244-45. The "benevolent" and "strict" construction dichotomy has been set aside, and a broad and purposive approach to the interpretation of municipal powers has been embraced: *Nanaimo*, *supra*, at para. 18. This interpretive approach has evolved concomitantly with the modern method of drafting municipal legislation. Several provinces have moved away from the practice of granting municipalities specific powers in particular subject areas, choosing instead to confer them broad authority over generally defined matters: *The Municipal Act*, S.M. 1996, c. 58, C.C.S.M. c. M225; *Municipal Government Act*, S.N.S. 1998, c. 18; *Municipal Act*, R.S.Y. 2002, c. 154; *Municipal Act, 2001*, S.O. 2001, c. 25; *The Cities Act*, S.S. 2002, c. C-11.1. This shift in legislative drafting reflects the true nature of modern municipalities which require greater flexibility in fulfilling their statutory purposes: *Shell Canada*, at pp. 238 and 245.

Alberta's *Municipal Government Act* follows the modern method of drafting municipal legislation. The legislature's intention to enhance the powers of its municipalities by drafting the bylaw passing provisions of the Act in broad and general terms is expressly stated in s. 9. Accordingly, to determine whether a municipality is authorized to exercise a certain power, such as limiting the issuance of taxi plate licences, the provisions of the Act must be construed in a broad and purposive manner.

pragmatique et fonctionnelle pour déterminer s'il y a eu excès de pouvoir; une telle démarche ne s'impose que dans le cas où une municipalité exerce une fonction juridictionnelle ou une fonction de prise de décisions de principe.

B. *L'interprétation correcte des pouvoirs municipaux*

6 L'évolution de la municipalité moderne a entraîné un virage dans la démarche à adopter pour interpréter les lois habilitant les municipalités. Dans *Produits Shell Canada Ltée c. Vancouver (Ville)*, [1994] 1 R.C.S. 231, p. 244-245, la juge McLachlin (plus tard Juge en chef) reconnaît ce virage notable dans la nature des municipalités. La dichotomie entre interprétation « bienveillante » et interprétation « stricte » fait place à une interprétation téléologique large des pouvoirs municipaux : *Nanaimo*, précité, par. 18. Cette méthode d'interprétation s'est développée en même temps que la méthode moderne de rédaction des lois sur les municipalités. Plusieurs provinces, au lieu de conférer aux municipalités des pouvoirs précis dans des domaines particuliers, préfèrent leur accorder un pouvoir général dans des domaines définis en termes généraux : *Loi sur les municipalités*, L.M. 1996, ch. 58, C.P.L.M. ch. M225; *Municipal Government Act*, S.N.S. 1998, ch. 18; *Loi sur les municipalités*, L.R.Y. 2002, ch. 154; *Loi de 2001 sur les municipalités*, L.O. 2001, ch. 25; *Cities Act*, S.S. 2002, ch. C-11.1. Ce virage en matière de rédaction législative reflète la véritable nature des municipalités modernes, qui ont besoin de plus de souplesse pour réaliser les objets de leur loi habilitante : *Shell Canada*, p. 238 et 245.

7 La *Municipal Government Act* de l'Alberta suit la méthode moderne de rédaction des lois sur les municipalités. L'intention du législateur d'accroître les pouvoirs des municipalités en formulant en termes larges et généraux les dispositions de la loi relatives à la prise de règlements est expressément énoncée à l'art. 9. De ce fait, pour déterminer si une municipalité est habilitée à exercer un pouvoir donné, comme celui de limiter le nombre de plaques de taxi, il faut donner une interprétation téléologique large aux dispositions de la loi.

8 A broad and purposive approach to the interpretation of municipal legislation is also consistent with this Court's approach to statutory interpretation generally. The contextual approach requires "the words of an Act . . . to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, at para. 26. This approach is also consistent with s. 10 of Alberta's *Interpretation Act*, R.S.A. 2000, c. I-8, which provides that every provincial enactment must be given a fair, large and liberal construction and interpretation that best ensures the attainment of its objects.

Une interprétation téléologique large des lois sur les municipalités est également compatible avec l'approche générale adoptée par la Cour en matière d'interprétation législative. Selon l'analyse contextuelle, il faut interpréter [TRADUCTION] « les termes d'une loi dans leur contexte global selon le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur » : E. A. Driedger, *Construction of Statutes* (2e éd. 1983), p. 87; *Bell ExpressVu Limited Partnership c. Rex*, [2002] 2 R.C.S. 559, 2002 CSC 42, par. 26. Cette approche concorde également avec l'art. 10 de l'*Interpretation Act* de l'Alberta, R.S.A. 2000, ch. I-8, qui prévoit que tout texte de la province s'interprète de la manière la plus équitable et la plus large qui soit compatible avec la réalisation de son objet.

C. *The City's Power to Limit the Number of Licences*

9 The respondents argue that the City does not have the power to limit the number of taxi plate licences under the Act. They submit that the authority to regulate has never implied numerical limits and that ss. 7 and 8 of the current *Municipal Government Act*, unlike s. 234 of the previous *Municipal Government Act*, neither expressly nor impliedly grant a municipality the power to limit the number of taxi plate licences. The respondents argue that while the Act expands the "matters" over which municipalities may enact bylaws under s. 7, the Act limits the "powers" exercisable by municipalities to those expressly specified. As the power to limit the number of taxi plate licences is not expressly specified in s. 8, the respondents allege it has been abolished.

10 In my respectful opinion, the respondents' argument must fail.

11 It is well established that the legislature is presumed not to alter the law by implication: *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 395. Rather, where it intends to depart from prevailing law, the legislature will do so expressly. Here, there is no indication in the Act that the legislature intended to remove the municipality's

C. *Le pouvoir de la Ville de limiter le nombre de permis*

Les intimés soutiennent que la Ville n'a pas le pouvoir de limiter le nombre de plaques de taxi en vertu de la loi. Ils font valoir que le pouvoir de réglementer n'a jamais impliqué le pouvoir d'imposer des limites quantitatives et que les art. 7 et 8 de la *Municipal Government Act* actuelle, contrairement à l'art. 234 de l'ancienne *Municipal Government Act*, n'accordent ni expressément ni implicitement aux municipalités le droit de limiter le nombre de plaques de taxi. Selon eux, alors qu'elle élargit les « domaines » dans lesquels les municipalités peuvent prendre des règlements en vertu de l'art. 7, la loi limite les « pouvoirs » pouvant être exercés par les municipalités à ceux qu'elle prévoit expressément. Comme le pouvoir de limiter le nombre de plaques de taxi n'est pas expressément prévu par l'art. 8, les intimés affirment qu'il a été supprimé.

À mon avis, l'argument des intimés doit être rejeté.

Il est bien établi que le législateur est présumé ne pas modifier implicitement le droit : *Sullivan and Driedger on the Construction of Statutes* (4e éd. 2002), p. 395. Lorsqu'il a l'intention de s'écarter du droit existant, le législateur le fait expressément. En l'espèce, rien dans la loi n'indique que le législateur avait l'intention de supprimer le pouvoir des

power to limit the number of taxi plate licences. To the contrary, s. 9(b) indicates that the legislature did not intend to curtail the powers exercised by municipalities but rather sought to enhance those powers under the new Act subject to the limitations in ss. 70 to 75, which do not preclude limiting the number of taxi licences. It is inconceivable, in my view, that the legislature would have intended to indirectly limit the ability of municipalities to regulate the taxi industry according to a practice dating 15 years and to adopt the restrictive approach defined in *Merritt v. City of Toronto* (1895), 22 O.A.R. 205, at pp. 207-8, simply by changing its method of drafting legislation. The new method was in fact specifically designed to avoid the need for listing specific matters and powers. Accordingly, a provision explicitly limiting the number of licences such as s. 13(1)(a) of the *Wildlife Act*, R.S.A. 2000, c. W-10, and s. 37(1)(d) of the *Gaming and Liquor Act*, R.S.A. 2000, c. G-1, is unnecessary.

The respondents' narrow interpretation cannot be reconciled with the language of the Act. According to the respondents, the broad authority conferred on municipalities only applies to s. 7 which deals exclusively with matters and not to s. 8 which deals exclusively with powers. I disagree. First, s. 9 clearly states that the power to pass bylaws is stated in general terms to "give broad authority" in respect of matters attributed to them. Second, to accept this matter/power distinction renders the opening words of s. 8, "[w]ithout restricting section 7", useless. Rather, ss. 7 and 8 must be read together, as one is without restriction to the other. Section 8 is supplementary to s. 7 and speaks of the "broad authority" mentioned in s. 9. On this reading of ss. 7, 8 and 9 the respondents' interpretation must be rejected because their narrow and literal approach to s. 8 effectively restricts s. 7, which grants the power to regulate businesses.

municipalités de limiter le nombre de plaques de taxi. Au contraire, l'al. 9b) indique que le législateur n'avait pas l'intention de diminuer les pouvoirs des municipalités, mais cherchait plutôt à les accroître en vertu de la nouvelle loi, sous réserve des art. 70 à 75, qui n'empêchent pas la limitation du nombre de permis de taxi. Il est inconcevable, selon moi, que le législateur ait eu l'intention de limiter indirectement la capacité des municipalités de réglementer le secteur des taxis selon une méthode vieille de 15 ans et d'adopter l'approche restrictive énoncée dans *Merritt c. City of Toronto* (1895), 22 O.A.R. 205, p. 207-208, simplement en modifiant sa méthode de rédaction législative. En fait, la nouvelle méthode visait spécialement à éviter d'avoir à énumérer des domaines de compétence et des pouvoirs précis. Il est donc inutile d'avoir une disposition qui limite expressément le nombre de permis, comme l'al. 13(1)a) de la *Wildlife Act*, R.S.A. 2000, ch. W-10, et l'al. 37(1)d) de la *Gaming and Liquor Act*, R.S.A. 2000, ch. G-1.

12 L'interprétation restrictive proposée par les intimés ne peut se concilier avec le libellé de la loi. Selon les intimés, le pouvoir général conféré aux municipalités ne s'applique qu'à l'art. 7, qui porte exclusivement sur les domaines de compétence, et non à l'art. 8, qui porte exclusivement sur les pouvoirs. Je ne suis pas de cet avis. Premièrement, l'art. 9 dit clairement que le pouvoir de prendre des règlements est formulé en termes généraux afin de [TRADUCTION] « conférer un pouvoir général » aux municipalités dans les domaines qui leur sont attribués. Deuxièmement, admettre cette distinction entre domaines de compétence et pouvoirs enlève toute utilité à l'expression [TRADUCTION] « [s]ans que soit limitée la portée générale de l'article 7 » dans le passage introductif de l'art. 8. Les articles 7 et 8 doivent plutôt être lus ensemble, l'un ne devant pas limiter la portée de l'autre. L'article 8, qui complète l'art. 7, traite du « pouvoir général » mentionnée à l'art. 9. Selon cette interprétation des art. 7, 8 et 9, la position des intimés doit être rejetée parce que leur interprétation restrictive et littérale de l'art. 8 limite effectivement la portée de l'art. 7, qui confère le pouvoir de réglementer les activités commerciales.

13 Applying a broad and purposive interpretation, ss. 7 and 8 grant the City the power to pass bylaws limiting the number of taxi plate licences. As discussed, s. 8 supplements s. 7 by illustrating some of the broad powers exercisable by a municipality. Here the power to limit the number of licences could fall under either s. 8(a), the power to regulate, or s. 8(c), the power to provide for a system of licences. To "regulate", as defined in the *Oxford English Dictionary* (2nd ed. 1989), vol. XIII, is "subject to . . . restrictions". Thus, as O'Leary J.A. in dissent aptly stated, the "jurisdiction to regulate the taxi business necessarily implies the authority to limit the number of TPLs [taxi plate licences] issued": para. 202. This accords with the legislative history.

14 The power to limit the issuance of licences also falls under the power to provide for a system of licences under s. 8(c). Sections 8(c)(i) through (vi) represent some of the types of bylaws that provide for a system of licences. The use of the word "including" indicates that the list is non-exhaustive; therefore, any type of bylaw that is consistent with the list is authorized. There is clearly no room for the application of the *expressio unius est exclusio alterius* principle advocated by the respondents. Common to each of the provisions is the power to impose limitations on licences such as setting out the conditions that must be satisfied before a licence is granted or renewed. The bylaw limiting the number of taxi plate licences is consistent with the examples provided as it also imposes a specific limit on a licensed activity.

15 The respondents have also argued that the bylaw is inconsistent with the right to enjoyment of property protected by the *Alberta Bill of Rights*, R.S.A. 2000, c. A-14, s. 1, and with s. 3 of the *Municipal Government Act* which provides that the purposes of municipalities are good governance and the development and maintenance of safe and viable communities. Both arguments relate to the effects of the bylaw which the respondents allege have transformed taxi licences into an expensive commodity benefiting a small group of brokers.

L'application d'une interprétation téléologique large permet de conclure que les art. 7 et 8 habilitent la Ville à prendre des règlements limitant le nombre de plaques de taxi. Comme nous l'avons vu, l'art. 8 complète l'art. 7 en donnant quelques exemples du pouvoir général dont est dotée une municipalité. En l'espèce, le pouvoir de limiter le nombre de permis pourrait découler soit du pouvoir de réglementer, prévu à l'al. 8a), soit du pouvoir d'établir un régime de permis, prévu à l'al. 8c). Le terme « réglementer », selon *Le Nouveau Petit Robert* (2003), p. 2218, signifie « [a]ssujettir à un règlement ». Et comme le dit si bien le juge O'Leary dans sa dissidence, le [TRADUCTION] « pouvoir de réglementer le secteur des taxis comporte nécessairement le pouvoir de limiter le nombre de plaques de taxi délivrées » : par. 202. Cela concorde avec l'historique législatif.

Le pouvoir de limiter le nombre de permis découle également du pouvoir d'établir un régime de permis en vertu de l'al. 8c). Les sous-alinéas 8c)(i) à (vi) représentent quelques types de règlements établissant un régime de permis. L'emploi du terme « notamment » indique que la liste n'est pas exhaustive; par conséquent, tout type de règlement compatible avec la liste est autorisé. Il n'est clairement pas possible d'appliquer le principe défendu par les intimés selon lequel la mention de l'un implique l'exclusion de l'autre. Le pouvoir d'assortir de restrictions la délivrance de permis en prévoyant, par exemple, les conditions d'octroi ou de renouvellement, est commun à chacune des dispositions. Le règlement limitant le nombre de plaques de taxi est compatible avec les exemples fournis en ce qu'il impose aussi une limite précise à une activité autorisée.

Les intimés ont également fait valoir que le règlement porte atteinte à leur droit à la jouissance de leurs biens garanti par l'art. 1 de l'*Alberta Bill of Rights*, R.S.A. 2000, ch. A-14, et qu'il allait à l'encontre de l'art. 3 de la *Municipal Government Act*, qui précise que les municipalités ont pour objets d'assurer un bon gouvernement et de créer et de maintenir des collectivités sûres et viables. Ces deux arguments ont trait aux effets du règlement, lequel aurait, selon les intimés, transformé le permis de taxi en un produit coûteux qui profite à un petit groupe de courtiers.

As noted earlier in these reasons, there is no challenge before this Court to the legislation based on the *Charter* and no record to support the allegation now being made that the *Alberta Bill of Rights* has been breached. This Court in *Bell ExpressVu*, *supra*, at para. 62, held that absent any challenge on constitutional grounds, courts are bound to interpret and apply statutes in accordance with the sovereign intent of the legislature. In this case, I find no ambiguity in the legislation that would bring me to consider whether the Act is reflective of *Charter* values and no reason to question the authority of the Council for the City of Calgary to decide the best interests of its citizens in the regulation of the taxi industry. Here, as in *Bell ExpressVu*, some citizens are affected by the restrictions imposed, but this has no bearing on the jurisdiction of the municipal government to regulate.

Accordingly, the City of Calgary was authorized under the Act to enact Bylaw 91/77.

IV. Conclusion

The appeal is allowed with costs throughout.

Appeal allowed with costs.

Solicitor for the appellant: City of Calgary Law Department, Calgary.

Solicitors for the respondents United Taxi Drivers' Fellowship of Southern Alberta, Rashpal Singh Gosal and Haringer Singh Dhesi: Dale Gibson & Associates, Edmonton.

Solicitors for the respondent Air Linker Cab Ltd.: Zinner & Sara, Calgary.

Solicitor for the intervener: Attorney General of Alberta, Edmonton.

16 Comme je l'ai mentionné au début de mes motifs, la loi ne fait l'objet d'aucune contestation, devant la Cour, fondée sur la *Charte*, et aucun document n'a été soumis à l'appui de l'allégation de violation de l'*Alberta Bill of Rights* qui est maintenant soulevée. Dans *Bell ExpressVu*, précité, par. 62, la Cour a statué qu'en l'absence de contestation fondée sur des motifs d'ordre constitutionnel, les tribunaux ne peuvent qu'interpréter et appliquer les textes législatifs selon l'intention souveraine du législateur. En l'espèce, je ne vois aucune ambiguïté dans la loi qui m'oblige à me demander si elle respecte les valeurs véhiculées par la *Charte*, et aucune raison de mettre en doute la compétence du conseil de la Ville de Calgary pour décider du meilleur intérêt de ses citoyens en matière de réglementation du secteur des taxis. En l'espèce, comme dans *Bell ExpressVu*, certains citoyens sont touchés par les limites imposées, mais cela n'a aucune incidence sur la compétence du gouvernement municipal en matière de réglementation.

17 En conséquence, la Ville de Calgary était habilitée par la loi à édicter le règlement 91/77.

IV. Conclusion

18 Le pourvoi est accueilli avec dépens dans toutes les cours.

Pourvoi accueilli avec dépens.

Procureur de l'appelante : Contentieux de la Ville of Calgary, Calgary.

Procureurs des intimés United Taxi Drivers' Fellowship of Southern Alberta, Rashpal Singh Gosal et Haringer Singh Dhesi : Dale Gibson & Associates, Edmonton.

Procureurs de l'intimée Air Linker Cab Ltd. : Zinner & Sara, Calgary.

Procureur de l'intervenant : Procureur général de l'Alberta, Edmonton.

TAB 7

Enactments always speaking

9 An enactment shall be construed as always speaking and shall be applied to circumstances as they arise.

RSA 1980 cI-7 s9

Enactments remedial

10 An enactment shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects.

RSA 1980 cI-7 s10

Enacting clause

11 The words "HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:" indicate the authority by virtue of which an Act is passed.

RSA 1980 cI-7 s11

Preambles and reference aids

12(1) The preamble of an enactment is a part of the enactment intended to assist in explaining the enactment.

(2) In an enactment,

(a) tables of contents,

(b) marginal notes and section headers, and

(c) statutory citations after the end of a section or schedule

are not part of the enactment, but are inserted for convenience of reference only.

RSA 2000 cI-8 s12;2002 c17 s3

Definitions and interpretation provisions

13 Definitions and other interpretation provisions in an enactment

(a) are applicable to the whole enactment, including the section containing the definitions or interpretation provisions, except to the extent that a contrary intention appears in the enactment, and

(b) apply to regulations made under the enactment except to the extent that a contrary intention appears in the enactment or in the regulations.

RSA 1980 cI-7 s13

(zz) "Registrar of Land Titles" means the Registrar within the meaning of the *Land Titles Act*;

(zz.1) "spouse" means the spouse of a married person;

(aaa) "statutory declaration" or "solemn declaration" means a solemn declaration made under section 18 of the *Alberta Evidence Act* or section 14 of the *Canada Evidence Act* (Canada);

(bbb) repealed RSA 2000 c16(Supp) s49;

(ccc) "territories", when used as meaning the territories of Canada, means the Northwest Territories, the Yukon Territory and Nunavut;

(ddd) "treasury branch" means a treasury branch within the meaning of the *Alberta Treasury Branches Act*;

(eee) "trust corporation" means a trust corporation registered under the *Loan and Trust Corporations Act*;

(fff) "village" includes summer village;

(ggg) "will" means a will as defined in the *Wills and Succession Act*;

(hhh) "writ of enforcement" means a writ of enforcement under the *Civil Enforcement Act;*

(iii) "writ proceedings" means writ proceedings as defined in the *Civil Enforcement Act*;

(jjj) "writing", "written" or any similar term includes words represented or reproduced by any mode of representing or reproducing words in visible form.

(2) In an enactment,

(a) "hereafter" shall be construed as referring to the time after the commencement of the enactment containing that word;

(b) "herein" used in a section or part of an enactment shall be construed as referring to the whole enactment and not to that section or part only;

(c) "may" shall be construed as permissive and empowering;

(d) "must" is to be construed as imperative;

TAB 8

In the Court of Appeal of Alberta

Citation: Lloyds Bank Canada v. International Warranty Company Limited, 1989 ABCA 155

Date: 19890613
Docket: 8903-0223-AC & 8903-0224-AC
Registry: Edmonton

Between:

Lloyds Bank Canada

Claimant
Appellant

- and -

International Warranty Company Limited

Debtor

And Between:

Attorney General of Canada

Claimant
Respondent

- and -

International Warranty Company Limited

Debtor

And Between:

Province of Alberta
Treasury Branches and Coopers & Lybrand Limited

Applicants
(Appellants)

- and -

CTS Western Ltd., Her Majesty the Queen in Right of Canada as represented by the Minister of Revenue Canada Taxation and Esso Resources Canada Limited

Respondents

(Respondents)

The Court:

The Honourable Mr. Justice Foisy
The Honourable Mr. Justice Stratton
The Honourable Mr. Justice Irving

Memorandum of Judgment

COUNSEL:

M.J. McCabe, Esq. and Ms. M. Whittaker, for the Appellant

R.K. Moen, Esq., for the Respondent

R.T.G. Reeson, Esq., for the Appellants

R.K. Moen, Esq., for the Respondents

MEMORANDUM OF JUDGMENT

STRATTON, J.A.:

[1] The issue in these two appeals involves the determination of entitlement to certain funds wherein Revenue Canada is the competing creditor in the first named action against the Appellant, Lloyds Bank Canada ("Lloyds") and in the second action, against the Appellant, Alberta Treasury Branches ("Treasury Branch"). Lloyds and Treasury Branch hold as security Assignments of Book Debts from their respective debtors. Revenue Canada claims priority in each case under the provisions of the Income Tax Act ("the Act") and the principal basis of its claim is common to both appeals.

[2] The applications to Queen's Bench which launched the proceedings were under the respective statutes noted in the above styles of cause; however it is sufficient for our purposes to simply note that each statute properly authorized an application to Queen's Bench to settle the competing claims.

[3] In chambers and before us the cases were heard together. The learned chambers judge framed his written reasons in terms of the Lloyds appeal but noted that his reasons "would apply mutatis mutandis" to the Treasury Branch appeal. I will follow the same format in

that this Memorandum of Judgment will refer mainly to the facts and parties involved in the Lloyds appeal.

[4] Soon after ceasing business operations, International Warranty Company Limited (I.W.) paid salaries to its employees out of anaccount in its name at the Toronto Dominion Bank. The required withholding sum of $53,870.68 was not paid to Revenue Canada. At all material times I.W. was indebted to Lloyds in the amount of 1.75 million dollars and had given to Lloyds an Assignment of Book Debts to secure that debt.

[5] It is common ground that the funds of I.W. which are subject to the dispute between Lloyds and Revenue Canada were either held by the Toronto Dominion Bank or, for the purposes of these proceedings, treated as being held by it.

[6] The material parts of section 224 of the Act are:

> "224.(1) Where the Minister has knowledge or suspects that a person is or will be, within 90 days, liable to make a payment to another person who is liable to make a payment under this Act (in this section referred to as the "tax debtor"), he may, by registered letter or by a letter served personally, require that person to pay forthwith, where the moneys are immediately payable, and, in any other case, as and when the moneys become payable, the moneys otherwise payable to the tax debtor in whole or in part to the Receiver General on account of the tax debtor's liability under this Act.
>
> (the underlining is mine)
>
> *** ***
>
> (1.2) Notwithstanding any other provision of this Act, the *Bankruptcy Act,* any other enactment of Canada, any enactment of a province or any law, where the Minister has knowledge or suspects that a particular person is or will become, within 90 days, liable to make a payment
>
> (a) to another person who is liable to pay an amount assessed under subsection 227 (10.1) or a similar provision, or to a legal representative of that other person (each of whom is in this subsection referred to as the "tax debtor"), or
>
> (b) to a secured creditor who has a right to receive the payment that, but for a security interest in favour of the secured creditor, would be payable to the tax debtor, the Minister may, by registered letter or by a letter served personally, require the particular person to pay forthwith, where the moneys are immediately payable, and in any other case, as and when the moneys become payable, the moneys otherwise payable to the tax debtor or the secured creditor in whole or in part to the Receiver General on account of the tax debtor's liability under subsection 227(10.1) or a similar provision.
>
> (1.3) in subsection (1.2),

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

'security interest' means any interest in property that secures payment or performance of an obligation and includes an interest created by or arising out of a debenture mortgage, hypothec, lien, pledge, charge, deemed or actual trust, assignment or encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for;

(4) Subsections (1) to (3) are applicable to assessments in respect of amounts that are deducted or withheld after the day on which this Act is assented to."

[7] On January 28, 1988 Revenue Canada served upon the Toronto Dominion Bank a written "Requirement to Pay" pursuant to section 224(1.2)(b).

[8] It is not disputed that I.W. was legally responsible for the withholding funds claimed by Revenue Canada.

[9] In finding in favour of Revenue Canada the learned chambers judge considered section 224(1.2) to have a "plain meaning that is unambiguous". Later in his judgment he said:

> Section 224(1.2) "… empowers the Minister by letter to require a person (here, the Toronto-Dominion Bank) to pay ' moneys otherwise payable to … the secured creditor … to the Receiver General on account of the tax debtor's liability …' If there are moneys that are otherwise payable to a secured creditor, it is clear that those moneys must be paid not to the secured creditor but to the Receiver General, and that the moneys are not to be held for some such purpose as safekeeping while entitlement is decided, but 'on account of the tax debtor's liability'. In other words, the section clearly provides by implication that the moneys so paid become the property of the Crown; there is no other way that the tax debtor's liability could be satisfied."

[10] With the greatest respect we disagree. In particular we do not agree that the section has the "plain meaning that is unambiguous" attributed to it by the learned chambers judge. For Revenue Canada to succeed the plain and unambiguous meaning of the section must be that it deprives a properly secured creditor, in this case Lloyds, of all or part of its security without compensation, for the purpose of paying another debt entirely unrelated to the security. It is surely equivalent to the transfer of proprietary rights without compensation.

[11] In *Homeplan Realty Ltd. v. Avco Financial Services* (1977) 81 D.L.R. (3d) 289 (affirmed by S.C.C. (1979) 33 C.B.R. (N.S.) 34) the B.C. Court of Appeal had for

consideration a claim for priority under a provincial statute, which constituted a claim by an employee for wages, if certified under the act, as being payable "in priority over any other claim or right - including - every mortgage of real or personal property". Robertson, J.A. had this to say at p. 292:

> "If the Legislative Assembly intends to produce by statute results that are so brutal and piratical, it has the power to do so, but the Courts will hold that that was its intention only if the language of the statute compels that interpretation.
>
> In *Craies on Statute Law,* 6th ed. (1963), this is said at p. 118:
>
> > As Brett M.R. said in *Att.-Gen. v. Horner* (1884) 14 Q.B.D. 245, 257: 'It is a proper rule of construction not to construe an Act of Parliament as interfering with or injuring persons' rights without compensation unless one is obliged to so construe it.' Therefore rights, whether public or private, are not to be taken away, or even hampered, by mere implication from the language used in a statute, unless, as Fry, J. said in Mayor, etc. of *Yarmouth v. Simmons* (1879) 10 Ch.D. 518, 527, 'the legislature clearly and distinctly authorises the doing of something which is physically inconsistent with the continuance of an existing right.'

[12] This same concept was expressed in Maxwell, Interpretation of Statutes, 11th ed., 1962, p. 276 as follows:

> "Proprietary rights should not be held to be taken away by Parliament without provision for compensation unless the legislature has so provided in clear terms. It is presumed, where the objects of the Act do not obviously imply such an intention, that the legislature does not desire to confiscate the property or to encroach upon the right of persons, and it is therefore expected that, if such be its intention, it will manifest it plainly if not in express words at least by clear implication and beyond reasonable doubt."
>
> (the emphasis is mine)

[13] As noted above, the learned trial judge was of the view that s. 224(1.2) clearly provided by implication that the moneys paid in response to Revenue Canada's "Requirement to Pay" became the property of the Crown. This conclusion is not in accord with prior decisions of this court.

[14] In *Lemarre*; *University* of *Calgary v. Morrison and Reveiver General of Canada* [1978], 2 W.W.R. 465, the Minister of National Revenue made a demand, similar to the one given in the present case, under the then applicable section of the *Income Tax Act,* namely 224(1). The question there was whether the demand took precedence over an assignment in bankruptcy. Section 224(1) then read as follows:

> "224. (1) When the Minister has knowledge or suspects that a person is or is about to become indebted or liable to make any payment to a person liable to make a payment

under this Act, he may, by registered letter or by a letter served personally, require him to pay the moneys otherwise payable to that person in whole or in part to the Receiver General of Canada on account of the liability under this Act."

[15] It will be noted that the words I have underlined are, for all practical purposes, identical to the words I have underlined in the section here under review (supra). Thus the difference between these two sections is not of significance for our purposes. In giving judgment of the court in *Lemarre,* Prowse, J.A. pointed out that section 224(1) seemed to neither create a trust nor pass property to the minister. At p. 469 he said:

"The distinction between garnishee proceedings and the remedy afforded the minister is that the demand need not be issued in judicial proceedings and, further, the demand is broader in scope as it attaches payments arising out of a debt or a liability. The property in the debt or liability when due or determined is not impressed with a trust nor is it transferred to the minister."

(the emphasis is mine)

[16] In *Attorney General of Canada v. Royal Bank of Canada* [1979], 1 W.W.R. 479, McGillivray, C.J.A., in writing for the court, expressly followed the decision in Lemarre:

"We are all of the view that the decision of this court in *University of Calgary v. Receiver Gen. of Can.,* [1978] 2 W.W.R. 465, 27 C.B.R. (N.S.) 41, 85 D.L.R. (3d) 392, 8 A.R. 533, enunciated two propositions: firstly, a demand made under s. 224 does not convey the indebtedness to the Crown, nor does it impress it with a trust; and, secondly, the minister does not, by virtue of the demand, become a holder of a security. In short, the Crown does not acquire an equitable interest in the indebtedness."

(pages 479 - 480)

[17] Following the decisions in *Lemarre* and the *Royal Bank* I am of the view that the proceedings under s. 224(1.2) are at the most a form of extra-judicial attachment which could bring the funds in question into the custody of Revenue Canada. The section falls short of effecting the transfer of property in the funds or establishing priority of Revenue Canada's claim. Something further is required to accomplish either purpose.

[18] As pointed out by the learned trial judge a 1986 amendment to the *Income Tax Act,* which was never proclaimed, would have "made the Crown's position impregnable" on this point. This section, if it had been proclaimed, would have established the priority of Revenue Canada which, as I have said, s. 224(1.2) fails to do. The unproclaimed section reads as follows:

"(10.2) Notwithstanding any other provision of this Act, any other enactment of Canada, any enactment of a Province or any law where a person has been assessed under

subsection (10.1) or a similar provision the amount determined under subsection (10.3) is secured by a charge upon the property referred to in subsection (10.4) and the charge has priority over all other claims and all other security interests."

[19] In accordance with the understanding above mentioned, my conclusion applies equally to the Treasury Branch appeal.

[20] In the Lloyds appeal, Revenue Canada raised a further argument not applicable to the Treasury Branch appeal; nor was it dealt with in the judgment of the learned chambers judge. The basis of this argument is International Warranty's letters of January 4, 1988 to the Toronto Dominion Bank directing payment of certain of its funds held by that bank to pay to the Receiver General for "employee benefits". The letter also purported to give notice that the "said funds are intended for the Receiver General and are being held in trust" by the bank for that purpose. Revenue Canada argued that a specific trust was established by International Warranty for the purposes of payment of employee benefits and that Lloyds waived its right under its assignment of book debts to give effect to that trust. We reject that contention. We can find from the material before us no evidence of Lloyds' waiver of its rights under its security and, as pointed out by counsel for Lloyds, International Warranty cannot validly create a trust covering moneys earlier secured by it unless that trust be made subject to that prior security.

[21] The reasons for judgment of the learned chambers judge, dated January 19, 1989 (which we have just considered) by its express terms, did not cover funds claimed by Revenue Canada other than those sufficient to cover the penalty imposed by it upon International Warranty for non payment. He subsequently issued supplementary reasons for judgment on May 11, 1989 following further submissions by counsel. Because of the conclusions we have reached with respect to the January 19, 1989 judgment it is unnecessary to deal separately with the supplementary reasons.

[22] In the result we allow both the Lloyds and Treasury Branch appeals. In the Lloyds appeal, I direct the sheriff of the Judicial District of Edmonton to pay to Lloyds the funds held by him in those proceedings. In the Treasury Branch appeal, Esso Resources is hereby directed to pay to the Treasury Branch the funds held by it in those proceedings.

[23] Costs here and in the court below will follow the event.

DATED at EDMONTON, Alberta
this 13th day of June,
A.D. 1989

TAB 9

Her Majesty The Queen *Appellant*

v.

Royal Bank of Canada *Respondent*

INDEXED AS: ROYAL BANK OF CANADA *v.* SPARROW ELECTRIC CORP.

File No.: 24713.

1996: June 19; 1997: February 27.

Present: La Forest, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Crown — Priority — Employee source deductions not paid by company in receivership — Company's inventory subject to fixed charge and to Bank Act security — Whether bank had priority to proceeds of sale of inventory over statutory trust in favour of Her Majesty — Bank Act, S.C. 1991, c. 46, s. 427 — Income Tax Act, R.S.C., 1985, c. 1 (5th Supp.), ss. 153, 227(4), (5) — Personal Property Security Act, S.A. 1988, c. P-4.05, s. 28(1).

Banks and banking operations — Security — Company's inventory subject to fixed charge and to Bank Act security — Employee source deductions not paid by company in receivership — Whether bank had priority to proceeds of sale of inventory over statutory trust in favour of Her Majesty — Bank Act, S.C. 1991, c. 46, s. 427 — Income Tax Act, R.S.C., 1985, c. 1 (5th Supp.), ss. 153, 227(4), (5) — Personal Property Security Act, S.A. 1988, c. P-4.05, s. 28(1).

The Royal Bank secured a loan made to Sparrow Electric with a general security agreement (GSA) covering Sparrow's present and after-acquired property and with *Bank Act* security (BAS) created by an assignment of inventory under s. 427 of the *Bank Act*. When Sparrow experienced financial difficulties, a standstill agreement was executed. This agreement allowed Sparrow to continue its business but permitted the bank, on default, to appoint a receiver and enforce its security. A receiver

Sa Majesté la Reine *Appelante*

c.

Banque Royale du Canada *Intimée*

RÉPERTORIÉ: BANQUE ROYALE DU CANADA *c.* SPARROW ELECTRIC CORP.

N° du greffe: 24713.

1996: 19 juin; 1997: 27 février.

Présents: Les juges La Forest, Sopinka, Gonthier, Cory, McLachlin, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL DE L'ALBERTA

Couronne — Priorité de rang — Retenues sur la paye d'employés non versées par la compagnie sous séquestre — Biens figurant dans l'inventaire de la compagnie assujettis à un privilège fixe et à une garantie de la Loi sur les banques — La banque avait-elle priorité de rang sur la fiducie légale constituée en faveur de Sa Majesté relativement au produit de la vente des biens figurant dans l'inventaire — Loi sur les banques, L.C. 1991, ch. 46, art. 427 — Loi de l'impôt sur le revenu, L.R.C. (1985), ch. 1 (5e suppl.), art. 153, 227(4), (5) — Personal Property Security Act, S.A. 1988, ch. P-4.05, art. 28(1).

Banques et opérations bancaires — Garantie — Biens figurant dans l'inventaire de la compagnie assujettis à un privilège fixe et à une garantie de la Loi sur les banques — Retenues sur la paye d'employés non versées par la compagnie sous séquestre — La banque avait-elle priorité de rang sur la fiducie légale constituée en faveur de Sa Majesté relativement au produit de la vente des biens figurant dans l'inventaire — Loi sur les banques, L.C. 1991, ch. 46, art. 427 — Loi de l'impôt sur le revenu, L.R.C. (1985), ch. 1 (5e suppl.), art. 153, 227(4), (5) — Personal Property Security Act, S.A. 1988, ch. P-4.05, art. 28(1).

La Banque Royale a garanti un prêt consenti à Sparrow Electric au moyen d'une convention de garantie générale (CGG) portant sur les biens que Sparrow possédait alors ou qu'elle acquerrait par la suite, et au moyen d'une garantie de la *Loi sur les banques* (GLB) résultant d'une cession des biens figurant dans l'inventaire de l'entreprise, consentie en vertu de l'art. 427 de la *Loi sur les banques*. Lorsque Sparrow a éprouvé des difficultés financières, un moratoire a été conclu. Ce

was appointed in November 1992 at which time it was discovered that Sparrow had not been remitting its payroll deductions as required by s. 153 of the *Income Tax Act* (*ITA*). It is probable that these defaults had occurred in 1992. In January 1993, the receiver received court permission to sell Sparrow's assets. An amount from the proceeds of sale equivalent to that owing the federal government was ordered to be held in trust pending resolution as to entitlement. The bank claimed priority based on its GSA and its BAS, which entitled it to inventory proceeds. The federal government's claim was based on the s. 227 *ITA* deemed trust provisions, which created a deemed statutory trust in the moneys deducted from wages but not remitted to Her Majesty.

On the first application to determine priority, the deemed trust was held to take priority over the GSA. On a subsequent application by the bank for a determination of whether its BAS took priority over the deemed trust, the Court of Queen's Bench found that the deemed trust took priority. The Court of Appeal found that the BAS took priority over the deemed trust. At issue here is whether the s. 227(5) *ITA* deemed trust takes priority over a previously executed GSA and a previously executed BAS with respect to the proceeds of the sale of the inventory.

Held (La Forest, Gonthier and Cory JJ. dissenting): The appeal should be dismissed.

(1) *Section 227(4) and (5) of the Income Tax Act*

Although the employer, at the point of withholding, becomes the trustee of a fund which is in law the property of its employee, s. 227(4) *ITA* has the effect of making Her Majesty the beneficiary under that trust. A conceptual difficulty arises when the tax debtor fails to set aside moneys which are to be remitted. The subject of Her Majesty's beneficial interest at that point becomes intermingled with the general assets of the tax debtor and Her Majesty's claim then becomes that of a beneficiary under a non-existent trust. Subsections (4) and (5) of s. 227 resolve this conceptual dilemma by clearly and unambiguously rendering amounts unremitted as held in

moratoire permettait à Sparrow de poursuivre ses activités, mais autorisait la banque, en cas de défaut de la part de Sparrow, à nommer un séquestre et à réaliser sa garantie. Un séquestre a été nommé en novembre 1992, au moment où on a découvert que Sparrow avait omis de verser les retenues sur la paye qu'elle avait effectuées et qu'elle était tenue de verser en vertu de l'art. 153 de la *Loi de l'impôt sur le revenu* (*LIR*). Il est probable que ces omissions sont survenues en 1992. En janvier 1993, le séquestre a obtenu une autorisation judiciaire de vendre des éléments d'actifs de Sparrow. Il a été ordonné qu'un montant tiré du produit de la vente et équivalant à la somme due au gouvernement fédéral soit détenu en fiducie jusqu'à ce que l'on ait décidé qui y aurait droit. La banque a revendiqué une priorité de rang fondée sur sa CGG et sa GLB, qui lui donnait droit au produit de la vente des biens figurant dans l'inventaire. La demande du gouvernement fédéral était fondée sur les dispositions en matière de fiducie réputée de l'art. 227 *LIR*, qui créaient une fiducie légale réputée relativement aux retenues sur la paye non versées à Sa Majesté.

À la suite de la première demande de détermination de l'ordre de priorité, il a été conclu que la fiducie réputée avait priorité de rang sur la CGG. Lors d'une demande subséquente présentée par la banque en vue de faire déterminer si la GLB qu'elle détenait avait priorité de rang sur la fiducie réputée, la Cour du Banc de la Reine a statué que la fiducie réputée avait priorité de rang. La Cour d'appel a décidé que la GLB avait priorité sur la fiducie réputée. Il s'agit en l'espèce de savoir si la fiducie réputée détenue en vertu du par. 227(5) *LIR* a priorité de rang sur une CGG et une GLB antérieures, quant au produit de la vente des biens figurant dans l'inventaire.

Arrêt (les juges La Forest, Gonthier et Cory sont dissidents): Le pourvoi est rejeté.

(1) *Les paragraphes 227(4) et (5) de la Loi de l'impôt sur le revenu*

Quoique l'employeur devienne, au moment d'effectuer les retenues, le fiduciaire de sommes qui, en droit, appartiennent à ses employés, le par. 227(4) *LIR* a pour effet de faire de Sa Majesté le bénéficiaire de cette fiducie. Une difficulté conceptuelle survient lorsque le débiteur fiscal omet de mettre de côté les sommes qui doivent être versées. L'objet du droit que Sa Majesté possède à titre bénéficiaire se confond alors avec l'ensemble de l'actif du débiteur fiscal et la créance de Sa Majesté devient alors celle d'un bénéficiaire d'une fiducie inexistante. Ce dilemme conceptuel est résolu par les par. 227(4) et (5) qui prévoient clairement et nettement

the security interest in the inventory. It seems to me that as a result of the enactment of the *PPSA*, something more than an unadorned licence to sell is needed to justify the conclusion that a creditor intended to abridge considerably its security interest in inventory.

And so I conclude that the licence to sell inventory is not an exception to the respondent's fixed and specific charge against the debtor's inventory. To hold otherwise would be to eviscerate the respondent's security interest. This is not to say, however, that Parliament could not legislate otherwise. Parliament has shown that it knows how to assert priority over rival security interests. See *Alberta (Treasury Branches) v. M.N.R.; Toronto-Dominion Bank v. M.N.R.*, [1996] 1 S.C.R. 963, at p. 975. All that is needed to overtake a fixed and specific charge is clear language to that effect.

Though I consider the above legal arguments sufficient to dispose of this appeal, I observe that policy considerations also tell in favour of the conclusion I have reached.

In this respect, the first thing to notice is that the security agreement that the debtor and the respondent had in this case is an example of a very common and important financing device. To a considerable extent, commerce in our country depends on the vitality of such agreements. As several leading academics have observed, the amounts at stake run into the billions of dollars each year. And though not every creditor seeks security, the incentives to do so are powerful. See Jacob S. Ziegel, Benjamin Geva and R. C. C. Cuming, *Commercial and Consumer Transactions* (Rev. 2nd ed. 1990), at pp. 957-60. Accordingly, tinkering with security interests is a dangerous business. The risks of judicial innovation in this neighbourhood of the law are considerable.

lattitude que nous pour interpréter la permission de vendre comme un consentement tacite à la réduction de la garantie sur les biens figurant dans l'inventaire. Il me semble que, par suite de l'adoption de la *PPSA*, il faut plus qu'une simple permission de vendre pour justifier la conclusion qu'un créancier a voulu réduire considérablement la garantie qu'il possède sur les biens figurant dans un inventaire.

106 C'est ainsi que je conclus que la permission de vendre les biens figurant dans l'inventaire du débiteur n'est pas une exception au privilège fixe et spécifique que l'intimée détient sur ces biens. Conclure le contraire ferait perdre tout son sens à la garantie de l'intimée. Cela ne veut pas dire, toutefois, que le législateur fédéral ne pourrait pas légiférer autrement. Celui-ci a montré qu'il sait comment revendiquer la priorité de rang sur des garanties opposées. Voir *Alberta (Treasury Branches) c. M.R.N.; Banque Toronto-Dominion c. M.R.N.*, [1996] 1 R.C.S. 963, à la p. 975. Tout ce qui est nécessaire pour devancer un privilège fixe et spécifique est un langage clair en ce sens.

107 Bien que je considère que les arguments juridiques susmentionnés sont suffisants pour trancher le présent pourvoi, je constate que des considérations de principe militent également en faveur de la conclusion à laquelle je suis parvenu.

108 À cet égard, la première chose à noter est que la convention de garantie liant le débiteur et l'intimée en l'espèce est un exemple de mécanisme de financement très courant et important. Le commerce, dans notre pays, dépend en grande partie de la vitalité de ces conventions. Comme plusieurs auteurs importants l'ont fait remarquer, les sommes en jeu s'élèvent à des milliards de dollars chaque année, et même si les créanciers ne demandent pas tous des garanties, des facteurs puissants les incitent à le faire. Voir Jacob S. Ziegel, Benjamin Geva et R. C. C. Cuming, *Commercial and Consumer Transactions* (2e éd. rév. 1990), aux pp. 957 à 960. Il est donc dangereux de remanier des garanties. L'innovation judiciaire dans ce domaine du droit comporte des risques considérables.

TAB 10

CanLII

Income Tax Act, RSC 1985, c 1 (5th Supp)

This Act was amended by several enactments which came into force retroactively. This may cause some versions to contain changes which did not occur exactly at the dates shown.

Current version: in force since Jun 21, 2018

Link to the latest version:	http://canlii.ca/t/7vb7
Stable link to this version:	http://canlii.ca/t/5390q
Citation to this version:	Income Tax Act, RSC 1985, c 1 (5th Supp), <http://canlii.ca/t/5390q> retrieved on 2019-01-11
Currency:	This statute is current to 2018-12-12 according to the Justice Laws Web Site

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(11) A sheriff or other person who is unable, by reason of subsection 223(9) or 223(10), to comply with any law or rule of court is bound by any order made by a judge of the Federal Court, on an *ex parte* application by the Minister, for the purpose of giving effect to the proceeding, charge, lien, priority or binding interest.

Deemed security

(11.1) When a charge, lien, priority or binding interest created under subsection 223(6) by filing, registering or otherwise recording a memorial under subsection 223(5) is registered in accordance with subsection 87(1) of the *Bankruptcy and Insolvency Act*, it is deemed

(a) to be a claim that is secured by a security and that, subject to subsection 87(2) of that Act, ranks as a secured claim under that Act; and

(b) to also be a claim referred to in paragraph 86(2)(a) of that Act.

Details in certificates and memorials

(12) Notwithstanding any law of Canada or of a province, in any certificate made under subsection 223(2) in respect of a debtor, in any memorial evidencing the certificate or in any writ or document issued for the purpose of collecting an amount certified, it is sufficient for all purposes

(a) to set out, as the amount payable by the debtor, the total of amounts payable by the debtor without setting out the separate making up that total; and

(b) to refer to the rate of interest to be charged on the separate amounts making up the amount payable in general terms as interest at the rate prescribed under this Act applicable from time to time on amounts payable to the Receiver General without indicating the specific rates of interest to be charged on each of the separate amounts or to be charged for any particular period of time.

NOTE: Application provisions are not included in the consolidated text; see relevant amending Acts. R.S., 1985, c. 1 (5th Supp.), s. 223; 1994, c. 7, Sch. VIII, s. 129; 1996, c. 23, s. 187; 1998, c. 19, s. 224; 2000, c. 30, s. 175(E); 2013, c. 34, s. 160.

Application of ss. 223(1) to (8) and (12)

223.1 (1) Subsections 223(1) to 223(8) and 223(12) are applicable with respect to certificates made under section 223 or section 223 of the *Income Tax Act*, chapter 148 of the Revised Statutes of Canada, 1952, after 1971 and documents evidencing such certificates that were issued by the Federal Court and that were filed, registered or otherwise recorded after 1977 under the laws of a province, except that, where any such certificate or document was the subject of an action pending in a court on February 10, 1988 or the subject of a court decision given on or before that date, section 223 shall be read, for the purposes of applying it with respect to that certificate or document, as section 223 of the *Income Tax Act*, chapter 148 of the Revised Statutes of Canada, 1952, read at the time the certificate was registered or the document was issued, as the case may be.

Application of ss. 223(9) to (11)

(2) Subsections 223(9) to 223(11) are applicable with respect to certificates made under section 223, or section 223 of the *Income Tax Act*, chapter 148 of the Revised Statutes of Canada, 1952, after September 13, 1988.

NOTE: Application provisions are not included in the consolidated text; see relevant amending Acts. 1988, c. 55, s. 168.

Garnishment

224 (1) Where the Minister has knowledge or suspects that a person is, or will be within one year, liable to make a payment to another person who is liable to make a payment under this Act (in this subsection and subsections 224(1.1) and 224(3) referred to as the "tax debtor"), the Minister may in writing require the person to pay forthwith, where the moneys are immediately payable, and in any other case as and when the moneys become payable, the moneys otherwise payable to the tax debtor in whole or in part to the Receiver General on account of the tax debtor's liability under this Act.

Idem

(1.1) Without limiting the generality of subsection 224(1), where the Minister has knowledge or suspects that within 90 days

(a) a bank, credit union, trust company or other similar person (in this section referred to as the "institution") will lend or advance moneys to, or make a payment on behalf of, or make a payment in respect of a negotiable instrument issued by, a tax debtor who is indebted to the institution and who has granted security in respect of the indebtedness, or

(b) a person, other than an institution, will lend or advance moneys to, or make a payment on behalf of, a tax debtor who the Minister knows or suspects

(i) is employed by, or is engaged in providing services or property to, that person or was or will be, within 90 days, so employed or engaged, or

(ii) where that person is a corporation, is not dealing at arm's length with that person,

the Minister may in writing require the institution or person, as the case may be, to pay in whole or in part to the Receiver General on account of the tax debtor's liability under this Act the moneys that would otherwise be so lent, advanced or paid and any moneys so paid to the Receiver General shall be deemed to have been lent, advanced or paid, as the case may be, to the tax debtor.

Garnishment

(1.2) Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act*, any other enactment of Canada, any enactment of a province or any law, but subject to subsections 69(1) and 69.1(1) of the *Bankruptcy and Insolvency Act* and section 11.09 of the *Companies' Creditors Arrangement Act*, if the Minister has knowledge or suspects that a particular person is, or will become within one year, liable to make a payment

(a) to another person (in this subsection referred to as the "tax debtor") who is liable to pay an amount assessed under subsection 227(10.1) or a similar provision, or

(b) to a secured creditor who has a right to receive the payment that, but for a security interest in favour of the secured creditor, would be payable to the tax debtor,

the Minister may in writing require the particular person to pay forthwith, where the moneys are immediately payable, and in any other case as and when the moneys become payable, the moneys otherwise payable to the tax debtor or the secured creditor in whole or in part to the Receiver General on account of the tax debtor's liability under subsection 227(10.1) or the similar provision, and on receipt of that requirement by the particular person, the amount of those moneys that is so required to be paid to the Receiver General shall, notwithstanding any security interest in those moneys, become the property of Her Majesty to the extent of that liability as assessed by the Minister and shall be paid to the Receiver General in priority to any such security interest.

Definitions

(1.3) In subsection 224(1.2),

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

security interest means any interest in, or for civil law any right in, property that secures payment or performance of an obligation and includes an interest, or for civil law a right, created by or arising out of a debenture, mortgage, hypothec, lien, pledge, charge, deemed or actual trust, assignment or encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for; (*garantie*)

similar provision means a provision, similar to subsection 227(10.1), of any Act of a province that imposes a tax similar to the tax imposed under this Act, where the province has entered into an agreement with the Minister of Finance for the collection of the taxes payable to the province under that Act. (*disposition semblable*)

Garnishment

(1.4) Provisions of this Act that provide that a person who has been required to do so by the Minister must pay to the Receiver General an amount that would otherwise be lent, advanced or paid to a taxpayer who is liable to make a payment under this Act, or to that taxpayer's secured creditor, apply to Her Majesty in right of Canada or a province.

Minister's receipt discharges original liability

(2) The receipt of the Minister for moneys paid as required under this section is a good and sufficient discharge of the original liability to the extent of the payment.

Idem

(3) Where the Minister has, under this section, required a person to pay to the Receiver General on account of a liability under this Act of a tax debtor moneys otherwise payable by the person to the tax debtor as interest, rent, remuneration, a dividend, an annuity or other periodic payment, the requirement applies to all such payments to be made by the person to the tax debtor until the liability under this Act is satisfied and operates to require payments to the Receiver General out of each such payment of such amount as is stipulated by the Minister in the requirement.

Failure to comply with s. (1), (1.2) or (3) requirement

(4) Every person who fails to comply with a requirement under subsection 224(1), 224(1.2) or 224(3) is liable to pay to Her Majesty an amount equal to the amount that the person was required under subsection 224(1), 224(1.2) or 224(3), as the case may be, to pay to the Receiver General.

Failure to comply with s. (1.1) requirement

(4.1) Every institution or person that fails to comply with a requirement under subsection 224(1.1) with respect to moneys to be lent, advanced or paid is liable to pay to Her Majesty an amount equal to the lesser of

(a) the total of moneys so lent, advanced or paid, and

(b) the amount that the institution or person was required under that subsection to pay to the Receiver General.

Service of garnishee

(5) Where a person carries on business under a name or style other than the person's own name, notification to the person of a requirement under subsection 224(1), 224(1.1) or 224(1.2) may be addressed to the name or style under which the person carries on business and, in the case of personal service, shall be deemed to be validly served if it is left with an adult person employed at the place of business of the addressee.

Idem

(6) Where persons carry on business in partnership, notification to the persons of a requirement under subsection 224(1), 224(1.1) or 224(1.2) may be addressed to the partnership name and, in the case of personal service, shall be deemed to be validly served if it is served on one of the partners or left with an adult person employed at the place of business of the partnership.

NOTE: Application provisions are not included in the consolidated text; see relevant amending Acts. R.S., 1985, c. 1 (5th Supp.), s. 224; 1994, c. 7, Sch. V, s. 91, Sch. VIII, s. 130, c. 21, s. 101; 1997, c. 12, s. 128; 2001, c. 17, s. 228(E); 2005, c. 47, s. 139; 2007, c. 36, s. 108; 2013, c. 34, s. 161.

Recovery by deduction or set-off

224.1 Where a person is indebted to Her Majesty under this Act or under an Act of a province with which the Minister of Finance has entered into an agreement for the collection of the taxes payable to the province under that Act, the Minister may require the retention by way of deduction or set-off of such amount as the Minister may specify out of any amount that may be or become payable to the person by Her Majesty in right of Canada.

NOTE: Application provisions are not included in the consolidated text; see relevant amending Acts. 1979, c. 5, s. 64; 1980-81-82-83, c. 48, s. 104.

Acquisition of debtor's property

224.2 For the purpose of collecting debts owed by a person to Her Majesty under this Act or under an Act of a province with which the Minister of Finance has entered into an agreement for the collection of taxes payable to the province under that Act, the Minister may purchase or otherwise acquire any interest in, or for civil law any right in, the person's property that the Minister is given a right to acquire in legal proceedings or under a court order or that is offered for sale or redemption and may dispose of any interest or right so acquired in such manner as the Minister considers reasonable.

NOTE: Application provisions are not included in the consolidated text; see relevant amending Acts. R.S., 1985, c. 1 (5th Supp.), s. 224.2; 2013, c. 34, s. 162.

Payment of moneys seized from tax debtor

224.3 (1) Where the Minister has knowledge or suspects that a particular person is holding moneys that were seized by a police officer in the course of administering or enforcing the criminal law of Canada from another person (in this section referred to as the "tax debtor") who is liable to make a payment under this Act or under an Act of a province with which the Minister of Finance has entered into an agreement for the collection of taxes payable to the province under that Act and that are restorable to the tax debtor, the Minister may in writing require the particular person to turn over the moneys otherwise restorable to the tax debtor in whole or in part to the Receiver General on account of the tax debtor's liability under this Act or under the Act of the province, as the case may be.

Receipt of Minister

(2) The receipt of the Minister for moneys turned over as required by this section is a good and sufficient discharge of the requirement to restore the moneys to the tax debtor to the extent of the amount so turned over.

NOTE: Application provisions are not included in the consolidated text; see relevant amending Acts. R.S., 1985, c. 1 (5th Supp.), s. 224.3; 1994, c. 21, s. 102.

Seizure of goods, chattels or movable property

225 (1) If a person has failed to pay an amount as required by this Act, the Minister may give 30 days notice to the person by registered mail addressed to the person's latest known address of the Minister's intention to direct that the person's goods and chattels, or movable property, be seized and sold, and, if the person fails to make the payment before the expiration of the 30 days, the Minister may issue a certificate of the failure and direct that the person's goods and chattels, or movable property, be seized.

Sale of seized property

(2) Property seized under this section shall be kept for 10 days at the cost and charges of the owner and, if the owner does not pay the amount owing together with the costs and charges within the 10 days, the property seized shall be sold by public auction.

Notice of sale

(3) Except in the case of perishable goods, notice of the sale setting out the time and place thereof, together with a general description of the property to be sold shall, a reasonable time before the goods are sold, be

(2) If a taxpayer fails to pay, as required, any tax, interest or penalties demanded under this section, the Minister may direct that the goods and chattels, or movable property, of the taxpayer be seized and subsections 225(2) to (5) apply, with respect to the seizure, with any modifications that the circumstances require.

NOTE: Application provisions are not included in the consolidated text; see relevant amending Acts. R.S., 1985, c. 1 (5th Supp.), s. 226; 1994, c. 7, Sch. II, s. 185; 2013, c. 34, s. 164.

Withholding taxes

227 (1) No action lies against any person for deducting or withholding any sum of money in compliance or intended compliance with this Act.

Return filed with person withholding

(2) Where a person (in this subsection referred to as the "payer") is required by regulations made under subsection 153(1) to deduct or withhold from a payment to another person an amount on account of that other person's tax for the year, that other person shall, from time to time as prescribed, file a return with the payer in prescribed form.

Failure to file return

(3) Every person who fails to file a return as required by subsection (2) is liable to have the deduction or withholding under section 153 on account of the person's tax made as though the person were a person who is neither married nor in a common-law partnership and is without dependants.

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.

Meaning of security interest

(4.2) For the purposes of subsections 227(4) and 227(4.1), a security interest does not include a prescribed security interest.

Application to Crown

(4.3) For greater certainty, subsections (4) to (4.2) apply to Her Majesty in right of Canada or a province where Her Majesty in right of Canada or a province is a secured creditor (within the meaning assigned by subsection 224(1.3)) or holds a security interest (within the meaning assigned by that subsection).

Payments by trustees, etc.

(5) Where a specified person in relation to a particular person (in this subsection referred to as the "payer") has any direct or indirect influence over the disbursements, property, business or estate of the payer and the specified person, alone or together with another person, authorizes or otherwise causes a payment referred to in subsection 135(3), 135.1(7) or 153(1), or on or in respect of which tax is payable under Part XII.5 or XIII, to be made by or on behalf of the payer, the specified person

(a) is, for the purposes of subsections 135(3) and 153(1), section 215 and this section, deemed to be a person who made the payment;

(a.1) is, for the purposes of subsections 135.1(7) and 211.8(2), deemed to be a person who redeemed, acquired or cancelled a share and made the payment as a consequence of the redemption, acquisition or cancellation;

(b) is jointly and severally, or solidarily, liable with the payer to pay to the Receiver General

(i) all amounts payable by the payer because of any of subsections 135(3), 135.1(7), 153(1) and 211.8(2) and section 215 in respect of the payment, and

(ii) all amounts payable under this Act by the payer because of any failure to comply with any of those provisions in respect of the payment; and

(c) is entitled to deduct or withhold from any amount paid or credited by the specified person to the payer or otherwise recover from the payer any amount paid under this subsection by the specified person in respect of the payment.

Definition of *specified person*

(5.1) In subsection 227(5), a ***specified person*** in relation to a particular person means a person who is, in relation to the particular person or the disbursements, property, business or estate of the particular person,

(a) a trustee;

(b) a liquidator;

(c) a receiver;

(d) an interim receiver;

(e) a receiver-manager;

(f) a trustee in bankruptcy or other person appointed under the *Bankruptcy and Insolvency Act*;

(g) an assignee;

(h) a secured creditor (as defined in subsection 224(1.3));

(i) an executor, a liquidator of a succession or an administrator;

(j) any person acting in a capacity similar to that of a person referred to in any of paragraphs 227(5.1)(a) to 227(5.1)(i);

(k) a person appointed (otherwise than as an employee of the creditor) at the request of, or on the advice of, a secured creditor in relation to the particular person to monitor, or provide advice in respect of, the

disbursements, property, business or estate of the particular person under circumstances such that it is reasonable to conclude that the person is appointed to protect or advance the interests of the creditor; or

(l) an agent of a specified person referred to in any of paragraphs 227(5.1)(a) to 227(5.1)(k).

Person includes partnership

(5.2) For the purposes of this section, references in subsections 227(5) and 227(5.1) to persons include partnerships.

Excess withheld, returned or applied

(6) Where a person on whose behalf an amount has been paid under Part XII.5 or XIII to the Receiver General was not liable to pay tax under that Part or where the amount so paid is in excess of the amount that the person was liable to pay, the Minister shall, on written application made no later than 2 years after the end of the calendar year in which the amount was paid, pay to the person the amount so paid or such part of it as the person was not liable to pay, unless the person is or is about to become liable to make a payment to Her Majesty in right of Canada, in which case the Minister may apply the amount otherwise payable under this subsection to that liability and notify the person of that action.

Repayment of non-resident shareholder loan

(6.1) Where, in respect of a loan from or indebtedness to a corporation or partnership, a person on whose behalf an amount was paid to the Receiver General under Part XIII because of subsection 15(2) and paragraph 214(3)(a) repays the loan or indebtedness or a portion of it and it is established by subsequent events or otherwise that the repayment was not made as part of a series of loans or other transactions and repayments, the Minister shall, on written application made no later than 2 years after the end of the calendar year in which the repayment is made, pay to the person an amount equal to the lesser of

(a) the amount so paid to the Receiver General in respect of the loan or indebtedness or portion of it, as the case may be, and

(b) the amount that would be payable to the Receiver General under Part XIII if a dividend described in paragraph 212(2)(a) equal in amount to the amount of the loan or indebtedness repaid were paid by the corporation or partnership to the person at the time of the repayment,

unless the person is or is about to become liable to make a payment to Her Majesty in right of Canada, in which case the Minister may apply the amount otherwise payable under this subsection to that liability and notify the person of that action.

Foreign affiliate dumping — late-filed form

(6.2) If, in respect of an investment described in subsection 212.3(10), a corporation is deemed by subparagraph 212.3(7)(d)(ii) to pay a dividend and the corporation subsequently complies with the requirements of subparagraph 212.3(7)(d)(i) in respect of the investment,

(a) subject to paragraph (b), the Minister shall, on written application made on a particular day that is, or is no more than two years after, the day on which the form described in subparagraph 212.3(7)(d)(i) is filed, pay to the corporation an amount equal to the lesser of

(i) the total of all amounts, if any, paid to the Receiver General, on or prior to the particular day, on behalf of a person and in respect of the liability of the person to pay an amount under Part XIII in respect of the dividend, and

(ii) the amount that the person was liable to pay in respect of the dividend under Part XIII;

(b) where the corporation or the person is or is about to become liable to make a payment to Her Majesty in right of Canada, the Minister may apply the amount otherwise payable under paragraph (a) to that liability and notify the corporation, and, if applicable, the person, of that action; and

(c) for the purposes of this Part (other than subparagraph (a)(i)), if the amount described in subparagraph (a)(ii) exceeds the amount described in subparagraph (a)(i), the corporation is deemed to pay that excess to the Receiver General on the day on which the form described in subparagraph 212.3(7)(d)(i) is filed.

Application for assessment

(7) Where, on application under subsection 227(6) by or on behalf of a person to the Minister in respect of an amount paid under Part XII.5 or XIII to the Receiver General, the Minister is not satisfied

(a) that the person was not liable to pay any tax under that Part, or

(b) that the amount paid was in excess of the tax that the person was liable to pay,

the Minister shall assess any amount payable under that Part by the person and send a notice of assessment to the person, and sections 150 to 163, subsections 164(1) and 164(1.4) to 164(7), sections 164.1 to 167 and Division J of Part I apply with any modifications that the circumstances require.

Application for determination

(7.1) Where, on application under subsection 227(6.1) by or on behalf of a person to the Minister in respect of an amount paid under Part XIII to the Receiver General, the Minister is not satisfied that the person is entitled to the amount claimed, the Minister shall, at the person's request, determine, with all due dispatch, the amount, if any, payable under subsection 227(6.1) to the person and shall send a notice of determination to the person, and sections 150 to 163, subsections 164(1) and 164(1.4) to 164(7), sections 164.1 to 167 and Division J of Part I apply with such modifications as the circumstances require.

Penalty

(8) Subject to subsection (9.5), every person who in a calendar year has failed to deduct or withhold any amount as required by subsection 153(1) or section 215 is liable to a penalty of

(a) 10% of the amount that should have been deducted or withheld; or

(b) where at the time of the failure a penalty under this subsection was payable by the person in respect of an amount that should have been deducted or withheld during the year and the failure was made knowingly or under circumstances amounting to gross negligence, 20% of that amount.

Joint and several, or solidary, liability

(8.1) If a particular person has failed to deduct or withhold an amount as required under subsection 153(1) or section 215 in respect of an amount that has been paid to a non-resident person, the non-resident person is jointly and severally, or solidarily, liable with the particular person to pay any interest payable by the particular person pursuant to subsection (8.3) in respect thereof.

Retirement compensation arrangement deductions

(8.2) Where a person has failed to deduct or withhold any amount as required under subsection 153(1) in respect of a contribution under a retirement compensation arrangement, that person is liable to pay to Her Majesty an amount equal to the amount of the contribution, and each payment on account of that amount is deemed to be, in the year in which the payment is made,

(a) for the purposes of paragraph 20(1)(r), a contribution by the person to the arrangement; and

(b) an amount on account of tax payable by the custodian under Part XI.3.

Interest on amounts not deducted or withheld

(8.3) A person who fails to deduct or withhold any amount as required by subsection 135(3), 135.1(7), 153(1) or 211.8(2) or section 215 shall pay to the Receiver General interest on the amount at the prescribed rate, computed

(a) in the case of an amount required by subsection 153(1) to be deducted or withheld from a payment to another person, from the fifteenth day of the month immediately following the month in which the amount was required to be deducted or withheld, or from such earlier day as may be prescribed for the purposes of subsection 153(1), to,

(i) where that other person is not resident in Canada, the day of payment of the amount to the Receiver General, and

(ii) where that other person is resident in Canada, the earlier of the day of payment of the amount to the Receiver General and April 30 of the year immediately following the year in which the amount was required to be deducted or withheld;

(b) in the case of an amount required by subsection 135(3) or 135.1(7) or section 215 to be deducted or withheld, from the day on which the amount was required to be deducted or withheld to the day of payment of the amount to the Receiver General; and

(c) in the case of an amount required by subsection 211.8(2) to be withheld, from the day on or before which the amount was required to be remitted to the Receiver General to the day of the payment of the amount to the Receiver General.

Liability to pay amount not deducted or withheld

(8.4) A person who fails to deduct or withhold any amount as required under subsection 135(3) or 135.1(7) in respect of a payment made to another person or under subsection 153(1) in respect of an amount paid to another person who is non-resident or who is resident in Canada solely because of paragraph 250(1)(a) is liable to pay as tax under this Act on behalf of the other person the whole of the amount that should have been so deducted or withheld and is entitled to deduct or withhold from any amount paid or credited by the person to the other person or otherwise to recover from the other person any amount paid by the person as tax under this Part on behalf of the other person.

No penalty — certain deemed payments

(8.5) Subsection (8) does not apply to a corporation in respect of

(a) an amount of interest deemed by subsection 214(16) to have been paid as a dividend by the corporation unless, if the Act were read without reference to subsection 214(16), a penalty under subsection (8) would have applied in respect of the amount; and

(b) an amount deemed by subparagraph 212.3(7)(d)(ii) or subsection 247(12) to have been paid as a dividend by the corporation.

No penalty — qualifying non-resident employers

(8.6) Subsection (8) does not apply to a ***qualifying non-resident employer*** (as defined in subsection 153(6)) in respect of a payment made to an employee if, after reasonable inquiry, the employer had no reason to believe at the time of the payment that the employee was not a ***qualifying non-resident employee*** (as defined in subsection 153(6)).

Penalty

(9) Subject to subsection 227(9.5), every person who in a calendar year has failed to remit or pay as and when required by this Act or a regulation an amount deducted or withheld as required by this Act or a regulation or an amount of tax that the person is, by section 116 or by a regulation made under subsection 215(4), required to pay is liable to a penalty of

(a) subject to paragraph (b), if

(i) the Receiver General receives that amount on or before the day it was due, but that amount is not paid in the manner required, 3% of that amount,

(ii) the Receiver General receives that amount

(A) no more than three days after it was due, 3% of that amount,

(B) more than three days and no more than five days after it was due, 5% of that amount, or

(C) more than five days and no more than seven days after it was due, 7% of that amount, or

(iii) that amount is not paid or remitted on or before the seventh day after it was due, 10% of that amount; or

(b) where at the time of the failure a penalty under this subsection was payable by the person in respect of an amount that should have been remitted or paid during the year and the failure was made knowingly or under circumstances amounting to gross negligence, 20% of that amount.

Penalty

(9.1) Notwithstanding any other provision of this Act, any other enactment of Canada, any enactment of a province or any other law, the penalty for failure to remit an amount required to be remitted by a person on or before a prescribed date under subsection 153(1), subsection 21(1) of the *Canada Pension Plan*, subsection 53(1) of the *Unemployment Insurance Act* and subsection 82(1) of the *Employment Insurance Act* shall, unless the person who is required to remit the amount has, knowingly or under circumstances amounting to gross negligence, delayed in remitting the amount or has, knowingly or under circumstances amounting to gross negligence, remitted an amount less than the amount required, apply only to the amount by which the total of all so required to be remitted on or before that date exceeds $500.

Interest on amounts deducted or withheld but not remitted

(9.2) Where a person has failed to remit as and when required by this Act or a regulation an amount deducted or withheld as required by this Act or a regulation, the person shall pay to the Receiver General interest on the amount at the prescribed rate computed from the day on which the person was so required to remit the amount to the day of remittance of the amount to the Receiver General.

Interest on certain tax not paid

(9.3) Where a person fails to pay an amount of tax that, because of section 116, subsection 212(19) or a regulation made under subsection 215(4), the person is required to pay, as and when the person is required to pay it, the person shall pay to the Receiver General interest on the amount at the prescribed rate computed from the day on or before which the amount was required to be paid to the day of payment of the amount to the Receiver General.

Liability to pay amount not remitted

(9.4) A person who has failed to remit as and when required by this Act or a regulation an amount deducted or withheld from a payment to another person as required by this Act or a regulation is liable to pay as tax under this Act on behalf of the other person the amount so deducted or withheld.

Payment from same establishment

(9.5) In applying paragraphs 227(8)(b) and 227(9)(b) in respect of an amount required by paragraph 153(1)(a) to be deducted or withheld, each establishment of a person shall be deemed to be a separate person.

Assessment

(10) The Minister may at any time assess any amount payable under

(a) subsection 227(8), 227(8.1), 227(8.2), 227(8.3) or 227(8.4) or 224(4) or 224(4.1) or section 227.1 or 235 by a person,

(b) subsection 237.1(7.4) or (7.5) or 237.3(8) by a person or partnership,

(c) subsection 227(10.2) by a person as a consequence of a failure of a non-resident person to deduct or withhold any amount, or

(d) Part XIII by a person resident in Canada,

and, where the Minister sends a notice of assessment to that person or partnership, Divisions I and J of Part I apply with any modifications that the circumstances require.

Part XII.5

(10.01) The Minister may at any time assess any amount payable under Part XII.5 by a person resident in Canada and, where the Minister sends a notice of assessment to that person, Divisions I and J of Part I apply with any modifications that the circumstances require.

Idem

(10.1) The Minister may at any time assess

(a) any amount payable under section 116 or subsection 227(9), 227(9.2), 227(9.3) or 227(9.4) by any person,

(a.1) [Repealed, 1997, c. 25, s. 67(7)]

(b) any amount payable under subsection 227(10.2) by any person as a consequence of a failure by a non-resident person to remit any amount, and

(c) any amount payable under Part XII.5 or XIII by any non-resident person,

and, where the Minister sends a notice of assessment to the person, sections 150 to 163, subsections 164(1) and 164(1.4) to 164(7), sections 164.1 to 167 and Division J of Part I apply with such modifications as the circumstances require.

Joint and several, or solidary, liability re contributions to RCA

(10.2) If a non-resident person fails to deduct, withhold or remit an amount as required by subsection 153(1) in respect of a contribution under a retirement compensation arrangement that is paid on behalf of the employees or former employees of an employer with whom the non-resident person does not deal at arm's length, the employer is jointly and severally, or solidarily, liable with the non-resident person to pay any amount payable under subsection (8), (8.2), (8.3), (9), (9.2) or (9.4) by the non-resident person in respect of the contribution.

(10.3) to (10.9) [Repealed, 1994, c. 7, Sch. VIII, s. 153]

Withholding tax

(11) Provisions of this Act requiring a person to deduct or withhold an amount in respect of taxes from amounts payable to a taxpayer are applicable to Her Majesty in right of Canada or a province.

Agreement not to deduct void

(12) Where this Act requires an amount to be deducted or withheld, an agreement by the person on whom that obligation is imposed not to deduct or withhold is void.

Minister's receipt discharges debtor

(13) The receipt of the Minister for an amount deducted or withheld by any person as required by or under this Act is a good and sufficient discharge of the liability of any debtor to the debtor's creditor with respect thereto to the extent of the amount referred to in the receipt.

Application of other Parts

(14) Parts IV, IV.1, VI and VI.1 do not apply to any corporation for any period throughout which it is exempt from tax because of section 149.

Partnership included in "person"

(15) In this section, a reference to a "person" with respect to any amount deducted or withheld or required to be deducted or withheld is deemed to include a partnership.

Municipal or provincial corporation excepted

(16) A corporation that at any time in a taxation year would be a corporation described in any of paragraphs 149(1)(d) to (d.6) but for a provision of an appropriation Act is deemed not to be a private corporation for the purposes of Part IV with respect to that year.

NOTE: Application provisions are not included in the consolidated text; see relevant amending Acts. R.S., 1985, c. 1 (5th Supp.), s. 227; 1994, c. 7, Sch. II, s. 186, Sch. V, s. 90, Sch. VIII, ss. 132, 153, c. 21, s. 104; 1996, c. 21, s. 57, c. 23, s. 176; 1997, c. 25, s. 67; 1998, c. 19, s. 226; 2000, c. 12, s. 138; 2001, c. 17, ss. 180, 229; 2006, c. 4, s. 86; 2008, c. 28, s. 33; 2012, c. 19, s. 14, c. 31, s. 52; 2013, c. 34, ss. 165(E), 351; 2014, c. 39, s. 68; 2016, c. 7, s. 46.

Liability of directors for failure to deduct

227.1 (1) Where a corporation has failed to deduct or withhold an amount as required by subsection 135(3) or 135.1(7) or section 153 or 215, has failed to remit such an amount or has failed to pay an amount of tax for a taxation year as required under Part VII or VIII, the directors of the corporation at the time the corporation was required to deduct, withhold, remit or pay the amount are jointly and severally, or solidarily, liable, together with the corporation, to pay that amount and any interest or penalties relating to it.

Limitations on liability

(2) A director is not liable under subsection 227.1(1), unless

(a) a certificate for the amount of the corporation's liability referred to in that subsection has been registered in the Federal Court under section 223 and execution for that amount has been returned unsatisfied in whole or in part;

(b) the corporation has commenced liquidation or dissolution proceedings or has been dissolved and a claim for the amount of the corporation's liability referred to in that subsection has been proved within six months after the earlier of the date of commencement of the proceedings and the date of dissolution; or

(c) the corporation has made an assignment or a bankruptcy order has been made against it under the *Bankruptcy and Insolvency Act* and a claim for the amount of the corporation's liability referred to in that subsection has been proved within six months after the date of the assignment or bankruptcy order.

Idem

(3) A director is not liable for a failure under subsection 227.1(1) where the director exercised the degree of care, diligence and skill to prevent the failure that a reasonably prudent person would have exercised in comparable circumstances.

Limitation period

(4) No action or proceedings to recover any amount payable by a director of a corporation under subsection 227.1(1) shall be commenced more than two years after the director last ceased to be a director of that corporation.

Amount recoverable

(5) Where execution referred to in paragraph 227.1(2)(a) has issued, the amount recoverable from a director is the amount remaining unsatisfied after execution.

TAB 11

Canada (Attorney General) v. Caisse populaire de la Vallée de l'or, 2005 FC 119 (CanLII)

Date: 2005-01-25
File number: T-68-02
Other citations: 280 FTR 46; [2006] 3 CTC 1; 17 CBR (5th) 45
Citation: Canada (Attorney General) v. Caisse populaire de la Vallée de l'or, 2005 FC 119 (CanLII), <http://canlii.ca/t/1mp38>, retrieved on 2019-01-11

Date: 20050125

Docket: T-68-02

Citation: 2005 FC 119

BETWEEN:

ATTORNEY GENERAL OF CANADA

Plaintiff

and

LA CAISSE POPULAIRE DE LA VALLÉE DE L'OR

Defendant

REASONS FOR JUDGMENT

RICHARD MORNEAU, PROTHONOTARY

Introduction

[1] In the case at bar the plaintiff is relying on the vehicle of the deemed trust referred to in subsections 227(4.1) of the *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1, as amended (the Act), and 86(2.1) of the *Employment Insurance Act*, S.C. 1996, c. 23, as amended (the EIA), as a basis for claiming from the defendant what she regards as the proceeds of the sale of a trailer in a situation where the tax debtor itself sold the property and remitted to the defendant, the tax debtor's secured creditor, the proceeds obtained from the sale.

[2] In the plaintiff's submission, based on the relevant legislative provisions and the principles laid down by the Supreme Court in *First Vancouver Finance v. M.N.R.*, 2002 SCC 49 (CanLII), [2002] 2 S.C.R. 720 (*First Vancouver*), and by the Federal Court of Appeal in *Canada (M.N.R.) v. National Bank et al.*, 2004 FCA 92 (CanLII) (leave to appeal to the Supreme Court of Canada denied on October 14, 2004, docket SCC 30311, hereinafter *National Bank*), the trailer at the time of the sale was property deemed to be held in trust pursuant to subsections 227(4.1) of the Act and 86(2.1) of the EIA, and the amount received by the tax debtor from the sale and then remitted to the defendant was clearly under the same legislative provisions "proceeds thereof" which continued to be subject to the deemed trust. Consequently, in the plaintiff's submission, she has special priority over the defendant in claiming those proceeds of sale (up to the amount of the unpaid source deductions - SDs), namely the sum of $5,849.67.

[3] The defendant did not admit that the amount which it received from the sale of the trailer was "proceeds thereof" within the meaning of subsection 227(4.1) of the Act. Further, the defendant argued it was essential and of capital importance to take into account the time at which the plaintiff, for all practical purposes, asserted or made known her deemed trust. In its written submissions, the defendant used the term [TRANSLATION] "materialize" to convey this idea - when deciding whether it or the plaintiff had special priority in claiming the proceeds of the sale of the trailer.

[4] In the defendant's submission, certainty in the law and the security of commercial transactions require here that the defendant be able to retain these proceeds of sale, as in practice the plaintiff did not assert her rights under the Act until after the trailer had been sold by the debtor and the proceeds of its sale remitted to the defendant.

[5] On account of the amount at issue, the plaintiff's action in the case at bar was treated as a simplified action and heard on the merits together with the action brought by the plaintiff against another financial institution in case T-949-02, as it involved facts and considerations which in law are similar.

[6] These reasons for judgment will accordingly apply *mutatis mutandis* to both cases and a copy of these reasons will be included in each record. As for the judgments as such, a short judgment will be rendered in each case as the amounts at issue are somewhat different.

Factual background

[7] In the case at bar, as in case T-949-02, the facts as already mentioned essentially result from the same process and were the subject of an agreement between the parties in each case. At the hearing, therefore, there was quite properly no cross-examination of witnesses or oral evidence in rebuttal.

[8] In the case at bar, namely T-68-02, the facts were as follows.

[9] In February 1999, 2430-1277 Québec Inc. (the debtor) converted to a secured loan guaranteed by a movable hypothec a credit line granted to it earlier by the defendant.

[10] The debtor's property which was the subject of the defendant's security was a 1989 Témisco RBLG trailer (the trailer), which the defendant had already held as security since 1995 to secure another loan to the debtor.

[11] In December 1999, the debtor sold the trailer to 9028-9901 Québec Inc. (the buyer) for the sum of $10,000, which was paid by cheque made out to the debtor on December 22, 1999.

[12] On December 22, 1999, the sum from the cashed cheque, namely $10,000, was remitted in its entirety to the defendant, who the same day proceeded to strike the movable hypothec that it held on the trailer.

[13] At that time, the debtor had failed to pay, and has still not paid, SDs to Her Majesty, namely the sum of $5,849.67, for the amounts deducted from the salary paid to its employees for the months of February 1998 to November 1999, for taxes payable by those employees under the Act, and for employee premiums payable by those employees under the EIA.

[14] The debtor ceased operations in November 1999.

[15] On February 2, 2001, the Canada Customs and Revenue Agency (the Agency) sent the defendant a formal demand informing it that the debtor owed the plaintiff money for SDs and that the debtor's property was subject to the provisions of subsections 227(4.1) of the Act and 86(2.1) of the EIA.

[16] The defendant refused to pay the plaintiff that sum, although it was required to do so by the formal demand.

[17] On January 11, 2002, the plaintiff filed her simplified statement of claim in the Registry of this Court.

[18] For case T-949-02, the facts are the following.

[19] On June 30, 1999, the defendant made a loan of $45,000 to LRC Forestiers Inc. (the debtor), secured by a hypothec on all debts and accounts receivable and on all the debtor's property, including in particular a John Deere conveyor (the conveyor).

[20] On October 17, 2000, the debtor sold the conveyor to Entreprises Perfort Inc. (the buyer) for the sum of $15,500, plus applicable taxes.

[21] On October 18, 2000, the sum of $17,828.88, representing the proceeds of sale of the conveyor, including applicable taxes, was deposited in the debtor's bank account.

[22] On October 19, 2000, that sum was withdrawn from its bank account with the defendant and applied to the loan which the defendant had made to the debtor.

[23] On October 23, 2000, the defendant proceeded to the voluntary reduction of the movable hypothec which it held on the conveyor.

[24] On September 7, 2001, the Agency sent the defendant a letter informing it that the debtor owed the plaintiff sums of money for SDs and that the debtor's property was subject to the provisions of subsections 227(4.1) of the Act and 86.(2.1) of the EIA.

[25] In particular, the debtor was and still is indebted to the Agency in the amount of $8,988.55, including $5,462.39 for SDs withheld from the salaries paid to its employees pursuant to the Act and the EIA, but which it had not remitted to Her Majesty.

[26] On June 20, 2002, the plaintiff filed her simplified statement of claim in the Registry of this Court and served it on the defendant on June 25, 2002.

[27] To date, the sum of $5,462.39 claimed by the defendant has still not been paid.

[28] For the sake of simplicity, these reasons will concentrate on the facts in case T-68-02 and on subsection 227(4.1) of the Act.

Analysis

[29] The plaintiff's cause of action is based primarily on the following legislative provisions of the Act (here we will simply note that the EIA contains similar provisions in its subsections 86(2) and (2.1)).

227(4) [**Trust for moneys deducted.**] Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act.	227(4) **Montant détenu en fiducie.** Toute personne qui déduit ou retient un montant en vertu de la présente loi est réputée, malgré toute autre garantie au sens du paragraphe 224(1.3) le concernant, le détenir en fiducie pour Sa Majesté, séparé de ses propres biens et des biens détenus par son créancier garanti au sens de ce paragraphe qui, en l'absence de la garantie, seraient ceux de la personne, et en vue de le verser à Sa Majesté selon les modalités et dans le délai prévus par la présente loi.
(4.1) [**Extension of trust.**] Notwithstanding any other provision	(4.1) **Non-versement.** Malgré les autres dispositions de la présente loi, la *Loi sur la faillite et l'insolvabilité* (sauf ses articles 81.1 et 81.2), tout autre texte législatif fédéral

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.

[Emphasis added.]

éral ou provincial ou toute règle de droit, en cas de non-versement à Sa Majesté, selon les modalités et dans le délai prévus par la présente loi, d'un montant qu'une personne est réputée par le paragraphe (4) détenir en fiducie pour Sa Majesté, les biens de la personne, et les biens détenus par son créancier garanti au sens du paragraphe 224(1.3) qui, en l'absence d'une garantie au sens du même paragraphe, seraient ceux de la personne, d'une valeur égale à ce montant sont réputés:

a) être détenus en fiducie pour Sa Majesté, à compter du moment où le montant est déduit ou retenu, séparés des propres biens de la personne, qu'ils soient ou non assujettis à une telle garantie;

b) ne pas faire partie du patrimoine ou des biens de la personne à compter du moment où le montant est déduit ou retenu, que ces biens aient été ou non tenus séparés de ses propres biens ou de son patrimoine et qu'ils soient ou non assujettis à une telle garantie. Ces biens sont des biens dans lesquels Sa Majesté a un droit de bénéficiaire malgré toute autre garantie sur ces biens ou sur le produit en découlant, et le produit découlant de ces biens est payé au receveur général par priorité sur une telle garantie.

[30] In *First Vancouver*, Iacobucci J. summarized the general treatment of SDs under the Act as follows at page 723:

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

[31] The Court went on to indicate more specifically the general context of and reason for the vehicle of the deemed trust. The Supreme Court considered that the collection of SDs was at the very heart of tax collections. This, together with the fact that where SDs are concerned the plaintiff is an involuntary creditor of a tax debtor and, unlike a financial institution, cannot familiarize herself with the debtor's affairs and financial situation, justifies the vehicle of the deemed trust by which the Act gives the plaintiff, that is to say the Agency, special priority when the Agency and secured creditors concurrently assert a right to the property of a tax debtor. The following are the applicable comments of the Supreme Court in this regard, at pages 729 to 733 of the judgment:

The collection of source deductions has been recognized as "at the heart" of income tax collection in Canada: see *Pembina on the Red Development Corp. v. Triman Industries Ltd.* (1991), 1991 CanLII 2699 (MB CA), 85 D.L.R. (4th) 29 (Man. C.A.), at p. 51, *per* Lyon J.A. (dissenting), quoted with approval by Gonthier J. (dissenting on another issue) in *Royal Bank of Canada v. Sparrow Electric Corp.*, 1997 CanLII 377 (SCC), [1997] 1 S.C.R. 411, at para. 36. Because of the importance of collecting source deductions, the legislation in question gives the Minister the vehicle of the deemed trust to recover employee tax deductions which employers fail to remit to the Minister.

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

. . .

In response to *Sparrow Electric*, the deemed trust provisions were amended in 1998 (retroactively to 1994) to their current form. Most notably, the words "notwithstanding any security interest . . . in the amount so deducted or withheld" were added to s. 227(4). As well, s. 227(4.1) (formerly s. 227(5)) expanded the scope of the deemed trust to include "property held

by any secured creditor . . . that but for a security interest . . . would be property of the person". Section 227(4.1) was also amended to remove reference to the triggering events of liquidation, bankruptcy, etc., instead deeming property of the tax debtor and of secured creditors to be held in trust "at any time an amount deemed by subsection (4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act". Finally, s. 227(4.1) now explicitly deems the trust to operate "from the time the amount was deducted or withheld".

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

[Emphasis added.]

[32] I agree with the plaintiff in finding that three issues must be decided in this action:

1. Was the trailer deemed to be held in trust at the time of the sale pursuant to subsection 227(4.1) of the Act?

2. Was the amount received by the defendant following the sale of the trailer "proceeds thereof" within the meaning of subsection 227(4.1) of the Act?

3. If so, does the Act create a duty for the defendant to remit these "proceeds thereof" in priority to the Receiver General for Canada, i.e. the plaintiff?

[33] On the first issue, namely whether at the time of the sale the trailer was deemed to be held in trust pursuant to subsection 227(4.1) of the Act, the situation is as follows.

[34] The debtor collected SDs under the Act and failed to remit them to the plaintiff for the period from February 1998 to November 1999.

[35] Consequently, the trailer, which was the property of the debtor at the time the SDs were collected, became subject to a deemed trust from the time of the debtor's first default in February 1998.

[36] Accordingly, at the time of the sale in December 1999, as the SDs collected in 1998 and 1999, had still not been remitted to the plaintiff and amounted to $5,849.67, the trailer was deemed to be held in trust within the meaning of subsection 227(4.1) of the Act up to an amount of $5,849.67.

[37] On the second issue, namely whether the amount received by the defendant following the sale of the trailer constituted "proceeds thereof" within the meaning of subsection 227(4.1) of the Act, for the reasons that follow this question must be answered in the affirmative.

[38] As the Supreme Court mentioned in *First Vancouver*, at paragraph 42:

42. . . . In this way, when an asset is sold by the tax debtor, the deemed trust ceases to operate over that asset; however, the property received by the tax debtor in exchange becomes subject to the deemed trust. As such, the trust is neither depleted nor enhanced; it simply floats over the property belonging to the tax debtor at any given time, for as long as the default in remittances continues.

[Emphasis added.]

[39] I agree with the plaintiff in saying that on the basis of the principles laid down by the Supreme Court in *First Vancouver*, the amount obtained from the sale of property held in trust constitutes "proceeds thereof" within the meaning of subsection 227(4.1) of the Act, whether those proceeds come from a sale by the debtor as in this case or from the realization of a security as in *National Bank, supra*, paragraph [2]. In that case, the Federal Court of Appeal held that creditors realizing their securities on property covered by the deemed trust had a positive duty to pay the Receiver General the proceeds of realization of the property, in priority over their own security.

[40] There is also reason to support the proposition that, in order to be subject to the deemed trust, it will suffice if the sum of money comes from property covered by the deemed trust, regardless of whom is holding it, since the Act provides that the "proceeds thereof" must be remitted to the Receiver General in priority, and does not limit this duty to the person through whom the proceeds thereof first pass. Whether the proceeds of the sale are paid to the secured creditor directly, or first to the debtor and then to the secured creditor, the secured creditor still receives proceeds of property subject to the deemed trust. If the vehicle of the deemed trust only applied when a security was realized, it would be easy for a secured creditor to avoid responding to a claim by the defendant based on that vehicle. The creditor in question would only have to ensure that the subject of his security was sold by the debtor [TRANSLATION] "voluntarily", and then demand the proceeds of the sale from the debtor.

[41] At this stage of our analysis, we cannot agree with the defendant that it did not benefit from the proceeds of the sale due to the fact that the amount paid to the debtor was initially placed in its current savings account, thereby confusing this sum with the other monies that were in the bank account. Ultimately, in the defendant's view, that sum lost its identity or nature of "proceeds" of the sale before it was applied to the defendant's secured loan.

[42] The fact that in a situation of seizure before judgment without judicial authorization the courts have developed such a concept is clearly admissible (see *inter alia Hudson's Bay Company v. Hawkins*, 1998 CanLII 11830 (QC CS), REJB 1998-09249), but in my opinion such a very special concept cannot apply in more general circumstances and in view of the reason behind the vehicle of the deemed trust, or in view of the facts of the case at bar, where it is quite clear from the fact that the relevant banking transactions were contemporaneous (taking place on the same day, as in the case at bar, or the following day as in case T-949-02) that the selling price - and not any other sum - was received by the defendant. The defendant thus benefited from the proceeds of sale of the trailer within the meaning of subsection 227(4.1) of

the Act. This finding is not affected by the fact that the defendant was passive in the sale of the trailer, and was not actively involved. Further, even accepting the argument that the defendant struck the hypothec to enable the buyer of the trailer to receive a clear title to it, such altruism, even it were to be admitted, does not alter the initial benefit received by the defendant, namely repayment of the loan in whole or in part.

[43] Additionally, we should consider here an argument which the defendant addressed in particular in its written submissions, namely that since the plaintiff's position materialized after the trailer or its proceeds of sale left the debtor's estate, certainty in the law and the security of commercial transactions require that the plaintiff could not then assert her rights under subsection 227(4.1) of the Act.

[44] In the defendant's submission, this must be so since otherwise a financial institution could not agree to have its debt repaid and to release a movable hypothec without ensuring that the plaintiff was paid first. Otherwise, in the defendant's submission, an institution might have to repay the plaintiff up to the amount of the SDs owed, when such an institution might also have lost any right of recourse against third parties, such as a surety released by the payment made by a debtor.

[45] For the reasons that follow, I do not consider that this temporal limitation which the defendant seeks to raise against the plaintiff's action can stand up.

[46] First, the very wording of subsection 227(4.1) of the Act contains no such limitation, unlike the wording of subsection 224(1.2) of the Act, dealing with the garnishment procedure which materializes in the plaintiff's favour when a third party is sent a letter requiring the third party to pay the plaintiff an amount otherwise payable to a tax debtor. Subsection 224(1.2) reads:

224 (1.2) (1.2) Notwithstanding a	224(1.2) Malgré les autres dispos
ny other provision of this Act, th	itions de la présente loi, la *Loi su*
e *Bankruptcy and Insolvency Act*,	*r la faillite et l'insolvabilité*, tout
any other enactment of Canada, a	autre texte législatif fédéral ou pr
ny enactment of a province or an	ovincial et toute règle de droit, m
y law, but subject to subsections	ais sous réserve des paragraphes
69(1) and 69.1(1) of the *Bankrup*	69(1) et 69.1(1) de la *Loi sur la f*
tcy and Insolvency Act and sectio	*aillite et l'insolvabilité* et de l'arti
n 11.4 of the *Companies' Credito*	cle 11.4 de la *Loi sur les arrange*
rs Arrangement Act, where the M	*ments avec les créanciers* des co
inister has knowledge or suspects	mpagnies, s'il sait ou soupçonne
that a particular person is, or will	qu'une personne donnée est ou de
become within one year, liable to	viendra, dans les douze mois, déb
make a payment	iteur d'une somme:
(a) to another person (in this subs	a) soit à un débiteur fiscal, à savo
ection referred to as the "tax debt	ir une personne redevable du mo

or") who is liable to pay an amount assessed under subsection 227 (10.1) or a similar provision, or

ntant d'une cotisation en application du paragraphe 227(10.1) ou d'une disposition semblable;

(b) to a secured creditor who has a right to receive the payment that, but for a security interest in favour of the secured creditor, would be payable to the tax debtor,

b) soit à un créancier garanti, à savoir une personne qui, grâce à une garantie en sa faveur, a le droit de recevoir la somme autrement payable au débiteur fiscal,

the Minister may in writing require the particular person to pay forthwith, where the moneys are immediately payable, and in any other case as and when the moneys become payable, the moneys otherwise payable to the tax debtor or the secured creditor in whole or in part to the Receiver General on account of the tax debtor's liability under subsection 227(10.1) or the similar provision, and on receipt of that requirement by the particular person, the amount of those moneys that is so required to be paid to the Receiver General shall, notwithstanding any security interest in those moneys, become the property of Her Majesty to the extent of that liability as assessed by the Minister and shall be paid to the Receiver General in priority to any such security interest.

le ministre peut exiger par écrit de la personne donnée que tout ou partie de cette somme soit payé au receveur général, sans délai si la somme est payable immédiatement, sinon dès qu'elle devient payable, au titre du montant de la cotisation en application du paragraphe 227(10.1) ou d'une disposition semblable dont le débiteur fiscal est redevable. Sur réception de l'avis de cette exigence par la personne donnée, la somme dont le paiement est exigé devient, malgré toute autre garantie au titre de cette somme, la propriété de Sa Majesté jusqu'à concurrence du montant de la cotisation et doit être payée au receveur général par priorité sur toute autre garantie au titre de cette somme.

[Emphasis added.]

[47] Additionally, it is apparent from *First Vancouver* and *National Bank* that the only limitation on the vehicle of the deemed trust is that affecting third parties who acquire for value property of which the tax debtor divests himself in the ordinary course of business. The Supreme Court was concerned with avoiding uncertainty and a general chilling effect on commercial transactions with respect to such third parties. In *First Vancouver*, the Supreme Court mentioned the following on these points at pages 739 and 740:

It is significant in this regard that purchasers for value are not included in ss. 227(4) and 227 (4.1) whereas secured creditors are.

. . . . .

. . . to allow s. 227(4.1) to override the rights of purchasers for value would result in an unprecedented level of uncertainty. In fact, in oral argument, counsel for the Minister conceded that such an interpretation would, in theory, allow the Minister to go so far as to assert an interest in assets sold by tax debtors to ordinary consumers. In my view, it is no exaggeration to say that adopting this interpretation of the deemed trust would have general chilling effect on commercial transactions.

. . . . .

In summary, the deemed trust does not operate over assets which a tax debtor has sold in the ordinary course to third party purchasers.

[Emphasis added.]

[48] In *National Bank*, the Federal Court of Appeal did not hesitate to acknowledge, at paragraphs 27 and 34 of its reasons, the absolute nature of the deemed trust with regard to secured creditors, even over property taken by them in the exercise of their security. It is quite clear to the Court that a secured creditor remains as such and does not become a purchaser in good faith, as the defendant would hope, so as to benefit from the exception noted by the Supreme Court. The Court said the following:

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

. . .

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

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

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

[Emphasis added]

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

[49] The temporal limitation which the defendant seeks to establish would ultimately run contrary to the general context and reason for the vehicle of the deemed trust, as seen in paragraph [31].

[50] This rejection of the temporal limitation relied on by the defendant is consistent with the interpretation to be given to subsection 227(4.1) of the Act and the related provisions, according to the rulings of the Supreme Court in *Alberta (Treasury Branches) v. M.N.R.*, 1996 CanLII 244 (SCC), [1996] 1 S.C.R. 963, where a majority of the Court said at page 975:

In interpreting sections of the *Income Tax Act*, the correct approach, as set out by Estey J. in *Stubart Investments Ltd. v. The Queen*, 1984 CanLII 20 (SCC), [1984] 1 S.C.R. 536, is to apply the plain meaning rule. Estey J. at p. 578 relied on the following passage from E.A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.

[51] It should be noted that in *National Bank* the Federal Court of Appeal was ultimately considering a situation similar to the one at bar, that is, it had to rule on the proceeds of the sale of property in the hands of a secured third party.

[52] Here, only the route taken by the proceeds of sale to arrive in the hands of the secured creditor differs. In my opinion, the way in which a security was realized in this case does not lose any of its impact because the sale was made by the debtor.

[53] Any inequity in the affairs of the defendant on account of the nature of the deemed trust could very well be avoided.

[54] First, as the Supreme Court held in *First Vancouver* at paragraph 23, a financial institution has an opportunity to become familiar with a tax debtor's business and finances, and can organize its affairs accordingly.

[55] In this case, we cannot disregard the possibility that the defendant, if it had wanted to, could easily have obtained the information needed to determine whether a deemed trust existed and thereby avoided being exposed to this action by the plaintiff. In order to do this, it only had to require its debtor, as a condition of granting the loan, to make a waiver of confidentiality pursuant to subsection 241(5) of the Act. This would have enabled it to determine the state of the SDs at any time, or better still, to impose on its customer a duty to satisfy it of the amount of the sums deducted and that those amounts had been remitted.

[56] In view of the foregoing, the third issue is whether the Act imposes a duty on the defendant to remit the "proceeds thereof" in priority to the Receiver General of Canada. This question must also be answered in the affirmative. This is clear from paragraph 40 of *National Bank*, where the Court said:

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

[Emphasis added.]

[57] In this case, as I have determined that the defendant received the "proceeds thereof" from the trailer within the meaning of subsection 227(4.1) of the Act, and did not perform its positive duty to remit the proceeds, up to the amount of the unpaid SDs, namely the sum of $5,849.67, the plaintiff is entitled to claim that amount from the defendant.

[58] For these reasons, the plaintiff's action will be allowed and the defendant ordered to pay the plaintiff the sum of $5,849.67, with interest pursuant to subsections 36(2) and 37(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, as amended, at the rate specified in the Act compounded daily from December 22 ,1999, until payment is made in full.

[59] I am persuaded, based on *Markevich v. Canada*, 2003 SCC 9 (CanLII), [2003] 1 S.C.R. 94, *National Bank* and paragraph 36(2)(*a*) of the *Federal Courts Act*, that December 22, 1999, can be accepted in this case as the starting date for computing interest before judgment.

Richard Morneau

Prothonotary

Montréal, Quebec

January 25, 2005

Certified true translation

K. Harvey

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-68-02
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA
Plaintiff	
and	
LA CAISSE POPULAIRE DE LA VALLÉE DE L'OR	
Defendant	
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	December 15, 2004
REASONS FOR JUDGMENT BY:	Richard Morneau, Prothonotary
DATED:	January 25, 2005

APPEARANCES:

Nadine Dupuis	FOR THE PLAINTIFF
Patrick Vézina	
Jocelyn Geoffroy	FOR THE DEFENDANT

SOLICITORS OF RECORD:

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Amos, Quebec	

By lexum for the law societies members of the Federation of Law Societies of Canada

TAB 12

Her Majesty The Queen *Appellant*

v.

Province of Alberta Treasury Branches *Respondent*

and between

Her Majesty The Queen *Appellant*

v.

Province of Alberta Treasury Branches *Respondent*

and between

Her Majesty The Queen *Appellant*

v.

The Toronto-Dominion Bank *Respondent*

INDEXED AS: ALBERTA (TREASURY BRANCHES) *v.* M.N.R.; TORONTO-DOMINION BANK *v.* M.N.R.

File No.: 24056.

1995: October 12; 1996: April 25.

Present: La Forest, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Taxation — Income tax — Goods and Services Tax — Garnishment — Income tax and GST legislation providing for garnishment enabling Minister of National Revenue to intercept monies owed to tax debtors — Whether provisions give Minister priority over creditors who have received general assignment of book debts from tax debtor — Meaning of "secured creditor" — Income Tax Act, S.C. 1970-71-72, c. 63, s. 224(1.2), (1.3) — Excise Tax Act, R.S.C., 1985, c. E-15, s. 317(3), (4).

Sa Majesté la Reine *Appelante*

c.

Province of Alberta Treasury Branches *Intimé*

et entre

Sa Majesté la Reine *Appelante*

c.

Province of Alberta Treasury Branches *Intimé*

et entre

Sa Majesté la Reine *Appelante*

c.

La Banque Toronto-Dominion *Intimée*

RÉPERTORIÉ: ALBERTA (TREASURY BRANCHES) *c.* M.R.N.; BANQUE TORONTO-DOMINION *c.* M.R.N.

N° du greffe: 24056.

1995: 12 octobre; 1996: 25 avril.

Présents: Les juges La Forest, Cory, McLachlin, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL DE L'ALBERTA

Droit fiscal — Impôt sur le revenu — Taxe sur les produits et services — Saisie-arrêt — Lois relatives à l'impôt sur le revenu et à la TPS prescrivant une procédure de saisie-arrêt permettant au ministre du Revenu national d'intercepter des sommes dues à des débiteurs fiscaux — Les dispositions en cause confèrent-elles au Ministre la priorité de rang sur les créanciers ayant obtenu d'un débiteur fiscal une cession générale de créances comptables? — Sens de l'expression «créancier garanti» — Loi de l'impôt sur le revenu, S.C. 1970-71-72, ch. 63, art. 224(1.2), (1.3) — Loi sur la taxe d'accise, L.R.C. (1985), ch. E-15, art. 317(3), (4).

Bankruptcy — Priorities — General assignments of book debts — Income tax and GST legislation providing for garnishment enabling Minister of National Revenue to intercept monies owed to tax debtors — Whether provisions give Minister priority over creditors who have received general assignment of book debts from tax debtor.

The first case involved in these appeals arose from a loan made by the respondent Alberta Treasury Branches to a hotel operator which was secured in part by a general assignment of book debts ("GABD"). The hotel operator was in arrears to the Minister of National Revenue ("MNR") for unremitted GST, plus interest and penalties. The MNR served requirements to pay under s. 317(3) of the *Excise Tax Act* ("*ETA*") on all possible debtors of the hotel operator. That section provides for a form of garnishment which enables the MNR in certain circumstances to intercept monies owed to a tax debtor. It applies to a "secured creditor", defined as "a person who has a security interest in the property of another person". After the hotel operator made an assignment under the *Bankruptcy Act*, the trustee estimated the realization of the assets of the estate would leave a shortfall to Alberta Treasury Branches. The Court of Queen's Bench, in an application to determine priorities, held that the MNR had priority by virtue of the provisions of the *ETA*. In the second case, an excavation company borrowed money from Alberta Treasury Branches and granted it a GABD. After the company completed certain contract work, the client held holdback funds which were claimed by various creditors of the company, including the MNR, to whom the company was indebted for unremitted employee source deductions, interest and penalties. The MNR served two requirements to pay on the client, under s. 224(1.2) of the *Income Tax Act* ("*ITA*"), which provides for a garnishment remedy identical to the one provided for in the *ETA*. On an application to determine priority to the monies in question, the master decided that Alberta Treasury Branches had priority through its GABD. This decision was upheld on appeal. In the third case, a drilling company borrowed money from the respondent bank which was secured in part by a GABD. The company owed the MNR unremitted GST, interest and penalties. The MNR served requirements to pay under s. 317(3) *ETA* on the company's trade debtors. Another of its creditors successfully filed a petition under the *Bankruptcy Act* to have the company declared a bankrupt. In an application to determine priority, the Court of Queen's Bench held that the MNR had priority under the provisions of the *ETA*. In all three cases the Court of

Faillite — Priorités — Cession générale de créances comptables — Lois relatives à l'impôt sur le revenu et à la TPS prescrivant une procédure de saisie-arrêt permettant au ministre du Revenu national d'intercepter des sommes dues à des débiteurs fiscaux — Les dispositions en cause confèrent-elles au Ministre la priorité de rang sur les créanciers ayant obtenu d'un débiteur fiscal une cession générale de créances comptables?

La première affaire en cause dans les présents pourvois découle d'un prêt qui a été consenti à une société hôtelière par l'intimé l'Alberta Treasury Branches, et qui était garanti en partie par une cession générale de créances comptables. La société hôtelière accusait des arriérés au titre de la TPS non versée au ministre du Revenu national («MRN»), plus intérêts et pénalité. Le MRN a signifié à tous les débiteurs possibles de la société hôtelière une demande de paiement fondée sur le par. 317(3) de la *Loi sur la taxe d'accise* («*LTA*»). Cette disposition prescrit une procédure de saisie-arrêt qui, dans certaines circonstances, permet au MRN d'intercepter des sommes dues à un débiteur fiscal. Elle s'applique à un «créancier garanti», qui est défini comme une «[p]ersonne qui a une garantie sur un bien d'une autre personne». Après que la société hôtelière eut fait cession de ses biens en vertu de la *Loi sur la faillite*, le syndic a estimé que la réalisation de l'actif de la faillite ne suffirait pas à payer entièrement l'Alberta Treasury Branches. À la suite d'une demande visant à établir l'ordre de priorité, la Cour du Banc de la Reine a statué que le MRN avait priorité en vertu des dispositions de la *LTA*. Dans la deuxième affaire, une société d'excavation avait emprunté des sommes à l'Alberta Treasury Branches et lui avait consenti une cession générale de créances comptables. Après l'achèvement de certains travaux par la société, le client a retenu des fonds qui étaient réclamés par différents créanciers de la société, dont le MRN à qui la société devait des arriérés de retenues à la source, plus intérêts et pénalité. Le MRN a signifié au client deux demandes de paiement fondées sur le par. 224(1.2) de la *Loi de l'impôt sur le revenu* («*LIR*»), qui prescrit une procédure de saisie-arrêt identique à celle prévue dans la *LTA*. À la suite d'une demande visant à établir l'ordre de priorité relativement aux sommes en cause, le protonotaire a décidé que l'Alberta Treasury Branches avait priorité en vertu de sa cession générale de créances comptables. Cette décision a été confirmée en appel. Dans la troisième affaire, une société de forage avait contracté auprès de la banque intimée un emprunt qui était garanti en partie par une cession générale de créances comptables. La société devait au MRN une somme au titre de la TPS non versée, plus intérêts et pénalité. Le MRN a signifié aux

Appeal held that the lending institution had priority over the MNR.

Held (Iacobucci and Major JJ. dissenting): The appeals should be allowed.

Per La Forest, Cory and McLachlin JJ.: The definition of "security interest" is broad enough to include a GABD, and the wording of s. 224(1.2) *ITA* and s. 317(3) *ETA* is sufficiently clear and unequivocal to allow a transfer of property in the garnished funds to the MNR and to grant him a priority in circumstances where the balance of the section applies. Moreover, an assignee of a GABD is a "secured creditor" within the meaning of s. 224(1.3) *ITA* or s. 317(3) *ETA* because the assignee holds a security interest "in the property of another person". Each assignment of book debts made in these cases provides that it is to be a "continuing collateral security". Further, all the assignments limit liability to the extent of the outstanding indebtedness. Thus, if the loan secured by the GABD was repaid, the lending institution would have no further interest in the assignment. Since the assignment by its terms can be redeemed by payment of the debt, it should not be construed as an absolute assignment. Neither the lending institutions nor the debtor companies by their actions gave any indication that the institutions were the owners of the book debts. The lending institutions made no efforts whatsoever to realize upon the book debts or in any way to act as "owners" of them until the debtor companies were obviously in severe financial difficulty if not bankrupt. Both the wording of the documents and the actions of the parties indicate that they regarded the assignment to be given as collateral security for the indebtedness. So long as the possibility of redemption exists, the GABD remains as collateral security.

When there is neither any doubt as to the meaning of the legislation nor any ambiguity in its application to the facts, then the statutory provision must be applied regardless of its object or purpose. However, the very

débiteurs commerciaux de la société des demandes de paiement fondées sur le par. 317(3) *LTA*. Un autre des créanciers de la société a présenté avec succès une pétition en faillite contre celle-ci. À la suite d'une demande visant à établir l'ordre de priorité, la Cour du Banc de la Reine a statué que le MRN avait priorité en vertu des dispositions de la *LTA*. Dans les trois cas, la Cour d'appel a statué que l'établissement de crédit avait priorité sur le MRN.

Arrêt (les juges Iacobucci et Major sont dissidents): Les pourvois sont accueillis.

Les juges La Forest, Cory et McLachlin: La définition du terme «garantie» est suffisamment large pour comprendre une cession générale de créances comptables, et le libellé des par. 224(1.2) *LIR* et 317(3) *LTA* est suffisamment clair et net pour permettre de transférer au MRN la propriété des fonds saisis-arrêtés et lui accorder la priorité dans les circonstances où le reste de la disposition s'applique. De plus, le titulaire d'une cession générale de créances comptables est un «créancier garanti» au sens du par. 224(1.3) *LIR* ou du par. 317(3) *LTA*, parce que celui-ci détient une garantie «sur un bien d'une autre personne». Chaque cession de créances comptables consentie en l'espèce prévoit qu'elle constituera une «garantie accessoire et permanente». En outre, toutes les cessions limitent la dette au montant de la créance impayée. En conséquence, si le prêt garanti par la cession générale de créances comptables était remboursé, l'établissement de crédit n'aurait plus aucun autre droit sur la cession. Puisque l'acte de cession prévoit que la cession peut être rachetée par le paiement de la créance, celle-ci ne devrait pas être interprétée comme une cession absolue. Ni les établissements de crédit ni les sociétés débitrices n'ont agi de façon à indiquer que les établissements étaient propriétaires des créances comptables. Les établissements de crédit n'ont nullement cherché à réaliser les créances comptables ou à se comporter, de quelque manière que ce soit, comme «propriétaires» de ces créances jusqu'à ce que les sociétés débitrices soient de toute évidence en grave difficulté financière, pour ne pas dire en faillite. Le texte des documents et les actions des parties indiquent qu'elles considéraient que la cession avait été consentie à titre de garantie accessoire relativement aux créances. Dans la mesure où il existe une possibilité de rachat, la cession générale de créances comptables demeure une garantie accessoire.

Lorsqu'il n'y a aucun doute quant au sens d'une mesure législative ni aucune ambiguïté quant à son application aux faits, elle doit être appliquée indépendamment de son objet. Cependant, l'historique même de

history of this case with the clear differences of opinion expressed as between the trial judges and the Court of Appeal indicates that for able and experienced legal minds, neither the meaning of the legislation nor its application to the facts is clear. Even if the ambiguity were not apparent, it is significant that in order to determine the clear and plain meaning of the statute it is always appropriate to consider the scheme of the Act, the object of the Act and the intention of Parliament. The Parliamentary intent was to confirm the overriding right of the MNR to collect by garnishment the taxes collected which ought to have been remitted by the debtor company to the MNR. These amounts so collected could be said to belong not to the collecting debtor entities but to the government. In those circumstances the priority granted to the MNR to recover such funds cannot possibly be said to be expropriation without compensation.

The same instrument cannot be both a "security interest" and an "absolute assignment". If an instrument is an absolute assignment, then since it is complete and perfect in itself, there cannot be a residual right remaining with the debtor to recover the assets. Pursuant to the instruments presented in this case the borrower retains the right to redeem the book debts once the debt is paid off. This right of redemption irrefutably demonstrates that the assignment is something less than absolute. A GABD represents a security interest with the legal title being with the lender and the equitable title remaining with the borrower. This conclusion is supported by s. 63 of the Alberta *Personal Property Security Act*, which stipulates the basis upon which the right of redemption in personal property, including book debts, will be terminated. To conclude that a GABD results in a change of ownership as a result of its absolute nature rather than constituting collateral security for a debt will have serious implications. It could result in a change in the ordering of priorities provided by the *Bankruptcy and Insolvency Act*, the *Companies' Creditors Arrangement Act* and the *Canada Business Corporations Act*. Further, it could constitute the means by which an unscrupulous debtor company, knowingly or unknowingly abetted by a creditor company, could so order its affairs that many other *bona fide* creditors could be adversely affected.

Per Major J. (dissenting): A GABD falls within the definition of "security interest" in s. 224(1.3) *ITA*. The phrase an "assignment ... of any kind whatever" is broad enough to encompass the absolute assignments of book debts which are at issue in these appeals. The lending institutions, however, do not fall within the defini-

la présente affaire, conjugué aux divergences évidentes d'opinions entre les juges de première instance et la Cour d'appel, révèle que, pour des juristes doués et expérimentés, ni le sens de la mesure législative ni son application aux faits ne sont clairs. Même si l'ambiguïté n'était pas apparente, il importe de signaler qu'il convient toujours d'examiner l'esprit de la loi, l'objet de la loi et l'intention du législateur pour déterminer le sens manifeste et ordinaire de la loi en cause. Le Parlement voulait confirmer le droit prépondérant du MRN de recouvrer par voie de saisie-arrêt les impôts perçus que la société débitrice aurait dû lui verser. On pourrait dire que les montants ainsi perçus appartiennent non pas aux entités débitrices qui les perçoivent, mais au gouvernement. Dans ces circonstances, on ne saurait dire que la priorité accordée au MRN en matière de recouvrement de ces fonds constitue une expropriation sans indemnisation.

Le même écrit ne saurait constituer à la fois une «garantie» et une «cession absolue». Si un écrit constitue une cession absolue, le débiteur ne peut alors conserver un droit résiduel de recouvrer les biens puisqu'une telle cession est complète et parfaite en soi. Conformément aux écrits présentés en l'espèce, l'emprunteur conserve le droit de racheter les créances comptables une fois la dette payée. Ce droit de rachat démontre de façon irréfutable que la cession n'est pas absolue. Une cession générale de créances comptables représente une garantie dont le titre en common law appartient au prêteur et le titre en *equity* continue d'appartenir à l'emprunteur. Cette conclusion est étayée par l'art. 63 de la *Personal Property Security Act* de l'Alberta, qui prévoit les cas où il y a extinction du droit de rachat de biens meubles, y compris des créances comptables. Il y aurait de graves répercussions à conclure qu'une cession générale de créances comptables donne lieu, en raison de son caractère absolu, à un transfert de propriété, au lieu de constituer une garantie accessoire pour le paiement d'une créance. Il pourrait en résulter une modification de l'ordre de priorité prévu par la *Loi sur la faillite et l'insolvabilité*, la *Loi sur les arrangements avec les créanciers des compagnies* et la *Loi sur les sociétés par actions*. De plus, cela pourrait permettre à un débiteur sans scrupule, encouragé sciemment ou à son insu par une société créancière, d'organiser ses affaires de façon à léser de nombreux autres créanciers de bonne foi.

Le juge Major (dissident): Une cession générale de créances comptables est visée par la définition du terme «garantie» au par. 224(1.3) *LIR*. L'expression «cessions [...] quelle qu'en soit la nature» est suffisamment générale pour inclure les cessions absolues de créances comptables visées dans les présents pourvois. Cepen-

tion of "secured creditor" because they do not hold a security interest "in the property of another person". An assignment passes title and therefore property in the book debts is held by the lending institution and not by the tax debtor. The assignments in each of the three cases involved here all contain language which makes it clear that they are immediate and absolute. The fact that the GABD is referred to as "continuing collateral security" in the instruments does not make the GABD anything less than absolute. While the tax debtor retains an equity of redemption upon an assignment of its book debts, here the value of the loans secured by the book debts far exceeds the value of the debts themselves and there is thus no value in the equity of redemption. Further, an absolute assignment of book debts makes those book debts the property of the assignee, and they remain the property of the assignee until the assignor actually exercises his equitable right to redeem. In determining whether the book debts, once assigned, are the "property" of the assignor or of the assignee, the court must interpret the word in its plain and ordinary sense. The plain and ordinary meaning of "property" is legal title and not a contingent future equitable right to reacquire property which one does not presently hold. In the circumstances of these appeals, a strict reading of the taxation statute is appropriate. In the absence of clear and unequivocal language, there is a presumption that proprietary rights are not to be taken away without provision being made for compensation. In the context of these appeals, the interpretation urged by the MNR would have the effect of expropriating property to which the lender is legally entitled under its security agreement with the tax debtor. The plain and ordinary meaning of the statutory words simply does not bear the strained interpretation of property that, absent the security interest, is the property of another person. In addition to offending the principle that extra words should not be read into a section unless absolutely necessary, this proposed reading attempts to read in wording which can be expressly found in another part of the same section. If there is an ambiguity in the meaning of the word "property", then the specific effect of this section warrants a strict resolution of any ambiguity in favour of the respondent lending institutions.

Per Iacobucci J. (dissenting): While the general principles of statutory interpretation outlined by Cory J. were agreed with, the general assignments of book debts

dant, les établissements de crédit ne sont pas des «créanciers garantis» parce qu'ils ne détiennent pas une garantie «sur un bien d'une autre personne». Une cession transfère le titre de propriété et c'est donc l'établissement de crédit et non le débiteur fiscal qui a la propriété des créances comptables. Dans chacune des trois affaires ici en cause, le libellé de l'acte de cession établit clairement que la cession est immédiate et absolue. Le fait que la cession générale de créances comptables soit qualifiée de «garantie accessoire et permanente» dans les écrits n'en change pas le caractère absolu. Bien que le débiteur fiscal conserve un droit de rachat lorsqu'il cède ses créances comptables, la valeur des prêts garantis, en l'espèce, par les créances comptables excède de beaucoup celle des créances elles-mêmes et, ainsi, le droit de rachat n'est d'aucune utilité. De plus, le cessionnaire devient propriétaire des créances comptables visées par une cession absolue, et ces créances comptables demeurent sa propriété jusqu'à ce que le cédant exerce le droit de rachat qui lui est reconnu en *equity*. Pour déterminer si les créances comptables cédées constituent le «bien» du cédant ou celui du cessionnaire, la cour doit donner à ce terme son sens ordinaire. Le terme «bien» s'entend ordinairement d'un titre de propriété et non d'un droit futur éventuel, reconnu en *equity*, de racheter un bien qu'une personne ne détient pas pour l'instant. Dans les circonstances des présents pourvois, il convient d'interpréter restrictivement la loi fiscale. Il existe, en l'absence de termes clairs et non équivoques, une présomption que les droits de propriété d'une personne ne peuvent lui être retirés sans qu'elle soit indemnisée. Dans le contexte des présents pourvois, l'interprétation préconisée par le MRN aurait pour effet d'exproprier des biens auxquels le prêteur a légalement droit en vertu du contrat de garantie qu'il a conclu avec le débiteur fiscal. Le sens ordinaire des termes employés dans la Loi n'a aucun rapport avec l'interprétation forcée consistant à dire qu'il s'agit, en l'absence de garantie, du bien d'une autre personne. En plus de contrevenir au principe qu'il ne faut pas ajouter des mots à une disposition, sauf s'il est absolument nécessaire de le faire, l'interprétation proposée tente d'introduire des termes explicitement utilisés dans une autre partie de la même disposition. Si le sens du terme «bien» est ambigu, l'effet spécifique de cette disposition justifie alors que toute ambiguïté soit strictement résolue en faveur des établissements de crédit intimés.

Le juge Iacobucci (dissident): Bien que les principes généraux d'interprétation législative exposés par le juge Cory aient été acceptés, les cessions générales de

in this case were tantamount to an absolute transfer of property, as found by Major J.

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By Cory J.

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By Major J. (dissenting)

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créances comptables consenties en l'espèce équivalaient à un transfert absolu de propriété, comme l'a conclu le juge Major.

Jurisprudence

Citée par le juge Cory

Arrêts mentionnés: *Friesen c. Canada*, [1995] 3 R.C.S. 103; *Pembina on the Red Development Corp. c. Triman Industries Ltd.*, [1991] 6 W.W.R. 481; *Thermo King Corp. c. Provincial Bank of Canada* (1981), 34 O.R. (2d) 369, autorisation de pourvoi refusée, [1982] 1 R.C.S. xi; *Bonavista (Town) c. Atlantic Technologists Ltd.* (1994), 117 Nfld. & P.E.I.R. 19; *Bank of Montreal c. Baird* (1979), 33 C.B.R. (N.S.) 256, autorisation de pourvoi refusée, [1980] 1 R.C.S. v; *R.V. Demmings & Co. c. Caldwell Construction Co.* (1955), 4 D.L.R. (2d) 465; *R. in Right of B.C. c. F.B.D.B.* (1987), 17 B.C.L.R. (2d) 273; *Evans Coleman and Evans Ltd. c. R.A. Nelson Construction Ltd.* (1958), 27 W.W.R. 38; *Banque fédérale de développement c. Québec (Commission de la santé et de la sécurité du travail)*, [1988] 1 R.C.S. 1061; *Canada c. Banque Nationale du Canada*, [1993] 2 C.F. 206; *TransGas Ltd. c. Mid-Plains Contractors Ltd.* (1993), 101 D.L.R. (4th) 238, conf. par [1994] 3 R.C.S. 753; *Berg c. Parker Pacific Equipment Sales*, [1991] 1 C.T.C. 442; *Lundrigans Ltd. (Receivership) c. Bank of Montreal* (1993), 110 Nfld. & P.E.I.R. 91.

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Excise Tax Act, R.S.C., 1985, c. E-15, s. 317(3), (4) [ad. 1990, c. 45, s. 12].
Income Tax Act, S.C. 1970-71-72, c. 63, ss. 153, 224(1) [rep. & sub. 1980-81-82-83, c. 140, s. 121], (1.2) [ad. 1987, c. 46, s. 66; am. 1990, c. 34, s. 1], (1.3) [ad. 1987, c. 46, s. 66].
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Edward R. Sojonky, Q.C., and *Michael J. Lema*, for the appellant.

Written submissions only by *J. Gary Greenan* and *Scott Watson*, for the respondent Province of Alberta Treasury Branches.

Jeffery D. Vallis and *C. Bryce Code*, for the respondent the Toronto-Dominion Bank.

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POURVOIS contre un arrêt de la Cour d'appel de l'Alberta (1994), 16 Alta. L.R. (3d) 1, 149 A.R. 34, 63 W.A.C. 34, [1994] 4 W.W.R. 685, 24 C.B.R. (3d) 257, 94 D.T.C. 6650, [1995] 1 C.T.C. 75, qui a infirmé des décisions du juge Forsyth (1992), 5 Alta. L.R. (3d) 141, 134 A.R. 124, [1993] 1 W.W.R. 639, 15 C.B.R. (3d) 143, et du juge MacLeod, et qui a confirmé une décision du juge Hunt (1993), 9 Alta. L.R. (3d) 349, 139 A.R. 295, [1993] 5 W.W.R. 756, [1994] 1 C.T.C. 108, 5 P.P.S.A.C. (2d) 117, concernant l'ordre de priorité. Pourvois accueillis, les juges Iacobucci et Major sont dissidents.

Edward R. Sojonky, c.r., et *Michael J. Lema*, pour l'appelante.

Argumentation écrite seulement par *J. Gary Greenan* et *Scott Watson*, pour l'intimé le Province of Alberta Treasury Branches.

Jeffery D. Vallis et *C. Bryce Code*, pour l'intimée la Banque Toronto-Dominion.

The judgment of La Forest, Cory and McLachlin JJ. was delivered by

1 CORY J. — At issue on these appeals is whether, on the facts of this case, lending institutions are secured creditors pursuant to the provisions of s. 224 of the *Income Tax Act*, S.C. 1970-71-72, c. 63 (*ITA*) and s. 317 of the *Excise Tax Act*, R.S.C., 1985, c. E-15 (*ETA*), which are practically identical in their provisions.

2 The facts giving rise to these appeals and the decisions of the court below have been ably set out in the reasons of Justice Major.

3 Both the *ITA* and the *ETA* provide for the collection of funds due to the federal government by way of income tax deductions from the wages of employees and for the remission of monies owing for the Goods and Services Tax (GST). The sections under review provide for the recovery of monies owing from those who are responsible for the collection and remission of income tax deductions and GST collections by way of garnishment. This system of collection and remission of income tax is exceedingly important. For example, in 1987 some 87 per cent of all personal income tax was collected through employer's deduction and remission.

4 In the cases under consideration, the company responsible for collection and remission of income tax and GST borrowed money from a lending institution. To secure their indebtedness the debtor companies made a general assignment of book debts (GABD) to the lending institution. If the submissions of the appellant prevail then the Government of Canada will recover the monies which ought to be paid to it by way of employees' income tax or GST. If the respondents are correct in their position, then the lending institutions will retain the funds which have come into their possession as a result of the GABD. Thus the decision in this case will have a very real significance for both the federal government and lending institutions.

Version française du jugement des juges La Forest, Cory et McLachlin rendu par

LE JUGE CORY — Il s'agit en l'espèce de déterminer si, d'après les faits, les établissements de crédit sont des créanciers garantis conformément aux dispositions pratiquement identiques de l'art. 224 de la *Loi de l'impôt sur le revenu*, S.C. 1970-71-72, ch. 63 (*LIR*), et de l'art. 317 de la *Loi sur la taxe d'accise*, L.R.C. (1985), ch. E-15 (*LTA*).

Le juge Major expose fort bien, dans ses motifs, les faits à l'origine des présents pourvois et les décisions des tribunaux d'instance inférieure.

La *LIR* et la *LTA* prescrivent toutes les deux la perception de fonds dus au gouvernement fédéral par voie de retenues fiscales sur les salaires d'employés, ainsi que le versement des sommes dues au titre de la taxe sur les produits et services (TPS). Les dispositions examinées prévoient le recouvrement, au moyen d'une saisie-arrêt, des sommes dues auprès des personnes responsables de la perception et du versement des retenues fiscales et de la TPS. Ce régime de perception et de versement de l'impôt sur le revenu est extrêmement important. Par exemple, en 1987, quelque 87 pour 100 de l'impôt sur le revenu des particuliers a été perçu au moyen des retenues et des versements effectués par les employeurs.

Dans les présents pourvois, la société responsable de la perception et du versement de l'impôt sur le revenu et de la TPS avait emprunté une somme à un établissement de crédit. Pour garantir leur emprunt, les sociétés débitrices avaient consenti une cession générale de créances comptables à l'établissement de crédit. Si l'appelante obtient gain de cause, le gouvernement du Canada recouvrera alors les sommes qui devraient lui être versées au titre de l'impôt sur le revenu des employés ou de la TPS. Par contre, si les intimés ont raison, les établissements de crédit conserveront alors les fonds qui sont tombés en leur possession par suite de la cession générale de créances comptables. En conséquence, la décision en l'espèce revêt une très grande importance pour le gouvernement fédéral et les établissements de crédit.

In essence, s. 224(1.2) provides a form of garnishment enabling the federal government to intercept monies owed to tax debtors. It is not available for the collection of income tax generally, but is limited to the recovery of funds owing by a person or company which has withheld monies from another person, usually an employee, for income tax purposes pursuant to s. 153 *ITA* and has failed to remit the withheld amounts to the federal government. A similar garnishment remedy is provided by s. 317(3) *ETA*. It is applicable in circumstances where a company or an individual has failed to remit GST which was collected as required by the provisions of the *ETA*.

Major J. has concluded that the Alberta Court of Appeal was correct in finding that an assignee of a GABD is not a "secured creditor"within the meaning of s. 224(1.3) *ITA* or s. 317(3) *ETA* because the assignee does not hold a security interest "in the property of another person". Rather, the assignee is the owner of those book debts. With respect I cannot agree with that conclusion. However I am in complete agreement with these conclusions:

1. The definition of "security interest" is broad enough to include a general assignment of book debts even where that assignment is absolute.

2. The wording of s. 224(1.2) *ITA* as amended in 1990 is sufficiently clear and non-equivocal to allow a transfer of property in the garnished funds to the Minister of National Revenue (MNR) and to grant him a priority in circumstances where the balance of the section applies.

The Provisions of the GABD Made in These Cases

It would be helpful first to consider the assignment of book debts made in these cases in order to ascertain the apparent intentions of the parties. The two assignments in which the Treasury Branch was the lender provide:

Le paragraphe 224(1.2) prescrit essentiellement une procédure de saisie-arrêt qui permet au gouvernement fédéral d'intercepter des sommes dues à des débiteurs fiscaux. Ce type de saisie-arrêt ne peut servir au recouvrement des créances fiscales en général. Il ne vise que le recouvrement de sommes dues par une personne ou une société qui a, en vertu de l'art. 153 *LIR*, prélevé des sommes auprès d'une autre personne, habituellement un employé, et qui a omis de verser les montants retenus au gouvernement fédéral. Le paragraphe 317(3) *LTA* prévoit l'application d'une procédure similaire de saisie-arrêt dans le cas où une société ou un particulier a omis de verser la TPS perçue conformément aux dispositions de la *LTA*.

Le juge Major a conclu que la Cour d'appel de l'Alberta a eu raison de statuer que le titulaire d'une cession générale de créances comptables n'est pas un «créancier garanti» au sens du par. 224(1.3) *LIR* ou du par. 317(3) *LTA*, parce que celui-ci ne détient pas une garantie «sur un bien d'une autre personne». Le titulaire d'une telle cession est plutôt propriétaire des créances comptables. En toute déférence, je ne puis souscrire à cette conclusion. Cependant, je suis entièrement d'accord avec les conclusions suivantes:

1. La définition du terme «garantie» est suffisamment large pour comprendre une cession générale de créances comptables même s'il s'agit d'une cession absolue.

2. Le libellé du par. 224(1.2) *LIR*, modifié en 1990, est suffisamment clair et net pour permettre de transférer au ministre du Revenu national (MRN) la propriété des fonds saisis-arrêtés et lui accorder la priorité dans les circonstances où le reste de la disposition s'applique.

Les dispositions de la cession générale de créances comptables consentie dans les présentes affaires

Il serait utile d'examiner tout d'abord la cession de créances comptables consentie dans les présentes affaires afin de déterminer les intentions apparentes des parties. Voici comment étaient formulées les deux cessions consenties au prêteur Treasury Branch:

THE PRESENT assignment and transfer shall be a continuing collateral security to Treasury Branches for the payment of all and every present and future indebtedness and liability of the undersigned to Treasury Branches. . . . [Emphasis added.]

To a similar effect, the Toronto Dominion assignment reads in part:

PROVIDED and it is hereby distinctly understood and agreed that these presents are and shall be a continuing collateral security to the Bank for the general balance due at any time by the Assignor to the Bank. . . .

PROVIDED ALWAYS and it is hereby distinctly agreed that these presents are and shall be continuing and collateral security to the present and any future indebtedness of the Assignor to the Bank. . . . [Emphasis added.]

8 Further, all the assignments limit liability to the extent of the outstanding indebtedness. Thus, if the loan secured by the GABD was repaid the Bank or Treasury Branch would have no further interest in the assignment. The documents themselves refer to the assignment as being a continuing collateral security for the payment of the indebtedness. The clear intention of the parties is that the assignment is given as security for the payment of a debt and upon payment of the debt the GABD is to be of no force or effect. That is to say the lending institution could not, after payment of the debt, make use of the GABD to realise upon any of the book debts of the assignor. In my view since the assignment by its terms can be redeemed by payment of the debt it cannot or at least should not be construed as an absolute assignment.

9 Neither the lending institutions nor the debtor companies by their actions gave any indication that the respondents were the owners of the book debts. This is demonstrated by the fact that the lending institutions made no efforts whatsoever to realise upon the book debts or in any way to act as "owners" of them until the debtor companies were obviously in severe financial difficulty if not bankrupt.

[TRADUCTION] La cession et le transfert effectués AUX PRÉSENTES constituent une garantie accessoire et permanente en faveur de Treasury Branches au titre du paiement de toute créance et dette, présentes et futures, de la soussignée à Treasury Branches . . . [Je souligne.]

Dans la même veine, la cession consentie à la Banque Toronto-Dominion prévoyait notamment:

[TRADUCTION] SOUS RÉSERVE, et il est clairement entendu et convenu que les présentes constituent une garantie accessoire et permanente en faveur de la Banque pour tout solde général dû, à quelque moment que ce soit, par le cédant à la Banque . . .

TOUJOURS SOUS RÉSERVE, et il est clairement convenu que les présentes constituent une garantie accessoire et permanente au titre de toute créance, présente et future, du cédant à la Banque . . . [Je souligne.]

De plus, toutes les cessions limitent la dette au montant de la créance impayée. En conséquence, si le prêt garanti par la cession générale de créances comptables était remboursé, la Banque ou le Treasury Branch n'aurait plus aucun autre droit sur la cession. Les documents mêmes précisent que la cession constitue une garantie accessoire et permanente au titre du paiement de la créance. Les parties voulaient clairement que la cession générale de créances comptables constitue une garantie au titre du paiement d'une créance et qu'elle ne soit plus exécutoire une fois le paiement effectué. Cela signifie que l'établissement de crédit ne pourrait, une fois la créance payée, se servir de cette cession générale de créances comptables pour procéder à la réalisation de l'une ou l'autre des créances comptables du cédant. À mon avis, puisque l'acte de cession prévoit que la cession peut être rachetée par le paiement de la créance, celle-ci ne peut ou tout au moins ne devrait pas être interprétée comme une cession absolue.

Ni les établissements de crédit ni les sociétés débitrices n'ont agi de façon à indiquer que les intimés étaient propriétaires des créances comptables. Cela ressort du fait que les établissements de crédit n'ont nullement cherché à réaliser les créances comptables ou à se comporter, de quelque manière que ce soit, comme «propriétaires» de ces créances jusqu'à ce que les sociétés débitrices

Only then did the lending institutions seek to realise upon their security. Both the wording of the documents and the actions of the parties indicate that they regarded the assignment to be given as collateral security for the indebtedness. In commercial affairs, it is well known that a GABD is indeed a means of granting collateral security for a debt. In my view, so long as the possibility of redemption exists, the GABD remains as collateral security.

soient de toute évidence en grave difficulté financière, pour ne pas dire en faillite. Ce n'est qu'à ce moment que les établissements de crédit ont cherché à réaliser leur garantie. Le texte des documents et les actions des parties indiquent qu'elles considéraient que la cession avait été consentie à titre de garantie accessoire relativement aux créances. En matière commerciale, il est bien connu qu'une cession générale de créances comptables est, en fait, un moyen d'accorder une garantie accessoire relativement à une dette. À mon avis, dans la mesure où il existe une possibilité de rachat, la cession générale de créances comptables demeure une garantie accessoire.

In light of this customary commercial understanding of a GABD, it may be helpful to review the legislation to determine if, by its wording, it renders a GABD something other than collateral security for a debt and makes the assignee the owner of the book debts.

10 Compte tenu de la façon dont une cession générale de créances comptables est habituellement interprétée en matière commerciale, il peut être utile d'examiner la mesure législative pour déterminer si, par sa formulation, elle fait de la cession générale de créances comptables autre chose qu'une garantie accessoire au titre d'une créance et si elle rend le cessionnaire propriétaire des créances comptables.

Pertinent Provisions of the *ITA* and the *ETA* and Their History

As Major J. pointed out, prior to 1987 the provisions of the garnishment remedy in the *ITA* (s. 224(1)) were almost unanimously interpreted by the courts in such a way that a demand made under the section was ineffective to attach any of the assigned debts. The courts held that by the assignment the tax debtor had transferred all its interest in the accounts to the assignee with the result that there was nothing left for the Minister of National Revenue (MNR) to attach by garnishment.

Les dispositions pertinentes de la *LIR* et de la *LTA* et leur historique

11 Comme l'a fait remarquer le juge Major, avant 1987, les tribunaux ont considéré quasi unanimement que les dispositions de la *LIR* relatives à la saisie-arrêt (par. 224(1)) ne permettaient pas de saisir-arrêter les créances cédées. Les tribunaux ont conclu que le débiteur fiscal avait, par la cession, transféré en totalité au cessionnaire son droit sur ses comptes, de sorte qu'il ne restait rien sur quoi pouvait porter la saisie-arrêt du ministre du Revenu national (MRN).

In an attempt to address these decisions, Parliament amended the *ITA* in 1987 by adding two new subsections. They provided that the MNR could garnish funds owed by a tax debtor to a "secured creditor" and defined the terms "secured creditor" and "security interest". As Major J. observed, there was a divergence of opinion in the provincial courts of appeal as to whether the 1987 amend-

12 Pour tenter de donner suite à ces décisions, le Parlement a modifié la *LIR* en 1987, en y ajoutant deux nouveaux paragraphes. Ces paragraphes prévoyaient que le MRN était habilité à saisir-arrêter les sommes dues par un débiteur fiscal à un «créancier garanti», et définissaient les expressions «créancier garanti» et «garantie». Comme l'a fait remarquer le juge Major, les cours d'appel des pro-

ments permitted the MNR to effectively garnish funds in the hands of an assignee of a GABD.

13 In order to further clarify the situation and resolve the differences of opinion in the appellate courts, Parliament again amended the *ITA* with the apparent aim of granting priority to the MNR. It may be helpful to set out s. 224(1.2) *ITA* as it now appears following the 1990 amendment:

224. . . .

(1.2) Notwithstanding any other provision of this Act, the *Bankruptcy Act*, any other enactment of Canada, any enactment of a province or any law, where the Minister has knowledge or suspects that a particular person is or will become, within 90 days, liable to make a payment

(*a*) to another person (in this subsection referred to as the "tax debtor") who is liable to pay an amount assessed under subsection 227(10.1) or a similar provision, or

(*b*) to a secured creditor who has a right to receive the payment that, but for a security interest in favour of the secured creditor, would be payable to the tax debtor,

the Minister may, by registered letter or by a letter served personally, require the particular person to pay forthwith, where the moneys are immediately payable, and in any other case, as and when the moneys become payable, the moneys otherwise payable to the tax debtor or the secured creditor in whole or in part to the Receiver General on account of the tax debtor's liability under subsection 227(10.1) or a similar provision, and on receipt of that letter by the particular person, the amount of those moneys that is required by that letter to be paid to the Receiver General shall, notwithstanding any security interest in those moneys, become the property of Her Majesty and shall be paid to the Receiver General in priority to any such security interest. [Emphasis added.]

(1.3) In subsection (1.2),

"secured creditor" means a person who has a security interest in the property of another person or who acts for or on behalf of that person with respect to the security interest and includes a trustee appointed under a trust deed relating to a security interest, a

vinces ont eu des opinions divergentes quant à savoir si les modifications de 1987 permettaient au MRN de saisir-arrêter les sommes entre les mains du titulaire d'une cession générale de créances comptables.

Afin de clarifier davantage la situation et de résoudre les divergences d'opinions des cours d'appel, le Parlement a modifié de nouveau la *LIR* dans le but apparent d'accorder la priorité au MRN. Il peut être utile de reproduire le par. 224(1.2) *LIR*, tel qu'il se présente depuis la modification de 1990:

224. . . .

(1.2) Malgré les autres dispositions de la présente loi, la *Loi sur la faillite*, tout autre texte législatif fédéral, tout texte législatif provincial et toute règle de droit, s'il sait ou soupçonne qu'une personne donnée est ou deviendra, dans les 90 jours, débiteur d'une somme:

a) soit à un débiteur fiscal, à savoir une personne redevable d'un montant cotisé en application du paragraphe 227(10.1) ou d'une disposition semblable;

b) soit à un créancier garanti, à savoir une personne qui, grâce à une garantie en sa faveur, a le droit de recevoir la somme autrement payable au débiteur fiscal,

le ministre peut, par lettre recommandée ou signifiée à personne, obliger la personne donnée à payer au receveur général tout ou partie de cette somme, sans délai si la somme est payable immédiatement, sinon dès qu'elle devient payable, au titre du montant de la cotisation en application du paragraphe 227(10.1) ou d'une disposition semblable dont le débiteur fiscal est redevable. Sur réception de la lettre par la personne donnée, la somme qui y est indiquée comme devant être payée devient, malgré toute autre garantie au titre de cette somme, la propriété de Sa Majesté et doit être payée au receveur général par priorité sur toute autre garantie au titre de cette somme. [Je souligne.]

(1.3) Les définitions qui suivent s'appliquent au paragraphe (1.2).

«créancier garanti» Personne qui a une garantie sur un bien d'une autre personne — ou qui est mandataire de cette personne quant à cette garantie —, y compris un fiduciaire désigné dans un acte de fiducie portant sur la garantie, un séquestre ou séquestre-gérant nommé

receiver or receiver-manager appointed by a secured creditor or by a court on the application of a secured creditor, a sequestrator or any other person performing a similar function;

"security interest" means any interest in property that secures payment or performance of an obligation and includes an interest created by or arising out of a debenture, mortgage, hypothec, lien, pledge, charge, deemed or actual trust, assignment or encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for;

The question then is how should these sections be interpreted. At the outset it should be remembered that Parliament was responding to the division of opinion in the appellate courts and attempting to make it clear that the MNR could undertake garnishment procedure in those situations where a GABD has been made. The appropriate principles to be considered in interpreting taxation legislation were clearly set out in *Friesen v. Canada*, [1995] 3 S.C.R. 103, at pp. 112-14. There the principles were summarized in these words:

C. *Principles of Interpretation*

The central question on this appeal of whether the appellant is entitled to take advantage of the inventory valuation method in s. 10 of the Act involves a careful examination of the wording of the provisions of the Act and a consideration of the proper interpretation of these sections in the light of the basic structure of the Canadian taxation scheme which is established in the *Income Tax Act*.

In interpreting sections of the *Income Tax Act*, the correct approach, as set out by Estey J. in *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, is to apply the plain meaning rule. Estey J. at p. 578 relied on the following passage from E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

par un créancier garanti ou par un tribunal à la demande d'un créancier garanti, un administrateur-séquestre ou une autre personne dont les fonctions sont semblables à celles de l'une de ces personnes.

. . .

«garantie» Droit sur un bien qui garantit l'exécution d'une obligation, notamment un paiement. Sont en particulier des garanties les droits nés ou découlant de débentures, hypothèques, *mortgages*, privilèges, nantissements, sûretés, fiducies réputées ou réelles, cessions et charges, quelle qu'en soit la nature, de quelque façon ou à quelque date qu'elles soient créées, réputées exister ou prévues par ailleurs.

Il s'agit alors de déterminer comment ces dispositions devraient être interprétées. Au départ, il faudrait se rappeler que le Parlement réagissait à la divergence d'opinions des cours d'appel et tentait d'établir clairement que le MRN pourrait procéder à une saisie-arrêt dans les cas où il y aurait eu une cession générale de créances comptables. Les principes dont il faut tenir compte dans l'interprétation des lois fiscales sont clairement énoncés dans l'arrêt *Friesen c. Canada*, [1995] 3 R.C.S. 103, aux pp. 112 à 114, où ils sont résumés en ces termes:

C. *Principes d'interprétation*

La question principale soulevée dans le présent pourvoi, soit celle de savoir si l'appelant a le droit de se prévaloir de la méthode d'évaluation des biens figurant dans un inventaire prévue à l'art. 10 de la Loi, nécessite un examen attentif du libellé des dispositions de la Loi, de même qu'une étude de l'interprétation qu'il convient de donner à ces articles à la lumière de la structure de base du régime fiscal canadien établi dans la *Loi de l'impôt sur le revenu*.

Pour interpréter les dispositions de la *Loi de l'impôt sur le revenu*, il convient, comme l'affirme le juge Estey dans l'arrêt *Stubart Investments Ltd. c. La Reine*, [1984] 1 R.C.S. 536, d'appliquer la règle du sens ordinaire. À la page 578, le juge Estey se fonde sur le passage suivant de l'ouvrage de E. A. Driedger, intitulé *Construction of Statutes* (2e éd. 1983), à la p. 87:

> [TRADUCTION] Aujourd'hui il n'y a qu'un seul principe ou solution: il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur.

14

The principle that the plain meaning of the relevant sections of the *Income Tax Act* is to prevail unless the transaction is a sham has recently been affirmed by this Court in *Canada v. Antosko*, [1994] 2 S.C.R. 312. Iacobucci J., writing for the Court, held at pp. 326-27 that:

> While it is true that the courts must view discrete sections of the *Income Tax Act* in light of the other provisions of the Act and of the purpose of the legislation, and that they must analyze a given transaction in the context of economic and commercial reality, such techniques cannot alter the result where the words of the statute are clear and plain and where the legal and practical effect of the transaction is undisputed: *Mattabi Mines Ltd. v. Ontario (Minister of Revenue)*, [1988] 2 S.C.R. 175, at p. 194; see also *Symes v. Canada*, [1993] 4 S.C.R. 695.

I accept the following comments on the *Antosko* case in P. W. Hogg and J. E. Magee, *Principles of Canadian Income Tax Law* (1995), Section 22.3(c) "Strict and purposive interpretation", at pp. 453-54:

> It would introduce intolerable uncertainty into the Income Tax Act if clear language in a detailed provision of the Act were to be qualified by unexpressed exceptions derived from a court's view of the object and purpose of the provision. . . . (The *Antosko* case) is simply a recognition that "object and purpose" can play only a limited role in the interpretation of a statute that is as precise and detailed as the Income Tax Act. When a provision is couched in specific language that admits of no doubt or ambiguity in its application to the facts, then the provision must be applied regardless of its object and purpose. Only when the statutory language admits of some doubt or ambiguity in its application to the facts is it useful to resort to the object and purpose of the provision.

15 Thus, when there is neither any doubt as to the meaning of the legislation nor any ambiguity in its application to the facts then the statutory provision must be applied regardless of its object or purpose. I recognize that agile legal minds could probably find an ambiguity in as simple a request as "close the door please" and most certainly in even the shortest and clearest of the ten commandments. However, the very history of this case with the clear differences of opinion expressed as between

Le principe voulant que le sens ordinaire des dispositions pertinentes de la *Loi de l'impôt sur le revenu* prévale, à moins d'être en présence d'une opération simulée, a récemment été approuvé par notre Cour dans l'arrêt *Canada c. Antosko*, [1994] 2 R.C.S. 312. Le juge Iacobucci affirme, au nom de la Cour, aux pp. 326 et 327:

> Même si les tribunaux doivent examiner un article de la *Loi de l'impôt sur le revenu* à la lumière des autres dispositions de la Loi et de son objet, et qu'ils doivent analyser une opération donnée en fonction de la réalité économique et commerciale, ces techniques ne sauraient altérer le résultat lorsque les termes de la Loi sont clairs et nets et que l'effet juridique et pratique de l'opération est incontesté: *Mattabi Mines Ltd. c. Ontario (Ministre du Revenu)*, [1988] 2 R.C.S. 175, à la p. 194; voir également *Symes c. Canada*, [1993] 4 R.C.S. 695.

J'accepte les commentaires suivants qui ont été faits à l'égard de l'arrêt *Antosko* dans l'ouvrage de P. W. Hogg et J. E. Magee, intitulé *Principles of Canadian Income Tax Law* (1995), dans la section 22.3c) [TRADUCTION] «Interprétation stricte et fondée sur l'objet visé», aux pp. 453 et 454:

> [TRADUCTION] La Loi de l'impôt sur le revenu serait empreinte d'une incertitude intolérable si le libellé clair d'une disposition détaillée de la Loi était nuancé par des exceptions tacites tirées de la conception qu'un tribunal a de l'objet de la disposition. [. . .] (L'arrêt *Antosko*) ne fait que reconnaître que «l'objet» ne peut jouer qu'un rôle limité dans l'interprétation d'une loi aussi précise et détaillée que la Loi de l'impôt sur le revenu. Lorsqu'une disposition est rédigée dans des termes précis qui n'engendrent aucun doute ni aucune ambiguïté quant à son application aux faits, elle doit être appliquée nonobstant son objet. Ce n'est que lorsque le libellé de la loi engendre un certain doute ou une certaine ambiguïté, quant à son application aux faits, qu'il est utile de recourir à l'objet de la disposition.

En conséquence, lorsqu'il n'y a aucun doute quant au sens d'une mesure législative ni aucune ambiguïté quant à son application aux faits, elle doit être appliquée indépendamment de son objet. Je reconnais que des juristes habiles pourraient probablement déceler une ambiguïté dans une demande aussi simple que «fermez la porte, s'il vous plaît», et très certainement même dans le plus court et le plus clair des dix commandements. Cependant, l'historique même de la présente

the trial judges and the Court of Appeal of Alberta indicates that for able and experienced legal minds, neither the meaning of the legislation nor its application to the facts is clear. It would therefore seem to be appropriate to consider the object and purpose of the legislation. Even if the ambiguity were not apparent, it is significant that in order to determine the clear and plain meaning of the statute it is always appropriate to consider the "scheme of the Act, the object of the Act, and the intention of Parliament". What then was Parliament's intention in enacting the 1990 legislation?

affaire, conjugué aux divergences évidentes d'opinions entre les juges de première instance et la Cour d'appel de l'Alberta, révèle que, pour des juristes doués et expérimentés, ni le sens de la mesure législative ni son application aux faits ne sont clairs. Il semblerait donc convenir d'examiner l'objet de la mesure législative. Même si l'ambiguïté n'était pas apparente, il importe de signaler qu'il convient toujours d'examiner «l'esprit de la loi, l'objet de la loi et l'intention du législateur» pour déterminer le sens manifeste et ordinaire de la loi en cause. Quelle était alors l'intention du Parlement lorsqu'il a adopté la mesure législative de 1990?

The Purpose of the Legislation

There can be no doubt of the importance of levying taxation. The *ITA* entrusts to employers the duty of deducting income tax from the wages of employees and remitting it on their behalf. Similarly the *ETA* imposes on those who provide goods and services to others the duty to collect and remit the GST which is payable. In essence, companies collect taxes which they hold in trust for the government.

The purpose of the 1987 legislation, which I think is even more appropriately applied to the 1990 legislation, was very clearly and forcefully set forth in *Pembina on the Red Development Corp. v. Triman Industries Ltd.*, [1991] 6 W.W.R. 481 (Man. C.A.). There, at pp. 488-89, Scott C.J.M. observed:

To determine the dominant characteristic of the legislation, it is important to know the governmental policy behind the section. The tax debtor's bank is in the best position to know its customer and to structure its business arrangements accordingly. Revenue Canada, on the other hand, does not have the same opportunity to become acquainted with the affairs of the tax debtor or its creditors. It must therefore rely solely on the provisions of the legislation to mandate the employer to remit the employee income tax deductions as required by the [Income Tax] Act, and to establish its collectability in the event of default.

. . .

L'objet de la mesure législative

On ne saurait douter de l'importance de la levée d'impôts. La *LIR* impose aux employeurs l'obligation de retenir l'impôt sur le salaire de leurs employés et de le verser en leur nom. De même, la *LTA* impose à ceux qui fournissent des produits et services à autrui l'obligation de percevoir et de verser la TPS exigible. Essentiellement, les sociétés perçoivent des impôts qu'elles détiennent en fiducie pour le compte du gouvernement.

L'objet de la loi de 1987, qui, à mon avis, s'applique encore plus à la loi de 1990, a été exposé très clairement et avec vigueur dans l'arrêt *Pembina on the Red Development Corp. c. Triman Industries Ltd.*, [1991] 6 W.W.R. 481 (C.A. Man.). Dans cet arrêt, le juge en chef Scott fait remarquer, aux pp. 488 et 489:

[TRADUCTION] Pour déterminer la caractéristique dominante de la mesure législative, il importe de connaître la politique gouvernementale qui la sous-tend. La banque du débiteur fiscal est la mieux placée pour connaître son client et organiser ses affaires en conséquence. Par contre, Revenu Canada n'a pas la même chance de se familiariser avec les affaires du débiteur fiscal ou de ses créanciers. Il doit donc s'en remettre uniquement aux dispositions de la Loi pour exiger de l'employeur qu'il verse les montants d'impôt sur le revenu des employés qu'il a retenus conformément à la Loi [de l'impôt sur le revenu], et déterminer s'il pourra percevoir les montants en question en cas de défaut.

. . .

The purpose of the Act is not only to levy tax, but to collect it. There is a strong public duty on employers to remit; indeed, this is central to the scheme of self-assessment under the Act.

Further, Lyon J.A., dissenting in the result, stated at pp. 506-7:

One must always remember that the withholding tax or source deduction to which s. 224 applies is at the heart of the collection procedures for personal income taxation in Canada. Indeed, if one makes a calculation from the statistics reported in "Taxation Statistics, 1987," a publication of Revenue Canada Taxation, catalogue No. RV-1987, one finds that 87 per cent of all personal income taxes paid in Canada are collected by source deductions. It can thus be seen that Parliament in passing s. 224(1.2) made it as all-encompassing as it is in order to ensure its continued viability. No other system is so crucial to the overall collection procedure adopted by the Crown. Parliament clearly meant to protect this system. Using the employer as a tax collector requires such extra protection in cases such as the one at bar where the employer converts the withheld tax money to its own purposes. Understandably, that conversion cannot be countenanced if the integrity of that system is to be preserved. Parliament, therefore, acting within its constitutional authority, has taken this extraordinary remedy to protect a major collection source.

. . .

In my opinion it was intended by Parliament that anyone who, in the ordinary course of business, made credit arrangements with a tax debtor involving assignments of accounts receivable, did so subject to the overriding right of the Crown to satisfy the primary obligations of the tax debtor to collect and remit taxes withheld from its employees. The words of the statute can mean nothing less. The section is cast in the broadest of possible terms precisely because it was meant to interfere with and interrupt payments under such assignments and divert them to meet this statutory obligation. I do not know what other words Parliament could use to make its overriding intention and claim more clear.

18 These statements can be applied even more forcefully to the 1990 amendments. The Parliamentary intent was to confirm the overriding right

La Loi vise non seulement à lever des impôts, mais aussi à les percevoir. Les employeurs ont une obligation publique importante de verser les montants perçus; en fait, c'est un élément crucial du régime d'autocotisation prévu par la Loi.

Plus loin, le juge Lyon, dissident quant au résultat, affirme, aux pp. 506 et 507:

[TRADUCTION] Il faut toujours se rappeler que les retenues d'impôt ou les retenues à la source visées par l'art. 224 sont au cœur de la procédure de perception de l'impôt sur le revenu des particuliers au Canada. En réalité, si l'on fait un calcul à partir des statistiques publiées dans «Statistiques fiscales de 1987», publication de Revenu Canada, Impôt, nº de catalogue RV-1987, on constate que 87 pour 100 de l'impôt sur le revenu des particuliers est perçu au moyen de retenues à la source. On peut donc considérer qu'en adoptant le par. 224(1.2), le Parlement lui a donné ce caractère exhaustif de façon à en assurer la viabilité. Aucun autre régime n'est aussi crucial relativement à la procédure globale de perception adoptée par l'État. Le Parlement a nettement voulu protéger ce régime. Se servir de l'employeur comme percepteur d'impôt requiert une protection additionnelle dans des cas comme celui dont nous sommes saisis où l'employeur utilise les retenues d'impôt à ses propres fins. Naturellement, on ne saurait approuver cette utilisation si l'on veut préserver l'intégrité du régime. Le Parlement a donc adopté, conformément à sa compétence constitutionnelle, ce recours extraordinaire pour protéger une source importante de perception.

. . .

À mon avis, le Parlement a voulu que quiconque conclut, avec un débiteur fiscal, dans le cours normal de ses affaires, une entente de crédit assortie d'une cession de comptes débiteurs, le fasse sous réserve du droit prépondérant de l'État d'obtenir l'acquittement des principales obligations du débiteur en matière de perception et de versement des impôts prélevés auprès de ses employés. Le texte de la Loi ne signifie rien de moins. Cette disposition est rédigée de la manière la plus générale possible précisément parce qu'elle visait à interrompre les paiements effectués aux termes d'une telle cession et à les utiliser de manière à remplir l'obligation prévue par la Loi. Je ne vois pas comment le Parlement aurait pu exprimer plus clairement son intention et sa réclamation prépondérantes.

Ces propos peuvent s'appliquer avec encore plus de vigueur aux modifications de 1990. Le Parlement voulait confirmer le droit prépondérant du

of the MNR to collect by garnishment the taxes collected which ought to have been remitted by the debtor company to the MNR.

What is the Nature of a General Assignment of Book Debts?

Like Major J., I am of the view that a GABD is a form of security for a loan which is always subject to the right of the debtor to redeem. It will be remembered that s. 224(1.3) defines the "security interest" in these words:

> "security interest" means any interest in property that secures payment or performance of an obligation and includes an interest created by or arising out of a debenture, mortgage, hypothec, lien, pledge, charge, deemed or actual trust, assignment or encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for;

This definition encompasses the general assignments of book debts which are at issue in these appeals. However, I cannot agree with Major J.'s conclusion that the creditors are not secured creditors. I find it difficult, indeed impossible, to conclude that the same document can be both a security interest and an absolute assignment. The same document cannot, simultaneously, embrace two such conflicting concepts.

Basically, security is something which is given to ensure the repayment of a loan. *Black's Law Dictionary* (6th ed. 1990), at p. 1357, gives a clear definition of a "security interest" in these terms:

> The term "security interest" means any interest in property acquired by contract for the purpose of securing payment or performance of an obligation or indemnifying against loss or liability. A security interest exists at any time, (A) if, at such time, the property is in existence and the interest has become protected under local law against a subsequent judgment lien arising out of an unsecured obligation, and (B) to the extent that, at such time, the holder has parted with money or money's worth.

MRN de recouvrer par voie de saisie-arrêt les impôts perçus que la société débitrice aurait dû lui verser.

Quelle est la nature d'une cession générale de créances comptables?

19 À l'instar du juge Major, j'estime qu'une cession générale de créances comptables constitue une forme de garantie relative à un prêt, qui sera toujours assujettie au droit de rachat du débiteur. Qu'on se rappelle la définition du terme «garantie», contenue au par. 224(1.3):

> «garantie» Droit sur un bien qui garantit l'exécution d'une obligation, notamment un paiement. Sont en particulier des garanties les droits nés ou découlant de débentures, hypothèques, *mortgages*, privilèges, nantissements, sûretés, fiducies réputées ou réelles, cessions et charges, quelle qu'en soit la nature, de quelque façon ou à quelque date qu'elles soient créées, réputées exister ou prévues par ailleurs.

Cette définition inclut les cessions générales de créances comptables en cause dans les présents pourvois. Cependant, je ne puis souscrire à la conclusion du juge Major que les créanciers ne sont pas des créanciers garantis. J'estime qu'il est difficile, voire impossible, de conclure que le même document peut constituer à la fois une garantie et une cession absolue. Le même document ne saurait englober simultanément deux concepts aussi contradictoires.

20 Fondamentalement, une garantie est quelque chose que l'on donne pour assurer le remboursement d'un prêt. Le *Black's Law Dictionary* (6e éd. 1990), à la p. 1357, définit clairement l'expression «*security interest*»:

> [TRADUCTION] Le terme «garantie» («*security interest*») désigne tout droit sur un bien acquis par contrat aux fins de garantir le paiement ou l'exécution d'une obligation ou l'indemnisation d'une perte ou d'une dette. Une garantie existe, à un moment donné, (A) si le bien existe à ce moment et si le droit sur ce bien est protégé en vertu du droit interne contre un privilège ultérieur constitué par jugement relativement à une obligation non garantie, et (B) dans la mesure où, à ce moment, le titulaire a déboursé une somme ou renoncé à une valeur en argent.

21 This definition is consistent with that set out in the *ITA*. It is in sharp contrast to the definition of the word "absolute" set out in the same source at p. 9 in these terms:

> Complete; perfect; final, without any condition or incumbrance; as an absolute bond (*simplex obligatio*) in distinction from a conditional bond. Unconditional; complete and perfect in itself; without relation to or dependence on other things or persons.

22 These definitions are, in my view, correct. If that is the case, then it can be seen that the same instrument cannot be both a "security interest" and an "absolute assignment". If an instrument is an absolute assignment, then since it is complete and perfect in itself, there cannot be a residual right remaining with the debtor to recover the assets. By definition, a complete and perfect assignment cannot recognize the concept of an equity of redemption. An absolute assignment cannot function as a means of "securing" the payment of a debt since there would be no basis for the debtor to recover that which has been absolutely assigned. An absolute assignment is irrevocable. To say that the same instrument can operate both as an absolute assignment and as a security interest is to simultaneously put forward two incompatible positions. The two conflicting concepts cannot live together in the same document.

Cases Which Have Considered the Nature of a General Assignment of Book Debts

23 Major J. expressed the opinion that it is "well-established law" that a GABD, such as those in issue, has the effect of transferring all title and ownership in the property assigned so that they can no longer be considered to be the property of the assignor. Yet ordinarily, in the world of commerce, a GABD is considered to be a security interest. As a security interest, it simply cannot transfer all "right, title and ownership in and to the property assigned". This conclusion has found support in other cases.

24 In *Thermo King Corp. v. Provincial Bank of Canada* (1981), 34 O.R. (2d) 369 (C.A.), leave to

Cette définition est compatible avec celle formulée dans la *LIR*. Elle contraste vivement avec celle du terme «*absolute*» («absolu»), que l'on trouve à la p. 9 du même ouvrage:

> [TRADUCTION] Complet; parfait; final, sans condition ni privilège; comme une garantie absolue (*simplex obligatio*) par rapport à une garantie conditionnelle. Inconditionnel; complet et parfait en soi; sans rapport ni dépendance avec d'autres choses ou d'autres personnes.

À mon avis, ces définitions sont exactes. Si c'est le cas, le même écrit ne saurait alors constituer à la fois une «garantie» et une «cession absolue». Si un écrit constitue une cession absolue, le débiteur ne peut alors conserver un droit résiduel de recouvrer les biens puisqu'une telle cession est complète et parfaite en soi. Par définition, une cession complète et parfaite ne peut reconnaître le concept d'un droit de rachat. Une cession absolue ne peut servir à «garantir» le paiement d'une dette puisque le débiteur n'aurait aucune raison de recouvrer ce qui a fait l'objet d'une cession absolue. Une cession absolue est irrévocable. Affirmer que le même écrit peut constituer à la fois une cession absolue et une garantie revient à avancer simultanément deux points de vue incompatibles. Ces deux concepts contradictoires ne peuvent coexister dans le même document.

La jurisprudence dans laquelle la nature d'une cession générale de créances comptables a été examinée

Le juge Major affirme qu'il est «bien établi en droit» qu'une cession générale de créances comptables, comme celles dont il est question, a pour effet de transférer en totalité le titre et la propriété relatifs au bien cédé de sorte qu'il ne peut plus être considéré comme le bien du cédant. Pourtant, en matière commerciale, une cession générale de créances comptables est habituellement considérée comme une garantie. En tant que garantie, elle ne peut tout simplement pas transférer en totalité «le droit, le titre et la propriété relatifs au bien cédé». D'autres arrêts appuient cette conclusion.

Dans l'arrêt *Thermo King Corp. c. Provincial Bank of Canada* (1981), 34 O.R. (2d) 369 (C.A.),

appeal refused, [1982] 1 S.C.R. xi, Wilson J.A. (as she then was) held, for a unanimous court, that a GABD is a security document. In that case she was required to consider an instrument which was very similar if not identical to those presented in these appeals. At p. 381 she concluded:

> While these provisions appear on their face to constitute the assignor a trustee for the bank of any payments it receives from its customers and to permit the bank to appropriate them at will, *whether or not any debt is then due to the bank by the assignor*, this seems to be quite incompatible with the nature of the instrument as a collateral security. [Emphasis in original.]

Similarly, in *Bonavista (Town) v. Atlantic Technologists Ltd.* (1994), 117 Nfld. & P.E.I.R. 19, Osborn J. considered a GABD. He wrote (at p. 24):

> One may ask, if the assignment is absolute to the point of ownership, why does it specifically give to the Bank the power to collect or dispose of the debts. Are not such powers incidents of ownership? Similarly, if the assignment is absolute, what remaining rights reside in the customer that may be "extinguished" if the Bank buys the accounts at a sale?
>
> In my view, the assignment contemplates that it will operate as a security interest. It vests in the Bank title to the debts owed to Atlantic, but such vesting is for the purpose of security; it is not to transfer ownership, as that term is commonly understood. . . . The Bank is a "secured creditor". The nature of the interest held by the Bank, even if considered to be an absolute assignment, cannot be divorced from the circumstances in which it arose. The commercial reality is that the Bank held a security interest in the property of Atlantic. Atlantic transferred its receivable to the Bank to secure payment of money Atlantic owed to the Bank. Once Atlantic paid off the Bank, it was entitled, not to a reassignment of the debt, but, by the wording of the assignment, "to the cancellation hereof". The Bank was a secured creditor holding a security interest. [Emphasis added.]

I agree with the reasoning expressed in these cases. As well, I would note that the Newfoundland Court of Appeal in *Bank of Montreal v. Baird*

autorisation de pourvoi refusée, [1982] 1 R.C.S. xi, le juge Wilson (plus tard juge de notre Cour) a statué, au nom de la Cour d'appel à l'unanimité, qu'une cession générale de créances comptables est un document de garantie. Dans cette affaire, elle devait examiner un écrit très semblable, voire identique, à ceux dont il est question dans les présents pourvois. Elle conclut, à la p. 381:

> [TRADUCTION] Bien que ces dispositions paraissent à première vue faire du cédant un fiduciaire de la banque relativement aux paiements qu'il reçoit de ses clients, et permettre à la banque de les affecter comme elle l'entend, peu importe *que le cédant ait alors ou non une dette échue envers la banque*, cela semble tout à fait incompatible avec la nature de l'écrit en tant que garantie accessoire. [En italique dans l'original.]

De même, dans *Bonavista (Town) c. Atlantic Technologists Ltd.* (1994), 117 Nfld. & P.E.I.R. 19, le juge Osborn a examiné une cession générale de créances comptables. Il écrit, à la p. 24:

> [TRADUCTION] On peut se poser la question suivante: si la cession est absolue au point de transférer la propriété, pourquoi donne-t-elle expressément à la banque le pouvoir de recouvrer les créances ou d'en disposer? De tels pouvoirs ne sont-ils pas accessoires au droit de propriété? De même si la cession est absolue, quels sont les droits résiduels du client qui risquent d'être «éteints» si la banque achète les comptes lors d'une vente?
>
> À mon avis, l'acte de cession prévoit qu'elle servira de garantie. Il attribue à la banque le titre relatif aux créances payables à Atlantic, mais cette attribution vise à constituer une garantie; elle ne transfère pas la propriété du bien, au sens que l'on donne habituellement à ce terme. [. . .] La banque est un «créancier garanti». La nature du droit détenu par la banque, même considéré comme une cession absolue, ne saurait être dissociée des circonstances qui y ont donné naissance. Sur le plan commercial, il reste que la banque détenait une garantie sur le bien d'Atlantic. Atlantic a transféré son compte débiteur à la banque pour garantir le paiement des sommes qu'elle lui devait. Après avoir payé la banque, Atlantic avait droit, aux termes de l'acte de cession, «à l'annulation de cette cession» et non à une rétrocession de la créance. La banque était un créancier garanti titulaire d'une garantie. [Je souligne.]

Je suis d'accord avec le raisonnement exprimé dans ces arrêts. De même, je tiens à préciser que, dans l'arrêt *Bank of Montreal c. Baird* (1979), 33

(1979), 33 C.B.R. (N.S.) 256, leave to appeal refused, [1980] 1 S.C.R. v, dealt with a GABD as a security interest. Further, the New Brunswick Court of Appeal in *R.V. Demmings & Co. v. Caldwell Construction Co.* (1955), 4 D.L.R. (2d) 465, found that a bank holding a GABD was a secured creditor, subject to an equity of redemption in the assignor company.

26 I also find support for this conclusion from the reasoning in cases which considered a situation similar to that created by a GABD. These cases arise when a borrower grants to a lending institution a fixed charge or mortgage based upon the borrower's present and future stock-in-trade and inventory but reserves to the borrower the right to make sales of the stock-in-trade and inventory in the ordinary course of business.

27 In *R. in Right of B.C. v. F.B.D.B.* (1987), 17 B.C.L.R. (2d) 273, McLachlin J.A. (as she then was), on behalf of the majority of the Court of Appeal, considered the manner in which courts have dealt with such instruments and in so doing, reached the following conclusions at p. 303:

> Generally speaking, the authorities draw a clear distinction between fixed and floating charges, recognizing nothing between and taking the view that any charge which permits dealing in the ordinary course of business must be regarded as floating. . . .

28 She then went on, at pp. 303-4, to discuss the conceptual possibility of a fixed charge on stock-in-trade coupled with a licence to deal in those goods, a situation analogous to that which the lending institutions claim exists under a GABD. She noted at p. 305:

> The generally accepted view . . . is that such a charge should be regarded as floating rather than fixed because it involves no final and irrevocable appropriation of property to the creditor.

C.B.R. (N.S.) 256, autorisation de pourvoi refusée, [1980] 1 R.C.S. v, la Cour d'appel de Terre-Neuve a traité une cession générale de créances comptables comme une garantie. En outre, dans l'arrêt *R.V. Demmings & Co. c. Caldwell Construction Co.* (1955), 4 D.L.R. (2d) 465, la Cour d'appel du Nouveau-Brunswick a statué qu'une banque titulaire d'une cession générale de créances comptables était un créancier garanti, sous réserve d'un droit de rachat de la part de la société cédante.

Cette conclusion s'appuie également sur le raisonnement suivi dans des affaires concernant une situation semblable à celle engendrée par une cession générale de créances comptables. Pareils cas se présentent lorsqu'un emprunteur consent à un établissement de crédit une charge fixe ou un *mortgage* sur ses stocks de marchandises et inventaire présents et futurs, tout en se réservant le droit de les vendre dans le cours normal des affaires.

Dans l'arrêt *R. in Right of B.C. c. F.B.D.B.* (1987), 17 B.C.L.R. (2d) 273, le juge McLachlin (maintenant juge de notre Cour) a examiné, au nom de la Cour d'appel à la majorité, la façon dont les tribunaux ont traité de tels écrits et, ce faisant, elle est arrivée à la conclusion suivante (à la p. 303):

> [TRADUCTION] En général, la jurisprudence établit une distinction claire entre les charges fixes et les charges flottantes, ne reconnaissant rien entre les deux et considérant qu'une charge qui permet des opérations dans le cours normal des affaires doit être considérée comme flottante . . .

Elle examine ensuite, aux pp. 303 et 304, s'il est possible, sur le plan conceptuel, d'avoir une charge fixe sur un stock de marchandises assortie d'une autorisation de faire des opérations sur ces marchandises, situation analogue à celle qui, selon les établissements de crédit, existe lorsqu'il y a cession générale de créances comptables. Elle souligne, à la p. 305:

> [TRADUCTION] Selon le point de vue généralement accepté [. . .] une telle charge devrait être considérée comme flottante et non fixe parce qu'elle ne comporte pas une attribution définitive et irrévocable de biens au créancier.

She also observed that the English courts have specifically rejected the possibility of an absolute assignment being coupled with a licence to deal (at pp. 305-6):

> . . . this theory was soon rejected by the English courts, as is seen from the comments of Lord Buckley in *Evans v. Rival Granite Quarries Ltd.*, [1910] 2 K.B. 979 at 999 (C.A.):
>
> > A floating security is not a future security; it is a present security, which presently affects all the assets of the company expressed to be included in it. On the other hand, it is *not a specific security*; the holder cannot affirm that the assets are specifically mortgaged to him. The assets are mortgaged in such a way that the mortgagor can deal with them without the concurrence of the mortgagee. *A floating security is not a specific mortgage of the assets, plus a licence to the mortgagor to dispose of them in the course of his business, but is a floating mortgage applying to every item comprised in the security*, but not specifically affecting any item until some event occurs or some act on the part of the mortgagee is done which causes it to crystallize into a fixed security. [Emphasis added by McLachlin J.A.]

In determining whether a particular charge over book debts is fixed or floating, McLachlin J.A. referred (at p. 307) to R. A. Pearce in "Fixed Charges over Book Debts", [1987] J. Bus. L. 18, at p. 29:

> . . . the essential characteristic for deciding whether a charge of book debts is fixed or floating is whether the book debts can be disposed of free from the charge; if they can, the charge is a floating charge, otherwise it is a fixed charge.

. . .

Modern authorities have accepted the either-or approach to fixed and floating charges upon which the courts settled in the late 19th and early 20th centuries. For example, they accept the conclusion that a fixed charge on book debts is inconsistent with the assignor having the freedom to deal with proceeds in the course of his business: see *Siebe Gorman & Co. v. Barclays Bank Ltd.*, [1979] 2 Lloyd's Rep. 143 (Ch. D.); *Re Armagh Shoes Ltd.*, [1982] N.I. 59 (Ch. D.); *Re Keenan Bros. Ltd.* (1985), 5 I.L.R.M. 641 (S.C.). In *Great Lakes*

Elle a également fait remarquer que les tribunaux anglais ont expressément écarté la possibilité d'une cession absolue assortie d'une autorisation de faire des opérations (aux pp. 305 et 306):

> [TRADUCTION] . . . cette théorie a vite été rejetée par les tribunaux anglais, comme l'indiquent les commentaires de lord Buckley dans l'arrêt *Evans c. Rival Granite Quarries Ltd.*, [1910] 2 K.B. 979, à la p. 999 (C.A.):
>
> > Une charge flottante n'est pas une charge future; c'est une charge actuelle qui grève tous les biens de la société spécifiés dans l'acte qui la constitue. Par contre, il ne s'agit *pas d'une charge spécifique*; le titulaire ne peut soutenir qu'il possède un *mortgage* spécifique sur ces biens. Les biens sont grevés d'un *mortgage* de telle façon que le débiteur sur *mortgage* peut faire des opérations sur ces biens sans l'approbation du créancier sur *mortgage*. *Une charge flottante n'est pas un mortgage spécifique sur les biens, assorti d'une autorisation consentie au débiteur sur mortgage de les aliéner dans le cours normal de ses affaires; c'est plutôt un mortgage général qui grève tout bien visé par la charge*, mais qui n'affecte pas spécifiquement ces biens jusqu'à ce qu'un événement donné se produise ou jusqu'à ce que le créancier sur mortgage accomplisse un acte qui a pour effet de transformer cette charge en charge fixe. [Italiques ajoutés par le juge McLachlin.]

Pour déterminer si une charge particulière sur des créances comptables est fixe ou flottante, le juge McLachlin renvoie (à la p. 307) à l'article de R. A. Pearce, intitulé «Fixed Charges over Book Debts», [1987] J. Bus. L. 18, à la p. 29: 29

> [TRADUCTION] . . . pour décider si une charge sur des créances comptables est fixe ou flottante, il s'agit essentiellement de savoir si ces créances peuvent être aliénées libres et quittes de toute charge; dans l'affirmative, la charge est flottante, sinon elle est fixe.

. . .

En ce qui concerne les charges fixes et flottantes, la jurisprudence moderne a accepté l'analyse dichotomique à laquelle les cours de justice en sont arrivées à la fin du XIX^e siècle et au début du XX^e siècle. Par exemple, ils acceptent la conclusion qu'une charge fixe sur des créances comptables est incompatible avec le fait que le cédant ait la liberté de faire des opérations sur les produits dans le cours de ses affaires: voir *Siebe Gorman & Co. c. Barclays Bank Ltd.*, [1979] 2 Lloyd's Rep. 143 (Ch. D.); *Re Armagh Shoes Ltd.*, [1982] N.I.

Petroleum Co. v. Border Cities Oil Ltd., [1934] O.R. 244, [1934] 2 D.L.R. 743 (C.A.), an assignment of book accounts which permitted the debtor to continue to "collect, get in, and deal with said debts, accounts, claims, moneys, and choses in action in the ordinary course of the business" was held to be a floating charge. The same result obtained in *R. v. Lega Fabricating Ltd.* (1980), 22 B.C.L.R. 145 (S.C.).

She indicated that the sole exception to this rule appeared to be the case of *Evans Coleman and Evans Ltd. v. R.A. Nelson Construction Ltd.* (1958), 27 W.W.R. 38 (B.C.C.A.), cited by Major J. in his reasons. Significantly she went on to observe at p. 307:

> Why did the courts reject the concept of a fixed charge with a licence to deal? In doing so, they undeniably limited the freedom of debtor and creditor to contract as they might choose in an age when freedom of contract was paramount. The answer, it may be suggested, lies in the effects which recognition of such a concept would have upon the rights of third parties and general commercial activity, as well as the perceived injustice of allowing the debtor to trade freely while remaining immune from the normal incidents of legal process. As Fletcher-Moulton L.J. put it in *Evans v. Rival Granite Quarries Ltd.*, supra (p. 995):
>
> > The results of such a contention are astonishing; it means that by giving such a debenture a company retains the full right of trading with untied hands and at the same time obtains immunity from the operation of all processes of law. I should be slow to come to the conclusion that such an anomaly was recognized by the law. Nor do I think that it is. A consideration of the effect of floating charges and of the fact that the freedom of the company to carry on its business is not based on special words creating that freedom, but on the nature of the charge itself, leads me to the conclusion that the right of the company to carry on its business as it wills pending the enforcement of the security must mean that it may carry it on in accordance with law, including a liability to the processes of the law if it does not pay its debts.

Finally, at p. 309, McLachlin J.A. concluded:

> In general, the courts have been unwilling to characterize charges which permit the debtor to deal with his property in the ordinary course of business as fixed

59 (Ch. D.); *Re Keenan Bros. Ltd.* (1985), 5 I.L.R.M. 641 (C.S.). Dans l'arrêt *Great Lakes Petroleum Co. c. Border Cities Oil Ltd.*, [1934] O.R. 244, [1934] 2 D.L.R. 743 (C.A.), on a statué que constituait une charge flottante une cession de créances comptables qui permettait au débiteur de continuer de «percevoir et d'effectuer des opérations sur lesdits comptes, créances, réclamations, sommes et droits incorporels dans le cours normal des affaires». On est arrivé à la même conclusion dans *R. c. Lega Fabricating Ltd.* (1980), 22 B.C.L.R. 145 (C.S.).

Le juge McLachlin a indiqué que la seule exception à cette règle semblait être l'arrêt *Evans Coleman and Evans Ltd. c. R.A. Nelson Construction Ltd.* (1958), 27 W.W.R. 38 (C.A.C.-B.), que le juge Major cite dans ses motifs. Fait révélateur, elle ajoute, à la p. 307:

> [TRADUCTION] Pourquoi les tribunaux ont-ils rejeté le concept d'une charge fixe assortie d'une autorisation de faire des opérations? Ce faisant, ils ont incontestablement restreint la liberté des débiteurs et des créanciers de contracter comme ils l'entendent à une époque où prédominait la liberté contractuelle. La réponse, peut-on suggérer, réside dans les répercussions que la reconnaissance d'un tel concept aurait sur les droits des tiers et le commerce en général, et dans l'injustice apparente de permettre au débiteur de faire librement des opérations, à l'abri de l'application normale de la loi. Comme le lord juge Fletcher-Moulton l'affirme dans l'arrêt *Evans c. Rival Granite Quarries Ltd.*, précité (p. 995):
>
> > Une telle prétention donne des résultats étonnants; cela signifie qu'une société, qui consent une telle débenture, conserve le plein droit de faire des opérations, sans aucune restriction, et qu'elle se trouve, en même temps, à l'abri de toute application de la loi. Je devrais hésiter à conclure qu'une telle anomalie a été reconnue par la loi. Je ne crois pas non plus que ce soit le cas. L'examen de l'incidence des charges flottantes et du fait que la liberté de la société d'exercer ses activités est fondée non pas sur des termes spéciaux établissant cette liberté, mais sur la nature de la charge elle-même, m'amène à conclure que le droit de la société d'exercer ses activités à sa guise jusqu'à l'exécution de la charge signifie qu'elle doit les exercer conformément à la loi, tout en étant assujettie à l'application de la loi si elle ne paie pas ses dettes.

Enfin, le juge McLachlin conclut, à la p. 309:

> [TRADUCTION] En général, les tribunaux ont refusé de qualifier de charges fixes, assorties d'une autorisation de vendre, les charges qui permettent au débiteur de

charges with licenses to sell. Rather, the courts have characterized such charges as floating, with the result that they give the chargeholder no priority over third parties prior to crystallization. . . . In short, the answer to the question of whether the courts have recognized a fixed charge subject to a licence to sell in the ordinary course of business is no . . . .

The Significance of the Equity of Redemption

For the resolution of these appeals, it is essential that there be a clear recognition of the fundamental difference between an absolute and a conditional assignment of book debts. In an absolute assignment, all interests are transferred and no property remains in the hands of the assignor. It is, simply, a sale of the book debts of the company. This is the basis of the business of factoring. Factoring is described in R. Burgess, *Corporate Finance Law* (2nd ed. 1992), at p. 100, in this manner:

> "Factoring is a legal relationship between a financial institution (the factor) and a business concern (the client) selling goods or providing services to trade customers (the customers) whereby the factor purchases the client's book debts either with or without recourse to the client and administers the client's sales ledger."

From this definition it is apparent that factoring arrangements involve:

(1) the purchase of the client's book debts;

(2) the taking over and administration of the client's sales ledger and credit control functions; and

(3) the provision to the client of finance which will be a specified percentage of the nominal value of the debts.

The author goes on (at p. 101) to consider the requirements for an assignment of book debts under English law and observes that to be effective the assignment must be absolute. The text defines "absolute", in these terms:

> The ordinary legal meaning of "absolute" is unconditional, so, for an assignment to be absolute, it must not

faire des opérations sur ses biens dans le cours normal des affaires. Les tribunaux les ont plutôt qualifiées de charges flottantes, ne conférant ainsi à leur titulaire aucune priorité de rang sur des tiers avant la matérialisation. [. . .] Bref, il faut répondre par la négative à la question de savoir si les tribunaux ont reconnu l'existence d'une charge fixe assortie d'une autorisation de vendre dans le cours ordinaire des affaires . . .

L'importance du droit de rachat

Pour trancher les présents pourvois, il est essentiel de reconnaître clairement la différence fondamentale qui existe entre une cession absolue et une cession conditionnelle de créances comptables. Une cession absolue transfère tous les droits et aucun bien ne demeure entre les mains du cédant. C'est simplement une vente de créances comptables de la société. C'est le fondement de l'affacturage. Voici comment R. Burgess décrit l'affacturage dans son ouvrage intitulé *Corporate Finance Law* (2e éd. 1992), à la p. 100:

> [TRADUCTION] «L'affacturage est une relation juridique entre une institution financière (la société d'affacturage) et une entreprise (le client) qui vend des marchandises ou fournit des services à des clients commerciaux (l'achalandage), en vertu de laquelle la société d'affacturage achète les créances comptables du client avec ou sans le concours de ce dernier et en administre le grand livre des ventes.»

Selon cette définition, une entente d'affacturage semble comporter les éléments suivants:

1) l'achat des créances comptables du client,

2) l'acquisition et l'administration du grand livre des ventes et des fonctions de contrôle du crédit du client, et

3) le financement du client qui correspond à un pourcentage précis de la valeur nominale des créances.

L'auteur examine ensuite (à la p. 101) les exigences d'une cession de créances comptables en vertu du droit anglais et fait remarquer que pour être efficace une cession doit être absolue. L'auteur définit ainsi le terme [TRADUCTION] «absolu»:

> [TRADUCTION] En droit, le terme «absolu» signifie ordinairement inconditionnel, de sorte que pour qu'une

30

be conditional in any way; specifically, it must not purport to be by way of charge only.

31 A factoring of accounts receivable is based upon an absolute assignment of them. It is in effect a sale by a company of its accounts receivable at a discounted value to the factoring company for immediate consideration. In my view, s. 224 *ITA* does protect those engaged in the factoring business and those lending institutions that have succeeded in perfecting their security interest prior to any intervention by the MNR. However, I cannot accept the submission that Parliament, by this section, intended to create an interest which was both conditional as a security interest and at the same time unconditional as an absolute assignment. There cannot have been an intent to combine such incompatible concepts.

32 Clearly a GABD does not meet the standard required for a factoring arrangement which requires an absolute transfer of the proprietary interest of the assignor in the book debts. Pursuant to the instruments presented in this case the borrower retains the right to redeem the book debts once the debt is paid off. This right of redemption irrefutably demonstrates that the assignment is something less than absolute.

33 I agree with the MNR that what the actual equity of the borrower in the book debts may be from time to time is irrelevant for the purpose of determining the legal effect of the equity of redemption. It would be absurd if a company were to fluctuate between having title and not having title to their book debts based on their ratio of debt to assets. This is particularly true of a company engaged in a seasonal business. Yet if a GABD is treated as an absolute assignment, this can be the only result, as the bank is limited to recovering the amount of the loan. Since the bank could not recover any book debts if the company had a surplus in their account, the book debts would belong to the company. When there was a deficit, some or all of the book debts would belong to the bank. Such a fluctuating state of affairs is inconsistent with the certainty required in commercial matters. I believe that the correct view is that a GABD rep-

cession soit absolue, elle ne doit être aucunement conditionnelle; plus précisément, elle ne doit pas être apparemment constituée par une charge seulement.

Un affacturage de comptes débiteurs est basé sur leur cession absolue. C'est, en réalité, une société qui vend, selon leur valeur actualisée, ses comptes débiteurs à une société d'affacturage, moyennant contrepartie immédiate. À mon avis, l'art. 224 *LIR* protège les sociétés d'affacturage et les établissements de crédit qui ont réussi à réaliser leur garantie avant l'intervention du MRN. Cependant, je ne puis accepter l'idée que le Parlement a voulu, par cette disposition, créer un droit à la fois conditionnel en tant que garantie, et inconditionnel en tant que cession absolue. Il ne peut avoir eu l'intention de combiner des concepts aussi incompatibles.

De toute évidence, une cession générale de créances comptables ne satisfait pas au critère d'une entente d'affacturage qui exige un transfert absolu du droit de propriété que le cédant possède sur les créances comptables. Conformément aux écrits présentés en l'espèce, l'emprunteur conserve le droit de racheter les créances comptables une fois la dette payée. Ce droit de rachat démontre de façon irréfutable que la cession n'est pas absolue.

Je suis d'accord avec le MRN pour dire qu'il n'est pas pertinent de savoir quel peut être, à l'occasion, le droit réel de l'emprunteur sur les créances comptables lorsqu'il s'agit de déterminer l'incidence du droit de rachat sur le plan juridique. Il serait absurde qu'une société puisse tantôt détenir le titre sur ses créances comptables et tantôt ne pas le détenir, selon son ratio d'endettement. Cela est particulièrement vrai dans le cas d'une entreprise saisonnière. Cependant, si l'on considère une cession générale de créances comptables comme une cession absolue, c'est exactement ce qui se passe puisque la banque ne peut recouvrer que le montant du prêt. Puisque la banque ne pourrait recouvrer aucune créance comptable si la société accusait un surplus à son compte, les créances comptables appartiendraient à la société. En cas de déficit, une partie ou la totalité des créances comptables appartiendraient à la banque. Une situation

resents a security interest with the legal title being with the lender and the equitable title remaining with the borrower. This is supported both by the jurisprudence and by the wording of the section.

This Court, in *Federal Business Development Bank v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 1061, interpreted "property of a bankrupt" in what is now s. 67 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, as including property subject to a security interest, even when the legal title to the property is transferred to the security holder. This indicates that the concept of "property" is not so narrow as to encompass only legal title. It would be inconsistent to hold in this case that a transfer of legal title by means of a GABD is an absolute transfer when it has already been held in another that an equity of redemption is a property interest which remains with the borrower.

The recent case of *Canada v. National Bank of Canada*, [1993] 2 F.C. 206, applied *Federal Business Development Bank v. Quebec (Commission de la santé et de la sécurité du travail)*, *supra*, to provide an appropriate answer to the question as to whether or not a borrower under a GABD retains a property interest in the book debts. Rothstein J. held (at pp. 224-25):

> Based on the reasoning of Houlden J. in *Re Broydon Printers*, *supra*, as approved by Lamer J. in *Federal Business Development Bank*, *supra*, the right of redemption of the book debts, in my view, comes within the definition of "property" in the *Bankruptcy Act*. As such, the reasoning of Lamer J. in *Federal Business Development Bank* would apply and the book debts would constitute "property of the bankrupt" for purposes of subsection 107(1) of the *Bankruptcy Act*.

In summary, an assignment cannot be both absolute and yet leave an equity of redemption in the

aussi changeante est incompatible avec la certitude requise en matière commerciale. À mon avis, il est correct d'affirmer qu'une cession générale de créances comptables représente une garantie dont le titre en common law appartient au prêteur et le titre en *equity* continue d'appartenir à l'emprunteur. C'est ce que confirment la jurisprudence et le texte de la disposition en cause.

Dans l'arrêt *Banque fédérale de développement c. Québec (Commission de la santé et de la sécurité du travail)*, [1988] 1 R.C.S. 1061, notre Cour a affirmé que l'expression «biens d'un failli» contenue dans ce qui constitue maintenant l'art. 67 de la *Loi sur la faillite et l'insolvabilité*, L.R.C. (1985), ch. B-3, comprend les biens assujettis à une garantie, même lorsque le titre de propriété du bien en cause est transféré au titulaire de la garantie. Cela indique que le concept des «biens» n'est pas restrictif au point de ne viser que le titre de propriété. Il serait contradictoire de statuer en l'espèce qu'un transfert de titre de propriété au moyen d'une cession générale de créances comptables est absolu alors qu'il a déjà été statué dans un autre arrêt qu'un droit de rachat est un droit de propriété qui continue d'appartenir à l'emprunteur.

Dans la décision récente *Canada c. Banque Nationale du Canada*, [1993] 2 C.F. 206, on a appliqué l'arrêt *Banque fédérale de développement c. Québec (Commission de la santé et de la sécurité du travail)*, précité, pour déterminer si un emprunteur sous le régime d'une cession générale de créances comptables conserve un droit de propriété sur les créances comptables. Le juge Rothstein conclut, aux pp. 224 et 225:

> À la lumière du raisonnement tenu par le juge Houlden dans *Re Broydon Printers*, *supra*, et approuvé par le juge Lamer dans *Banque fédérale de développement*, *supra*, j'estime que le droit de racheter les comptes clients s'accorde avec la définition de «biens» de la *Loi sur la faillite*. Puisqu'il en est ainsi, c'est le raisonnement tenu par le juge Lamer dans *Banque fédérale de développement* qui s'applique en l'espèce et les comptes clients représentent des «biens du failli» au sens du paragraphe 107(1) de la *Loi sur la faillite*.

En résumé, une cession ne peut à la fois être absolue et laisser au cédant un droit de rachat. Le fait

form of the right to redeem with the assignor. The retention of an equity of redemption is consistent with a security interest and not with an absolute assignment. A GABD simply cannot constitute an absolute transfer of property.

36 This conclusion is supported by s. 63 of the Alberta *Personal Property Security Act*, S.A. 1988, c. P-4.05, which stipulates the basis upon which the right of redemption in personal property, including book debts, will be terminated. There must be either a disposition of the collateral by the secured party or an irrevocable election made by the secured party creditor under s. 62 of the Act to take the collateral. In the absence of these events, the debtor has certain rights under the section to redeem the collateral. The facts presented on these appeals do not disclose whether the lending institutions prior to receiving notice from the MNR, sold or transferred the book debts, or met the requisite conditions in order to be deemed irrevocably to have taken the collateral. If they did not, it would appear that the debtor companies still retained a right of redemption under the statute.

37 I would further add that to conclude that a GABD results in a change of ownership as a result of its absolute nature rather than constituting collateral security for a debt will have serious implications. It could, for example, result in a change in the ordering of priorities provided by the *Bankruptcy and Insolvency Act*, the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, and the *Canada Business Corporations Act*, R.S.C., 1985, c. C-44. Further, it could constitute the means by which an unscrupulous debtor company, knowingly or unknowingly abetted by a creditor company, could so order its affairs that many other *bona fide* creditors could be adversely affected.

Summary

38 In *Friesen*, *supra*, it was held that the words of the *Income Tax Act* should be given their plain and ordinary meaning in accordance with the structure and purpose of the Act. It is clear that in enacting

de conserver un droit de rachat est compatible avec l'existence d'une garantie et non d'une cession absolue. Une cession générale de créances comptables ne peut tout simplement pas constituer un transfert absolu de propriété.

Cette conclusion est étayée par l'art. 63 de la *Personal Property Security Act* de l'Alberta, S.A. 1988, ch. P-4.05, qui prévoit les cas où il y a extinction du droit de rachat de biens meubles, y compris des créances comptables. Il doit y avoir aliénation par le créancier garanti du bien donné en garantie ou encore, en vertu de l'art. 62 de la Loi, un choix irrévocable du créancier garanti de prendre le bien donné en garantie. Hormis ces cas, le débiteur possède, en vertu de l'art. 63, certains droits de racheter le bien donné en garantie. Dans les présents pourvois, les faits ne révèlent pas si les établissements de crédit avaient, avant de recevoir l'avis du MRN, vendu ou transféré les créances comptables, ou satisfait aux conditions requises pour être irrévocablement réputés avoir pris le bien donné en garantie. Il semblerait que, s'ils ne l'ont pas fait, les sociétés débitrices conservent encore un droit de rachat en vertu de la Loi.

J'ajouterais qu'il y aurait de graves répercussions à conclure qu'une cession générale de créances comptables donne lieu, en raison de son caractère absolu, à un transfert de propriété, au lieu de constituer une garantie accessoire pour le paiement d'une créance. Il pourrait en résulter, par exemple, une modification de l'ordre de priorité prévu par la *Loi sur la faillite et l'insolvabilité*, la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. (1985), ch. C-36, et la *Loi sur les sociétés par actions*, L.R.C. (1985), ch. C-44. De plus, cela pourrait permettre à un débiteur sans scrupule, encouragé sciemment ou à son insu par une société créancière, d'organiser ses affaires de façon à léser de nombreux autres créanciers de bonne foi.

Résumé

Dans l'arrêt *Friesen*, précité, on a conclu que les dispositions de la *Loi de l'impôt sur le revenu* devraient être interprétées suivant leur sens ordinaire, conformément à l'économie et à l'objet de la

the sections of the *ITA* and *ETA* under consideration Parliament was attempting to ensure the priority of the claim of the MNR over that of other creditors. The primary task of collecting and remitting taxes and contributions under both Acts rests with those who are employers and those who sell goods and services. These amounts so collected could be said to belong not to the collecting debtor entities but to the government. In a sense the funds collected but not remitted might be considered to be held in a form of trust since the entities that have collected these funds are not in any circumstances entitled to retain them. Rather, they must remit the funds. In those circumstances the priority granted to the MNR to recover such funds cannot possibly be said to be expropriation without compensation.

Loi. Il est clair que, lorsqu'il a adopté les dispositions en cause de la *LIR* et de la *LTA*, le Parlement a tenté d'assurer la priorité de la réclamation du MRN sur celles des autres créanciers. Ce sont principalement les employeurs et les vendeurs de produits et services qui ont la tâche de percevoir et de verser les taxes et les cotisations établies en vertu des deux lois. On pourrait dire que les montants ainsi perçus appartiennent non pas aux entités débitrices qui les perçoivent, mais au gouvernement. En un sens, on pourrait considérer que les fonds perçus mais non versés sont détenus dans une sorte de fiducie puisque les entités qui les ont perçus ne sont, en aucun cas, habilitées à les conserver. Elles doivent plutôt les verser au gouvernement. Dans ces circonstances, on ne saurait dire que la priorité accordée au MRN en matière de recouvrement de ces fonds constitue une expropriation sans indemnisation.

In an effort to ensure the recovery of these amounts collected for the MNR, Parliament has endeavoured to ensure the priority of the claims of the MNR to these funds over other creditors. The majority of the courts that have considered this issue since the 1990 amendment have concluded that Parliament has succeeded in achieving this aim: see: *TransGas Ltd. v. Mid-Plains Contractors Ltd.* (1993), 101 D.L.R. (4th) 238 (Sask. C.A.), aff'd [1994] 3 S.C.R. 753; *Berg v. Parker Pacific Equipment Sales*, [1991] 1 C.T.C. 442 (B.C.S.C.); *Lundrigans Ltd. (Receivership) v. Bank of Montreal* (1993), 110 Nfld. & P.E.I.R. 91 (Nfld. T.D.); *Bonavista (Town) v. Atlantic Technologists Ltd.*, *supra*, as well as two of the trial decisions in this case on appeal.

39 Pour assurer le recouvrement des montants perçus pour le compte du MRN, le Parlement s'est efforcé d'assurer que les réclamations du MRN en la matière aient priorité sur celles des autres créanciers. La majorité des tribunaux qui ont examiné cette question, depuis la modification de 1990, ont conclu que le Parlement a réussi à atteindre cet objectif: voir *TransGas Ltd. c. Mid-Plains Contractors Ltd.* (1993), 101 D.L.R. (4th) 238 (C.A. Sask.), conf. par [1994] 3 R.C.S. 753, *Berg c. Parker Pacific Equipment Sales*, [1991] 1 C.T.C. 442 (C.S.C.-B.), *Lundrigans Ltd. (Receivership) c. Bank of Montreal* (1993), 110 Nfld. & P.E.I.R. 91 (Div. 1re inst., T.-N.), *Bonavista (Town) c. Atlantic Technologists Ltd.*, précité, ainsi que deux des décisions rendues en première instance en l'espèce.

I am in agreement with Major J. that a GABD is a security interest and as well that "secured creditor" excludes those individuals who own property absolutely. However I cannot agree that a GABD constitutes an absolute assignment so that the assignee becomes the owner of the book debts. The two concepts in the same instrument are incompatible and an impossible contradiction. Quite simply, a GABD cannot be an absolute

40 Je suis d'accord avec le juge Major pour dire qu'une cession générale de créances comptables est une garantie et que l'expression «créancier garanti» ne vise pas les personnes qui ont la propriété absolue d'un bien. Cependant, je ne puis convenir qu'une cession générale de créances comptables constitue une cession absolue de manière à rendre le cessionnaire propriétaire des créances comptables. Ces deux concepts, dans un

assignment since by its very nature it is a security interest.

même document, sont incompatibles et représentent une contradiction impossible. Une cession générale de créances comptables ne peut tout simplement pas constituer une cession absolue vu qu'elle est, de par sa nature même, une garantie.

41 In drafting the language of the sections it must be assumed that Parliament sought carefully to achieve its purpose, and that it did not intend to create an absurdity or a redundancy. My position can be summarized in this manner:

Il faut supposer que, lorsqu'il a rédigé les dispositions en cause, le Parlement a soigneusement cherché à atteindre son objectif et qu'il n'a pas voulu créer une absurdité ou une redondance. Mon point de vue peut se résumer ainsi:

(i) The definitions of a "security interest" and a "secured creditor" cannot be contradictory. Parliament cannot have intended to create definitions which overlap and contradict each other with the result that the same instrument can, at the same time, be both a "security interest" and not a "security interest". This is not to say that all assignments are "security interests". Rather it is simply that an instrument, once having been defined as a "security interest", cannot also be an absolute assignment. By definition, an absolute assignment cannot be a "security interest".

(i) Les définitions des expressions «garantie» et «créancier garanti» ne sauraient être contradictoires. Le Parlement ne peut avoir voulu établir des définitions qui se chevauchent et se contredisent, de sorte qu'un même écrit puisse à la fois constituer une «garantie» et ne pas en constituer une. Cela ne veut pas dire que toutes les cessions sont des «garanties». Cela signifie plutôt simplement qu'un écrit, une fois défini comme une «garantie», ne peut également constituer une cession absolue. Par définition, une cession absolue ne peut pas être une «garantie».

(ii) GABDs are "security interests" and not absolute assignments because they:

(ii) Une cession générale de créances comptables est une «garantie» et non une cession absolue pour les motifs suivants:

(a) meet the definition of "security interests" as set out in s. 224(1.3) *ITA*;

a) elle correspond à la définition du terme «garantie» énoncée au par. 224(1.3) *LIR*;

(b) are defined as collateral security on their face;

b) elle se définit à première vue comme une garantie accessoire;

(c) are treated as security for a loan on the part of the parties involved;

c) elle est considérée comme une garantie relative au paiement d'un prêt par les parties en cause;

(d) have been defined by this Court as including an equity of redemption, and thus provide a property interest for the borrower. As a result they cannot be absolute;

d) elle a été définie par notre Cour comme incluant un droit de rachat, et confère donc un droit de propriété à l'emprunteur. Elle ne saurait donc être absolue;

(e) cannot be simultaneously a security interest and an absolute assignment;

e) elle ne peut constituer à la fois une garantie et une cession absolue;

(f) to recognize GABDs as absolute assignments would frustrate the purpose of several other statutes.

f) reconnaître ce type de cession comme une cession absolue contrecarrerait l'objet de plusieurs autres lois.

(iii) "secured creditor" is meant to exclude absolute owners. By definition, one cannot be a secured

(iii) L'expression «créancier garanti» vise à exclure les propriétaires absolus. Par définition,

creditor and at the same time an owner of the security. An absolute assignee would be an owner of the book debts as is, for example, a factor. Parliament by this section has excluded those financial institutions engaged in factoring from the operation of the section, together with those financial institutions who have perfected their security interest by assuming ownership. There is no intention manifested by the 1990 amendment to accord any priority to holders of GABDs.

Disposition

I would allow the appeals, set aside the order of the Court of Appeal and confirm the priority of the MNR, and direct that the MNR recover in all three cases in the manner directed by the trial judge in *The Queen v. Toronto-Dominion Bank*. The MNR should have his costs throughout.

The following are the reasons delivered by

IACOBUCCI J. (dissenting) — While I agree with the general principles of statutory interpretation outlined by my colleague Justice Cory, I agree with Justice Major that the general assignments of book debts in this case were tantamount to an absolute transfer of property. Accordingly, I would dispose of the appeals in the manner proposed by Major J.

The following are the reasons delivered by

MAJOR J. (dissenting) —

I. Introduction

These are appeals from a decision of the Court of Appeal of Alberta involving three cases. In all cases Her Majesty in Right of Canada as represented by the Minister of National Revenue (the "MNR") is a party. Alberta Treasury Branches is a party in two of the cases and the Toronto-Dominion Bank is the other party. Each appeal involves a priorities contest between the MNR's

une personne ne peut être à la fois un créancier garanti et un propriétaire de la garantie. Le titulaire d'une cession absolue serait propriétaire des créances comptables comme l'est, par exemple, une société d'affacturage. Le Parlement a soustrait à l'application de cette disposition les institutions financières œuvrant dans le domaine de l'affacturage, ainsi que les institutions financières qui ont réalisé leur garantie en devenant propriétaires du bien grevé. La modification de 1990 ne révèle aucune intention d'accorder la priorité aux titulaires d'une cession générale de créances comptables.

Dispositif

Je suis d'avis d'accueillir les pourvois, d'annuler l'ordonnance de la Cour d'appel, de confirmer la priorité du MRN et d'ordonner que le MRN recouvre les sommes en cause dans les trois pourvois de la façon établie par le juge de première instance dans *The Queen c. Toronto-Dominion Bank*. Le MRN a droit à ses dépens dans toutes les cours. 42

Version française des motifs rendus par

LE JUGE IACOBUCCI (dissident) — Bien que je sois d'accord avec les principes généraux d'interprétation législative exposés par mon collègue le juge Cory, je conviens avec le juge Major que les cessions générales de créances comptables consenties en l'espèce équivalaient à un transfert absolu de propriété. En conséquence, je statuerais sur les pourvois de la manière proposée par le juge Major. 43

Version française des motifs rendus par

LE JUGE MAJOR (dissident) —

I. Introduction

Il s'agit de pourvois contre un arrêt de la Cour d'appel de l'Alberta relativement à trois affaires. Sa Majesté la Reine du chef du Canada, représentée par le ministre du Revenu national («MRN»), est partie au litige dans les trois cas. L'Alberta Treasury Branches est partie dans deux des affaires et l'autre partie est la Banque Toronto-Dominion. Dans les trois cas, il s'agit de déterminer la priorité 44

garnishee summons, and a general assignment of book debts ("GABD") to the lending institutions.

45 Section 224(1.2) of the *Income Tax Act*, S.C. 1970-71-72, c. 63, as amended in 1990, S.C. 1990, c. 34, s. 1, provides a form of garnishment which enables the MNR in certain circumstances to intercept monies owed to tax debtors. This form of garnishment is not available for the collection of income tax debts generally. It is limited to the collection of amounts owing by a person who has withheld, or should have withheld, monies from another under s. 153 of the *Income Tax Act* and who has failed to remit the withheld amounts. An identical garnishment remedy, provided by the *Excise Tax Act*, R.S.C. 1985, c. E-15, s. 317(3), applies where a person has failed to remit GST which was, or ought to have been, collected from other persons.

46 The issue in these appeals is whether the sections apply to give the MNR a priority over creditors who have received an absolute assignment of book debts from the tax debtor. The resolution of the appeals turns on the definition of "secured creditor", which requires the holding of a security interest in the "property of another person".

47 In my opinion, the sections do not grant the MNR a priority over a creditor who holds an assignment of book debts. As a matter of law, such a creditor owns the book debts in question and thus cannot be said to have a security interest in the property of another person.

48 This result is dictated by the common law as well as basic principles of the interpretation of the *Income Tax Act*. The wording of the sections is simply not sufficiently clear and unambiguous to authorize the expropriation, without compensation, of a proprietary interest from the innocent holder of the assignment of the book debts.

entre le bref de saisie-arrêt du MRN et une cession générale de créances comptables aux établissements de crédit.

Le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, S.C. 1970-71-72, ch. 63, modifié en 1990, L.C. 1990, ch. 34, art. 1, prescrit une procédure de saisie-arrêt qui, dans certaines circonstances, permet au MRN d'intercepter des sommes dues à des débiteurs fiscaux. Ce type de saisie-arrêt ne peut servir au recouvrement des créances fiscales en général. Il ne vise que le recouvrement de sommes dues par une personne qui a retenu, ou aurait dû retenir, des sommes en vertu de l'art. 153 de la *Loi de l'impôt sur le revenu*, et qui a omis de verser les montants retenus. Le paragraphe 317(3) de la *Loi sur la taxe d'accise*, L.R.C. (1985), ch. E-15, prévoit une procédure identique de saisie-arrêt dans le cas où une personne a omis de verser la TPS qui a été ou aurait dû être perçue auprès d'autres personnes.

Il s'agit ici de savoir si les dispositions en cause s'appliquent pour conférer au MRN la priorité de rang sur les créanciers qui ont obtenu du débiteur fiscal une cession absolue de créances comptables. Le règlement des pourvois repose sur la définition de «créancier garanti», qui exige qu'une personne détienne une garantie sur le «bien d'une autre personne».

À mon avis, ces dispositions ne confèrent pas au MRN la priorité de rang sur un créancier qui est titulaire d'une cession de créances comptables. En droit, un tel créancier est propriétaire des créances comptables en question et on ne peut donc pas dire qu'il possède une garantie sur le bien d'une autre personne.

Cette conclusion est dictée par la common law et les principes fondamentaux d'interprétation de la *Loi de l'impôt sur le revenu*. Le libellé des dispositions n'est tout simplement pas assez clair et précis pour autoriser l'expropriation, sans versement d'une indemnité, du titulaire innocent de la cession de créances comptables.

II. Facts

The first case arose in 1987 from a loan made by the respondent, Alberta Treasury Branches, to Country Inns Inc., an Alberta hotel operator. The borrowed money was secured in part by a general assignment of book debts. Country Inns Inc. was in arrears to the appellant MNR for $33,312.67 in unremitted GST, plus interest and penalties. Zurich Canada owed Country Inns Inc. $15,000 while Zurich Insurance Company was alleged to owe $95,000.

In June 1992, the MNR served requirements to pay under s. 317(3) of the *Excise Tax Act* on Zurich Canada and Zurich Insurance Company, and all other possible debtors. After Country Inns Inc. made an assignment under the *Bankruptcy Act*, R.S.C., 1985, c. B-3, the trustee estimated the realization of the assets of the estate would leave a shortfall to the respondent Alberta Treasury Branches, which was owed in excess of $6,000,000. Forsyth J. of the Court of Queen's Bench, in an application to determine priorities, held that the MNR had priority by virtue of the provisions of the *Excise Tax Act*: (1992), 5 Alta. L.R. (3d) 141.

In the second case, Pigott Project Management Ltd. contracted with Land-Rock Resources Ltd. for excavation work on the Old Man River Dam spillway. In 1989, Land-Rock borrowed monies from the respondent Alberta Treasury Branches and granted it a general assignment of book debts. After Land-Rock completed the contract work, Pigott held $161,821.77 in contract holdback funds. These funds were claimed by various creditors of Land-Rock, including the appellant MNR, to whom Land-Rock was indebted for unremitted employee source deductions, interests and penalties.

In 1991, the MNR served two requirements to pay on Pigott, under s. 224(1.2) of the *Income Tax Act*, for almost $600,000. On an application to determine priority to the monies in question, Master Waller of the Court of Queen's Bench decided the respondent Alberta Treasury Branches

II. Les faits

La première affaire découle d'un prêt consenti en 1987 par l'intimé l'Alberta Treasury Branches à Country Inns Inc., une société hôtelière albertaine. L'emprunt était garanti en partie par une cession générale de créances comptables. Country Inns Inc. accusait des arriérés de 33 312,67 $ au titre de la TPS non versée à l'appelant le MRN, plus intérêts et pénalité. Zurich Canada devait à Country Inns Inc. la somme de 15 000 $, et l'on alléguait que Zurich Insurance Company devait 95 000 $. 49

En juin 1992, le MRN a signifié à Zurich Canada, à Zurich Insurance Company et à tous les autres débiteurs possibles une demande de paiement fondée sur le par. 317(3) de la *Loi sur la taxe d'accise*. Après que Country Inns Inc. eut fait cession de ses biens en vertu de la *Loi sur la faillite*, L.R.C. (1985), ch. B-3, le syndic a estimé que la réalisation de l'actif de la faillite ne suffirait pas à payer entièrement l'intimé l'Alberta Treasury Branches qui était titulaire d'une créance de plus de 6 000 000 $. À la suite d'une demande visant à établir l'ordre de priorité, le juge Forsyth de la Cour du Banc de la Reine a statué que le MRN avait priorité en vertu des dispositions de la *Loi sur la taxe d'accise*: (1992), 5 Alta. L.R. (3d) 141. 50

Dans la deuxième affaire, Pigott Project Management Ltd. avait conclu avec Land-Rock Resources Ltd. un contrat d'excavation pour l'évacuateur de crues du barrage de la rivière Old Man. En 1989, Land-Rock a emprunté des sommes à l'intimé l'Alberta Treasury Branches et lui a consenti une cession générale de créances comptables. Après l'achèvement des travaux par Land-Rock, Pigott a retenu 161 821,77 $ sur le montant fixé au contrat. Cette somme était réclamée par différents créanciers de Land-Rock, dont l'appelant le MRN à qui Land-Rock devait des arriérés de retenues à la source, plus intérêts et pénalité. 51

En 1991, en vertu du par. 224(1.2) de la *Loi de l'impôt sur le revenu*, le MRN a signifié à Pigott deux demandes de paiement de près de 600 000 $. À la suite d'une demande visant à établir l'ordre de priorité relativement à ces sommes, le protonotaire Waller de la Cour du Banc de la Reine a décidé 52

had priority through its general assignment of book debts. An appeal to Hunt J. was dismissed: (1993), 9 Alta. L.R. (3d) 349.

53 In the third case, Bodor Drilling Ltd. operated a drilling company which borrowed monies from the respondent Toronto-Dominion Bank. The borrowed money was secured in part by a general assignment of book debts. Bodor owed the appellant MNR $83,325.19, in unremitted GST, interest and penalties.

54 In March 1992, the MNR served requirements to pay under s. 317(3) of the *Excise Tax Act* on the trade debtors of Bodor. Another of Bodor's creditors successfully filed a petition under the *Bankruptcy Act* to have Bodor declared a bankrupt. Bodor was indebted to the respondent Toronto-Dominion Bank in the amount of $266,331.12. In an application to determine priority, MacLeod J. of the Court of Queen's Bench held that the MNR had priority under the provisions of the *Excise Tax Act*.

55 All three cases were appealed to the Alberta Court of Appeal. It held that in each case the lending institution had priority over the MNR: (1994), 16 Alta. L.R. (3d) 1.

III. Analysis

56 Before 1987, the primary garnishment remedy in the *Income Tax Act* was provided by s. 224(1), which stated:

224. (1) Where the Minister has knowledge or suspects that a person is or will be, within 90 days, liable to make a payment to another person who is liable to make a payment under this Act (in this section referred to as the "tax debtor"), he may, by registered letter or by a letter served personally, require that person to pay forthwith . . . the moneys otherwise payable to the tax debtor in whole or in part to the Receiver General on account of the tax debtor's liability under this Act.

que l'intimé l'Alberta Treasury Branches avait priorité en vertu de sa cession générale de créances comptables. L'appel interjeté devant le juge Hunt a été rejeté: (1993), 9 Alta. L.R. (3d) 349.

Dans la troisième affaire, Bodor Drilling Ltd. exploitait une société de forage qui avait emprunté des sommes à l'intimée la Banque Toronto-Dominion. L'emprunt était en partie garanti par une cession générale de créances comptables. Bodor devait à l'appelant le MRN la somme de 83 325,19 $ au titre de la TPS non versée, plus intérêts et pénalité.

En mars 1992, le MRN a signifié aux débiteurs commerciaux de Bodor des demandes de paiement fondées sur le par. 317(3) de la *Loi sur la taxe d'accise*. Un autre des créanciers de Bodor a présenté avec succès une pétition en faillite contre Bodor. Bodor devait 266 331,12 $ à l'intimée la Banque Toronto-Dominion. À la suite d'une demande visant à établir l'ordre de priorité, le juge MacLeod de la Cour du Banc de la Reine a statué que le MRN avait priorité en vertu des dispositions de la *Loi sur la taxe d'accise*.

Ces trois affaires ont fait l'objet d'un appel devant la Cour d'appel de l'Alberta. Dans chaque cas, la cour a statué que l'établissement de crédit avait priorité sur le MRN: (1994), 16 Alta. L.R. (3d) 1.

III. Analyse

Avant 1987, la principale procédure de saisie-arrêt prévue dans la *Loi de l'impôt sur le revenu* figurait au par. 224(1):

224. (1) Lorsque le Ministre sait ou soupçonne qu'une personne est ou sera, dans les 90 jours, tenue de faire un paiement à une autre personne qui, elle-même, est tenue de faire un paiement en vertu de la présente loi (appelée au présent article le «débiteur fiscal»), il peut, par lettre recommandée ou par lettre signifiée à personne, exiger de cette personne que les deniers autrement payables au débiteur fiscal soient en totalité ou en partie versés, immédiatement [. . .] au receveur général au titre de l'obligation du débiteur fiscal en vertu de la présente loi.

Where a tax debtor had assigned its debts to another party as part of a security arrangement, courts were virtually unanimous in finding that a demand under s. 224(1) was ineffective to attach any of the assigned debts. The courts held that, by the assignment, the tax debtor had transferred its interest in its accounts to the assignee, leaving nothing for the MNR's garnishment to attach. See: *Royal Bank of Canada v. R.* (1984), 52 C.B.R. (N.S.) 198 (F.C.T.D.), at pp. 210-13, aff'd (1986), 60 C.B.R. (N.S.) 125 (F.C.A.).

Parliament amended the *Income Tax Act* in 1987 (S.C. 1987, c. 46, s. 66) and added two additional subsections (ss. 224(1.2) and (1.3)). Sections 317(3) and (4) were also added to the *Excise Tax Act*. For the purposes of the issue raised in these appeals the wording of the sections in the *Excise Tax Act* is identical to that of the *Income Tax Act*. For the sake of convenience I will refer to the sections of the *Income Tax Act*.

Section 224(1.2) provided that the MNR could garnish funds owed to a tax debtor or to a "secured creditor". Section 224(1.3) provided, *inter alia*, definitions of "secured creditor" and a "security interest":

224. . . .

(1.2) Notwithstanding any other provision of this Act, the *Bankruptcy Act*, any other enactment of Canada, any enactment of a province or any law, where the Minister has knowledge or suspects that a particular person is or will become, within 90 days, liable to make a payment

(*a*) to another person who is liable to pay an amount assessed under subsection 227(10.1) or a similar provision, or to a legal representative of that other person (each of whom is in this subsection referred to as the "tax debtor"), or

(*b*) to a secured creditor who has a right to receive the payment that, but for a security interest in favour of the secured creditor, would be payable to the tax debtor,

the Minister may, by registered letter or by a letter served personally, require the particular person to pay

Lorsqu'un débiteur fiscal a cédé ses créances à une autre partie dans le cadre d'un contrat de garantie, les tribunaux ont statué quasi unanimement qu'une demande fondée sur le par. 224(1) ne permet pas de saisir-arrêter les créances cédées. Les tribunaux ont conclu que le débiteur fiscal avait, par la cession, transféré au cessionnaire son droit sur ses comptes, et qu'il ne restait rien sur quoi pouvait porter la saisie-arrêt du MRN. Voir *Banque Royale du Canada c. R.* (1984), 52 C.B.R. (N.S.) 198 (C.F. 1re inst.), aux pp. 210 à 213, conf. par (1986), 60 C.B.R. (N.S.) 125 (C.A.F.).

En 1987, le Parlement a modifié la *Loi de l'impôt sur le revenu* (L.C. 1987, ch. 46, art. 66) et a ajouté deux paragraphes (les par. 224(1.2) et (1.3)). Les paragraphes 317(3) et (4) ont également été ajoutés à la *Loi sur la taxe d'accise*. Pour les fins de la question soulevée dans les présents pourvois, la formulation des dispositions de la *Loi sur la taxe d'accise* est identique à celles de la *Loi de l'impôt sur le revenu*. Pour plus de facilité, je vais me référer aux dispositions de la *Loi de l'impôt sur le revenu*.

Aux termes du par. 224(1.2), le MRN était habilité à saisir-arrêter les sommes dues à un débiteur fiscal ou à un «créancier garanti». Le paragraphe 224(1.3) définissait notamment les expressions «créancier garanti» et «garantie»:

224. . . .

(1.2) Nonobstant les autres dispositions de la présente loi et nonobstant la *Loi sur la faillite*, tout autre texte législatif fédéral, tout texte législatif provincial et toute règle de droit, s'il sait ou soupçonne qu'une personne donnée est ou deviendra, dans les 90 jours, débiteur d'une somme

a) soit à un débiteur fiscal, à savoir une personne redevable d'un montant cotisé en application du paragraphe 227(10.1) ou d'une disposition semblable ou un représentant légal de cette personne,

b) soit à un créancier garanti, à savoir une personne qui, grâce à une garantie en sa faveur, a le droit de recevoir la somme autrement payable au débiteur fiscal,

le ministre peut, par lettre recommandée ou signifiée à personne, obliger la personne donnée à payer au rece-

forthwith, where the moneys are immediately payable, and in any other case, as and when the moneys become payable, the moneys otherwise payable to the tax debtor or the secured creditor in whole in or in part to the Receiver General on account of the tax debtor's liability under subsection 227(10.1) or a similar provision.

(1.3) In subsection (1.2),

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

"security interest" means any interest in property that secures payment or performance of an obligation and includes an interest created by or arising out of a debenture, mortgage, hypothec, lien, pledge, charge, deemed or actual trust, assignment or encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for;

60 The operation of the 1987 version of s. 224(1.2) as against the holder of a GABD was considered by courts in Alberta, British Columbia, Saskatchewan, Manitoba and Nova Scotia.

61 In Alberta, in *Lloyds Bank of Canada v. International Warranty Co.* (1989), 64 Alta. L.R. (2d) 340 (Q.B.), rev'd (1989), 68 Alta. L.R. (2d) 356 (C.A.), McDonald J. held that the new definition of "security interest" was broad enough to include monies which were equitably assigned by a tax debtor to a bank (at pp. 352-53):

. . . the definition of "security interest" is so broad as to include moneys which have been equitably assigned by the tax debtor to, for example, a bank. The ownership by the bank of the funds that are the subject of the assignment constitutes an "interest in property". That interest in property is one which "secures payment" of the "obligation" of the tax debtor . . . . The provision of such

veur général tout ou partie de cette somme, sans délai si la somme est payable immédiatement, sinon dès qu'elle devient payable, au titre du montant cotisé en application du paragraphe 227(10.1) ou d'une disposition semblable dont le débiteur fiscal est redevable.

(1.3) Les définitions qui suivent s'appliquent au paragraphe (1.2).

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

. . .

«garantie» Droit sur un bien qui garantit l'exécution d'une obligation, notamment un paiement. Sont en particulier des garanties les droits nés ou découlant de débentures, hypothèques, *mortgages*, privilèges, nantissements, sûretés, fiducies réputées ou réelles, cessions et charges, quelle qu'en soit la nature, de quelque façon ou à quelque date qu'elles soient créées, réputées exister ou prévues par ailleurs.

Des tribunaux de l'Alberta, de la Colombie-Britannique, de la Saskatchewan, du Manitoba et de la Nouvelle-Écosse ont examiné l'application du par. 224(1.2), tel qu'il existait en 1987, au titulaire d'une cession générale de créances comptables.

En Alberta, dans la décision *Lloyds Bank of Canada c. International Warranty Co.* (1989), 64 Alta. L.R. (2d) 340 (B.R.), inf. par (1989), 68 Alta. L.R. (2d) 356 (C.A.), le juge McDonald a statué que la nouvelle définition du terme «garantie» était suffisamment large pour inclure des sommes qui avaient été cédées, selon l'*equity*, à une banque par un débiteur fiscal (aux pp. 352 et 353):

[TRADUCTION] . . . la définition du terme «garantie» est suffisamment large pour inclure des sommes que le débiteur fiscal a cédées, selon l'*equity*, à une banque par exemple. Le fait que la banque se trouve propriétaire des fonds visés par la cession constitue un «droit sur un bien». Ce droit garantit «l'exécution» de l'«obligation» du débiteur fiscal [. . .]. La constitution de cette garantie

security is the very purpose of the assignment of book debts. Moreover, the bank's interest is one "created by or arising out of [an] assignment . . . of any kind whatever, however or whenever arising . . . "

est l'objet même de la cession de créances comptables. De plus, le droit de la banque «[naît] ou découl[e] [d'une] cession[. . .], [. . .] quelle qu'en soit la nature, de quelque façon ou à quelque date qu'elle [. . .] soi[t] créée. . .»

As a result, he held that the MNR obtained priority to the garnished funds over the claim of Lloyds Bank as the assignee of the book debts.

Le juge McDonald a donc conclu que le MRN avait priorité relativement aux fonds saisis-arrêtés par rapport à Lloyds Bank, cessionnaire des créances comptables.

The Alberta Court of Appeal reversed the trial decision in *Lloyds Bank* but on other grounds. Relying on its decisions in *Re Lamarre; University of Calgary v. Morrison*, [1978] 2 W.W.R. 465, and *Attorney General of Canada v. Royal Bank of Canada*, [1979] 1 W.W.R. 479, the Court of Appeal held that the provisions of s. 224(1.2) provided at most for a form of extra-judicial attachment which could bring the funds into the custody of the MNR. The court held that the section fell short of effecting a transfer of property in the funds or establishing the priority of the MNR's claim. It concluded (at p. 362) that "[s]omething further is required to accomplish either purpose". 62

La Cour d'appel de l'Alberta a, pour d'autres motifs, infirmé la décision de première instance dans l'affaire *Lloyds Bank*. Se fondant sur ses arrêts *Re Lamarre; University of Calgary c. Morrison*, [1978] 2 W.W.R. 465, et *Attorney General of Canada c. Royal Bank of Canada*, [1979] 1 W.W.R. 479, la Cour d'appel a statué que le par. 224(1.2) établissait tout au plus une forme de saisie-arrêt extrajudiciaire aux termes de laquelle le MRN pourrait avoir la garde des fonds. La cour a statué que cette disposition ne permettait pas un transfert de propriété des fonds ni n'accordait la priorité de rang à la réclamation du MRN. Elle conclut (à la p. 362) que [TRADUCTION] «[q]uelque chose de plus est nécessaire pour réaliser l'une ou l'autre de ces fins».

The decision of the Alberta Court of Appeal in *Lloyds Bank* was followed by the Manitoba Court of Appeal in *Pembina on the Red Development Corp. v. Triman Industries Ltd.*, [1991] 6 W.W.R. 481, and the British Columbia Court of Appeal in *Concorde International Travel Inc. v. T.I. Travel Services (B.C.) Inc.* (1990), 72 D.L.R. (4th) 405. In the B.C. decision, Hinkson J.A. referred to the decision of the Alberta Court of Appeal in *Lloyds Bank* and stated at p. 409: 63

L'arrêt *Lloyds Bank* de la Cour d'appel de l'Alberta a été suivi par la Cour d'appel du Manitoba dans *Pembina on the Red Development Corp. c. Triman Industries Ltd.*, [1991] 6 W.W.R. 481, et par la Cour d'appel de la Colombie-Britannique dans *Concorde International Travel Inc. c. T.I. Travel Services (B.C.) Inc.* (1990), 72 D.L.R. (4th) 405. Dans l'arrêt de la Cour d'appel de la Colombie-Britannique, le juge Hinkson a mentionné l'arrêt *Lloyds Bank* de la Cour d'appel de l'Alberta, affirmant, à la p. 409:

In my opinion, s. 224 styled as it is "Garnishment" deals in s-ss. (1) and (1.2) with the mechanics of garnishment. The Minister in serving a demand pursuant to that section must be proceeding upon the basis that he asserts a tax debtor's liability to him. That justified garnishing the funds in the hands of a creditor of the tax debtor. But, I am unable to see in that section any provision that would have the effect of transferring the property in the funds to the Minister or establishing a prior-

[TRADUCTION] À mon avis, les par. (1) et (1.2) de l'art. 224 intitulé «Saisie-arrêt» portent sur la procédure de saisie-arrêt. Lorsqu'il signifie une demande conformément à cette disposition, le Ministre doit partir du principe qu'il fait valoir l'assujettissement à l'impôt du débiteur fiscal, le justifiant ainsi de faire une saisie-arrêt des sommes qui sont entre les mains d'un créancier du débiteur fiscal. Cependant, je ne vois, dans cet article, aucune disposition qui aurait pour effet de transférer au

ity of Revenue Canada's claim. That was the point dealt with by the Alberta Court of Appeal. [Emphasis added.]

64 To the opposite effect are decisions by courts in Saskatchewan and Nova Scotia: *Royal Bank of Canada v. Saskatchewan Power Corp.*, [1991] 1 W.W.R. 1 (Sask. C.A.), aff'g [1990] 2 W.W.R. 655 (Sask. Q.B.) and *Touche Ross Ltd. v. M.N.R.* (1990), 71 D.L.R. (4th) 648 (N.S.S.C.T.D.).

65 Apparently in order to deal with the competing lines of authority as to whether s. 224(1.2) was sufficient to grant a priority to the MNR, Parliament amended the section in 1990 by adding the following to the end of the section:

> . . . and on receipt of that letter [i.e. the garnishment summons] by the particular person, the amount of those moneys that is required by that letter to be paid to the Receiver General shall, notwithstanding any security interest in those moneys, become the property of Her Majesty and shall be paid to the Receiver General in priority to any such security interest.

66 This 1990 amendment was made to both the *Income Tax Act* and the relevant provisions of the *Excise Tax Act*. The three trial decisions in the cases at issue in these appeals are principally concerned with the issue of whether this amendment constituted the "something further" which *Lloyds Bank* had held was necessary to transfer the property interest in the funds to the MNR or to grant a priority to the MNR.

67 Two judges of the Court of Queen's bench held that the 1990 amendments did constitute the "something further" and that as a result the MNR gained priority over the book debts to the lending institutions in question. Forsyth J. based his decision expressly on the wording of the 1990 amendment and held that it was sufficiently explicit. In addition to the 1990 amendments, MacLeod J. placed reliance on the finding of McDonald J. in *Lloyds Bank* that a GABD falls within the definition of a security interest in s. 224(1.3).

Ministre la propriété des fonds ou d'accorder la priorité à la réclamation de Revenu Canada. C'est le point que la Cour d'appel de l'Alberta a examiné. [Je souligne.]

Par contre, en Saskatchewan et en Nouvelle-Écosse, les tribunaux ont exprimé des avis contraires: *Royal Bank of Canada c. Saskatchewan Power Corp.*, [1991] 1 W.W.R. 1 (C.A. Sask.), conf. [1990] 2 W.W.R. 655 (B.R. Sask.), et *Touche Ross Ltd. c. M.N.R.* (1990), 71 D.L.R. (4th) 648 (C.S. 1re inst., N.-É.).

Afin de remédier, semble-t-il, aux courants de jurisprudence contradictoires quant à savoir si le par. 224(1.2) était suffisant pour accorder la priorité au MRN, le Parlement a modifié ce paragraphe en 1990 en ajoutant le passage suivant à la fin:

> Sur réception de la lettre [le bref de saisie-arrêt] par la personne donnée, la somme qui y est indiquée comme devant être payée devient, nonobstant toute autre garantie au titre de cette somme, la propriété de Sa Majesté et doit être payée au receveur général par priorité sur toute autre garantie au titre de cette somme.

Cette modification de 1990 a été apportée à la *Loi de l'impôt sur le revenu* et aux dispositions pertinentes de la *Loi sur la taxe d'accise*. Dans les trois affaires dont nous sommes saisis en l'espèce, les juges de première instance avaient principalement examiné si cette modification constituait le [TRADUCTION] «quelque chose de plus» qui, selon l'arrêt *Lloyds Bank*, était nécessaire pour transférer au MRN le droit de propriété sur les fonds ou pour lui accorder la priorité de rang.

Deux juges de la Cour du Banc de la Reine ont statué que les modifications de 1990 constituaient ce «quelque chose de plus» et que le MRN avait, de ce fait, obtenu la priorité de rang sur les créances comptables cédées aux établissements de crédit en question. Le juge Forsyth a fondé explicitement sa décision sur la modification de 1990 et a statué qu'elle était suffisamment explicite. Le juge MacLeod, lui, s'est en outre fondé sur la conclusion du juge McDonald dans *Lloyds Bank*, selon laquelle la définition de «garantie» au par. 224(1.3) vise une cession générale de créances comptables.

In the third case, the Master in Chambers held that the 1990 amendments were still not sufficiently broadly worded to allow Revenue Canada to attach monies in which the tax debtor has no interest by virtue of an absolute assignment. Hunt J. on appeal agreed with his conclusion. She relied on a perceived ambiguity in the definition of security interest, stating at pp. 360-61:

I am of the view, moreover, that it is not clear whether the modifying provisions at the end of the definition of "security interest" (the words "of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for") are meant to apply to each of the enumerated types of interests or instruments (debenture, mortgage, assignment, etc.) or whether these words are meant only to modify the term "encumbrance". McDonald, J. [in *Lloyds Bank*, *supra*] assumed the former to be the case, but in my view the meaning is not without doubt. There is a third way of reading the modifying words at the end, namely that the words "of any kind whatever" describe "encumbrance", with the balance of the words applying to each of the listed types of interests. The words "of any kind whatever" might also be taken to apply to assignments *and* encumbrances. Were this provision more clear, it would be easier to conclude that Parliament meant to include *all* types of assignments, including unconditional assignments, in the definition. This would make it plainer that, indeed, Parliament intended Revenue Canada's claim to take priority over the property of someone other than the tax debtor, such as an assignee of the tax debtor's book debts. [Emphasis in original.]

I agree with Forsyth J. that the 1990 amendments to the *Income Tax Act* and the *Excise Tax Act* were sufficient to provide the "something further" which the Alberta Court of Appeal thought to be necessary in *Lloyds Bank*. As Côté J.A. in the decision of the Court of Appeal in this case stated about the amendment to s. 224(1.2), at p. 6:

. . . the amendments to that subsection say that service transfers the debt to Her Majesty, and that it shall be paid to Her Majesty notwithstanding the security interest, and in priority to the security interest. Where those

Dans la troisième affaire, le protonotaire en chambre a statué que les modifications de 1990 n'étaient pas encore formulées de façon assez générale pour permettre à Revenu Canada de saisir-arrêter des sommes sur lesquelles le débiteur fiscal n'a aucun droit en vertu d'une cession absolue. En appel, le juge Hunt a souscrit à cette conclusion. Elle s'est fondée sur une ambiguïté qu'elle percevait dans la définition du terme «garantie» (aux pp. 360 et 361): 68

[TRADUCTION] De plus, je suis d'avis que l'on ne sait pas exactement si la modification apportée à la fin de la définition du terme «garantie» («quelle qu'en soit la nature, de quelque façon ou à quelque date qu'elles soient créées, réputées exister ou prévues par ailleurs») est censée s'appliquer à chacun des types de droits ou d'instruments énumérés (débentures, *mortgages*, cessions, etc.) ou si elle n'est censée qualifier que le terme «charges». Le juge McDonald [dans *Lloyds Bank*, précité] opte pour la première hypothèse, mais, à mon avis, cette interprétation est douteuse. Il existe une troisième façon d'interpréter la modification en question, à savoir que l'expression «quelle qu'en soit la nature» qualifie le terme «charges», et que les autres mots s'appliquent à chacun des types de droit énumérés. On pourrait également considérer que l'expression «quelle qu'en soit la nature» s'applique aux cessions *et* aux charges. Si cette disposition était plus claire, il serait plus facile de conclure que le Parlement a voulu inclure dans la définition *tous* les types de cession, y compris les cessions inconditionnelles. Si tel était le cas, il serait plus évident que le Parlement a voulu que la réclamation de Revenu Canada ait priorité sur le bien d'une personne autre que le débiteur fiscal, comme le cessionnaire des créances comptables du débiteur fiscal. [En italique dans l'original.]

Je suis d'accord avec le juge Forsyth pour dire que les modifications apportées en 1990 à la *Loi de l'impôt sur le revenu* et à la *Loi sur la taxe d'accise* étaient suffisantes pour fournir le «quelque chose de plus» que la Cour d'appel de l'Alberta a jugé nécessaire dans l'arrêt *Lloyds Bank*. Comme le juge Côté l'a dit, dans l'arrêt de la Cour d'appel en l'espèce, relativement à la modification du par. 224(1.2), à la p. 6: 69

[TRADUCTION] . . . les modifications apportées à ce paragraphe précisent que la signification transfère la créance à Sa Majesté et que les sommes dues doivent lui être payées nonobstant la garantie, et ce, en priorité sur cette

amendments apply, in my view they reverse our *Lloyds Bank* decision and give the M.N.R. priority over earlier mortgages and assignments. I cannot confine them to floating or conditional assignments and must disagree with one of the Justices appealed from.

70 I also agree with MacLeod J. that McDonald J. at trial in *Lloyds Bank* was correct to hold that a GABD falls within the definition of security interest in s. 224(1.3). That section defines "security interest" as including:

> . . . any interest in property that secures payment or performance of an obligation and includes an interest created by or arising out of . . . [an] assignment . . . of any kind whatever, however or whenever arising. . . .

71 With respect, I do not accept the conclusion of Hunt J. that the definition of "security interest" is ambiguous and that the phrase "of any kind whatever" should be read to modify only "encumbrance" which is the last type of security listed. When the definition is read in its plain and ordinary sense, it is clear that the broad phrase "of any kind whatever" is intended to cover all of the listed types of security including an assignment. The phrase "a[n] assignment . . . of any kind whatever" is broad enough to encompass the absolute assignments of book debts which are at issue in these appeals.

72 The finding that a GABD is a security interest for the purposes of the *Income Tax Act* or the *Excise Tax Act* is also consistent with the manner in which the assignments are dealt with in the contracts which create the assignments. For instance, the instrument which creates the assignment of book debts from Land-Rock Resources Ltd. to Alberta Treasury Branches provides, *inter alia*:

> THE PRESENT assignment and transfer shall be a continuing collateral security to Treasury Branches for the payment of all and every present and future indebtedness and liability of the undersigned to Treasury

garantie. Lorsqu'elles s'appliquent, ces modifications infirment, à mon avis, notre arrêt *Lloyds Bank* et accordent au MRN la priorité sur les *mortgages* et cessions antérieurs. Je ne puis en limiter l'application aux cessions générales ou conditionnelles et je ne puis qu'exprimer mon désaccord avec l'un des juges dont la décision a été portée en appel.

Je conviens également avec le juge MacLeod que le juge McDonald de première instance, dans l'affaire *Lloyds Bank,* a eu raison d'affirmer qu'une cession générale de créances comptables est visée par la définition du terme «garantie» au par. 224(1.3). Aux termes de cette disposition, le terme «garantie» comprend notamment:

> Droit sur un bien qui garantit l'exécution d'une obligation, notamment un paiement. Sont en particulier des garanties les droits nés ou découlant de [. . .] cessions [. . .] quelle qu'en soit la nature, de quelque façon ou à quelque date qu'elles soient créées . . .

En toute déférence, je n'accepte pas la conclusion du juge Hunt que la définition du terme «garantie» est ambiguë et que l'expression «quelle qu'en soit la nature» ne devrait viser que le terme «charges» qui est le dernier type de garantie énuméré. Lorsque l'on donne à la définition son sens ordinaire, il est clair que l'expression générale «quelle qu'en soit la nature» est destinée à s'appliquer à tous les types de garantie énumérés, dont les cessions. L'expression «cessions [. . .] quelle qu'en soit la nature» est suffisamment générale pour inclure les cessions absolues de créances comptables visées dans les présents pourvois.

La conclusion qu'une cession générale de créances comptables est une garantie pour les fins de la *Loi de l'impôt sur le revenu* ou de la *Loi sur la taxe d'accise* est également compatible avec la façon dont les cessions sont traitées dans les actes de cession. Par exemple, l'instrument aux termes duquel Land-Rock Resources Ltd. consent une cession de créances comptables à l'Alberta Treasury Branches prévoit notamment:

> [TRADUCTION] La cession et le transfert effectués AUX PRÉSENTES constituent une garantie accessoire et permanente en faveur de Treasury Branches au titre du paiement de toute créance et dette, présentes et

Branches and any ultimate unpaid balance thereof with interest. [Emphasis added.]

My conclusions that the GABDs at issue in these appeals fall within the statutory definition of a security interest and that the 1990 amendment is effective, when it applies, to give the MNR a priority over earlier mortgages and assignments, do not, however, lead inevitably to the conclusion that the MNR has priority over the lending institutions to the debts at issue in these appeals.

A new argument was raised before the Alberta Court of Appeal and this Court to the effect that even if an unconditional GABD is a security interest, the lending institutions do not fall within the definition of "secured creditor" in s. 224(1.3) of the *Income Tax Act*. Côté J.A. held at pp. 7-8:

The M.N.R. must believe or suspect that the intended recipient of the letter is liable, or will soon become liable to make a payment under para. (*a*) or para. (*b*) of the operative subs. (1.2). No one suggests that para. (*a*) applies here, given the general assignments of book debts and other assignments. So the effective precondition in these cases is para. (*b*). It says:

> (*b*) to a secured creditor who has a right to receive the payment that, but for [a] security interest in favour of the *secured creditor*, would be payable to the tax debtor. (emphasis added)

Subsection (1.3) defines "security interest", and that definition appears to be satisfied in the present cases. But subs. (1.3) also defines "secured creditor" .... I will restate that definition slightly using square brackets:

> . . . a [certain] person who has a security interest *in the property of another person* or who acts for or on behalf of that person with respect to the security interest and includes . . . (emphasis added)

In each of these three appeals, there was a general assignment of book debts which purported immediately to transfer title to the Bank or Treasury Branch. Doubtless it was done to secure a loan, but legal title was thereafter in the transferee, the Bank or Treasury

futures, de la soussignée à Treasury Branches ainsi que de tout solde impayé, avec intérêts. [Je souligne.]

Cependant, même si je conclus que les cessions générales de créances comptables ici en cause sont visées par la définition du terme «garantie» dans la Loi et que la modification de 1990 a pour effet d'accorder, lorsqu'elle s'applique, la priorité à la réclamation du MRN sur les *mortgages* et cessions antérieurs, il ne s'ensuit pas nécessairement pour autant que le MRN a priorité sur les établissements de crédit relativement aux créances visées en l'espèce. 73

Devant la Cour d'appel de l'Alberta et notre Cour, on a avancé le nouvel argument voulant que, même si une cession générale inconditionnelle de créances comptables est une garantie, les établissements de crédit ne sont pas des «créanciers garantis» au sens du par. 224(1.3) de la *Loi de l'impôt sur le revenu*. Le juge Côté de la Cour d'appel conclut, aux pp. 7 et 8: 74

[TRADUCTION] Le MRN doit croire ou soupçonner que le destinataire prévu de la lettre est ou sera sous peu tenu de faire un paiement en vertu de l'al. *a*) ou *b*) du par. (1.2) qui s'applique. Personne ne soutient que l'al. *a*) s'applique en l'espèce, vu les cessions générales de créances comptables et les autres cessions effectuées. Alors, la condition préalable à remplir dans ces cas est celle prévue à l'al. *b*) qui se lit ainsi:

> *b*) soit à un créancier garanti, à savoir une personne qui, grâce à une garantie en *sa* faveur, a le droit de recevoir la somme autrement payable au débiteur fiscal. (italiques ajoutés)

Le paragraphe (1.3) définit le terme «garantie» et cette définition semble respectée dans les présentes affaires. Toutefois, ce même paragraphe définit aussi l'expression «créancier garanti». [. . .] J'indique entre crochets les légères modifications que j'apporterais à cette définition:

> . . . [Une certaine] [p]ersonne qui a une garantie *sur un bien d'une autre personne* — ou qui est mandataire de cette personne quant à cette garantie—, y compris . . . (italiques ajoutés)

Dans chacun de ces trois appels, il y a eu une cession générale de créances comptables qui était censée transférer immédiatement le titre à la Banque ou au Treasury Branch. Il n'y a aucun doute que l'on voulait ainsi garantir un prêt, mais le titre de propriété s'est par la

Branch. Therefore, the Bank or Treasury Branch is not a "secured creditor" under this definition, because it does not have any interest "in the property of another person". The Bank or Treasury Branch itself is the owner. The tax debtor, both sides agree, would have to be the "other person". But he has no title. So one cannot say that the book debts (receivables) assigned are "the property of" the tax debtor.

suite trouvé transféré au cessionnaire, c'est-à-dire la Banque ou le Treasury Branch. En conséquence, la Banque ou le Treasury Branch n'est pas un «créancier garanti» au sens de cette définition parce que ni l'un ni l'autre n'a un droit «sur un bien d'une autre personne». Le propriétaire est la Banque ou le Treasury Branch. Le débiteur fiscal devrait être, comme les deux parties le reconnaissent, l'«autre personne». Cependant, il ne possède aucun titre de propriété. Alors, on ne saurait dire que les créances comptables (comptes débiteurs) cédées sont un «bien» du débiteur fiscal.

75 I agree. The wording of s. 224(1.2) clearly requires not only that there is a security interest, but also that the payment be made either to the tax debtor or to a secured creditor. Here, because of the assignments, the payments are made to the lending institutions and the question is whether these lending institutions meet the definition of "secured creditor" as defined in the statutes.

Je suis d'accord. Le libellé du par. 224(1.2) exige clairement non seulement qu'il existe une garantie, mais aussi que le paiement soit fait à un débiteur fiscal ou à un créancier garanti. En l'espèce, en raison des cessions consenties, les paiements doivent être faits aux établissements de crédit et la question est de savoir si ces établissements constituent des «créanciers garantis» au sens des lois en cause.

76 The definition of secured creditor is a "person who has a security interest in the property of another", that other being the tax debtor. The critical issue is whether, after an assignment, the lending institutions have a security interest in the property of the tax debtor. In my view, they do not. An assignment passes title and therefore property in the book debts is held by the lending institution and not by the tax debtor.

Un créancier garanti est une «[p]ersonne qui a une garantie sur un bien d'une autre personne», l'autre personne étant le débiteur fiscal. La question cruciale est de savoir si, à la suite d'une cession, les établissements de crédit possèdent une garantie sur le bien du débiteur fiscal. À mon avis, la réponse est négative. Une cession transfère le titre de propriété et c'est donc l'établissement de crédit et non le débiteur fiscal qui a la propriété des créances comptables.

77 It is well-established law that a GABD, such as the ones at issue in these appeals, has the effect of transferring all right, title and ownership in and to the property assigned so that it can no longer be considered the property of the assignor. See: *Evans Coleman and Evans Ltd. v. R.A. Nelson Construction Ltd.* (1958), 27 W.W.R. 38 (B.C.C.A.), at p. 42; *Lettner v. Pioneer Truck Equipment Ltd.* (1964), 47 W.W.R. 343 (Man. C.A.), at pp. 348-49; *Royal Bank of Canada v. Attorney General of Canada* (1977), 25 C.B.R. (N.S.) 233 (Alta. S.C.T.D.), at pp. 236 and 241, aff'd [1979] 1 W.W.R. 479; *Royal Bank of Canada v. R.*, *supra*, at pp. 206 and 212; *Toronto-Dominion Bank v.*

Il est bien établi en droit qu'une cession générale de créances comptables, comme celles dont il est question dans les présents pourvois, a pour effet de transférer en totalité le droit, le titre et la propriété relatifs au bien cédé de sorte qu'il ne peut plus être considéré comme le bien du cédant. Voir: *Evans Coleman and Evans Ltd. c. R.A. Nelson Construction Ltd.* (1958), 27 W.W.R. 38 (C.A.C.-B.), à la p. 42; *Lettner c. Pioneer Truck Equipment Ltd.* (1964), 47 W.W.R. 343 (C.A. Man.), aux pp. 348 et 349; *Royal Bank of Canada c. Attorney General of Canada* (1977), 25 C.B.R. (N.S.) 233 (C.S. Alb. 1re inst.), aux pp. 236 et 241, conf. par [1979] 1 W.W.R. 479; *Banque Royale du*

Minister of National Revenue (1990), 39 F.T.R. 102, at p. 105.

In *Evans Coleman and Evans Ltd. v. R.A. Nelson Construction Ltd.*, the plaintiff attempted to garnish funds owing to the defendant which were held by a bank. A second bank held a GABD executed by the defendant. The British Columbia Court of Appeal concluded that the GABD passed property in the book debts absolutely, and that the defendant no longer had an interest that could be garnisheed.

In *Royal Bank of Canada v. R.*, Muldoon J. of the Federal Court Trial Division came to a similar conclusion which was unanimously confirmed by the Federal Court of Appeal. Under the terms of the assignment, the assignor Miles contracted to act as a trustee for the funds assigned by him to the Royal Bank under a GABD. The MNR argued that an assignee can have no greater claim on the garnished money than the assignor. Muldoon J. rejected this argument and held at p. 212:

With respect, that contention misses the point. To equate the respective rights of the assignee and the assignor in and upon the book debts is to overlook the very nature and effect of the assignment, for the assignee owns the book debts and the assignor does not. To those who have not searched in the personal property security register, the assignor, of course, might still appear to be an ordinary trade creditor, but having assigned the book debts, the assignor, Miles, was in reality a trustee of them for the assignee, the plaintiff bank. Here, the Crown has received that which belonged to the bank.

In *Lettner v. Pioneer Truck Equipment Ltd.*, Guy J.A. of the Manitoba Court of Appeal commented upon the nature and effect a GABD as follows at pp. 348-49:

Canada c. R., précité, aux pp. 206 et 212; *Banque Toronto-Dominion c. Ministre du Revenu national* (1990), 39 F.T.R. 102, à la p. 105.

78 Dans l'affaire *Evans Coleman and Evans Ltd. c. R.A. Nelson Construction Ltd.*, la demanderesse avait tenté de saisir-arrêter des fonds dus à la défenderesse, qui étaient détenus par une banque. Une deuxième banque était titulaire d'une cession générale de créances comptables signée par la défenderesse. La Cour d'appel de la Colombie-Britannique a conclu que la cession générale de créances comptables avait complètement transféré la propriété des créances comptables, et que la défenderesse n'avait plus aucun droit susceptible de faire l'objet d'une saisie-arrêt.

79 Dans l'affaire *Banque Royale du Canada c. R.*, le juge Muldoon de la Cour fédérale, Section de première instance, est arrivé à une conclusion similaire que la Cour d'appel fédérale a confirmée à l'unanimité. Aux termes de l'acte de cession, le cédant Miles s'était engagé par contrat à agir à titre de fiduciaire des fonds qu'il avait cédés à la Banque Royale en vertu d'une cession générale de créances comptables. Le MRN prétendait qu'un cessionnaire ne peut détenir sur les sommes saisies-arrêtées un droit plus important que celui du cédant. Le juge Muldoon a rejeté cet argument, concluant, à la p. 212:

J'estime que cet argument passe à côté de la question. En mettant sur le même pied les droits du cédant et du cessionnaire sur les créances, on méconnaît la nature et l'effet mêmes du transport: en effet, les créances appartiennent au cessionnaire et non au cédant. Pour ceux qui ne consultent pas le registre des sûretés mobilières, le cédant apparaîtra bien sûr probablement comme un créancier commercial ordinaire. Cependant, après avoir transporté ses créances, le cédant, Miles, agit en réalité à titre de fiduciaire des créances pour le compte de la cessionnaire, la banque demanderesse. En l'espèce, la Couronne a reçu ce qui appartenait à la Banque.

80 Dans *Lettner c. Pioneer Truck Equipment Ltd.*, le juge Guy de la Cour d'appel du Manitoba fait des commentaires sur la nature et l'effet d'une cession générale de créances comptables, aux pp. 348 et 349:

As between Pioneer Truck and the bank, Pioneer Truck knows that its accounts receivable or book debts belong to the bank. In equity it cannot be heard to say that it owns these book debts.

. . .

The fact that banking practice in Canada permits the extension of credit to going concerns, and permits the borrowers (by licence, as it were) to collect some accounts to pay wages and current creditors, does not destroy the absolute and specific quality of the legal assignment to the bank.

81 In *Toronto-Dominion Bank v. Minister of National Revenue*, Jerome A.C.J. of the Federal Court Trial Division conducted a thorough review of the authorities, including those discussed above, and concluded at p. 105:

In light of the preceding authorities, and particularly in light of the Federal Court of Appeal's decision in *Royal Bank of Canada v. The Queen*, which is entirely binding on this Court, I must conclude that the general assignment of book debts granted April 26, 1983, by J.K. Campbell and Associates Limited to the Toronto-Dominion Bank constituted an absolute transfer of all property and interest previously held by J.K. Campbell in its accounts or other book debts, present or future. Accordingly, after April 26, 1983, the Toronto-Dominion Bank had full legal and equitable title in all accounts that were owing or that would become owing by debtors of J.K. Campbell unless such right was otherwise expropriated by competent and valid legislation.

82 In addition to establishing that an absolute assignment of book debts transfers property in the debts to the assignee, the cases discussed above also stand for the simple and obvious proposition that the true nature of an assignment can only be determined by examining the particular wording of the instrument which creates the assignment.

83 The assignments in each of the three cases which are involved in these appeals all contain language which makes it clear that they are immediate

[TRADUCTION] En ce qui concerne Pioneer Truck et la banque, Pioneer Truck sait que ses comptes débiteurs ou créances comptables appartiennent à la banque. Elle ne peut pas, en *equity*, déclarer qu'elle est propriétaire de ces créances comptables.

. . .

Le fait qu'il est d'usage courant dans les banques canadiennes de permettre aux entreprises en activité d'obtenir du crédit et aux emprunteurs (par autorisation administrative, pour ainsi dire) de percevoir certains comptes afin de payer les salaires et les comptes courants ne change en rien le caractère absolu et spécifique de la cession consentie à la banque.

Dans l'affaire *Banque Toronto-Dominion c. Ministre du Revenu national*, le juge en chef adjoint Jerome de la Cour fédérale, Section de première instance, a procédé à un examen approfondi de la jurisprudence, dont celle analysée plus haut, et a conclu, à la p. 105:

À la lumière des autorités précitées, et en particulier de l'arrêt de la Cour d'appel fédérale dans l'affaire *Banque Royale du Canada c. La Reine*, qui lie la présente Cour, je dois conclure que la cession générale de créances comptables faite le 26 avril 1983 par J.K. Campbell and Associates Ltd. à la Banque Toronto-Dominion constituait un transfert inconditionnel de tous les biens et droits détenus antérieurement par J.K. Campbell sur ces comptes ou autres créances comptables, actuels ou futurs. En conséquence, après le 26 avril 1983, la Banque Toronto-Dominion a un droit absolu, en common law et en *equity*, sur toutes les créances qui étaient ou seraient dues par les débiteurs de J.K. Campbell, à moins qu'elle n'ait été autrement expropriée de ce droit au moyen d'une loi valide.

En plus d'établir qu'une cession absolue de créances comptables transfère au cessionnaire la propriété des créances, la jurisprudence que je viens d'examiner étaye aussi la proposition simple et évidente voulant que la nature véritable d'une cession ne puisse être déterminée que par l'examen du texte de l'écrit constitutif de la cession.

Dans chacune des trois affaires ici en cause, le libellé de l'acte de cession établit clairement que la cession est immédiate et absolue. L'acte de cession

and absolute. Typical is the assignment from Land-Rock Resources to Alberta Treasury Branches, which provides:

THE UNDERSIGNED Land-Rock Resources Ltd. for valuable consideration HEREBY ASSIGNS AND TRANSFERS to Province of Alberta Treasury Branches (herein called "Treasury Branches") all debts, demands and choses in action now due or hereafter to become due, together with all judgments and securities for the said debts, demands and choses in action, and all other rights and benefits in respect thereof which now are or may hereafter become vested in the undersigned.

It was noted in *Royal Bank of Canada v. R.*, at p. 202, that there may be a distinction between an absolute assignment and one that provides that, in the event of default and the non-remedy of the default, the bank may without further notice deal with the book debts. Such wording appears to be less than an absolute assignment and creates for the lending institution a charge on the book debts which does not crystallize into property in the debts until there has been an unremedied default.

While it does not fall to be decided in this case, it seems likely that such an assignment does not transfer property to the lending institution and thus, at least prior to default on the part of the assignor, the lending institution would be a secured creditor under s. 224(1.3). This type of conditional wording is not present in any of the instruments at issue in these appeals, all of which are unconditional and absolute.

Moreover, at least one of the instruments provides that the assignor is a trustee for the book debts held by the lending institution. In *Royal Bank of Canada v. R.*, Muldoon J. held that the fact that the assignor is in the position of a trustee is a further indication that the assignment passes property to the assignee. The assignment from Bodor to the Toronto-Dominion Bank provides:

IT IS HEREBY DECLARED AND AGREED that all money received by the Assignor in payment of any

de Land-Rock en faveur de l'Alberta Treasury Branches est caractéristique:

[TRADUCTION] LA SOUSSIGNÉE Land-Rock Resources Ltd. CÈDE ET TRANSFÈRE, PAR LES PRÉSENTES, au Province of Alberta Treasury Branches (ci-après «Treasury Branches»), moyennant contrepartie, la totalité des créances, des demandes de paiement et des droits incorporels, échus ou à échoir, ainsi que tous les jugements et garanties au titre desdites créances, demandes de paiement et droits incorporels, ainsi que tous les autres droits et avantages y relatifs dont la soussignée est ou peut devenir titulaire.

On a fait remarquer dans la décision *Banque Royale du Canada c. R.*, à la p. 202, qu'il peut exister une distinction entre une cession absolue et une cession qui prévoit que, en cas de défaut et d'omission de remédier à ce défaut, la banque peut disposer des créances comptables sans autre préavis. Pareille formulation semble loin de constituer une cession absolue et crée en faveur de l'établissement de crédit un droit réel sur les créances comptables, dont il ne devient propriétaire que s'il n'est pas remédié au défaut. 84

Bien que nous n'ayons pas à trancher la question en l'espèce, il semble qu'une telle cession ne transfère pas la propriété à l'établissement de crédit et que, par conséquent, l'établissement de crédit soit un créancier garanti au sens du par. 224(1.3), tout au moins avant qu'il y ait défaut de la part du cédant. Ce genre de condition ne se trouve dans aucun des écrits en cause dans les présents pourvois, qui sont tous constitutifs de cessions inconditionnelles et absolues. 85

De plus, au moins un des écrits prévoit que le cédant est fiduciaire des créances comptables détenues par l'établissement de crédit. Dans la décision *Banque Royale du Canada c. R.*, le juge Muldoon a conclu que le fait que le cédant soit dans la position d'un fiduciaire constitue un autre indice que la cession transfère la propriété au cessionnaire. L'acte de cession conclu entre Bodor et la Banque Toronto-Dominion prévoit: 86

[TRADUCTION] IL EST DÉCLARÉ ET CONVENU, PAR LES PRÉSENTES, que toutes les sommes touchées par

debts, demands and choses in action . . . shall be received and held by the Assignor in trust for the Bank.

87 It should be noted that the fact that the GABD is referred to as "continuing collateral security" in two of the instruments does not make the GABD anything less than absolute. In both *Evans Coleman* and *Lettner*, the GABDs contained language that the general assignment of book debts would be continuing collateral security and in each case the courts held that such language did not affect the absoluteness of the assignment.

88 At the Alberta Court of Appeal, the MNR took the position that even if legal title was transferred to the assignee by the GABD, the assignor tax debtor retained an equitable interest in the nature of an equity of redemption which was sufficient for the book debts to remain the "property" of the tax debtor.

89 Côté J.A. responded to this argument by stating that while in theory the tax debtor held an equity of redemption, this equity could not be exercised in practice except by application to a court of equity. Such an application would only be granted by a court of equity where the value of the book debts exceeded the value of the loans which they secured. He concluded that in cases like the three on appeal, where the value of the loans exceeded the value of the book debts, there is no real equity of redemption. He also held that the only property of the tax debtor was the equity of redemption and that the MNR did not claim that interest.

90 I agree with Côté J.A. that the tax debtor retains an equity of redemption upon an assignment of its book debts. *Halsbury's Laws of England* (4th ed. 1980), vol. 32, at para. 401, defines a mortgage as "a disposition of property as security for a debt" which "may be effected . . . by an assignment of a chose in action" such as a book debt. At para. 407 *Halsbury's* also states that:

Incident to every mortgage is the right of the mortgagor to redeem, a right which is called his equity of redemp-

le cédant en paiement de créances, demandes de paiement et droits incorporels [. . .] sont reçues et détenues en fiducie par le cédant pour le compte de la banque.

Il y a lieu de souligner que le fait que la cession générale de créances comptables soit qualifiée de «garantie accessoire et permanente» dans deux des écrits n'en change pas le caractère absolu. Dans les affaires *Evans Coleman* et *Lettner*, l'acte de cession générale de créances comptables précisait qu'elle constituerait une garantie accessoire et permanente et, dans les deux cas, les tribunaux ont statué que cette qualification ne changeait en rien le caractère absolu de la cession.

Devant la Cour d'appel de l'Alberta, le MRN a soutenu que, même si le titre de propriété était transféré au cessionnaire par la cession générale de créances comptables, le débiteur fiscal cédant conservait un droit d'*equity* tenant d'un droit de rachat, qui suffisait pour que les créances comptables demeurent le «bien» du débiteur fiscal.

Le juge Côté a répondu à cet argument que le droit de rachat, que le débiteur fiscal possède en théorie, ne peut être exercé en pratique, sauf sur demande présentée à un tribunal d'*equity*. Un tribunal ne ferait droit à une telle demande que dans le cas où la valeur des créances comptables excéderait celle des prêts garantis par ces créances. Le juge Côté a conclu qu'il n'existe pas de véritable droit de rachat dans des cas comme en l'espèce où la valeur des prêts est supérieure à celle des créances comptables. Il a aussi conclu que le débiteur fiscal ne possède qu'un droit de rachat et que le MRN n'a pas revendiqué ce droit.

Je suis d'accord avec le juge Côté pour dire que le débiteur fiscal conserve un droit de rachat lorsqu'il cède ses créances comptables. *Halsbury's Laws of England* (4e éd. 1980), vol. 32, au par. 401, définit le *mortgage* comme étant [TRADUCTION] «l'aliénation d'un bien à titre de garantie d'une dette» qui «peut se faire [. . .] par la cession d'un droit incorporel» comme une créance comptable. Au paragraphe 407, *Halsbury's* affirme aussi:

[TRADUCTION] Le droit de rachat du débiteur sur *mortgage* se rattache à tout *mortgage*; c'est son droit de

tion .... This right arises from the transaction being considered as a mere loan of money secured by a pledge of the estate.

Thus *prima facie* an assignor of book debts retains an equitable right to redeem his assignment of the book debts once the debt obligation which is secured by the book debts has been completely discharged by the assignor.

I also agree with Côté J.A. that in the context of these appeals the fact that the tax debtors in theory hold an equity of redemption in their book debts is of purely academic interest since, on the facts, the value of the loans secured by the book debts far exceeds the value of the debts themselves. Thus there is no value in the equity of redemption held by the tax debtors. While the equity of redemption theoretically exists, for practical purposes it is incapable of any realization.

The appellant MNR argues, however, that Côté J.A. erred by focusing his attention on whether the value of the loans exceeds the value of the book debts. The MNR points out that if the relative value of the loan and the security is the only relevant factor then a tax debtor who operates his business with the assistance of a revolving line of credit secured by an assignment of book debts (which is a common business arrangement) would fluctuate between being and not being a secured creditor on an almost daily basis depending on the relative value of the collectibles and the line of credit of the business.

I share the MNR's concern that the relative value of the loan and the book debts is not the sole determining factor as to whether the assignor's equity of redemption makes the book debts his "property".

As a matter of law, an absolute assignment of book debts makes those book debts the property of the assignee. Those book debts remain the property of the assignee until the assignor actually exercises his equitable right to redeem. It is a necessary precondition to the exercise of the equity of redemption that the loans secured by the assignment be

rachat [. . .] Ce droit découle de l'opération considérée comme un simple prêt garanti par un nantissement de patrimoine.

Donc, à première vue, un cédant de créances comptables conserve un droit d'*equity* de racheter la cession en question une fois qu'il a acquitté entièrement la dette garantie par les créances comptables.

Je conviens également avec le juge Côté que, dans le contexte des présents pourvois, le fait qu'un débiteur fiscal possède, en principe, un droit de racheter ses créances comptables n'a qu'un intérêt purement théorique puisque, selon les faits, la valeur des prêts garantis par les créances comptables excède de beaucoup celle des créances elles-mêmes. En conséquence, le droit de rachat des débiteurs fiscaux ne leur est d'aucune utilité. Bien que ce droit existe en théorie, il ne peut être exercé en pratique. 91

L'appelant le MRN soutient cependant que le juge Côté a commis une erreur en se concentrant sur la question de savoir si la valeur des prêts excédait celle des créances comptables. Il souligne que si la valeur relative du prêt et de la garantie est le seul facteur pertinent, alors un débiteur fiscal qui exploite son entreprise au moyen d'une marge de crédit renouvelable garantie par une cession de créances comptables (une pratique commerciale courante) pourrait être un créancier garanti une journée, mais ne pas l'être le lendemain, selon la valeur relative des sommes recouvrables et de la marge de crédit de son entreprise. 92

À l'instar du MRN, je me demande si la valeur relative du prêt et des créances comptables n'est pas le seul facteur qui détermine si le droit de rachat du cédant a fait des créances comptables un «bien» lui appartenant. 93

En droit, le cessionnaire devient propriétaire des créances comptables visées par une cession absolue. Ces créances comptables demeurent la propriété du cessionnaire jusqu'à ce que le cédant exerce le droit de rachat qui lui est reconnu en *equity*. Pour que le droit de rachat puisse être exercé, les prêts garantis par la cession doivent 94

paid off in full, along with any accrued interest and costs.

95 With respect, however, while it is a necessary precondition that the value of the security exceed the value of the loan in order to exercise the right of redemption, the fulfilment of this precondition is not sufficient to return the book debts to the property of the assignor. The assignor must also choose to exercise the right of redemption which will mean a termination of the loan arrangement with the lending institution.

96 At base, the equity of redemption is no more than a recognition that the assignment of debts to the creditor, while immediate and absolute, is for a limited purpose. In equity, the creditor cannot unjustly enrich itself by realizing on more security than the value of the loan which is secured. At any given time the value of the security may exceed the value of the loan, but upon termination of the lending relationship, the assignor of the security is entitled, in equity, to an accounting.

97 In determining whether the book debts, once assigned, are the "property" of the assignor or of the assignee, the Court must choose between two competing definitions of "property". One definition is the immediate legal title to what had been assigned and the other is a potential interest enforceable only in equity to reacquire property which has been assigned to another, contingent upon successfully fulfilling the terms of the loan agreement.

98 In *Friesen v. Canada*, [1995] 3 S.C.R. 103, it was held that the words of the *Income Tax Act* are to be read in their plain and ordinary sense. The plain and ordinary meaning of "property" is legal title and not a contingent future equitable right to reacquire property which one does not presently hold. The very term "equity of redemption" highlights the fact that property is not presently held by the assignor, but rather there is a limited right to reacquire property at a future date.

avoir été payés en totalité, en plus des intérêts courus et des frais.

En toute déférence, toutefois, même si la valeur de la garantie doit nécessairement être supérieure à celle du prêt pour que puisse être exercé le droit de rachat, le respect de cette condition préalable n'est pas suffisant pour que le cédant redevienne propriétaire des créances comptables. Le cédant doit aussi choisir d'exercer ce droit de rachat et mettre ainsi fin à la convention de prêt avec l'établissement de crédit.

Au départ, le droit de rachat n'est qu'une façon de reconnaître que la cession des créances au créancier, quoique immédiate et absolue, ne vise qu'une fin limitée. En *equity*, le créancier ne peut s'enrichir sans cause en réalisant des garanties d'une valeur supérieure à celle du prêt garanti. La valeur de la garantie peut toujours excéder la valeur du prêt, mais lorsque la relation entre le prêteur et l'emprunteur prend fin, le cédant de la garantie a droit, en *equity*, à une reddition de compte.

Pour déterminer si les créances comptables cédées constituent le «bien» du cédant ou celui du cessionnaire, la cour doit choisir entre deux définitions opposées de ce terme. Ainsi, un bien peut être le titre de propriété immédiat relatif à ce qui a été cédé, ou un droit éventuel, exécutoire en *equity* seulement, de racheter le bien qui a été cédé à une autre personne pourvu que les conditions du prêt aient été respectées.

Dans l'affaire *Friesen c. Canada*, [1995] 3 R.C.S. 103, on a statué que les termes de la *Loi de l'impôt sur le revenu* doivent être interprétés selon leur sens ordinaire. Le terme «bien» s'entend ordinairement d'un titre de propriété et non d'un droit futur éventuel, reconnu en *equity*, de racheter un bien qu'une personne ne détient pas pour l'instant. L'expression «droit de rachat» elle-même fait ressortir le fait que le bien n'est pas actuellement détenu par le cédant, mais qu'il existe plutôt un droit restreint de racheter ce bien à une date ultérieure.

The central thrust of the MNR's submissions in this Court is contained in para. 45 of his factum, where he states that where title to property is transferred, the phrase "property of another person" must be read to mean "property that, *absent the security interest*, is the property of the person giving the security".

This proposition is contrary to the traditional Canadian jurisprudence that the words of a taxing statute are to read strictly for their plain and ordinary meaning and that only if there is a true ambiguity is the intention of Parliament to be considered.

In the circumstances of these appeals, a strict reading of the taxation statute is appropriate. As pointed out by Hunt J. at p. 361, these appeals raise not only the traditional tax interpretation principle of resolution of ambiguity in favour of the taxpayer: *Johns-Manville Canada Inc. v. The Queen*, [1985] 2 S.C.R. 46, at p. 72. They also raise the well-known principle that, in the absence of clear and unequivocal language, there is a presumption that proprietary rights are not to be taken away without provision being made for compensation.

In the context of these appeals, the interpretation of s. 224 urged by the MNR would have the effect of expropriating property to which the lender is legally entitled under its security agreement with the tax debtor. The taxes which would be garnished and withheld from the lending institution are not taxes owed by the lender but rather taxes owed by its debtor.

The lending institutions are innocent third parties whose proprietary rights would be expropriated by the provisions of s. 224 and accordingly those provisions must be read strictly to determine whether the expropriatory language is clear and unequivocal.

However, it is not necessary to resort to strict interpretation to resolve these appeals. In this case the plain and ordinary meaning of the phrase "property of another person" is property now held

99 L'essentiel de l'argumentation du MRN devant notre Cour figure au par. 45 de son mémoire, où il affirme que, dans le cas où il y a transfert du titre de propriété, l'expression [TRADUCTION] «bien d'une autre personne» doit être interprétée comme signifiant «bien qui, *en l'absence de la garantie*, est le bien de la personne qui donne la garantie».

100 Cette proposition va à l'encontre de la jurisprudence canadienne traditionnelle qui veut que les termes d'une loi fiscale soient interprétés restrictivement selon leur sens ordinaire et qu'il ne faille tenir compte de l'intention du législateur qu'en cas d'ambiguïté véritable.

101 Dans les circonstances des présents pourvois, il convient d'interpréter restrictivement la loi fiscale. Comme l'a fait remarquer le juge Hunt, à la p. 361, ces pourvois soulèvent non seulement le principe traditionnel d'interprétation fiscale selon lequel toute ambiguïté doit jouer en faveur du contribuable (*Johns-Manville Canada Inc. c. La Reine*, [1985] 2 R.C.S. 46, à la p. 72), mais aussi le principe bien connu qu'il existe, en l'absence de termes clairs et non équivoques, une présomption que les droits de propriété d'une personne ne peuvent lui être retirés sans qu'elle soit indemnisée.

102 Dans le contexte de présents pourvois, l'interprétation de l'art. 224, préconisée par le MRN, aurait pour effet d'exproprier des biens auxquels le prêteur a légalement droit en vertu du contrat de garantie qu'il a conclu avec le débiteur fiscal. Les impôts qui seraient saisis-arrêtés et prélevés auprès de l'établissement de crédit sont non pas des impôts dus par le prêteur, mais bien des impôts dus par son débiteur.

103 Les établissements de crédit sont des tiers innocents dont les droits de propriété feraient l'objet d'une expropriation en vertu de l'art. 224, et il faut donc interpréter strictement cette disposition afin de déterminer si l'expropriation est prévue de manière claire et non équivoque.

104 Cependant, il n'est pas nécessaire de recourir à une interprétation stricte pour résoudre les présents pourvois. En l'espèce, le sens ordinaire de l'expression «bien d'une autre personne» est le bien

by another person. This interpretation makes sense of the words without reading anything into the statute and respects the well-established principle of interpretation that statutes are to be read as though presently speaking.

105 One of the cardinal principles of the plain and ordinary meaning approach is that nothing be read into a section unless no sense can be made of that section without the addition of the extra words. The plain and ordinary meaning of the statutory words simply does not bear the strained interpretation urged by the MNR of "property that, *absent the security interest*, is the property of the person giving the security".

106 In addition to offending the principle that extra words should not be read into a section unless absolutely necessary, this proposed reading attempts to read in wording which can be expressly found in another part of the same section. Section 224(1.2)(*b*) applies to "a secured creditor who has a right to receive the payment that, but for a security interest in favour of the secured creditor, would be payable to the tax debtor". The emphasized words in s. 224(1.2)(*b*) are identical in effect to the words which the MNR seeks to introduce into the definition of secured creditor.

107 The use of a particular phrase in other parts of the *Income Tax Act* militates against reading that same phrase into a section of the Act where it is not found. This is particularly so where the phrase is found in the very same section as the disputed wording, and the section in question has been the subject of amendments twice within the last decade.

108 If Parliament had intended that s. 224(1.2) should cover all persons who hold a security interest, it could have defined "secured creditor" as any person who holds a security interest without the deliberately limiting words "in the property of another person". Alternatively, it could have expressly provided "property that but for a security interest in favour of the secured creditor would be

maintenant détenu par une autre personne. Cette interprétation dégage un sens des mots sans rien introduire dans la Loi et respecte le principe d'interprétation reconnu selon lequel la loi est censée parler au présent.

L'un des principes cardinaux de l'analyse fondée sur le sens ordinaire est qu'il ne faut rien introduire dans une disposition, sauf si l'on ne peut en dégager de sens sans y ajouter des mots. Le sens ordinaire des termes employés dans la Loi n'a aucun rapport avec l'interprétation forcée que préconise le MRN, savoir qu'il s'agit d'un [TRADUCTION] «bien qui, *en l'absence de garantie*, est le bien de la personne qui donne la garantie».

En plus de contrevenir au principe qu'il ne faut pas ajouter des mots à une disposition, sauf s'il est absolument nécessaire de le faire, l'interprétation proposée tente d'introduire des termes explicitement utilisés dans une autre partie de la même disposition. L'alinéa 224(1.2)*b*) s'applique à «un créancier garanti, à savoir une personne qui, grâce à une garantie en sa faveur, a le droit de recevoir la somme autrement payable au débiteur fiscal». Les mots que j'ai soulignés ont un effet identique à celui des termes que le MRN cherche à introduire dans la définition de «créancier garanti».

L'utilisation d'une expression particulière dans d'autres parties de la *Loi de l'impôt sur le revenu* milite contre son introduction dans une disposition où elle ne figure pas, à plus forte raison lorsque l'expression se trouve dans la même disposition que le libellé contesté et que la disposition en question a été modifiée à deux reprises au cours de la dernière décennie.

Si le Parlement avait voulu que le par. 224(1.2) s'applique à toutes les personnes qui détiennent une garantie, il aurait pu préciser que l'expression «créancier garanti» désigne une personne qui détient une garantie, sans y ajouter la restriction «sur un bien d'une autre personne». Subsidiairement, il aurait pu parler explicitement d'«un bien qui, en l'absence d'une garantie en faveur du

the property of another person", thus echoing the phrasing found in the rest of the section.

In spite of two recent amendments to this section, Parliament chose not to define secured creditor in the manner urged by the appellant MNR. To read into the section the words suggested by the MNR would be an unwarranted judicial usurpation of the legislative function. The only conclusion which can be drawn from the plain and ordinary meaning of the words which do appear in the Act is that Parliament did not intend to bring creditors who actually owned the title to the security interest within the purview of the section.

It is my conclusion that these appeals can be resolved without resort to any special principles of interpretation tailored to the expropriatory nature of this particular provision.

If I am mistaken in this conclusion, and there is an ambiguity in the meaning of the word "property" then I would hold that the specific effect of this section warrants a strict resolution of any ambiguity in favour of the respondents. Such an interpretation requires that "property" be read to mean present legal title in preference to a future contingent equitable right to reacquire property not currently held. It also requires that words expressly found in another part of the same section not be read without cause into the definition of secured creditor.

In summary, these appeals should be resolved as follows:

1. The definition of "security interest" is broad enough to include a general assignment of book debts even where that assignment is absolute.

2. The wording of s. 224(1.2), as amended in 1990, is sufficiently clear and unequivocal to allow a transfer of property in the garnished funds to the MNR and to grant him a priority in circumstances where the rest of that section applies.

créancier garanti, serait le bien d'une autre personne», reprenant ainsi la terminologie que l'on trouve dans le reste de la disposition.

Malgré deux modifications récentes apportées à cette disposition, le Parlement a choisi de ne pas définir l'expression «créancier garanti» de la façon proposée par l'appelant le MRN. Introduire dans la disposition les termes proposés par le MRN constituerait une usurpation injustifiée de la fonction législative par le pouvoir judiciaire. La seule conclusion qui peut être dégagée du sens ordinaire des termes utilisés dans la Loi est que le Parlement n'a pas voulu que les créanciers qui étaient en réalité propriétaires du titre de garantie soient visés par cette disposition. 109

Je conclus qu'il est possible de trancher les présents pourvois sans avoir recours à des principes d'interprétation particuliers en raison du caractère expropriateur de cette disposition particulière. 110

Si ma conclusion était erronée et si le sens du terme «bien» était ambigu, je conclurais alors que l'effet spécifique de cette disposition justifie que toute ambiguïté soit strictement résolue en faveur des intimés. Dans un tel cas, il faut interpréter le terme «bien» comme signifiant le titre de propriété actuel plutôt qu'un droit futur éventuel, reconnu en *equity*, de racheter un bien qu'on ne détient pas actuellement. Il faut également éviter de considérer, sans raison, que la définition de «créancier garanti» inclut des termes explicitement utilisés dans une autre partie de la disposition. 111

En résumé, les présents pourvois devraient être tranchés de la façon suivante: 112

1. La définition du terme «garantie» est suffisamment large pour comprendre une cession générale de créances comptables même s'il s'agit d'une cession absolue.

2. Le libellé du par. 224(1.2), modifié en 1990, est suffisamment clair et net pour permettre de transférer au MRN la propriété des fonds saisis-arrêtés et lui accorder la priorité dans les circonstances où le reste de la disposition s'applique.

3. An assignee of an absolute assignment of book debts is not a "secured creditor" within the meaning of s. 224(1.3) because he does not hold a security interest "in the property of another person".
4. Therefore, s. 224(1.2) of the *Income Tax Act* and s. 317(3) of the *Excise Tax Act* are not effective to grant the appellant MNR an interest in or priority over debts owed to the assignee of a GABD.

IV. Disposition

113 All three appeals should be dismissed with costs to the respondents.

Appeals allowed with costs, IACOBUCCI *and* MAJOR JJ. *dissenting.*

Solicitor for the appellant: The Deputy Attorney General of Canada, Ottawa.

Solicitors for the respondent Province of Alberta Treasury Branches: Bruni Greenan Klym, Calgary; Parlee McLaws, Calgary.

Solicitors for the respondent the Toronto-Dominion Bank: Howard, Mackie, Calgary.

3. Le cessionnaire d'une cession absolue de créances comptables n'est pas un «créancier garanti» au sens du par. 224(1.3), parce qu'il ne détient pas une garantie «sur un bien d'une autre personne».
4. En conséquence, le par. 224(1.2) de la *Loi de l'impôt sur le revenu* et le par. 317(3) de la *Loi sur la taxe d'accise* n'ont pas pour effet d'accorder à l'appelant le MRN un droit ou la priorité sur les créances du cessionnaire d'une cession générale de créances comptables.

IV. Dispositif

Les trois pourvois devraient être rejetés avec dépens en faveur des intimés.

Pourvois accueillis avec dépens, les juges IACOBUCCI *et* MAJOR *sont dissidents.*

Procureur de l'appelante: Le sous-procureur général du Canada, Ottawa.

Procureurs de l'intimé le Province of Alberta Treasury Branches: Bruni Greenan Klym, Calgary; Parlee McLaws, Calgary.

Procureurs de l'intimée la Banque Toronto-Dominion: Howard, Mackie, Calgary.

TAB 13

WORKERS' COMPENSATION ACT

Chapter W-15

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(3) Nothing in subsection (1) or (2) affects the priority of the Board under section 129.

(4) All reasonable costs and charges incurred or paid in respect of the filing of a certificate or certified statement under subsection (2) or in respect of any proceedings taken to collect the amount certified are recoverable in the same way as if they had been included in the amount certified in the certificate or certified statement when it was filed.

RSA 2000 cW-15 s127;2002 c27 s35;2009 c53 s189

Prohibition from carrying on business

128 If

(a) an employer defaults in the payment of a premium owing pursuant to an assessment and a person on behalf of a civil enforcement agency states by way of affidavit that the civil enforcement agency was unable to wholly satisfy the default through remedies taken under this Act or the *Civil Enforcement Act*, and

(b) that employer continues to carry on business in an industry to which this Act applies in which workers are employed,

a judge of the Court of Queen's Bench, on application made on behalf of the Board may, without the issue of any writ or the commencement of any action, restrain that employer from carrying on business in an industry to which this Act applies until the premium, together with the costs of the application, is paid.

RSA 2000 cW-15 s128;2002 c27 s49;2009 c53 s189

Priority of amount due to Board

129(1) Notwithstanding anything in any other Act, any amount due to the Board by an employer

(a) pursuant to an assessment made under this Act,

(b) in respect of any amount that the employer is required to pay to the Board under this Act, or

(c) on any judgment for an amount referred to in clause (a) or (b)

creates a fixed, specific and continuing charge in favour of the Board as provided in subsection (2).

(2) If subsection (1) applies, a fixed, specific and continuing charge in favour of the Board is created

(a) on the property or proceeds of property, whether real or personal, of the employer in Alberta, including money payable to, for or on account of the employer, whether the property, proceeds or money is acquired or is to be acquired by the employer before or after the amount becomes due, and

(b) on any other property or proceeds of property, whether real or personal, in Alberta that is used by the employer in or in connection with, or produced by the employer in, the industry with respect to which the employer is assessed or the amount becomes due, whether the property is used or produced before or after the amount becomes due.

(3) Subject to subsection (4) and section 131, the charge created by this section is payable in priority over all writs, judgments, debts, liens, charges, security interests as defined in the *Personal Property Security Act*, rights of distress, assignments including assignments of book debts and other claims or encumbrances of whatever kind of any person, including the Crown, whether legal or equitable in nature, whether absolute or not, whether specific or floating, whether crystallized or otherwise perfected or not and whenever created or to be created.

(4) The charge created by this section does not have priority over wages due from the employer to the employer's workers where the exercise of the priority would deprive the workers of any of their wages.

1981 cW-16 s126;1984 c68 s35;1990 c39 s19

Assignments, charges and mortgages void

130(1) When an employer in an industry to which this Act applies defaults in the payment of all or part of a premium owing pursuant to an assessment, or all or part of any other money due to the Board under this Act, any assignment of the employer's personal property made by the employer, including an assignment of book debts, is void as against the Board to the extent of money that has not, at the time of default, been paid under the assignment to or on behalf of the assignor, regardless of

(a) whether the assignment is absolute or not, or

(b) whether the assignment is made before or after the date the premium or other money becomes due or the default occurs.

(2) When an employer in an industry to which this Act applies defaults in the payment of

(a) all or part of a premium owing pursuant to an assessment, or

TAB 14

Alberta Court of Queen's Bench
Canada Mortgage and Housing Corporation v. Calgary (City)
Date: 1986-04-28

J. P. L. McDermott, for applicant.

P. Tolley, for respondent.

L. J. Burgess, for intervener.

(Calgary No. 8501-16201)

April 28, 1986.

[1] DIXON J.:— This matter came before me by special chambers application under originating notice of motion heard on 10th January 1986. The applicant, Canada Mortgage and Housing Corporation ("C.M.H.C"), was represented by Mr. John P. L. McDermott, the city of Calgary (the "city") was represented by Mr. Paul L. Tolley and the Alberta Urban Municipalities Association, an intervener party ("A.U.M.A."), was represented by Mr. Leo J. Burgess. At the conclusion of the hearing written argument was requested and the same were received by 15th February 1986.

[2] The facts involved in the application were relatively straight forward. Owner/occupants of a home in southeast Calgary defaulted on their obligations under a mortgage which was insured by C.M.H.C. The mortgagee, the Royal Bank of Canada, foreclosed on the property and subsequently transferred title to C.M.H.C. pursuant to a mortgage insurance policy. At the time of the transfer, there were outstanding utility arrears owed to the city in the amount of $126.18. The city's request of C.M.H.C. for payment of this sum has been rejected and the originating notice of motion seeks a declaration settling the question of priority as between the city's claim to unpaid utility arrears and C.M.H.C.'s interest as a transferee subsequent to foreclosure under a prior mortgage.

[3] C.M.H.C.'s principal argument is that the indefeasibility title provisions under the Land Titles Act, R.S.A. 1980, c. L-5, extinguish the city's claim against the property in question. Section 56 of the Land Titles Act reads, in part:

> 56 After a certificate of title has been granted for land, no instrument is effectual to pass any estate or interest in that land (except a leasehold interest for 3 years or for a less period) or to render that land liable as security for the payment of money, unless the instrument is executed in accordance with this Act and is registered hereunder …

C.M.H.C. argues that, as there was no registration of the city's claim for utility arrears prior to the transfer of title to C.M.H.C., there can be no charge in fact or in law as regards such arrears and the property in question was and remains unencumbered as regards such moneys or any claim therefor.

[4] Against this position, the city and A.U.M.A. argue that the legislature has accorded utility arrears the same priority status as unpaid taxes. It is asserted that this is as a result of the combined effect of ss. 309 and 310 of the Municipal Government Act, R.S.A. 1980, c. M-26, and s. 124 of the Municipal Taxation Act, R.S.A. 1980, c. M-31. The city claims a preferential lien and charge on property which is subject to utility arrears and that such lien or charge takes priority over every claim, privilege, lien or encumbrance of every person except the Crown. It is further argued that the city's lien for utility arrears is an exception to the concept of indefeasibility of title under the Land Titles Act either by virtue of the exception for "unpaid taxes" contained in s. 65(1)(*b*) of the Land Titles Act or as a special statutory exception.

[5] Sections 309(1) and 310(4) of the Municipal Government Act and s. 124(1) of the Municipal Taxation Act read as follows:

Municipal Government Act, R.S.A. 1980, c. M-26:

> 309(1) When the occupant is the owner or purchaser of a building or lot or part of a lot or when the agreement to provide a public utility is entered into with a non-occupant owner, the sum payable by him for the public utility supplied by the municipality to him or for his use and all rates, costs and charges imposed or loans made to him under any by-law or resolution passed under this Part are a preferential lien and charge on the building or lot or part of a lot and on the personal property of the debtor and may be levied and collected in like manner as municipal rates and taxes are recoverable.
>
> 310 …
>
> (4) Subject to the subsections (1) to (3), the municipal treasurer may collect any public utility expense, rate or rent that remains unpaid by charging the amount against the land in the same manner and subject to the same provisions as taxes due and owing in respect of that land.

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

> 124(1) The taxes and costs due in respect of any land or any improvement are recoverable with interest as a debt due the municipality from any person
>
> (*a*) who was the owner, purchaser, lessee, licensee or permitee of it at the time of its assessment, or
>
> (*b*) who subsequently became the owner, purchaser, lessee, licensee or permitee of the whole or any part thereof,

(saving his recourse against any other person) and are a special lien on his estate or interest

(*c*) in the land in respect of which the taxes are due and the improvements on it, or

(*d*) in the improvement in respect of which the taxes are due and the land on which it is situated,

as the case may be, except in so far as the land is exempt from taxation, in priority to every claim, privilege, lien or encumbrance of every person except the Crown, and the lien and priority are not lost or impaired by any neglect, omission or error.

[6] Without consideration to the application and effect of the provisions of the Land Titles Act, the foregoing provisions of the Municipal Government Act and the Municipal Taxation Act appear to establish that the city's preferential lien and charge on land re utility arrears has equivalence to the priority status granted as regards unpaid taxes. The city's argument in this respect is supported by the authorities of *Re Mountstephen Const. Ltd.* (1977), 25 C.B.R. (N.S.) 228, 78 D.L.R. (3d) 206, 6 A.R. 607 (T.D.); *Royal Bank of Can. v. 238842 Alta. Ltd.; Saskatoon v. Mowbrey Stout Ltd*., [1985] 5 W.W.R. 373, 57 C.B.R. (N.S.) 242, 20 D.L.R. (4th) 450, 40 Sask. R. 177 (C.A.); and *Re C.M.H.C. and Kitchener* (1985), 50 O.R. (2d) 49, affirmed 51 O.R. (2d) 128 (C.A.). While these cases support the proposition that the city's charge for public utility arrears can take priority over a prior mortgage as between the city and the owner/occupier or the mortgagee, they do not deal with any "indefeasibility of title" issue.

[7] The *Mountstephen* decision stands for the proposition that, with respect to both utilities and taxes, it is by virtue of the lien, and not by virtue of the proceedings taken to enforce the lien, that a municipality is secured against the real property interest of the debtor. It is not authority for the proposition that the lien may be enforced against a subsequent transferee of the title to the property.

[8] Similarly, the *Royal Bank of Can. v. 238842* decision lends no support to the city's position in the context of s. 56 of the Land Titles Act. Not only was the indefeasibility of title issue not canvassed by the Saskatchewan Court, but the Saskatchewan statute is substantially different. Section 69 of the Saskatchewan Land Titles Act, R.S.S. 1978, c. L-5, which is the comparable provision to s. 65 of the Alberta Act, expressly states that a certificate of title granted under that Act is by implication subject to "all unpaid taxes" and to the rights of Her Majesty and her seven referenced statutes and to "the rights of municipalities under the *Tax Enforcement Act* or any other former *Tax Enforcement Act*". These broad exceptions to the requirement of registration make the *Royal Bank* case distinguishable from the case at bar.

[9] Lastly, the city relies on the Ontario decision in *Re C.M.H.C. and Kitchener,* supra. The facts are similar to those in the present application and involve utility arrears. That case, however, turned on the effect of the 1979 amendment to s. 30(1) of the Public Utilities Act, R.S.O. 1970, c. 390, as amended 1982, c. 45, s. 1, which is similar to s. 309(1) of the Alberta Municipal Government Act. The amendment added the following words:

> 30(1) … and in the case of an amount payable by the owner of lands, the amount is a lien and charge upon the lands in the same manner and to the same extent as municipal taxes upon land.

[10] There has been no similar amendment to s. 309(1) of the Alberta Municipal Government Act. It states only that public utility arrears "are a preferential lien and charge on the [property] … and *may be levied and collected in like manner* as municipal rates and taxes are recoverable". This is in marked contrast to the Ontario statute, which is not merely concerned with the method of levy and collection but appears to actually equate the lien and charge arising from public utility arrears with that arising from unpaid taxes.

[11] It is pertinent to observe that the Torrens system does not apply in Ontario. As such, the same policy and legal considerations do not impact upon the Ontario courts in interpreting the Ontario land titles legislation.

[12] While it has been urged upon me that the foregoing case authorities appear to establish that public utility arrears enjoy an equivalent priority status to that of unpaid taxes, the city must still answer C.M.H.C.'s argument that, in any event, a preferential lien and charge for public utility arrears is not binding on a transferee unless it constitutes an exception to the indefeasibility of title provisions of the Land Titles Act. These exceptions are exhaustively set out in s. 65 of the Act and s. 65(1)(*b*) reads as follows:

> 65(1) The land mentioned in any certificate of title granted under this Act is, by implication and without any special mention therein, subject to …
>
> (*b*) all unpaid taxes, including irrigation and drainage district rates.

[13] The difficulty with the city's position is that, while unpaid taxes are expressly excepted, nowhere in either the Municipal Government Act or the Municipal Taxation Act are public utilities deemed to be unpaid taxes. In fact, ss. 309(1) and 310(4) imply the opposite by respectively providing that utility moneys may be "levied and collected in like manner as municipal rates and taxes" and are collectable "in the same manner and subject to the same provisions as taxes".

[14] A purchaser of property can protect himself from the surprise effect of a municipality's unregistered claim for unpaid taxes by applying for a certificate under s. 111 of the Municipal Taxation Act. There is no similar mechanism for obtaining a certificate as to outstanding public utility rates.

[15] It is my view that an allowance of the city's unregistered charge for utility arrears to survive a transfer of title so as to be enforceable as against a transferee would be contrary to the spirit and intent of one of the cornerstones of the Torrens system, namely, the concept of indefeasibility of title. Under the Torrens system, only registered encumbrances are allowed to survive a transference of title save and except for those exceptions as are expressly set out under s. 65 of the Land Titles Act. As the city's unregistered charge for utility arrears cannot be brought within any of these exceptions, it cannot survive the transfer of title to C.M.H.C.

[16] In the result, I find that C.M.H.C. is entitled to a declaration that its interest in the property in question is not subject to a lien or charge by the city for utility arrears. Any entitlement to assert a lien or charge is extinguished through the mortgage foreclosure and subsequent transfer to C.M.H.C. As the city's claim was not registered, its remedy lies against the former owner/occupiers and not C.M.H.C.

[17] In view of my finding, C.M.H.C.'s "Crown immunity" argument is academic and I need not consider it in these reasons for judgment.

[18] Counsel may address me on the question of costs if they so desire.

Declaration granted.

TAB 15

REVISED STATUTES of ALBERTA 1980

PRINTED FROM THE ORIGINAL STATUTE ROLL
DEPOSITED IN THE OFFICE OF
THE CLERK OF THE LEGISLATIVE ASSEMBLY
AND DECLARED TO BE IN FORCE AS
THE REVISED STATUTES OF ALBERTA 1980
PURSUANT TO THE REVISED STATUTES 1980 ACT

VOLUME 5

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Edmonton

(b) any money payable under a fire insurance policy which was effected and maintained for his own protection by a mortgagee of the property insured.

(4) As promptly as possible after an insurer receives notice of any loss or damage to property which may result in a charge arising under this section, the insurer shall, by registered mail, give notice of the loss or damage to the municipal secretary of the municipality in which the property is situated.

(5) Within 15 days after the mailing of a notice in accordance with subsection (4), the municipal secretary shall, by registered mail, notify the insurer of the full amount of the taxes due in respect of the land and improvements and the business carried on on the premises.

(6) When

(a) a charge arises under subsection (1) or (2), and

(b) a notice is mailed in accordance with subsection (5),

the insurer shall pay to the municipality

(c) the amount of the taxes stated in the notice to be due to the municipality, or

(d) the amount the insurer is liable to pay under the policy,

whichever is the lesser.

(7) On any payment being made under subsection (6), the amount for which the insurer paying the same is liable under the policy is reduced by the amount of the payment.

RSA 1970 c251 s119

Recovery of taxes

124(1) The taxes and costs due in respect of any land or any improvement are recoverable with interest as a debt due the municipality from any person

(a) who was the owner, purchaser, lessee, licensee or permittee of it at the time of its assessment, or

(b) who subsequently became the owner, purchaser, lessee, licensee or permittee of the whole or any part thereof,

(saving his recourse against any other person) and are a special lien on his estate or interest

(c) in the land in respect of which the taxes are due and the improvements on it, or

(d) in the improvement in respect of which the taxes are due and the land on which it is situated,

as the case may be, except in so far as the land is exempt from taxation, in priority to every claim, privilege, lien or encumbrance of every person except the Crown, and the lien and priority are not lost or impaired by any neglect, omission or error.

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

(3) The production of a copy of so much of the assessment roll or tax roll as relates to the taxes payable by any person and purporting to be certified as a true copy by the municipal secretary is prima facie proof of the debt.

(4) Any debt due to the Minister for taxes in respect of an improvement district or special area has the same priority under this section as a debt for taxes due to any other municipality.

RSA 1970 c251 s120

Distress for business tax

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

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

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

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

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

RSA 1970 c251 s121

Business tax not charge on real property

126 Nothing in this Act shall be construed to make the business taxes levied in respect of any premises a charge on the real estate or building in or on which those premises are situated.

RSA 1970 c251 s122

Enforced tax collection

127 For the purpose of enforced collection only, all taxes are deemed to be due on the day on which the tax notice respecting them was mailed as shown by the tax roll and if the address of any owner or purchaser is unknown, a tax notice is deemed to have been mailed on the date on which a tax notice was first mailed to any owner or purchaser.

RSA 1970 c251 s123

REVISED STATUTES

OF

ALBERTA 1970

PRINTED FROM THE ORIGINAL STATUTE ROLL DEPOSITED IN THE OFFICE OF THE CLERK OF THE LEGISLATIVE ASSEMBLY AND DECLARED TO BE IN FORCE AS THE REVISED STATUTES OF ALBERTA 1970 PURSUANT TO THE REVISED STATUTES 1970 ACT

Volume 4

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EDMONTON

(*d*) the amount the insurer is liable to pay under the policy,

whichever is the lesser.

(7) Upon any payment being made under subsection (6), the amount for which the insurer paying the same is liable under the policy is reduced by the amount of the payment.

[1967, c. 54, s. 111; 1968, c. 71, s. 25]

Recovery of taxes

120. (1) The taxes and costs due in respect of any land or any improvement are recoverable with interest as a debt due the municipality from any person

(*a*) who was the owner, purchaser, lessee, licensee or permittee thereof at the time of its assessment, or

(*b*) who subsequently became the owner, purchaser, lessee, licensee or permittee of the whole or any part thereof,

(saving his recourse against any other person) and are a special lien upon his estate or interest

(*c*) in the land in respect of which the taxes are due and the improvements thereon, or

(*d*) the improvement in respect of which the taxes are due and the land upon which it is situated,

as the case may be, except in so far as the land is exempt from taxation, in priority to every claim, privilege, lien or encumbrance of every person except the Crown, and the lien and priority are not lost or impaired by any neglect, omission or error.

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

(3) The production of a copy of so much of the assessment roll or tax roll as relates to the taxes payable by any person and purporting to be certified as a true copy by the municipal secretary is *prima facie* proof of the debt.

(4) Any debt due to the Minister for taxes in respect of an improvement district or special area has the same priority under this section as a debt for taxes due to any other municipality.

[1967, c. 54, s. 112; 1970, c. 82, s. 18]

Distress for business taxes

121. (1) All personal property of every nature and kind in or upon the premises belonging to the person assessed or used in connection with the business carried on therein or thereon and for which the occupant is assessed under the business assessment, is liable for the business taxes due by that occupant, and the business taxes are a first charge thereon and have priority over any other lien or claim

TAB 16

ROYAL BANK OF CANADA v. HODGSON. ALTA.

Alberta Supreme Court, Blain, Master-in-Chambers, Edmonton. April 12, 1917. S. C.

H. H. Hyndman, for plaintiff; *Parlee*, K.C., *contra*.

BLAIN, M.:—The plaintiff having an unsatisfied judgment against the defendant the Town of Grouard issued a garnishee summons and duly served same on the garnishee, a taxpayer, who it was alleged owed taxes to the town. By its answer, the tarnishee denied that any debt was due or accruing due to the gown, and took the alternative position that if any sum was due it was for taxes levied under the Town Act 1911-12, ch. 2, and was not a debt nor attachable.

The plaintiff moves for an order directing an issue to try the questions raised by the answer of the garnishee. On the application I was asked to dispose of the question whether or not such taxes are a debt and attachable. This being a question of law and one which, I think, should be determined before the trial of any issue is directed, I appointed a time under rule 654

ALTA.

S. C.

for argument of this question. On the argument it was assumed for the purposes of the motion that all proceedings in connection with the assessment and levy of the taxes were regular and proper, and I deal with it on this assumption. Under our garnishee proceedings the service of a garnishee summons on the garnishee binds *the debt*, if any, due or accruing due from the garnishee to the judgment debtor, r. 649. Only a debt can be attached and in order that the summons be effective the garnishee must be indebted to the judgment debtor. It becomes important then to ascertain whether or not taxes are a debt.

Sec. 305 of the Town Act says:

> the taxes due upon any land may be recovered with costs from any owner . . . . and such taxes shall be a special lien upon the land and shall be collectable by action or distress . . . .

and sec. 306 says:

> The production of a copy of so much of the roll as relates to the taxes payable by any person in the town certified as a true copy by the secretary-treasurer shall be *primâ facie* evidence of *the debt*.

Nowhere in the Act do I find taxes declared to be a debt, and the only place in which I find "debt" used is sec. 306.

The town is authorized to bring an action for the recovery of the taxes and if it desires to recover them in this way it may sue (as for a debt) and the roll shall be *primâ facie* evidence of the debt. The words "as for a debt" are not in the Town Act, but the Village Act, ch. 5 of the statutes of 1913, sec. 125, provides that taxes due a village "may be recovered by suit in the name of the village *as a debt* due the village," and sec. 306 of the Rural Municipality Act, ch. 3 of the statutes of 1911-12, contains a similar provision. These, it seems to me, throw light on the intention of the legislature in passing the provisions in the Town Act for recovery of taxes by suit. The action if resorted to must be in the form of an action for a debt, for this is the only form in which the action could be brought and for the purpose of the action the taxes are a debt. The very fact of the legislature considering it necessary to provide for the recovery of taxes by action would shew that that body did not consider taxes a debt: If taxes were a debt then no provision was necessary to enable the town to sue. Cooley on Taxation, 3rd ed., at p. 19, dealing with the question of whether or not taxes are a debt, states (citing

American authorities in support of his statements) taxes are not

contracts between party and party either express or implied: but they are the positive acts of the government, through its various agents, binding upon the inhabitants, and to the making and enforcing of which their personal consent individually is not required. They do not draw interest, as do sums of money owing upon contract; but only when it is expressly given. They cannot be assigned as debts, or be proved in bankruptcy as such; nor, if uncollected, are they assets which can be seized by attachment or other judicial process and subjected to the payment of municipal indebtedness. They are not the subject of set-off either on behalf of the state or the municipality for which they are imposed, or of the collector, or on behalf of the person taxed as against such state, municipality or collector. Taxes are not within a statute exempting certain timber claims from debts; nor are proceedings to enforce them barred by the ordinary statutes of limitation. The law abolishing imprisonment for debt has no application to taxes; and the remedies for their collection may include an arrest if the legislature shall so provide.

Dillon on Municipal Corporations, 5th ed., vol. 4, at p. 2478, states that taxes are not debts in the ordinary acceptance of the term, and in a note on the same page says:

In an important case in the Supreme Court of the United States Field, J.' states, with clearness, the distinction between "taxes" and "debts." *Taxes are not debts.* It was so held by this Court in the case of *Lane County* v. *Oregon*, 7 Wall 71. Debts are obligations for the payment of money founded upon contract express or implied. Taxes are imposts levied for the support of the government, or for some special purpose authorized by it. The consent of the taxpayer is not necessary to their enforcement. They operate *in invitum.* Nor is their nature affected by the fact that in some States . . . an action of debt may be instituted for their recovery. The form of procedure cannot change their character.

In *Lynch* v. *Canada N. W. Land Co.*, 19 Can. S.C.R. 204, at p. 208, Ritchie, C. J., says:

It is abundantly clear that taxes are not contracts between party and party, either express or implied, but they are the positive acts of the government through its various agents binding upon the inhabitants, and to the making or enforcing of which their personal consent, individually, is not required.

He then quotes from Dillon on Municipal Corporations and cases therein cited. And again, on p. 210, he says

We cannot attribute to the legislature an intent to include taxes under the term debts without something more than appears in the acts to shew that intention.

In *Canada Permanent L. & S. Co.* v. *School District of East Selkirk*, 9 Man. L.R. 331, the plaintiffs having recovered a judgment against the School District sought to attach under garnishee

ALTA.

S. C.

proceedings rates and taxes imposed for school purposes. The Referee directed the trial of an issue as to whether, on a date named, any sum of money was *owing* from a garnishee to the judgment debtor. An appeal from this order by the judgment debtor was heard by Killam, J., who allowed the appeal, holding that these rates and taxes did not constitute *a debt, obligation or liability* which could be attached under the Garnishment Act to answer a claim against the School District.

An appeal from the decision of Killam, J., to the full Court was dismissed, the Chief Justice of that Court not dealing with the question whether or not taxes are a debt, Dubuc, J., holding with Killam, J., that taxes were not attachable and Bain, J., concurring in the dismissal. The provisions of the Manitoba Act, under which the garmishee proceedings were had, were much wider than the provisions of our rule. That Act provided for the attachment of "*all debts, obligations* or *liabilities due, owing, payable* or *accruing due.*" Whereas our rule provides only for the attachment of a debt.

In *Pipestone* v. *Hunter*, 28 D.L.R. 776, Mathers, C.J., held that taxes were not barred by the Statute of Limitations. In the course of his judgment he says "a municipal tax is not a debt in the ordinary sense of that term," citing Dillon on Municipal Corporations and *Lynch* v. *Canada N.W.L. Co.*, already referred to.

I must hold that taxes are not a debt attachable under garnishee proceedings and the application of the plaintiff will be dismissed and the garnishee summons set aside with costs. There will be a stay for 15 days to enable the plaintiff to appeal if so advised.

Application dismissed.

TAB 17

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

Definitions

1 In this Act,

(a) "affidavit" means an affirmation when made by a person entitled to affirm;

(b) "certificate of title" means the record of the title to land that is maintained by the Registrar;

(c) "court" means any court authorized to adjudicate in Alberta in civil matters in which the title to real estate is in question;

(d) repealed 2008 cA-4.2 s137;

(e) "encumbrance" means any charge on land created or effected for any purpose whatever, inclusive of mortgage, mechanics' or builders' liens, when authorized by statute, and executions against land, unless expressly distinguished;

(f) "encumbrancee" means the owner of an encumbrance;

(g) "encumbrancer" means the owner of any land or of any estate or interest in land subject to any encumbrance;

(h) "endorsed" and "endorsement" apply to anything entered, printed, stamped or written on an instrument or caveat or on any paper attached to it by the Registrar;

(i) "filing" means the entering in the record of any instrument or caveat;

(j) "grant" means a grant of Crown land, whether in fee or for years, and whether direct from Her Majesty or pursuant to any statute;

(k) "instrument" means

(i) a grant, certificate of title, conveyance, assurance, deed, map, plan, will, probate or exemplification of will, letters of administration, or an exemplification of letters of administration, mortgage or encumbrance,

(ii) a judgment or order of a court,

(iii) an application under section 75, or

(iv) any other document in writing relating to or affecting the transfer of or dealing with land or evidencing title to land;

(l) "judge" means an official authorized in Alberta to adjudicate in civil matters in which the title to real estate is in question;

(m) "land" means land, messuages, tenements and hereditaments, corporeal and incorporeal, of every nature and description, and every estate or interest therein, whether the estate or interest is legal or equitable, together with paths, passages, ways, watercourses, liberties, privileges and easements appertaining thereto and trees and timber thereon, and mines, minerals and quarries thereon or thereunder lying or being, unless any of them are specially excepted;

(n) "memorandum" means the endorsement on the certificate of title of the particulars of an instrument or caveat presented for registration;

(o) "mortgage" means a charge on land created merely for securing a debt or loan;

(p) "mortgagee" means the owner of a mortgage;

(q) "mortgagor" means the owner or transferor of land, or of any estate or interest in land charged as security for a debt or a loan;

(r) "owner" means a person entitled to any freehold or other estate or interest in land, at law or in equity, in possession, in futurity or expectancy;

(s) "possession" when applied to persons claiming title to land means also alternatively the reception of the rents and profits of the land;

(t) "register" means the register of titles to land kept in accordance with this Act;

(u) "Registrar" means the Registrar of Titles and includes a Deputy Registrar and an Assistant Deputy Registrar;

(v) "registration" means

(i) the bringing of land under the provisions of this Act,

(ii) the entering on the certificate of title of a memorandum authorized by this Act or any other Act of any instrument or caveat, and

TAB 18

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

Interpretation

1(1) In this Act,

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

(b) "agency" means a person who is authorized pursuant to an agreement entered into under Part 2 to operate a civil enforcement agency and includes a sheriff where the sheriff is acting pursuant to section 9(7);

(c) "agricultural products" includes

(i) crops or livestock, and

(ii) products of crops or livestock in their unmanufactured states,

while in the possession of a person engaged in growing, raising, fattening, grazing or other agricultural operations;

(d) "bailiff" means a civil enforcement bailiff appointed under Part 2;

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

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

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

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

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

(g) "civil enforcement proceedings" includes

(i) writ proceedings;

(ii) distress proceedings authorized under this Act or any other law that is in force in Alberta;

(iii) evictions authorized pursuant to a law in force in Alberta or an order of a Court;

(h) repealed 2006 cS-4.5 s107;

(i) "clerk" means the clerk of the Court;

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

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

(i) nursery stock,

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

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

(l) "deposit account" means a chequing, savings, demand or similar account at a bank, treasury branch, trust corporation, loan corporation, credit union or other deposit-taking financial institution in Alberta, but does not include an account or arrangement under which money is deposited for a fixed term whether or not the term may be abridged, extended or renewed;

(m) "distress" means anything done to exercise

(i) a right of a landlord to distrain for unpaid rent,

(ii) a right of a lessor of personal property to repossess,

(iii) a right of a secured party to enforce a security interest under section 56(1)(a) or 58(1) of the *Personal Property Security Act*,

(iv) a right to take possession of personal property under an order of the Court,

(v) a right of distress under an enactment, or

(vi) any other right under a law in force in Alberta to take personal property out of the possession of a person other than under the authority of a writ;

(n) "distribute" means pay out in accordance with Part 11;

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

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

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

(p) "enforcement creditor" means a person in whose favour a writ is in force;

(q) "enforcement debt" means an amount outstanding on a money judgment in respect of which a writ is in force;

(r) "enforcement debtor" means a person against whom a writ is in force;

(s) "eviction" means anything done to enforce the right to take physical possession of premises or land, but does not

include any action authorized under a lease that does not involve the physical removal of the tenant from the premises or land;

(t) "exempt" means, with respect to property,

(i) exempt from writ proceedings in accordance with Part 10, or

(ii) exempt from distress proceedings in accordance with sections 104(d) and 105(1)(b);

(u) "exigible" means, with respect to property, not exempt from writ proceedings or distress proceedings;

(v) "fixture" means tangible personal property that has been annexed to land and that is regarded in law as part of the land to which it has been annexed, but does not include building materials;

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

(x) "instructing creditor" means the enforcement creditor on whose instructions certain writ proceedings are taken or continued;

(y) "instrument" means

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

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

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

but does not include

(iv) chattel paper, a document of title or a security certificate, or

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

(z) "judgment" includes any order, decree, duty or right that may be enforced as or in the same manner as a judgment of the Court;

(aa) "judgment creditor" means a person who has a money judgment;

(bb) "land" includes any interest in land, but does not include growing crops;

(cc) repealed 2006 cS-4.5 s107;

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

(ee) "mobile home" means

(i) a vacation trailer or house trailer, or

(ii) a structure, whether ordinarily equipped with wheels or not, that is constructed or manufactured

(A) to be moved from one point to another by being towed or carried, and

(B) to provide living accommodation for one or more persons;

(ff) "money judgment" means a judgment requiring a person to pay money or that part of a judgment that requires a person to pay money;

(gg) "obligation" means a legal or equitable duty to pay money;

(hh) "perfected" means, in respect of a security interest, perfected in accordance with the *Personal Property Security Act*;

(ii) "person", when used to refer to a creditor, includes the Crown except where the context otherwise requires;

(jj) "personal property" means property other than land;

(kk) "Personal Property Registry" means the Personal Property Registry established under the *Personal Property Security Act*;

TAB 19

main line, is used as an emergency route when there are breakdowns in the main line. It is a branch line and is not entitled to exemption from taxation.

I would dismiss the appeals with costs.

Appeals dismissed with costs.

Solicitor for the plaintiff, appellant: E. H. M. Knowles, Regina.

Solicitors for the defendants, respondents: MacPherson, Leslie & Tyerman, Regina.

ELVEN J. BERKHEISER (*Defendant*) ..APPELLANT;

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*Dec. 15, 19
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Apr. 12

AND

GLADYS BERKHEISER AND FLORENCE GLAISTER (*Defendants*) .. } RESPONDENTS;

AND

LEONARD B. THOMSON, RAY NEWSON AND DOUGLAS CAMPBELL (*Plaintiffs*) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Mines and minerals—Petroleum and natural gas "lease"—Terms and effect of document—Ademption of legacy.

A document whereby the owner of land "doth grant and lease . . . all the petroleum and natural gas . . . within, upon or under the lands . . . together with the exclusive right and privilege to explore, drill for, win, dig, remove, store and dispose of, the leased substances", with special terms as to duration, operations and payments, is not an out-and-out conveyance of the minerals *in situ*, and does not have the effect of adeeming *pro tanto* a devise of the land. *McColl-Frontenac Oil Company Limited v. Hamilton et al.*, [1953] 1 S.C.R. 127, distinguished.

Per Rand and Cartwright JJ.: The document under consideration in this case had the effect that the title to the oil and gas remained in the owner subject to the incorporeal right of the "lessee", which right was extinguished on the termination of the lease. The rents and royalties were obviously profits and, like rent from a leasehold, were embraced in the devise. The instrument created either a *profit à prendre* or an irrevocable licence to search for and to win the substances named. It was unnecessary in this case to decide whether petroleum and natural gas *in situ* were to be classed as corporeal hereditaments and sold as land.

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*PRESENT: Rand, Kellock, Locke, Cartwright and Nolan JJ.

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Per Kellock, Locke and Nolan JJ.: While it was quite competent for an owner of land so to convey minerals lying in or under it that thereafter there were two separate estates in fee, that was not the result of the instrument here in question. Reading all the terms of the "lease", they were quite inconsistent with any conception of a grant in fee, whether of the minerals *in situ* or of a *profit à prendre*. The instrument was to be construed as a grant of a *profit à prendre* for an uncertain term which might be brought to an end upon the happening of any of the various contingencies for which the "lease" provided.

APPEAL by the defendant Elven J. Berkheiser from the judgment of the Court of Appeal for Saskatchewan (1), affirming the judgment of Graham J. (2), on an originating notice of motion.

E. C. Leslie, Q.C., for the defendant, appellant.

J. P. Nelligan, for the defendants, respondents.

The judgment of Rand and Cartwright JJ. was delivered by

RAND J.:—The facts in this appeal are these. By will dated May 2, 1947, a testatrix devised to the appellant a quarter-section of land in Saskatchewan; under date of December 18, 1951, with an incorporated company, she entered into what is called a "lease" of all petroleum and natural gas "within, upon or under" the quarter-section for a term of 10 years "and so long thereafter as the leased substances or any of them are produced" from the land; on July 9, 1953, she died. The lease called for a down payment of $320; it provided, in the event of deferred operations, for an annual acreage rental of $160, for certain royalties related to the oil and gas as they were produced, and for other matters mentioned later. Following the death of the lessor a payment of the rental was made to the executors which deferred drilling to December 18, 1954. Under a clause headed "Surrender", the lease was terminated by notice given after the death but before April 15, 1955, when these proceedings were launched. The respondents are the residuary beneficiaries under the will, and the substantial question raised is whether the interest of oil and gas is now vested in them or in the appellant.

(1) 16 W.W.R. 459, [1955] 5 D.L.R. 183 (*sub nom. re Sykes Estate; Thomson et al. v. Berkheiser et al.*)

(2) 16 W.W.R. 172.

In the Courts below the transaction was treated as an out-and-out sale or agreement of sale of minerals *in situ*, the sale of a corporeal hereditament; the title to the minerals in fee simple was thereby severed from the rest of the fee; this worked an ademption of the devise to the extent of the oil, gas and royalties, and on termination the title fell into the residue. Apart from any question of the effect of a "termination" by notice of an estate, legal or equitable, in fee simple, or any question of a determinable fee or a fee on condition, the controversy hinges on the validity of that interpretation of the lease and it becomes necessary to examine its terms.

The operative words in the premises are:

> THE LESSOR . . . DOTH HEREBY GRANT AND LEASE . . . all the petroleum and natural gas . . . within, upon or under the lands . . . together with the exclusive right and privilege to explore, drill for, win, take, remove, store and dispose of, the leased substances and . . . to drill wells, lay pipe lines, and build and install such tanks, stations, structures and roadways as may be necessary . . . .

Provisos were stipulated, (a) in effect, that if the drilling of a well was not commenced within the second year (the first year having been carried over by the down payment) the lease should terminate unless the lessee should pay the rental which would defer the work for a further year, with like payments for like deferred periods thereafter; (b) that if, at any time within the 10-year period and prior to discovery, a dry well or wells should have been drilled, or if after the discovery, during that term, production should cease, the lease should terminate at the next anniversary date unless operations for further drilling had been commenced or the rental paid, in which event thereafter the rental proviso would continue in force; and (c) that if at any time after the 10-year period production had ceased but the lessee had begun further work, the lease should remain in force so long as the operations were prosecuted and, if successful, so long thereafter as production continued. In any case, the time of any cesser of drilling, working or production from any cause beyond the lessee's control should not be counted against it. Royalties were provided, (1) on crude oil, of $12\frac{1}{2}$ per cent. of the current market value at the point of measurement; (2) on natural gas, of $12\frac{1}{2}$ per cent. of the current value at the point of measurement, and on gas treated in a plant, that percentage

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of the residual gas therefrom marketed; (3) on plant products, related to the current market-price at the plant where produced on a basis, the details of which are not material. The lessor might, in lieu of the cash royalty, on notice, take one-eighth of the oil, for collecting which the lessee would provide free of cost tanks for not more than 10 days' accumulation. The lessee agreed to drill offset wells whenever and wherever they might be required by reason of production on lands laterally adjoining the quarter-section and not owned by the lessor.

The language of the provision for surrender read:

> Notwithstanding anything herein contained, the Lessee may at any time or from time to time determine or surrender this Lease and the term hereby granted as to the whole or any part or parts of the leased substances and/or the said lands, upon giving the Lessor written notice to that effect, WHEREUPON this Lease and the said term shall terminate as to the whole or any part or parts thereof so surrendered and the annual acreage rental shall be extinguished or proportionally reduced as the case may be, but the Lessee shall not be entitled to a refund of any such rent theretofore paid.

If within 90 days of notice of default given by the lessor for breach, non-observance or non-performance by the lessee of any covenant, proviso, condition, restriction or stipulation, the default was not remedied, the lease would thereupon terminate.

Whether petroleum and natural gas *in situ* are to be classed as corporeal hereditaments and sold as land has been the subject of a great deal of consideration by Courts, particularly in the United States, and the application of common law conceptions to substances of such character, whose utility was little appreciated before this century, has produced a wide variance of opinion; but for the reasons following, the determination of that question here becomes unnecessary.

A corporeal hereditament was looked upon at common law as property of a permanent and indestructible character. When land was spoken of there was in mind not only the substances of the soil but also the space in which the substances were contained. To the ownership of land applied the maxim *cujus est solum, ejus est usque ad coelum.* In this conception of space filled with substance there is, for the purposes of law, an indestructible base to which incorporeal rights can be related.

But as stated in Challis's Real Property, 3rd ed. 1911, at p. 54, the classification of minerals—and the illustration there given of coal indicates the kind of mineral in mind—as corporeal hereditaments, is, in the foregoing respect, an anomaly; the use of minerals has, as its primary object, their removal from the soil and to that extent, their destruction as part of it. *A fortiori* would that consideration operate in respect of the fugacious minerals we are dealing with.

What as a practical matter is sought by such a lessor is the undertaking of the lessee to explore for discovery and in the event of success to proceed with production to its exhaustion. Neither presence nor absence of the minerals was here known, and the initial task was to verify the existence or non-existence of the one or the other. The fugitive nature of each is now well known; a large pool of either, underlying many surface titles, may in large measure be drained off through wells sunk in one of them; tapping the reservoir against such abstraction may, then, become an urgent necessity of the owner.

In that situation the notion of ownership *in situ* is not the likely thing to be suggested to the mind of any person interested because primarily of the difficulty of the factual conception itself. The proprietary interest becomes real only when the substance is under control, when it has been piped, brought to the surface and stored. Any step or operation short of that mastery is still in the stage of capture. To the ordinary producer that course of action is compatible with the risk of discovering nothing, but an initial grant of a title to something that may prove to be non-existent can scarcely be said to be so.

The language of the lease confirms this. The word "grant" is no more significant to a fee title than to an easement or a *profit à prendre* or, apparently, under the land law of Saskatchewan, an irrevocable licence to take. Indeed it is more appropriate to incorporeal than it is to corporeal rights. At common law a grant of a freehold title was ineffectual unless accompanied by livery of seisin, and, in the case of a tenement, attornment. Livery in relation to mines involves difficulties and, in later conveyancing, a transfer of minerals of an open mine appears to have been limited in practice to a bargain and sale under the statute

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of uses, or a lease of the surface and a release of the minerals, or by a statutory deed: *Challis, op. cit.*, p. 58. An unopened mine has been referred to as an incorporeal hereditament, but that is considered by Challis to be an unsound view. The word "lease" in its ordinary meaning implies in relation to land the possession of an indestructible substance (although at common law the lessee for years held the seisin or possession for the freeholder). For oil or gas, livery would seem to be out of the question and for the reasons mentioned other modes of conveyance appropriate to a corporeal hereditament would not accord with the notion of ownership of those substances.

The idea suitable to the partial use of the surface of lands as a necessary means of seeking for and drawing off these fluid substances, apart from the influence by analogy of existing concepts related to different substances, is that of operations to reduce to possession something by its nature generally ready for flight, which, as embodying a property interest, is adequately symbolised by the general term incorporeal right. The word "grant", then, not being significant of title and the word "lease" not carrying with it the possession with which it is ordinarily associated, we look to the detailed description of the acts authorized for the true intendment of the instrument and doing that here I interpret it as either a *profit à prendre* or an irrevocable licence to search for and to win the substances named.

This view is strengthened by the provision for payment of taxes. The lessor is to pay "all taxes, rates and assessments" levied directly or indirectly against her by reason of her interest in production or *her ownership of mineral rights*, as well as those assessed against the surface of the land. On the other hand, the lessee is to pay all taxes levied in respect of the undertaking and operations and of the lessee's interest in production. The effect of this is not modified by the stipulation that the lessee shall reimburse the lessor for seven-eighths of any taxes imposed on the latter by reason of being the registered owner of the leased substances. This treats the legal title to the substances as remaining in the lessor and the interest of the lessee as analogous to that of an ordinary lessee of land, that is, as having only an interest in relation to them.

Rights of this nature have long been recognized in coal and other minerals and profits. In *Muskett v. Hill et al.* (1), the instrument was construed to be a licence coupled with a grant and the interest of the assignee held to be assignable. Tindal C.J. quoted the following language from *Thomas v. Sorrell* (2):

> But a licence to hunt in a man's park, and carry away the deer kill'd to his own use; to cut down a tree in a man's ground, and to carry it away the next day after to his own use, are licences as to the acts of hunting and cutting down the tree; but as to the carrying away of the deer kill'd and tree cut down, they are grants.

In *Wilkinson v. Proud et al.* (3), the decision went on the distinction between such a right and title; in the language of Parke B.:

> This is not a claim of a prescriptive right to take coal in the plaintiff's close, but a prescription for all the strata and seams of coal lying under it, that is, for a part of the soil itself, and not for the right to get the coal, which would be the subject of a grant.

In *Martyn v. Williams* (4), a licence was granted to the defendant "to dig, work, and search for china clay, and to raise, get, and dispose of the same . . . for the term of 21 years". The grantee covenanted, among other things, that at the expiration of the term he or his assigns would deliver up the works to the grantor in good repair. The grantor assigned and an action was brought by the assignee against the grantee on the covenant. It was held that the grant created an incorporeal hereditament, the covenants relating to which under 32 Hen. VIII, c. 34, ran with the land. Martin B., in delivering the judgment, made observations which are of special interest here:

> These cases [*Doe d. Hanley v. Wood* (1819), 2 B. & Ald. 724, 106 E.R. 529, and *Muskett v. Hill et al., supra*] establish that it is an incorporeal hereditament, a property, and an estate capable of being inherited by the heir, and assigned to a purchaser, or otherwise conveyed away. It is in truth "a tenement" within the definition of Lord Coke in the First Institute, 20 a., who says that the word "tenement includeth not only corporate inheritances, but also all inheritances issuing out of them, or concerning or annexed to, or exerciseable within them, as rent, estovers, common, or other profits whatever, granted out of land." . . . The statute in express terms therefore extends to incorporeal hereditaments and tenements, and is not confined merely to lands. If, therefore, there had been an estate in fee of the right or interest created by the indenture

(1) (1839), 5 Bing. N.C. 694, 132 E.R. 1267.
(2) (1673), Vaugh. 330 at 351, 124 E.R. 1098 at 1109.
(3) (1843), 11 M. & W. 33, 152 E.R. 704.
(4) (1857), 1 H. & N. 817, 156 E.R. 1430.

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mentioned in the declaration, and the owner in fee of the right had demised it for twenty-one years, and there had been a covenant such as that secondly declared on, we should have been of opinion, that the assignee of the reversion could have sued upon it for a breach committed in his own time. But in the present case no estate in fee in the right to take the china clay has been created. The owners of the fee simple merely granted the right for a term of years, and after the expiration of this term, the plaintiff, who was then the owner of the land, was entitled to do all which the defendant was authorised and licensed by the indenture to do, not by virtue of the same estate which the defendant had, having reverted and continuing an existing estate, but by virtue of his ownership of and dominion over his own land; (for the owner of land exercises his right over it, not by virtue of any licences or liberties or easements, but by virtue of his ownership in which all interests of this kind merge: *Greathead v. Morley,* 3 M. & G. 139); and the question is, whether the conveyance or assignment of the land to the plaintiff, during the existence of the term in the incorporeal tenement, was an assignment of the reversion within the statute of 32 H. 8. We think that it was. There is in reality the relation of reversioner and ownership of particular estates between them; there is exactly the same privity of estate as exists between reversioner and tenant properly so called, and upon the determination of the term the entire interest in the land reverted to the plaintiff, as upon the expiration of an ordinary lease.

In *Hooper et al. v. Clarke* (1), an exclusive right and licence to take and kill game on certain land with the use of a cottage was similarly treated: Blackburn J. at pp. 202-3 said:

> The first question is, this being the demise of an incorporeal hereditament, do convenants which would run with a demise of land, run with it? *Martyn v. Williams* [*supra*] decides that they do.

To the like effect was the decision in *Lord Hastings v. North Eastern Railway Company* (2), where a covenant to pay for the privilege of a way-leave on which to make and use a railway, based on a rate on the coal carried to a certain port, was held to run with the reversion.

In such cases the title to the substances as part of the land remains in the owner and upon it is imposed the incorporeal right which the termination of the lease, as in this case, extinguishes. As stated in Jarman on Wills, 8th ed. 1951, p. 939 (vol. 2), an immediate devise of land in fee to a person *in esse,* carries the rents and profits of the land from the death of the testator. The rents and royalties here are obviously profits and like rent from a leasehold, in the absence of a specific bequest of them, which, if an assignment of the lessor's interest in the lease, would require a grant of the minerals themselves, are embraced in the

(1) (1867), L.R. 2 Q.B. 200. (2) [1898] 2 Ch. 674.

devise. It follows that both the right to the payment of $160 and the reversionary interest in the petroleum and gas enured to the appellant.

The interpretation given the instrument is not at all affected by the judgment of this Court in *McColl-Frontenac Oil Company Limited v. Hamilton et al.* (1). In the majority reasons written by Kellock J. at pp. 136-7, dealing with that question, he says:

> Whether the proper construction of the instrument is that, with respect to minerals, it is a grant of the minerals as land, as in *Gowan's* case (2), or a demise of the surface to which is super-added a *profit à prendre,* the result is, in my opinion, the same.

The finding that the agreement was a sale of property within the Act there being examined was satisfied by the transfer of title as the oil or gas was obtained in production; but that piecemeal sale and acquisition is the completion of the exercise of the right to win them, in contrast to the out-and-out conveyance of them *in situ.*

I would, therefore, allow the appeal, set aside the judgment below by declaring the petroleum and natural gas rights to be vested in the appellant and that the appellant is entitled to the sum of $160 received by the executors. The costs in this Court will be according to the terms on which leave to appeal was granted; those in the Courts below will be as directed by their judgments respectively.

The judgment of Kellock, Locke and Nolan JJ. was delivered by

KELLOCK J.:—It is quite competent for an owner of land so to convey mineral lying in or under the land that thereafter two separate estates in fee exist, the one in the mineral conveyed and the other in that which is retained. The respondents contend that this is the result of the instrument here in question.

Under the instrument the late Esther Elizabeth Sykes (described as "Lessor") "doth hereby grant and lease" to the Canadian Devonian Petroleums Limited (described as "Lessee")

> . . . all the petroleum and natural gas and related hydrocarbons except coal and valuable stone, (hereinafter referred to as the "*leased* substances"), within, upon or under the lands hereinbefore described and all the right,

(1) [1953] 1 S.C.R. 127, [1953] 1 D.L.R. 721.

(2) *Gowan v. Christie et al.* (1873), L.R. 2 Sc. & Div. 273.

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title, estate and interest of the Lessor in and to the *leased* substances or any of them within, upon or under any lands excepted from, or roadways, lanes, rights-of-way adjoining the lands aforesaid, together with the exclusive right and privilege to explore, drill for, win, take, remove, store and dispose of, the leased substances and for the said purposes to drill wells, lay pipe lines, and build and install such tanks, stations, structures and roadways as may be necessary, and, insofar as the Lessor has the right so to grant, and for the said purposes, the right of entering upon, using and occupying the said lands or so much thereof and to such an extent as may be necessary or convenient.

TO HAVE AND ENJOY the same for the term of Ten (10) years from the date hereof and so long thereafter as the *leased* substances or any of them are produced from the said lands, subject to the sooner termination of *the said term* as hereinafter provided.

(The italics are mine.)

The document further provides that if operations for the drilling of a well are not commenced within one year from its date the lease shall thereupon terminate unless the lessee shall have paid or tendered to the lessor $160, called "annual acreage rental", which payment shall "confer the privilege" of deferring the commencement of drilling operations for a period of one year. There may be further extensions upon "like payments or tenders", but, so far as this provision is concerned, the lease would terminate, at the latest, at the expiration of the 10-year term.

It is also provided that if at any time during the 10-year term and prior to "discovery of production" on the lands, the lessee should drill a dry well or wells, or if at any time during the term and after the discovery of production, such production should cease, the lease shall terminate "at the next ensuing anniversary date" unless drilling operations for a further well have been commenced or unless further tender of the annual acreage rental is made, in which latter event the earlier provision as to payment or tender of such rental is to be deemed to have continued in force. Again, there is nothing in this provision which, in my view, would allow the extension of the term beyond the 10-year period.

It is further provided, however, that if at any time after the expiration of the 10-year term the "leased substances" are not being produced but the lessee is then engaged in drilling or working operations on the land, the lease shall remain in force for so long as such operations are prosecuted and for so long as any resulting production continues. Provision is also made for payment of a royalty to the lessor upon any and all production.

The instrument also contains a clause that the lessee may, at any time, terminate or surrender the lease "as to the whole or any part or parts of the leased substances and/or the said lands" upon written notice to the lessor to that effect. Provision is also made for termination of the lease by the lessor upon notice to the lessee of any default on its part under the instrument and failure to remedy such default within a period of 90 days from receipt of such notice.

In Armour on Real Property, 2nd ed. 1916, the following is stated on p. 47:

> . . . a grant of all the coal or other mineral in or upon certain land, is a grant of part of the land itself, and passes complete ownership in the mineral to the grantee.

But the learned author continues:

> But a grant of the right to enter, search for and dig coal, and carry away as much as may be dug, is a grant of an incorporeal right to enter and dig, and passes the property in such coal only as shall be dug.

As stated in 11 Halsbury, 2nd ed. 1933, p. 386, s. 678:

> A *profit à prendre* may be created for an estate in perpetuity analogous to an estate in fee simple, or for any less period or interest such as a term of years . . . .

In the case at bar the Courts below have construed the instrument as a conveyance in fee. The basis of this view is sufficiently indicated in the following extracts from the judgment of Martin C.J.S., speaking for the Court of Appeal (1):

> Authorities are to the effect that petroleum and natural gas leases in the form of the one under review are sales of a portion of the land with liberty to enter upon the land for the purpose of searching for and carrying away the petroleum and natural gas within, upon or under the land. . . .
>
> Applying these authorities the testatrix disposed of an interest in the land when she entered into the petroleum and natural gas lease and the lease was in effect at the time of her death on July 9, 1953, but came to an end on December 18, 1954. The will of the testatrix spoke from her death, namely July 9, 1953, and as the sale of the petroleum and natural gas was then in effect just as she had made it on December 18, 1951, the devise of the interest in the land consisting of petroleum and natural gas was adeemed. Where there is a specific legacy and the subject-matter does not remain the property of the testator at his death the legacy is said to be adeemed. . . .
>
> . . . I cannot agree that the testatrix, so far as petroleum and natural gas are concerned, had anything left at the time of her death which she could dispose of. Section 19 of *The Wills Act*, R.S.S. 1953, ch. 120, cannot be

(1) 16 W.W.R. at pp. 461-2.

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Kellock J.

applied because the testatrix had no estate in the petroleum and natural gas which she had "power to dispose of by will at the time of her death." . . . I am unable to distinguish the sale of minerals—an interest in land—from the case where a testator in his will makes a specific devise of land but subsequently sells the land under agreement for sale.

While what is referred to as a "mining lease" commonly amounts to a "sale of land", so to characterize any given instrument does not necessarily equate it with either a grant in fee simple of the mineral in place or of a *profit à prendre*. For example, the grant in question in *Gowan v. Christie et al.* (1), was only for a term of 21 years. Nevertheless, the oft-quoted citation from the judgment of Lord Cairns, on pp. 283-4, was quite properly applicable to it. Lord Cairns was there differentiating a mineral from an agricultural lease in that the agricultural lessee, while entitled to "fruits", is not entitled to either a corporeal or an incorporeal interest in the lands.

The words of Lord Cairns were also cited in *Joggins Coal Company Limited v. The Minister of National Revenue* (2), but the decision of the issue there arising did not require the Court to determine anything more with respect to the instrument before the Court than that the appellant had such an interest in the mineral that it was entitled to claim a share in depletion allowance as a "lessee" within the meaning of the *Income War Tax Act*.

The question which arose in *McColl-Frontenac Oil Company Limited v. Hamilton, et al.* (3), was whether the instrument before the Court was "a contract for the sale of property" within the meaning of the Alberta *Dower Act*. Whether the agreement was one for the sale of the mineral in place or of a *profit à prendre* was immaterial. In either case the Court considered the language of the statute to apply.

In the case at bar it is necessary to decide whether the interest in the mineral created in favour of the grantee was of such a nature that the devise to the appellant was, *pro tanto*, adeemed. In my opinion, this is not so. The provisions of the instrument as analyzed above are, in my

(1) (1873), L.R. 2 Sc. & Div. 273.
(2) [1950] S.C.R. 470, [1950] 3 D.L.R. 1, [1950] C.T.C. 149.
(3) [1953] 1 S.C.R. 127, [1953] 1 D.L.R. 721.

opinion, quite inconsistent with any conception of a grant in fee whether of the minerals in place or of a *profit à prendre*. In my opinion, the instrument is to be construed as a grant of a *profit à prendre* for an uncertain term which might be brought to an end upon the happening of any of the various contingencies for which it provides. It did not bring about that separation of the estate in the minerals from the estate in the land apart from the minerals which is the necessary basis for the operation of the doctrine of ademption.

In *Martyn v. Williams* (1), a *profit à prendre* in certain minerals had been granted to the defendant for a term of years by the owner in fee, who subsequently conveyed all his estate to the plaintiff. Martin B., delivering the judgment of the Court, said, at p. 829:

> But in the present case no estate in fee in the right to take the china clay has been created. The owners of the fee simple merely granted the right for a term of years, and after the expiration of this term, the plaintiff, who was then the owner of the land, was entitled to do all which the defendant was authorised and licensed by the indenture to do, not by virtue of the same estate which the defendant had, having reverted and continuing an existing estate, but by virtue of his ownership of and dominion over his own land; (for the owner of land exercises his right over it, not by virtue of any licences or liberties or easements, but by virtue of his ownership in which all interests of this kind merge: *Greathead v. Morley*, 3 M. & G. 139); and the question is, whether the conveyance or assignment of the land to the plaintiff, during the existence of the term in the incorporeal tenement, was an assignment of the reversion within the statute of 32 H. 8. We think that it was. There is in reality the relation of reversioner and ownership of particular estates between them; there is exactly the same privity of estate as exists between reversioner and tenant properly so called, and upon the determination of the term the entire interest in the land reverted to the plaintiff, as upon the expiration of an ordinary lease.

Accordingly, upon the termination of the interest of the grantee under the lease here in question, the estate of the appellant in the lands was no longer subject to it. The doctrine of ademption does not apply. Equally the appellant is entitled to the amount paid for acreage rental by the lessee following the death of the testatrix.

(1) (1857), 1 H. & N. 817, 156 E.R. 430.

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Kellock J.

The appeal should, therefore, be allowed. I agree with the order as to costs proposed by my brother Rand.

Appeal allowed.

Solicitors for the defendant Elven J. Berkheiser, appellant: MacPherson, Leslie & Tyerman, Regina.

Solicitors for the defendant Glaister, respondent: McIlraith & McIlraith, Ottawa.

Solicitors for the plaintiffs: Donnelly & Polley, Swift Current.

Bank of Montreal *Appellant*

v.

Enchant Resources Ltd. and D. S. Willness *Respondents*

Banque de Montréal *Appelante*

c.

Enchant Resources Ltd. et D. S. Willness *Intimés*

INDEXED AS: BANK OF MONTREAL *v.* DYNEX PETROLEUM LTD.

Neutral citation: 2002 SCC 7.

File No.: 27766.

Hearing and judgment: November 9, 2001.

Reasons delivered: January 24, 2002.

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

RÉPERTORIÉ : BANQUE DE MONTRÉAL *c.* DYNEX PETROLEUM LTD.

Référence neutre : 2002 CSC 7.

N° du greffe : 27766.

Audition et jugement : 9 novembre 2001.

Motifs déposés : 24 janvier 2002.

Présents : Le juge en chef McLachlin et les juges Gonthier, Iacobucci, Major, Bastarache, Binnie et LeBel.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Commercial law — Oil and gas industry — Overriding royalties — Whether overriding royalties arising from working interest capable of being interest in land.

The appellant Bank was a secured creditor of D, a corporation in liquidation. The trustee in bankruptcy wanted to sell all the oil and gas properties of D. One issue of concern was whether any such sale would be subject to overriding royalties arising out of the working interest held by D. Also, the respondents held overriding royalties and claimed priority over the Bank, as to the assets of D, because their interests, as protected by caveats filed in a land registration office, preceded the Bank's loans to D and its predecessors. The caveats claimed an interest in D's working interest as a result of services performed for D and/or its predecessors. The chambers judge granted the Bank's application for a preliminary determination finding that an overriding royalty interest cannot be an interest in land. The Court of Appeal set aside that decision, holding that overriding royalty interests can, subject to the intention of the parties, be interests in land.

Held: The appeal should be dismissed.

EN APPEL DE LA COUR D'APPEL DE L'ALBERTA

Droit commercial — Industrie pétrolière et gazière — Redevances dérogatoires — Une redevance dérogatoire issue d'une participation directe peut-elle constituer un intérêt foncier?

La Banque appelante était un créancier garanti de D, société en voie de liquidation. Le syndic de faillite voulait vendre tous les avoirs gaziers et pétroliers de D. Se posait donc notamment la question de savoir si la vente serait conclue sous réserve des redevances dérogatoires provenant de la participation directe détenue par D. Par ailleurs, les intimés étaient titulaires de redevances dérogatoires et prétendaient prendre rang avant la Banque quant aux avoirs de D, parce que leurs intérêts, protégés par des oppositions déposées à un bureau d'enregistrement foncier, étaient antérieurs aux prêts consentis par la Banque à D et à ses prédécesseurs. Les oppositions faisaient valoir un intérêt dans la participation directe détenue par D par suite de la fourniture de services à D ou à ses prédécesseurs. Le juge en chambre a accueilli la demande présentée par la Banque en vue de faire statuer de façon préliminaire qu'un droit de redevance dérogatoire ne pouvait constituer un intérêt foncier. La Cour d'appel a infirmé cette décision, statuant qu'un droit de redevance dérogatoire peut constituer un intérêt foncier, à condition que telle soit l'intention des parties.

Arrêt : Le pourvoi est rejeté.

The common law prohibition against the creation of an interest in land from an incorporeal hereditament is inapplicable to the oil and gas industry given its practices and the support found in the law. A royalty which is an interest in land may be created from an incorporeal hereditament such as a working interest or a *profit à prendre* if that is the intention of the parties.

Cases Cited

Referred to: *Berkheiser v. Berkheiser*, [1957] S.C.R. 387; *Saskatchewan Minerals v. Keyes*, [1972] S.C.R. 703; *Scurry-Rainbow Oil Ltd. v. Galloway Estate* (1993), 138 A.R. 321, aff'd (1994), 157 A.R. 65; *Canco Oil and Gas Ltd. v. Saskatchewan* (1991), 89 Sask. R. 37; *St. Lawrence Petroleum Ltd. v. Bailey Selburn Oil & Gas Ltd.*, [1963] S.C.R. 482; *Vanguard Petroleums Ltd. v. Vermont Oil & Gas Ltd.*, [1977] 2 W.W.R. 66; *Isaac v. Cook* (1982), 44 C.B.R. 39; *Guaranty Trust Co. v. Hetherington* (1987), 50 Alta. L.R. (2d) 193, aff'd in part [1989] 5 W.W.R. 340; *Vandergrift v. Coseka Resources Ltd.* (1989), 67 Alta. L.R. (2d) 17; *Nova Scotia Business Capital Corp. v. Coxheath Gold Holdings Ltd.* (1993), 128 N.S.R. (2d) 118; *Friedmann Equity Developments Inc. v. Final Note Ltd.*, [2000] 1 S.C.R. 842, 2000 SCC 34.

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APPEAL from a judgment of the Alberta Court of Appeal (1999), 74 Alta. L.R. (3d) 219, 255 A.R. 116, 220 W.A.C. 116, 182 D.L.R. (4th) 640, 2 B.L.R. (3d) 58, 15 C.B.R. (4th) 5, 15 P.P.S.A.C. (2d) 175, [2000] 2 W.W.R. 693, [1999] A.J. No. 1463 (QL), 1999 ABCA 363, reversing a judgment of the Court of Queen's Bench (1995), 39 Alta. L.R. (3d) 66, [1996] 6 W.W.R. 461, 11 P.P.S.A.C. (2d) 291, [1995] A.J. No. 1279 (QL). Appeal dismissed.

Richard B. Jones, for the appellant.

L'interdiction reconnue en common law de créer un intérêt foncier à partir d'un héritage incorporel est inapplicable à l'industrie gazière et pétrolière, étant donné ses pratiques et l'appui fourni par la jurisprudence. Une redevance qui est un intérêt foncier peut être créée à partir d'un héritage incorporel tel qu'une participation directe ou un profit à prendre, si telle est l'intention des parties.

Jurisprudence

Arrêts mentionnés : *Berkheiser c. Berkheiser*, [1957] R.C.S. 387; *Saskatchewan Minerals c. Keyes*, [1972] R.C.S. 703; *Scurry-Rainbow Oil Ltd. c. Galloway Estate* (1993), 138 A.R. 321, conf. par (1994), 157 A.R. 65; *Canco Oil and Gas Ltd. c. Saskatchewan* (1991), 89 Sask. R. 37; *St. Lawrence Petroleum Ltd. c. Bailey Selburn Oil & Gas Ltd.*, [1963] R.C.S. 482; *Vanguard Petroleums Ltd. c. Vermont Oil & Gas Ltd.*, [1977] 2 W.W.R. 66; *Isaac c. Cook* (1982), 44 C.B.R. 39; *Guaranty Trust Co. c. Hetherington* (1987), 50 Alta. L.R. (2d) 193, conf. en partie par [1989] 5 W.W.R. 340; *Vandergrift c. Coseka Resources Ltd.* (1989), 67 Alta. L.R. (2d) 17; *Nova Scotia Business Capital Corp. c. Coxheath Gold Holdings Ltd.* (1993), 128 N.S.R. (2d) 118; *Friedmann Equity Developments Inc. c. Final Note Ltd.*, [2000] 1 R.C.S. 842, 2000 CSC 34.

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POURVOI contre un arrêt de la Cour d'appel de l'Alberta (1999), 74 Alta. L.R. (3d) 219, 255 A.R. 116, 220 W.A.C. 116, 182 D.L.R. (4th) 640, 2 B.L.R. (3d) 58, 15 C.B.R. (4th) 5, 15 P.P.S.A.C. (2d) 175, [2000] 2 W.W.R. 693, [1999] A.J. No. 1463 (QL), 1999 ABCA 363, infirmant un jugement de la Cour du Banc de la Reine (1995), 39 Alta. L.R. (3d) 66, [1996] 6 W.W.R. 461, 11 P.P.S.A.C. (2d) 291, [1995] A.J. No. 1279 (QL). Pourvoi rejeté.

Richard B. Jones, pour l'appelante.

James C. Crawford, *Q.C.*, *Frank R. Dearlove* and *Scott H. D. Bower*, for the respondents.

The judgment of the Court was delivered by

MAJOR J. —

I. Introduction

1 This appeal arises from an application made by the appellant Bank of Montreal before the chambers judge in the Alberta Court of Queen's Bench for a determination that, as a matter of law, an overriding royalty is incapable of being an interest in land. The application was opposed by several defendants including the respondents in this Court, Enchant Resources Ltd. ("Enchant") and D. S. Willness ("Willness"), each holders of overriding royalties who claim their interests to be interests in land. The learned chambers judge allowed the Bank's application which the Alberta Court of Appeal reversed, holding that an overriding royalty is capable of being an interest in land. This appeal to the Supreme Court of Canada was dismissed with reasons to follow.

II. Facts

2 The material filed and submissions of counsel indicated that royalty arrangements are common forms of arranging exploration and production in the oil and gas industry in Alberta. Typically, the owner of minerals *in situ* will lease to a potential producer the right to extract such minerals. This right is known as a working interest. A royalty is an unencumbered share or fractional interest in the gross production of such working interest. A lessor's royalty is a royalty granted to (or reserved by) the initial lessor. An overriding royalty or a gross overriding royalty is a royalty granted normally by the owner of a working interest to a third party in exchange for consideration which could include, but is not limited to, money or services (e.g., drilling or geological surveying) (G. J. Davies, "The Legal Characterization of Overriding Royalty Interests in Oil and Gas" (1972), 10 *Alta. L. Rev.* 232, at p. 233). The rights and obligations

James C. Crawford, *c.r.*, *Frank R. Dearlove* et *Scott H. D. Bower*, pour les intimés.

Version française du jugement de la Cour rendu par

LE JUGE MAJOR —

I. Introduction

Le présent pourvoi vise une demande que la Banque de Montréal, appelante, a présentée à un juge de la Cour du Banc de la Reine de l'Alberta siégeant en chambre afin qu'il statue, en droit, qu'une redevance dérogatoire ne peut constituer un intérêt foncier. Plusieurs défendeurs se sont opposés à la demande. Au nombre des opposants figuraient les intimés devant notre Cour, Enchant Resources Ltd. (« Enchant ») et D. S. Willness (« Willness »), titulaires de redevances dérogatoires qui prétendaient détenir un intérêt foncier. Le juge a fait droit à la demande de la Banque. La Cour d'appel de l'Alberta a infirmé cette décision, statuant qu'une redevance dérogatoire peut être un intérêt foncier. Notre Cour a rejeté le pourvoi, avec motifs à suivre.

II. Les faits

Les pièces produites et les plaidoiries des avocats révèlent que les arrangements en matière de redevances sont de pratique courante en Alberta dans le secteur de l'exploration et de la production pétrolières et gazières. D'ordinaire, le propriétaire des minéraux *in situ* donne à bail à un producteur potentiel le droit d'extraire ces minéraux. Pour désigner ce droit, on utilise l'expression « participation directe ». Une redevance est une part ou participation fractionnaire non grevée dans la production brute issue de cette participation directe. La redevance du bailleur est une redevance accordée au bailleur initial (ou qu'il se réserve). Une redevance dérogatoire ou redevance dérogatoire brute est une redevance accordée normalement par le titulaire d'une participation directe à un tiers en échange d'une contrepartie qui peut comprendre notamment une somme d'argent ou des services (par exemple, le forage ou les études géologiques) (G. J. Davies,

of the two types of royalties are identical. The only difference is to whom the royalty was initially granted.

« The Legal Characterization of Overriding Royalty Interests in Oil and Gas » (1972), 10 *Alta. L. Rev.* 232, p. 233). Les mêmes droits et obligations se rattachent aux deux types de redevance. Seul les différencie le fait que la redevance n'est pas accordée initialement à la même personne.

The appellant Bank of Montreal was a secured creditor of Dynex Petroleum Ltd. ("Dynex"), a corporation in liquidation. The trustee in bankruptcy wanted to sell all the oil and gas properties of Dynex. One issue was whether any such sale would be subject to overriding royalties arising out of the working interest held by Dynex. Also, there were several competing claims against the appellant, which by the time of this appeal had narrowed to the overriding royalties of the respondents Enchant and Willness, who claimed a preference by way of a caveat filed in the South Alberta Land Registration District, claiming an interest in Dynex's working interest as a result of services performed for Dynex and/or its predecessors. The respondents claimed their royalty rights comprised interests in land and claimed priority over the appellant because their interests, as protected by caveats, preceded the appellant's loans to Dynex and its predecessors. The appellant submitted that at common law an interest in land could not arise from an incorporeal hereditament and therefore the respondents' overriding royalties (which arose from a working interest, an incorporeal hereditament) did not rank higher in priority than the appellant's security interest.

3 La Banque de Montréal, appelante, était un créancier garanti de Dynex Petroleum Ltd. (« Dynex »), société en voie de liquidation. Le syndic de faillite voulait vendre tous les avoirs gaziers et pétroliers de Dynex. La question se posait donc de savoir si la vente serait conclue sous réserve des redevances dérogatoires provenant de la participation directe détenue par Dynex. De plus, l'appelante se voyait opposer plusieurs réclamations concurrentes dont ne subsistaient plus, au moment du présent pourvoi, que les redevances dérogatoires des intimés Enchant et Willness, qui revendiquaient un rang prioritaire en invoquant une opposition déposée au bureau d'enregistrement foncier du district du sud de l'Alberta, faisant valoir un intérêt dans la participation directe détenue par Dynex par suite de la fourniture de services à Dynex ou à ses prédécesseurs. Les intimés soutenaient que leurs droits de redevance comportaient des intérêts fonciers et prétendaient prendre rang avant l'appelante parce que leurs intérêts protégés par les oppositions étaient antérieurs aux prêts consentis par l'appelante à Dynex et à ses prédécesseurs. L'appelante a soutenu que, en common law, un intérêt foncier ne pouvait dériver d'un héritage incorporel et que, partant, les redevances dérogatoires des intimés (dérivées d'une participation directe et, donc, d'un héritage incorporel) ne prenaient pas rang avant la sûreté qu'elle détenait.

This case pits this ancient common law rule against a common practice in the oil and gas industry. The Court is asked to resolve the apparent conflict.

4 La présente affaire oppose cette ancienne règle de common law et une pratique courante du secteur pétrolier et gazier. La Cour est appelée à trancher ce conflit apparent.

III. Judicial History

III. Historique des procédures judiciaires

The appellant applied to the Court of Queen's Bench of Alberta ((1995), 39 Alta. L.R. (3d) 66) for a preliminary determination that the overriding royalty interests do not constitute interests in land. The learned chambers judge, Rooke J. in allowing the application held at para. 3 that:

5 L'appelante a demandé à la Cour du Banc de la Reine de l'Alberta ((1995), 39 Alta. L.R. (3d) 66) de statuer, par une décision préliminaire, que les droits de redevance dérogatoire ne constituaient pas des intérêts fonciers. Le juge Rooke siégeant en chambre a fait droit à la demande en ces termes, au par. 3 :

. . . as a matter of law, a lessee of an oil and gas lease (which is a profit à prendre), which is in itself an interest in land, obtained from a lessor (whether the Crown or freehold), cannot in law pass on an interest in land to a third party.

He also concluded that if an interest in land could issue from a *profit à prendre*, which he held that it could not, the matter could not be determined summarily as evidence would be necessary to examine the language of the instruments and the intentions of the parties.

6 After a review of policy considerations, industry practice and Canadian and United States case law, the Alberta Court of Appeal ((1999), 74 Alta. L.R. (3d) 219) concluded that overriding royalty interests can constitute interests in land if intended by the parties. For substantially the same reasons as the Court of Appeal, I conclude that overriding royalty interests can be interests in land.

IV. Issue

7 Can an overriding royalty issued from a working interest (an incorporeal hereditament) be an interest in land?

V. Analysis

8 At common law, an interest in land could issue from a corporeal hereditament but not from an incorporeal hereditament. "Corporeal hereditament" is defined by *The Dictionary of Canadian Law* (2nd ed. 1995) as:

1. A material object in contrast to a right. It may include land, buildings, minerals, trees or fixtures. . . .

2. Land. . . .

"Incorporeal hereditament" is defined as:

1. "(A right) . . . in land, which (includes) such things as rent charges, annuities, easements, profits à prendre, and so on.". . .

[TRADUCTION] . . . en droit, le preneur à bail d'une concession pétrolière et gazière (qui est un profit à prendre), qui est en soi un intérêt foncier, obtenue d'un bailleur (location de la Couronne ou location à bail franche), ne peut, en common law, transmettre un intérêt foncier à un tiers.

Il a également conclu que, si un intérêt foncier pouvait dériver d'un profit à prendre — solution qu'il a écartée —, la question ne pourrait être tranchée sommairement, car une preuve serait nécessaire aux fins de l'examen des termes des instruments et de l'intention des parties.

Après avoir examiné les considérations de principe, la pratique du secteur d'activité en cause et la jurisprudence canadienne et américaine, la Cour d'appel de l'Alberta ((1999), 74 Alta. L.R. (3d) 219) a conclu que les droits de redevance dérogatoire pouvaient constituer des intérêts fonciers si telle était l'intention des parties. M'appuyant essentiellement sur les mêmes motifs que la Cour d'appel, je suis d'avis que les droits de redevance dérogatoire peuvent constituer des intérêts fonciers.

IV. La question en litige

Une redevance dérogatoire issue d'une participation directe (un héritage incorporel) peut-elle constituer un intérêt foncier?

V. Analyse

En common law, un intérêt foncier pouvait être issu d'un héritage corporel, mais non d'un héritage incorporel. Dans le *Dictionary of Canadian Law* (2e éd. 1995), la notion de « *corporeal hereditament* » (héritage corporel) est définie comme suit :

[TRADUCTION]

1. Chose matérielle par contraste avec un droit. Peut s'entendre de fonds de terre, bâtiments, minéraux, arbres ou accessoires fixes. . .

2. Fonds de terre. . .

L'expression « *incorporeal hereditament* » (héritage incorporel) est définie comme suit :

[TRADUCTION]

1. « (Droit) . . . sur un fonds de terre, qui (inclut) des choses telles que les rentes-charges, annuités, servitudes, profits à prendre, etc. » . . .

2. Property which is not tangible but can be inherited. . . .

In *Berkheiser v. Berkheiser*, [1957] S.C.R. 387, at p. 392, Rand J. held that an oil and gas lease, the interest from which an overriding royalty is created, can be a *profit à prendre*, an interest in land. A *profit à prendre* is an incorporeal hereditament. The appellant has submitted that at common law, an interest in land could not issue from an incorporeal hereditament and therefore overriding royalties cannot be interests in land.

Canadian case law suggests otherwise. In *Saskatchewan Minerals v. Keyes*, [1972] S.C.R. 703, the majority declined to decide whether an overriding royalty could be an interest in land. However, Laskin J. in dissent specifically addressed that issue. He did not find the distinction between corporeal and incorporeal hereditaments to be useful in this context and discussed the difficulty of conforming new commercial concepts to anachronistic categories at p. 722:

> The language of "corporeal" and "incorporeal" does not point up the distinction between the legal interest and its subject-matter. On this distinction, all legal interests are "incorporeal", and it is only the unconfronted force of a long history that makes it necessary in this case to examine certain institutions of property in the common law provinces through an antiquated system of classification and an antiquated terminology. The association of rents and royalties has run through the cases (as in *Re Dawson and Bell*, *supra*, the *Berkheiser* case, *supra*, and cf. *Attorney-General of Ontario v. Mercer*, at p. 777) but without the necessity hitherto in this Court to test them against the common law classifications of interests in land or to determine whether those classifications are broad enough to embrace a royalty in gross.

Laskin J. referred to *Berkheiser*, *supra*, where Rand J. held that a royalty was analogous to rent. While that case involved a lessor's royalty, Laskin J. found that although theoretically the holder of a lessor's royalty holds an interest in reversion, whereas the holder of an overriding royalty does not, since in essence the two interests are identical,

2. Bien qui n'est pas matériel, mais qui peut être transmis par voie héréditaire . . .

9 Dans *Berkheiser c. Berkheiser*, [1957] R.C.S. 387, p. 392, le juge Rand a décidé qu'une concession pétrolière et gazière, l'intérêt dont est issue une redevance dérogatoire, peut être un profit à prendre, un intérêt foncier. Un profit à prendre est un héritage incorporel. L'appelante a prétendu que, en common law, un intérêt foncier ne pouvait être issu d'un héritage incorporel et que, par conséquent, les redevances dérogatoires ne pouvaient pas constituer des intérêts fonciers.

10 La jurisprudence canadienne semble indiquer le contraire. Dans *Saskatchewan Minerals c. Keyes*, [1972] R.C.S. 703, la Cour suprême à la majorité s'est abstenue de décider si une redevance dérogatoire pouvait constituer un intérêt foncier. Toutefois, le juge Laskin, dissident, s'est intéressé précisément à cette question. Il n'a pas jugé la distinction entre les héritages corporels et incorporels utile dans ce contexte et il a traité de la difficulté de concilier les concepts modernes du commerce et les catégories anachroniques à la p. 722 :

> Les expressions « corporel » et « incorporel » ne font pas ressortir la distinction entre l'intérêt en droit et l'objet auquel il se rattache. D'après cette distinction tous les intérêts en droit sont « incorporels », et c'est l'autorité jamais attaquée d'une longue évolution historique qui nous oblige ici à étudier certaines institutions de la propriété dans les provinces régies par la *common law* au moyen d'un système de classification suranné et d'une terminologie surannée. Les rentes et les redevances ont été associées dans la jurisprudence (par exemple, dans les cause *Re Dawson and Bell* et *Berkheiser*, précitées; voir aussi *Attorney General of Ontario v. Mercer*, p. 777), mais jusqu'à maintenant, cette Cour n'a jamais eu à les analyser en regard de la classification des intérêts dans un bien-fonds en *common law*, ni à déterminer si cette classification est assez générale pour englober une redevance existant par elle-même.

11 Le juge Laskin s'est reporté à la décision *Berkheiser*, précitée, où le juge Rand a décidé qu'une redevance était assimilable à une rente. Bien que cette affaire ait porté sur une redevance de bailleur, le juge Laskin a estimé que, même si en théorie le titulaire d'une redevance de bailleur détient un intérêt de réversion, ce qui n'est pas le

there should be no distinction between the two royalty interests in their treatment as interests in land. The effect of Laskin J.'s reasons was to render inapplicable, at least insofar as overriding royalties, the common law rule against creating interests in land out of incorporeal interests.

12 Laskin J. concluded that the overriding royalty was an interest in land, analogous to a rent-charge. It is significant that he did not find all overriding royalty interests to be interests in land. He held that the intentions of the parties judged by the language creating the royalty would determine whether the parties intended to create an interest in land or to create contractual rights only.

13 In *Scurry-Rainbow Oil Ltd. v. Galloway Estate* (1993), 138 A.R. 321 (Q.B.), aff'd (1994), 157 A.R. 65 (C.A.), and in *Canco Oil and Gas Ltd. v. Saskatchewan* (1991), 89 Sask. R. 37 (Q.B.), Hunt J. and Matheson J. respectively relied upon the dissent in *Keyes*, *supra*, to find that lessor royalties can be interests in land depending on the intentions of the parties and the language used to create the interest. The Court of Appeal in *Scurry-Rainbow* did not base its decision on this issue.

14 The appellant referred to cases that held royalty interests not to be interests in land. (See *St. Lawrence Petroleum Ltd. v. Bailey Selburn Oil & Gas Ltd.*, [1963] S.C.R. 482; *Vanguard Petroleums Ltd. v. Vermont Oil & Gas Ltd.*, [1977] 2 W.W.R. 66 (Alta. S.C.T.D.); *Isaac v. Cook* (1982), 44 C.B.R. 39 (N.W.T.S.C.); *Guaranty Trust Co. v. Hetherington* (1987), 50 Alta. L.R. (2d) 193 (Q.B.), aff'd in part [1989] 5 W.W.R. 340 (Alta. C.A.); *Vandergrift v. Coseka Resources Ltd.* (1989), 67 Alta. L.R. (2d) 17 (Q.B.); *Nova Scotia Business Capital Corp. v. Coxheath Gold Holdings Ltd.* (1993), 128 N.S.R. (2d) 118 (S.C.).) Although each of these cases held that the royalty therein is not an interest in land, they do not support the proposition that a royalty cannot be an interest in land. In each case the court found

cas du titulaire d'une redevance dérogatoire, il n'y avait pas lieu de faire de distinction entre ces deux redevances dans l'effet qui leur est attribué à titre d'intérêts fonciers, puisque les deux intérêts sont essentiellement identiques. Les motifs du juge Laskin ont eu pour effet de rendre inapplicable, du moins quant aux redevances dérogatoires, la règle de common law interdisant la création d'intérêts fonciers à partir d'intérêts incorporels.

Le juge Laskin a conclu que la redevance dérogatoire était un intérêt foncier, analogue à une rente-charge. Il est significatif qu'il n'ait pas jugé que toutes les redevances dérogatoires étaient des intérêts fonciers. Il a estimé que les intentions des parties révélées par les termes du contrat de redevance permettraient de décider si les parties avaient l'intention de créer un intérêt foncier ou uniquement des droits contractuels.

Dans *Scurry-Rainbow Oil Ltd. c. Galloway Estate* (1993), 138 A.R. 321 (B.R.), conf. par (1994), 157 A.R. 65 (C.A.), et dans *Canco Oil and Gas Ltd. c. Saskatchewan* (1991), 89 Sask. R. 37 (B.R.), les juges Hunt et Matheson, respectivement, se sont fondés sur l'opinion dissidente exprimée dans *Keyes*, précité, pour conclure que les redevances de bailleur pouvaient être des intérêts fonciers selon les intentions des parties et les termes employés pour créer l'intérêt. La Cour d'appel dans *Scurry-Rainbow* n'a pas fondé sa décision sur cette question.

L'appelante a cité des décisions où il a été jugé que des droits de redevance n'étaient pas des intérêts fonciers. (Voir *St. Lawrence Petroleum Ltd. c. Bailey Selburn Oil & Gas Ltd.*, [1963] R.C.S. 482; *Vanguard Petroleums Ltd. c. Vermont Oil & Gas Ltd.*, [1977] 2 W.W.R. 66 (C.S. 1re inst. Alb.); *Isaac c. Cook* (1982), 44 C.B.R. 39 (C.S.T.N.-O.); *Guaranty Trust Co. c. Hetherington* (1987), 50 Alta. L.R. (2d) 193 (B.R.), conf. en partie par [1989] 5 W.W.R. 340 (C.A. Alb.); *Vandergrift c. Coseka Resources Ltd.* (1989), 67 Alta. L.R. (2d) 17 (B.R.); *Nova Scotia Business Capital Corp. c. Coxheath Gold Holdings Ltd.* (1993), 128 N.S.R. (2d) 118 (C.S.).) Bien que dans toutes ces décisions, il ait été statué que la redevance en cause n'était pas un intérêt foncier, elles ne permettent pas d'affirmer qu'une redevance ne peut

that the language used by the parties in creating the interest did not evidence the intention to create an interest in land.

That royalties can be interests in land finds support in W. H. Ellis's "Property Status of Royalties in Canadian Oil and Gas Law" (1984), 22 *Alta. L. Rev.* 1, at p. 10:

> Royalties, as used in the oil and gas industry, make sense only if they are property interests in unproduced minerals. Owners of mineral rights should be able to create them as such if they make clear their intent to do so.

In *Oil & Gas Agreements Update* (1989), J. F. Newman in his article "Can a Gross Overriding Royalty Be an Interest in Land?" concludes that most parties to an overriding royalty interest intend for such interest to be an interest in land. Evidence of this is the common practice of registering caveats in the Land Titles Office of Alberta seeking to protect that interest.

The oil and gas industry, which developed largely in the second half of the 20th century and continues to evolve, is governed by a combination of statute and common law. The application of common law concepts to a new or developing industry is useful as it provides the participants in the industry and the courts some framework for the legal structure of the industry. It should come as no surprise that some common law concepts, developed in different social, industrial and legal contexts, are inapplicable in the unique context of the industry and its practices.

The appellant could not offer any convincing policy reasons for maintaining the common law prohibition on the creation of an interest in land from an incorporeal hereditament other than fidelity to common law principles. Given the custom in the oil and gas industry and the support found in case

jamais être un intérêt foncier. Dans chacune, la cour a conclu que les termes employés par les parties pour créer l'intérêt ne révélaient pas l'intention de créer un intérêt foncier.

15 La thèse selon laquelle les redevances peuvent constituer des intérêts fonciers est étayée par l'article de W. H. Ellis, « Property Status of Royalties in Canadian Oil and Gas Law » (1984), 22 *Alta. L. Rev.* 1, p. 10 :

> [TRADUCTION] Les redevances, telles qu'utilisées dans le secteur des hydrocarbures, n'ont de sens que si elles constituent des intérêts de propriété dans les minéraux non encore produits. Les titulaires des droits miniers doivent pouvoir créer de tels intérêts, s'ils précisent clairement que telle est leur intention.

16 Dans l'article intitulé « Can a Gross Overriding Royalty Be an Interest in Land? », publié dans *Oil & Gas Agreements Update* (1989), J. F. Newman conclut que, la plupart du temps, il est de l'intention des parties à un contrat de redevance dérogatoire que le droit de redevance constitue un intérêt foncier. En fait foi la pratique courante qui consiste à enregistrer des oppositions au bureau d'enregistrement des titres fonciers de l'Alberta afin de protéger ces intérêts.

17 Le secteur des hydrocarbures, qui s'est développé en grande partie dans la seconde moitié du XX^{e} siècle et continue d'évoluer, est régi par un ensemble de lois et de règles de common law. L'application des notions de common law à une industrie nouvelle ou en évolution est utile, car elle fournit aux intervenants de l'industrie et aux tribunaux un cadre juridique à l'intérieur duquel structurer les activités de ce secteur. Il n'est guère étonnant que certaines notions de common law élaborées dans des contextes sociaux, industriels et juridiques différents soient inapplicables dans le contexte particulier de ce secteur d'activité et de ses pratiques.

18 L'appelante n'a pu invoquer aucune raison de principe convaincante justifiant le maintien de la règle de common law qui interdit la création d'un intérêt foncier à partir d'un héritage incorporel, si ce n'est la fidélité aux principes de common law. Étant donné, d'une part, la coutume dans le secteur des

law, it is proper and reasonable that the law should acknowledge that an overriding royalty interest can, subject to the intention of the parties, be an interest in land.

19 The Alberta Court of Appeal offered compelling insight into the evolution of the law at para. 52:

> The principles inherent in the above argument need not be applied to prevent an overriding royalty from being an interest in land for a number of reasons. First, royalties and ORRs need not be classified into a traditional common law property category unsuited to the realities of the oil and gas industry and need not be subject to the arcane strictures of traditional categories. Second, some authorities suggest it is possible to have an incorporeal interest (an overriding royalty) created from an incorporeal interest. Third, even if it is not possible, the rule need not be blindly adhered to because, as stated by Mr. Justice Holmes in "The Path of the Law" (1897) 10 Harv. L. Rev. 457 at p. 469, it is "revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV," and "still more revolting if the grounds upon which it was laid down have vanished long since, and the rule persists from blind imitation of the past."

20 In *Friedmann Equity Developments Inc. v. Final Note Ltd.*, [2000] 1 S.C.R. 842, 2000 SCC 34, at para. 42, Bastarache J. outlined when changes to the rules of common law are necessary:

> (1) to keep the common law in step with the evolution of society,
>
> (2) to clarify a legal principle, or
>
> (3) to resolve an inconsistency.

In addition, the change should be incremental, and its consequences must be capable of assessment.

21 In this appeal, to clarify the status of overriding royalties, the prohibition of the creation of an interest in land from an incorporeal hereditament is inapplicable. A royalty which is an interest in land may be created from an incorporeal hereditament such as

hydrocarbures et, d'autre part, l'appui fourni par la jurisprudence, il est opportun et raisonnable que la loi reconnaisse qu'un droit de redevance dérogatoire peut constituer un intérêt foncier, à condition que telle soit l'intention des parties.

La Cour d'appel de l'Alberta nous offre des réflexions convaincantes sur l'évolution du droit, au par. 52 :

> [TRADUCTION] Il n'est pas nécessaire d'appliquer les principes qui se dégagent de l'argument précité pour empêcher qu'une redevance dérogatoire ne constitue un intérêt foncier, et ce pour plusieurs raisons. D'abord, il n'est pas nécessaire de classer les redevances et les redevances dérogatoires dans les catégories classiques du droit des biens en common law qui ne s'accordent pas avec les réalités du secteur pétrolier et gazier, ni de les assujettir aux définitions ésotériques des catégories classiques. Ensuite, certaines sources semblent indiquer qu'il est possible qu'un intérêt incorporel (une redevance dérogatoire) soit créé à partir d'un intérêt incorporel. Enfin, même si cela n'était pas possible, nous ne serions pas tenus de suivre la règle aveuglément, puisque, pour reprendre les propos du juge Holmes dans « The Path of the Law » (1897) 10 Harv. L. Rev. 457, p. 469, il est « choquant que la valeur d'une règle de droit ne tienne qu'à son ancienneté, dût-elle remonter à Henri IV », et « encore plus choquant que son fondement ait disparu depuis longtemps, mais qu'elle subsiste en raison d'un passéisme aveugle. »

Dans *Friedmann Equity Developments Inc. c. Final Note Ltd.*, [2000] 1 R.C.S. 842, 2000 CSC 34, par. 42, le juge Bastarache a mis en lumière les cas où une modification de la common law sera nécessaire :

> (1) pour permettre à la common law de suivre l'évolution de la société;
>
> (2) pour préciser un principe de droit;
>
> (3) pour éliminer une contradiction.

De plus, la modification doit être graduelle et ses conséquences doivent pouvoir être évaluées.

Dans le présent pourvoi, pour préciser le droit en matière de redevances dérogatoires, l'interdiction de créer un intérêt foncier à partir d'un héritage incorporel est inapplicable. Une redevance qui est un intérêt foncier peut être créée à partir d'un héritage

a working interest or a *profit à prendre*, if that is the intention of the parties.

Virtue J. in *Vandergrift*, *supra*, at p. 26, succinctly stated:

> . . . it appears reasonably clear that under Canadian law a "royalty interest" or an "overriding royalty interest" can be an interest in land if:
>
> 1) the language used in describing the interest is sufficiently precise to show that the parties intended the royalty to be a grant of an interest in land, rather than a contractual right to a portion of the oil and gas substances recovered from the land; and
>
> 2) the interest, out of which the royalty is carved, is itself an interest in land.

VI. Conclusion

The appeal is dismissed with costs to the respondents.

Appeal dismissed.

Solicitors for the appellant: Jones, Rogers, Toronto.

Solicitors for the respondents: McDonald Crawford; Bennett Jones, Calgary.

incorporel tel qu'une participation directe ou un profit à prendre, si telle est l'intention des parties.

22 Dans *Vandergrift*, précité, p. 26, le juge Virtue dit succinctement :

> [TRADUCTION] . . . il semble assez clair que, selon le droit canadien, un droit de redevance ou un droit de redevance dérogatoire peut être un intérêt foncier si les conditions suivantes sont réunies :
>
> (1) les termes employés pour décrire l'intérêt sont suffisamment précis pour démontrer l'intention des parties que la redevance constitue un intérêt foncier, plutôt qu'un droit contractuel sur une fraction des hydrocarbures extraits du sol;
>
> (2) l'intérêt dont est issue la redevance est lui-même un intérêt foncier.

VI. Conclusion

23 Le pourvoi est rejeté avec dépens en faveur des intimés.

Pourvoi rejeté.

Procureurs de l'appelante : Jones, Rogers, Toronto.

Procureurs des intimés : McDonald Crawford; Bennett Jones, Calgary.