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Vancouver Registry

Court of Appeal for British Columbia

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF THE
PROVINCE OF BRITISH COLUMBIA

PLAINTIFF
(APPELLANT)

AND:

NATIONAL BANK OF CANADA, THE GOVERNOR AND COMPANY OF ADVENTURERS OF ENGLAND TRADING INTO HUDSON BAY carrying on business as THE BAY, and COOPERS & LYBRAND LIMITED

DEFENDANTS
(RESPONDENTS)

Before: The Honourable Chief Justice McEachern
The Honourable Mr. Justice Legg
The Honourable Mr. Justice Hollinrake

W. A. Pearce, Q.C. and J. Pottinger — Counsel for the Appellant

S.F. Dunphy — Counsel for the Respondents National Bank of Canada and Coopers & Lybrand Limited

M. R. Storrow, Q.C. and F. Lamer — Counsel for the Respondent The Governor and Company of Adventurers of England Trading into Hudson Bay carrying on business as The Bay

Place and Date of Hearing: Vancouver, British Columbia
June 21, 1994

Place and Date of Judgment: Vancouver, British Columbia
November 17, 1994

Written Reasons by:
The Honourable Mr. Justice Hollinrake

Concurred in by:
The Honourable Chief Justice McEachern
The Honourable Mr. Justice Legg

VANCOUVER
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COURT OF APPEAL
REGISTRY

Court of Appeal for British Columbia

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA

v.

NATIONAL BANK OF CANADA, THE GOVERNOR AND COMPANY OF ADVENTURERS OF ENGLAND TRADING INTO HUDSON BAY carrying on business as THE BAY, and COOPERS & LYBRAND LIMITED

Reasons for Judgment of Mr. Justice Hollinrake:

1 This is an appeal where the Crown in an action in which it is the appellant before us asserts a right to funds paid to the receiver of a company now in bankruptcy by retailers who collected tobacco tax under the *Tobacco Tax Act*, R.S.B.C. 1979, c. 404 and amending acts.

2 The judgment in the court below is reported at (1993), 75 B.C.L.R. (2d) 35.

3 Coopers & Lybrand Limited ("Coopers") was appointed as agent by The National Bank of Canada (the "Bank") on August 12, 1988 to realize upon security granted by Red Carpet Distribution Inc. ("Red Carpet") over inventory and accounts receivable pursuant to s. 178 of the *Bank Act* and a general assignment of book debts. Red Carpet was a tobacco wholesaler.

4 The Hudson's Bay Company (the "Bay") was a second secured creditor of Red Carpet on inventory and accounts receivable pursuant to separate security. Red Carpet was deemed to have made an assignment in bankruptcy effective August 30, 1988 following the failure of a proposal under the *Bankruptcy Act* made on that date.

5 Shoppers Drug Mart Store #243 (SDM) was and is a retailer which sells, along with a good many other products, tobacco goods. The Crown, in what it describes as a test case, claims $31,017.57, calculated as the tax payable upon tobacco products furnished under four invoices which were paid by SDM on September 20, 1988 to the receiver of Red Carpet.

6 There were three motions made in this case all under Rule 18A of the Rules of Court. Two of those motions were made by the Crown. One sought judgment against the Bank and Coopers generally. The other sought judgment against the Bay in the sum of $31,017.57 alleging that the Bay held in trust those monies which it had received from the Bank's receiver after the Bank's security was satisfied. The third motion was by the Bay to dismiss the Crown's claim as found in paras. 5 to 12 inclusive of the amended statement of claim.

7 The chambers judge said in her judgment that all three motions were before her. The order entered following the hearing of these motions refers to the application of the Crown for judgment against

the Bay and to the Bay's motion to dismiss the claims of the Crown as found in paras. 5 to 12 of the amended statement of claim. As I read the order of the court below no reference is made to the Crown's motion for judgment generally against the Bank and Coopers. The operative part of the order reads:

> THIS COURT ORDERS THAT:
>
> 1. The Plaintiff's application under Rule 18A of the Supreme Court Rules is dismissed; and
> 2. The Plaintiff's claims made at Paragraphs 5 to 12 of the Amended Statement of Claim and prayers (a) and (b) of the prayer for relief are therefore dismissed.

8 There is then before us the judgment of the court below dismissing the Crown's 18A motion for judgment against the Bay in the sum of $31,017.57 and the Bay's successful motion to strike out the claims of the Crown as found in paras. 5 to 12 of the amended statement of claim. Paras. 5 to 12 of that amended statement of claim read:

> 5. Every consumer who acquires tobacco in the Province of British Columbia is required at the time of purchase to pay the Provincial Crown a tax (S. 2(1) Tobacco Tax Act). The tax imposed by the Tobacco Tax Act is collected by the retail dealer at the time of sale and remitted to the Minister in the manner prescribed by the Regulations (S. 2(5) Tobacco Tax Act). Under the Tobacco Tax Act Regulations every wholesale dealer in the Province is deemed to be a "collector" by the Minister (S. 4(8) Tobacco Tax Act Regulations). Red Carpet as a "collector" was required to remit taxes pursuant to S. 6 of the Tobacco Tax Act Regulations.
>
> 6. The collection scheme under the Tobacco Tax Act and Regulations required Red Carpet to remit tax to the Director appointed under the Tobacco Tax Act on the 20th day following the end of the 23rd day of the previous

month pursuant to an authorization made pursuant to S. 6(2) of the Tobacco Tax Act Regulations. Red Carpet agreed to remit taxes based upon its purchases of tobacco for the preceding month as aforesaid. Red Carpet's retail dealers in turn paid Red Carpet tobacco tax based upon sales of tobacco by Red Carpet to the retail dealers. Red Carpet's invoices to its dealers included the tax component on the tobacco.

7. At the time Red Carpet made its remittance each month to the Director, most of the tobacco which it had purchased in the previous month would have been sold by its retail dealers to consumers and tax paid on that tobacco. By the time Red Carpet's retail dealers paid their invoices to Red Carpet, most of the tobacco which they purchased would have been sold and tax collected on same. To the extent that Red Carpet's retail dealers prepaid tax to be collected, the monies which Red Carpet received from its retail dealers were imprest with a trust in favour of the retail dealers and the Plaintiff jointly, such that when the tobacco was ultimately sold the monies which Red Carpet held in trust for the retail dealers and the Crown was then held in trust for the Provincial Crown by operation of law and by reason of S. 15 of the Tobacco Tax Act. To the extent that Red Carpet prepaid tax to the Crown, the Crown in turn was obliged to remit any trust monies to retail dealers directly who had prepaid taxes to Red Carpet where the retail dealers were unable to sell the tobacco.

8. The Plaintiff states that as at August 11, 1988, Red Carpet owed the Crown the sum of $6,248,844 based upon purchases which it made for the period June 24, 1988 to July 23, 1988. In addition, Red Carpet purchased tobacco for the period July 24, 1988 to August 12, 1988 for which tobacco tax was payable in the amount of $2,679,511.

9. On August 12, 1988, the Bank appointed Coopers & Lybrand as its receiver to collect on the receivables of Red Carpet pursuant to its security. On August 30, 1988, Red Carpet was petitioned into bankruptcy.

10. The Plaintiff states that for tobacco which was purchased by Red Carpet between June 23, 1988 and August 12, 1988 taxes were paid by consumers in the Province of British Columbia totalling $8,928,355. Approximately $4.9 million was remitted to Red Carpet by its retail dealers prior to August 12, 1988 and approximately $4 million was collected by Coopers & Lybrand as agent for the Bank from Red Carpet's retail dealers after August

12, 1988. The monies which Red Carpet and Coopers & Lybrand received totalling $8,928,355 were at all material times the property of the Plaintiff. Further, at all material times, Red Carpet and Coopers & Lybrand were a fiduciary for those monies received from Red Carpet's retail dealers as aforesaid. The Plaintiff was the trust beneficiary of those monies.

11. With respect to monies collected by Red Carpet up to and including August 12, 1988, the Plaintiff states that these monies were wrongfully used by the Bank to retire the indebtedness of Red Carpet to the Bank. The Bank knew or ought to have known that a significant portion of all revenues received by Red Carpet from its retail dealers consisted of taxes, which tax monies were imprest with a trust by reason of S. 15 of the Tobacco Tax Act and/or by operation of law. Further, the Bank must be taken to have known that where tobacco was sold on credit the first payments made by retail dealers are deemed to include the full amount of the tax by reason of S. 13 of the Tobacco Tax Act Regulations. In causing Red Carpet to make payments on its indebtedness, or in appropriating cash on hand as at August 12, 1988, the Bank knowingly appropriated trust funds as aforesaid and in utilizing the monies for its own use breached its trust obligations to the Plaintiff wherein the Plaintiff sustained damages in the approximate sum of $4.9 million.

12. The monies collected by Coopers & Lybrand as the Bank's agent were similarly imprest with a trust. With respect to monies collected by Coopers & Lybrand after August 12, 1988 as agent for the Bank these monies were knowingly transferred to the Bank and/or The Bay when Coopers & Lybrand knew or ought to have known that the monies were the property of the Plaintiff and that it had a fiduciary obligation to remit these monies to the Plaintiff. These monies were misapplied by the Bank and The Bay to reduce the indebtedness of Red Carpet with them. Alternatively, the monies are presently held by The Bay in a trust account of its agent Peat Marwick. The Plaintiff states that at all material times the Bank and The Bay knew that the receivables as aforesaid included tobacco taxes and prepaid tobacco taxes and as such were obliged to hold the proceeds from same in trust as aforesaid. By misapplying the funds, The Bay and the Bank have breached their fiduciary obligations with the Plaintiff and the Plaintiff has sustained damages in the approximate sum of $4 million.

9 I set out now the relevant portions of the *Tobacco Tax Act* and ss. 5 and 6 of the regulations pursuant to that Act.

> **Tax on consumer**
> **2.** (1) Every consumer shall, at the time of making a purchase of tobacco, pay to Her Majesty in right of the Province a tax at the rate of
>
> . . .
>
> (5) The tax imposed by this Act shall be collected by the retail dealer at the time of the sale and shall be remitted to the minister at the time and in the manner prescribed by the regulations.
> (6) Every dealer shall be deemed to be an agent for the minister and as such shall levy and collect the tax imposed by this Act on the purchaser.
>
> . . .
>
> **15.** Every person who collects any tax under this Act shall be deemed to hold it in trust for Her Majesty in right of the Province and for the payment over of it in the manner and at the time provided under this Act or the regulations; and the amount, until paid, forms a lien and charge on the entire assets of that person, or his estate in the hands of any trustee, having priority over all other claims of any person.
>
> . . .
>
> TOBACCO TAX ACT REGULATIONS
>
> . . .
>
> **5.** every dealer who is not a collector shall collect the tax imposed by the act and shall pay over the tax to a collector on demand.
> **6.** (1) every collector shall
> (a) on or before the 20th day of each month in respect of the previous month, deliver to the director such return as he requires, and
> (b) remit with the return required by paragraph (a) the amount of the tax as computed in the return.
> (2) Notwithstanding subsection (1), the director may, upon application in writing, authorize a collector who maintains his records so that he closes his books at the end of a period that does not coincide with a calendar month but that is not longer in duration than 5 weeks, to deliver the report and remit the tax required by subsection (1) on or before the 20th day following the end of such period.

10 The chambers judge set out the legislative and administrative scheme in issue here in some detail, and I quote from her judgment (pp. 39-41, (B.C.L.R):

> *The Legislative Scheme and the Administrative Scheme*
>
> It is a striking fact that the manner in which taxes are collected under the *Tobacco Tax Act* is completely different from what one would expect from a reading of the Act. Subsection 2(1) states that "Every consumer shall, at the time of making a purchase of tobacco, pay to Her Majesty in Right of the Province a tax..." Subsection 2(5) provides that the tax shall be collected by the retail dealer at the time of sale and remitted to the Minister in the manner prescribed. Section 5 of the Regulations requires that every "dealer" (i.e., a person who sells tobacco either at the wholesale or retail level) must "collect the tax imposed by the Act" and "pay over the tax to a collector on demand". Subsection 6(1) of the Regulations requires that each "collector" (i.e., every dealer appointed by the Minister to act as his agent in collecting tax under the Act) file a return within 20 days of the end of each month in respect of that month and remit it with the amount of tax computed therein. Applying the definitions to the parties here, Red Carpet was both a "dealer" and a "collector", and each of its retail customers, such as the SDM store in the Crown's example, was both a "dealer" and "retail dealer" for purposes of the statute.
>
> Section 15 of the Act provides that every person who collects any tax under the Act shall be deemed to hold it in trust for Her Majesty and that the amount until paid "forms a lien and charge on the entire assets of that person ... having priority over all other claims of any person." Similar language to this, further supplemented, was of course at issue in *Henfrey Samson*.
>
> Constitutionally, the legislative scheme seems unassailable, as it imposes a "direct tax" - i.e., one intended to be imposed on the very person who is required to pay it: see *Atlantic Smoke Shops Ltd. v. Conlon*, [1943] 3 W.W.R. 113, [1943] A.C. 550, [1943] 2 All E.R. 393, [1943] 4 D.L.R. 81 (P.C.), at p. 122 [W.W.R.]. In practice, however, the tax is collected in a very different manner. It is, to quote Barr, J. in *423092 Ontario Ltd. v. Minister of National Revenue* also quoted

by our Court of Appeal in *Tseshaht Band v. British Columbia*, 69 B.C.L.R. (2d) 1, 94 D.L.R. (4th) 97, [1992] 4 C.N.L.R. 171, at p. 15 [B.C.L.R.], " 'a direct tax ... collected indirectly.' " The most important provision in this regard is s. 15 of the Regulations, which states:

> The Minister or the Director may, subject to the Act and the regulations, enter into agreement with collectors for the purpose of facilitating collection and payment of the tax.

On the strength of this provision, the Province requires that as a condition of being licensed under the Act to sell tobacco products, each wholesale dealer undertake to remit to the Province within 20 days of the end of each month or period, an amount based on its purchases of tobacco in the month or period. None of the parties was able to produce a copy of the agreement between Red Carpet and the Crown, but it was generally acknowledged that in accordance with this arrangement, Red Carpet normally remitted the appropriate amount to the Crown by the 21st of each month, based on its tobacco purchases in the previous month. The amount so paid then became one of Red Carpet's inventory costs and was assumedly passed along to its retail customers. In turn, the retailer assumedly passed the cost along to its customers, the tobacco consumers.

I say "assumedly" because there was no requirement of law, and no practice, under which the tax had to be passed along at either level: the wholesaler and retailer were free to sell at any price, including one that was less than cost, if they wished. It would appear they could even *give* the products away under the scheme. There was no requirement that they "break out" separately in the price charged for tobacco products, the amount of "tax" or the amount remitted by Red Carpet to the Crown; nor that they segregate any particular amount received on the sale of the products, retain it in any separate account, or file a return of tax collected. No such procedure was necessary, of course, because the Crown had already received what I will call its "tax substitute" at an earlier stage in the chain. (On this point, see *Tseshaht*, supra, at 15 and *Chehalis Indian Band et al v. British Columbia* (1988) 31 B.C.L.R. (2d) 333, 53 D.L.R. (4th) 761, [1989] 1 T.S.T. 3008, 2 T.C.T. 4017, [1989] 1 C.N.L.R. 62 (C.A.), at p. 340 [B.C.L.R.].) It relied on the marketplace to pass the added cost along to consumers

> at the end of that chain. In theory it received no more and no less than what it would have received had the tax been collected directly from retailers. (The Crown advised that it is the Province's practice to give a refund where an overpayment occurs as a result of the administrative scheme - where, for example, a retailer's stock is destroyed by fire.)
>
> (emphasis mine)

11 I think the trial judge was right in saying the sum of $31,017.57 the Crown seeks to recover is not the tax paid and collected from the consumer upon the tobacco products included in the four invoices, but funds which are a substitute for that tax.

12 I deal now with the facts as to how the sum of $31,017.57 was arrived at.

13 The first thing to note is that the owner of the SDM store was not concerned about the amount of tax being collected by the store from customers. He deposed from an examination of the invoices paid by his store to Red Carpet on September 20, 1988:

> I am satisfied that the tobacco products were sold to retail customers and taxes collected thereon prior to my payment to Coopers & Lybrand Ltd. on September 20, 1988 with the exception of the following tobacco products: .... These tobacco products had not been reordered when the payment was made on September 20, 1988 and accordingly I am not in a position to know how much of these tobacco products had in fact been sold as at September 20, 1988. However, these tobacco products were subsequently reordered and accordingly all of the tobacco products purchased with the subject invoices were in fact sold and taxes collected thereon. To the extent that some of these products would not have been sold prior to September 20, 1988, I would have considered my payment on

> September 20, 1988 with respect to these products to include the full tax component of the tobacco products which I expect to sell.

By this, I understand the owner to be saying that because of the administrative scheme, he did not concern himself with the amount of tax collected on sales. Instead, he paid invoices which included a component for tax, within 21 days of receipt of product, and he cannot say how much of the product was sold and how much remained on his shelves on the date of payment.

14 The calculation of this $31,017.57 is made by the Crown. This understanding is shared by the trial judge who said at p. 41 (B.C.L.R.):

> Not surprisingly then, the owner of the store involved in the SDM "test case", Mr. Bird, was not aware of the amount of "tax" being collected by him or being paid to Red Carpet from time to time. However, the Crown relies on the average turnover rate for tobacco products stated in Mr. Bird's affidavit to reach the conclusion that by the time SDM normally paid its invoices (within 21 days of receipt of the products), most if not all those products would have been sold.

15 The figure of $31,017.57 is calculated by the Crown from four invoices.

16 The last tax remitted to the Crown by Red Carpet was for products purchased from manufacturers in the period between May 21, 1988 through June 17, 1988. Based on Red Carpet's average turnover of tobacco product, the last tobacco product on which Red Carpet

had already paid tax left Red Carpet's Vancouver warehouse approximately 8 days after June 17, i.e. June 25. However, Red Carpet's inventory was not segregated in a fashion which would correspond to the inventory for the period of tobacco tax remittances, and accordingly there is no calculation available of Red Carpet's **actual** turn over of inventory. Therefore it is possible, although unlikely, that the tobacco products delivered in the four invoices included product on which tax had already been paid by Red Carpet in their monthly tax remittance. Counsel for the Crown did advise that the scheme permits the wholesaler to recoup from the tax collected any amount which he may have prepaid to the Crown.

17 In the next monthly period, Red Carpet's purchases from producers from June 18, 1988 until July 22, 1988, Red Carpet failed to remit its tobacco tax remittance due on August 11, 1988. Furthermore, there is no evidence of a tobacco tax remittance based on Red Carpet's purchases of tobacco from manufacturers from July 23, 1988.

18 The tobacco products, which are the subject matter of the test case, were delivered to SDM on July 20, 1988, July 27, 1988, August 4, 1988 and August 10, 1988. By the time SDM **usually** paid their invoices (i.e. 21 days following receipt of the tobacco products) most of the tobacco products on those invoices would have

been sold. With a few exceptions the tobacco products listed in the SDM invoices were sold to consumers prior to the payment of the amount owing under these invoices to Red Carpet on September 20, 1988.

19 The following is a hypothetical example of how the administrative scheme worked in the payment of the tobacco tax:

20 Day 1: Red Carpet as a wholesale dealer purchases one dollar of tobacco from a tobacco manufacturer. Red Carpet makes a record of this purchase for the tobacco tax remittance it is required to submit for the month 20 days after the end of the monthly period. The moneys to be remitted are what has been referred to as the "tax substitute" by the trial judge. On average all tobacco purchased on Day 1 would be sold to retail dealers like SDM by Day 8-10.

21 Day 2: Red Carpet delivers tobacco to SDM and invoices it. Let us say Red Carpet invoices SDM for three dollars. Red Carpet understands the two dollar markup to consist of inventory costs and profit. Part of the cost of the inventory is however the one dollar attributable to the tax substitute. The amount invoiced includes all of Red Carpet's costs, including an amount attributable to the tax substitute that Red Carpet will have to pay based on their purchase on Day 1. Red Carpet does not segregate out in any way, nor are they required to, the one dollar they are

charging SDM which is attributable to the tax substitute they <u>will</u> pay the Crown.

22 Day 3: The consumer purchases the tobacco from SDM for four dollars, let us say one dollar of which represents SDM's profit. SDM puts the purchase money in the cash register and then in a general operating account from which SDM pays suppliers, etc. Although there is no evidence of what kind of account SDM put the money earned from tobacco sales, it is agreed they did not segregate it in any way, nor did they segregate out any amount attributable to tobacco tax. At no time is any record made by SDM of the amount of the purchase money which is attributable to tobacco tax. In fact, SDM does not <u>know</u> the amount attributable to tobacco tax. All SDM knows is that it has been invoiced by Red Carpet for three dollars and Red Carpet has some arrangement with the Crown to take care of the tobacco tax.

23 Day 23: SDM pays its invoice to Red Carpet for the full three dollars. During the time between Day 3 when the tobacco was sold and Day 23 the one dollar the Crown calculates as being attributable to the tobacco tax has been in SDM's general operating account. No evidence is available as to the balance of this account during this time period and indeed whether it was in a credit position at all times.

24 SDM treated that one dollar as it treated the full three dollars: as part of its general revenue. When Red Carpet received the payment from SDM it put it in its general operating account where it was mixed with its other funds. It did not treat the one dollar which could be attributed to the tobacco tax any differently than the rest of SDM's payment or any other payments it received.

25 Day 28: For the purposes of this example, this is the end of the monthly period for each tobacco tax remittance. Red Carpet adds up all its purchases from tobacco manufacturers in the past 28 days (in this example only one purchase) and fills out the tobacco tax remittance form which provides for a calculation of the amount of one dollar that must be remitted with the form.

26 Day 48: Due date of tobacco tax remittance based on Red Carpet's purchases from manufacturers in the period from Day 1 to Day 28. Based on the Day 1 purchase the amount remitted would be one dollar. Again, this is the tax substitute.

27 In the case of the $31,017.57 at issue there are a few notable differences. This amount is calculated based on four invoices like the one made on Day 3 of the hypothetical example. The remittance on Day 48 was made with an NSF cheque, which is the subject of that portion of the Crown's amended statement of claim not at issue

before the chambers judge. Furthermore, three of the invoices involved were for deliveries which occurred between Day 28 and Day 48, and therefore did not form part of the tax remittance due on Day 48.

28 In addition, SDM did not pay the four invoices at issue to Red Carpet within the usual 21 days. The affidavit material suggests that on the date of Coopers' appointment, SDM's national head office directed the individual stores not to pay Red Carpet pending the receipt of legal advice. An agreement was reached between Coopers and SDM head office that the head office would direct individual stores to pay their account by 21 September. SDM #243 paid its account to Coopers on September 20, 1988. This payment was 61 days, 54 days, 47 days and 41 days following each respective delivery date of the products in the invoices.

29 The position of the Crown generally is that its right to what it asserts are tobacco tax moneys arises from:

1. Trust. The Crown says the three requirements of certainty of intention, subject matter and object are met. As to intention, the Crown says this comes expressly from s. 15 of the Act or alternatively it can be implied. As to subject matter the Crown says this has been established in the calculation of the figure of

$31,017.57. The object of the trust is clear on its face.

2. The relationship between the Crown and Red Carpet under the *Tobacco Tax Act* was one of principal and agent. An agent owes fiduciary duties in equity to his principal. Equity thus being invoked, it is open to the Crown to trace the sum of $31,017.57 into the hands of the Bay and thus assert a constructive trust or equitable lien over these funds. See: P.D. Maddaugh and J.D. McCamus, *The Law of Restitution*, Canada Law Book Inc. 1990, p. 127.

3. The Bay has been unjustly enriched in the sum of $31,017.57 and that being so the Court should impose a constructive trust over that fund now being held in trust.

30 I deal firstly with the Crown's assertion of trust and express intention.

31 The starting point here is *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24. The chambers judge referred to this case at the outset of her reasons and went on to say at p. 38 (B.C.L.R.):

> There, the Supreme Court of Canada held that a "deemed" trust created by statute in favour of the provincial Crown was not a "trust" for purposes of s. 67 of the *Bankruptcy Act*, R.S.C. 1985, C.B.-3 and therefore did not exempt the subject-matter of the trust from the normal scheme of distribution established under the Act. Here,

> the question is whether, under the "administrative scheme" established by the Province of British Columbia for the collection of tax under the *Tobacco Tax Act*, a non-statutory or "ordinary" trust existed for the benefit of the Provincial Crown in respect of funds paid by tobacco retailers to the receiver of accounts of a wholesaler of tobacco products. The wholesaler is now bankrupt. If such a trust existed, or if a constructive trust is created, the funds so paid will fall outside the estate of the bankrupt in accordance with s. 67 of the *Bankruptcy Act* and may be traced or followed into the defendants' hands. If no such trust existed, and if none is constructed as a remedy for unjust enrichment, the Crown's claim against the defendants must fail and the Crown may be limited to its recourse against the bankrupt estate. I suspect that this recourse is likely to be fruitless.

32 In ***Henfrey Samson*** McLachlin, J. delivered the majority judgment and I quote at length from that judgment:

> The issue on this appeal is whether the statutory trust created by s. 18 of the British Columbia *Social Service Tax Act*, R.S.B.C. 1979, c. 388, gives the province priority over other creditors under the *Bankruptcy Act*, R.S.C. 1970, c. B-3.
>
> Tops Pontiac Buick Ltd. collected sales tax for the provincial government in the course of its business operations, as it was required to do by the *Social Service Tax Act*. Tops mingled the tax collected with its other assets. When the Canadian Imperial Bank of Commerce placed Tops in receivership pursuant to its debenture and Tops made an assignment in bankruptcy, the receiver sold the assets of Tops and applied the full proceeds in reduction of the indebtedness of the bank.
>
> The province contends that the *Social Service Tax Act* creates a statutory trust over the assets of Tops equal to the amount of the sales tax collected but not remitted ($58,763.23), and that it has priority over the bank and all other creditors for this amount.
>
> The Chambers judge held that the *Social Service Tax Act* did not create a trust and that the province did not

have priority. On appeal the receiver conceded that the legislation created a statutory trust, but contended that the chambers judge was correct in ruling that the Province did not have priority because the *Bankruptcy Act* did not confer priority on such a trust. The British Columbia Court of Appeal accepted this submission. The Province now appeals to this Court.

The section of the *Social Service Tax Act* which the Province contends gives it priority provides:

> **18.** (1) Where a person collects an amount of tax under this Act
> (a) he shall be deemed to hold it in trust for Her Majesty in right of the Province for the payment over of that amount to Her Majesty in the manner and at the time required under this Act and regulations, and
> (b) the tax collected shall be deemed to be held separate from and form no part of the person's money, assets or estate, whether or not the amount of the tax has in fact been kept separate and apart from either the person's own money or the assets of the estate of the person who collected the amount of the tax under this Act.
> (2) The amount of taxes that, under this Act,
> (a) is collected and held in trust in accordance with subsection (1); or
> (b) is required to be collected and remitted by a vendor or lessor
> forms a lien and charge on the entire assets of
> (c) the estate of the trustee under paragraph (a);
> (d) the person required to collect or remit the tax under paragraph (b); or
> (e) the estate of the person required to collect or remit the tax under paragraph (d).

The province argues that s. 18(1) creates a trust within s. 47(a) of the *Bankruptcy Act*, which provides:

> **47.** The property of a bankrupt divisible among his creditors shall not comprise
> (a) property held by the bankrupt in trust for any other person.

The respondent, on the other hand, submits that the deemed statutory trust created by s. 18 of the *Social Service Tax Act* is not a trust within s. 47 of the *Bankruptcy Act*, in that it does not possess the attributes of a true trust. It submits that the province's claim to the tax money is in fact a debt

falling under s. 107(1)(*j*) of the *Bankruptcy Act*, the priority to which falls to be determined according to the priorities established by s. 107.

> 107. (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:
>
> . . .
>
> (*j*) claims of the Crown not previously mentioned in this section, in right of Canada or of any province, *pari passu* notwithstanding any statutory preference to the contrary.

. . .

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

Practical policy considerations also recommend this interpretation of the *Bankruptcy Act*. The difficulties of extending s. 47(*a*) to cases where no specific property impressed with a trust can be identified are formidable and defy fairness and common sense.

. . .

In summary, I am of the view that s. 47(*a*) should be confined to trusts arising under general principles of law, while s. 107(1)(*j*) should be confined to claims such as tax claims not established by general law but secured "by her Majesty's personal preference" through legislation. This conclusion, in my opinion, is supported by the wording of the sections in question, by the jurisprudence of this Court, and by the policy considerations to which I have alluded.

I turn next to s. 18 of the *Social Service Tax Act* and the nature of the legal interests created by it. At the moment of collection of the tax, there is a deemed statutory trust. At that moment the trust property is identifiable and the trust meets the requirements for a trust under the principles of trust law. The difficulty in this, as in most cases, is that the trust property soon ceases to be identifiable. The tax money is mingled

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

Applying these observations on s. 18 of the *Social Service Tax Act* to the construction of ss. 47(*a)* and 107(1)(*j*) of the *Bankruptcy Act* which I have earlier adopted, the answer to the question of whether the province's interest under s. 18 is a "trust" under s. 47(*a*) or a "claim of the Crown" under s. 107(1)(*j*) depends on the facts of the particular case. If the money collected for tax is identifiable or traceable, then the true state of affairs conforms with the ordinary meaning of "trust" and the money is exempt from distribution to creditors by reason of s. 47(*a*). If, on the other hand, the money has been converted to other property and cannot be traced, there is no "property held ... in trust" under s. 47(*a*). The province has a claim secured only by a charge or lien, and s. 107(1)(*j*) applies.

In the case at bar, no specific property impressed with a trust can be identified. It follows that s. 47(*a*) of the *Bankruptcy Act* should not be construed as extending to the province's claim in this case.

The province, however, argues that it is open to it to define "trust" however it pleases, property and civil rights being matters within provincial competence. The short answer to this submission is that the definition of "trust" which is operative for purposes of exemption under the *Bankruptcy Act* must be that of the federal Parliament, not the provincial legislatures. The provinces may define "trust" as they choose for matters within their own legislative competence, but they cannot dictate to parliament how it should be defined for purposes of the *Bankruptcy Act: Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board.*

> Nor does the argument that the tax money remains the property of the Crown throughout withstand scrutiny. If that were the case, there would be no need for the lien and charge in the Crown's favour created by s. 18(2) of the *Social Service Tax Act*. The province has a trust interest and hence property in the tax funds so long as they can be identified or traced. But once they lose that character, any common law or equitable property interest disappears. The province is left with a statutory deemed trust which does not give it the same property interest a common law trust would, supplemented by a lien and charge over all the bankrupt's property under s. 18(2).

33 As I read the judgment of McLachlin, J. the underlying principle leading to her conclusions is that the provinces cannot legislate within their own spheres of activity such as "to create their own priorities under the *Bankruptcy Act* and to write a differential scheme of distribution on bankruptcy from province to province."

34 In her reasons for judgment under the heading "Implied Trust" the chambers judge said at pp. 42-44 (B.C.L.R.):

> Can it be said a trust cognizable under "general principles of law" existed in these circumstances, such that the result in *Henfrey Samson* is avoided? It is almost trite law that the three prerequisites to the creation of a trust, whether express or implied, are certainty of the settlor's intention to create a trust, certainty of the subject-matter of the trust, and certainty of objects: See Waters, *The Law of Trusts in Canada* 2nd ed. (1984), c. 5. In my view, the trust advocated by the Crown in respect of funds paid by retailers such as SDM to Coopers in satisfaction of Red Carpet's invoices clearly fails to meet the first two of these criteria.

Dealing first with intention, the Crown argues that SDM would have "expected" that "if Red Carpet did not pay the Crown as contemplated by the Administrative Scheme to which [SDM] was a party, Red Carpet would not appropriate the moneys to its own use but would remit the taxes and prepaid taxes to the Crown. Otherwise [SDM] would remain liable for payment of the taxes to the Crown." As a result of this expectation, says Mr. Pearce, a fiduciary relationship arose in equity which gives rise to an implied trust, or an in rem interest, in respect of the funds. In this regard, he quotes the following passage from Waters, at p. 1044:

> A fiduciary relationship arises in equity whenever one person places trust and confidence in another. The occasion for this trust and confidence may be that X permits his property to be in Y's hands for some particular purpose, or that X places Y in an office which he is to discharge for X such as the performance of a particular task.

These comments are made in the context of Dr. Waters' exploration of the tracing remedy. He goes on to note that courts of Equity historically imposed a "preliminary requirement of fiduciary relationship" for the remedy and that this requirement survived the adoption of the Judicature Acts in Canada although it is "now probably gone" as a condition for the imposition of a constructive trust and "may now be gone as a constituent element of the tracing remedy as well." I do not read this, however, as meaning that certainty of intent is not necessary for the existence of a trust: on the contrary, the example given contemplates that the property delivered or paid given by X to Y is *intended* to be used for a particular purpose for X's benefit. In a sense, Y is acting as the agent of X, if he is not already a fiduciary of some kind. He is not, as Mr. Dunphy said in his very able argument, intended to be free to use the money or property as he pleases.

Putting the Crown's case at its strongest, the evidence indicates that SDM knew or assumed that arrangements had been made at the wholesale level for the payment of the tax and that therefore SDM did not have to worry about the problem. This general "assumption" about the arrangements between the Crown and the wholesaler does not in my view constitute the specific intention necessary for the creation of a trust, express or

implied, in respect of tax collected by the retailer. The situation is not like that in *Lowndes Lambert Group Ltd. v. Specialty Underwriting Services Ltd.* (1986) 11 B.C.L.R. (2d) 308 (S.C.); *Barclay's Bank, Ltd. v. Quistclose Investments Ltd.*, [1970] A.C. 567, [1968] 3 All E.R. 651 (H.L.); *Salter & Arnold Ltd. v. Dominion Bank*, [1923] 3 W.W.R. 257, 4 C.B.R. 379 (Man.K.B.); or *McEachren v. Royal Bank of Canada* (1990), [1991] 2 W.W.R. 702, 2 C.B.R. (3d) 29, 78 Alta. L.R. (2d) 158 (Q.B.), where, had the person paying the money or delivering the property to another, been asked his intentions in doing so, he would likely have responded so that the recipient will carry out my specific intention and nothing else. Here, had the retailer been asked the same question, his reply would have been "to pay my debt to Red Carpet". The funds so paid were not intended or expected to remain SDM's property unless and until some calculation of tax was carried out and the appropriate amount remitted on SDM's behalf to the Crown. Indeed, as Mr. Bird's affidavit discloses (at para.4(i)), he assumed that Red Carpet had paid "the taxes" (as opposed to the tax substitute) at the wholesale level pursuant to its arrangement with the Crown. He expected that Red Carpet would be reimbursed for this cost when he paid his invoice, and that is what in fact happened: the funds paid to Red Carpet were deposited into its general account and mingled with its other funds, and SDM received a corresponding credit in its account with Red Carpet.

This is not to say that a trustee's mingling of trust funds with other funds precludes the creation of a trust in the first place, although one case, *Re Christie Grant, Ltd.*, [1922] 3 W.W.R. 1161, 3 C.B.R. 361, [1923] 1 D.L.R. 505 (C.A.), has held just that. (See the discussion in Waters, at pp. 1039-1140.) But where, as here, the "mingling" is in fact intended by the alleged settlor of the trust, or where segregation is *not* intended, certainty of intention becomes very uncertain indeed. This is my interpretation of the reasoning in *Red Carpet v. Lega Fabricating Ltd.* (1981), 29 B.C.L.R. 161, 126 D.L.R. (3d) 148 (C.A.), and in *Re Points of Call Holidays Ltd.* (1991), 54 B.C.L.R. (2d) 384, 5 C.B.R. (3d) 299, 41 E.T.R. 56 (S.C.). I also note my respectful agreement with the observation of Esson, C.J.B.C. in the latter case that the decision of the Supreme Court of Canada in *Lowden v. R.*, [1982] 2 S.C.R. 60, 22 Alta. L.R. (2d) 289, 68 C.C.C. (2d) 531, 139 D.L.R. (3d) 257, the

> case most strongly relied upon by Mr. Pearce in these proceedings, did not turn on the concept of trust.

35 The Crown says that the very words of s. 15 make it plain that "when retailers collect tax, the tax monies are subject to a trust for the benefit of the Provincial Crown and that when monies are remitted to wholesalers/"collectors" the same trust relationship is intended." (Crown factum). This was not dealt with by the chambers judge.

36 With respect, I do not think the Crown can rely on the statute to create the facts necessary to establish a trust under general principles of trust law. I think this would be contrary to the underlying principle in *Henfrey Samson*. That principle being that the province cannot legislate to, in effect, create its own priorities contrary to those in the *Bankruptcy Act*. If the province cannot deem a trust in order to accomplish this I cannot see how it can by legislation create facts through that legislation to accomplish the same end.

37 I turn now to the Crown's assertion in the alternative that on the facts there is an implied intention to create a trust. I have set out above how the chambers judge dealt with the issue of implied intention.

38 I think it significant that SDM did not, nor did it need to because of the manner in which the tax was being collected, concern itself with any records to demonstrate at the end of the day what funds were tax moneys on the sale of tobacco. I do not think there is any evidence to lead to the conclusion that SDM considered that these funds were trust funds at the time it made a sale of tobacco to its customer. In Mr. Bird's affidavit he deposes that these funds were not segregated. It can only be assumed there was intermingling by SDM of these so called trust funds with other funds derived from the sale of other products. I cannot see how it can be said that on remitting to Red Carpet SDM intended to remit trust funds. Any such inference, in my opinion, would not accord with the manner in which SDM handled these funds or the collection system set up by the province. I repeat the words of the chambers judge set out above at pp. 43-44 (B.C.L.R.):

> The situation is not like that in *Lowndes Lambert Group Ltd. v. Specialty Underwriting Services Ltd.* (1986) 11 B.C.L.R. (2d) 308 (S.C.); *Barclay's Bank Ltd. v. Quistclose Investments Ltd.*, [1970] A.C. 567, [1968] 3 All E.R. 651 (H.L.); *Salter & Arnold Ltd. v. Dominion Bank*, [1923] 3 W.W.R. 257, 4 C.B.R. 379 (Man. K.B.); or *McEachren v. Royal Bank* (1990), [1991] 2 W.W.R. 702, 2 C.B.R. (3d) 29, 78 Alta. L.R. (2d) 158 (Q.B.) where, had the person paying the money or delivering the property to another, been asked his intentions in doing so, he would likely have responded "so that the recipient will carry out my specific intention and nothing else." Here, had the retailer been asked the same question, his reply would have been "to pay my debt to Red Carpet". The funds so paid were not intended or expected to remain SDM's property unless and until some calculation of tax was carried out and the appropriate amount remitted on SDM's behalf to the Crown.

39 I agree with everything said in this passage. I am unable to see any facts from which a trust could be implied. I cannot view the relationship between SDM and Red Carpet as other than a debtor-creditor one. I think this follows from the manner in which the province chose to collect the tax.

40 I conclude the trust asserted by the Crown does not in law exist because of the lack of certainty of intention be it expressed or implied.

41 Having concluded there is no certainty of intention, either express or implied, it is not necessary for me to deal with certainty of subject matter. However, I do record here that the chambers judge concluded there was no certainty of subject matter saying at p. 44, (B.C.L.R.):

> Although it is unnecessary for me to do so, I also conclude that the second condition for the existence of a trust, certainty of subject matter, is not met, since on these facts it cannot be said with certainty how much of every dollar paid by retailers such as SDM to Red Carpet represented tobacco products in respect of which Red Carpet had already remitted its "tax substitute", and how much represented tobacco products in respect of which the Crown had yet to be paid. For this reason as well, the "share" of the funds to which the Crown as the alleged beneficiary of the trust would be entitled was not ascertainable.

42 I turn now to the tracing issue. This was not dealt with by the chambers judge.

43 The position of the Crown on this issue is set out in its factum as follows:

> Even if the Funds were not impressed with a trust, either express or implied, the Crown is still entitled to a remedy against Coopers/the Bank for breach of fiduciary duty and is entitled to trace the Funds into the hands of The Bay.

44 This aspect of the appeal deals with the dismissal of the Crown's Rule 18A application for judgment against the Bay in the sum of $31,017.57.

45 The basis for this submission of the Crown is that Coopers stepped into the shoes of Red Carpet which it says by the *Tobacco Tax Act* makes Coopers an agent of the Crown for collecting the tax.

46 For the purpose of dealing with this submission I will assume that even without the provisions of the Act deeming an agency relationship between the Crown and Red Carpet (s. 2(6)), Red Carpet was an agent of the Crown for the purpose of collecting the tax. I make that assumption notwithstanding the position taken by the Bank that Coopers cannot be an agent of the Crown for this purpose because by its appointment it is an agent of the Bank for the purpose of collecting Red Carpet's receivables. I will also assume that Red Carpet, being an agent of the Crown for this purpose, had fiduciary obligations to the Crown as agent thus invoking equity and the principles of tracing. My last assumption is that ***Re***

Hallett's Estate (1880), 13 Ch.D. 696 (C.A.) is the law of British Columbia when it comes to tracing.

47 The principle in *Re Hallett's Estate* that is significant to this case is that intermingling of trust funds does not of itself prevent tracing. In that case the court held that where there is intermingling the law presumes that the wrongdoer's funds are first taken from the intermingled fund and what remains are trust funds. At p. 727-8 Jessel M.R. said:

> Now, first upon principle, nothing can be better settled, either in our own law, or, I suppose, the law of all civilised countries, than this, that where a man does an act which may be rightfully performed, he cannot say that that act was intentionally and in fact done wrongly. ...
>
> When we come to apply that principle to the case of a trustee who has blended trust moneys with his own, it seems to me perfectly plain that he cannot be heard to say that he took away the trust money when he had a right to take away his own money. The simplest case put is the mingling of trust moneys in a bag with money of the trustee's own. Suppose he has a hundred sovereigns in a bag, and he adds to them another hundred sovereigns of his own, so that they are commingled in such a way that they cannot be distinguished, and the next day he draws out for his own purposes £100, is it tolerable for anybody to allege that what he drew out was the first £100, the trust money, and that he misappropriated it, and left his own £100 in the bag? It is obvious he must have taken away that which he had a right to take away, his own £100. What difference does it make if, instead of being in a bag, he deposits it with his banker, and then pays in other money of his own, and draws out some money for his own purposes? Could he say that he had actually drawn out anything but his own money? His money was there, and he had a right to draw it out, and why should the natural act of simply drawing out the money be attributed to anything except to his ownership of money which was at his bankers.

48 The rule enunciated in *Re Hallett's Estate* was further refined in *James Roscoe (Bolton), Ltd. v. Winder*, [1915] 1 Ch. 62. In that case £455.18 of what was found to be trust funds were deposited by the trustee into his general personal account. Two days later he had withdrawn and spent for his own purposes that money with the exception of a remaining £25.18. Subsequently he paid more of his own money into the account, so that at the time of his death there was £358.5. The beneficiary applied to trace the funds for the full amount in the account at the trustee's death claiming it had a charge in the amount of £455.18.

49 Sargant J., in rejecting the beneficiary's claim that it had a continuing charge over the account in the amount of £455 said at pp. 68-69:

> ... the trust moneys cannot possibly be traced into this common fund, which was standing to the debtor's credit at this death to an extent of more than 25l, because although prima facie under the...rule in *Re Hallett's Estate*, any drawings out by the debtor ought to be attributed to the private moneys which he had at the bank and not to the trust moneys, yet, when the drawings out had reached such an amount that the whole of his private money part had been exhausted, it necessarily followed that the rest of the drawings must have been against trust moneys...You must for the purpose of tracing, which was the process adopted in *Re Hallett's Estate*, put your finger on some definite fund which either remains in its original state or can be found in another shape. That is tracing and tracing, by the very facts of this case, seems to be absolutely excluded except as to the 25*l* 18s."

50 This case has been applied by the Ontario Court of Appeal in *Re Norman Estate* (1951), O.R. 752 (C.A.). In addition, that Court acknowledged with approval the "lowest intermediate balance" rule in *Re Ontario Securities Commission and Greymac Credit Corp.* (1986), 55 O.R. (2d) 673 (C.A.) at pp. 687-8, affirmed and reasons of the Court of Appeal adopted, [1988] 2 S.C.R. 172. The headnote for this case says *Roscoe* was not followed. However, on a reading of the judgment I do not find this so. (See also *Maddaugh and McCamus*, supra, at p. 153.) I also note the lowest intermediate balance rule was applied by Taylor J. (as he then was) in *Coopers & Lybrand v. R. in right of Canada, et al* (1981), 32 B.C.L.R. 71 (B.C.S.C.).

51 I think this result is a logical one and one that accords with principle. In A. W. Scott, *Scott on Trusts*, 4th ed. by W.F. Fratcher, Little Brown & Co., 1989 §518.1, p. 640, the author says:

> ... the real reason for allowing the claimant to reach the balance [of the mixed fund] is that he has an equitable interest in the mingled fund which the wrongdoer cannot destroy as long as any part of the fund remains; <u>but there is no reason for subjecting other property of the wrongdoer to the claimants claim any more then to the claims of other creditors merely because the money happens to be put in the same place where the claimant's money formerly was, unless the wrongdoer actually intended to make restitution to the claimant.</u>"
>
> (emphasis mine)

52 In the case before us, in my opinion, the tracing exercise must logically commence from the time the moneys could arguably be said to be the Crown's moneys. This must be at the time the tobacco tax is collected from consumers by SDM. The Crown argues that when Red Carpet is paid for its invoices by SDM the amount of those invoices which can be calculated to be attributable to tobacco tax is the starting point for the tracing exercise. This calculated amount is still "tax" as defined by the Act but can it be said to be identifiable as the actual tax paid over by the consumer at the time of purchase of the tobacco product from SDM? There is a difference between calculating what one is owed over a set period of time as opposed to tracing the funds that initially represented that debt in the form of money in the hands of the debtor.

53 The calculation leads to an in personam remedy in debt. The tracing leads to an in rem remedy by way of a constructive trust or equitable lien.

54 To trace the money from the time it is paid to SDM is, as I have said above, the only logical starting point. It follows that the $31,017.57 sought by way of judgment against the Bay must be the same $31,017.57 all the way through the administrative scheme commencing with the payment by the customer to SDM.

55 I also note here that if SDM had gone into bankruptcy, this case would be the same as the ***Henfrey Samson*** case on its facts. SDM is the equivalent of the retailer Tops Pontiac in ***Henfrey Samson***. In ***Henfrey Samson*** there was intermingling on the part of Tops Pontiac and this meant the tax moneys could not be traced (see p. 34 (S.C.R.)). Here there is intermingling on the part of SDM <u>and</u> on the part of Red Carpet.

56 With SDM and Red Carpet having intermingled the "tax money" with all their other funds, and the time frame being as it is, I cannot see how this "tax money" could possibly be identified to permit successful tracing.

57 On this issue I conclude the Crown cannot succeed.

58 I turn now to the Crown's submission as to unjust enrichment and the imposition by the court of a remedial constructive trust over the $31,017.57.

59 The Crown says the Bay has been unjustly enriched in that "tax money", that by the provisions of the ***Tobacco Tax Act*** should properly be in the hands of the Crown, is now in the hands of the Bay.

60 The Crown submits the requirements for the imposition of a remedial constructive trust as set out in ***Pettkus v. Becker***, [1980] 2 S.C.R. 834 have been met. The respondents say that when this $31,017.57 came into the hands of Coopers and then to the Bay it was not impressed with a trust but rather became part of the estate of Red Carpet in bankruptcy. They say that whether or not these funds are part of the estate of Red Carpet must be determined as at the date of bankruptcy. That is, if there was no trust at the date of bankruptcy - August 30, 1988 - the funds coming into the hands of Coopers were subject to the Bank's security. The $31,017.57 came into the hands of Coopers after August 30, 1988. In response to this the Crown says, and I quote from its factum:

> It is clear that a constructive trust can be deemed to have arisen when the duty to make restitution arose (i.e. upon the collection of the tax).

61 This assertion calls on the court to protect the Crown against the results of the method of collection devised by it. The collection scheme was such that on the collection of the "tax money" there was no obligation whatever on SDM or Red Carpet to remit those funds at the time of collection to the Crown. That is the reality. That is a reality resulting from the dictates of the Crown as found in the regulations to the Act which dictate the method of collection. The constructive trust is a remedy subject to equitable principles. I have some difficulty in the Crown asking the court to impose a constructive trust as at the time when

the "tax money" was collected by SDM or Red Carpet where firstly, the facts giving rise to the need for such a trust result from the Crown's collection scheme devised by it, and secondly, the result of the imposition of such a trust would be to intervene in the priority scheme of the *Bankruptcy Act*. However, before the issue of remedy the Crown must establish there is an unjust enrichment.

62 In finding against the Crown on this issue the chambers judge said at pp. 45-6 (B.C.L.R.):

> Again, however, I find that none of the required elements exists in the case at bar. The Crown's argument that Coopers or the secured creditors will be "enriched" unless a constructive trust is imposed seems to be predicated on a breach of trust or duty on their part. I have found that no ordinary trust existed, and the Supreme Court of Canada has in the past ruled that a *deemed* trust is ineffective in the context of the *Bankruptcy Act*. Thus I cannot see how the Crown can succeed in the argument that the secured creditors have been "enriched" in a manner that equity should remedy. The creditors have not received and will not receive anything more than what they were owed by Red Carpet. Nor were the funds received by Coopers and the secured creditors at the expense of the Crown in particular. The Crown is only one of several creditors who will suffer loss, and that loss is a result of Red Carpet's *bankruptcy*, not of a wrongful act on the part of the defendants or a mistake on the part of the Crown. In short, the juristic reason for the loss in this case is the operation of the *Bankruptcy Act*. No case was cited to me in which the operation of a statute has been the occasion for a constructive trust remedy, however unfair or unjust the statute may seem. I therefore conclude that the Crown also fails on this branch of its claim.

63 In my opinion, the trial judge was right in concluding there is no unjust enrichment here. The fact is the Bay lays claim to

this $31,017.57 by reason of it being a secured creditor and the priority provisions of the *Bankruptcy Act*. In *Atlas Cabinets & Furniture Ltd. v. National Trust Co.* (1990), 45 B.C.L.R. (2d) 99, Lambert J.A. in this Court said at p. 110:

> But it is important to understand what is meant by "enrichment", by "deprivation", and by "juristic reason" in the context of a commercial relationship where ordinary and extraordinary flows of funds are part of the reality and purpose of the relationship. To my mind the key to the correct interpretation and application of the decisions of the Supreme Court of Canada on this subject to a commercial relationship is to focus on the "unjust" element of "unjust enrichment". In that respect it is worthwhile to go back to the impetus given to this cause of action by the decision of the House of Lords in *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.*, [1943] A.C. 32, [1942] 2 All E.R. 122. In the judgment of Lord Wright, which was approved by Mr. Justice Cartwright, for the majority of the Supreme Court of Canada, in *Deglman v. Guar. Trust*, this is said at p. 61:
>
> > It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution.
>
> In 66 Am. Jur. 2d at p. 945, unjust enrichment is defined as "the unjust retention of a benefit to the loss of another, or the retention of money or property of another, against the fundamental principles of justice or equity and good conscience." And see *Major-Blakeney Corp. v. Jenkins*, 263 P. 2d 655 (Cal.Dist.C.A.,1953); *B & M Die Co. v. Ford Motor Co.*, 421 N.W. 2d 620 (Mich.C.A.1988); and *Belpar Marine Inc. v. Adams & Porter Inc.* 638 F. Supp. 1001 (Dist.Ct., 1986). Those cases

> illustrate the continuing insistence in the United States that the enrichment must be against equity and good conscience. In my opinion the concept of the injustice of the enrichment as being against sound commercial conscience must continue to guide the application of the three tests in *Pettkus v. Becker* when they are applied to a commercial relationship.

64 I do not see how it can be said that the enrichment here, if it be such, is "against equity and good conscience" when the funds are in the hands of the Bay as a result of the security it held and the operation of the priority provisions of the *Bankruptcy Act*. In my opinion, security agreements such as we have here and the priority provisions of the *Bankruptcy Act* provide sufficient juristic reason for any "enrichment" to counteract any suggestion of that "enrichment" being unjust.

65 The Crown says this Court should be guided by the decision of the Saskatchewan Court of Appeal in *Taypotat v. Surgeson*, [1985] 3 W.W.R. 18 and impose a constructive trust to prevent what it describes as a windfall to secured creditors in this bankruptcy. *Taypotat* dealt with a series of building contracts between councillors of an Indian band and a construction company which went bankrupt before completion of the houses. The trustee in bankruptcy rejected the claim of the purchasers of those uncompleted houses. The Court found for the purchasers on two grounds. First, on the basis of the building contracts

establishing the purchasers' legal proprietary right in the uncompleted houses, and second, on the principle of unjust enrichment impressing a constructive trust over the uncompleted houses. The Court recognized that the imposition of a constructive trust in that situation was disruptive of the scheme of priorities in the *Bankruptcy Act* by referring by analogy to statutory deemed trusts created by parliament and the provincial legislatures. At p. 37 (W.W.R.) the Court said:

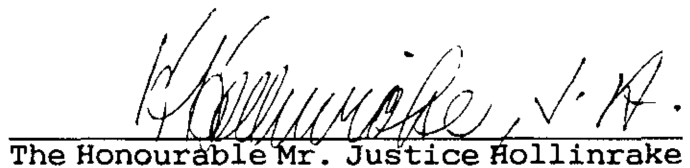
> In this particular case we are not required to consider limiting factors to the remedial sweep flowing from a constructive trust. The appellants' claim is limited to the five partly completed houses which are readily identifiable. We accordingly leave the question of limiting factors for future consideration.
>
> We would, however, observe that, in the circumstances of this case, we reject any notion that the relief granted is disruptive of the scheme of priorities in bankruptcies or under the Personal Property Security Act, 1979-80 (Sask.), c. P-6.1. Parliament has had no difficulty in creating statutory deemed trusts with respect to Canada pension contributions or unemployment insurance. The legislature of this province has created and deemed trusts with respect to wages and vacation pay under the Labour Standards Act, R.S.S. 1978, s. L-1, and statutory charges under the Education and Health Tax Act, R.S.S. 1978, c. E-3; see for example *Royal Bank of Can. v. G.M. Homes Inc.* (1984), 52 C.B.R. (N.S.) 224, 26 B.L.R. 297, 4 P.P.S.A.C. 116, 10 D.L.R. (4th) 439, 34 Sask.R. 195 (C.A.).

66 As I read this passage the Saskatchewan Court of Appeal felt at liberty to grant a remedy that would be "disruptive of the scheme of priorities in bankruptcies" because the provincial legislature had created deemed trusts that did just that. With

respect, I think that reasoning must fall in the face of the principle enunciated by the Supreme Court of Canada in ***Henfrey Samson*** that provincial legislatures cannot legislate deemed trusts which have the effect of interfering with the priority provisions of the ***Bankruptcy Act***.

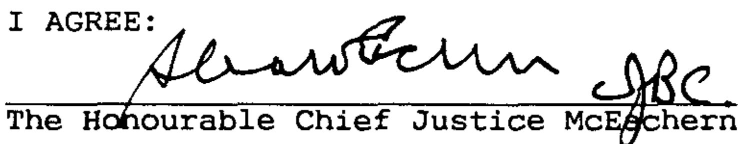
67 For these reasons I think the Crown has failed to establish unjust enrichment on the part of the Bay and, that being so, the claim for constructive trust over the sum of $31,017.57 must fail.

68 I would dismiss the appeal.



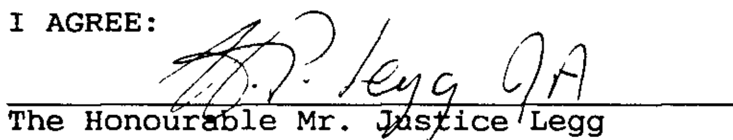
The Honourable Mr. Justice Hollinrake

I AGREE:



The Honourable Chief Justice McEachern

I AGREE:



The Honourable Mr. Justice Legg