Federal Court  Cour fédérale

Date: 20180525

Docket: T-1834-15

Citation: 2018 FC 538

Ottawa, Ontario, May 25, 2018

PRESENT: Mr. Justice Grammond

BETWEEN:

HER MAJESTY THE QUEEN

Plaintiff

and

THE TORONTO-DOMINION BANK

Defendant

JUDGMENT AND REASONS

[1] Tax legislation equips the government with very powerful tools to ensure that taxes are properly paid. One of those tools is the deemed trust – when a person collects taxes from a taxpayer and fails to remit those taxes to the government, the law imposes a trust upon the person's property. This trust operates in priority to any security interest in the property.

[2] In this action, the Crown seeks to recover money that the Toronto-Dominion Bank received from one of its customers in payment of a loan secured by a mortgage. The Crown

asserts that the customer failed to remit GST amounts that he had collected, thus bringing the deemed trust into operation. It says that the legislation required the Bank to reimburse the payments made by the customer out of the property held in trust. The Bank disagrees. It says that it is a "*bona fide* purchaser for value" and it is therefore not caught by the deemed trust and has no duty to repay.

[3] I am allowing the Crown's claim. The legislation imposes an obligation on the Bank to repay the money it received from its customer and it necessarily excludes the defence of *bona fide* purchaser for value. Even if this result appears harsh, it was clearly contemplated by Parliament.

I. Facts

[4] Mr. Weisflock carried on a landscaping business as a sole proprietorship. In 2007 and 2008, he collected but failed to remit goods and services tax [GST] to the Receiver General for a total amount of $67,854. The plaintiff, Her Majesty the Queen [the Crown], claims this amount pursuant to section 222 of the *Excise Tax Act*, RSC 1985, c E-15 [ETA].

[5] The defendant, Toronto-Dominion Bank [the Bank], is engaged in the business of lending money. In 2010 the Bank granted Mr. Weisflock and his spouse a Home Equity Line of Credit [HELOC] and a mortgage [Mortgage]. Both loans were secured upon Mr. Weisflock's house and charges in favour of the Bank were duly registered. At the time of these applications the Bank was not aware of Mr. Weisflock's GST debts.

[6] In 2011, Mr. Weisflock sold his house. From the proceeds of the sale of the house, Mr. Weisflock fully repaid the outstanding debt of the HELOC and the Mortgage to the Bank. The Bank did not enforce its securities against Mr. Weisflock and the security interests registered against his house were discharged.

[7] In April 2013 the Canada Revenue Agency [CRA] issued a demand letter to the Bank seeking payment of $97,327 on the basis of the deemed trust mechanism of the ETA with respect to Mr. Weisflock's failures to remit GST in 2007 and 2008. The Bank had no prior notice of CRA's claim. In February 2015 CRA issued a revised demand letter to the Bank seeking payment of an amount of $67,854, correcting the previous amount claimed which mistakenly included interest owing by Mr. Weisflock.

[8] The Bank refused to pay the amount of $67,854. The Crown seeks payment of this amount, pre and post-judgment interest on this amount, costs, and any other relief that this Court may allow.

II. Statutory Scheme

[9] This case requires me to interpret the deemed trust provisions found in section 222 of the ETA. That section is very similar to section 227 of the *Income Tax Act*, RSC 1985 c 1 (5th Supp) [ITA]. Other federal statutes contain similar provisions (see, for example, the *Employment Insurance Act*, SC 1996 c 23 s 86(2.1)), but I will refer only to the ETA and the ITA in these reasons. To understand the purpose and structure of those provisions, it is useful to look at their recent history.

[10] Prior to 1997, section 227 of the ITA and section 222 of the ETA merely provided that an employer who deducts or withholds income tax amounts (in the case of the ITA) or a person who collects GST (in the case of the ETA) holds that money in trust for Her Majesty. In *Royal Bank of Canada v Sparrow Electric Corp*, [1997] 1 SCR 411 [*Sparrow Electric*], the Supreme Court of Canada was confronted with a conflict between the deemed trust of section 227 of the ITA and the security interests of a creditor of the person who deducted tax but failed to remit it. The Court held that the deemed trust could not take priority over pre-existing security interests, thus defeating the Crown's claim.

[11] In the wake of *Sparrow Electric*, the government announced that it would introduce legislation that would give absolute priority to the deemed trust over secured creditors. Parliament amended the ITA in 1998 and the ETA in 2000. The relevant sections of both acts were amended to provide, first, that the deemed trust would extend to property acquired after the trust arises and, second, that the deemed trust would take priority over the security interests of creditors. Moreover, the following language was added to both provisions, which is particularly relevant to this case. I quote from section 222(3) of the ETA:

[property of the person] is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.	Ces biens sont des biens dans lesquels Sa Majesté du chef du Canada a un droit de bénéficiaire malgré tout autre droit en garantie sur ces biens ou sur le produit en découlant, et le produit découlant de ces biens est payé au receveur général par priorité sur tout droit en garantie.

[12] It should also be emphasized that, in section 222, Parliament resorted to a private law concept, the trust, to implement its intention. In doing so, Parliament is presumed to rely on the rules associated with this private law context to supplement the explicit provisions of the ETA. As the Supreme Court of Canada once said, tax legislation "does not operate in a vacuum but rather relies implicitly on the general law, especially the law of contract and property" (*Bastien Estate v Canada*, 2011 SCC 38 at para 49, [2011] 2 SCR 710; see also *Markevich v Canada*, 2003 SCC 9 at para 14, [2003] 1 SCR 94; *Will-Kare Paving & Contracting Ltd v Canada*, 2000 SCC 36 at paras 31-35, [2000] 1 SCR 915).

[13] This articulation between federal tax legislation and principles of private law, which fall under provincial jurisdiction, is also mandated by section 8.1 of the *Interpretation Act*, RSC 1985 c I-21 [*Interpretation Act*], which reads, in its relevant part:

[…] unless otherwise provided by law, if in interpreting an enactment it is necessary to refer to a province's rules, principles or concepts forming part of the law of property and civil rights, reference must be made to the rules, principles and concepts in force in the province at the time the enactment is being applied.	[…] s'il est nécessaire de recourir à des règles, principes ou notions appartenant au domaine de la propriété et des droits civils en vue d'assurer l'application d'un texte dans une province, il faut, sauf règle de droit s'y opposant, avoir recours aux règles, principes et notions en vigueur dans cette province au moment de l'application du texte.

[14] Hence, unless the ETA makes an exception explicitly or by necessary implication, the principles of the law of trusts – which form part of the "law of property and civil rights" – must be called in aid to ensure the proper application of section 222.

III. Analysis

[15] In order to adjudicate the Crown's claim, I first need to determine if section 222 of the ETA imposed on the Bank an obligation to repay the amount received from Mr. Weisflock. Second, I must decide whether the Bank may assert, in defence, that it is a *bona fide* purchaser for value of the money received from Mr. Weisflock. Third, I will consider the Bank's argument that it was no longer a secured creditor when the obligation to pay was "triggered." Lastly, I will address the policy considerations raised by the Bank.

A. *The obligation to pay proceeds*

[16] I first conclude that the amounts paid by Mr. Weisflock to the Bank were "proceeds" of the sale of his property, which was the subject of the deemed trust. I reach that conclusion on the basis of the language of section 222 of the ETA as well as the authority of precedent.

[17] Section 222 of the ETA and section 227 of the ITA are generally understood to accomplish two separate things. First, they establish the deemed trust and delineate what property is subject to it, including that affected by security interests. Second, they create an obligation to pay the proceeds of the trust property to the Receiver General. That obligation is often called a "statutory obligation", in an apparent effort to detach it from the rules governing trusts.

[18] In this case, the Crown does not allege that the Bank held property in trust. The deemed trust covered Mr. Weisflock's house, despite the mortgage that the Bank held on the house. The

Bank did not hold legal title to any property as a form of security, so the extension of the deemed trust to that category of property is not in play. Rather, the Crown alleges that the Bank has a "statutory obligation" under the final proviso of section 222(3), because it received the "proceeds" of the property, namely, part of the amount from the sale to a third party, when Mr. Weisflock reimbursed his loans.

[19] In response, the Bank argues that the "proceeds shall be paid" clause applies only where it enforces its security and sells the debtor's property to repay itself. In that situation, the secured creditor truly receives the proceeds of trust property and is subject to the "statutory obligation" to pay those proceeds to the Receiver General. From that perspective, "proceeds" would refer only to the amounts obtained by a secured creditor upon realizing on his security.

[20] The word "proceeds," however, is usually understood in a broader sense, which is not limited to the proceeds of a forced sale. For example, *Black's Law Dictionary* (10th ed. 2014) provides the following definition:

> 1. The value of land, goods, or investments when converted into money; the amount of money received from a sale <the proceeds are subject to attachment>.
>
> 2. Something received upon selling, exchanging, collecting, or otherwise disposing of collateral.

[21] While no definition of "proceeds" is found in the ETA or ITA, the term is defined in Ontario's *Personal Property Security Act*, RSO 1990 c P.10 at section 1:

"proceeds" means identifiable or traceable personal property in any form derived directly or	«produit» Bien meuble identifiable ou retrouvable sous quelque forme que ce soit,

indirectly from any dealing with collateral or the proceeds therefrom, and includes,	qui provient directement ou indirectement d'une opération relative au bien grevé ou à son produit. S'entend en outre de ce qui suit:
(a) any payment representing indemnity or compensation for loss of or damage to the collateral or proceeds therefrom,	a) un paiement à titre d'indemnité ou de réparation pour perte ou dégradation du bien grevé ou de son produit;
(b) any payment made in total or partial discharge or redemption of an intangible, chattel paper, an instrument or investment property, and	b) un paiement fait à titre de mainlevée ou de rachat total ou partiel d'un bien immatériel, d'un acte mobilier, d'un effet ou d'un bien de placement;
(c) rights arising out of, or property collected on, or distributed on account of, collateral that is investment property; ("produit")	c) les droits découlant d'un bien grevé qui est un bien de placement ou les biens recouvrés ou distribués au titre d'un tel bien grevé. («proceeds»)

[22] Those definitions suggest that the word "proceeds," especially when used in the context of security law, does not convey a meaning that is restricted to forced sales or the realization of security interests. I would also add that in *First Vancouver Finance v MRN*, 2002 SCC 49, [2002] 2 SCR 720 [*First Vancouver*], a case to which I will return later in these reasons, Justice Iacobucci appears to use the word "proceeds" to describe the amount received when voluntarily selling property ("while property which is sold to third party purchasers is released from the trust, at the same time, the proceeds of disposition of the alienated property are captured by the trust," at para 5; "the debtor is free to alienate its property in the ordinary course, in which case the trust property is replaced by the proceeds of sale of such property," at para 40).

[23] Moreover, the interpretation put forward by the Bank is foreclosed by precedent.

[24] In *Canada (Attorney General) v National Bank of Canada*, 2004 FCA 92 [*National Bank*], the Federal Court of Appeal dealt with a number of cases where financial institutions had realized upon the assets of their debtors, which also had tax debts that gave rise to a deemed trust. Justice Noël, as he then was, described the operation of the deemed trust provisions as follows:

> 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 […] (para 40)
>
> Parliament evidently wished to confer on the Crown an ongoing interest in the property that is deemed to be held in trust for as long as the tax debtor's default persists, and to subject the secured creditor to the obligation to remit to the Receiver General the proceeds arising from the property held in trust in absolute priority, to the extent of the unpaid debt. (para 50)

[25] These remarks may be understood as pertaining only to "proceeds" arising from the forced sale of assets subject to a security interest, which was the situation in that case. Subsequent cases, however, applied that reasoning, without distinction, to situations other than a forced sale by a secured creditor.

[26] The issue was considered in two cases decided together by Justice Pinard: *Canada (Attorney General) v Caisse populaire de la Vallée de l'Or*, 2005 FC 948 [*Vallée de l'Or*] and *Canada (Attorney General) v Caisse populaire Desjardins de Lyster*, 2005 FC 949 [*Lyster*]. In *Lyster*, the Caisse populaire held a movable hypothec over the property of its debtor. In order to

meet its obligations towards the Caisse populaire, the debtor sold a piece of equipment that was subject to the movable hypothec. The debtor then used the money it obtained from that sale to make a payment to the Caisse populaire. Justice Pinard commented as follows:

> In this case, it is true that the respondent did not officially realize its security interest against the debtor. However, there is nothing in the language of subsection 227(4.1) of the ITA that would subordinate the Crown's beneficial right to a similar official execution of a security interest against a tax debtor. […]
>
> In light of this interpretation, it is clear in this case that the monetary amount realized on the sale of the skidder by the tax debtor was the "proceeds" of a property subject to the deemed trust and that consequently, since this trust had ceased to attach to the skidder, the monetary consideration received by the tax debtor was now itself held in trust.
>
> It was precisely these "proceeds" in which the applicant had a beneficiary interest, that immediately, the very next day, were remitted in full by the tax debtor to the respondent by way of a deposit into its bank account for the purpose of reducing its debt to the respondent, thereby depleting the deemed trust by a corresponding amount. […] (paras 9-11)

[27] Justice Pinard then proceeded to cite as authority paragraph 40 of the *National Bank* decision of the Federal Court of Appeal, quoted above, which dealt with a forced sale. Justice Pinard extended the logic of *National Bank* to other situations where property subject to the trust is sold and the proceeds paid to a secured creditor. He thus ruled in favour of the Crown.

[28] The situation in *Vallée de l'Or* is slightly different. Like in *Lyster*, the debtor sold property voluntarily and used the proceeds to pay off a loan. The difference is that once the payment was made, the Caisse populaire's security was discharged, as the loan had been repaid in full. In *Lyster*, the Caisse populaire kept its security over the rest of the debtor's property because there was an amount outstanding on the loan. Nevertheless, Justice Pinard once again

ruled in favour of the Crown, repeating word for word the passages of his decision in *Lyster* that I have reproduced above.

[29] Before me, the Bank argued that *Vallée de l'Or* was wrongly decided and that *Lyster* should be confined to its specific facts, as the creditor kept a security interest after the disputed payment was made. The difficulty with this argument is that *Lyster* was confirmed by the Federal Court of Appeal (*Caisse populaire Desjardins de Lyster/Inverness/Val-Alain v Canada (Attorney General)*, 2006 FCA 367). Justice Létourneau stated that he could find no error in Justice Pinard's reasoning. Even though *Vallée de l'Or* was not appealed, Justice Pinard's reasons were identical in both cases and I must conclude that the Federal Court of Appeal's endorsement of his reasons in one case would equally apply to the other. As a result, it is not open to me to find that *Vallée de l'Or* was wrongly decided or to resort to the fine distinctions suggested by the Bank.

[30] A more recent case, *Canada v Callidus Capital Corporation*, 2017 FCA 162, buttresses that conclusion. A debtor sold part of his property and used the sale price to make payments to its creditor. The creditor never enforced its security. The case turned upon the issue of whether subsequent bankruptcy of the debtor extinguished not only the deemed trust, but also the statutory obligation of the creditor who received proceeds of the sale of trust assets. That question is not at issue here. Nevertheless, Justice Rennie, speaking for the majority of the Court, wrote that *National Bank* was dispositive (at para 23). He described the result in a manner that does not hinge upon the fact that proceeds were obtained as a result of a forced sale:

> In the present case, proceeds from a sale of the tax debtor's property were paid to the secured creditor. […] Proceeds were paid out of priority in contradiction to the express wording of

> subsection (3), which created an obligation, independent of the existence of the deemed trust, to pay. (para 31)

[31] To summarize, the phrase "the proceeds of the property shall be paid to the Receiver General" in section 222(3) of the ETA encompasses proceeds flowing from the voluntary sale of the tax debtor's property. Upon such a sale, a tax debtor has an obligation to pay the proceeds to the Receiver General. If the tax debtor fails to do so and pays a secured creditor instead, that creditor has an obligation to repay the money to the Crown.

[32] At the hearing, I asked counsel for the Crown whether the same logic would apply to unsecured creditors. He asserted that it did. I am not sure, however, that this is compatible with the wording of section 222(3), which requires proceeds of the property to be paid to the Crown "in priority to all secured interests." A contrary interpretation seems to have been adopted in *Canada (Attorney General) v Community Expansion Inc*, 72 OR (3d) 546 (Ont SCJ) at para 19, aff'd 2005 CanLII 1402 (Ont CA). It would also seem odd that Parliament provided a mechanism for the exemption of certain security interests in section 222(4), but not for the protection of unsecured creditors, if the latter are subject to the statutory obligation to pay. Given that the Bank was a secured creditor when it received the payment from Mr. Weisflock, and in light of my conclusion on the next question, it is not necessary for me to decide this issue.

[33] In this case, the money obtained by Mr. Weisflock in consideration for the transfer of his house to a third party constituted "proceeds" of property that was the subject matter of the deemed trust. Mr. Weisflock had an obligation to pay his tax debt with that money, but failed to

do so. Instead, he used that money to repay the Bank, a secured creditor. Therefore, the Bank had a statutory obligation to repay that money to the Crown.

B. *Bona fide purchaser for value*

[34] The Bank also relies on the defence of *bona fide* purchaser for value. In *First Vancouver*, the Supreme Court of Canada recognized the existence of such a defence in the context of the deemed trusts of the ETA and ITA. *First Vancouver* dealt with the ITA after it was amended in 1998 in the wake of *Sparrow Electric*.

[35] Here, the Bank says that it may avail itself of this defence, as it must be considered the purchaser of the money repaid to it by Mr. Weisflock. I agree that the Bank may describe itself in this manner. I am of the view, however, that *First Vancouver* and subsequent cases have deprived secured creditors of the possibility of invoking this defence. To understand why this is so, it is necessary to clarify the interaction between the deemed trust of the ETA and ITA and the *bona fide* purchaser for value defence.

(1) Source of the defence

[36] The defence of *bona fide* purchaser for value is firmly rooted in trust law. It is useful to step back to understand its doctrinal foundations. The starting point is the fact that when a trust is created, equity superimposes beneficial ownership over the legal title to the property that is the subject-matter of the trust. This beneficial ownership remains vested in the beneficiary of the trust even in situations where legal title changes. In other words, trust beneficiaries are able to

follow the trust property even though the trustee purports to transfer the legal title to that property to someone else (Donovan W.M. Waters, ed., *Waters' Law of Trusts in Canada*, 4th ed. (Toronto: Carswell, 2012) at 1334 [Waters]).

[37] This ability to follow trust property in whatever hands it is found is often called "tracing." Tracing can also extend to the proceeds arising out of the sale of trust property. As Waters states, "[t]he basic principle is that the traceable proceeds of trust property will themselves be trust property, if the beneficiary so elects" (Waters at 1341).

[38] Nevertheless, if the acquirer of trust property gave value and did not know that the transfer amounted to a breach of trust, the claim of the beneficiary of the trust is defeated (*i Trade Finance Inc v Bank of Montreal*, 2011 SCC 26 at para 60, [2011] 2 SCR 360 [*i Trade Finance*]). As Justice Eileen Gillese explains, this is an application of the maxim, "where the equities are equal, the law prevails" (Eileen E. Gillese, *The Law of Trusts*, 3rd ed. (Toronto: Irwin Law, 2014) at 18, 184-185; see also Waters at 1334, 1353).

[39] In section 222 of the ETA, Parliament created a trust, indicated that the Crown has beneficial ownership of the subject-matter of the trust and provided that the Crown could claim the proceeds of that property. In doing so, it incorporated the rules of trust law described above, which relate to the consequences of a breach of trust. Of course, these rules are incorporated in the legislative scheme only to the extent that they are compatible with the legislation. Thus, the rules governing the creation of trusts evidently do not apply to the deemed trust. That is what I understand the Supreme Court of Canada to mean when it said, in *Sparrow Electric*, at para 31,

that "[t]he trust is not in truth a real one, as the subject matter of the trust cannot be identified from the date of creation of the trust" (see also *First Vancouver* at para 34). In contrast, when it applied the defence of *bona fide* purchaser for value, in *First Vancouver*, the Court did not allude to any incompatibility between the defence and the legislation. Rather, the reasoning of Justice Iacobucci appears to be based on the fact that, by failing to mention subsequent acquirers, Parliament did not intend to alter the common law in this regard (at para 43).

[40] At the hearing before me, counsel for the Crown asserted that the deemed trust of the ETA or ITA is not governed by trust law at all. He argued that what the Court did in *First Vancouver* was to create a statutory version of the defence that is entirely independent from its equitable counterpart. I do not accept this perspective. There is nothing in *First Vancouver* that would suggest that the Court was relying on something other than the equitable defence. There was no indication of the defence in the text of section 227 of the ITA, so the Court must have applied the equitable defence. Moreover, as a matter of principle, when Parliament refers to private law concepts, it is presumed to refer to all the rules governing those concepts, as long as those rules are compatible with the statutory scheme. It would be highly inconvenient if courts were to hold that Parliament created parallel concepts that may or may not be governed by the same rules as their private law counterparts. This would also run against the direction given by Parliament in section 8.1 of the *Interpretation Act*.

[41] Hence, the Bank may invoke equitable defences to claims based on the deemed trust of the ETA and ITA, provided that it meets the conditions of such defences and provided that the defence is not inconsistent with the scheme of the legislation.

(2) Does the defence apply to money?

[42] The application of the *bona fide* purchaser for value defence in this case presents a conceptual difficulty. In ordinary parlance, the Bank did not purchase anything. It received money in repayment of the loan it made to Mr. Weisflock. For that reason, the Crown says that the defence is unavailable. It points to the fact that the buyers of Mr. Weisflock's house would be the *bona fide* purchasers for value in this case. The Bank, however, argues that it "purchased money." In my view, this is an awkward manner of saying that the defence does not apply merely to transactions which are properly called "sales," but also to transactions where a third party acquires property, be it chattels or money, that was initially part of the corpus of the trust, for some form of consideration.

[43] I agree that the defence is not limited to "purchasers" who obtain property through a contract of sale. In *i Trade Finance*, the Supreme Court of Canada, quoting from Professor Ziegel, noted that a purchaser in equity is a person who acquires any interest in property, irrespective of the precise manner in which that interest is acquired (paras 62-66). In that case, a bank successfully argued that it was a *bona fide* purchaser for value in a situation where shares were pledged to it. A recent decision of the Ontario Court of Appeal, *Arrow ECS Norway AS v John Doe*, 2017 ONCA 664, also supports the proposition that the defence may be invoked by a person who received money for a valuable consideration, including the payment of an existing debt, and who was unaware that the money had been obtained fraudulently.

(3) Does the defence apply to a secured creditor?

[44] Nevertheless, I am of the view that the defence of *bona fide* purchaser for value cannot be invoked by a secured creditor in the context of the deemed trust of the ETA and ITA. That possibility has been foreclosed by *First Vancouver* and subsequent cases, as it would essentially render the deemed trust meaningless.

[45] The Supreme Court's reasoning in *First Vancouver* is based on the combination of two ideas. First, the subject matter of the deemed trust changes over time – Justice Iacobucci likens it to a floating charge. This is why the mechanism of the deemed trust is consistent with the *bona fide* purchaser for value defence. As Justice Iacobucci notes, trust assets that are sold are replaced by property received in exchange and "the trust is neither depleted nor enhanced" (at para 42). The second idea is that Parliament chose to treat secured creditors differently:

> […] the intent of Parliament […] 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. (para 28)

[46] Hence, the 1998 and 2000 amendments to the ITA and ETA deemed trust provisions are based on the premise that a secured creditor cannot invoke the *bona fide* purchaser for value defence when it enforces its security or receives a payment from its debtor. If that defence were available, secured creditors would almost always be able to invoke it to defeat the mechanism of the deemed trust. When a secured creditor receives a payment, it usually gives or has given something of value in exchange, whether the granting of the loan or the discharge of the security when the loan is repaid. Moreover, secured creditors are most often unaware of the existence of a

tax debt when they receive a payment. Thus, the *bona fide* purchaser for value defence for secured creditors is inconsistent with Parliament's intent.

[47] I would add that the defence remains available to unsecured creditors, such as suppliers, landlords or public utilities, who receive payments from a tax debtor. In those cases, denying the defence would give rise to the concerns mentioned by Justice Iacobucci at para 44 of *First Vancouver* – it "would have a general chilling effect on commercial transactions."

[48] Subsequent cases have also drawn a sharp distinction between secured creditors and *bona fide* purchasers for value, so that the two categories are mutually exclusive. In *National Bank*, the trial judge had ruled that financial institutions who had taken their debtors' property in payment of their debts could be considered *bona fide* purchasers for value. The Federal Court of Appeal rejected that characterization:

> This decision [*First Vancouver*], which is not referred to by the trial judge in his reasons, establishes unambiguously that the Banks or the Caisses in the present cases are not comparable to third party purchasers. They are secured creditors […] (at para 30)

[49] A similar argument was made by the Caisses populaires in *Lyster* and *Vallée de l'Or*. Justice Pinard, whose opinion was confirmed by the Federal Court of Appeal, rejected the defence, stating that the transactions could not be considered as arising in the normal course of business (at para 12).

[50] In view of the above, it is not necessary for me to decide whether the transactions at issue can be described as being in the normal course of business, either for the Bank or Mr. Weisflock.

In any event, the fact that a transaction took place in the normal course of business is not, as such, an element of the defence of *bona fide* purchaser for value. It may be a relevant factor in assessing whether the purchaser is in good faith.

[51] It is also immaterial that Mr. Weisflock voluntarily paid his debt to the Bank, rather than the Bank realizing upon its security. What matters is that the Bank was a secured creditor when it received the payment. One may perhaps wonder why Parliament singled out secured creditors in the deemed trust provisions of the ITA and ETA. It may be because debtors have a much stronger incentive to make payments to secured creditors rather than to unsecured creditors. The enforcement of securities may signal the practical end of a business (for a well-known example, see *Houle v Canadian National Bank*, [1990] 3 SCR 122). Thus, payments that are "voluntary" on their face may not truly be so. In that context, an inquiry as to the voluntary nature of payments may not be the most apt manner of drawing a line between what is subject to the deemed trust and what is not.

[52] The result of this may be that unsecured creditors will often be in a position to claim to be *bona fide* purchasers for value, whereas secured creditors cannot. At first blush, this might appear absurd, but on closer examination, it may have been a rational decision for Parliament to make. By definition, security interests are meant to provide a very strong inducement to debtors to pay their secured creditors first, before paying unsecured ones and, in all likelihood, before paying tax debts to the Crown.

C. *Crystallization or triggering event?*

[53] The Bank also argues that the deemed trust only comes into operation upon a "triggering event," which could be the bankruptcy of the debtor, the realization of the creditor's security or a requirement to pay made by the Crown. The Bank adds that when the trigger was pulled in this case, which is when the Crown made its first demand to pay in April 2013, it was no longer a secured creditor of Mr. Weisflock.

[54] This idea, however, is unanimously rejected by all cases subsequent to the amendments to the ITA and ETA in 1998 and 2000. The Supreme Court of Canada provides the following explanation in *First Vancouver* at para 33:

> […] the intent of the section is to allow the trust to operate in a continuous manner, attaching to any property which comes into the hands of the debtor as long as the debtor continues to be in default, and extending back in time to the moment of the initial deduction. The language Parliament has chosen belies the suggestion that the deemed trust only captures property of the tax debtor in existence at some particular moment in time.

[55] Likewise, Justice Rennie rejected the need for a trigger or crystallizing event in *Callidus* at para 34:

> In my view, the search for a crystallizing event or something analogous to that is not quite apt, given that the deemed trust mechanism is not located within the section of the legislation dealing with assessments, and, in any event, there is no legislative requirement for, or mechanism by which, such a notice could issue. There is no need for a crystallizing event, as the legislation establishes the obligation to pay. The words "if at any time" make clear that the obligation has no temporal limitation, nor is it contingent on crystallizing events.

[56] Counsel for the Bank adroitly likened the deemed trust to a "net" that can only fall over trust property at a specific moment. The analogy is appealing, but it is not an accurate description of the deemed trust. Perhaps we must say, on the authority of *First Vancouver*, that Parliament crafted a very special net for Her Majesty, one that is permanently triggered or deployed.

[57] The Bank also suggested that the Supreme Court's comments with respect to crystallizing events apply to the deemed trust itself, but not to the statutory obligation imposed on third parties who receive "proceeds" of the trust property, which would be conceptually separate from the trust. I am unable to accept this argument. The so-called statutory obligation is inextricably linked to the deemed trust. I fail to see how one could only be triggered by a particular event, but not the other. There is no basis in the wording of section 222 for such a distinction. Moreover, that argument is foreclosed by *Callidus*, which involved the statutory obligation.

D. *Policy Considerations*

[58] The Bank also raised a number of arguments that may be classified as policy or fairness arguments. It says that the payment it received is, in effect, being expropriated to satisfy Mr. Weisflock's debts. It also refers to the principle, mentioned in *Sparrow Electric* and *First Vancouver*, that "a tax on one person cannot be collected out of property belonging to another" (*First Vancouver* at para 43, quoting *Pembina on the Red Development Corp. v Triman Industries Ltd.* (1991), 85 DLR (4th) 29 (Man CA) at 46). In this regard, one could also refer to the classic judgment of Justice La Forest in *Re Estabrooks Pontiac Buick Ltd* (1982), 144 DLR (3d) 21 (NBCA) [*Estabrooks*].

[59] Courts have indeed been sensitive to the practical effects of interpretations that they give to legislation. Legislation is not adopted in a vacuum. It must be read against the backdrop of a web of well-established social and political norms, in particular norms regarding the allocation of wealth, property and financial risk. Parliament is not presumed to depart from those norms. For that reason, courts have established presumptions of interpretation protecting them. As Thomas Cromwell, Siena Anstis and Thomas Touchie have written,

> [t]he assumption underlying resort to these sorts of presumptions is that the legislature intends to respect fundamental social values and policies when drafting legislation and it is therefore appropriate for courts to take them into account in interpreting statutes […]
>
> ("Revisiting the Role of Presumptions of Legislative Intent in Statutory Interpretation" (2017) 95 Can Bar Rev 297 at 302 [Cromwell *et al*, "Revisiting"])

[60] One such norm is the protection of private property. In *Estabrooks*, Justice La Forest held that legislatures are not presumed to intend to take property without offering compensation and that ambiguous statutory language should be given a meaning that avoids such a result. He traced the origin of that presumption to the English Glorious Revolution. I venture to add that the idea that the Crown may not tax its subjects without the consent of their elected representatives may find its distant roots in the Magna Carta of 1215, even though it was issued in a very different context.

[61] Nevertheless, in the absence of constitutional guarantees, courts must bow to Parliamentary supremacy. Parliament may want to alter the norms governing the allocation of wealth, property and financial risk. Presumptions of interpretation should not frustrate

Parliament's intention. In *Estabrooks*, Justice La Forest cautioned about too much reliance on the presumption against interference with private property:

> The courts should not, for example, place themselves in the position of frustrating regulatory schemes or measures obviously intended to reallocate rights and resources simply because they affect vested rights. For legislation almost inevitably affects vested rights. They must similarly have great deference for legislative schemes establishing priorities among creditors and encumbrancers and, in particular, those that favour the Crown over other creditors […] (at 31)

[62] More recently, Cromwell, Anstis and Touchie have suggested that presumptions of legislative intent be considered as principles that must be taken into account when analyzing the context, instead of requirements that the statutory text must satisfy before it is interpreted so as to achieve a particular result (Cromwell *et al*, "Revisiting" at 316-322). Under that approach, considerations regarding the protection of private property are integrated in the statutory interpretation exercise, as factors forming part of the context of the statutory provision.

[63] I need not arbitrate between the approaches advocated by such eminent jurists as Justices La Forest and Cromwell. In this case, on either approach, it is obvious that Parliament was fully aware of the consequences of the amendments to the ITA and ETA on private property and the allocation of financial risk. Parliament had before it the decision of the Supreme Court in *Sparrow Electric*, which gave a narrow interpretation to the provisions of the ITA then in force, on the basis that they would otherwise allow the Crown to take the property of one person to pay the taxes of another. Nevertheless, Parliament made the choice to disregard the proprietary interests of secured creditors and to grant the Crown an absolute priority. I cannot cut down the

scope of the legislation in an attempt to bring it in line with the principle of protection of private property without thwarting Parliament's intent.

[64] Moreover, fairness arguments often rely on analogies and comparisons which may be more or less apt. In this case, the Bank seeks to compare itself to someone who is expropriated. Yet, an analogy with expropriation may not be the best way of illustrating the mechanism chosen by Parliament. Section 222, through the concept of the deemed trust, establishes the priority of certain tax debts over the claims of secured creditors. Setting priorities is not tantamount to expropriation. If the debtor is able to pay all of its creditors, including the Crown, there is nothing that resembles expropriation. Where, in contrast, the debtor is unable to pay, the deemed trust simply increases the risk that creditors will not be able to collect their debts. Thus, the Bank's loss in this case is the result of the operation of rules establishing priorities among creditors, not the attempt of one creditor to expropriate the other. In other words, the Crown is not so much collecting Mr. Weisflock's tax debts from the Bank as it is asserting the priority that those debts should have been given from the outset. Likewise, the fact that a secured creditor is unable to be repaid in full does not amount to expropriation. It is simply the materialization of lending risk.

[65] It may be argued that the consequences of the interpretation that I have adopted are harsh on secured creditors, especially when they are lending to individual customers as opposed to businesses. Yet, Parliament has already considered that potential harshness and provided a remedy. Section 222(4) of the ETA provides that for the purposes of the deemed trust provisions, "a security interest does not include a prescribed security interest." The *Security Interest*

(GST/HST) Regulations, SOR/2011-55, provide that a certain portion of a mortgage or hypothec on land or on a building is a prescribed security interest, provided the mortgage or hypothec is registered before the deemed trust arises. The portion that is so prescribed is calculated according to a formula set out in the Regulations. Hence, Parliament has already considered the potentially harsh consequences of the deemed trust on lenders and has drawn a line as to what is exempted. I cannot draw the line elsewhere.

IV. Disposition

[66] The action will be allowed for the full amount claimed.

[67] Moreover, under sections 36 and 37 of the *Federal Courts Act*, RSC 1985 c F-7, the Crown is entitled to pre-judgment and post-judgment interest according to the legislation of the province in which the cause of action arose, namely, Ontario. Sections 127-130 of the *Courts of Justice Act*, RSO 1990 c C.43, set out a method for the calculation of pre- and post-judgment interest, provide for a number of exceptions and give the court discretion to vary the method or disallow interest altogether, based on a number of factors. None of the exceptions apply and the parties have not argued that I should depart from the statutory method.

[68] Section 128(1) provides that pre-judgment interest must be calculated "from the date the cause of action arose." The Crown asserts that the cause of action arose on October 28, 2011, when Mr. Weisflock paid the Bank the proceeds of the sale of his house. As mentioned above, from that date the Bank had an obligation to repay that money to the Crown. The Bank did not take any position on that issue.

[69] A cause of action is “a set of facts that provides the basis for an action in court” (*Markevich v Canada*, 2003 SCC 9 at para 27, [2003] 1 SCR 94). In this case, those facts arose on October 28, 2011, when the Bank received money that should have been paid to the Receiver General. From that date, the Crown was in a position to sue the Bank.

[70] Moreover, the purpose of pre-judgment interest is compensatory (*Apotex Inc v Wellcome Foundation Ltd*, [2001] 1 FC 495 (CA) at paras 112-125). The aim is to make the aggrieved party whole, and to deprive the losing party of any benefit it may have gained from retaining money to which it was not entitled. Hence, it is logical that pre-judgment interest run from the date the Bank received part of the proceeds of the trust property.

[71] I agree with the Crown that the cause of action arose on October 28, 2011 and I have calculated pre-judgment interest accordingly.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The defendant is condemned to pay the plaintiff the sum of $67,854;

2. The defendant is condemned to pay the plaintiff pre-judgment interest in the amount of $5,797.71;

3. The defendant is condemned to pay costs to the plaintiff, assessed according to the Tariff;

4. The defendant is condemned to pay the plaintiff post-judgment interest calculated at a rate of 3.0% *per annum*, on the sum of $73,651.71, plus the amount of the costs, from the date of this judgment.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Louis L'Heureux Edward Harrison	FOR THE PLAINTIFF
Christine Lonsdale Jacqueline Cole	FOR THE DEFENDANT

SOLICITORS OF RECORD:

Attorney General of Canada Ottawa, Ontario	FOR THE PLAINTIFF
McCarthy Tétrault Toronto, Ontario	FOR THE DEFENDANT