

## CONSTRUCTION LAW UPDATE 3

### THE FIVE MOST IMPORTANT ISSUES IN LIEN LAW TODAY

#### A. Overhead Recovery

##### I. *Dietrich Steel Ltd. v. Shar-Dee Towers (1987) Ltd.* (unreported, Court File No. SC 5186/90, appeal allowed 3 February 1999, Court File C24935)

The defendant Shar-Dee Towers entered into a subcontract with Dietrich Steel for the supply of reinforcing steel on a project for the construction of a condominium project. Shar-Dee paid all of the invoices submitted by Dietrich Steel except for the holdback invoice. The agreed correct amount of the holdback was \$55,482.40. When the project commenced, Shar-Dee opened a segregated bank account into which all funds received by Shar-Dee were deposited. All such funds were used to pay for either direct construction costs or for direct overhead expenses. None of the funds were used for internal overhead expenses. All holdbacks and other monies received from the sale of the completed project were distributed by court-appointed trustee to the exclusion of the plaintiff. Dietrich Steel argued that the payment of accounts for overheads constituted a breach of trust. Section 8(1)(b) of the *Act* provides that “all amounts... received by a contractor... on account of the contract... constitute a trust fund for the benefit of the subcontractors and other persons who have supplied services or materials to the improvement who are owed amounts by the contractor or the subcontractor.” Section 10 of the *Act* provides that payments made by the trustee to a person for services or materials

supplied to the improvement discharges the trustee's obligation to all beneficiaries of the trust to the extent of the payment made. The defendants submitted that under s. 10 of the *Construction Lien Act*, the payments made by them discharged them from their trust obligations to the extent of the payments.

To be more specific, the overhead expenses paid by the contractor were for insurance coverage, phone services, audit fees, corporate income tax and other taxes, car repairs, leasing charges, and other related items. West J. held that the payments described were not payments for services or materials supplied to the improvement and as a result did not fall within the provisions of s. 10 of the *Act*. In other words, the Court held that unless payments are made for services or materials which were or would have been lienable, they were made in breach of trust. With regard to the liability of the personal defendants under s. 13(1) of the *Act*, the trial judge merely held that "the material before the Court satisfies it that the personal defendants were the persons having effective control of the corporations. A finding against them is therefore warranted".

One of the personal defendants appealed. The Ontario Court of Appeal agreed that all of the overhead payments were payments made in breach of trust, for which the contractor was liable. With regard to the personal defendant's liability, however, the Court held that the reasons given by the trial judge did not warrant a finding of personal liability. The only evidence before the Court was an agreed statement of facts, which only made clear that the personal defendant was an officer and director of the corporate defendant. McKinlay J.A. found that this alone was not enough. To be held liable under s. 13(1) of

the *Act*, a defendant must have assented to or acquiesced in conduct that he or she knew or reasonably ought to have known amounted to a breach of trust by the corporation. There having been no facts in the agreed statement of facts indicating that this was the case, the individual defendant's appeal was allowed.

**II. *Rudco Insulation Ltd. v. Toronto Sanitary Inc.* [1998] O.J. No. 4105 (Ont. C.A.)**

As was the case in *Dietrich Steel*, a corporate defendant and two personal defendants were sued for breach of trust after making payments from funds received on a project towards overheads before paying their subcontractors. The expenses discussed in *Rudco* were “wages, office expenses, rent, legal and accounting fees and the like”. At trial, on a motion under Rule 21(1)(a), Coe J. held that the group of people receiving such payments, e.g. lawyers, accountants and landlords, are not “other persons” to whom trust benefits are given, as defined in the *Act*, and were not envisaged by the words of Section 8.

The Ontario Court of Appeal agreed. It was held that it was common ground that the recipients of overhead expenses did not supply materials to an improvement. Therefore, the only way that the payments made could fall under s. 10 of the *Act* and discharge the contractor would be to hold that the payments were made for services supplied to an improvement within the meaning of s. 10. “Supply of services”, as defined in s. 1 of the *Act*, means “any work done or service performed upon or in respect of an improvement,

and includes, (a) the rental of equipment with an operator, and (b) where the making of the planned improvement is not commenced, the supply of a design, plan, drawing or specification that in itself enhances the value of the owner's interest in the land." As the recipients of the overhead expenses did not perform services upon an improvement, the question of whether those payments are payment made under s. 10 turns around the interpretation of "in respect of an improvement". The contractor argued that without the payment of overhead expenses, no work would have been done, consequently there would have been no improvement, and therefore the payments were made in respect to the improvement. O'Connor J.A. disagreed. Sections 8(1) and 14(1), he said, provide for a preference for one class of creditor not enjoyed by other creditors of the same debtor. Because the *Act* creates a preference that did not exist at common law, the question whether a certain creditor falls into the group benefiting from the *Act* is to be strictly interpreted. Also, if the recipients of overhead payments were included, the benefits to the group clearly intended to be within the class would be significantly reduced. Consequently, the payment of overhead expenses by Toronto Sanitary did not reduce its obligations to Rudco under s. 10.

## **B. Strangers to the Trust**

### **I. *Gold v. Rosenberg* (1997), 152 D.L.R. (4<sup>th</sup>) 385 (S.C.C.)**

A testator who died in 1985 named his son (“Rosenberg”) and his grandson (“Gold”) as executors and equal beneficiaries of his estate, which primarily consisted of commercial real estate held by two companies, Primary and Existing (“estate companies”). While Rosenberg ran the companies, Gold was not involved at all. Shortly after the testator’s death, Gold signed a general power of attorney allowing Rosenberg to continue to run the companies. Rosenberg also owned a self-storage warehouse. The banking for both estate companies, the storage company, the testator and Rosenberg was done by one single account manager at Toronto-Dominion Bank, who knew the will and knew about the power of attorney. When, in 1989, Rosenberg requested further loans from TD at a time when TD wanted him to repay earlier loans, it was agreed that the new loan would be provided on the condition that TD receive a guarantee from one of the estate companies. The bank also requested a second collateral mortgage over property owned by one of the estate companies and postponement of a mortgage held by Existing over a property owned by the storage company in favour of a new mortgage to the latter. One single law firm provided legal counsel for both estate companies, Rosenberg, the storage company and TD. In order to put the loan agreement into effect, Gold had to authorize the guarantee in a director’s resolution for Primary. The law firm prepared both this document and the guarantee. The law firm also sent a letter of opinion to TD, stating that “the authorization, execution, issuance and delivery of the said Guarantee by the Corporation does not conflict with or contravene any terms, conditions or provisions of any law or agreement to which the Corporation is subject or to which the Corporation is a party.” In a cover letter, the firm stated that while the resolution had to be signed by both Rosenberg and Gold, the latter had not yet done so. TD granted the loan, and Gold signed

the resolution at a later point in time. In 1989, Gold revoked the power of attorney and issued a statement of claim against Rosenberg, Primary, TD and the law firm, seeking a declaration that the guarantee was both invalid and unenforceable.

The trial judge, imposing a constructive trust on TD in favour of Gold, declared the guarantee, the mortgage and the postponement of the mortgage unenforceable. The Court of Appeal allowed TD's appeal and dismissed Gold's claim.

The Supreme Court of Canada had to discuss the following issues: Did the testator's will create a trust? If so, did this trust impose fiduciary duties upon Rosenberg? If so, and if these duties were breached, does the case fall within the law of knowing assistance? What is the test for the bank's liability? Is the bank liable under the doctrine of knowing assistance or the doctrine of knowing receipt?

Both the trial judge and the Court of Appeal approached the question of TD's liability by asking if TD had knowingly assisted Rosenberg in a fraudulent and dishonest breach of trust. Both instances agreed that Rosenberg was a trustee of Primary's property and that TD had participated in giving the guarantee. While the trial judge argued that there had been a dishonest breach of trust by Rosenberg, the Court of Appeal held that Gold actually signed the director's resolution, thus consenting to the breach of trust. The Court went on to state that the records proved that Gold knew what a guarantee was, what it was meant for and what its consequences could be. Also, he was not misled about any of this, so that his consent was valid. Consequently, there was no fraudulent and dishonest

breach of trust, the principle of knowing assistance did not apply and the appeal was allowed.

The Supreme Court held that the appeal from the Court of Appeal should be dismissed, but was sharply divided. The minority based its dissenting view on a clear differentiation between the principles of knowing receipt and knowing assistance. Writing for the minority, Justice Iacobucci held that under the principle of knowing assistance, a person is liable if he or she knowingly assisted in a fraudulent and dishonest breach of trust. Under the principle of knowing receipt, equity may impose liability if a person received, in his or her own right, property obtained through breach of trust. Both principles, while sharing similarities, are distinct types of liability, a differentiation case law so far has failed to clarify.

In the present case, TD Bank received an opinion letter from the law firm. Justice Iacobucci accepted the Court of Appeal's argument that this letter "undoubtedly provided comfort to the bank that the guarantee was not tainted by fraud". In light of this letter, then, TD had no actual knowledge of any fraud, and the claim in knowing assistance consequently failed.

The bank might, however, have been liable under the doctrine of knowing receipt. The defendant must then have received the trust property in his or her own right rather than as an agent of the trustees and must have been enriched by the trust property. This, Justice Iacobucci held, was the fundamental difference between knowing assistance and knowing

receipt. The former concerns participation in fraud, the latter is about unjust enrichment. The former is about furtherance of fraud, the latter about “rights of priority in relation to property taken by a legal owner for his own benefit”. Justice Iacobucci argued that while actual knowledge was the appropriate test for knowing assistance, knowing receipt was fundamentally different and therefore required a different test. In cases of knowing receipt, the plaintiff does not have to prove that the breach of trust was fraudulent, and the defendant is not involved in any misconduct by the trustee. All that matters here is that somebody received property that does not belong to him or her. It is, as Justice Iacobucci states, “simply a question of who has the better claim to the disputed property”. Somebody has been enriched at somebody else’s expense, which brings the claim within the law of retribution. In order to recover the property, the following prerequisites have to be met:

1. The property must have been subject to a trust in favour of the plaintiff.
2. There must have been a breach of trust.
3. The defendant must have taken the property in his or her own right, and if the circumstances were such as to put a reasonable person on inquiry, the defendant failed to do this properly.

In the case at hand, TD argued that the principle of knowing receipt was not applicable because the bank never received any trust assets, as the guarantee itself did not constitute property. Justice Iacobucci did not accept this. Even if the guarantee was not trust property, the bank received a valuable benefit, the estate was encumbered and its value reduced. Also, TD tried to enforce the guarantee, and if it ever were successful in that

attempt, it would obviously get the property. The fact that the guarantee was subject to a trust favouring Gold was at no point disputed, so that the first step of knowing receipt has been established. TD Bank took possession of the guarantee in its own right. The dealings between Rosenberg and Gold did in no way benefit Gold, they actually decreased the value of the estate, which established a clear breach of trust. Therefore, TD received property taken from Gold in breach of trust. Finally, the minority argued that the circumstances in this case were such as to put TD on inquiry. The bank's account manager knew both the testator's will and the power of attorney. He also knew that the director's resolution had not yet been signed when the loans were granted to the storage company. Finally, he knew that the dealings were to Gold's disadvantage. According to the minority, the mere reference to the law firm's letter of opinion could not be regarded as sufficient inquiry. The bank knew that the law firm represented all parties, which made it impossible that advice to Gold could have been independent legal advice.

Therefore, the minority would have allowed the appeal and held the guarantee to be unenforceable.

Writing for the majority, Justice La Forest argued that even if this were a case of knowing receipt, which he found more than doubtful, the bank in this case was not liable for breach of duty to inquire because it did what could reasonably be expected. It was held that "to receive trust property" meant to at least take the trust property into one's possession. The bank, by holding a guarantee backed by a collateral mortgage, did not receive the trust property into its possession. It was stated that "the guarantee supported

by the mortgage is no more than a contractual undertaking by the guarantor that, if the principal debtor defaults and the guarantor cannot make good the debt from his or her other assets, the creditor will receive the trust property”. The bank knew that Gold left Rosenberg in charge of the companies and signed the necessary power of attorney. The guarantee was properly executed, which the law firm confirmed in a letter. Gold signed the director’s resolution. Gold was a third-year university student who had taken business, economics and accounting courses, and it was therefore assumed that he knew what he was doing. If he had needed further advice, he likely would have asked for it. That, according to the majority, was all the bank had to know. There was no need for further inquiries, and it is not even clear to whom such inquiries could have been directed.

Thus, even if this were a case falling under the principle of knowing receipt, the respondent was not in “knowing” receipt. The appeal was therefore dismissed.

**II. *Citadel General Assurance Co. v. Lloyds Bank Canada* (1997), 152 D.L.R. (4<sup>th</sup>) 411 (S.C.C.)**

This decision, issued concurrently, dealt with the same issues. Here, too, the question was whether a bank, as a stranger to the trust, could be liable for breach of trust on the basis of either knowing assistance or knowing receipt.

As of 1979, the business operations of an insurance company, Citadel, involved Drive On Guaranteed Vehicle Payment Plan (1982) Limited, a wholly owned subsidiary of International Warranty Company Limited. Drive On sold insurance to car dealers, who collected the premiums when selling vehicles. Drive On then collected the premiums from the dealers, paid commissions and settled claims under the policies. Citadel acted as underwriter of the policies, and as such received the balance of the premiums on a monthly basis until 1987. There was, however, no written agreement between Citadel and Drive On in this period of time. In August 1987, Drive On defaulted on its payments to Citadel. During 1987, Lloyds Bank Canada and Hong Kong Bank of Canada (“Bank”) was the sole bank for Drive On, which used one account for all its transactions. International Warranty had started banking with the Bank in 1986. The Bank was aware of the fact that insurance premiums were deposited into the account. In April 1987, International Warranty’s signing officers, who were also the signing officers for Drive On, told the Bank to transfer money between both companies to cover overdrafts on both accounts. At the same time, Citadel and Drive On agreed to prepare a written agreement to formalize their relationship. Also, as of June 1987, Citadel rather than Drive On settled the claims, so that the monthly payments to Citadel increased substantially. In May, Citadel realized that the account Drive On used for the premiums was a standard bank account rather than a trust account, and that Drive On did not like the idea of a trust account. Also in June, International Warranty told the Bank to transfer all funds from Drive On to International Warranty at the end of each business day. While the June premiums were still sent to Citadel, the latter learned that Drive On was not able to cover the July and August premiums. A new agreement between Citadel and Drive On provided

that those premiums be paid with a promissory note, providing for monthly payments of \$100,000.00. After some payments were made, the entire Warranty Group of Companies went under. Citadel sued Drive On and the promissory note's guarantor for the outstanding amount of \$633,622.84, but was not able to collect anything.

An action against the Bank was successful at trial but dismissed by the Alberta Court of Appeal. The Supreme Court allowed the appeal from that court. The trial judge and the Court of Appeal agreed that the arrangement between Citadel and Drive On clearly created a trust. The trial judge found that the bank, knowing that Drive On's account was meant for premiums, should have been very suspicious when receiving instructions to empty the account on a daily basis. The bank was therefore held to be put on inquiry. It did not make these inquiries, therefore had constructive knowledge and became a constructive trustee. Kerans J.A. refused to accept that constructive knowledge was enough to establish the Bank's liability. Arguing that the Supreme Court's *Air Canada* decision required actual knowledge, recklessness or willful blindness, and further arguing that while the Bank might have been suspicious, it was far from clear that it had actual knowledge of the breach of trust, he allowed the bank's appeal and dismissed the claim.

Again, therefore, the question to be decided was under what circumstances the bank, as a stranger to the trust, was liable as a constructive trustee for a breach of trust by one of its customers.

As seen, the fact that there was a relationship of trust between the parties was never disputed. The three characteristics of a trust, i.e. certainty of intent, certainty of subject-matter, and certainty of object, were clearly met. The fact that the funds were placed in a general bank account does not affect this result, as the intention to create a trust relationship was clear. This said, there obviously was a breach of trust by failing to remit premiums collected for Citadel to Citadel.

As for the liability of the bank, Justice La Forest agreed with the Court of Appeal that the Bank did not have actual knowledge and therefore could not be liable under knowing assistance. However, he went on to test liability under the knowing receipt doctrine. The Bank here used a defence similar to the defence seen in *Gold*. It argued that it could not be liable under knowing receipt because a bank deposit was nothing but a loan to the bank, so that by transferring money between the accounts, the bank merely transferred credits, but it never received any trust property. The Court did not accept this position. As the chose in action in the case at hand could be subject to a statutory trust favouring Citadel, it could also be subject to a constructive trust favouring Citadel.

With regard to the knowledge requirement, the distinction between both categories of liability was again said to be fundamental, and therefore it was logical to require different degrees of knowledge. One category deals with the furtherance of fraud, requiring a higher threshold of knowledge than the receipt category, in which somebody received something for his or her own benefit and is thus necessarily enriched at the plaintiff's

expense. Relief has to be granted where a stranger to a trust received trust property while knowing about facts that should have made him or her inquire.

Here, the Bank should have been very suspicious about the daily emptying of funds from Drive On's account. The Bank should have made inquiries as to whether the insurance premiums were being misapplied. It should have investigated whether the use of the premiums to reduce an overdraft was a breach of trust. It did not do any of this. The Bank's enrichment was clearly unjust; it was therefore liable to Citadel as a constructive trustee.

**III. *Glenko Enterprises Ltd. v. Ernie Keller Contractors Ltd.* (1996), 134 D.L.R. (4<sup>th</sup>) 161 (Man. C.A.)**

The Manitoba Court of Appeal in this case considered whether a bank which has applied trust funds received from a building contractor to reduce an account overdraft participated in a breach of trust and had to account to the beneficiaries of that trust for those funds. The contractor, Ernie Keller, was involved in two unrelated projects. When funding from the federal government for one of the projects was delayed, Keller began to experience financial problems and the bank increased the operating line of credit from \$650,000 to \$1.2 million. In breach of the statutory trust provisions of s. 4 of the *Manitoba Builders' Lien Act*, R.S.M. 1987, c.B91, in favour of subtrades for the second

project, Keller used funds received from the second project to cover the deficit in the first project. The Court of Appeal applied the Ontario Court of Appeal's decision in *Arthur Anderson Inc. v. Toronto-Dominion Bank* (1994), 17 O.R. (3d) 363, which held that "... in the absence of sufficient facts or circumstances indicating that there is a good possibility of trust beneficiaries being unpaid there is no duty of inquiry on the bank to determine whether the trades must have been paid or will be able to be paid". The fact that the customer was a contractor was held only to be relevant to the extent that the bank must be deemed to have been aware at all times that trust funds were being deposited regularly into the account. Keller ran into financial difficulties because of an unpaid receivable from the first project and an unexpected loss in operations. The bank was aware of the first problem, not of the second. In regard to the first problem, the bank made extensive inquiries and reinstated monthly financial reporting by the contractor and scheduling regular meetings with the contractor. The bank took further security and restructured the loan. As the bank was not aware of the second problem, the question was whether there were facts and circumstances which should have put it on notice to make further inquiries. It was held that the duty to make inquiries was circumscribed by reasonableness, and that reasonableness was determined, among other factors, by the length and nature of the relationship between customer and bank. Keller had been the bank's customer for 25 years, was very highly regarded and successful and had always paid its trades in the past. There was nothing to alert the bank to any problem. Based on these facts, it was held at trial and on appeal that the inquiries made at the time were reasonable and that no further inquiries were required of the bank.

## C. Curing Defects in Liens

### I. *Venditti v. Petriglia* (1989), 33 C.L.R. 1 (Ont. C.A.)

The respondent registered a claim for lien for work done and material supplied. Attached to this lien was what purported to be an affidavit of verification. The affidavit bore the heading “AFFIDAVIT OF VERIFICATION OF LIEN CLAIM UNDER SECTION 34 OF THE ACT”. While the affidavit set out the name of the respondent and included the statement “I am the lien claimant named in the attached claim for lien”, all other paragraphs contained in Form 9 were struck out.

The Court of Appeal held that subsection 34(6) of the *Construction Lien Act* is mandatory and that the curative provisions of s. 6 of the *Act* provide no relief to persons who neglect to verify their claims for lien with an affidavit of verification which complies with the requirements of s. 34(6). While s. 6 permits the Court to excuse minor irregularities, the section does not mention subsection 34(6) and was consequently of no assistance to the lien claimant.

### II. *Sefri Construction International Ltd. v. Jaltas Inc.* (1990), 38 C.L.R. 15 (Ont. Master)

The decision in *Venditti* was followed in *Sefri Construction International Ltd. v. Jaltas Inc.* Jaltas registered a lien, but the affidavit of verification of the registered claim for lien lacked a signature of a commissioner of oaths at the foot of the jurat. All parties agreed that the error was by pure inadvertence. As a matter of fact, the solicitor, acting as commissioner of oaths, affixed his signature to four of five copies, but unfortunately it was the fifth copy that was registered in the registry office. Master Sischy held that he was bound by the decision in *Venditti* and discharged the lien.

#### **D. Sheltering**

##### **I. *Metric Masonry Amalgamated Ltd. v. Life Centre Non-Profit Housing Corp.* (Ajax) (1998), 38 C.L.R. (2d) 66 (Ont. Div. Ct.)**

Until the Ontario Divisional Court released its decision in *Sesco*, there had been divided authority as to whether or not the sections of Ontario's *Construction Lien Act* should be liberally or strictly construed. Also, it was not clear whether Rule 3 of the sheltering section of the *Construction Lien Act*, s. 36(4), which refers to the "nature of the relief claimed" in the sheltering claim, required that the nature of the materials and services supplied by the perfected lien claimant be similar or even identical to those of the sheltering lien claimant.

The motions judge, finding no clear or binding authority as to whether the sheltering rules were to be construed liberally or strictly, was “inclined to the view that they should be strictly construed”. Among other things, the sheltering sections provide that a sheltered lien claim is perfected “only as to the defendants and the nature of the relief claimed in the Statement of Claim under which it is sheltered”. Horizontal sheltering would allow a subcontractor or supplier to shelter under the statement of claim of a plaintiff subcontractor or supplier in the same class. In support of this concept, the appellant argued that the *Construction Lien Act* was remedial in nature, having been enacted with the purpose to protect persons supplying labour and materials to construction projects. Also, the sheltering provisions were described as an “integral part of the class proceeding concept of the Act” in that they protect the owner from the inconvenience and expense of filing a multitude of defences which might be required if every single lien claimant had to perfect their lien claims through statements of claim. The respondent submitted that the *Construction Lien Act* created an interest in real property that was in derogation of established property rights and therefore it had to be construed strictly. The more restricted curative section, section 6 of the *Construction Lien Act*, was also cited in the argument against a liberal interpretation of s. 36(4).

The court decided that the sheltering provisions of the *Construction Lien Act* were designed to bring about the realization of a lien in as summary and expeditious a manner as possible and therefore they formed part of the “enforcement provisions” of the *Construction Lien Act*, as distinguished from the “creation” section that actually give rise to the lien. Based on the Supreme Court of Canada’s decision in *Ace Lumber Ltd. v.*

*Clarkson Co.* (1963), 36 D.L.R. (2d) 554, the Divisional Court found that the *Act* had to be given a strict interpretation in determining whether or not a lien claimant was in fact entitled to a lien, but that once a person was held to be entitled to a lien, the statute ought to be liberally interpreted with respect to the rights of that person.

## **E. Taxes, Bankruptcy and Your Lien**

### **I. *Roscoe Enterprises Ltd. v. Wasscon Construction Inc.* (1998), 161 D.L.R. (4<sup>th</sup>) 725 (Sask. Q.B.)**

Canadian Tire entered into a contract with Wasscon as the general contractor for the construction of a Canadian Tire store. Roscoe was the subcontractor for demolition work on the project lands. Roscoe registered a lien for \$74,845.00, and Wasscon paid \$93,556.25, i.e. the full amount of the lien claim plus 25% for costs, into court as security. The lien was discharged upon the payment into court, and Roscoe commenced an action to enforce its claim of lien. In the following months, a total of ten further liens were registered. All of these ten claimants were subsequently joined in the lien action. Wasscon subsequently settled with Roscoe at a pre-trial settlement conference before the addition of the other lien claimants as defendants, but after the liens were registered. After Roscoe was paid out according to a court order, a total of \$61,056.25 remained in court. Unknown to Canadian Tire, Wasscon was petitioned into bankruptcy by its bank, and a trustee in bankruptcy was appointed. The question before the court was whether the

trustee was entitled to the monies in court under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, or whether the lien claimants were entitled to the funds under the *Builders' Lien Act*, S.S. 1984-85-86, c.B-7.1.

Relying on the Supreme Court of Canada's decision in *British Columbia v. Henfrey Samson Belair Ltd.* (1989), 59 D.L.R. (4<sup>th</sup>) 726, Zarzeczny J. held that the trustee was entitled to the funds. In *Henfrey*, the Supreme Court held that s. 67(1)(a) of the *Bankruptcy and Insolvency Act*, which provides that "the property of a bankrupt divisible among his creditors shall not comprise property held by the bankrupt in trust for any other person", applied only to trusts as defined by the general law and not to statutory trusts created by the provinces lacking the common law attributes of trust. If this were not so, Zarzeczny J. argued, the provinces would in fact be allowed to "create their own priorities under the *Bankruptcy Act* and to invite a differential scheme of distribution on bankruptcy from province to province". While *Henfrey* dealt with a tax statute, the Court was "unable to distinguish between the kind of trust provisions considered in the *Henfrey* case and those created by s. 7 of the [Saskatchewan Builders' Lien] *Act* in favour of the lien claimants on this application". Consequently, the trust could not prevail against the trustee in bankruptcy.