COURT OF APPEAL FOR ONTARIO

CITATION: The Guarantee Company of Canada v. Royal Bank of Canada, 2019 ONCA 9
DATE: 20190114
DOCKET: C65041 & C65042

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

BETWEEN

The Guarantee Company of North America and The Attorney General of Ontario

Respondent / Intervener
(Appellants)

and

Royal Bank of Canada, A-1 Asphalt Maintenance Ltd. (Receiver of), IUOE Local 793 and LIUNA Local 837, and LIUNA Local 183

Applicant / Respondents
(Respondents in Appeal)

Josh Hunter and Hayley Pitcher, for the appellant, The Attorney General of Ontario

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

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

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

Paul Cavalluzzo and Alex St. John, for the intervener, LIUNA Local 183

Heard: October 16, 2018

On appeal from the order of Justice Barbara A. Conway of the Superior Court of Justice, dated January 31, 2018, with reasons reported at 2018 ONSC 1123, 57 C.B.R. (6th) 103.

Sharpe J.A.:

[1] This appeal arises from a priority dispute between certain creditors and employees of a bankrupt company, A-1 Asphalt Maintenance Ltd. ("A-1"). The issue is whether the funds owing to or received by a bankrupt contractor and impressed with a statutory trust created by s. 8(1) of the *Construction Lien Act* R.S.O. 1990, c. C. 30 ("*CLA*") are excluded from distribution to the contractor's creditors, pursuant to s. 67(1)(a) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*").

[2] As I will explain, to decide this issue it is necessary to give careful consideration to several decisions of the Supreme Court of Canada, in particular, *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24, and to the decision of this court in *GMAC Commercial Credit Corporation – Canada v. T.C.T. Logistics Inc.* (2005), 74 O.R. (3d) 382.

[3] For the following reasons, I conclude that *Henfrey* contemplates provincially created statutory trusts preserving assets from distribution to ordinary creditors under the *BIA*, s. 67(1)(a), provided the statutory trust satisfies the general principles of trust law. The general principles of trust law require certainty of intention to create a trust and certainty of subject matter in addition to certainty of object. I conclude that the statutory trust created by the *CLA*, s. 8(1) satisfies the requirement for certainty of intention to create a trust. I reject the contention that by creating the required element of certainty of intention, the *CLA*, s. 8(1) creates

an operational conflict between the *CLA*, s. 8(1) and the *BIA*, s. 67(1)(a), triggering the doctrine of federal paramountcy. I conclude that debts for a project subject to the *CLA* are choses in action that supply the required certainty of subject matter. I further conclude that the commingling of *CLA* funds from various projects does not mean that the required certainty of subject matter was not present because the funds remained identifiable and traceable.

Facts

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

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

favour of any party." A subsequent order directed that receipts from other paving projects were also to be deposited in the Paving Projects Account.

[6] The City and the Town paid $675,372.27 (the "Funds") to the Receiver, who deposited the Funds into the Paving Projects Account. That amount represented debts owing to A-1 by the City and the Town when A-1 filed its Notice of Intention to make a proposal. While the Receiver commingled the trust funds received from A-1's various paving projects in the Paving Projects Account, the allocation of the funds in the Paving Projects Account to each specific project is identifiable because of the Receiver's careful accounting.

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

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

[8] There is a priority dispute between:

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

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

(3) certain employees that worked on the Four Projects, as represented by LIUNA Local 183 and IUOE Local 793 (together, the "Unions") (claiming a total of $511,949.14).

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

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

[10] The Receiver brought a motion for advice and directions to resolve the priority dispute and served a Notice of Constitutional Question identifying the

potential conflict between the *CLA* and *BIA*. The Attorney General of Ontario intervened in response.

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

Decision of the motion judge: 2018 ONSC 1123, 57 C.B.R. (6th) 103

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

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

[14] The motion judge stated that she was not suggesting that the statutory trust created by the *CLA* could never be recognized as "a true trust for purposes of the *BIA*". However, the motion judge concluded that on the facts of this case GCNA had failed to establish sufficient certainty of subject matter and that the Funds were

not therefore held in trust within the meaning of s. 67(1)(a). She reached that conclusion for two reasons. First, she stated, at para. 6, that the "funds owed to A-1 by the City/Town are not necessarily identifiable, do not necessarily come from any particular fund or account and are simply payable by the City/Town from its own revenues or other sources". Second, she found, at para. 7, that once the Funds were paid, "there was no established means for [A-1] to hold these monies separate from other funds and maintain their character as trust funds". The orders of the bankruptcy judge were "completely neutral" and "did not create any rights nor did they take away any rights, as explicitly stated in the orders".

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

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

Issues

[17] The following issues arise on this appeal:

1. Can a statutory deeming provision give rise to certainty of intention?
2. Were the debts of the City and the Town choses in action that supplied the required certainty of subject matter for a trust?
3. Did commingling of the Funds mean that the required certainty of subject matter was not present?
4. Does RBC's security interest have priority even if the trust created by s. 8(1) of the *CLA* survives in bankruptcy?

Analysis

Statutory Trusts

[18] As a preliminary matter, it will be helpful to define the terminology involving statutory trusts. In *Henfrey*, McLachlin J. referred to a "deemed statutory trust": p. 34. A "deemed statutory trust" is a trust that legislation brings into existence by constituting certain property as trust property and a certain person as the trustee of that property. The legislation purports to deem the trust into existence independently of the subjective intentions of or actions taken by the trustee. For example, the legislation at issue in *Henfrey*, s. 18 of the *Social Service Tax Act,* R.S.B.C. 1979, c. 388, established that a merchant who collected sales tax was "deemed to hold it in trust" for the provincial Crown. Deemed statutory trusts may

be in favour of either the Crown or private parties: *GMAC*, para. 14. The subject matter of deemed statutory trusts also varies. Some statutes establish a trust over specific sums of property owing to or received by the trustee. In contrast, other statutes purport to establish a general floating charge over the assets of the trustee for the sum of the trust moneys.

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

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

Positions of the Parties

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

[22] GCNA, supported by the Attorney General of Ontario and LIUNA Local 183, submits that the three certainties are present in s. 8(1). Certainty of intention is clear from the language of the statute that the amounts specified "constitute a trust fund". Certainty of object is spelled out as the statute specifies that the trust fund is "for the benefit of the subcontractors and other persons who have supplied services or materials to the improvement who are owed amounts by the contractor or subcontractor". Certainty of subject matter is made out as the statute clearly specifies that the subject of the trust is "all amounts owing to a contractor or subcontractor" and "all amounts received by a contractor or subcontractor...on account of the contract or subcontract price of an improvement".

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

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

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

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

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

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

[27] While RBC did not explicitly challenge the constitutional validity of s. 8(1) and accepted that it applies outside of the bankruptcy context, it did assert that the purpose of s. 8(1) is to alter priorities upon bankruptcy. The implication of RBC's argument about the purpose of s. 8(1) of the *CLA* is that the provision is

unconstitutional because its pith and substance fits within the federal power of bankruptcy and insolvency in s. 91(21) of the *Constitution Act, 1867*.

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

[29] In support of its submission that the purpose of the s. 8(1) statutory trust is to alter priorities in bankruptcy, RBC cites statements from two documents prepared by Ontario's Ministry of the Attorney General prior to the Legislature's enactment of the *CLA* in 1983: *Discussion Paper on the Draft Construction Lien Act* (Toronto: Ministry of the Attorney General, November 1980) and the *Report of the Attorney General's Advisory Committee on the Draft Construction Lien Act* (Toronto: Ministry of the Attorney General, April 1982). In particular, RBC relies on

the statement in the *Report of the Attorney General's Advisory Committee*, at p. xxxiv, suggesting that the primary purpose of the s. 8(1) trust is to "prevent contract monies from being misappropriated, and protect those monies from the claims of other creditors in the event of a bankruptcy".

[30] While the s. 8(1) trust may have the effect of protecting construction contract monies in the event of bankruptcy, I cannot agree that s. 8(1) is in pith and substance legislation in relation to bankruptcy and insolvency. The statement in the *Report of the Attorney General's Advisory Committee* is admissible but "must not be given inappropriate weight": Ruth Sullivan, *Sullivan on the Construction of Statutes* (6th ed) (Toronto: LexisNexis, 2014) at para. 23.58. A broader and more general protective purpose has been recognized both in academic writing and in the decisions of this court. Kevin McGuinness, "Trust Obligations Under the *Construction Lien Act*" (1994) 15 C.L.R. 208, at p. 227, states that the purpose of the s. 8(1) trust is to "isolate the contract moneys as they flow down the construction pyramid" and serve to preserve that pool of funds "during the period while payments are trickling down the pyramid to the persons ultimately entitled to the money concerned". As this court explained in *Dietrich Steel Ltd. v. Shar-Dee Towers (1987) Ltd. et al.* (1999), 42 O.R. (3d) 749 (C.A.), at p. 755, these statutory trusts "exist by statute at each level of the construction pyramid for the benefit of those adding value to the land involved". They are "super-imposed" on the contacts entered into by the "owner, contactor and subcontractors...for the benefit of all

those on the next level in the pyramid below the trustee". Similarly, in *Sunview Doors Ltd. v. Pappas,* 2010 ONCA 198, 101 O.R. (3d) 285, at para. 99, this court explained:

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

[31] RBC argues that the trust provisions are separate and independent from other provisions of the *CLA.* This submission fails to recognize that the trust provisions complement the other *CLA* remedies even outside of bankruptcy or insolvency. As this court stated in *Sunview Doors*, at para. 51, citing the Supreme Court's decision in *Minneapolis-Honeywell Regulator Co. v. Empire Brass Manufacturing Co.*, [1955] S.C.R. 694, at p. 696, the legislature enacted the trust provisions because it recognized that the lien provisions only provided a partial form of security to suppliers. The lien provisions failed to protect suppliers at the bottom of the pyramid in situations where the owner of the land had already paid the contractor. The trust provisions complement the lien provisions by providing security to suppliers at the bottom of the pyramid in these situations.

[32] I agree with the Attorney General of Ontario and LIUNA Local 183 that the s. 8(1) trust must be seen as an integral part of the scheme of holdbacks, liens and trusts, designed to protect the rights and interests of those engaged in the construction industry and to avoid the unjust enrichment of those higher up the construction pyramid. That purpose exists outside the bankruptcy context. As Slatter J.A. recognized in *Iona Contractors Ltd. v. Guarantee Company of North America*, 2015 ABCA 240, 387 D.L.R. (4th) 67, leave to appeal dismissed, [2015] S.C.C.A. No. 404, the trust provisions of construction lien legislation cannot be seen in isolation and are part of a comprehensive package to protect construction subcontractors: paras. 21-22. Any effects that s. 8(1) may have on protecting contract monies in the event of bankruptcy are purely incidental and do not detract from the provision's provincial pith and substance: see *Lacombe*, at para. 36. Accordingly, the s. 8(1) trust is a matter that is the proper subject of legislation relating to property and civil rights in the province: *John M.M. Troup Ltd. et al. v. Royal Bank of Canada*, [1962] S.C.R. 487, at p. 494.

(b) Does the doctrine of paramountcy apply?

[33] As valid provincial legislation, the *CLA* benefits from a presumption of constitutionality and should be interpreted to avoid conflict with federal legislation where possible. If there is conflict, the doctrine of paramountcy applies, the federal legislation prevails and the provincial legislation is inoperative. Paramountcy is triggered by a conflict between provincial and federal legislation, namely, where

there is an operational conflict such that it is impossible to comply with both laws or where the operation of the provincial law frustrates the purpose of the federal enactment: *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327, at para. 18.

[34] Determining whether there is operational conflict requires analyzing how s. 8(1) of the *CLA* intersects with the *BIA*. The *BIA* is valid federal legislation dealing with bankruptcy and insolvency. It has the dual purpose of ensuring the orderly and equitable distribution of the assets in the event of insolvency and enabling the rehabilitation of those who have suffered bankruptcy: *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, at para. 7. A central element of the *BIA*'s regime for the orderly and equitable distribution of assets is a scheme that stipulates what property is available for distribution to creditors and provides for an appropriate ranking of priorities among creditors.

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

under general principles of law, namely trusts that meet the three certainties: p. 34.

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

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

[38] In my view, *Henfrey* contemplates and requires courts to look to the deeming language of a statute to determine whether there is certainty of intention.

Accordingly, no conflict between the s. 8(1) *CLA* trust and the *BIA* arises, and the paramountcy doctrine is not triggered, on the basis that the deemed statutory trust lacks certainty of intention. I reach this conclusion for five reasons, which I outline below.

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

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

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

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

This means that "provincial law necessarily affects the 'bottom line'" in bankruptcy, and this, said the court, "is contemplated by the [*BIA*] itself."

[42] Accordingly, it is appropriate to look to provincial law to determine whether a trust satisfies the three certainties required for it to operate in bankruptcy. The *BIA* refers to but does not define what is meant by "a trust", yet the category of "trust" is recognized by the *BIA*'s scheme of priorities. As the Supreme Court of Canada stated in *Husky*, it is the "substance of the interest created" by the provincial law that is "relevant for the purpose of applying the *Bankruptcy Act*": at para. 40. Section 72 of the *BIA* contemplates the integration of the *BIA* with provincial legislation by providing that the *BIA* "shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property or civil rights that are not in conflict with [the *BIA*]." The Supreme Court has held that this provision demonstrates that Parliament intends provincial law to continue to operate in the bankruptcy and insolvency context unless it is inconsistent with the *BIA*: *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419, at para. 49.

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

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

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

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

> To interpret s. 47(*a*) as applying not only to trusts as defined by the general law, but to statutory trusts created by the provinces lacking the common law attributes of trusts, would be to permit the provinces to create their

> own priorities under the *Bankruptcy Act* and to invite a differential scheme of distribution on bankruptcy from province to province.

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

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

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

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

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

[50] As Gillese explains, at p. 42: "To satisfy the certainty of intention requirement, the court must find an intention that the trustee is placed under an imperative obligation to hold property on trust for the benefit of another". The

essential point is that the trustee is placed under an imperative obligation. I can see no reason in principle why that imperative obligation cannot be created by statute for the purposes of s. 67(1)(a) of the *BIA*.

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

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

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

[52] Third, the s. 8(1) *CLA* trust neither creates an operational conflict with the *BIA* nor engages the *Henfrey* policy concerns. I draw this conclusion because the

s. 8(1) trust neither attempts to create a general floating charge over all of the bankrupt's assets nor attempts to obtain a higher priority for the provincial Crown.

[53] RBC's argument centres on the policy concern about provinces reordering priorities in the *BIA*. RBC submits that the *Henfrey* court was concerned to prevent a province from elevating the priority of a Crown claim by deeming it to be a trust claim: *Henfrey*, at p. 33. RBC maintains that the court resolved this concern by holding that the provincial Crown could only obtain a higher priority by benefiting from rights that could be "obtained by anyone under general rules of law": *Henfrey*, at pp. 31-32, quoting *Québec (Deputy Minister of Revenue) c. Rainville*, [1980] 1 S.C.R. 35, at p. 45. RBC argues that this excludes consideration of statutory intention because private parties cannot legislate certainty of intention into existence like the provincial Legislature can.

[54] There is a well-established line of cases holding that an operational conflict arises where the application of provincial legislation would reorder the priorities prescribed by Parliament in the *BIA*. The leading case is *Husky Oil*, where a provincial statute deemed a debtor of a bankrupt to be a guarantor of money owed by the bankrupt to the Worker's Compensation Board. If the debtor was called upon to pay, it could set-off the amount it paid against the debt it owed to the bankrupt. As this had the effect of diverting funds from the bankrupt's estate to pay the Board it created an operational conflict with the *Bankruptcy Act*, R.S.C. 1985, c. B-3, and was held to be inoperative. Similarly, Québec statutes that deemed

debts for unpaid provincial taxes or worker's compensation claims to be "privileged" conflicted with the priority given the debt in the *Bankruptcy Act*, R.S.C. 1970, c. B-3, and were therefore inoperative: *Rainville*; *Federal Business Development Bank v. Québec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 1061. In another case, a provincial statute that created a charge on all an employer's property for unpaid Worker's Compensation claims conflicted with the priority the *Bankruptcy Act*, R.S.C. 1970, c. B-3 gave to such a claim and was therefore inoperative: *Deloitte Haskins and Sells Limited v. Workers' Compensation Board*, [1985] 1 S.C.R. 785.

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

[56] The amendments Parliament has made to s. 67 of the *BIA* confirm the distinction that I have drawn between provincial legislation that creates a priority in favour of the province and the type of statutory trust at issue in this case. In 1992,

Parliament amended s. 67 to add s. 67(2), a provision that deals with deemed trusts: *An Act to amend the Bankruptcy Act and to amend the Income Tax Act in consequence thereof*, S.C. 1992, c. 27, s. 33. Section 67(2) provides that subject to certain exceptions set out in s. 67(3), "any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty" shall not exclude the property under s. 67(1)(a) unless it would be excluded "in the absence of that statutory provision". The Supreme Court has held that this amendment reflects Parliament's intention to rank the Crown with ordinary creditors in most bankruptcy scenarios: *Québec (Revenue) v. Caisse populaire Desjardins de Montmagny*, 2009 SCC 49, [2009] 3 S.C.R. 286, at paras. 12-15. It is significant that Parliament singled out deemed trusts in favour of the Crown for exclusion from the protection s. 67(1)(a) offers and left untouched deemed trusts in favour of other parties.

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

[58] *Husky Oil* holds that an intention to intrude into the federal sphere of bankruptcy is not required for provincial legislation to be inapplicable. Provinces are not entitled to indirectly improve the priority of a claim and the provincial legislation will be inapplicable if its effect is to conflict with the order of priorities in

the *BIA*. Accordingly, the fact that the purpose of s. 8(1) is not to intrude into the federal sphere of bankruptcy or to alter priorities is not determinative.

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

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

[61] The deemed statutory trust that s. 8(1) of the *CLA* creates benefits private parties in the Ontario construction industry, not the provincial Crown. Ontario is thus not creating any "personal preference" for itself: *Henfrey*, at p. 32, quoting *Rainville*, at p. 45. To the contrary, any subcontractor or supplier in the construction industry can obtain trust protection under s. 8(1) in accordance with the "general rules of law" that the *CLA* establishes. Significantly, the passage from *Rainville* that

Henfrey quotes refers to "a builder's privilege" as a security interest that "may be obtained by anyone under general rules of law": *Henfrey*, at p. 32, quoting *Rainville*, at p. 45. The builder's privilege was a security interest that Québec legislation, Article 2013 of the *Civil Code of Lower Canada*, created over immoveable property in favour of construction industry participants who performed work on that property. It arose independently of the subjective intentions of the parties in the construction transaction, and was thus similar to the deemed statutory trust that s. 8(1) of the *CLA* creates.

[62] Moreover, s. 8(1) of the *CLA* impresses specific property with the trust and does not create a general priority. The court in *Henfrey* referred to "cases where no specific property impressed with a trust can be identified" as raising policy considerations that weighed against protecting such deemed statutory trusts under the predecessor provision to s. 67(1)(a) of the *BIA*: p. 33. However, the trust that s. 8(1) of the *CLA* creates does not attempt to create a general floating charge over the bankrupt's assets that would constitute a prohibited "general priority." Instead, it impresses specific property – the funds owing to or received by the contractor or subcontractor – with the trust.

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

> ...[T]he provisions of s. 22 meet the requirements of a common law trust. There is no deliberate attempt to reorder priorities in bankruptcy, and the province is not attempting to achieve indirectly what it cannot do directly. These considerations, coupled with the fact that the trust provisions of s. 22 are merely a collateral part of a complex regime designed to create security for unpaid subcontractors, leads to the conclusion that there is no operational conflict.

The decision of the British Columbia Supreme Court in *0409725 B.C. Ltd. (Bankruptcy of)*, 2015 BCSC 561, 3 P.P.S.A.C. (4th) 278, at para. 22, is to a similar effect:

> Applying the analysis of McLachlin J in *Henfrey*, certainty of intention is sufficiently provided by the statute in the circumstances of this case. That conclusion in no way intrudes into federal jurisdiction, and indeed, all parties conducted themselves on that basis.

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

[64] There is no frustration of the purpose of the *BIA* that would render s. 8(1) of the *CLA* inoperative. I agree with LIUNA Local 183 that excluding s. 8(1) *CLA* trust funds from distribution to A-1's creditors is consistent with the objective of the *BIA* to provide for the equitable distribution of the bankrupt's remaining assets. As I have already mentioned, the purpose of the *CLA* trust is to create a "closed system" to protect those suppliers and contractors down the construction pyramid and to ensure that the funds are not diverted prior to reaching their beneficial owner. The *CLA* scheme is directed at equity and at preventing the "unjust enrichment of those higher up in the construction pyramid": *Sunview Doors Ltd.*,

at para. 99. To allow s. 8(1) *CLA* trust funds to be distributed to creditors of a bankrupt contractor would provide an "unexpected and unfair windfall" to those creditors: *see Norame Inc., Re,* 2008 ONCA 319, 90 O.R. (3d) 303, at para. 18.

(v) The cases RBC relies on are distinguishable

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

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

[67] At issue in *GMAC* was a regulation, *Load Brokers*, O. Reg. 556/92, under the *Truck Transportation Act*, R.S.O. 1990, c. T.22. Section 15 of the *Load Brokers* regulation stated that load brokers "shall hold in trust" money received by the load broker on account of carriage charges and "shall" maintain separate trust accounts for such funds. TCT, the bankrupt, had failed to maintain separate accounts, and a priority dispute arose between the carriers who claimed a trust and TCT's secured creditor.

[68] RBC relies on para. 17 of the *GMAC* decision. There, the court stated that a "consistent line of cases from the Supreme Court of Canada," including *Henfrey*, "excludes statutory deemed trusts from the ambit of s. 67(1)(a)." The court also stated that Parliament had only elected to carve out exceptions from this exclusion for certain deemed trusts in favour of the Crown by enacting s. 67(3). Accordingly, it concluded that even if s. 15 of the Regulation created a deemed trust in addition

to a mere statutory trust obligation, this trust would not be a trust under s. 67(1)(a) of the *BIA*.

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

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

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

[72] Third, the court's reliance on ss. 67(2) and (3) of the *BIA* must be read in light of the Supreme Court's subsequent interpretation of those provisions in *Desjardins*. The *GMAC* court took the view that Parliament intended to allow only

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

[73] RBC also relies on *British Columbia v. National Bank of Canada* (1994), 119 D.L.R. (4th) 669 (B.C.C.A.), leave to appeal refused, [1995] S.C.C.A. No. 18, where the court stated, at p. 685, that provincial legislation cannot "create the facts necessary to establish a trust under general principles of trust law". The court accordingly rejected the province's argument that the provincial legislation supplied certainty of intention.

[74] However, this blanket statement from *National Bank* cannot be reconciled with *Henfrey* itself. The effect of taking this statement at face value would be that provincial deemed statutory trusts could never exist in bankruptcy. However, as

Iona Contractors recognized, *Henfrey* affirmed that provincial statutory trusts can survive in bankruptcy and that the statute at issue in *Henfrey* did create a valid trust at the moment of collection: *Iona Contractors*, at para. 35, citing *Henfrey*, at p. 34.

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

[76] In addition, RBC relies on two Saskatchewan Court of Queen's Bench decisions which purported to apply *Henfrey* to find that deemed statutory trusts for the construction industry, established by Saskatchewan's *The Builders' Lien Act*, S.S. 1984-85-86, c. B-7.1, did not operate in bankruptcy: see *Duraco Window Industries (Sask.) Ltd. v. Factory Window & Door Ltd. (Trustee of)* (1995), 34 C.B.R. (3d) 196 (Sask. Q.B.); *Roscoe Enterprises Ltd. v. Wasscon Construction Inc.* (1998), 161 D.L.R. (4th) 725 (Sask. Q.B.). However, the court in *Duraco* only

reached this conclusion because it interpreted *Henfrey* as requiring courts to analyze whether the three certainties were met "without regard" to the terms of the statute: at para. 9. The court then held that the deemed trust did not survive in bankruptcy because the parties did not subjectively intend to create a trust: paras. 11-13. The *Roscoe* court simply followed the *Duraco* court's analysis: at paras. 25-31. For the reasons stated above, this is a misreading of *Henfrey*. The court in *Henfrey* did look to the terms of the statute when it analyzed whether the deemed statutory trust satisfied the general principles of trust law: p. 34.

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

(vi) Conclusion

[78] I conclude, accordingly, that *Henfrey* contemplates that a provincial statute can supply the required element of certainty of intention for a statutory trust and that the trust created by the *CLA*, s. 8(1) does not give rise to an operational conflict with the *BIA*, s. 67(1)(a). Accordingly, the doctrine of paramountcy does not apply.

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

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

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

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

To a similar effect is this court's decision in *Angus v. Port Hope (Municipality)*, 2017 ONCA 566, 28 E.T.R. (4th) 169, at para. 112, leave to appeal refused, [2017] S.C.C.A. No. 382.

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

[82] The amounts owed by the City and the Town on account of the paving projects were debts. It is well-established that a debt is a chose in action which can properly be the subject matter of a trust. In *Citadel General Assurance Co. v. Lloyds Bank Canada*, [1997] 3 S.C.R. 805, at para. 29, the court stated: "A debt obligation is a chose in action and, therefore, property over which one can impose a trust". This proposition is supported by the decision of the House of Lords in *Lipkin Gorman v. Karpnale Ltd.*, [1991] 3 W.L.R. 10. See also Donovan W.M. Waters, Mark R. Gillen & Lionel D. Smith, *Waters' Law of Trusts in Canada*, 4th ed. (Toronto: Carswell, 2012), at p. 161.

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

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

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

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

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

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

[88] McLachlin J. explained this in *Henfrey* when she stated in relation to the deemed statutory trust imposed on money collected by a merchant under British Columbia's *Social Service Tax Act* that the trust attached the moment the tax is collected. Accordingly, "[i]f the money collected for tax is identifiable or traceable,

then the true state of affairs conforms with the ordinary meaning of 'trust' and the money is exempt from distribution to creditors" in the merchant's bankruptcy: pp. 34-35. McLachlin J. went on to explain that the problem with deemed statutory trusts is that very often, the trust property "ceases to be identifiable": p. 34. She then stated, at pp. 34-35, that the property ceases to be identifiable in the following circumstances:

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

[89] Subsequent jurisprudence confirms this statement of the law. In *Husky Oil*, the majority confirmed that *Henfrey* identified the key question as whether the trust property could be identified and traced: para. 25. This court also followed McLachlin J.'s statement of the law in *Graphicshoppe (Re)* (2005), 78 O.R. (3d) 401 (C.A.), where Moldaver J.A. (as he then was) stated, at para. 123:

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

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

matter. In fairness to the motion judge, I agree that there are *dicta* in *GMAC* that could be taken to support that proposition, and it appears that it has been read in the same way in other cases: *Bank of Montreal v. Kappeler*, 2017 ONSC 6760, at para. 3, and *Royal Bank of Canada v. Atlas Block Co.*, 2014 ONSC 3062, 15 C.B.R. (6th) 272, at paras. 35-36. However, for the following reasons, it is my view that GMAC should not be read as standing for the proposition that any commingling will be fatal to the existence of a trust.

[91] As described previously, the issue in *GMAC* concerned s. 15 of the *Load Brokers* regulation, which required load brokers to hold in trust for carriers' money received by the load broker on account of carriage charges and to maintain separate accounts for such funds. TCT, the bankrupt, had failed to maintain separate accounts, and a priority dispute arose between the carriers who claimed a trust and TCT's secured creditor. The court held that, as TCT had not maintained a separate account but had commingled the money it received for carriage charges, there was no trust for the purposes of s. 67(1)(a) of the *BIA*. The court stated, at para. 19: "Once the purported trust funds are co-mingled with other funds, they can no longer be said to be 'effectively segregated' for the purpose of constituting a trust at common law". Significantly, the authority cited for that proposition is *Henfrey*, and the court goes on to cite the same passage from *Henfrey* that I have referred to above, at para. 44, stating that when the "tax money is mingled with other money in the hands of the merchant and converted to other

property so that it cannot be traced", it ceases to be subject to any trust. The *GMAC* court went on to state, at para. 20, that the facts before the court were not distinguishable from those of *Henfrey* and that the legal result must also be the same.

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

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

[94] This distinction between deemed statutory trusts and statutory trust obligations explains the result in *GMAC*. The regulation only obligated the load broker to hold the funds received in a separate account. If TCT complied with this obligation, that would give rise to a trust. However, TCT did not comply with this obligation and instead deposited all funds received into a single account.

Accordingly, TCT did not perform the actions required to create a trust. The fact that the monies TCT received may have been capable of being traced due to the computerized accounting records it maintained does not alter the conclusion that no trust arose. As GCNA submitted in oral argument, while tracing is available once a trust exists, tracing is incapable of creating a trust.

[95] The distinction between deemed statutory trusts and mere statutory trust obligations also explains why a trust did attach to moneys received by the receiver on behalf of TCT following the receiver's appointment. The receiver had deposited payments received into a separate account pursuant to court orders: *GMAC*, para. 33. The court found that the receiver was required to comply with s. 15 of the regulation and hold the funds on trust: *GMAC*, para. 36. Accordingly, the court found that that the payments the receiver collected were held on trust because the receiver was required to comply with the regulation and did in fact comply with it by holding the funds in a separate account: *GMAC*, para. 38. The receiver's action of complying with the statutory trust obligation by depositing the funds into a separate account thus brought the trust into existence.

[96] In contrast, s. 8(1) of the *CLA* operates quite differently than s. 15 of the *Load Brokers* regulation. It does impose a deemed statutory trust rather than merely create a statutory trust obligation on the contractor to hold money on trust in a separate account. Section 8(1) declares that the amounts owing to the contractor "constitute a trust fund" independently of the contractor's subjective

intention or actions. The s. 8(1) trust is imposed from the time the moneys are owed to the contractor, not just after they are received. Accordingly, the fact that ss. 8(1) and (2) did not require the segregation of amounts received is not determinative because the statute itself, not the act of complying with a statutory obligation to segregate funds, created the trust.

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

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

[99] I am fortified in that conclusion by a considerable body of authority in addition to *Henfrey* that stands for the proposition that commingling alone will not destroy the element of certainty of subject matter under the general principles of trust law. I have already mentioned *Graphicshoppe* where this court clearly rejected that proposition. A.H. Oosterhoff, Robert Chambers & Mitchell McInnes, *Oosterhoff on Trusts: Text, Commentary and Materials*, 8th ed. (Toronto: Carswell, 2014), at pp.

207-208, states that when trust property is deposited into a mixed account, "the trust is not necessarily defeated. The rules of tracing allow the beneficiary to assert a proprietary interest in the account." In *B.M.P. Global Distribution Inc. v. Bank of Nova Scotia*, 2009 SCC 15, [2009] 1 S.C.R. 504, the Supreme Court held that mixing of the funds does not necessarily bar recovery and that it is possible to trace money into bank accounts as long as it is possible to identify the funds: at para. 85. The funds are identifiable if it can be established that the money deposited in the account was the product of, or substitute for, the original thing: at para. 86. As the Alberta Court of Queen's Bench recently held, in *Imor Capital Corp. v. Horizon Commercial Development Corp.*, 2018 ABQB 39, 56 C.B.R. (6th) 323, at para. 58:

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

The following cases are to the same effect: *In re Hallett's Estate* (1880), 13 Ch.D. 696 (C.A.); *In re Kayford Ltd.*, [1975] 1 W.L.R. 279 (Ch.); *Kel-Greg Homes Inc. (Re),* 2015 NSSC 274, 365 N.S.R. (2d) 274, at paras. 51-59; *0409725 B.C. Ltd.*, at paras. 24-34; *Kerr Interior Systems Ltd. v. Kenroc Building Materials Co. Ltd.,* 2009 ABCA 240, 54 C.B.R. (5th) 173, at para. 18.

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

[100] On appeal, RBC submits that its security interest takes priority over the deemed statutory trust in s. 8(1) of the *CLA* even if this court finds that the *CLA* trust is valid under s. 67(1)(a) of the *BIA*. RBC relies on the Supreme Court's decision in *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 in support of this argument. In that case, the majority found that a bank's security interest under the *Bank Act*, S.C. 1991, c. 46 and the *Personal Property Security Act*, S.A. 1988, c. P-4.05 took priority over a deemed statutory trust in favour of the federal Crown established by ss. 227(4) and (5) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.).

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

[102] Accordingly, I would decline to consider this argument. A respondent on appeal cannot seek to sustain an order on a basis that is both an entirely new argument and in relation to which it might have been necessary to adduce evidence before the lower court: see *R. v. Perka*, [1984] 2 S.C.R. 232, at p. 240; *Fanshawe College of Applied Arts and Technology v. AU Optronics Corp.*, 2016 ONCA 131, 129 O.R. (3d) 391 (in Chambers), at para. 9. RBC's proposed argument is both new and requires evidence that RBC has not adduced. In both

Sparrow Electric and *GMAC*, the court considered the specific provisions of the security agreement in determining whether the security attached to the trust funds: see *Sparrow Electric*, at paras. 71-72, 90; *GMAC*, at para. 26. This court is unable to consider the specific provisions of RBC's security agreement with A-1 because it is not part of the record.

Disposition

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

1. That by operation of s. 67(1)(a) of the *BIA*, the Funds satisfy the requirements for a trust at law and so are not property of A-1 available for distribution to A-1's creditors; and
2. That the balance of the motion concerning GCNA's priority dispute with the Unions be remitted to the Superior Court for disposition.

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

Released:
JAN 14 2019

I agree Alexandra Hoy J.A.
I agree Robert J. Roberts J.A.
I agree Lauwers J.A.