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The Unpaid Employee as Creditor: Case Comment on Homeplan Realty

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I. *Introduction*

The unpaid employee is a common phenomenon in employment law, and one which poses difficult problems of determining the available rights and remedies. Take Jean, for example, who works full-time in an office for Bill. By virtue of her employment contract, Jean earns a fixed salary at an hourly rate. Moreover, provincial statutes entitle her to vacation pay and holiday pay. Bill falls one month in arrears in paying Jean's wages, because his business is financially unstable. This adds a new dimension to the employment relationship: Jean is not only an employee, but also a creditor of Bill for wages owing. How can Jean collect this debt if Bill is unwilling to pay, or incapable of paying? Suppose that Bill owes other debts, for example, to the city for taxes, to a finance company for a short-term loan, to a manufacturer for an equipment lease, and to a car dealer for a conditional sale agreement. How will Jean's claim for wages fare against these competing creditors?

This paper deals with the enforcement of an employee's right to payment of wages, with particular attention to the statutory lien as a technique of wage protection. In Part II alternative remedies available to the unpaid employee are critically reviewed, with emphasis on the present state of wage protection in Nova Scotia. Part III focuses on the statutory lien created by s. 5A of the British Columbia *Payment of Wages Act*[1], in the context of a recent Supreme Court of Canada decision interpreting that section, and in Part IV the B.C. statutory lien is compared with the lien created by the Nova Scotia Labour Standards Code,[2] considering the implications for Nova Scotia's wage protection. Part V concludes the paper with recommendations for more effective wage protection.

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1. S.B.C. 1962, c. 45, s. 5A, as amended by S.B.C. 1970, c. 35, ss. 7, 8; 1973, c. 68, s. 7.

2. S.N.S. 1972, c. 10, as amended by S.M.S. 1974, c. 29; 1975, c. 50; 1976, c. 41; 1977, c. 18; 1977, c. 68.

At the outset of this discussion, it is essential to define the terms which recur throughout. The definitions of the Labour Standards Code (LSC) will be adopted as a point of departure, and modified where necessary.

"Employee" has been defined as "a person employed to do work" (s. 1(d)). For the purposes of this paper, the term excludes independent contractors,[3] and refers exclusively to non-unionized employees. "Wages" means "salaries, commissions and compensation in any form for work or services measured by time, piece or otherwise. . ." (s. 1(r)). It includes minimum wages, pay in lieu of notice, vacation pay, compensation for holidays with pay, and overtime,[4] but excludes compensation for breach of contract. Finally, "wage protection" means "protection of the employee's right to receive the wages he has earned."[5]

On first consideration, wage protection appears to be primarily concerned with the relationship between employer and employee, and the contractual obligation of the employer to pay the employee for services rendered. To a limited extent, legislation has extended this obligation by involving third parties (such as directors of some corporations) in the responsibility to pay unpaid wages. However, the status of the unpaid employee in relation to the employer's other creditors is essential to the matter of wage protection. This aspect of wage protection will hereafter be called "priority".

The wage-earner is particularly vulnerable as a creditor of his employer for the following reasons:

(1) An individual employee is in a weak bargaining position,

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3. In *Re Telegram Publishing Co. Ltd.* v. *Amm et al.* (1977), 77 D.L.R. (3d) 369 (Ont. Div. Ct.), Hughes J. suggests that the all-encompassing defintion of "employee" now obviates the need for a distinction between "independent contractor" and "employee". However, this point remains controversial, and is beyond the realm of this study.

4. Note that the Labour Standards Code excludes vacation pay from "wages", but includes it in the term "unpaid pay". For the purpose of simplicity, the two terms have been combined herein, arriving at the enlarged concept of "unpaid wages".

Confusion may arise from the LSC definitions of "pay" and "wages". For example, by interpreting s. 84 as implementing "protection of pay" through a s. 77 complaint and a s.24 order, it could apply to vacation pay as well as to other wages owed.

While acknowledging the difficulties of the potential over-lap between sections 34 and 84 of the LSC, this writer wishes to avoid such problems herein.

5. Owen Gray, *Wage Protection* (Ottawa: Labour Canada, 1973), at p. ii. The term is not defined in the Nova Scotia LSC.

stemming from the nature of the employer-employee relationship. The wage debt is not the only object of their relationship, unlike the situation with other business and consumer creditors. Because of his employer's general role of authority and his right of summary dismissal for certain breaches of duty an employee may be intimidated and afraid to assert his right as creditor.

(2) Business and consumer creditors are in a relatively strong bargaining position. "Good business creditors, particularly money-lenders, are harder to find than employees; if it comes to a choice, an employer may be more inclined to satisfy those creditors than to pay his employees."[6]

(3) There is a marked difference in the economic strength of wage creditors and business creditors. Many employees rely on wages as their only source of income. Non-payment for any length of time can be financially debilitating. An unpaid wage-earner is an involuntary creditor with no profit motive, whereas business creditors voluntarily extend credit in order to make a profit through interest charges. In other words, time usually works against employees, but in favour of other creditors.

(4) Employees are not in a position to assess the financial situation of their employers. Business creditors, on the other hand, can demand information relevant to the nature of the risk posed by a particular transaction, and have the expertise to assess such risk. It is essential that a creditor register his claim prior to the debtor's bankruptcy, because proceedings against a debtor or his property are stayed when the debtor becomes bankrupt. But without adequate information, unpaid employees are unable to do so. Here again the time factor is critical to wage collection.

(5) Without financial resources to hire a lawyer and pay the cost of legal action, employees are unaware of their rights as creditors and incapable of taking advantage of them. Frequently, the only practical remedy available to an employee is quitting and seeking a job with a reliable employer.

In general, unpaid employees cannot meaningfully compete with their employer's business and consumer creditors. In order to compensate for this vulnerability, wage creditors need fast and inexpensive legal remedies aginst employers, and priority in payment over other creditors.[7] Federal and provincial governments

6. *Id.*, at 118

7. A forceful analogy may be drawn between the position of wage creditors, and that of consumers. Legislators now perceive consumers as an economic class

have acknowledged the need for wage protection, and are at different stages in legislating solutions.

II. *Alternative Methods of Wage Protection*

(1) Civil Action

Wages owing can be recovered as a debt by an individual employee in a civil court of competent jurisdiction. The Municipal Courts Act[8] of Nova Scotia, s. 8(1)(a), confers jurisdiction on the Municipal Court over "any claim of debt or on contract in which the amount sought to be recovered does not exceed five hundred dollars. . ." The County Court has jurisdiction over claims of up to $50,000.[9]

The major drawback with civil actions is their cost — in time and money — to plaintiff employees. While time is of the essence to the employee who relies on his pay-cheque to meet daily expenses, the processes of getting to trial and executing a court order are time-consuming. Depending on the size of the debt owed, lawyers' fees may be more than the amount of wages recovered.

(2) *Master and Servants Acts*

Master and Servant Acts provide a faster method of recovering up to a specified limit of wages owed — generally a maximum of $500. or six month's wages. Commonly under these acts, after an employee swears a complaint before a justice of the peace or magistrate, the latter is empowered to issue a summons to the employer or, where appropriate, a warrant for his arrest. If the matter is determined in the employee's favour, an order for payment is filed, and enforced as an order of the court.[10] There are Master and Servant Acts in all provinces except New Brunswick, Nova Scotia, and Prince Edward Island.

(3) *Prosecution*

The Labour Standards Code of Nova Scotia makes non-payment of wages a summary offence, with a penalty of not more than $100. and, on default of payment, maximum fifty days' imprisonment (s. 89). Non-payment of vacation pay is also a summary offence,

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requiring special compensation for their lack of bargaining power. Thus, a network of consumer protection legislation is being developed to that end.

8. R.S.N.S. 1967, c. 197

9. County Court Act, R.S.N.S. 1967, c. 64, s. 27(a), as amended by S.N.S. 1968, c. 41, s. 7

10. For example, *Master and Servant Act*, R.S.O. 1970, c. 263, ss. 1-5

punishable by a fine of up to $500. and, in default, by imprisonment for between ten and ninety days (s. 92).

While the legislation of other provinces provides for a judicial order to pay wages due at the time of conviction,[11] the LSC is silent on the matter. However, such a remedy is available in Nova Scotia by a circuitous route. The Summary Proceedings Act,[12] s. 5(1), states that the Criminal Code,[13] Part XXIV, is applicable to summary convictions under provincial enactments. Within Part XXIV, s. 722 provides for the imposition of a maximum fine on summary conviction, and subsection 11 defines "fine" to include "a pecuniary penalty *or other sum of money*".[14] Arguably, "fine" would include wages due.

A further uncertainty under the Nova Scotian statute is whether individual employees may prosecute. S.88(1), requiring the written consent of the Minister of Labour to institute criminal proceedings, may have been intended to discourage such initiatives by private individuals.

The *Canada Labour Code*,[15] s. 69, creates a summary offence for non-payment of wages to federal employees. Section 71 provides for the convicting court to order payment of wage arrears, compensation for loss of employment to the date of conviction, and reinstatement.

Joining wage collection with criminal prosecution reduces the need for an employee to bring two separate actions. However, problems are created by wage recovery through prosecution. Such joinder of actions raises the burden of proof of non-payment from the usual civil standard to "beyond a reasonable doubt."[16] In addition, an order for payment of arrears is futile if the employer is insolvent. Finally, in jurisdictions such as Nova Scotia, where prosecution requires the Minister's consent, the availability of a remedy may depend on a political decision by the Minister of Labour on whether to prosecute.

(4) *Collection by Public Officials*

Most provinces — British Columbia, Manitoba, Nova Scotia,

11. *Supra*, note 5, at 28
12. S.N.S. 1972, c. 18, s. 5(1)
13. R.S.C. 1970, c. C-34
14. Thanks to Prof. B. Cotter of the Faculty of Law, Dalhousie University, for his enlightenment on this point.
15. R.S.C. 1970, c. L-1
16. *Supra*, note 5, at 40

Ontario, Prince Edward Island, and Saskatchewan[17] — have established public bodies to investigate and settle instances of wage non-payment. In Nova Scotia, the Director of Labour Standards and the Labour Standards Tribunal are responsible for wage protection. By s.75(1) of the LSC, an employer is obliged to pay his employees at least twice a month, within five working days after each pay period expires. If the employer fails to do so, an employee may complain to the Director within six months of the breach of duty (s. 77). The Director investigates the complaint and tries to settle it (s. 19(1)). If his attempts at settlement are unsuccessful, and he decides that the complaint is justified, the Director orders the employer to pay to the Tribunal the wages owing (s.19(3)). Both the employee and the employer have the right to appeal to the Tribunal within ten days after the order is served (s. 19(5)). The Tribunal issues a written order under s.24, which may be appealed to the Appeal Division of the Supreme Court on a question of law or jurisdiction, within thirty days (s.18(2)).

The LSC confers broad power and procedural discretion on the Director. He is not required to serve notice or hold hearings before making an order (s.19(8)). If no appeal is filed to the Tribunal (s. 19(5)), an order of the Director or the Tribunal may be entered with the Prothonotary and enforced as an order of the Surpreme Court (s.86(2)). This includes enforcement by means of attachment order, execution order and contempt order.

Collection by public officials is advantageous over action by individual employees. It is less expensive to the employee, speedier, and more informal than courtroom proceedings. The employee is benefitted by the expertise of the Labour Standards Branch, particularly if he is represented by the Director on an appeal to the Tribunal. Moreover, the Code provides enforcement measures not available to an employee under other statutes.[18] The question of who is acting — the employee or a public official — is a continuing dichotomy, and should be kept in mind throughout this section on alternatives of wage protection.

(5) *Liability of Strangers to the Employment Contract*

Legislation has altered the law of privity of contract by creating

17. *Payment of Wages Act*, S.B.C. 1962, c. 45; *Payment of Wages Act*, S.M. 1975, c. 21.; Labour Standards Code, S.N.S. 1972, c. 10; *Employment Standards Act, S.O. 1974, c. 112; Labour Act, R.S.P.E.I. 1974, c. L-1; Labour Standards Act, 1977*, S.S. 1976-77, c. 36

18. Such measures will be discussed later in this part of the paper.

several situations of direct third-party liability for wage payment.[19]

(a) Personal liability of directors of a corporation is coming into increasing use. Generally, corporation statutes imposing such measures make directors jointly and severally liable for unpaid wages of up to six months. They require an employee to have first sued the corporation within a certain time limit, and had the writ of execution returned unsatisfied. Directors can only be sued while they are still acting as directors, or within a specified period thereafter.[20] Some acts make express provision for claims in case of insolvency of a corporation, eliminating the requirement to have sued the corporation beforehand.

The only such legislation in effect in Nova Scotia is the Loan Companies Act,[21] the Trust Companies Act[22] and the *Canada Business Corporations Act*.[23] There is, as yet, no general provision in the LSC imposing personal liability on all company directors.

Director liability is a practical measure because directors are in a position to be aware of the financial status of the corporation and to insure wage payment. It provides incentive to more careful financial management of corporations. Further, it eliminates the occasional problem of piercing the corporate veil to identify the offending employer. Its most serious shortcomings are related to time. It may sometimes be impossible to meet the stipulated time limitations in order to sue a director, particularly while the director retains that position with the company. In addition, there is an extended period of time involved in the overall process before an employee actually collects his debt.

(b) The Nova Scotia Labour Standards Code, s.81, provides what is ostensibly another illustration of third-party liability for wage payment. After the Director receives a complaint of unpaid wages, he may order a person indebted to the employer (including a bank or credit union with which the employer has an account) to pay the amount owing to the Tribunal, which acts as trustee for the employer pending determination of the complaint. If the Director

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19. Refer to the Gray Report, *supra*, note 5, at 71-72, for a more in-depth treatment of this subject, and examples of third-party liability not mentioned in this paper.
20. For example, *Business Corporation Act*, R.S.O. 1970, c. 53, s. 139; *Payment of Wages Act*, S.B.C. 1962, c. 45, s. 15A, as amended by S.B.C. 1973, c. 68, s. 13
21. R.S.N.S. 1967, c. 171, s. 79
22. R.S.N.S. 1967, c. 316, s. 50
23. S.C. 1974-75, c. 33, s. 114

finds the complaint to be justified, the Tribunal uses such funds to pay the employee, and returns any surplus to the employer.

While s.81 appears to be a form of third-party liability in substance it merely provides for indirect payment by the employer, because the money paid is already owing to him. The advantage of this method is that the Director can order payment to the Tribunal before it is even decided that an employer is indebted to a complainant.

(6) *Upaid Wages as a Preferred Debt*

(a) Claims under the *Bankruptcy Act*[24]

When an employer makes an assignment of his property in bankruptcy, or if he is petitioned into bankruptcy, an unpaid employee may prove his claim under the *Bankrupty Act*. Section 2 of that Act defines "secured creditor" as:

> a person holding a mortgage, hypothec, pledge, charge, lien or privilege on or against the property of the debtor or any part thereof as security for a debt due or accruing due to him from the debtor, or a person whose claim is based upon, or secured by, a negotiable instrument held as collateral security and upon which the debtor is only indirectly or secondarily liable.

Section 107(1)(d) gives a wage-claimant preferred status, subject to the rights of secured creditors and payment of the costs of administration of the bankruptcy. This priority covers only "wages. . . for services rendered during three months next preceding the bankruptcy to the extent of five hundred dollars in each case."[25]

Three categories of wage-earners are excepted from preferred creditor status: (i) an employee (of a bankrupt) who is a father, son, daughter, mother, brother, sister, uncle or aunt by blood or marriage (s.109); (ii) officers and directors of a bankrupt corporation (s.111); and (iii) spouse or former spouse of a bankrupt (s.108 (2)). Unlike the other two excepted categories, which may still rank with the masses of unsecured unpreferred creditors, wage claims of a spouse or former spouse are deferred until payment in full of all other creditors.

Of all the difficulties with the present scheme of distribution

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24. R.S.C. 1970, c. B-3

25. The *Winding-Up Act*, R.S.C. 1970, c. W-10, S. 72 confers a similar priority on wage claims for debts incurred during the three months immediately preceding the winding-up order.

under the *Bankrupty Act*, four are particularly noteworthy in this context. First, with increasing resort to secured financing, a large portion of the bankrupt's assets are consumed by realizing claims of secured creditors, leaving a relatively small amount to be divided among unsecured creditors.[26] The priority accorded to wage claimants is certainly not a guarantee of full payment of their debts.

Second, the limits placed on the time and amount of wages to be accorded preference under s.107(d) are unreasonable and unrealistic. Most wage earners would refuse — or could not afford — to work beyond three months without pay so, in that sense, the time limit imposes no hardship. However not all wage claims stem from the three months "next preceding" bankruptcy, leaving upaid employees with earlier claims to scramble for assets with the mass of creditors without a preferred status.

The $500 ceiling on wage claims is too low, considering current drastic inflation rates in prices and wages throughout Canada.[27] Calculated on the basis of Nova Scotia's minimum wage of $2.75 per hour, earned in a 40-hour work week, an employee would earn $1320. in three months, disregarding holiday pay, vacation pay, overtime and fringe benefits. Moreover, the average employee's wage rate exceeds the minimum wage.[28]

Third, the exceptions of family and spouse from wage protection on bankruptcy penalizes employees for a relationship with the employer which is irrelevant to the debt owing under an

26. *The Report of the Superintendent of Bankruptcy*, 1973-4 (Information Canada: Ottawa, 1975), at 18, indicates that there were a total of 2,934 business bankruptcies in Canada in the 1973 calendar year. Of this total, $65,651,000. of assets went to secured creditors, and $38,814,000. to unsecured creditors. Secured creditors realized approximately 63% of the total assets, compared to about 37% realized by unsecured creditors.

In Nova Scotia, there were a total of 17 business bankruptcies in 1973. Of this total, $143,000. of assets went to secured creditors, and $119,000. to unsecured creditors. Secured creditors realized approximately 55% of the total assets, compared to about 45% realized by unsecured creditors. There were $534,000. in debts unpaid to general or unpreferred creditors, which is about twice the total amount of assets paid to secured and unsecured creditors ($262,000.).

27. *Supra*, note 5, at 124-125

28. The proposed new *Bankruptcy Act*, An Act representing Bankruptcy and Insolvency, Bill C-60, 1st session, 30th Parliament, 23-24 Eliz. II, 1974-75, directed itself to these first two problems by giving wage-earners priority over secured creditors for unpaid wages of up to $2,000. However, as a result of the strongly negative response of the Senate Banking, Trade and Commerce Committee to the Bill (of *The Proposed Bankruptcy Act, 1975, with Commentary*, Marantz, Woloshen and Zwaing (Toronto: Richard de Boo, 1975) at 27-28), secured creditors have since been restored to their traditional position of priority.

employment contract. The fact of being a relative of an employer does not reduce an employee's entitlement to renumeration for services rendered, or his need for wages owed to him.

Fourth, recent authorities indicate that s.107(1)(d) does not encompass employee's claims for severance pay. The LSC, s.68(4), provides for immediate termination by means of written notice and payment of an amount equal to wages for the required period of notice. This payment is probably not recoverable in the event of a claim under s.107(1)(d). In *Re Malone Lynch Securities Ltd.*,[29] an employer's bankruptcy resulted in termination of employment without notice. The employee claimed for severance pay under s.13(2) of the *Employment Standards Act* of Ontario.[30] The Supreme Court held that the provisions of the *Employment Standards Act* requiring notice on termination of employment were inapplicable to termination caused by the bankruptcy of the employer. The Act, as a whole, was never intended to apply in a situation of bankruptcy because, *inter alia,* proof of claims could only be filed for claims in existence at the date of bankruptcy. A similar situation arose in *Re Lewis' Department Store Ltd.*,[31] wherein it was decided that s.107(1)(d) priority for "wages. . . for services rendered during three months next preceding the bankruptcy" did not apply to severance pay.

In sum, while the *Bankruptcy Act* improves the relative ability of a wage creditor to realize a claim upon an employer's bankruptcy, it leaves significant gaps as a method of wage protection.

(b) Claims under Various Provincial Statutes

The Ontario *Employment Standards Act*,[32] s.14, confers on wage-earners priority to the claims of all preferred, ordinary or general creditors of an employer, up to $2,000. per employee, except in the case of bankruptcy. The inadequacy of this approach is evidenced by *Campeau Corporation* v. *Provincial Bank of Canata et al.*,[33] which dealt with s.8(1), the forerunner of s.14 of the Ontario Act. Section 8(1) reads:

> Notwithstanding the provisions of any other Act, a person to whom unpaid wages are due and owing by an employer shall have first priority over the claims or rights, including the claims

29. (1972), 17 C.B.R. (N.S.) 105 (Ont. S.C.)
30. R.S.O. 1970, c. 147
31. (1972), 17 C.B.R. (N.S.) 113 (Ont.)
32. S.O. 1974, c. 112, s. 14
33. (1975), 20 C.B.R. (N.S.) 99 (Ont. S.C.)

or rights of the Crown, of all preferred, ordinary or general creditors of the employer to the extent of $2,000.

It should be noted that, although very similar to s.14, s.8(1) contained no proviso about bankruptcy. The *Campeau* case may have led legislators to insert the proviso in the amended Act. The question before the court was the priority to be accorded to competing claims of a bank (as assignee of book debts) and unpaid employees (claiming under s.8(1) of the *Employment Standards Act*). It was held that the employees were not entitled to payment, because s.8(1) only provided priority over other unsecured creditors, but not over secured creditors. A significant *obiter* was that s.8(1) was inapplicable to claims under the *Bankruptcy Act*, in effect limiting preferred claims of Ontario wage-earners to $500. in a bankruptcy situation.

Thus, preferred creditor status under the Ontario Act does not ensure payment to employees whenever an employer has creditors with secured debts. As will be seen, the Nova Scotia Labour Standards Codes provides a greater measure of wage protection.

Other Nova Scotian legislation makes wage-earners preferred creditors in specific non-bankruptcy situations. The Assignments and Preferences Act,[34] s.21, provides that when an employer makes an assignment for the general benefit of creditors the assignee shall pay up to three months' wage claims of his employees in priority to other creditors. Under the Creditors' Relief Act,[35] s.23, where the sheriff seizes funds of an execution debtor, employees of the debtor shall be paid in priority to all other claims, up to three months' wages. If the funds seized are insufficient to pay wage claims in full, then they shall be paid rateably.

Such provisions are helpful to employees in the particular situations described,but are of limited application.

(7) *Unpaid Wages as a Secured Debt*

(a) Bonding

Legislation may require employers to post a bond as security for unpaid wages. The Alberta *Industrial Wages Security Act*[36] requires all employers in designated industries to post bonds each year,

34. R.S.N.S. 1967, c. 16, s. 21
35. R.S.N.S. 1967, c. 70, s. 23
36. R.S.A. 1970, c. 184

unless they have become exempt through proving reliability in wage payment. While such a system is an ongoing expense to employers, as well as to tax-payers financing its administration, it ensures that money will always be available for wage payment.

Under the Nova Scotia Labour Standards Code, bonding is a remedial measure, rather than preventive. Section 80 [37] empowers the Tribunal to order an employer to post a bond of a regulated amount, and apply the proceeds of the bond toward payment of the employer's debt. This technique is only available in the event of an appeal to the Tribunal. Moreover, it will be ineffective if an employer is insolvent, because an employer who cannot afford to pay wages will not be able to afford a bond.

(b) Statutory Liens

Section 84 of the Labour Standards Code creates a statutory lien in the following language:

> 84 (1) Notwithstanding any other Act, an order of the Tribunal under Section 24 constitutes a lien and charge in favour of the Tribunal for the amount set forth in the order and the amount set forth in the order is a debt due or accruing due to the Tribunal by the employer and the Tribunal shall be deemed to hold a mortgage on the assets of the employer to the amount set forth in the order and may enforce the mortgage by foreclosure proceedings.
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> (2) The lien and charge and mortgage referred to in subsection (2) shall be payable in priority over all liens, charges or mortgages of every person in respect of the real and personal property of the employer, including those of the Crown in the right of the Province, but excepting liens for wages due to workmen by that employer.[38]

Of the methods considered thus far, this is potentially the most effective and far-reaching. On first glance, it appears to overcome the problems facing wage-earners as preferred creditors and as claimants under the *Bankruptcy Act*. By holding a lien, charge or mortgage the Tribunal is elevated to the level of a secured creditor and is thereby well equipped to enforce payment of wage debts. When competing with other secured creditors a s.84-lien-holder has express priority in entitlement to assets of the employer. Upon a debtor's bankruptcy a s.84-lienholder can ostensibly claim as a

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37. S.N.S. 1972, c. 10, s. 80, as amended by S.N.S. 1976, c. 41, s. 19
38. S.N.S. 1972, c. 10, s. 84, as amended by S.N.S. 1975, c. 50, s. 3; 1976, c. 41, s. 21

secured creditor rather than with preferred status conferred by s.107(1)(d) of the *Bankruptcy Act*.

However, statutory liens have been confronted with serious problems. First, because an increasingly large number of secured creditors may compete for the assets of a single debtor little may remain even to be divided amongst them when insolvency or bankruptcy occurs.

Second, a related consideration is the confusion caused by the growing number of statutory liens. Many provincial and federal statutes create statutory liens with substantially similar priority provisions.[39] "Priority" loses its meaning when it is conferred on all claimants. This is clearly illustrated by *Re KRA Restaurants Ltd. and Toronto Dominion Bank et al.*,[40] although the case itself involved statutory trusts rather than liens. The Crown in the right of Canada was claiming under the *Canada Pension Plan*[41] and the *Unemployment Insurance Act*,[42] and the Crown in the right of the Province of Nova Scotia was claiming under the Health Services Tax Act.[43] The purpose of each of the relevant provisions was to create a trust to enable the Crown to have priority over other claims in the event of bankruptcy of the debtor. *Inter alia*, the Supreme Court had to determine the priority among the Crown claimants. It was held that the Crown in each of its capacities was entitled to take in rateable proportions.

Third, while s.84 is not explicit on this matter, it would appear that the lien arises upon the making of the Tribunal's order. This is indicated by the words ". . . an order of the Tribunal under Section 24 constitutes a lien and charge in favour of the Tribunal . . ." By

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39. Provisions of other Nova Scotia stautues creating liens with express priority-provisions include: Assessment Act, R.S.N.S. 1967, c. 14, ss. 135 and 153; Corporation Tax Act, R.S.N.S. 1967, c. 61, s. 30; Fire Prevention Act, R.S.N.S. 1967, c. 107, s. 13 (1), (2); Gypsum Mining Income Tax Act, R.S.N.S. 1967, c. 122, s.11; Halifax City Charter ss. 305, 206, 310; Health Services Tax Act, R.S.N.S. 1967, c. 126, s. 23; Mechanics's Lien Act, R.S.N.S. 1967, c. 178, ss. 14 (1), 32(1), (2); Mineral Resources Act, S.N.S. 1975, c. 12, s. 102; Municipal Affairs Act, R.S.N.S. 1967, c. 193, s. 19; Municipal Land Transfer Tax Act, S.N.S. 1968, C. 10, s. 12; Power Commission Act, R.S.N.S. 1967, c. 233, s. 62; Warehousemen's Lien Act, R.S.N.S. 1967, c. 334, s. 2; Woodemen's Lien Act, R.S.N.S. 1967, c. 342, s. 3; Workmen's Compensation Act, R.S.N.S. 1967 c. 343, s. 144 (1).

40. (1977), 74 D.L.R. (3d) 272 (N.S.S.C. (T.D.))

41. R.S.C. 1970, c. C-5, s. 24

42. S.C. 1970-71-72, c. 48, s. 71

43. R.S.N.S. 1967, c. 126, s. 23

the time the lien arises property may already have passed to a "*bona fides* purchaser for value without notice", or an employee may already have made an assignment in bankruptcy. In both cases, the lien will be unenforceable.[44]

Fourth, constitutional difficulties may arise in the event of an employer's bankruptcy if the statutory lien is seen as provincial interference with the allocation of priorities under s.107(1)(d) of the federal *Bankruptcy Act*. However in *In Re Clemenshaw*,[45] which involved a lien created by s.48 of the B.C. *Workmen's Compensation Act*,[46] the British Columbia Court of Appeal held that s.48 made the Board a secured creditor and that status was not removed by s.107(1)(i) of the *Bankruptcy Act*. This judgment demonstrates a judicial willingness to recognize statutory liens under the *Bankruptcy Act*.

Fifth, the artificial creation of secured credit may jeopardize the development of secured financing. The conflicting social values involved in this issue, and the underlying preferences displayed by the courts in relation to it, will be developed further in Part III.

Security for wages through liens is provided not only under the Labour Standards Code but also by other provincial legislation, such as the Mechnaics' Lien Act,[47] sections 14(1) and 32(1) and (2), the Warehousemen's Lien Act,[48] s.2, and the Woodmen's Lien Act,[49] s.3. The Mechanics' Lien Act imposes liability on land-owners for wages of the unpaid employees of contractors and sub-contractors. The owner is required to withhold a certain portion of payments to contractors,based on a percentage of the cost of labour on his project. Employees' claims are paid from this "holdback" fund. The lien arises when the first work or service is performed and, according to s.23(1), the lien may be registered before, during, or forty-five days after performance of the contract.[50] If the land-owner does not pay the lien claims within

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44. Collection of materials on "Wage Protection", submitted by Judy Haldeman for Employment Law Seminar, Dalhousie University, at 11.
45. (1963), 4 C.B.R. (N.S.) 238 (B.C.C.A)
46. R.S.B.C. 1960, c. 413
47. R.S.N.S. 1967, c. 178, ss. 14(1), 32(1), (2)
48. R.S.N.S. 1967, c. 334, s. 2
49. R.S.N.S. 1967, c. 342, s. 3
50. *Report to the Attorney General of the Nova Scotia Law Reform Advisory Commission on Builders' Liens* (Halifax: Queen's Printers, 1976); Study papers by Professor P. E. Darby, pp. 71 et seq.
Section 8 of the Mechanics' Lien Act implies that the lien's priority arises upon

three months, the lienholder is entitled to judicial sale of land, and payment from the proceeds of the sale.

In comparison to a lien arising under s.84 of the Labour Standards Code, a mechanics' lien is more "secure" in that it arises at an earlier time and it is payable from an existing fund. Further, the concept is better established and accepted by the courts. Note, however, that a mechanics' lienholder is the individual wage-earner, whereas a s.84 lien is created in favour of the Tribunal.

(c) The *Bank Act*[51]

The *Bank Act*, s.88, authorizes a bank to make loans, taking security in the form of goods produced by the debtor, or used by him in the course of production. Subsection (5) gives priority to employees of the debtor over the claim of the bank, when the bank realizes its security in this particular form. Employees may claim for unpaid wages incurred in the three months next preceding the making of an assignment in bankruptcy by their employer, or of a receiving order against him. This security interest in favour of employees obviously creates no constitutional problem of recognition under the *Bankruptcy Act*, and is an effective method of enhancing a wage-earner's preferred creditor status established by s.107(1)(d).

(8) Statutory Trusts

A trust, in this context, is actually a form of secured interest ensuring payment of a loan. However, because the sections creating statutory liens and trusts are distinct under the Labour Standards Code, and because trusts and secured credit are treated separately by the *Bankruptcy Act*, they will be discussed separately herein.

The Nova Scotia LSC, s.34, deems an employer to be trustee of vacation pay for his employees. That trust is "a charge upon the assets of the employer or his estate in his hands or the hands of a

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registration. However, it has been held that, where a judgment creditor recovered after the lien arose but registered before the lien was registered, the lienholder still had priority. (See *W. Eric Whebby Ltd. et al.* v. *Regency Construction Co. Ltd.*, October 18, 1967, N.S.Co.CT., unreported.)
This opinion was recently confirmed in *Silver et al.* v. *R.R. Seeton Construction Ltd.* (1977), 74 D.L.R. (3d) 212 (N.S.Co.Ct.), at p. 226. In that case, O'Hearn, Co. Ct. J. decided that, by virtue of s. 14(1), the lien arises when work is commenced, before registration, and it takes priority even though not registered until later, despite s. 8.

51. R.S.C. 1970, c. B-1, s. 88

trustee and has priority over all other claims." The purpose of this statutory trust becomes clear in the situation of a bankrupt employer when, by virtue of s.47(a) of the *Bankruptcy Act*, property held by the bankrupt in trust for any other person does not vest in the trustee in bankruptcy. Section 34 is thus an attempt to exempt vacation pay from distribution with other property of the bankrupt. Both ss.34 and 84 are deliberate attempts to circumvent s.107(1)(d) of the *Bankruptcy Act* by improving the status of the wage-earner from that of preferred to that of secured creditor.

An alternative to the s.34 "deemed trust" is illustrated by the Ontario *Employment Standards Act*,[52] s. 15, which creates a "fictional trust" of vacation pay funds. Whether or not an employer has actually deducted vacation pay, he is deemed to have done so. This eliminates the need for the beneficiary/employee to trace the deduction into the assets of the employer, and to ascertain what property is the subject of the trust.[53]

Four basic problems with this method of wage protection have been encountered. First, statutory trusts, and in particular fictional trusts, are theoretically objectionable as they depart from the normal concept of a trust.[54] Where an employer fails to deduct vacation pay, there is no existing property to form the subject-matter of a trust. Mr. Justice Romer deplored the artificiality of such statutory creatures:

> It is, of course, quite permissible to "deem" a thing to have happened when it is not known whether it happened or not. It is an unusual but not an impossible conception to "deem" that a thing happened when it is known positively that it did not. To deem, however, that a thing happened, when not only is it known that it did not happen, but it is positively known that precisely the opposite of it happened, is a conception which to my mind. . . amounts to a complete absurdity.[55]

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52. S.O. 1974, c. 112, s. 15

53. *Re Deslauriers Construction Products Limited; Attorney General of Canada* v. *Perlmutter* (1972), 14 C.B.R. (N.S.) 197 (Ont.C.A.), at p. 201
Houlden and Morawitz state the general rule of tracing trust property:

> A *cestui que trust* may claim as subject to the trust, any proceeds which the trustee has received for the trust property or any property into which the trustee has invested or converted trust property or the proceeds thereof, provided that the property claimed can be identified as the product into which the trust property can be traced.
> *Bankruptcy Law of Canada* (Toronto: The Carswell Co. Ltd. 1960), at 109

54. D. E. Baird, "Comment" (1973), C.B.R. (N.S.) 273 at 276

55. *Robert Batcheller & Sons, Ltd.* v. *Batcheller*, [1945] 1 All E. R. 522, at 530

Despite objections to their artificiality, courts have consistently upheld statutory trusts as valid, satisfying the general requirements of the law of trusts.[56] Courts have resigned themselves to the ultimate authority of the legislature in this field.

Second, the constitutional question recurs, because of what David Baird calls "this insidious attempt to quietly and ruthlessly supersede the priorities set out in s.107(1)(d) of the *Bankruptcy Act*.[57] This problem recently arose before the Nova Scotia Supreme Court in *MacMillan et al.* v. *Frizzell Plumbing and Heating Ltd. et al.*[58] Morrison, J. had to decide whether employees of an insolvent employer, claiming under the statutory trust created by s.34 of the LSC, had priority over the claim of a debenture-holder. The Court resolved the matter in favour of the employees, holding that no constitutional problem existed. Under s.34, the trust arose when wages were earned by the employees, and was already attached to the property of the employer when it came into the hands of a receiver. Thus, the creation of the trust is independent of the employer's insolvency, and is constitutionally valid.[59]

Third, as statutory trusts become more frequently employed by federal and provincial legislators a problem develops of sorting out priorities among the various claimants under statutory trusts, as well as in relation to other secured interests. The matter of competing priorities among statutory trusts has already been discussed.[60] With regard to the priority of statutory trusts over secured creditors, there is conflicting case law on the matter, and the present situation in Canada is very unclear. Baird suggests that priority depends on the date the trust arises (or is deemed to have been created), and whether a specific secured interest was created before or after the trust arose.[61] Baird's opinion accords with that of Morrison J. in *MacMillan* v. *Frizzell*,[62] where he said:

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56. e.g., *Re Dairy Maid Chocolates Ltd.* (1972), 17 C.B.R. (N.S.) 270; *Re Deslauriers Construction Products Limited; Attorney General of Canada* v. *Perlmutter, supra,* note 53

57. *Supra*, note 54, at 275

58. (1975), 56 D.L.R. (3d) 415 (N.S.S.C.) (T.D.)

59. Refer to *John M.M. Troup Ltd.* v. *Royal Bank of Canada*, [1962] S.C.R. 487; *Re Dairy Maid Chocolates Ltd., supra,* footnote 55; and *Re KRA Restaurants Ltd.* and *Toronto Dominion Bank, supra*, footnote 40, upholding the right of the provinces to create trusts which will be effective under the *Bankruptcy Act*.

60. *Supra*, text accompanying notes 38-43

61. D. E. Baird, "Statutory Trusts Liens — Priority Over Claims of Secured Creditors" (1978), 25 C.B.R. (N.S.) 261 at 265

62. *Supra*, note 58 at 430-431

> Section 34 is not restrospective. It does not attempt to change the law before 1973. On February 1, 1973 [the date of proclamation of the LSC], any vacation pay accruing due at that time became protected by the trust. In my opinion, to escape the effect of this trust the debenture would have had to be crystallized by January 31, 1973. Subsequent to February 1, 1973, vacation pay became impressed with the trust as it was earned.[63]

Two recent Nova Scotia decisions indicate that the priority of a statutory trust is largely a factor of the precise wording of the provisions creating the trusts. In *Re KRA Restaurants*,[64] the Trial Division of the Supreme Court held that the *Canada Pension Plan*, the *Unemployment Insurance Act* and the Health Services Tax Act do not give the Crown priority over secured creditors. The decision turned on the words "assets of the estate" in the first two Acts, and "assets in the hands of the trustee" in the last Act. These words indicate that the trust was only to be imposed on those funds generated from the realization of unencumbered assets by the trustee in bankruptcy.

Re KRA Restaurants was followed by Glube J. in *Bank of Nova Scotia* v. *Middleton Motors Ltd.*,[65] where a debenture-holder competed with the Crown claiming under trust provisions of the federal and provincial *Income Tax Acts*,[66] *Canada Pension Plan* and *Unemployment Insurance Act*. These cases indicate the infinite mutations of statutory trusts, and the significance of the wording of their provisions for the ultimate effect of the trusts.

Finally, it should be noted that a trust is an equitable interest, whereas a lien is a legal interest. Where the equities are equal, a legal interest will prevail. This equitable maxim may explain the insertion in s.34 of provisions creating both a mortgage (which is a legal interest) and a trust. Subsection (2) deems an employee to hold a mortgage to the amount of vacation pay due, and Subsection (3) confers priority on the mortgage similar to the scope of priority under a s.84-lien. What seems on first sight to be an instance of statutory overkill may merely be compensation for the inherent weakness of equitable claims.

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63. But See *Re A. L. Charlebois Ltd.* [1977] 3 W.W.R. 741 (Sask, Q.B.) where a deemed trust was determined to have priority over a loan secured by an assignment of book debts and a debenture. Priority was granted without consideration to when the statutory trust arose.
64. *Supra*, note 40
65. (1978), 29 N.S.R. (2d) 561 (N.S.S.C.) (T.D.)
66. R.S.C. 1970, c. I-5, s. 227 (4), (5) and R.S.N.S. 1967, c. 134, s. 36(4), (5)

One may logically ask, why should the legislature create a trust at all if it is inherently disadvantageous or, in other words, why should vacation pay be segregated under a statutory trust? Would it not be more effective and consistent protection to combine ss.34 and 84; that is, why not create a lien for all forms of unpaid wages, including vacation pay, and expressly provide that such lien arises as soon as wages are earned? The effectiveness of such a provision will be considered when s.5A of the *Payment of Wages Act* of British Columbia is examined in Part III of this paper.

III. Section 5A and the *Homeplan* Judgment

The matter of the priority assigned by statute to claims for unpaid wages assumes particular significance in the context of statutory liens. The B.C. *Payment of Wages Act*[67] creates one of the most sophisticated statutory liens in any provincial jurisdiction. It is therefore of general relevance to determine how far the courts have been willing to go in protecting wage claims brought under s.5A. Section 5A reads:

> (1) Notwithstanding any other Act, the amount of wages set forth in a certificate issued under section 5 constitutes a lien and charge in favour of the Board payable in priority over any other claim or right, including those of the Crown in right of the Province and, without limiting the generality of the foregoing, such priority shall extend over every assignment, including an assignment of book debts, whether absolute or otherwise, every mortgage of real or personal property, and every debenture.
>
> (2) A certificate issued under section 5 shall constitute a lien and charge under subsection (1) from the date wages were earned, and shall extend to all moneys due from any source to the employer named in the certificate, including moneys due or accruing due from any contract, account receiveable, and insurance claim.
>
> (3) Subsections (1) and (2) shall apply to every certificate issued under section 5, whether issued before or after this section comes into force.

This section creates a lien in favour of the Board of Industrial Relations, which acts on behalf of an unpaid employee. The operation of a s.5A lien is activated by the Board issuing a certificate of wages owing to an employee, accrued within a

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67. *Supra*, note 1. The Manitoba *Payment of Wages Act*, S.M. 1975, c. 21, s. 7, *as am* by S.M. 1976, c. 69, s. 35 is very similar to s.5A of the B.C. Act. Its wording may be preferable to that of s.5A, in that it is less ambiguous about the property to which the lien attaches, and the retroactive effect of the provision.

maximum of the last six months. The operation of the lien has been problematic in three basic aspects: (1) the time at which the lien arises; (2) the property to which the lien attaches; and (3) the claims over which the lien has priority.

(1) Section 5A(2) indicates the intent of the Legislature to make the lien retroactive to the time the wages were earned. The B.C. County Court, in interpreting the predecessor to the present section 5A, held that the lien is created the moment the wages are owed to an employee, irrespective of the date a certificate is filed.[68]

(2) The 1970 amendments to the B.C. *Payment of Wages Act* created a lien "in respect of the real or personal property of the employer." This clause was omitted in the 1973 version of s.5A, leaving the provision open to the interpretation that the lien applied to property interests other than those owned by an employer. Such a construction would enhance the protection provided by the lien, because a greater quantity of property would be available as security for wage debts. So far B.C. courts have refused the invitation to broaden the scope of a s.5A lien.

Henfry v. Board of Industrial Relations[69] involved the determining of priorities between certificates under the *Payment of Wages Act* and a debenture executed by the employer. The plaintiff contended that s.5A was ineffective to create a lien because it failed to specify the property to which the lien attached. Hinkson J. held that a valid lien was created, because the words of s.5A indicate that the lien was intended to attach to the real or personal property of the employer. The court merely implied into the present s.5A the clause which was dropped from the 1970 amendment of the Act. It viewed the omission as a legislative oversight, rather than a deliberate technique to increase the amount of property available to satisfy a wage creditor's lien.

In *Ocean Air Conditioning and Refrigeration Contractors Ltd.* v. *Dan et al.*,[70] claimants under the *Payment of Wages Act* were competing with mechanics' lienholders. The s.5A lienholders were employed by Image Development, a subcontractor of A&W, the general contractors, whereas the mechanics' lienholders were claiming against A&W. A&W paid money into court to have the mechanics' liens cancelled. The Board of Industrial Relations

68. *Board of Industrial Relations* v. *Bingham Sawmills Ltd. and Trethewey-Wells Timber Ltd.*, B.C.Co.Ct., December 1972 (unreported).
69. [1976] 4 W.W.R. 427 (B.C.S.C.)
70. [1977] 3 W.W.R. 456 (B.C.C.A.)

submitted that the s.5A lienholders were entitled to payment out of the mechanics' lien holdback money. Commenting on this submission, Bull J. A. said:

> But the section is incapable of any other construction than that the lien or charge . . . must be a lien or charge on the property of the employer (Image) and not on the property of others (A&W).[71]

This *dictum* accords with the narrow construction of s.5A by Hinkson J. in *Henfrey*.[72]

(3) Section 5A confers on the lien "priority over any other claim or right", compared to its predecessor, which gave priority to the Board "over all liens, charges, or mortgages of every person". Arguably, the 1973 amendments expanded the scope of the Board's priority by using more general language. The B.C. Court of Appeal, however, in *Ocean Air Conditioning*,[73] interpreted the provision restrictively, holding that the 1973 amendments eliminated the Board's priority over liens. The mechanics' lien thereby should be paid in preference to claims made under a s.5A certificate.

Except for the matter of the time the lien arises, it seems that courts are reluctant to give effect to the language of s.5A, despite the *prima facie* intent of the legislators to broaden wage protection by means of the statutory lien. Such reluctance is more readily understood when viewed in the context of the common law rule of priorities in commercial transactions. It is well established that "where the equities are equal, the first in time wins". In other words, where there is a competition for priority between two legal interests or between two equitable interests the interest which was executed at the earlier date takes priority. This rule has been complicated somewhat by the introduction of statutes requiring registration, but where all competing interests have been properly registered the common law rule of "first in time" remains in force. If read literally section 5A of the *Payment of Wages Act* derogates from the common law by conferring absolute priority on a wage-earner's lien, regardless of the date of execution. Judges schooled in the traditional rules of priority hesitate to adopt the literal meaning and defeat prior registered interests.

The section 5A lien was recently re-examined by the British Columbia Court of Appeal and the Supreme Court of Canada in

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71 *Id.*, at 457
72. *Supra*, note 69
73. *Supra*, note 70.

Board of Industrial Relations v. *Avco Financial Services Realty Limited and Homeplan Realty Limited*.[74]

The significance of *Homeplan* lies in the typical nature of its facts, and the consequently broad implications which the judgment has for employees and secured creditors caught in similar situations. Defendants Melvin and Shirley Goodine owned land in fee simple. On August 1, 1973, they executed a first mortgage on the land, for $16,300. plus interest, in favour of Homeplan Realty Limited. On February 5, 1974, they executed a second mortgage for $9,000. plus interest, in favour of Midtown Securities Limited. On February 8, 1974, Midtown assigned the second mortgage to Avco Financial Services Realty Limited.

On December 6 and 18, 1974, two certificates of the Board of Industrial Relations were made pursuant to s.5(1)(c) of the *Payment of Wages Act* (hereafter called the Act), asserting that Goodine was an employer who owed wages to employees, totalling $8,804.80. The mortgages, assignment and certificates were all registered in the Land Registry Office. Thus *Homeplan* involved a classic competition between secured interests all properly registered.

In February, 1975, Homeplan began foreclosure proceedings against Goodine and obtained an order for sale of the land. Subsequently, the land was sold for $28,100. and the proceeds were held in trust pending determination of priorities of distribution by the B.C. Supreme Court.

At trial,[75] Ruttan J. decided that the employees' certificates took priority over the mortgages, with the result that the wage claims and Homeplan were paid in full, but Avco, the second mortgagee, received no payment. On appeal by Avco to the British Columbia Court of Appeal, Robertson J. A. for the majority overturned the trial decision. He held that the mortgagees had priority over the wage creditors because their claims were registered before the date the wages were earned. This resulted in non-payment of a large share of the wage debt. Craig J.A., dissenting, agreed with the judgment of Ruttan J. The Supreme Court of Canada unanimously dismissed an appeal by the Board of Industrial Relations.

Closer examination of the *Homeplan* decisions of the lower courts indicates differences of opinion among the judges on many of

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74. June 14, 1979, S.C.C. (unreported), Martland, Ritchie, Dickson, Beetz, Estey, J. J. Appeal from (1978), 81 D.L.R. (3d) 287 (B.C.C.A.), dismissed

75. *Homeplan Realty Ltd.* v. *Goodine et al.*, B.S.S.C., August 3, 1976 (unreported)

the basic issues posed by the s.5A statutory lien.

First, the validity of the lien created by s.5A of the Act seems to be assumed by all of the judges. Even Robertson J. A., who placed the severest restrictions on the operation of the statutory lien, conceded that it would take priority over charges registered *after* the wages are earned.

Second, the question of the time that the lien arises was handled succinctly by Ruttan J. in the following words:

> The lien crystallizes as soon as the wages are earned, whether or not the certificate has been registered. At that point of time, the lien is charged against the property, and, by reading subsection (2) with subsection (1), I conclude that the property of the lien is created at the same time.[76]

This is a literal interpretation of s.5A(2), with which Robertson J. A. apparently agreed. He observed that, when a certificate is issued by the Board, it constitutes "a lien and charge retroactively from the date they [the wages] were earned".[77]

Third, on the matter of the extent of priority of a certificate over competing claims, the relevant portion of s.5A states that the certificate:

> . . . constitutes a lien and charge . . . payable in priority *over any other claim or right*, including those of the Crown in right of the Province, and, without limiting the generality of the foregoing, such priority shall extend over every assignment, including an assignment of book debts, whether absolute or otherwise, *every mortgage of real or personal property*, and every debenture.

Ruttan J. again gave s.5A a broad and literal reading, saying, "To me it appears obvious that the lien takes priority over all charges as spelled out in subsection (1) of Section 5A."[78]

To the contrary, Robertson J.A. interpreted s.5A, subsection (2) as qualifying the broad priority given wage claimants under subsection (1), such that only charges registered *after* the earning of wages would be superseded by a s.5(1)(c) certificate. Charges registered beforehand would themselves take priority.

This narrow approach seems to confuse two separate questions: the date when the lien crystallizes, and the extent of the lien's priority. These questions are treated separately in the Act in

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76. *Id.* at 4
77. *Supra*, note 74, at 294
78. *Supra*, note 75, at 4

subsections (2) and (1) respectively, where it is stated that ". . . a certificate issued . . . shall constitute a lien and charge under subsection (1) from the date the wages were earned", and such lien is "payable in priority over any other claim or right". In effect Robertson J. A. said that the date the lien arises determines the scope of its priority, reading in an arbitrary boundary to the priority of the lien. This approach denies meaning to the words "any other claim or right" and "every mortgage of real or personal property", and limits the implicit intent of the Legislature to broaden the rights and remedies of wage creditors.

Fourth, the problem of determining the property to which the lien attaches, which is not specified by s.5A, confronted the court in *Homeplan*. It is a problem fundamental to the operation of the s.5A lien, and until decisively resolved will recur in most situations of competing claims between secured creditors. At the trial level, without discussing the reasons for his conclusion, Ruttan J. adopted the position of *Henfrey* v. *Board of Industrial Relations*[79] that s.5A creates a charge against the property of the employer. Dissenting from the Court of Appeal, Craig J.A. also agreed with *Henfrey*. He clarified Hinkson J.'s interpretation, explaining that "the lien attaches to the interest which the employer has in that property, regardless of the nature of that interest."[80]

It seems that Ruttan J. and Craig J.A. failed to consider the implications of their decision for the operation of the statutory lien in general, and in the context of this particular case. Their final disposition of *Homeplan* is inconsistent with the narrow approach taken in regard to the property to which the lien attaches. At the date of trial, the only interest which the Goodines had in their real property was an equity of redemption, which was smaller than the amount owing on the two mortgages. Neither Ruttan J. nor Craig J. A. expressly questioned whether the amount of wages owing under the certificate ($8,804.80) exceeded the employer's equitable financial interest in his property. There is a strong possibility that it did, considering the total amount of the mortgagees ($25,300) and the price at which the land was sold ($28,100). If such was the case, by giving the wage-earners priority over the mortgages the property interest of one of the mortgagees would be charged with payment of part of the wages. In effect, the s.5A lien would attach to the

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79. *Supra*, note 69
80. *Supra*, note 74, at 301

property of the mortgagees as well as the employer-mortgagor, contrary to the *Henfrey* interpretation of this matter.

Perhaps the judges were reluctant to take the radical and unprecedented step of extending the s.5A lien to interests in property other than the employer's interests, and were uncertain what boundaries to draw, if any, should such a liberal interpretation be made. Or perhaps their concerns with the policy of wage protection led them to resolve the overall priority question in favour of the wage creditors. Such judicial fence-sitting benefits unpaid employees in a particular case but generates uncertainty in the long-term operation of the s.5A statutory lien and in the status of wage protection in Canadian courts.

Robertson J.A., for the majority of the Court of Appeal, also pointed to the problem of deciding the property to which the lien attaches, lamented the ambiguity of s.5A in this respect, and then made no effort to resolve the difficulty. He side-stepped the problem by imposing a time limit on the priority of the statutory lien, such that the lien was defeated by the pre-existing mortgages, without having to deal directly with the question of whether the lien could attach to the property interest of a person other than the employer. However, he clearly indicated his attitude toward the object of the lien, when he commented, "I feel . . . that the language may not be sufficiently clear to warrant the implication that will bring about the harm to the mortgagee that must result from it."[81]

Thus, while all the judgments favoured the restrictive *Henfrey* interpretation that the lien attaches to the property of the employer, the matter was deliberately left open by the majority judgment in the Court of Appeal.

Underlying all of the aforementioned issues is the question of statutory interpretation. Each of the judges acknowledged that the statute derogates from the common law to some extent, by creating a valid lien to secure wage payment. However, the extent of derogation each was willing to allow depended on whether he adopted a narrow or a liberal construction of the words of s.5A.

As has already become apparent from discussing the trial judgment, Ruttan J. for the most part adopted a literal and liberal interpretation of the Act. He quoted a revealing passage from the B.C. Court of Appeal judgment in *Workmen's Compensation Board* v. *Sumas Oil and Gas:*

81. *Id.*, at 295

> . . . The legislature can make the law which was formerly not the law, and may destroy vested rights both at law and in equity if it expresses its intention to do so. Has it done so by s.46? I am satisfied that it has. There can be no question about the meaning of the words used, though I feel that they would destroy to a great extent confidence in securities of those lending money to employers on mortgage securities, notwithstanding that the securities are executed by the debtor and on registration are protected by the Land Registry Act, . . . but if that is the intent and meaning of the Act, that meaning must prevail in a Court of Law and Equity . . .[82]

Ruttan J. went on to say that a similar right of priority has been created by s.5A of the *Payment of Wages Act*.

Craig J.A., who agreed with the trial judge about the effect of s.5A, expressly rejected the strict construction principle. He observed that the *Interpretation Act*[83] demands a liberal construction in accordance with the purpose of each statute, and the object of the *Payment of Wages Act* is wage protection, which he sought to achieve.

However, in the decisions of both Ruttan J. and Craig J.A., a notable exception to the principle of liberal interpretation is their conclusion about the property to which the s.5A lien attaches. They implied into the section a significant limitation on the scope of operation of the statutory lien.

Robertson J.A. adopted a narrow approach to interpreting the statute, refusing to defeat a registered charge unless such intention was clearly expressed. As he explained,

> If the Legislative Assembly intends to produce by statute results that are so brutal and piratical, it has the power to do so, but the Courts will hold that that was its intention only if the language of the statute compels that interpretation.[84]

In line with this approach, Robertson J.A. was able to read in limitations to s.5A and thereby prevent the statute from derogating from the common law to the extent of defeating charges registered prior in time to the earning of wages.

This question of statutory interpretation is significant in that it indicates how clear and unambiguous a statute must be to effectively confer priority on wage claimants over a secured interest, particularly over a registered charge. Even those judges

82. (1933), 3 D.L.R. 489 (B.C.C.A.), at 491
83. S.B.C. 1974, c. 42, s. 8
84. *Supra*, note 74, at 292.

who expressly proclaimed the principle of liberal construction were inconsistent in its application. It is therefore not enough for draftsmen to indicate the purpose of legislation and enact broad and permissive provisions. The precise extent to which they intend to vary the existing statute and common law must be clearly expressed in order to be effective.

Most judges would probably disagree with the underlying purpose of wage protection legislation. The "priorities" question puts into competition the interests of wage protection and secured financing, judged in the context of the social and economic needs of the community. Those who favour protection of the rights of secured creditors,[85] if they articulate a reason other than traditional notions of free enterprise, express fears of serious disruption of the commercial lending system.[86] Loss of the priority now enjoyed by secured creditors would make secured transactions uncertain and thus increase the cost of financing. Small businesses just starting out, and labour-intensive industries, would have particular difficulty proving that they could pay wage claims, with enough capital remaining to pay their debts, in order to get a loan. Thus, it is argued that giving absolute priority to wage-earners will prejudice the position of other secured creditors.

Advocates of the interests of wage-earners point to the responsibility of society to protect the innocent under-dog. Employees contribute to the community and are entitled to renumeration, but most are not in as good a position to enforce their rights as are secured creditors. As is observed by A. J. Roman,

> In the baldest terms, the present system is based on power. Those who have the economic might and the legal remedies obtain security, those who do not do without.[87]

Unpaid employees are often intimidated by their employer-debtor and unaware of their rights, and have too little money to hold out for

85. *Campeau Corporation* v. *Provincial Bank of Canada et al.*, *supra*, note 33, at 105, where Houlden J. commented that in the *Bankruptcy Act*, ". . . the Legislature has attempted to give priority to unpaid claims of wage-earners over ordinary creditors in the case of bankruptcy . . . While this is commendable, it is also important that persons advancing money on the strength of security should have their rights protected".

86. Report of the Senate Banking, Trade and Commerce Committee, Debates of the Senate, Canada. Thursday, December 11, 1975. Discussed by M. A. Catzman, "Employment Claims in Bankruptcy", 1976 Lecture Series of Upper Canada, Lecture 213, at 219-220.

87. A. J. Roman, "Security Interests, Priorities and Economic Justice" (Term Paper, Spring 1970)

an advantageous settlement or to seek a legal remedy. Whereas business creditors may recover their losses by charging such losses against tax payments, wage creditors are offered no such options for bad debts. It is further argued that those same legislators who provide business incentives to employers must recognize their duty to protect the rights and interests of employees.

Thus, *Homeplan* presented an opportunity for judicial guidance in the balancing of these competing values. At the trial level, there was no discussion of policy considerations raised by the case. Ruttan J. mechanically interpreted the words of the *Payment of Wages Act*, and applied them to the situation at hand.

Robertson J.A. reacted emotionally against the trial judment, labelling its result "repugnant".[88] His decision indicates an ingrained respect for secured financing as essential to a free enterprise system, and a desire to avoid defeating registered interests. Near the end of his judgment, after having saved the secured interest of the second mortgagee at the expense of wage claims, he commented,

> I am convinced that the first part of s-s. (2) qualifies the generality of s-s. (1) in the way that I have indicated, and in reaching that conclusion I have the satisfaction of being able to withdraw the adjectives "brutal and piratical" that I used earlier. When the subsections are so read together, s.5A presents a much less drastic appearance than it did when read alone. For example, a person intending to lend money on mortgage has a reasonable chance to ascertain by inquiry whether there are any wage claims that are likely to take priority over his security or he may be prepared to take a chance in the circumstances known to him; and a person who has taken his security before any wages are earned will not have his security destroyed or impaired by later unpaid wages.[89]

In marked contrast, Robertson J.A. was silent about the impact of his decision on the wage creditors. Clearly His Lordship appeared more concerned with protecting the innocent mortgagee than the innocent wage-earner, but without reasons for holding this definite policy preference or consideration of the object of the *Payment of Wages Act*. His judgment may thus be seen as covert judicial policy-making in favour of secured business creditors.

To the contrary, Craig J.A. expressed his view of the purpose of the Act, and sought to give it effect:

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88. *Supra*, note 74, at 291.
89. *Id.*, at 296

> Having regard to the purpose of the legislation and the wording of s-s.5A(1), I think that the priority "over any other claim or right" and over "every mortgage of real or personal property" includes claims or rights or mortgages which are prior in time to the date when the wages were earned . . . It is true that there may be cases (as apparently this case is) where this interpretation may result in the prior mortgagee not being able to realize on his security of payment of a debt owing to him, but I venture to think that such cases will be the exception rather than the rule.[90]

Once again, however there was no real discussion of the underlying policy issues. From the approach taken by Craig J. A., two conflicting inferences can be drawn. It is possible that for him wage protection outweighs the social priority of protecting secured transactions. Alternatively, perhaps he shares the values of the majority of the court but is prepared to defer to the power of the legislature rather than indulge in blatant judicial law-making.

In summary, it may be asked where the law on s.5A stood after the *Homeplan* decision by the B.C. Court of Appeal. The majority of the Court of Appeal thoroughly trounced the venture towards a liberal construction of s.5A by Ruttan J. A new qualification on the scope of the priority of the statutory lien was introduced: secured interests registered before the lien arises were given priority of payment over employees' claims. The question of the property to which the lien attaches was deliberately left undecided. Finally, the policy considerations of the Court of Appeal in relation to s.5A were concealed, although the sympathies of the majority obviously lay with secured business creditors. The basic question of why a mortgagee should be able to realize fully on his security while a wage-earner cannot, remained unanswered.

The appeal to the Supreme Court of Canada provided the Court with an opportunity to resolve the conflicting views of the lower court judges with fully articulated reasons for decision to guide courts in future questions of wage protection.

Not surprisingly, the Supreme Court of Canada was far from radical. Martland J. adopted the judgment of the majority of the British Columbia Court of Appeal. He agreed that a section 5A-lien arises on the date the wages are earned, and that such a lien can only take priority over claims registered *after* the lien attaches. However, His Lordship went one step beyond the position of Robertson J. A. by expressly delimiting the property to which the lien attaches to

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90. *Id.*, at 301, 302

"the employer's equity in that property." His judgment exemplifies a literal approach to statutory interpretation, and the conventional policy-outlook entrenching the rights of secured creditors. This broad traditionalism is evident in the following passage:

> The property to which a s.5A lien attaches is not defined nor identified. In the absence of a specific statutory provision to that effect, in my view it should not be construed in a manner which could deprive third parties of their pre-existing property rights.[91]

Any uncertainties arising from the lower court decisions in *Homeplan* were resolved in favour of secured business creditors. Martland J. clearly signalled that the courts will not assist in the reforming of laws concerning wage protection and secured transactions.

IV. Section 84 of the Labour Standards Code

It would be useful to re-evaluate s.84 of Nova Scotia's LSC, in light of the main issues raised in *Homeplan* in regard to s.5A: (1) the date the lien arises; (2) the scope of priority of the lien; and (3) the property to which the lien attaches.

(1) As has already been mentioned,[92] s.84 indicates that the statutory lien arises at the time the Tribunal's order is made. The advantage of s.5A over a s.84-lien on the matter of timing is evident in a situation of bankruptcy. When an employer goes bankrupt before an order/certificate is issued against him, would the proceedings be stayed?[93] Under s-5A, the Board could probably continue its proceedings, because the lien is considered to have existed retroactively from the date the upaid wages were earned, before the employer's assignment in bankruptcy. However, under s.84, proceedings by the Tribunal would likely be stayed, discharging the employer's debt to his employees.

(2) A lien under s.84 has priority "over all liens, charges or mortgages of every person . . . excepting liens for wages due to workmen by that employer." Comparing s.84 and s.5A in isolation from judicial interpretations one has the impression that s.5A confers broader priority on the lien. However, it is arguable that s.84 is broader because of its ability to avoid the restrictions judicially imposed on a s.5A-lien. For example, the B.C. Court of Appeal held that a s.5A-lien has no preference over a mechanics'

91. Unreported decision at 6
92. *Supra*, at 17
93. *Supra*, note 5 at 114

lien, in part because the section no longer confers priority over other liens since the 1973 amendments.[94] To the contrary, claimants under s.84 are to be paid in express priority over other lienholders.[95]

The Supreme Court of Canada in *Homeplan* further restricted the priority of s.5A liens to claims registered *after* the statutory lien arises. Perhaps the absence of a provision in s.84 expressing the time the lien arises will avoid a similar reading-in of a time qualification on the scope of its priority. This suggestion is reinforced by the recent amendment to the LSC, s.84. Before 1975, the section did not confer priority over mortgages or some encumbrances on land which have been registered under the N.S. Registry Act. This restriction was dropped in the 1975 amendments.

However, *Bank of Nova Scotia* v. *Middleton Motors Ltd.*[96] indicates a willingness on the part of the Nova Scotia Supreme Court to impose time restrictions on the priority of statutory trusts, similar to the time limit implied by the courts in *Homeplan,* without consideration of the underlying intent or purpose of the Act(s). Thus, problems arising out of *Homeplan* may not be unique to courts of British Columbia.

(3) Finally, s.84 is unclear about the property to which the lien attaches. Because of the language of the section, and the reluctance of judges to depart from accepted notions of secured financing, it will probably be held that the lien attaches to the real and personal property of the employer. Subsection (1) deems the Tribunal to hold a mortgage "on the assets of the employer". Subsection (2) confers priority over all liens, charges or mortgages "in respect of the real and personal property of the employer". Thus, in this aspect, the effects of s.5A and s.84 are probably the same, in that the liens are

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94. *Ocean Air Conditioning and Refrigeration Contractors Ltd.* v. *Dan et al., supra*, note 70.

95. Note, however, that the result in *Ocean Air* would have been the same under both Acts, because s. 84 excepts the claims of other workmen from its jurisdiction. Thus, labour-and-material lienholders would still have succeeded in their claim.

An informal practice has been established between the Labour Standards Board and the Workmen's Compensation Board, conferring priority on claims of the former over the latter. (Interview with Gordon Gillis, Solicitor for the Department of Labour August 27, 1979) This arrangement is practical, because claims of unpaid employees are usually smaller than claims of competing creditors. Moreover, the arrangement is supported by the wording at the beginning of section 84(1), LSC: "Notwithstanding any other Act . . ."

96. *Supra*, note 65

limited to the property interests of the employer.

In sum, while a s.84-lien may be more effective in one respect, and a s.5A-lien in others, this form of wage protection is clearly unsatisfactory in that it is subject to the interpretative techniques and implied policy preferences of presiding judges.

Notwithstanding all of this, two recent decisions by the Supreme Court of Nova Scotia may indicate that concerns about the effectiveness of s.84 are groundless. This is the first time that s.84 has come before the courts of Nova Scotia.

Central and Eastern Trust Company v. *George R. Saunders Construction Co. Ltd. et al.*[97] involved the claim of the plaintiff-mortgagee (for $37,849.37) competing with the Provincial Tax Commission (for $3,110.95), the Labour Standards Tribunal (for $640. of unpaid wages and vacation pay), the Workmen's Compensation Board (for $3,658.08), and the Nova Scotia Power Corporation (for $472.24). The Provincial Tax Commission abandoned its claim for priority, so the remaining parties contested their entitlement to portions of $42,000. realized on the sale of mortgaged lands. With little ado, Lusby J. (a Local Judge of the Trial Division) decided that each of the parties had a valid claim to take in priority to the mortgagee, regardless of the fact that the mortgage was executed and registered before any of the other claims arose.

Three aspects of the judgment may seriously reduce its value as a persuasive authority on s.84. First, Lusby J. failed to discuss any of the issues raised by applying s.84, especially the time the lien arose and the property to which it attached. He merely said,

> In my opinion, the wording of s.84(2) can only be interpreted as giving the Tribunal priority in the present instance over the mortgagee, even although the foreclosed mortage was executed and registered before the unregistered order of the Tribunal was made and probably even before the employee had become entitled to the wages and vacation pay mentioned in the order. It is within the power of a provincial legislature to enact legislation having so drastic an effect.[98]

This approach conflicts with that adopted in *Re KRA Restaurants* and *Bank of Nova Scotia* v. *Middleton Motors Ltd.*, which illustrate the tendency of the Nova Scotia Supreme Court to read in a time limitation to the operation of statutory secured instruments.[99]

97. (1978), SAM No. 0379 (as yet unreported)
98. *Id.*, at 7
99. *Supra*, at 38

Lusby J.'s departure from the traditional approach is the result of a mechanical application of statutory provisions, without considering underlying competing values and societal needs. He initially assumed that municipal taxes have overriding precedence, without reference to a relevant statutory provision. Thereafter, he upheld the priority of claims by unpaid employees, workmen and the Nova Scotia Power Corporation. Although these claims require strikingly different degrees of statutory protection, the language of their priority-provisions is substantially the same. Therefore, it is the Legislature which must ultimately accept the blame for overlooking society's needs in assigning priorities, and the responsibility for remedying these statutory inadequacies.

Second, the result of this case may have depended largely on its particular facts. Lusby J. may have been willing to confer priority on the s.84-lien, as well as on the Workman's Compensation Board and the Power Corporation, because of the relatively small amounts of their claims. They could be paid in full, leaving over $30,000. for the mortgagee, which claimed $37,849.37 in total. Where assets to pay a registered charge will be entirely or substantially consumed by statutory claimants, a court may be less eager to recognize the priority of the latter.

Third, it appears that Lusby J. combined the claims for vacation pay and wages into a single claim for "unpaid pay" under s.84 of the LSC. In other words, he disregarded the statutory distinction between "pay" (s. 1(n)) and "wages" (s. 1(r)),[100] in order to treat both claims together as a s.84-lien. The judgment was silent about the reasons for doing so. While this approach may be preferred for its simplicity, it renders s.34 superfluous, except perhaps for claims of vacation pay only. It is as yet uncertain what method the courts will adopt in reconciling this overlap between s.84 and s.34.

Central and Eastern Trust Company lacks any analysis of the problems posed by a s.84-lien, and reflects no depth of understanding of the subject. However, in light of the second Supreme Court decision on the same question, *Central and Eastern Trust Company* may be of some value as a trail blazer for wage protection via section 84.

In *Re Miss Dartmouth*,[101] the Trustee in bankruptcy applied for directions in distributing $11,000. among competing creditors. The

100. Refer to note 4

101. (March 20, 1979) N.S.S.C. in bankruptcy, S.H. No. 22708 (as yet unreported)

claimants were the Federal Business Development Bank with a registered chattel mortgage (for $66,938.49), the Workmen's Compensation Board (for $61.30), the Crown in right of the Province of Nova Scotia under the Health Services Tax Act (for $502.77), the Crown in right of Canada under the *Canada Pension Act* (for $60.52) and the *Unemployment Insurance Act* (for $61.42), and the Director of Labour Standards for vacation pay (in the amount of $858.80). All the parties agreed that the claim of the Workmen's Compensation Board had priority over the claim of the Bank. Further, the Court assumed that the Bank's mortgage took precedence over the Crown liens. Thus, the only issue before the Court was the status of the claim filed by the Director of Labour Standards. The claim was for vacation pay under section 34 of the Labour Standards Code.

In the course of his judgment in *Re Miss Dartmouth Limited*, Cowan C.J.S.C. helped to clarify the relationship between sections 34 and 84 of the Nova Scotia Code. He explained that section 84 was invoked because: "No appeal to the Labour Standards Tribunal, established under the Code, was made by the bankrupt and, by the terms of s.19(5) of the Code, the Director's order is deemed to be an order of the Tribunal."[102] In such a situation, the court must consider the combined effect of sections 34 and 84, creating both a statutory trust and lien on a wage creditor's behalf.

Cowan, C.J.S.C. cited with approval the judgment of Lusby J. in *Central and Eastern Trust Company*, conferring priority on claims of unpaid employees regardless of date of registration. His Lordship commented,

> In my opinion, it was the intention of the Legislature, as expressed in the sections [34 and 84], that the claim made by the Tribunal on behalf of the employees, should rank in priority to all liens, charges or mortgages, including those such as the chattel mortgage held by the Bank, previously executed and registered or filed in the appropriate office of the registrar of deeds for the registration district in question.[103]

Accordingly, the claims of the Workmen's Compensation Board and the Director of Labour Standards were paid in full in priority to those of the Business Development Bank.

The judgment of Cowan, C.J.S.C. implied that claims of wage creditors under sections 34 and 84 extend beyond the property of the

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102. *Id.*, at 3
103. *Id.*, at 4

employer. Counsel for the Bank had submitted *inter alia* that all of the competing claims "merely attached to the interest of the debtor in the chattels in question",[104] but His Lordship rejected that submission with respect to the claim filed by the Director of Labour Standards. Unfortunately, after deciding that the statutory lien of wage creditors takes priority over an earlier chattel mortgage, His Lordship failed to define the property to which the lien attaches.

The value of *Re Miss Dartmouth Limited* as a precedent in Nova Scotia is uncertain. The judgment of Cowan, C.J.S.C. was rendered after the British Columbia Court of Appeal decision in *Homeplan* but before the Supreme Court of Canada handed down its judgment. *Homeplan* was not mentioned in *Re Miss Dartmouth Limited*.[105] Like *Central and Eastern Trust Company*, the decision was never appealed to the Appeal Division of the Supreme Court.

A further similarity between *Central and Eastern Trust Company* and *Re Miss Dartmouth Limited* lies in the relative amounts claimed by competing creditors. As was pointed out in respect of the former case,[106] prior satisfaction of the liens of the Workmen's Compensation Board and Director of Labour Standards did not substantially reduce the amounts available to pay the chattel mortgage held by the Bank. Had there been no other competing claims, the sum of $11,000. would have satisfied approximately 16.5% of the Bank's total debt of $66,938.49. After payment in full to the Workmen's Compensation Board and the Director of Labour Standards, the remaining $10,079.90 satisfied approximately 15% of the claim of the Bank — a reduction of only 1.5%.

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104. *Id.*, at 2

105. It has been suggest that the *Homeplan* decision does not apply to Nova Scotia, for two reasons. First, the Torrens land titles system in effect in British Columbia is fundamentally different from the Nova Scotia registry system. Within the Torrens system, registration and issuance of a registrar's certificate of title confers indefeasible title. Purchasers of land may rely absolutely on registered title. Because of the significance of registration of a property interest in British Columbia it would seriously disrupt the system if the courts disregarded the date of registration in determining priorities of interests. The registry system of Nova Scotia, on the other hand, is outdated and inefficient. It is a solicitor's certificate of title rather than registration that guarantees clear title. This reduced reliance on registration may allow Nova Scotia courts to distinguish *Homeplan* in establishing priority of property interests. Second, as has already been pointed out, there is a major distinction between the wording of section 5A of the *Payment of Wages Act* and section 84 of the Labour Standards Code. (The above contentions were made by Gordon Gillis, Solicitor for the Department of Labour, in an interview on August 27, 1979.)

106. *Supra*, at 44

Central and Eastern Trust and *Re Miss Dartmouth Limited* reveal a surprisingly liberal interpretation of s.84 of the Labour Standards Code. Both judgments made a radical allocation of priorities to wage creditors over a mortgagee with a prior registered claim. Neither judgment expressly considered its impact on the conduct of secured commercial transactions, nor distinguished inconsistent case law. Despite an absence of binding judicial authority, the cases invite more effective wage protection by statutory lien in Nova Scotia. But it is still likely that if the Appeal Division of the Nova Scotia Supreme Court were confronted with sizeable wage claims which would preclude payment to secured business creditors it would consider itself bound by the judgment of the Supreme Court of Canada in *Homeplan*.

V. *Recommendations*

From briefly canvassing alternative methods of wage protection it may be concluded that federal and provincial legislators have recognized the need for protecting wage-earners and have half-heartedly committed themselves to implementing a program to that end. Further, it appears that most judges (with the possible exception of those in Nova Scotia) are unwilling to assist wages creditors at the expense of other secured creditors, unless expressly required to do so by statute. How then can wage protection, particularly at the provincial level, be made more effective? Three basic approaches will be suggested: (1) tighten up statutory liens; (2) reconcile competing statutory liens; and (3) develop a public fund.

(1) Specific proposals for amending s.84 have been implicit in the preceding discussion; such as making the lien retroactive to the date the wages are earned and expressly excluding time limitations to priority, such as that imposed by the courts in *Homeplan*. Provisions modelled on other statutory liens may be adopted to extend the priority of s.84 liens. For example, the Workmen's Compensation Act[107] creates "a first lien upon all the property, real, personal or mixed, used in or in connection with or produced in or by the industry with respect to which the employer is assessed though not owned by the employer . . ." Adding a similar provision to s.84 may effectively extend the property to which the

107. R.S.N.S. 1967, c. 343, s. 144(1)

lien attaches beyond the employer's interest in his real or personal property.

Another model is the Assessment Act,[108] ss.135 and 153 of which create a lien for taxes on real and personal property. Any creditor, or the sheriff, who takes possession of personal property assessed for taxes "shall be personally liable to the municipality or town for the amounts of the rates and taxes rated and levied against the owner . . ." (s. 135(3)). Perhaps s.84 could make business and consumer creditors personally liable to the extent of their security when they attempt to realize on it prior to an employer's bankruptcy. Such a provision would ensure payment of a greater percentage of wage claims by acting as a disincentive to secured creditors realizing on their security and draining the employer's assets left over for wage claimants.

Finally, s.84 of the Labour Standards Code should provide for an employee's right to claim interest at a current rate on unpaid wages, as soon as the debt becomes due under the contract of employment. There is scant authority on this point. In *Eaton* v. *The Queen*,[109] an employee claimed, *inter alia*, interest for delay in payment of salary. The *Eaton* case must be distinguished because the claimant was employed by the Crown in right of Canada under a collective agreement but Kerr J.'s comments about the issue of interest are useful. He pointed out that there are two kinds of interest: an amount agreed to be paid on a loan, and a sum payable as damages for non-payment of a debt.[110] A review of common law authorities, as well as the *Federal Court Act*,[111] revealed that the Crown would only be liable to pay interest of either kind where there was an express statutory provision or contractual obligation.

A Nova Scotia case dealing with interest is *Leisure Cedar Homes Construction Inc.* v. *Hranisauljewicz and Janulewicz*,[112] where interest was claimed by mechancis' lineholders. The uncertainty of the law in this area is illustrated by a citation in the *Leisure* decision from another judgment, that,

> a good case can be made out that the Supreme Court has the power to award interest to the same extent as it has in England

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108. R.S.N.S. 1967, c. 14, ss. 135, 153. This provision resembles the *Bank Act*, R.S.C. 1970, c. B-1, s. 88(5).
109. (1972), 31 D.L.R. (3d) 723 (Fed. Ct.) (T.D.)
110. *Id.*, at 731
111. R.S.C. 1970 (2nd Supp), c. 10, s. 35
112. (1976) 22 N.S.R. (2d) 372 (N.S. Co.Ct.)

under Lord Tenterden's Act in 1833.[113]

McLellan, Co. Ct. J. in *Leisure*, indicates that interest will be allowed where there is a contractual right to interest, or where a specific debt is owed at a certain time by virtue of a written agreement, or where there has been a written demand of payment giving notice that interest will be claimed.

A more recent Nova Scotia authority on the matter of awarding prejudgment interest is *Webb Real Estate* v. *McInnis, Meehan & Tramble et al.*[114] This Court of Appeal decision clarifies the authority of the court to award interest and damages in the nature of interest. The case is not set in the context of a wage creditor's claim, but the principles of law laid down by the court are clearly applicable to such a case.

Coffin J.A. decided that, in addition to a common law power to award prejudgment interest, there is express statutory authority in the 1859 Interest Act[115] still in force in Nova Scotia, which is the equivalent to *Lord Tenterden's Act* of England. Section 4 of the Interest Act reads as follows:

> 4. Upon all debts or sums certain payable at a certain time, or otherwise, the jury, and the court where there is no jury, on the trial of any issue or inquisition of damages, may, if they shall think fit, allow interest from the time when such debts, or sums certain, were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or if payable otherwise, then from the time when demand of payment shall have been made in writing, such demand giving notice to the debtor that interest will be claimed from the date thereof.

Webb Real Estate serves to reinforce the opinion of the court in *Leisure*. As a result, it is open to an unpaid employee to claim interest by any of the methods mentioned by McLellan Co. Ct. J., depending on his specific contract of employment. Thus, statutory provision for interest in the Labour Standards Code would not derogate from the common law, or from statutory law and judges may be willing to enforce it. Such an amendment would encourage prompt payment of wages, and would harness time as a weapon working in the employee's favour.

(2) It seems that whenever the Legislature has recognized the

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113. *Sydney Rotary Drilling Services Ltd.* v. *Quebec Assurance Company* (1975), 16 N.S.R. (2d) 233 (N.S.S.C.) (T.D.), cited by McLellan, Co.Ct. J., at 373.
114. (1977), 20 N.S.R. (2d) 6 (N.S.C.A.)
115. R.S.N.S. 1859 (Second Series), Ch. 82

importance of meeting the claims of a particular class of creditor, it has blindly tacked a priority provision onto a statutory lien. It has failed to reconcile priority of claims with the needs of the community and to come to terms with its own relative values. Provincial legislation must clearly delineate an order of priorities among statutory security interests. To draft such legislation it will be necessary to set out and evaluate competing interests and define government policy objectives in relation to secured transactions, wage protection and Crown claims of statutory priority for various provincial and municipal taxes.

Constitutional difficulties may arise in the event of a bankrupt debtor, with conflict between provincial statutes and the order of distribution specified under the *Bankruptcy Act*. Further constitutional questions will be posed in situations of competing claimants under federal statutory trusts such as those created by the *Canada Pension Plan* and the *Unemployment Insurance Act*, and provincial statutory trusts. Federal and provincial co-operation in rationalizing priorities among statutory security interests, both before and during situations of bankruptcy, is a desirable goal, however unlikely it is to be achieved in the near future. In the meantime, provincial delineation of priorities is essential to an effective system of wage protection by statutory security interests.

(3) The most secure method of wage protection would be a public fund, guaranteeing immediate payment of a set maximum of unpaid wages. This is not a new concept. Extensive bonding programs, such as in Alberta,[116] may be seen as a form of wage insurance. If the program was extended beyond designated industries to encompass all employers, and if there was no allowance for exemptions for good past performance in wage payment, then a general compulsory insurance scheme would have been developed from the existing bonding system.

In December, 1975, the Senate Banking, Trade and Commerce Committee recommended that a government-administered fund be created by contributions from employers and employees. Upon bankruptcy, employees would receive unpaid wages to a limit of $2,000, excluding vacation pay, severance pay and fringe benefits.[117]

Comparison to insurance schemes in other countries points out the disadvantages of the Senate Committee proposal for unpaid

116. *Supra*, at 75
117. Can. Sen. Deb., Thursday, December 11, 1975.

employees. In Israel, under the National Social Insurance Act, workers' wages are guaranteed in the event of bankruptcy. However, only employers are responsible for funding the scheme. The ceiling of payments from the fund is annually adjusted to correspond to changes in the average wage.[118] Japan has implemented a scheme very similar to that in Israel, guaranteeing wage payments, severance pay, and interest at a specified rate.[119] In Germany, the wage insurance plan repays salary, vacation pay, overtime, and "special benefits for dangerous and arduous work".[120]

In comparison to these national insurance schemes, the Senate proposal seems harsh and unreasonable in requiring employees to contribute to a fund ensuring wage payment. Wages are an employer's debt, owed in consideration for an employee's continuing services. An employee should not be expected to relieve the employer of a share of his contractual liability to pay wages, nor to guarantee its performance. Furthermore, it is arbitrary to exclude vacation pay, severance pay and fringe benefits from wages recoverable from the fund. All forms of payment are contractual debts owed by the employer. If the purpose of the exclusion is to limit the quantum of wage claims, such is already achieved by setting a $2,000. ceiling on recovery. Thus, the exclusion is unreasonable and redundant.

Effective wage protection may be guaranteed by a provincial insurance scheme, operating not only upon an employer's bankruptcy, but also upon insolvency, as well as in the event of the employer's unwillingness to pay. This scheme could be administered by the provincial Department of Labour in conjunction with officers under the Labour Standards Code. Funding would be provided by each employer contributing a pre-determined percentage of the salaries earned by its employees. After a preliminary investigation of complaints made to the Director, employees with valid complaints would be paid forthwith, up to a maximum set by regulations) for example, three months and a figure annually adjusted). In order to reimburse the fund, the Labour Standards Tribunal would be automatically subrogated into the employees' rights against the employer, and would claim the full amount of wages owing. If the Tribunal recovered more than the amount

118. *I.L.O. Social and Labour Bulletin*, 1975, No. 2, at 150-151
119. *I.L.O. Social and Labour Bulletin*, 1976, No. 2, at 134
120. *I.L.O. Social and Labour Bulletin*, 1974, No. 2, at 53-54

initially paid by the fund to the employee, that balance would go to the employee, who would thereby have the potential to be fully compensated.

Development of public wage insurance would cause minimal, if any, disruption to the existing system of commercial transactions. That is, it could operate effectively to guarantee wage payments to unpaid employees, despite the Legislature's failure to enhance the priority of wage creditors over that of secured creditors. However, the process of subrogation to reimburse the public fund would be less successful if the rights of wage creditors were not upgraded through amendments to the section 84 lien.

The cost of administering such a scheme would probably not be very high. Because the resources in the fund itself would come from employer contributions, the provincial government need only pay pure costs of administration, such as hiring people to receive and deposit contributions into the fund, and make payments to deserving complainants. There is an exisiting framework of staff working within the Labour Standards Branch, which could investigate complaints (as it already does) and enforce the employees' subrogated rights to reimburse the public fund, although this staff would have to be increased if there were a greater volume of complaints after putting the insurance scheme into effect.

Whether or not such a scheme is established is essentially a question of the economic priorities of the provincial government. The fact that few complaints are presently made to the Director of Labour Standards in relation to the number of incidents of non-payment of wages and the inadequacy of existing remedies for wage-creditors indicate that a public fund is vital to an effective program of wage protection. Surely a society which has accepted the concept of unemployment insurance should realize the social and economic importance of "employment" insurance.[121]

No single wage-collection remedy is sufficient in itself because of the infinite variety of circumstances in which non-payment of wages occurs. However, the present patchwork of wage protection in Nova Scotia is unsatisfactory, not only because of large gaps in available remedies, but also because the alternative remedies are hidden among widespread statutes. The average employee, not to mention the average lawyer, has difficulty discovering the rights of a wage creditor and how to enforce them. As a start, therefore, the various

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121. Interview with Professor B. Cotter, February 14, 1979.

remedies now available and future improvements upon them, should be systemmatically integrated in a single statute.

Until the Nova Scotia government implements similar recommendations to those discussed herein, or somehow drastically revises its present "program" of wage recovery, wage protection will continue to be one of the most contentious issues in the field of employment law.

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