C.A. No. 113602

NOVA SCOTIA COURT OF APPEAL

Hallett, Bateman and Flinn, JJ.A.
Cite as: L. Martin (1984) Inc. v. Shubenacadie First Nation, 1995 NSCA 114

BETWEEN:

L. MARTIN (1984) INC. Appellant - and - SHUBENACADIE BAND Respondent - and - THE CANADIAN IMPERIAL BANK OF COMMERCE Respondent - and - THE ESKASONI BAND Respondent - and - EASTLAND INDUSTRIES LIMITED Respondent - and - PAUL KENNETH FRANCIS Respondent	)	Dennis F. Ashworth for the Appellant Sean P. O'Boyle for the Respondent The Eskasoni Band Gregory H. Cooper for the Respondent Eastland Industries Limited Theresa M. O'Leary for the Respondent Paul Kenneth Francis Appeal Heard: June 6, 1995 Judgment Delivered: August 16, 1995

THE COURT: Appeal allowed per reasons for judgment of Hallett, J.A.; Bateman and Flinn, JJ.A. concurring.

HALLETT, J.A.:

This is an appeal from a decision of Mr. Justice Edwards arising out of an interpleader application by the Shubenacadie Band Council to determine which of several

parties was entitled to be paid a sum of money owing by the Shubenacadie Band under a construction contract entered into by the Shubenacadie Band with the respondent Paul Kenneth Francis for the construction of residential homes on the Shubenacadie Reserve. The application proceeded on an Agreed Statement of Facts.

Mr. Francis is an Indian, a member of the Eskasoni Band, and resides on the Eskasoni Reserve in Cape Breton. Mr. Francis had made a number of assignments of book debts, some general and some specified to the various claimants.

The learned trial judge held that s. 89(1) of the **Indian Act**, R.S.C. 1985, c. I-6 was applicable and governed the issue he was required to consider. Section 89(1) states:

> "89. (1) Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band."

The learned trial judge concluded that the sum of $101,636.33 owing by the Shubenacadie Band to Mr. Francis and held at the Council office in the form of a bank draft payable to the Band in trust was the property of an Indian on a reserve. He further held, applying a liberal interpretation of the **Indian Act** that assignments of book debts, both general and specific, were included within the wording of s. 89(1) of the **Act**. He concluded that by reason of s. 89(1) the only claimant "not barred" by the section was the Eskasoni Band being the only Indian entity of the several claimants. The learned trial judge ordered that the $101,636.33 be paid to the Eskasoni Band.

On the appeal L. Martin (1984) Inc. asserts that Justice Edwards misinterpreted s. 89(1) of the **Act** and that it is entitled to $70,000 of this fund by reason of a letter of direction from Francis to his solicitor instructing his solicitor to pay to Martin funds which were due to Mr. Francis from the Shubenacadie Band to the maximum amount of $70,000. The letter was dated November 7th, 1991, and according to the Agreed Statement of Facts was sent to the solicitor for the Shubenacadie Band on the same date.

Martin asserts that it has priority over the other claimants as it had a specified

assignment of a debt growing due under the contract between the Shubenacadie Band and Mr. Francis and was first (along with the respondent Eastland) to give notice to the Shubenacadie Band of the fact that it held an assignment from Mr. Francis.

Eastland Industries Limited claims under a letter of direction from the solicitor for Mr. Francis which, according to the Agreed Statement of Facts, is a specific absolute assignment made by Francis to Eastland under the terms of which all amounts payable by the Shubenacadie Band Council to Francis are to become payable to Eastland. The Agreed Statement of Facts further states that payment was directed by Francis to be made to his lawyer in trust for the benefit of Eastland. The narrative of the Agreed Statement of Facts also makes reference to a letter from Mr. Francis's solicitor to the solicitor for the Shubenacadie Band dated November 7th, 1991, as being written notice of the so-called assignment from Mr. Francis to Eastland. There are problems with the Agreed Statement of Facts with respect to the claims of Martin and Eastland as the actual documentation does not appear to support what the parties agreed were the facts. However, in view of the conclusion I have reached these apparent errors are irrelevant.

The Eskasoni Band Council claims under a general assignment of book debts made by Mr. Francis on July 26th, 1990, and registered at the Registry at Sydney in the County of Cape Breton on August 8th, 1990, pursuant to the **Assignment of Book Debts Act**, R.S.N.S. 1989, c. 24. This was the first of many assignments of book debts made by Mr. Francis to suppliers and to the Canadian Imperial Bank of Commerce. It was also the first to be registered under the **Act**.

Before Mr. Justice Edwards the Canadian Imperial Bank of Commerce (CIBC) had claimed under several general assignments of book debts made subsequent to the assignment to the Eskasoni Band Council and under certain irrevocable letters of direction made by Mr. Francis to his solicitor to forward all funds due from the Shubenacadie Band

directly to the CIBC in Sydney. CIBC did not make any representations on the appeal to this Court from Mr. Justice Edwards' decision.

As Justice Edwards concluded that all the assignments made by Mr. Francis to entities other than the Indian Band were invalid by reasons of s. 89(1) of the **Indian Act**, it was not necessary for him to determine the priorities between the respective claimants.

I am of the opinion the learned Chambers judge erred in his interpretation of s. 89(1) of the **Indian Act**. Mr. Francis is a member of the Eskasoni Band but most significantly he was in the construction business. The words of LaForest J., writing for the majority (6 of 7) of the Supreme Court of Canada, in **Mitchell v. Peguis Indian Band et al**, [1990] 5 W.W.R. 97; [1990] 2 S.C.R. 85 are determinative of this issue. In interpreting ss. 87, 89 and 90 of the **Indian Act**, which LaForest J. referred to as a "legislative package", he stated at p. 132:

> ". . . the purpose of the legislation is not to remedy the economically disadvantaged position of Indians by ensuring that Indians may acquire, hold and deal with property in the commercial mainstream on different terms than their fellow citizens. An examination of the decisions bearing on these sections confirms that Indians who acquire and deal in property outside lands reserved for their use deal with it on the same basis as all other Canadians."

And at p. 134 LaForest J. stated that the protection afforded by s. 89(1) of the **Act** is limited:

> "I draw attention to these decisions by way of emphasizing once again that one must guard against ascribing an overly broad purpose to ss. 87 and 89. These provisions are not intended to confer privileges on Indians in respect of any property they may acquire and possess, wherever situated. Rather, their purpose is simply to insulate the property interests of Indians in their reserve lands from the intrusions and interference of the larger society so as to ensure that Indians are not dispossessed of their entitlement."

In my opinion s. 89(1) was not intended to prevent an Indian from entering into

normal financing agreements in conjunction with the operation of a commercial business. The section applies to prevent an Indian from pledging his personal assets on the reserve such as his home, furniture, appliances and household goods. When an Indian is in business he or she holds and deals with his or her business property in the commercial mainstream on terms no different than those applicable to all other Canadians. In my opinion such an interpretation is advantageous to the Indian in business. The accounts receivable of Mr. Francis' construction business were not property of an Indian situate on a reserve of the nature that was intended by Parliament to be protected by s. 89(1) of the **Act**. Mr. Francis could deal with his accounts receivable as any other Canadian businessperson. Section 89(1) did not prevent him from assigning his book debts nor protect him from having done so. The Eskasoni Band is not entitled to the funds held by the Shubenacadie Band on the ground found by the learned Chambers judge.

I am, however, of the opinion that the Eskasoni Band is entitled to the fund by reason of having obtained the first general assignment of book debts from Francis and having registered it prior to Francis making further assignments notwithstanding that the holders of the subsequent assignments or directions to pay (which the parties agreed were assignments in the Agreed Statement of Facts) gave notice of the assignments they held to the debtor, the Shubenacadie Band, prior to the Eskasoni Band giving notice to the Shubenacadie Band of its prior registered general assignment of book debts. I will set forth my reasons for coming to this conclusion.

The sections of the **Assignment of Book Debts Act** that are relevant to a consideration of the issues that arise on this appeal are as follows:

> "Section 4. (1) Save as herein provided, every assignment of book debts made by any person engaged in a trade or business shall be absolutely void as against the creditors of the assignor and as against subsequent purchasers unless the assignment is

(a) in writing;

(b) accompanied by an affidavit of an attesting witness or affidavits of attesting witnesses, of the execution thereof by the assignor, or by the assignors respectively, identifying the assignment and stating the date of execution by the assignor, or the respective dates of execution by the assignors, as the case may be, and a further affidavit of the assignee or one of the several assignees, his or their agent stating that the assignment was executed in good faith and for valuable consideration and not for the mere purpose of protecting the book debts therein mentioned against the creditors of the assignor or for the purpose of preventing such creditors from recovering any claims which they have against the assignor;

(c) registered, as hereinafter provided, together with the affidavits within thirty days of the execution of the assignment.

(2) If there are two or more assignors, the date of execution of the assignment shall be deemed to be the date of the execution by the assignor who last executes it.

(3) Every assignment which is required to be in writing and to be registered under this Act shall, as against creditors and subsequent purchasers, take effect only from the time of the registration of the assignment."

"2 (i) In this Act [the term] "subsequent purchasers" includes any person who in good faith for valuable consideration and without notice obtains by assignment, an interest in book debts which have already been assigned."

"3 This Act shall not apply to

(a) an assignment of book debts, whether specific or by way of floating charge, made by a corporation, and contained

(i) in a trust deed or other instrument to secure bonds, debentures or debenture stock of the corporation or of any other corporation, or

(ii) in any bonds, debentures or debenture stock of the corporation as well as in the trust deed or

> other instrument securing the same, or in a trust deed or other instrument securing bonds, debentures or debenture stock of any other corporation, or
>
> (iii) in any bonds, debentures or debenture stock or any series of bonds or debentures of the corporation not secured by a separate instrument;
>
> (b) an assignment of book debts due at the date of the assignment from specified debtors;
>
> (c) an assignment of debts growing due under specified contracts;
>
> (d) an assignment of book debts included in a
>
> transfer of a business made *bona fide* and for value;
>
> (e) an assignment of book debts, included in any authorized assignment under the *Bankruptcy Act* (Canada)."

Because of the conflicting case law on the effect of registration statutes in general (of which the **Assignment of Book Debts Act** is one), I will review the cases decided under several of these statutes. I will also trace the history of the law of priorities as between holders of assignments of book debts from the same person. On the latter point I shall begin with the leading case of **Dearle v. Hall** decided in England in 1823 reported in 3 Russ 1, 38 E.R. 475. The High Court of Chancery held that the assignee of a chose in action who first notified the party legally obliged to pay the assignor of the assignment had priority to payment over the assignee whose assignment pre-dated that of the notifying assignee but who failed to give notice to the debtor before the subsequent assignee gave notice. On the facts of that case the decision was fair and equitable given that there was no statutory registration system in place at the time. In fact at this time assignments were not formally recognized at common law. Without a registration system as provided for by the **Assignment of Book Debts Acts** of the various provinces, persons intending to lend money or extend credit on the

assignment of book debts had no ability other than through inquiries made to the assignor or the debtor to ascertain if there has been a prior assignment.

In **Dearle v. Hall** the court concluded that the equities favoured the assignee who gave notice on the ground that the prior assignee was negligent in failing to take reasonable steps at that time he took the assignment to protect his own interest by notifying the trustees of the fact that the fund had been assigned to him.

It is fundamental logic and law that if a person effectively transfers all of his or her interest in property to another there is nothing left to subsequently transfer to a third party. Therefore, a subsequent transfer would be of no effect. However, the law has long recognized that where personal property is transferred absolutely or by way of mortgage to another but the transferor is allowed to retain possession of the property, which fact thus facilitates fraudulent subsequent transfers, equity alters the logic to protect innocent third parties without notice of the true state of the title to the property who may be persuaded to acquire such property for valuable consideration or lend money on the security of the same. The theory being that a mortgagee of personal property, by allowing the owner to retain possession, has facilitated the commission of a fraud by the owner and should therefore bear the risk rather than the innocent third party that acquires the property for valuable consideration and without notice of the prior mortgage. Similarly, if a person sells personal property and transfers possession of the property to the purchaser <u>but retains title</u> the common law recognized that innocent purchasers for value from the purchaser in possession without notice of the retention of title by the original vendor were protected.

Dearle v. Hall held that when an equitable assignment of a chose in action is made, notice to the debtor of the assignment was necessary and that a prior assignee who did not give notice could not call on a court of equity to interpose and take the property from the assignee who had used due diligence to ascertain if the assignor was in a position to make

the assignment and had given notice of the assignment to the debtor.

Not only would it be unfair to the second assignee in time who took the regular precautions to ascertain if there had been a prior assignment, it would also be unfair to the trustees as the assignee who had the prior assignment could under such circumstances require that the trustees pay the prior assignee notwithstanding that he had already paid the second assignee who had given notice. The essence of the decision in **Dearle v. Hall** is that equity would not assist the first assignee whose problem arose out of the fact that he was negligent in failing to give notice of the assignment to the trustees. As between the parties the court felt he ought to bear the loss when the same chose in action was assigned more than once.

The decision in **Dearle v. Hall** was applied in the leading Canadian cases that first considered the effect of the passage of the **Assignment of Book Debts Acts** on the equitable position that the assignee who first gave notice to the debtor had priority over prior assignees who did not give a notice. The **Act** provides that general assignments of book debts by persons engaged in a trade or business are void against creditors and subsequent purchasers as defined in the **Act** unless registered as provided in the **Act** (s. 4). One of the most oft quoted judgments as to the effect of registration under the **Act** is that of Orde J.A. of the Ontario Court of Appeal in **Snyder's Limited v. Furniture Finance Corp.**, [1931] 1 D.L.R. 398. He stated that the law as to priorities between competing assignees was the same as it was prior to the passage of the **Assignment of Book Debts Act**. And that the only purpose of that **Act** was to require an assignment of general book debts to be registered in the manner provided by the **Act** or else it was void as against creditors, and subsequent purchasers for value without notice. It was his opinion that the **Act** was never intended by the Legislature to do more as there was an absence of any provision in the **Act** that gave priority to competing assignees based on the respective dates of registration.

What Orde J.A. had to say is as follows:

> "This assignment was duly registered as required by the Assignment of Book Debts Act, and some stress was laid upon this registration as if it in some way placed the plaintiff in a position superior to that of the defendant. This is, of course, not the effect of the Act. The Act does not either expressly or impliedly confer any greater right upon an assignee of a chose in action that he had before. All it does is to make a general assignment of book debts void, as against creditors and subsequent purchasers or mortgagees in good faith and for value, unless registered. By registration the plaintiff here has preserved whatever rights it acquired by virtue of the assignment and no more. In other words, its rights are to be determined exactly as if the Act had never been passed.
>
> What are those rights? The assignment as such transferred to the plaintiff no rights in the choses in action which were recognised at common law. Its efficacy was and still is based solely upon principles of equity, with the additional statutory right given to the assignee to bring action in his own name, instead of that of the assignor, against the debtor, upon giving notice to the latter: Conveyancing and Law of Property Act, R.S.O. 1927, c. 137, s. 49. The assignee takes subject to all the equities. He cannot acquire higher rights against the debtor than those of the assignor himself, and his rights may be defeated or impaired by the intervention of some other assignee who, by giving notice to the debtor of his assignment, or for some other reason, acquires a superior equitable title." {My Emphasis]

I would note that in **Snyder** the judgments of the Court of Appeal really turned on the fact that the conditional sales financing arrangements and the assignment of those contracts to the defendant finance company were known to Snyder (a furniture manufacturer) when it took the general assignment of book debts from its customer, Fagel, who operated a retail furniture store and who sold to his customers by way of conditional sales agreements. The Appeal Court refused Snyder's claim to priority over the monies payable to the finance company pursuant to the assignments of the conditional sales contracts. The judgment of Latchford C.J. was short and to the point. He stated at p. 404:

> "I agree in the conclusion arrived at by the learned trial Judge that the action fails. The appeal should, I think, be dismissed with costs, if only on the simple ground that it was never in the contemplation of the parties to the August assignment that the conditional sales agreements covered, as the parties knew, by the previous contract

> between Fagel and the defendant [the finance company], should be affected by the subsequent assignment of Fagel's book debts."

Even Orde J.A.'s judgment, which is so often quoted for the proposition that the rights as between assignees is determined exactly as if the **Assignment of Book Debts Act** had never been passed, when read in the context of the facts of that case does not have the punch it appears to have as the conditional sales agreements and their subsequent assignment to the finance company meant that there was nothing owing to Fagel at the time the book debts were assigned to Snyder. Therefore, Fagel could not effectively transfer an interest in the amount owing to Fagel from his customers as there was nothing left upon which the assignment to Snyder's could operate.

The line of reasoning expressed by Orde J.A. in **Snyder** decision that registration under the **Assignment of Book Debts Act** did nothing more than prevent the assignment from being void had also been expressed in Nova Scotia by Mellish J. nine years earlier in **Commercial Credit Co. of Canada Ltd. v. Fulton Bros.** , (1922) 55 N.S.R. 208 at p. 240-243, 65 D.L.R. 699 at p. 719-722 when considering similar registration provisions of the **Bills of Sale Act** and the effect of registration under that **Act** on the operation and effectiveness of s. 27(2) of the **Sale of Goods Act**. Section 27(2) is now s. 28(3) of the present **Sale of Goods Act** and provides as follows:

> "28. (3) Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for him of the goods or documents of title, under any sale, pledge or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner."

In that case Mellish J. stated at p. 242:

" The provisions contained in the above section [s. 9 of the **Factors Act** which was identical to s. 27(2) the **Sale of Goods Act**] and in subsection 27 (2) of our Sale of Goods Act are not in my opinion inconsistent with the provisions of the Bills of Sale Act. It may well be that under the provisions of the latter Act an agreement which is not evidenced by writing and filed in compliance with section 8 is void even against a party having notice (See *Edwards v.* Edwards *(1876) 2 Ch. 291*) and that under the Sale of Goods Act the innocent purchaser is protected provided he had no notice, whether the agreement complies with the Bills of Sale Act or not.

I do not think that the filing in the Registry of Deeds under the latter Act furnishes the 'notice' contemplated by the subsection in question. And I certainly do not think that the Bills of Sale Act is to be construed as impliedly enacting that one who purchases goods exposed for sale with the concurrence of the owner by a dealer in the regular and ordinary course of business is bound before buying, in order to protect himself from such owner, to search the Registry of Deeds."

Justice Mellish went on to state at p. 243:

"And the Bills of Sale Act, I think, like the Ontario Conditional Sales Act which for present purposes may be said to be embodied in section 8 of our Bills of Sale Act, "does not enlarge the common law rights of those who allow their goods out of their hands, but it prevents all who have not complied with its conditions from asserting common law rights." (*Falconbridge* on the Sale of Goods, p. 60 and cases there cited.) As impressively stated by Mr. Justice Orde in one of these cases, speaking of this Conditional Sales Act:

> The Act is designed for the protection of persons dealing with one to whom the possession but not the ownership of a chattel has been given, and requires the owner to comply with certain provisions of the Act if he desires to preserve his ownership. But, having complied with those provisions, he stands in no higher or better position than if the Act had not been passed. *Commercial Finance Corporation Ltd. v. Shatford*; 47 O.L.R. 392 at p. 396."

Justice Mellish concluded that s. 27(2) of the **Sale of Goods Act** governed the case but whether or not it did the plaintiffs could not succeed by reason of estoppel. It was noted by Hall J.A. in **Kozak v. Ford Motor Credit Co. of Canada Ltd. et al.** (1971), 18 D.L.R. (3d)

735 at p. 747 that the decision of the Court in **Commercial Credit Co. of Canada Ltd. v. Fulton Bros.**, supra, turned on the fact that there was a fraudulent scheme in place and that Mellish J.'s comments that the filing of a bill of sale was not the "notice" contemplated by s. 27(2) of the **Sale of Goods Act** was not necessary to the decision.

In 1951 the Ontario High Court in **Pettit and Johnston v. Foster Wheeler Ltd.**, [1950] 2 D.L.R. 42 applied the reasoning of Orde J.A. as expressed in **Snyder**. The Headnote states:

> "A made a general assignment of book debts to a bank which was registered on April 27, 1944. Subsequently A became entitled to certain money under a contract with X. Being also indebted to B, A assigned to B in writing his claim against X, and X was notified of the assignment by letter of October 13, 1944. On December 27, 1944 A purported to assign to the bank his claim against X. The latter, on being notified by the bank of the assignment, paid the bank. *Held*, X was liable to pay again to B who first gave notice to X of the assignment by A. Section 52 of the *Conveyancing and Law of Property Act*, R.S.O. 1937, c. 152, did not afford any protection to X, since it related to procedure only. The registration of the assignment of book debts did not in itself give the bank any priority against the assignment to B who had first given notice to X."

It would appear that s. 52(1) of the **Conveyancing and Law of Property Act** referred to in the decision above was the same as what is now s. 43(5) of the **Judicature Act** of this Province which provides:

> "43 (5) Any absolute assignment by writing under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such a debt or chose in action, shall be and be deemed to have been effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee if this subsection had not been enacted, to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same and the power to give a good discharge for the same, without the concurrence of the assignor."

Section 52(2) of that **Act** provided for an interpleader proceeding which a debtor fixed with notice of conflicting claims by assignees could resort. A similar provision to s. 52(2) of the Ontario Act is found in s. 43(6) of the present Nova Scotia **Judicature Act** which provides:

> "43(6) In case of an assignment of a debt or other chose in action, if the debtor, trustee, or other person liable in respect of such debt or chose in action, has had notice that such assignment is disputed by the assignor, or any one claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he may if he thinks fit call upon the several persons making claim thereto to interplead concerning the same, or he may if he thinks fit pay the same into the Supreme Court, upon obtaining an order therefor, to abide the determination of the Supreme Court in respect thereof."

The foundation of the decision in the **Pettit** case was the rule established by the decision in **Dearle v. Hall**. The learned trial judge impliedly approved the statements made by Orde J.A. in the **Snyder** decision.

In 1958 Professor G.V. LaForest, Faculty of Law, University of New Brunswick (now of the Supreme Court of Canada) authored an article entitled "**Filing Under the Conditional Sales Act: Is it Notice to Subsequent Purchasers?**". It appears in 36 Canadian Bar Review 87. In that article he started with the premise that most lawyers consider that registration under the **Conditional Sales Act** protects the conditional seller against a claim by a subsequent purchaser for value and without actual notice. He then goes on to demonstrate in a very persuasive and logical way that this view, based on precedent, was not the law of most common law provinces.

In 1995 I would go so far as to say that most lawyers in commercial practice in the provinces where those Acts have not been repealed by the comprehensive personal property security **Acts**, consider registration under either the **Conditional Sales Act**, **The Bills of Sale Act** and the **Corporations Securities Registration Act** and the **Assignment**

of Book Debts Act constitute constructive notice to creditors, subsequent purchasers and lenders of the existence of the security document registered under those respective Acts.

I will review some of the cases decided under these other Acts that provide for registration of documents relating to personal property transactions as the language of these statutes as to the effect of registration is very similar to that in the **Assignment of Book Debts Act**. The language of each of these Acts (registration statutes) generally provide that the interest in property that is created or reserved by chattel mortgages, conditional sales agreements, assignments of book debts and corporate debentures are void against creditors and subsequent purchasers or mortgagees for valuable consideration and without notice unless the document is registered under the relevant Act. None of the Nova Scotia registration statutes contain any express words that establish priority based on date of registration of documents registered under the respective Acts.

Professor LaForest expressed the opinion that registration of a conditional sales agreement is not constructive notice to subsequent purchasers and why, in his opinion, it should not be. He stated at p. 388:

> "But nowhere in the Act will one find a provision setting forth the effect of ordinary registration. It may, of course, be argued that since the Act declares that conditions reserving title in unregistered agreements are void against subsequent purchasers for value and without notice, then by implication it provides that such conditions in registered agreements are valid against innocent purchasers. But reading into statutes provisions that are not there is at best dangerous, and this is particularly so where it would take away the rights of innocent persons as it would here. Further, it is suggested that implying such a condition would fly in the face of the whole purpose and object of the Act as it appears from its provisions. The purpose of the Act is to limit the rights of conditional sellers, not to add to them. Thus the section already cited makes conditions reserving title in the seller void unless the agreement is registered or the Act is otherwise complied with, and a later section seriously curtails the seller's right of sale on repossession. It is submitted, therefore, that the legislature intended to make conditions reserving title void unless the agreement was registered, and not to interfere with them if registered, but rather to allow them whatever operation they had

> before. This, I suggest, is a fair inference to draw if one reads the Act without preconceived notions."

He analyzes the provisions of the **Sale of Goods Act**, to which I have already referred, and the decision of Mellish J. in the **Commercial Credit** case in which Mellish J. held that the filing of a conditional sales agreement under the **Conditional Sales Act** did not constitute notice within what is now s. 28(2) of the Nova Scotia **Sale of Goods Act**. It was Professor LaForest's view that the **Conditional Sales Act** was not designed to compel buyers to search the Registry but was rather aimed at preventing fraudulent or preferential agreements by making such agreements void unless made public by registration. He suggests this is probably what Orde J.A. had in mind when he stated that the rights of sellers were not increased by passage of the **Conditional Sales Acts** in Canada.

I would note that in Nova Scotia the **Conditional Sales Act** was passed in 1882 and the **Sale of Goods Act** in 1895. This leads to an inference by some that the Legislature did not intend that the purpose of the **Conditional Sales Act** was to give notice to creditors, subsequent purchasers as otherwise why would it have enacted what is now s. 28(2) of the **Sale of Goods Act**. This interpretation would be consistent with the interpretation reached by Mellish J. in the **Commercial Credit** case. Professor LaForest at p. 396 stated:

> "The Conditional Sales Acts still serve the purpose for which they were originally enacted. They continue to make unregistered agreements reserving title in a seller void against subsequent purchasers, mortgagees and certain creditors. It is true that the rights of the seller would not prevail against a subsequent buyer by virtue of the sections in the Factors and Sale of Goods Acts, but these sections, it should be observed, are not applicable to creditors so that filing does serve a most useful purpose. What is more it provides a seller with a public method of giving notice which will bind subsequent purchasers who find the agreement in the registry."

He concludes his article by asking the question "Should registration under a Conditional Sales Act be notice?" At p. 400 he states:

> "It may be urged that the Conditional Sales Act should be amended to make it clear that filing is notice. But it is submitted that we should pause long before taking that step unless, at least, certain other changes are made in the Act. For there is much to be said for the principle that when one of two innocent persons must suffer through the wrong of a third party, it is the person who has put the third party in a position where he can harm others who should bear the loss. Here it is the seller who has trusted the buyer and thereby made it possible for him to set himself up as the owner, and it was to make the seller bear the loss that section 9 of the Factors Act and section 25(2) of the Sale of Goods Act were passed.
>
> Searching the registry may, it is true, give the subsequent purchaser notice - but not always. Except for the provinces and territories where there is a central registry, it may well happen that a conditional sale agreement is filed in one registration district but the sale to the subsequent purchaser takes place in another district. Again, a conditional seller is given a certain period under all the Acts to register his agreement, but a fraudulent buyer may sell the goods during that period before the agreement is filed.
>
> Another matter should be considered. The vast majority of conditional sellers (or their assignees) are organizations that provide for losses under these agreements, either in their prices, interest or other charges. Such losses are part and parcel of the ordinary business risks that in a competent concern are taken into account. So much is this so that many finance companies register only a fraction of the conditional sales agreements assigned to them. But the subsequent purchaser is not in this happy position. To him the loss will usually be a completely unexpected financial blow for which he has not provided."

If one applies Professor LaForest's very sound reasoning as to the limited purpose of the **Conditional Sales Act** to the interpretation of the **Assignment of Book Debts Act**, then one would have to agree that the registration of a general assignment of book debts would not be constructive notice to "subsequent purchasers" as defined in the **Act** as the limited purpose of such registration legislation, in Professor LaForest's view in 1958, based on decided cases at that time, was only to cause the assignment to be void for lack of registration. In other words, registration statutes were not intended to provide a means for potential purchasers or lenders to ascertain if the personal property in question was subject

to a conditional sales agreement.

In view of the difference in nature between chattels (tangible personal property) and choses in action, the same considerations that led to the passage of s. 28(2) of the **Sale of Goods Act** do not necessarily apply to transfers of book debts as there is no visible possession of the latter.

Applying Professor LaForest's reasoning to the assignment of book debts when there are competing assignees, in the absence of actual notice of the prior assignment, the assignee of book debts who first notifies the debtor of an assignment would have priority. In short, based on the cases decided up until that time, the law respecting priorities remained as it was prior to the registration systems created by the enactment of the **Assignment of Book Debts Act**.

In 1972 the Saskatchewan Court of Appeal took a new tack with respect to registration statutes. **Kozak v. Ford Motor Credit Co. of Canada Ltd. et al.** (1971), 18 D.L.R. (3d) 735 distinguished the English cases in holding that registration of a conditional sale agreement under the **Conditional Sales Act** constituted notice of its existence sufficient to deprive a subsequent purchaser from the buyer of the protection otherwise available to him under s. 26(2) of the Saskatchewan Sale of Goods Act even though the **Conditional Sales Act** did not contain an express provision to this effect. Section 26(2) of the Saskatchewan Act corresponded to s. 25(2) in the English Sale of Goods Act, 1893; that Act was adopted in 1893 with minor variations by all the common law provinces in Canada. The section in question is presently s. 28(3) of the Nova Scotia **Conditional Sales Act**. In **Kozak** the court stated at p. 748-749:

> "I am well aware of the position taken against the extension of the doctrine of constructive notice to commercial transactions, as expressed by Cotton, L.J., and Lindley, L.J., in *Joseph v. Lyons, supra*, and amplified by Lindley, L.J., in *Manchester Trust v. Furness*, [1895] 2 Q.B. 539. A definition of constructive notice in

equity is found in *Hanbury's Modern Equity*, 9th ed. (1969), at p. 23:

> Constructive notice exists where knowledge of the equitable interest would have come to him if he had made all such inquiries as a prudent purchaser would have made.

It appears from this definition, and from reading the cases above quoted, that the term "constructive notice" is applied only with respect to equitable interests and not to a legal interest, which the respondent Ford Motor Credit Co. Ltd. has here. It is, therefore, not necessary to decide whether, in Saskatchewan today, with a central registry for conditional sales and bills of sale, and where it is widely known that almost all automobiles are sold under conditional sale agreements, the extension of the doctrine of constructive notice to commercial transactions would be desirable. Under present conditions, it would seem that if registration were not held to be notice, in the words of Lindley, L.J., "we should be doing further mischief and paralyzing the trade of the country".

In my opinion, what is here involved is something distinct from the equitable concept of constructive notice. In my opinion, where the Legislature enacted the registration provisions of the *Conditional Sales Act*, it intended that registration would constitute notice to all persons. The Legislature did not intend that registration would be necessary to preserve rights against subsequent creditors and purchasers if the said rights could be defeated by the creditor or subsequent purchaser omitting or refusing to search. It did not intend to provide a method by which third persons could readily discover the existence of a conditional sale agreement and ascertain the amount thereunder owing unless it also intended that they would proceed at their own peril if they did not search.

This was the view of the legislation adopted by the trial Judge and is the interpretation of it which has been universally accepted and followed in this Province by the Courts, the practitioners and the commercial community since the legislation was first enacted. I cannot find that this interpretation is wrong. It is certainly the most convenient and logical one to adopt."

In 1978 the New Brunswick Court of Appeal in **General Motors Acceptance Corp. of Canada Ltd. v. Hubbard** (1978), 87 D.L.R. (3d) 39; 21 N.B.R. (2d) 49 embraced the arguments made by Professor LaForest in his 1958 article and re-affirmed the earlier view that registration under the **Conditional Sales Act** does not constitute notice unless the Act

imposing the requirement so provides. There was no such provision in the New Brunswick **Act** nor is there such a provision in the Nova Scotia **Conditional Sales Act**.

In 1984 the Ontario Court of Appeal in **Acmetrack Ltd. v. Bank Canadian National et al.** (1984), 12 D.L.R. (4th) 428 reversed the previously well-established Ontario general position developed by Orde J.A. in the cases referred to that registration is not notice. The Court of Appeal held that registration of a floating charge and assignment of book debts under the **Corporation Securities Registration Act** was notice to the bank that held a subsequently executed chattel mortgage registered under the Ontario **Personal Property Security Act.** The Court in **Acmetrack** accepted the reasoning in **Kozak** that registration of the instrument creating the charge was notice to the bank although it had no actual notice of **Acmetrack**'s security. Zuber J.A. stated at p. 55:

> "The question that arises then is whether registration pursuant to the C.S.R.A. by Acmetrack constitutes notice to creditors, including the Bank.
>
> Unlike the P.P.S.A. (s. 53), the C.S.R.A. is silent as to the effect of registration. I recognize that there is a body of case-law expressed largely in older cases which holds that mere registration pursuant to a statute (where the statute is silent as to the effect of registration) does not constitute notice to the world: see *Berger v. Myles*, [1963] 1 O.R. 525, 38 D.L.R. (2d) 16; *McAllister et al. v. Forsyth et al.* (1884), 12 S.C.R. 1; *Nourse v. Canadian Canners Ltd.*, [1935] O.R. 361, [1935] 3 D.L.R. 168.
>
> In my opinion, however, this view of the effect of registration no longer reflects the purpose of modern registration statutes."

In **Acmetrack**, after quoting from the passage I have previously set out from the reasons of Hall, J.A. in the **Kozak** decision, Mr. Justice Zuber made reference to several Ontario decisions and quoted from a decision of Blair J.A. in **MacKay & Hughes (1973) Ltd. v. Martin Potatoes Inc.**; **Dominion Stores Ltd.**, **Garnishee**, 46 O.R. (2d) 304, 9 D.L.R. (4th) 439, 51 C.B.R. (N.S.) 1 where Blair J.A. stated:

> "It seems to me that the provision for registration of debentures under the *Corporation Securities Registration Act* achieves the dual purpose of protecting the public and also relieving debenture holders of the impossible task of locating all creditors and customers of the debtor in order to make the floating charge effective. The creditors, whose interest is primarily at stake, are by virtue of the registration made aware of the existence of the floating charge and the ever present possibility that it may be crystallized and attach specifically to the property of the debtor."

Zuber J.A. in **Acmetrack** then stated:

> "I agree with the foregoing statements which reflect a change in the case-law to make it consistent with contemporary business practice and current understanding of the effect of registration. I conclude, therefore, that registration of the Acmetrack security constituted notice to the Bank."

Therefore, we are faced with conflicting views as to the effect of registration of security documents under several registration statutes.

The legislation that has been in effect in all the Canadian provinces (prior to the passage of comprehensive personal property security statutes in most provinces), including the **Conditional Sales Act**, **the Bills of Sale Act**, **the Assignment of Book Debts Act**, and **the Corporation Securities Registration Act** were or are similar to that in force in Nova Scotia. Each of these registration statutes basically provides that unless the instrument in question is registered as provided in the respective Acts, it will be void against creditors and subsequent purchasers and mortgagees for valuable consideration and without notice (See s. 3 **Conditional Sales Act**, R.S.N.S. 1989, c. 84; s. 3 **Bills of Sales Act**, R.S.N.S. 1989, c. 39; s. 3 **Corporation Securities Registration Act**, R.S.N.S. 1989, c. 102; and, s. 4 of the **Assignment of Book Debts Act**, R.S.N.S. 1989, c. 24.)

I have previously set out the wording of s. 4 and s. 3 of the **Assignment of Book Debts Act**. The provisions of s. 3 of that **Act** which provide that the **Act** does not apply to certain assignments poses a problem that is not present in interpreting the other registration

statutes of this Province. I will not repeat the actual wording of the five specific types of assignments to which the **Act** does not apply. In summary, the **Act** does not apply to assignment of book debts by way of floating charge in a trust deed or in bonds; the document in which such an assignment is included would be registered under the **Corporation Securities Registration Act**. Under Section 3(b) the **Act** does not apply to book debts due at the date of an assignment from specified debtors. Obviously this provision allows such an assignment to be effective without registration. Likewise, s. 3(c) "an assignment of debts growing due under specified contracts" does not have to be registered to be effective. Under s. 3(d) it is obvious that an assignment of book debts that is part of a transfer of a business made bona fide and for value would not have to be registered under the **Act** as the assignor has not retained an apparent interest in the book debts. Nor, of course, would an assignment of book debts included in an assignment under the **Bankruptcy Act** have to be registered as there is federal legislation governing such an assignment and there is a complete divestiture of the property by the assignor with the trustee in bankruptcy going into possession.

In reading ss. 3 and 4 of the **Act** it is clear that the intention of the Legislature was that only general assignments of book debts were required to be registered. However, in my opinion, this does not detract from the effect of the registration of such general assignments. In **Acmetrack**, the Ontario Court of Appeal concluded that the registration under the **Corporation Securities Registration Act** was notice to subsequent purchasers and for the very practical reason that it is a registration system that provides a means for a person dealing with the owner or apparent owner of assets (the corporation) to ascertain whether or not the assets are encumbered. In practice searches are conducted by lenders or prospective purchasers as there is a means to ascertain the state of title to personal property and business assets just as is done with respect to real property under the **Registry Act**, R.S.N.S. 1989, c. 392. However, I would note that s. 18 of the **Registry Act** in effect provides for priority

by date of registration of instruments affecting title. Section 18 states:

> "18 Every instrument shall, as against any person claiming for valuable consideration and without notice under any subsequent instrument affecting the title to the same land, be ineffective unless the instrument is registered in the manner provided by this Act before the registering of such subsequent instrument."

The decisions in **Kozak** and **Acmetrack** accord with prudent commercial practice which dictates that before buying personal property (other than from a mercantile agent in the ordinary course of his business) or lending money on the security of personal property a search at the appropriate registry office is undertaken to determine the state of title to the property. Similar searches are done in registries where corporate security documents are registered.

In 1985 Professor Jacob S. Ziegel, Faculty of Law, University of Toronto, in an article entitled "**Registration Statutes and the Doctrine of Constructive Notice**" published in 63 Canadian Bar Review, 629 reviewed the decisions in **Kozak**; **General Motors Acceptance Corp. of Canada Ltd. v. Hubbard;** and **Acmetrack** as well as the older line of cases including **Dearle v. Hall**, supra, **Joseph v. Lyons** (1884-85), 15 Q.B.D. 280 (C.A.) and **Snyder's Ltd. v. Furniture Finance Corp. Ltd.**, supra. Professor Ziegel stated at p. 637:

> "Over more than a century, however, the reason for imposing the registration requirements has not changed. It is designed to give notice of the security interest where the debtor is allowed to remain in possession or control of the collateral, and where it is not practical or desirable for the secured party to obtain or retain possession of the collateral himself. It is thus seen as an accommodation between the interests of a secured party who relies on the collateral as security for the debtor's performance of his obligations, and the interests of the debtor's creditors and subsequent purchasers and mortgagees who might be misled by the debtor's continued possession of the collateral, or who cannot readily ascertain the title position in the absence of a registration requirement. The legislation makes it possible for these persons to proceed on an informed basis. If they choose not to search (and leaving aside some important exceptions) they act at their own

> risk. In the light of this history, it must be obvious that to impute constructive notice of the existence of the security interest to those parties for whose benefit the registration requirement is imposed is totally consistent with the purposes of the legislation and does not introduce gratuitous complications into commercial transactions."

Professor Ziegel took a broader view of the purpose of registration statutes than did Professor LaForest. Professor Ziegel concluded that the decisions in **Kozak** and **Acmetrack** made "eminently good sense" and that the courts in these two cases correctly interpreted the legislative design of the registration statutes in question without imposing unreasonable burdens on third parties. Apparently after the article was written but before it was published the Ontario Court of Appeal in **National Bank of Canada v. Harding Carpets Limited** (1985), 5 P.P.S.A.C. 29 reversed a decision of Trainor J., the judge of the first instance, who had applied the reasoning in **Acmetrack** in holding that a prior general assignment of book debts took precedence over a subsequent assignment of a debt growing due under a specified contract despite the fact that the latter assignee gave the first notice of assignment to the debtor. Trainor J. considered the older line of Ontario authorities, such as **Snyder**, to have been overruled by **Acmetrack**. In a short oral decision reversing the trial judge the Ontario Court of Appeal stated:

> "We think this appeal must succeed. . . . We have reached this conclusion as it is our opinion that because of s. 2(c) of the Assignment of Book Debts Act, R.S.O. 1970, c. 33, that Act has no application to this specific assignment held by the appellant of which it had given notice. In the result then, the appeal is allowed with costs here and above."

Professor Ziegel commented on this decision at p. 644:

> "The court's reasoning was that "because of s. 2(c) of the *Assignment of Book Debts Act*, the Act has no application to this specific assignment held by the appellant of which it had given notice". What this seems to mean is that because Harding was not required to register its assignment under the Assignment of Book Debts Act it was not subject to the doctrine of constructive notice.

> This basis of distinguishing *Acmetrack* is, with respect, unpersuasive. The decision in *Acmetrack* was not based on the two competing security interests being governed by the same perfection requirements since obviously they were not. Rather counsel for the bank in that case invoked the equitable doctrine of purchaser for value without notice, just as in the present case Harding relied on another equitable rule (the rule in *Dearle v. Hall*) premised on the non-applicability of the doctrine of constructive notice. Since the defence failed in *Acmetrack* why should it have prevailed here?
>
> Perhaps what the Court of Appeal meant to say was that, having regard to the general purpose of the Assignment of Book Debts Act and its overall structure, the legislature did not mean to deprive a specific assignee of the benefit of the rule in *Dearle v. Hall* where he did not have actual knowledge of the prior assignment. If that was the basis of the court's decision it is unfortunate that we are not given the benefit of the court's analysis of the Act. For it seems to me that the available indicia in the Act, coupled with the historical reasons for its introduction, point in the opposite direction."

In my opinion the Ontario Court of Appeal in **National Bank of Canada v. Harding Carpets** must have meant that in the Court's opinion the legislature, when it enacted s. 3 of the **Act**, did not intend the doctrine of constructive notice would apply to those types of assignments of book debts described in s. 3(a) to (e) inclusive. This would not be inconsistent with the decision in **Acmetrack**; it simply means that the doctrine of constructive notice by reason of s. 3 does not apply to the holders of these types of assignments. By not expressly rejecting the reasoning in **Acmetrack** the Court may have implicitly acknowledged that the **Act** should be interpreted as conveying constructive notice to creditors and subsequent purchasers (other than those who would fall within ss. 3(b) and 3(c)) of a prior general assignment of book debts.

I would also infer that the decision endorsed the older line of cases in that if the **Assignment of Book Debts Act** does not apply to an assignment of specified debts or debts growing due under a specified contract, then under the equitable law such an assignee who, not having notice of the prior assignment, gives the first notice of an assignment to the debtor

has priority. If I have correctly speculated as to what the Ontario Court of Appeal decided, I find myself in disagreement with that Court. In my opinion the Legislature of this Province must have intended to provide a notice registry as otherwise there would not have been any need to include in the **Act** the detailed provisions as to where to register general assignments (s. 5(1)) and how the assignments are to be registered. (s. 5(2)). The latter is of most significance. Registration is effected by filing the assignment document in a public registry. The general assignments are indexed chronologically and alphabetically in the name of the assignor so that a search can easily be made to ascertain if a business has made a general assignment. Had the Legislature intended that registration not be notice there would have been no need whatsoever to provide for chronological and alphabetical filing and retention of the assignment documents in the public registry for inspection. If the only purpose of registration was so that the general assignment would not be void, the **Act** would only have provided that the general assignment be presented at the Registry office, stamped and returned to the assignee. There would be no need to maintain any sort of indexes or retention of the documents for viewing by any member of the public. The interpretation of s. 3 of the **Act** in **National Bank of Canada v. Harding Carpets** would lead to some strange results. For example, a trustee in bankruptcy of a business that had made a prior general assignment of book debts to a bank would have priority over the bank if the trustee, in the absence of actual notice of the prior assignment, gave notice to the debtors of the assignment in bankruptcy prior to the bank giving notice of the general assignment. Such a result does not accord with good sense or commercial expectations as it would make the assignment in favour of the bank, which was given for the purpose of extending credit to the business, worthless.

Furthermore, the equities of the situation that exists in 1995 as opposed to that which existed in England in 1823 when **Dearle v. Hall** was decided or even in 1895 when

the English court in **Manchester v. Furness** decided that the doctrine of constructive notice should not be extended to commercial transactions dictates that the courts move away from the old line of cases and recognize the reality that the registration statutes provide a means to determine the state of title to assets that are being sold or charged. As a general rule it is prudent to turn to the registration systems as provided in these statutes to determine if the property in question is owned or has been encumbered by the purported owner unless there is no need to so as, for instance, when a purchaser buys a motor vehicle from a car dealer and is therefore protected by the provisions of the **Sale of Goods Act**.

In 1989 the British Columbia Court of Appeal in **Lloyds Bank of Canada v. Lumberton Mills Ltd.** (1988), 71 C.B.R. (N.S.) 1, [1989] 2 W.W.R. 360, 32 B.C.L.R. (2d) 67, 12 A.C.W.S. (3d) 229 was dealing with the effect of registration under the **Corporation Securities Registration Act**. In that case Lumberton purchased certain mining equipment located in the Queen Charlotte Islands which it intended to dismantle and ship to Vancouver for resale. To finance the undertaking it borrowed from the plaintiff bank and executed a demand debenture for $2.5 million. The debenture was registered in the offices of the Registrar of Companies two days after execution in July, 1986. As part of the debenture, Lumberton Co. agreed not to incur salvage expenses exceeding $200,000 per month and not to allow the creation of any liens having priority over the debenture. Lumberton Co. employed the defendant to transport the equipment from the Queen Charlotte Islands to Vancouver. By January, 1987, the defendant had made four trips but had not been paid, and Lumberton Co. agreed in a "transportation agreement" that the defendant should have a general lien on the equipment to secure the past and future indebtedness of Lumberton Co. The defendant made one further trip in March, 1987, and several days later Lumberton Co. went into receivership under the debenture. The defendant claimed a lien on the equipment, for an amount primarily related to the fifth trip. On a summary trial application brought by

the plaintiff, it was held that the plaintiff's debenture took priority over any lien right of the defendant. The defendant appealed.

In dismissing the appeal Lambert J.A. said, at pp. 5-6:

> "The system for registration of debentures under the Company Act of British Columbia is a system that contemplates the filing and registration of the entire debenture document. It is not a system for the filing and registration of mere notice or particulars of the debenture. Accordingly, in my opinion, the registration of the entire debenture document constitutes constructive notice to those with an interest in the company's encumbrances, for whatever effect constructive notice may have, of all of the provisions of the debenture document: see Gower, Modern Company Law (1954), at p. 485, and *Wilson v. Kelland*, [1910] 2 Ch. 306 at 313. Anyone who has an interest in the encumbrances on the company's property will fail to search the registry at his or her peril.
>
> Constructive notice arising from a system of recording or registering documents or events under a statutory scheme is not the same as constructive notice arising as an inference of fact. The latter kind of constructive notice is not likely to be found to be effective in a commercial transaction: see *Manchester Trust v. Furness*, [1895] 2 Q.B. 539, 64 L.J.Q.B. 766 (sub nom. *Manchester Trust Ltd. v. Turner, Withy & Co.*) (C.A.), per Lindley L.J. at p. 770. But the former kind of constructive notice is the very essence of the statutory scheme, *and the courts should allow the scheme to operate in accordance with the legislative intention.* (Emphasis Added)"

In 1991 the British Columbia Court of Appeal in **Royal Bank of Canada v. Lions Gate Fisheries Ltd.** (1991), 76 D.L.R. (4th) 289 had another opportunity to consider the effect of statutory registration schemes; in that case it was the **Bank Act**. The headnote sets out the bare bones of the facts, the issues and the decision as follows:

> "In 1985 the respondent bank registered, in accordance with the *Bank Act*, R.S.C. 1985, c. B-1, a notice of intention with respect to a security under s. 178 for money owing to the bank by a customer. The customer subsequently gave the bank a general assignment of debts. In July, 1987, the appellant, which had no actual notice of the bank's interest, entered into a transaction with the bank's customer whereby the customer owed the appellant the sum of $22,000, due on August 10th. On August 14, 1987, the appellant purchased goods from the customer for a price of $30,000, due on August 29th. Subsequently, the bank enforced its security and

> demanded payment of $30,000 from the appellant. The appellant sought to set-off the earlier debt of $22,000. At trial the bank succeeded.
>
> On appeal to the British Columbia Court of Appeal, **held**, dismissing the appeal, the history and purpose of s. 178 showed that registration of notice was to be treated as notice to the world. Accordingly, registration under the Act was constructive notice to the appellant of the bank's interest, and the appellant was not entitled to a set-off. There were several ways in which the appellant could have protected itself effectively, but it had failed to do so."

Cumming J.A., writing for the Court, set out the provisions of s. 178(4)(a) of the **Bank Act** which are in the usual language of registration statutes that the banks rights in respect of property covered by the security are "void as against creditors of the person giving the security and as against subsequent purchasers or mortgagees" unless the notice of intention signed by the person giving this security was registered.

Cumming J.A. reviewed the older cases, including the decision of the Supreme Court of Canada in **McAllister v. Forsyth** (1885), 12 S.C.R. 1. In that case the Supreme Court of Canada held that an assignee of property did not have notice of a chattel mortgage notwithstanding that it was properly registered under the **Bills of Sale Act** of Nova Scotia prior to the assignment. This decision turned on the fact that the property in question was "after acquired property". He also made reference to the fact that a number of provincial courts of appeal had held that mere registration of a security is not notice of the security.

Cumming J.A. went on to review the decisions in **Snyder**, **Kozak**, and **Acmetrack** as well as the views of Professor Ziegel in the article to which I have already referred. After quoting from the Professor's endorsement of the results in **Kozak** and **Acmetrack**, Cumming J.A. stated at p. 306:

> "This approach comports, it seems to me, with what was said by Lambert J.A. in *Lumberton, supra*."

Justice Cumming concluded at p. 318 with the following statement:

> "Registration of notice of intention to give security under the authority of s. 178 of the *Bank Act* must be taken to be notice to the world, and so to the appellant herein in particular, of the bank's interest."

And at p. 319:

> "In the present case the bank did all that was required of it under the Act. It was open to the appellant, as the trial judge pointed out, to take steps to protect itself but it simply failed to do so."

Clearly there is a trend in the Canadian case law of several other provinces that registration under a statute that provides for a detailed registration system constitutes constructive notice to creditors and subsequent purchasers for valuable consideration without actual notice. This trend is also evident in Nova Scotia. I will briefly review comments made by judges to this effect when considering the several registration statutes.

The Corporation Securities Registration Act

Under the above-noted **Act** in **Royal Bank of Canada v. Maple Ford Sales Limited** (1983), 60 N.S.R. (2d) 150 Glube C.J., after quoting from Halsbury's Laws of England, 4th edition, volume 7, paragraph 826, on the effect of registration of a floating charge under English statute law, made the following statement respecting registration of a floating charge debenture pursuant to the **Corporation Securities Registration Act**:

> "I would suggest that registration under the *Corporations Securities Registration Act* or in the Registry of Deeds must, by that reference and the note, provide actual notice of the contents. To suggest that there would have to be additional proof of actual notice, over and above registration, does not seem to me to agree with that statement. It is my view, on that basis, that the cases of *Bank of Canada v. Madill* (1981), 37 C.B.R. 80; 43 N.S.R. (2d) 574; 81 A.P.R. 574; 120 D.L.R. (3d) 17, and *Union Bank of Halifax v. Indian and General Investment Trust* (1908), 40 S.C.R. 510, do not apply to the case in question. Madill deals with after-acquired property and a search of the Registry of Deeds would not have revealed the Bank debenture as it could contain no reference to the land in question. In

> the case at bar it has been agreed that the Royal Bank's debenture was filed under the *Corporations Securities Registration Act*. I can only take from that that anyone perusing that filing should have actual notice of the contents." (para. 13)

In **Re Crichton Enterprises Ltd.** (1979), 38 N.S.R. (2d) 348 I stated at p. 358:

> "Surely the purpose of the Act is to give notice to creditors of documents secured against property of the debtor. On the facts of this case, it is clear that had any creditor cared to search at the office of the Registrar of Joint Stock Companies, he would have found the Demand Debenture and be as knowledgeable as if the manner of effecting registration had been in accordance with the requirements of section 3(2) of the *Corporations Securities Registration Act*."

> Irrespective of the difficulties created by the legislation, the words of section 3(2) and section 2(1) of the *Corporations Securities Registration Act* are plain and on the facts the Demand Debenture was not "duly registered" in that it was not registered in accordance with the requirements of the Act and, accordingly, is void against the creditors."

In **Crichton Enterprises** the affidavit required by the statute was not present and, therefore, based on established authority, the debenture was not "duly registered".

Conditional Sales Act

In **Nova Scotia, Province of, and Touche Ross Limited v. Weymouth Sea Products Limited and Commercial Credit Corporation Limited** (1983), 61 N.S.R. (2d) 410 Hart, J.A., writing for the Appeal Division, expressed the prevailing view of the registration provisions of the **Conditional Sales Act** that they are "designed to give notice of the encumbrance against goods in the possession of a person within the province."

In **Matsushita Electric of Canada Ltd. v. Central Trust Co. and Coopers & Lybrand Ltd.** (1986), 73 N.S.R. (2d) 250 Glube C.J. recognized the relevancy of registration under the **Conditional Sales Act** of documents that reserve title to the seller.

She stated at paragraph 41:

> "I find that it would be totally inequitable to allow the privity rule in this case to lead to the conclusion that there is no obligation to comply with the **Conditional Sales Act** and register the appropriate document. This would allow someone in the position of Datacom to make conditional sales agreements to the detriment of a bona fide conditional sale holder who has registered and who was not aware and could never become aware of the unregistered document. To hold this position would also lead to the conclusion that a debenture holder could not rely on any inventory at all because at any time an unregistered conditional sales contract would have priority. This would be untenable in the business world."

In **Canadian Cooperative Agricultural Services v. Beaton** (1990), 97 N.S.R. (2d) 266 Grant J. commented on the purpose of the registration requirement of the **Conditional Sales Act** as follows:

> "It [the **Conditional Sales Act**] contains provisions which require registration of agreements with a description of the goods sold under them. These provisions exist to protect people who might try to purchase or encumber the goods while they are in the possession of the purchaser under the conditional sale agreement, but while legal title still remains in the original vendor. Section 3(1) of the **Act** calls them:
>
> > "(a) subsequent purchasers or mortgages claiming from or under the buyer in good faith for valuable consideration and without notice; and
> >
> > (b) creditors of the buyer who at the time of becoming creditors have no notice of the provision;"
>
> Section 3 of the **Act** operates such that if a conditional seller wishes to protect his/her title against third parties claiming from the buyer in good faith, then he/she must register the conditional sale agreement according to the provisions set out in the **Act**. This protects innocent third parties from losing their interest because of an invisible security arrangement like the conditional sale."

By implication a potential purchaser, to be protected, should search the records.

Bills of Sale Act

Clarkson Company Limited v. Muir et al. (1982), 41 C.B.R. 309; 53 N.S.R. (2d) 609 Justice Rogers, in considering the registration provisions of the **Bills of Sale Act**, stated:

> "I believe this section is intended to void a chattel mortgage against other than the parties to it unless there has been some notice to others, whether they be creditors or subsequent purchasers and/or mortgagees. And a method of notice is provided in the Act, that is due registration at the Registry of Deeds.
>
> If notice of the Chattel Mortgage is given through due registration, that is constructive notice, the Chattel Mortgage is valid."

In **Wood Motors Ltd. v. Sullivan** (1983), 57 N.S.R. (2d) 71 Anderson J., after quoting the above passage by Justice Rogers stated at paragraph 8:

> "I believe this to be the law in Nova Scotia and so, as the Chattel Mortgage here was duly registered, the defendant here had notice of said mortgage."

In **Whitford v. Toronto-Dominion Bank** (1986), 71 N.S.R. (2d) 408 Burchell J. stated at p. 412:

> "...it is my view that due registration in the Registry of Deeds under the **Bills of Sale Act** gives notice to the public at large of its existence. Constructive notice in other words flows from the fact of registration itself as long as the security is otherwise valid."

On appeal of the decision of Rogers J. in **Clarkson Co. v. Muir et al.** (1982), 53 N.S.R. (2d) 609 Hart J.A. apparently considered that registration under the **Bills of Sale Act** is a form of notice. He stated at paragraph 11:

> "In my opinion it is the creditors themselves who are entitled to the notice provided by registration of encumbrances against the goods of the owners, and that protection is afforded to them at all times before a valid registration occurs. "

And at paragraph 12 stated:

> "Assuming that there was no valid chattel mortgage recorded prior to the assignment of bankruptcy I would reach the conclusion that the actual creditors had no notice in fact of the encumbrance against the goods of the owners and would not be bound by it."

By implication Hart J.A. decided that registration is notice.

In **Pozdnekoff v. Royal Bank of Canada** (1979), 34 N.S.R. (2d) 435 I held that registration constituted constructive notice to a subsequent purchaser and mortgagee. I considered the decisions of the Supreme Court of Canada in **Rose v. Peterkin** (1885), 13 S.C.R. 677 as to what constitutes constructive notice. On the basis of this decision I concluded in **Pozdnekoff** that if one is appraised of facts which should put him on his inquiry the court binds him with constructive notice of the knowledge he could have ascertained by a reasonable inquiry.

Assignment of Book Debts Act

The effect of registration of a general assignment of book debts made under this **Act** does not appear to have been considered by the courts of the Province since the passage of the first uniform **Assignment of Book Debts Act**, S.N.S. 1931, chapter 5; proclaimed in force on September 1st, 1932. Nor have the courts had occasion to interpret s. 3 of the **Act**. Both issues are relevant on this appeal.

The Appellant's position

Counsel for both Eastland and Martin rely on: (i) the decision of the Ontario Court of Appeal in **National Bank of Canada v. Harding Carpets**; (ii) the rule established in **Dearle v. Hall**; and (iii) the line of Canadian cases to which I have already referred that applied that rule respecting assignments of book debts. A review of the most recent decisions relied upon by these parties in which the rule in **Dearle v. Hall** was applied are: **Re: Royal Bank of Canada and Revelstoke Companies Limited** (1979), 94 D.L.R. (3d)

692**; Harding Carpets Limited v. Royal Bank of Canada**, [1980] 4 W.W.R. 149 (Man. Q.B.) The courts in those decisions simply applied the rule and did not analyze the reasoning behind the decision in **Dearle v. Hall**. That is not meant as a criticism but simply as a statement of fact.

Other cases which applied the rule in **Dearle v. Hall** are **Toronto Dominion Bank v. Mercury Express Ltd.** (1978), 7 B.C.L.R. 78 and **Re Mutual Life Assurance Co. of Canada and Boban Construction Ltd. et al** (1984), 9 D.L.R. (4th) 746. The first mentioned case is more or less on all fours with the fact situation before us. Munroe J. found in favour of the subsequent assignee who had given notice first notwithstanding the prior assignment was a general assignment that had been registered. Munroe J. also held that the registration of the general assignment did not fix the subsequent assignee with constructive notice of the existence of the general assignment. In the **Mutual Life** case Macdonell J. followed **Toronto Dominion Bank v. Mercury Express Ltd.**. He stated that priority is established by the first notice given to the debtor. (See also **Bank of Nova Scotia v. Newfoundland Rebar Company et al.** (1987), 65 Nfld. & P.E.I.R. 165)

On the other hand Goodridge J. of the Newfoundland Supreme Court stated in **Re Newtown Construction Limited** (1983), 45 Nfld. & P.E.I.R. 239 at p. 242:

> "A debtor is not bound by an assignment unless he has been given actual notice of it. Registration operates as notice to creditors and subsequent purchasers. Without registration, the assignment is void against such persons."

Goodridge J. also made the following general observations about assignments of book debts which are worth keeping in mind. In **Newtown Construction** Goodridge J. had before him an interpleader proceeding where a judgment creditor was vying with an assignee of book debts for priority. He stated at paragraph 14:

> "In the usual case, it is purely a question of time. Barring statutory

> provision to the contrary, first in time is first in law. The assignee's time is marked by registration of his instrument if registration is required under the *Assignment of Book Debts Act* (the "Act"); if registration is not required, it is marked by the date of the instrument."

And at paragraphs 20 and 21:

> "An assignment of book debts is absolute. It passes title to the accounts to the assignee. This position is not changed by virtue of the fact that the assignee may elect to allow the assignor to collect the accounts and disburse the same as it sees fit until such time, if ever, as it elects to insist upon its rights.
>
> Canadian cases on this are numerous. Counsel for the Bank referred to two - *Imperial Bank v. Georges & Son*; *Georges & Son v. Kidd* (1909), 12 W.L.R. 386, and *Clarkson and Home Bank v. Lancaster* (1926), 38 B.C.R. 217."

The latter point is significant in that it must always be borne in mind that an assignment of book debts actually passes title to the book debts even though the assignee allows the book debts to be collected by the assignor until such time as the assignee may elect to exercise its right to those book debts.

These comments of Goodridge J. are consistent with those of the British Columbia Court of Appeal in **Evans, Coleman & Evans Ltd. v. R.A. Nelson Construction Ltd.** (1958), 16 D.L.R. (2d) 123.

> The position of Martin and Eastland is articulated in Eastland's factum as follows:
>
> "The Assignment of Book Debts Act R.S.N.S., 1989 is not applicable to the Assignment as it is a specific assignment of a single debt, not a general assignment of accounts. The sole test for determining the priority between an assignment (be it a general assignment of book debts or an assignment of a specific debt) and an unregistered assignment of a specific debt is the time at which notice was given to the debtor."

This proposition goes far beyond what **Dearle v. Hall** decided. In that case the subsequent assignee had made diligent inquiries of the trustee as to whether or not there had

been a prior assignment and was not advised that there had been. On the facts as agreed to by the parties, we do not know if Martin or Eastland made any attempt to ascertain if there had been a prior assignment and one would be led to infer that they did not. Nor did they apparently make a search at the Registry of Deeds for the County of Cape Breton to determine if a general assignment had been registered. Nor do we know if they may have had actual notice of the prior assignments to Eskasoni.

The Rule in Dearle v. Hall

Although the decision in **Dearle v. Hall** was, in my opinion, fair and equitable given there was nothing like a registration system in place to which a prospective assignee could turn to ascertain whether the chose in action had been previously assigned and the subsequent assignee in that case made what inquiries he could, the decision has not escaped critical analysis. In **Ward v. Duncombe**, [1893] A.C. 369 the House of Lords gave thorough consideration to the underlying rationale of the rule that if a subsequent assignee of a chose in action gives notice to the trustees of the fund assigned and a prior assignee has failed to give notice, the subsequent assignee has priority to payment from the trustees.

In **Ward v. Duncombe** the House of Lords confirmed the decision of the Court of Appeal finding that the prior assignee in that case was entitled to payment. The case seemed to turn on the fact that one of the trustees of the fund was actually aware of the prior assignment.

In his written opinion Lord Herschell did a thorough review of the decisions in **Dearle v. Hall**; **Loveridge v. Cooper**, 3 Russ 1; **Ryall v. Rowles**, 1 Ves 348; and **Foster v. Cockerell**, 3 Cl. & F. 456. He stated at p. 381:

> "Where at the time the second advance is made one of the trustees has notice of a prior incumbrance, I see no reason why notice of the second incumbrance should give it priority over the earlier assignment. The fund was not at the time of the second advance left in the apparent possession of the cestui que trust. The person asked

> to make the second advance could have protected himself had he chosen to make that inquiry of all the trustees which prudence enjoined. Where, however, notice is given to one trustee only, who is no longer a trustee at the time the second encumbrancer advances his money, a condition of things has arisen precisely similar to that which led to the rule laid down in *Dearle v. Hall*. The fund is again in the apparent possession of the cestui que trust. No inquiry of the trustees will avail to protect any one who is asked to make an advance upon the security, or take an assignment of the cestui que trust's interest in the fund. In those circumstances the reasons which led the Court to hold, in the case referred to, that the title of the second encumbrancer or assignee who had given notice must prevail over that of the assignee or encumbrancer earlier in date, are equally applicable. But they do not, in my opinion, at all warrant the conclusion that where at the time of the second advance and notice the trustees, through one of their number, were in possession of notice of a prior assignment, the later assignment, although it is not, at the time when notice of it is received by the trustees, entitled to priority over the earlier assignment, becomes entitled to such priority when the trustee who had notice of that assignment dies or ceased to act. I see no sound ground for holding that the priority shifts by reason of a circumstance wholly independent of the encumbrancers, and which does not touch or affect any action on their part. Why should an accident of this description entitle the second encumbrancer to a priority to which he had no title at the time when he made the advance, and gave notice of it to the trustees? The property was not then in the apparent ownership of the cestui que trust. Due inquiry would presumably have revealed the existence of the earlier assignment. If I am right in the view which I have taken of the basis on which the equitable rule as to notices rests, it disposes of the contention of the appellants." {Emphasis mine}

In **Ward v. Duncombe** Lord Macnaghten also considered the opinions given in **Dearle v. Hall** and the subsequent opinion in **Foster v. Cockerell**. He concluded that the doctrine established by **Dearle v. Hall** had its origin in that case as he found no trace of the doctrine in earlier cases in the Court of Chancery. He concluded that the doctrine established in that case did not rest upon "any very satisfactory principle" (p. 391).

He went on to state at p. 393:

> "I am inclined to think that the rule in *Dearle v. Hall* has on the whole produced at least as much injustice as it has prevented. It was argued in *Dearle v. Hall* that notice to the trustees necessarily prevents fraud on the part of the assignor. "The trustees," said Mr.

> Sugden, "are converted into a register, and by applying to them every one who proposes to negotiate for the purchase of the fund, except in the very improbable event of the trustees incurring personal responsibility by lending themselves to the vendor's dishonest purposes, is enabled to ascertain whether any prior incumbrances exist which will prevail over the title that is to be conveyed to him." . . . . . If the rule in *Dearle v. Hall* had never been invented it still would have been necessary for an equitable assignee, for his own protection, to give notice to the legal holders of the fund the subject of the assignment. A solicitor employed in such a transaction would still have incurred serious liability if he neglected so obvious a precaution. And I rather doubt whether the existence of the rule has led to notice being given in any case in which it would not have been given if the rule had been unknown.
>
> My Lords, I have made these observations, not for the purpose of impugning the authority of the rule in *Dearle v. Hall*. The rule is settled law. But it seems to me that when your Lordships are asked to extend the rule to a case not already covered by authority, it is proper to inquire into the principles upon which the rule is said to be founded. For the reasons which I have already given, I do not think that those principles are so clear or so convincing that the rule ought to be extended to a new case."

The quote from Lord Macnaghten's judgment is of interest in that he states that a solicitor acting for an assignee who failed to give a trustee notice of the assignment by the cestui que trust would be liable for failure to take such a fundamental precaution. Likewise, today, a lawyer might be negligent if, in advising a client proposing to lend money on the security of an assignment of book debts, be it general or specific, he failed to advise the client that a search should be made at the appropriate registry to ascertain if there had not already been a general assignment and to make specific inquiries of the debtors (if it was an assignment of a specific debt) whether the debtor had notice of a prior specific assignment.

Disposition of the Appeal

The registration statutes with respect to personal property provide a system which most lawyers and judges recognize as a means to ascertain the state of title to personal

property. The registration system, as contained in the **Assignment of Book Debts Act** provides a means whereby a lender or supplier intending to extend credit on the security of book debts can ascertain whether the debts have been previously assigned by general assignment so as to put them beyond the ability of the assignor to make a further assignment. A failure to make a search at the appropriate registry is a failure to take the prudent steps that one would expect of a prudent lender or purchaser. In **Dearle v. Hall** the subsequent assignee took the precautions expected of him by inquiring from the trustees of the estate who held the legal title to the beneficial interest being assigned whether the interest had been previously assigned or was incumbered. The second assignee, having been advised that there had not been such an assignment (the trustees were not aware that the beneficiary had previously assigned the interest) took the assignment and advised the trustee that they had done so. The court held that the subsequent assignee had done all he prudently could to ascertain if the assignor had the ability to assign the interest and that the second assignee, having given notice to the trustees, should prevail over the prior assignee who, by his lack of prudence in failing to notify the trustees of the assignment, had allowed the beneficiary to make the subsequent assignment. The court held the equities favoured the second assignee.

The enactment of the **Assignment of Book Debts Act** has significantly changed the situation from that which existed prior to its passage. Considering the detailed provisions in the **Act** as to how general assignments are to be registered and indexed so that the public can determine if a business has made a general assignment, I am of the opinion the Legislature intended that registration would be notice to creditors and subsequent purchasers as defined in the **Act** of the prior assignment. However, there is still the problem created by the wording of s. 3. It would have been clearer if the Legislature had simply stated that persons holding the types of assignments referred to in s. 3 did not have to register under the

Act. However, reading of the **Act** as a whole and considering its essential feature to provide a detailed system of registration, it is my opinion the Legislature in using the words in s. 3 that the **Act** did not apply to assignment of specific debts, etc., must have meant only that such assignments need not be registered. To interpret the **Act** otherwise would be to defeat one of the two essential purposes of the **Act**.

Even if the Legislature did not intend to provide a system that would enable persons to ascertain if a general assignment had been made, the effect of the **Act** is to provide such a system. Therefore, prudence dictates that persons proposing to take an assignment of book debts, general or specific, should search just as was implicitly required of the second assignee in **Dearle v. Hall** to have made inquiries of the trustees whether there had been a prior assignment.

If the Legislature intended that registration would be constructive notice to creditors and subsequent purchasers but not constructive notice to those assignees falling within s. 3 by reason of the wording of that section, there is nevertheless a system of registration which has become recognized as a means to ascertain if there had been a prior general assignment. Based on the reason in **Dearle v. Hall** a person proposing to take a specific assignment should search the registry to see if there has been a prior general assignment and if he fails to do so equity should not intervene to assist him in the event there is a prior registered assignment which he could have discovered had he searched.

With the **Act** providing a system for the registration of general assignment of book debts the equities now favour the holder of a general assignment of book debts who has registered the assignment as required by the **Act** over all subsequent assignees, be they holders of specific or general assignments, as the subsequent assignees by exercising prudence can search at the appropriate registry office to ascertain if the debt had previously been assigned. In such circumstances it no longer makes sense to apply the equitable rule

developed in **Dearle v. Hall** that the assignee (without actual notice of a prior assignment) who first gives notice of the assignment of book debts to the debtor has priority over a prior assignment.

The following comments are not necessary to this decision; they are made to test the validity of my interpretation of the **Act** in various factual situations.

An assignment of the type covered by the provisions of ss. 3(b) and (c) of the **Act** which was obtained prior to the execution and registration of a general assignment of book debts of which the assignee gave notice to the debtor prior to registration of a general assignment of book debts by a subsequent assignee, would have priority over the general assignment with respect to the specific debt even though the specific assignment was not registered. This would be so because the assignments referred to in ss. 3(b) and (c) do not have to be registered to be valid and were first in time.

If the assignee holding the prior specific assignment failed to give notice to the debtor prior to the general assignment being registered and prior to the assignee of the general book debts giving notice to the debtor, the holder of the specific assignment, based on the equitable rule developed in **Dearle v. Hall**, could not be heard to complain if the debtor paid the holder of the general assignment. In such circumstances equity should not intervene to require the debtor to pay a second time as the holder of the assignment of the specific debt did not exercise prudence, having failed to advise the debtor of the assignment.

An assignment falling within the provisions of ss. 3(b) and (c) taken subsequent to the registration of a general assignment should not have priority over the prior assignment even if such assignee was first to give notice of the assignment to the debtor as such assignee could and should have, in the exercise of reasonable prudence, ascertained by a search at the appropriate registry whether or not there had been a prior general assignment of book debts.

A general assignment of book debts that is not registered, irrespective of its priority in time, is void against creditors and subsequent purchasers and mortgagees for valuable consideration and without notice.

As between competing assignees of assignments that come within either s. 3(b) or s. 3(c) of the **Act** the subsequent assignee, if the first to give notice to the debtor, and in the absence of actual knowledge of a prior assignment and provided the subsequent assignee made prudent inquiries whether there had been a prior assignment, and none was disclosed would, under the rule in **Dearle v. Hall**, be entitled to be paid the debt in the absence of notice to the debtor of the prior assignment. Under such circumstances it would be appropriate to apply that rule in **Dearle v. Hall**.

A debtor who paid an assignee of a debt of the nature covered by ss. 3(b) or (c) of the **Act**, having been given notice by such assignee, and in the absence of actual notice of a prior registered general assignment would be protected under the rule in **Dearle v. Hall** from being required to pay the holder of the prior registered general assignment as in my opinion a debtor is not required to make a search of the Registry to determine if there is a general assignment registered. However, where a debtor has actual notice of more than one assignment prudence may dictate that the debtor not rely on the rule in **Dearle v. Hall** but should retain the funds to pay the debt until the competing claims have been resolved. To do otherwise might not be prudent in that there is provision in s. 43(6) of the **Judicature Act** whereby a debtor may (it is not mandatory) pay money into court and call upon the several persons making the claim to bring interpleader proceedings to determine who is entitled to the fund.

The registration under the **Assignment of Book Debts Act** of a general assignment of book debts in the proper registry office gives a party dealing with the assignor the ability to determine if book debts due at present or in the future have been the subject of

a previous general assignment. A party who intends to provide credit to a business on the security of a general assignment of book debts or an assignment of accounts of specified debtors or of monies accruing due on a specified contract can do a search to determine if the business has already made a general assignment of its accounts. The search is made at the Registry Office for the district where the assignor has his place of business (s. 5(1)(d)). The assignee who has given valuable consideration for the general assignment of book debts and properly registers that assignment should not be defeated by a subsequent assignment of the type designated in ss. 3(b) or 3(c) of the **Act** simply because the latter assignee gave notice of the assignment to the debtor prior to the holder of the prior general assignment of book debts giving such notice. The equities no longer favour the subsequent assignee of a debt growing due under a specified contract because, before advancing credit or lending money on the strength of such an assignment, the assignee could have searched the proper registry office to ascertain if there was in existence a general assignment of book debts to another. As recognized by Professor Ziegel, this is not a burdensome task to impose on a person proposing to purchase or lend on the security of receivables. Such a person, if truly concerned about securing the credit or loan could undertake such a search just as it is prudent to search the conditional sales registry and the bills of sale registry when: (i) purchasing personal property from a person other than a mercantile agent who has sold the property in the ordinary course of business; or (ii) if lending money on the security of personal property. The creation of a registration system for the general assignment of book debts has altered the equities between the person holding assignments of book debts, be they general or specific, from that which existed prior to the enactment of the **Assignment of Book Debts Act**.

The views of the courts, as expressed in the older cases, that the registration statutes did not change the law have given way to a more realistic view as expressed in **Kozak**, **Acmetrack** and **Lions Gate**. In my opinion this is a view that is perfectly rational

and that accords with the purpose of those statutes as they have been interpreted and applied by the legal profession and the business community in the latter part of the 20th century.

A reading of the **Assignment of Book Debts Act** clearly shows that it provides a registration system for general assignments of book debts to which the public has access to obtain relevant information. Read with this purpose in mind, s. 3, which provides that the **Act** shall not apply to the types of assignment that fall within the terms of (a) to (e) of that section, simply means that those types of assignment do not have to be registered under the **Act**; nothing more. The fact that the **Act** does not apply to those types of assignments does not mean that assignees of debts due from specified (named) debtors or debts growing due under specified contracts are not fixed with the knowledge that there is a means to ascertain if a potential assignor has made a previous general assignment of book debts.

I endorse the results of the decision in **Acmetrack** and **Lions Gate** that registration under the statutes considered in those cases (the **Corporations Securities Registration Act** and the **Bank Act**) is constructive notice to subsequent purchasers and mortgagees and in some cases creditors. There is no reason not to come to a similar conclusion when interpreting the effect of s. 4 of the **Assignment of Book Debts Act** of this Province.

It is not necessary to determine in this case whether the registration of a general assignment of book debts is notice to the debtor. However, I am inclined to the view that it is not constructive notice as the debtor is not his brother's keeper so to speak. The Courts should not lightly impose on the debtor duties to other possible assignees in the absence of actual knowledge of other assignments.

I would reiterate that, in my opinion, given the detailed system established by the **Assignment of Book Debts Act** for registration which facilitates the public's ability to ascertain if there has been a general assignment of book debts by a businessperson I am of the opinion that the Legislature intended that subsequent assignees of the type designated in

s. 3(a) to (e) of the **Act** would have constructive notice of the registration of a general assignment despite the words used in s. 3. But even if I have incorrectly interpreted the intent of the legislation and in particular s. 3 of the **Act** the equities no longer favour the position taken by Martin and Eastland for the reasons previously set forth.

There are a few other points that require a comment.

In **Royal Bank of Canada v. G.M.A.C.** (1985), 67 N.S.R. (2d) 306 MacKeigan C.J. stated in paragraphs 8 and 9 that from its execution a general assignment of book debts is a specific charge on all existing and future book debts which specific charge attaches to a future debt as soon as that debt comes into existence; the charge is fully effective immediately upon execution but not enforceable against the debtor until notice is given. The learned Chief Justice was considering an assignment of book debts as contained in a debenture. Such an assignment is not subject to the provisions of the **Act.** However, s. 4(3) of the **Act** provides that a general assignment of book debts, standing on its own so to speak, is only effective from the date of registration. Therefore, anyone dealing with a business and considering taking an assignment of book debts can ascertain by a search whether its receivables are still owned by the business or have been previously assigned by way of general assignment. In the hiatus period between execution of the assignment and registration, if the assignor made a further assignment that comes within ss. 3(b) or (c) of the **Act** and that subsequent assignee gave notice to the debtor, the subsequent assignee, in the absence of actual notice of the prior assignment, would have priority over the general assignment as there would not be any means to ascertain if the assignor had previously executed a general assignment; the general assignment is not effective against creditors and "subsequent purchasers" as defined in the **Act** until registered. Although the subsequent assignee would have been required to inquire of the assignor if there had been a prior assignment, he would not necessarily get a truthful answer. In the absence of actual notice of the general assignment, and assuming prudent inquiries were made of the debtor, the

subsequent assignee would have priority. In my opinion this would be consistent both with respect to the reasoning in **Dearle v. Hall** and **Ward v. Duncombe** and the **Act** as I have interpreted it.

In the appeal we have under consideration, any one of the lenders or businesses that extended money or credit to Mr. Francis on the strength of assignments, (be they specific or general, which were all made subsequent to the registration of the general assignment of book debts to the Eskasoni Band) could have ascertained by a search in the Registry for Cape Breton County where Mr. Francis had his place of business that he had already made a general assignment of his present and future book debts to the Eskasoni Band. Under the circumstances there is no equity in following the old rule that the assignee who first notified the debtor of the assignment has priority. In my opinion, the older cases decided subsequent to the enactment of the registration legislation should no longer be applied as it is now recognized that this type of Act provides for a register to which the public has access and can ascertain the state of title to the personal property in question. The equities no longer favour the party who, with the means to ascertain if there has been a previous general assignment of book debts proposed to be assigned, fails to take the reasonable precautions of a search. With respect to book debts, the enactment of the **Assignment of Book Debts Act** reversed the equities that existed at the time **Dearle v. Hall** was decided. And with respect, I disagree with the interpretation of s. 3 of the **Assignment of Book Debts Act** by the Ontario Court of Appeal in **National Bank of Canada v. Harding Carpets**, supra. In my opinion, s. 3 means only that the types of assignment mentioned in that section do not have to be registered under the **Act**.

In this case the Shubenacadie Band did not pay the assignee who gave the first notice but retained the money in trust and applied to the Supreme Court for a determination of who should be paid. Had the Shubenacadie Band in good faith without actual notice of the other assignments paid the assignee who first gave notice to the Shubenacadie Band of the

assignment equity would dictate that it not be required to also pay the Eskasoni Band even though it was the first to register its general assignment. In my opinion, under such circumstances the Eskasoni Band could bring proceedings to recover the funds paid in error to the subsequent assignee who had given the first notice as the subsequent assignee could have ascertained by a search that there had been a prior general assignment and would not have had a right to the fund.

As a practical matter, a holder of a general assignment of book debts is not in the position to give notice to the debtors of the assignor because those debtors change from time to time. The rights of an assignee under a general assignment of book debts should not be defeated by a subsequent assignee who can fit within clauses 3(b) or 3(c) of the **Act** simply because that assignee first gave notice of his assignment to the debtor. There is no reason not to apply the general rule that the first assignment in time would have priority as there is nothing left to assign after the assignment has been executed; provided, of course, the general assignment had been registered as required by the **Act**.

Some time was spent in argument respecting the provisions of s. 43(5) of the **Judicature Act**, R.S.N.S. 1989, c. 240.

Section 43(5) of the **Judicature Act** was enacted to eliminate the need of an assignee to join as a plaintiff the assignor in a suit against the debtor whose debt had been assigned by way of absolute assignment. It also enables the assignee to give a good discharge of the debt without the concurrence of the assignor. The section preserved any equities that others may have had to the debt which would have entitled them to priority over the right of the assignee. The provisions of s. 43(5) of the **Judicature Act** while they preserve the existing equitable rights of others do not assist the other claimants in this case as in my opinion the equities no longer favour the subsequent assignees who gave the first notice of assignment to the debtor.

Were it not for the fact that I am of the opinion that the Eskasoni Band Council

is entitled to the funds, we would not have been able to decide the issues before us because of the omission of key pieces of evidence from the Agreed Statement of Facts. For instance, there is nothing in the Agreed Statement of Facts as to whether or not Martin or Eastland had actual notice of the prior general assignment to Eskasoni; that is a critical fact in assessing the equities even applying the rule in **Dearle v. Hall**. It is often overlooked that a very relevant fact in that case was the lack of knowledge by the subsequent assignee of the prior assignment despite having made prudent inquiries of the trustees. We do not know what inquiries, if any, were made by Eastland or Martin to determine whether or not there had been a prior assignment.

As mentioned previously, the Agreed Statement of Facts does not seem to accord with the documents giving rise to the claims of Martin and Eastland. Without going into details both Martin and Eastland's assignments were described as absolute assignments; the actual documents upon which they rely do not appear to warrant this interpretation. However, in view of the conclusion reached, these problems have become irrelevant.

Conclusion

Martin's appeal was successful on the issue raised under the **Indian Act** but it failed on the priorities issue. Eastland also failed on this key issue. The Notice of Contention filed on behalf of the Eskasoni Band that the decision of Justice Edwards be upheld on the ground that the Eskasoni Band held a security which ranked in priority to the security held by the various other claimants ought to be sustained. I would therefore order that the Shubenacadie Band pay to the Eskasoni Band the sum of $101,636.33. The Order of Justice Edwards was silent as to costs. In view of the divided success on the appeal I would order that the parties bear their own costs.

Hallett, J.A.

Concurred in:

Bateman, J.A.

Flinn, J.A.

C.A. No. 113602

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

L. MARTIN (1984) INC.

Appellant

- and -

SHUBENACADIE BAND

Respondent

- and -

THE CANADIAN IMPERIAL BANK OF COMMERCE

Respondent

- and -

THE ESKASONI BAND

Respondent

- and -

EASTLAND INDUSTRIES LIMITED

Respondent

- and -

PAUL KENNETH FRANCIS

Respondent

REASONS FOR JUDGMENT BY:

HALLETT, J.A.