**IN THE SUPREME COURT OF NOVA SCOTIA**

**Citation:** Carbopego-Abastecimento De Combustiveis S.A. v. AMCI Export Corporation, 2007 NSSC 118

**Date:** 20070420
**Docket:** SH 259728
**Registry:** Halifax

**In The Matter** of the *Canada and United Kingdom Reciprocal Recognition and Enforcement of Judgments Act*, R.S.N.S. 1989, c.52

**And In The Matter** of an application to register a Judgment of the English High Court of Justice, Queen's Bench Division, Commercial Court

**Between:**

Carbopego-Abastecimento De Combustiveis S.A.

Plaintiff

v.

AMCI Export Corporation

Defendant

and

**Docket:** SH 219171
**Registry:** Halifax

**Between:**

Nova Scotia Power Incorporated,
a body corporate

Plaintiff

v.

AMCI Export Corporation,
a body corporate

Defendant

| | |
|---|---|
| **Judge:** | The Honourable Justice Arthur J. LeBlanc |
| **Heard:** | October 4th & 23rd, 2006, in Halifax, Nova Scotia |
| **Counsel:** | James Gould, Q.C. & Lisa Wight, for the plaintiff<br>David Coles, Q.C. & Shelley Martin, for the defendant |

**By the Court**:

[1] This is an application for a determination of priorities between an attachment order and a judgment. Funds were seized by the sheriff under an attachment order for the benefit of the plaintiff. There is also a judgment creditor with a claim against the defendant. This application involves two proceedings, both involving AMCI Export Corporation (AMCI) as defendant, but with different plaintiffs. The two plaintiffs, Carbopego-Abastecimento De Combustiveis S.A. (Carbopego) and Nova Scotia Power Incorporated (NSPI) are opponents on the application. Carbopego has applied for a determination of priorities between a registered judgment in its favor and an attachment order obtained by NSPI in the other proceeding.

[2] Nova Scotia Power Incorporated (NSPI), a Nova Scotia corporation, commenced an action in this Court against AMCI, a Delaware corporation, on April 13, 2004. The applicant, a Portugese corporation, commenced an action against AMCI in the English High Court of Justice on September 17, 2004.

[3] On January 18, 2005, NSPI obtained a pre-judgment attachment order pursuant to Rule 49, attaching certain property of AMCI located in Nova Scotia.

Later in 2005 the applicant obtained a High Court judgment against AMCI, which it successfully applied to register in Nova Scotia under the *Canada and United Kingdom Reciprocal Recognition and Enforcement of Judgments Act*, in the amount of CDN $14,232,667.28. Robertson J. ordered registration but stayed execution against the attached property because NSPI had an action pending against AMCI.

[4] In March 2006 the applicant registered its judgment in the Nova Scotia Personal Property Security Registry and shortly thereafter delivered an execution order to the sheriff. The execution order was not acted upon due to the stay of execution.

[5] NSPI has applied for summary judgment against AMCI. The application was heard between April and September 2006 and has not yet been adjudicated upon. Applications by the applicant to revoke or vary the stay of execution were dismissed by Kennedy C.J. and Wright J. Wright J. considered that, among other things, there was a dispute between the applicant and the respondent with respect to their rights and priorities to the attached property. The applicant maintains that there was no argument advanced by NSPI with respect to priorities.

## ISSUE

[6] The current application is intended to resolve the priorities between the applicant and the respondent with respect to the attached property.

## ARGUMENTS

[7] NSPI obtained the attachment order under Rule 49, which states, in part:

> **49.01.** (1) Where a defendant,
>
> (a) resides out of the jurisdiction, or is a corporation that is not registered under the *Corporations Registration Act*;
>
> * * *
>
> a plaintiff may, at or after the commencement of the proceeding and before judgment and as an incident of the relief claimed, make application for an attachment order in Form 49.04A.

[8] The rule sets out the details of the affidavit and bond required for an attachment order, then the details of the order itself at R. 49.04, which states, in part:

> 49.04. (1) Unless the court otherwise orders, an attachment order in Form 49.04A shall direct any sheriff within ninety (90) days of its issue or within such further time as the court orders,
>
> (a) to attach, accept as a receiver, hold and dispose of as provided by this Rule, any property in which a defendant has an interest, including any debt, rent, legacy, share, bond, debenture or other security, currency, or other demand, due

> or accruing due at any time while the order is valid, whether in the possession of the defendant or any other person and not exempt by law from seizure, as will secure in whole or in part the amount of the claim which a plaintiff seeks to recover from the defendant as stated in the attachment order....

[9] Rule 49.10 addresses the issue of conflicting claims. It requires that a sheriff, "having several attachment orders to attach the same property, shall attach the property in the sequence in which the orders were received by him."

[10] The applicant claims priority to the AMCI funds because it has a registered judgment, while the respondent has only an attachment order. It argues that a pre-judgment attachment order is intended to ensure the defendant's appearance at the hearing or to prevent the defendant from removing property from the jurisdiction. The applicant submits that other jurisdictions use garnishee orders to achieve the same effect and claims that garnishment is equivalent to the attachment of debts. The applicant says there is no property, legal or equitable, acquired by way of a garnishment or attachment order prior to judgment.

[11] The applicant refers to *Francis v. Brown*, [1854] O.J. No. 125 (U.C.Q.B.), where goods were seized by the sheriff and held by the Court. The Court reviewed

the issue of priority between a pre-judgment creditor and a judgment creditor. Burns J. stated:

> 18 I entertain no doubt the plaintiff cannot sustain the present action. If he could, it must be on the principle that when an attachment has issued against the effects of an absconding debtor, according to the provisions of and under the *Division Court Act*, the goods thereby seized become liable to the attaching creditor, to the exclusion of other creditors who by suits have obtained executions before the attaching creditor could obtain a judgment and execution. There is no expression of words in the Act of Parliament indicating that it was the will of the Legislature that the attaching creditor should have so much advantage over the non-attaching creditor....
>
> * * *
>
> 20 An attaching creditor must proceed to judgment and execution, and if there be more than one attaching creditor they are specially provided for; but in the case of an attaching creditor and a non-attaching creditor, as both must proceed to judgment and execution, I apprehend the rule *qui prior est in tempore, potior est in jure,* as respects the execution, must prevail, and no lien or priority is gained merely by means of an attachment.

[12] NSPI points out that in *Francis v. Brown* it was noted that the procedure for obtaining a pre-judgment attachment order in the Division Court was more straightforward than that in the Superior Court, where the case was heard. Draper J. reasoned that it would be unfair to penalize a creditor who was required to submit to the jurisdiction of the Superior Court on account of the size of its claim. Similarly, in this case, Carbopego obtained an order in the English Court requiring AMCI to post a bond, failing which Carbopego would have judgment on liability. No such remedy is available to NSPI under Nova Scotia law, where summary judgment is harder to obtain.

[13] The applicant also refers to *B.C. Millwork Products Ltd. v. Overhead Door Sales* (1961), 26 D.L.R. (2d) 753 (B.C.S.C.). In that case, the Court held that a prejudgment attachment order did not give the plaintiff priority over a subsequently registered judgment, as it did not form an equitable charge on the debt until a judgment had been obtained. Consequently, the defendant had priority to the funds because it had a registered judgment. NSPI says this case should be distinguished on the basis that the Court did not order that the other judgment creditor should be allowed to execute on the entire fund, but only a proportionate sharing in the fund in Court. The Court stated, at p. 759:

> ... Overhead Door Co. does not ask for payment out to it of the whole fund but asks only to share proportionately with B.C. Millwork in the fund in Court. This would appear to be an equitable disposition of those monies, particularly in view of the fact that it was the diligence of B.C. Millwork that resulted in them being paid into Court. I do not express any view as to what the order should be if Overhead Door Co. had asked for payment out to it of the whole sum now in Court.

[14] Further, NSPI says, the authority for a pre-judgment attachment order was based on statutory language that does not resemble Rule 49.04, which states that the Sheriff shall attach the property for the benefit of a plaintiff “in the proceeding,” referring to the proceeding in which the attachment order was obtained.

[15] In *Tec Floor Coverings Ltd. v. Aztec Restorations Ltd.*, [2004] B.C.J. No. 753 (Prov. Ct.) the plaintiff obtained a pre-judgment garnishee order. As a result, the defendant paid monies into court. The CCRA was a judgment creditor. The Court concluded that the CCRA had priority to the funds seized pursuant to the pre-judgment garnishee order:

> 8 The Garnishing Order Before Judgment does not create a charge on the moneys thereby paid into court. An equitable charge on the moneys so paid in is only created after judgment is granted and even then is subject to priority of a charging order obtained by another judgment creditor prior to the judgment being entered by the court in the case in which the money was paid in.

[16] NSPI distinguishes *TecFloor* on grounds similar to those argued for *B.C. Millworks*.

[17] NSPI argues that a Rule 49 attachment order gives the plaintiff a right to the funds seized until it recovers a judgment against the defendant. A similar approach has found favor in Prince Edward Island: *Powrmatic of Canada Ltd v. Keenan (Judgment Debtor) and Sabado (Garnishee)*, [1978] P.E.I.J. No. 42 (P.E.I.S.C.) and *Duffy Construction Ltd. v. Dennis Construction Ltd.*, [2000] P.E.I.J. No. 124 (S.C.T.D.). NSPI says these cases confirm that a judgment creditor who obtains a post-judgment garnishee order, or a pre-judgment attachment order, should be rewarded for its efforts.

[18] In *Powrmatic* the applicant, which held a garnishee order under s. 5(1) of the P.E.I. *Garnishee Act*, sought payment out of court of funds paid in by an individual who owed money to a judgment debtor of the applicant. The record indicated that there were several judgment creditors, but only the applicant had obtained a garnishee order. The application was opposed by another judgment creditor, CIBC, whose "judgment against Keenan was filed two days prior to the filing of the judgment by Powrmatic but it did not follow through with garnishee proceedings" (para. 4). The bank argued that there was no priority among judgment creditors. McQuaid J. said:

> 5 While it is correct to say that our *Judgment and Execution Act* ... cannot be properly interpreted as giving one judgment creditor a better right to be paid than another judgment creditor... the case at bar is not simply a case of one judgment creditor seeking this priority over another judgment creditor. Rather, it is a case of priority being sought by a judgment creditor who was diligent enough to proceed one step further than the other judgment creditors and obtain a garnishee order after recording his judgment.
>
> 6 Section 5 of our *Garnishee Act* provides that monies due to the judgment debtor may be attached by a judgment creditor and Rule 49.14(a) of our Rules of Court authorizes a judge, the prothonotary or a deputy prothonotary to order:
>
> > "that all debts, obligations and liabilities owing, payable or accruing due from such third person (hereinafter called the Garnishee) to . . . the judgment debtor shall be attached to answer the judgment . . . which has been recovered."
>
> 7 Rule 49.16 further provides that the service of that order on the garnishee "shall bind such debts, obligations or liabilities in his hands from the time of the service".

> 8 The law on the matter is clear. The money is impressed in the hands of the garnishee with a charge in favor of the judgment creditor as from the time of the service of the garnishee order ... and the service of the attaching order obtained after judgment creates an equitable charge upon the debt in favor of the garnishing creditor.... This equitable charge, once it is established, is not effected by the fact that executions are subsequently issued by other judgment creditors. As is said by MacDonald, C.J.A., in *Anderson v. Dowber* ... at page 646:
>
> > "It seems to me that the service of the attaching summons, while not a transfer of the debt, creates a charge on it which is not taken away by the subsequent receipt of writs of execution by the Sheriff. (emphasis mine)"
>
> 9 If, as is obviously the case, the attached money is removed from the operation of subsequently issued writs of execution, it must surely be implied, and I so hold, that the first attaching judgment creditor has a priority over other judgment creditors who were less diligent in pursuing their right.

[19] NSPI argues that *Powrmatic* demonstrates the similarity between P.E.I. and Nova Scotia law with respect to attachment and garnishment by recognizing that property is attached for the benefit of the attaching party in the proceeding.

[20] In *Duffy* the Sheriff had paid money into court resulting from garnishments against Dennis. Duffy and Ultramar filed and served pre-judgment notices of garnishment, providing priority over other creditors, and obtained judgments against Dennis in February 2000, two months before the Crown did. The Crown did not issue or serve a pre-judgment notice of garnishment, but sought payment out of court of the money, claiming a Crown prerogative over creditors of equal degree. The issue was whether the creditors were “of equal degree.” Webber J.

said, at paragraph 11, “those creditors who are more diligent in the pursuit of their claim than other creditors, e.g. those who take the additional step of obtaining a garnishee order, will set themselves apart so as not to be "of equal degree" with less diligent creditors.”

[21] Webber J. considered whether “the issuance of a garnishee order gives a judgment creditor a priority over other judgment creditors” (paragraph 12). She concluded:

> 28 I find that the *Garnishee Act* was intended by the legislature to give creditors who utilized it a priority over other creditors. Nothing in that *Act* suggests that the priority so obtained would not apply to the Crown. What is clear is that creditors were limited by the *Crown Proceedings Act* as to the circumstances in which they could obtain a garnishment against the Crown. That limitation is what is addressed in s. 20 of the *Garnishee Act*.
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> * * *
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> 30 While it dealt with a failure of the Crown to participate in interpleader proceedings, [*Agricultural Credit Corp. of Saskatchewan v. Kozak*, [1991] S.J. No. 99 (Q.B.)] makes comments also of relevance to the rationale behind the requirement for creditors to be of equal degree before Crown prerogative can apply. Baynton J. stated at paragraph 51 as follows:
>
> > 51 ...Surely the Crown cannot stand by and let its subjects pour their efforts and financial resources into an interpleader matter, and then, when the benefits have been realized, swoop in and take them away without compensation. ...
>
> 31 In the instant case, evidence was produced of considerable efforts made by Duffy to obtain payment of the debt due to him, including an early pre-judgment garnishee order. This extra effort is what gives his claim a priority over those who acted neither so swiftly nor so diligently. The same principle applies to the actions of Ultramar in serving a pre-judgment notice of garnishment.

> 32 As was pointed out in many of the cases cited herein, the fact that the creditors here are not of equal degree means that the Crown prerogative does not arise, not that the Crown prerogative is abrogated. Crown prerogative simply does not become an issue where the creditors are not of equal degree.
>
> 33 I find there is no Crown prerogative in the instant case because, for the reasons stated above, the Government is not a creditor of equal degree with Duffy or Ultramar.

[22] A Prince Edward Island judgment creditor can avail itself of the pre-judgment steps under the *Garnishee Act* to secure funds owing to the judgment debtor, which will stand to the credit of the judgment creditor should it succeed against the judgment debtor. Nova Scotia does not have legislation equivalent to the *Garnishee Act*, while P.E.I. does not have an equivalent to our *Creditors' Relief Act*.

[23] The applicant argues that the Prince Edward Island decisions are driven by the lack of a *Creditors' Relief Act* requiring the distribution of the judgment debtor's assets on a *pro rata* basis. Subsection 35(3) of the Nova Scotia *Creditors' Relief Act*, by contrast, provides for this:

> Any judgment creditor who attaches a debt shall be deemed to do so for the benefit of himself and all creditors entitled under this *Act*, payment of such debt shall be made to the sheriff, who, in making distribution, shall apportion to such judgment creditor a share *pro rata*, according to the amount, upon his judgment, of the whole amount to be distributed under the provisions of this *Act*, but such share shall not exceed the amount recovered by the garnishee proceedings unless the judgment creditor has placed an order in the sheriffs hands.

[24] The applicants argue that section 35(3) is for the benefit of all creditors of the debtor, not just the attaching creditor. NSPI, therefore, cannot be in a better position than a creditor seeking to enforce a judgment. While NSPI did not attach a debt, but attached the debtor's property, and is not a judgment creditor, the applicant suggests that the same reasoning applies in this case. NSPI notes that in *Powrmatic* the Court stated that the *Judgment and Execution Act* did not give one judgment creditor priority over another.

[25] NSPI says the Civil Procedure Rules require the attached property to be held for its benefit in the event its claim is successful. NSPI relies upon Rule 49, which, as stated above, requires the Sheriff

> to attach, accept as a receiver, hold and dispose of as provided by this Rule, any property in which a defendant has an interest, including any debt, rent, legacy, share, bond, debenture or other security, currency, or other demand, due or accruing due at any time while the order is valid, whether in the possession of the defendant or any other person and not exempt by law from seizure, as will secure in whole or in part the amount of the claim which a plaintiff seeks to recover from the defendant as stated in the attachment order. [Rule 49.04(1)(a)]

[26] Rule 49.06 permits the owner of attached property to regain possession by posting a bond, a condition of which is that

> the defendant or other person giving the bond shall, on the plaintiff obtaining judgment against the defendant in the proceeding, forth-with pay to the plaintiff on account of the judgment all or such portion of the amount as is secured by the bond, or comply with any other order of the court. [®. 49.06(2)]

[27] This underlines the need for the Sheriff to have in hand either the property or a bond, should the plaintiff succeed. NSPI also refers to Rule 49.10, which deals with conflicting claims on attachment. Where there are several attachment orders, Rule 49.10(1) requires the Sheriff to "attach the property in the sequence in which the orders were received by him", that is, not *pari passu*. This suggests that if a party such as NSPI is diligent enough to locate the property and take steps to attach it, it should be rewarded for such diligence.

[28] NSPI cites decisions in Nova Scotia and British Columbia which suggest that granting priority to an attaching creditor is not inconsistent with creditors' relief legislation. In *Halliday Craftsmen Ltd. v. Cogger* (1967), 64 D.L.R. (2d) 452 (N.S. Co. Ct.), a judgment creditor obtained and served an attachment order before the Sheriff had in hand an execution order in favor of other judgment creditors. The plaintiff obtained judgment and a garnishment order. Subsequently, three other creditors obtained judgments and execution orders, on the day the garnishee paid money into court, at which point there was no execution order on the plaintiff's judgment. Two of the non-party judgment creditors claimed they were entitled to

share in the garnished funds pursuant to s. 34 (now s. 35) of the *Creditors' Relief Act*. Morrison Co. Ct. J. said, at pp. 454-455:

> Mr. McInnis contends that the *Creditors' Relief Act*, R.S.N.S. 1954, c. 65, entitled his clients to share in the moneys paid into Court by the garnishee. His contention is based on s. 34 of the *Act* ....
>
> I have not been referred to any Nova Scotia authority dealing with this section but what appears to be a similar section was dealt with by the British Columbia Court of Appeal in the case of *Anderson v. Dawber* (1915), 25 D.L.R. 644.... The Court had under consideration in that case s. 31 of the British Columbia *Creditors Relief Act*. The section is not quoted in full in the report but it would appear to correspond with s. 34 of the Nova Scotia *Act*. The headnote of that case reads as follows:
>
> > Where there are no other executions in the sheriff's hands at the time, the service of a summons for the attachment of a debt, under sec. 31 of the *Creditors Relief Act* (B.C.), while not a transfer of the debt itself, creates a charge thereon in favor of the attaching creditor, entitling him to be paid out of the funds the amount of his claim, and is not taken away by the subsequent receipts of other writs of execution by the sheriff.
>
> At p. 645 Macdonald, C.J.A., said:
>
> > In my opinion, all the sub-sections of sec. 31 of the said *Act* are controlled by the opening sentences of sub-sec. (1). The sheriff's interest in moneys attachable arises only when there are executions in his hands, and there are or appear to be insufficient goods of the debtor to satisfy them and his own fees.
>
> Although the British Columbia statute then in effect is not available to me, these comments of the Chief Justice indicate that the opening wording of the section is the same as the opening wording of s. 34 of the Nova Scotia *Act*. In dealing with s. 31(3) of the British Columbia *Act* (s. 34(3) of the Nova Scotia Act) the learned Chief Justice held that at the time the debt was attached there were no other creditors "entitled under the act". He adds:
>
> > Had there been executions in the sheriff's hands at the time the attaching summons was served, then sec. 31 would have given the sheriff the prior right, i.e., the right himself to attach the debt or to take advantage of the process of judgment creditors commencing their attachment proceedings thereafter.

> I think that the situation is the same in the present case, and I am of the opinion that at the time the judgment creditor herein attached the debt, there were no other creditors "entitled" under the provisions of the *Creditors' Relief Act*. Therefore I do not think that the Act has any application at all in the circumstances of the present case. It would be otherwise of course if the amount paid into Court exceeded the amount of the plaintiff's claim.

[29] As such, the money paid into Court was to be paid to the plaintiff.

[30] NSPI says the *Anderson* decision referred to in *Halliday* provides further support for its position by clarifying that the *Creditors' Relief Act* provision stating that judgment creditors do not have priority over one another does not apply to creditors who obtain attachment orders prior to judgment, who are entitled upon judgment to a priority claim on the property. As such, the *Act* only determines priority among contemporaneous execution creditors, not between an execution creditor and a party with an attachment order.

[31] NSPI submits that *Halliday* and *Anderson* indicate that Carbopego is not entitled to share in the attached property, as it did not have a judgment at the time NSPI's attachment order was served by the Sheriff, and therefore did not have an execution order in the hands of the Sheriff at the time.

[32] *Halliday*, however, involved a judgment creditor who obtained a garnishee order. In the present case there is no judgment in favor of NSPI. NSPI argues that there is no distinction between the attachment order and the garnishee order in *Halliday*. NSPI has spent time and money to recover the property or prevent it from leaving the jurisdiction. It must await to determination of the proceeding in order to recover, however. It would make no sense for NSPI to pursue the matter and then be left without a remedy because the funds are in the hands of Carbopego.

[33] Is it possible that Rule 49 has the same effect as s. 5 of the P.E.I. *Garnishee Act*? In other words, does the provision mean that funds belonging to a potential judgment debtor can be secured in order to respond to a possible judgment? This was the essence of the decision in *Duffy Construction*.

[34] The attachment rules were put into effect pursuant to s. 46 of the *Judicature Act*, which provides, in part:

> The judges of the Court of Appeal or a majority of them may make rules of court in respect of the Court of Appeal and the judges of the Supreme Court or a majority of them may make rules of court in respect of the Supreme Court for carrying this Act into effect and, in particular, [...]
>
> (b) regulating the pleading, practice and procedure in the Court and the rules of law which are to prevail in relation to remedies in proceedings therein. [...]

> (f) regulating the payment, transfer or deposit into, in or out of any court of any money or property or the dealing therewith....

[35] Also of note is s. 49, which states:

> Where any provisions in respect of the Court are contained in any Act, rules of Court may be made for modifying such provisions to any extent that is deemed necessary for adapting the same to the practice and procedure of the Court, unless, in the case of any Act passed on or after the first day of October, 1884, this power is expressly excluded with respect to such Act or any provision thereof.

[36] Rules of court in Saskatchewan and New Brunswick permit the modification of a statute to the extent the judge considers necessary, unless that power is expressly excluded by statute. Section 77 of the New Brunswick *Judicature Act* is nearly identical to s. 49 of the Nova Scotia *Judicature Act*. In *Associates Financial Services Ltd. v. Michaud*, [1980] N.B.J. No. 358 (Q.B.)(QL) the Court ordered the defendant to pay the plaintiff monthly amounts pursuant to the *Arrest and Examinations Act*. When the defendant failed to pay, the plaintiff sought an order allowing him to issue a writ of attachment. The defendant opposed the application on the ground that a rule was not complied with. Angers J. said:

> 10 It is accepted law that the Rules of Court will prevail over any statute unless expressly stated otherwise in the statute. Section 77, *Judicature Act*, R.S.N.B. 1973, c. J-2. I find nothing in the *Arrest and Examinations Act* which would curtail, remove or otherwise avoid the requirements of Order 41, rule 5.

[37] By this reasoning, an attachment order under Rule 49 could prevail over the *Creditors' Relief Act*.

[38] In *Plantana (Litigation Guardian of) v. Saskatoon (City)*(2006), 263 D.L.R. (4th) 603 the Saskatchewan Court of Appeal considered a conflict between a rule of court and a statute. Jackson J.A., for the majority, stated:

> [96] Where two enactments are in conflict, the courts resort to the following strategies:
>
> > If the provisions cannot both apply without conflict, the courts resort to one of the conflict avoidance or conflict resolution techniques at their disposal. These include (1) interpretation to avoid conflict; (2) the paramountcy of some categories of legislation over others; (3) implied exception (*generalia specialibus non derogant*); and (4) implied repeal. Of course, these interpretive strategies are subject to any express solutions provided by the legislature.
> >
> > Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Vancouver: Butterworths, 2002), at pp. 263-64.
>
> In making this statement, I agree that it is not always clear whether a court has found no conflict or has applied a strategy to avoid conflict.

[39] The majority took the view that there had been a specific legislative intent to pass a statute contradicting the rule. Applying this reasoning in the present case, it appears that the relevant sections of the *Creditors' Relief Act* have not been amended to accommodate the Civil Procedure Rules.

[40] In *Polyco Window Manufacturing Ltd. v. Prudential Assurance Co.* (1994), 113 D.L.R. (4th) 549 (Sask. Q.B.) the Court considered whether a fund paid into court by an insurance company in order to settle an insurance claim was to be shared *pro rata* among execution creditors pursuant to the *Creditors' Relief Act* where garnishors asserted a prior right under the *Attachment of Debts Act*. The Court declined to follow an *obiter* comment in *Mills v. Harris & Craske* (1914), 7 W.W.R. 968, where it was held that garnishors had priority over execution creditors. Halvorson J. commented on the *Mills* decision at pp. 553-555:

> Apparently, [the judge's] thinking was that a garnishor had priority if the *Creditors' Relief Act* did not remove it. How the garnishor attained a priority in the first place was not mentioned. Nor was there any attempt to explain why the garnishee money was not encompassed in the plain word "fund" used in the *Act*.
>
> Notwithstanding the deficiency in the *Mills* rationale, the decision seems to have gone unchallenged....
>
> Contrary authority finally surfaced in 1982, and the execution creditors rely heavily upon it. In *Re Yancey's Men's Wear Ltd.* (1982), 17 Sask. R. 287, the court ordered that a garnishor must share the attached fund pursuant to the *Creditors' Relief Act*. This decision is not as conclusive as the execution creditors suggest. There, the court was required to rule on the priority of Crown claims to the garnisheed fund. After fixing the Crown preference, the court stated at p. 297:
>
> > Section 15 of the *Attachment of Debts Act* ... provides that "... a judge may order the third person or any other person to appear and state the nature and particulars of his claim." Here, no such order was sought or made and the nature and particulars of the several claims of the judgment creditors are already a matter of record and on file. <u>As between the plaintiff and the other judgment creditors there is no priority</u> in the monies which will remain after payment of costs and the claims of the federal and provincial Crowns and in said balance of monies the plaintiff and the other judgment creditors will share *pari passu*. [Emphasis added by Halvorson J.]

> Apparently, *Mills* was not cited, but the court simply assumed the *Creditors' ReliefAct* intervened to outrank the rights of the garnishors.
>
> In any event, I agree with the decision in *Yancey's*. Apart from *obiter* comments in *Mills*, there is no authority for ruling that a garnishor has priority over execution creditors. The clear intent of the *Creditors' Relief Act* to abolish priority among execution creditors must prevail. If a garnishor is to be rewarded for his diligence, beyond a preference in costs, it must be through legislative enactment not judicial pronouncement.
>
> It is fitting as well, that a garnishor should not receive a preference inasmuch as service of a summons does not give the garnishor an interest in the attached money. He has no claim in the nature of a lien. All he acquires is the right to have the money diverted away from the debtor and into court. This is apparent from s. 5(1) of the *Attachment of Debts Act* which stipulates that the summons "shall bind any debt due or accruing due". The right escalates to a proprietary interest when the court orders payment out to the garnishor.
>
> Furthermore, it is fitting that there should be rateable sharing where, as here, numerous creditors proceeded against Polyco over an extended period of time. Garnishees were served randomly on Prudential. It would be purely fortuitous if certain garnishors were more successful than others.
>
> A ruling favoring priority for garnishors would be hollow in most situations under the *Creditors' Relief Act*. Disappointed execution creditors could easily launch insolvency proceedings against the debtor. This would result in all the attached funds being paid to the trustee for distribution among all creditors. The garnishors would have no priority in bankruptcy. This reinforces the conclusion that the garnishors never acquired priority in the first place, by service of their summonses.

[41] In *T.S.T. Contracting Ltd. v. Timberline Enterprises Ltd.*, [2006] B.C.J. No. 704 (S.C.) the facts were set out as follows by Lander J.:

> 1 Timberline had contracts with a number of companies to provide goods, services, or financing to a project it was working on. Timberline did not pay the creditors as required under the contracts. Various creditors had prejudgment garnishment orders issued against debtors or suspected debtors of Timberline. Each the four creditors in the case at bar received default judgment against Timberline at different times.

> 2 There have been two notices of motion filed with respect to the monies currently being held in court as a result of 550031 B.C. Ltd. (the garnishee) paying into court the debt that it owed to Timberline Enterprises as a result of a prejudgment garnishment summons served by T.S.T.
>
> 3 One of the notices of motion was filed by T.S.T. who seeks to have the monies held in court paid to it.
>
> 4 The other notice of motion was filed by Bendickson with support from Pollard and Le Beau and seeks to have the funds held in Court as a result of T.S.T.'s garnishment summons paid rateably to all four of the creditors.

[42] The Court concluded that the creditors did have standing to apply to have the garnishment order set aside. The order could be set aside under the *Act* if it was "just in all the circumstances" to do so. The Court said:

> 24 Bendickson, Pollard and Le Beau all submit that the garnishing order should be set aside because it is "just in all the circumstances" and they all rely on s. 5 of the *Court Order Enforcement Act* in support of this submission.
>
> 25 They submit that this section of the *Court Order Enforcement Act* "reinforces strongly a Judge's ability to do equity even if a valid Garnishing Order is issued by a Judgment Creditor".
>
> 26 Pollard and Le Beau further submitted that *Royal Bank of Canada v. Taylor* (1986), 8 B.C.L.R. (2d) 140, and *Zinetti Pasta Ltd. v. F.M.G. Food Import & Export Ltd*, [1982] B.C.J. No. 663, [1982] B.C.W.L.D. 1353, support this submission. Pollard and Le Beau, do acknowledge that *Zinetti Pasta* was an application by a judgment debtor and not an application by judgment creditors as in the case at bar. However, they submit that it is appropriate to apply the principles of *Zinetti* to the case at bar....
>
> 27 A review of s. 5 of the *Court Order Enforcement Act* and the 2 cases cited by Pollard and Le Beau ... do not support the this submission.
>
> 28 The cases cited by the judgment creditors were all cases where the application for release of the garnishment was made by the defendant or judgment debtor.

> 29 Section 5 of the *Act* only applies to applications by defendants or judgment debtors who apply to have the garnishment released in exchange for making payments on the debts in installments. In the case at bar there has been no application by the defendants for release of the garnishment summons nor is there any indication that the defendant wishes to or would be capable of paying in installments. No authority to the contrary has been provided by Bendickson, Pollard [or] Le Beau that would suggest that the courts have broadened the scope of s. 5 to allow for judgment creditors to apply under this section, nor can I find any authority that would support this position.

[43] As such, the creditors did not have a right to share in the proceeds of the garnishment under s. 5. The Court also addressed "the timing of the garnishment orders and priorities between the creditors" (para. 55). T.S.T. referred to the *B.C. Millworks* decision. Lander J. said:

> 57 T.ST. submits that *B.C. Millworks Products Ltd. v. Overhead Door Sales* ... supports its contention that the garnished funds should be payable to T.S.T. They further submit that there is no basis on which the judgment creditors of Timberline are entitled to a rateable share in the garnished funds.
>
> 58 In *Overhead Door* the Court dealt with the issue of the priority of judgment creditors to funds that were ... paid into court as a result of the garnishment order of one creditor and were claimed, in part, by a different creditor who had not served a prejudgment garnishment summons but had obtained judgment prior to the garnishing creditor. The court found that:
>
> > ... in British Columbia an attaching order obtained after judgment forms an equitable charge on a debt owing by the garnishee to the judgment debtor from the time of the service upon him of the attachment order, but that service upon a garnishee of an attachment order obtained before judgment does not form an equitable charge on the debt until such time as judgment be obtained. Its effect before judgment seems limited to ordering the money to be paid into Court to await final disposition by order of the Court and to preventing the garnishee from paying the debt or the portion of it attached to the garnishee's creditor or to his order without leave of the Court.
> >
> > ...

> The general principal is that charges take priority in the order in which they become a charge.

[44] The Court concluded that T.S.T. had a prior charge on the entire fund, since the garnished funds were paid into court pursuant to its summons. Although other judgment creditors had issued summonses, they had not served them on the party who had the money, but rather on other companies which disputed their indebtedness to Timberline. It appears that the Court declined to find that the fund should be shared rateably because the judgment creditors had not issued writs of attachment required under the *Creditor Assistance Act*.

**PPSA**

[45] The applicant refers to s. 2B(1) of the *Creditors Relief Act*, which provides that the personal property of the judgment debtor shall not be bound except by registration of a notice for judgment pursuant to section 2A(1). The Carbopego judgment is registered in the Personal Property Security Registry.

[46] The applicant suggests that NSPI could only have priority if it were a secured creditor. Section 20 of the *Personal Property Security Act* states that a security interest is perfected when it has attached and all steps required for

perfection have been completed. The applicant maintains that NSPI has not perfected an interest, for instance, by taking possession or by registration.

[47] The applicant refers to *Canadian Imperial Bank of Commerce v. CTV Television Inc*, [2005] N.B.J. No. 567 (N.B.Q.B.), where the bank registered a general security agreement prior to CTV obtaining a judgment. At paragraph 24 the Court cited Professor Catherine Walsh's *Introduction to the New Brunswick Personal Property Security Act*, at pp. 110-111, where the author discusses ss. 19 and 20 of the New Brunswick *Act*, which are substantially identical to ss. 20 and 21 of the Nova Scotia *Act*. Professor Walsh states, in part:

> S. 20(1)(a) abandons the traditional linkage between the priority rights of judgment creditors and the judgment enforcement process. Judgment creditors are not required to even initiate enforcement proceedings, let alone take that process to the point of seizure, in order to assert priority over an unperfected security interest. All they need do is register notice of their judgment in the Personal Property Registry, something which amendments to the *Creditors Relief Act*, proclaimed in force at the same time as the PPSA, permits them to do as soon as judgment is obtained. Once notice of the judgment is registered, the debtor's present and after-acquired personal property is bound in the amount of the judgment. Registration binds the property for the amount of the judgment, costs and accrued interest, less any amounts paid to satisfy the judgment. Provided the notice of judgment is registered before the security interest is perfected, s. 20(1)(a) of the PPSA gives priority to the interest of the judgment creditor.
>
> A registered judgment has priority over an unperfected security interest regardless of whether the security interest attaches before or after the judgment is registered. In cases where the security interest attaches before the judgment is registered, but is not yet perfected in the procedural sense of registration or taking possession, the *Creditors Relief Act* expressly provides that the registered judgment has priority. In cases where the security interest does not attach until after the judgment is registered, the security interest is postponed by PPSA s. 20(1)(a) even

> if the security interest was registered before the judgment was registered. This is because, under s. 19, a security interest is perfected only when it has attached and all procedural perfecting steps have been completed. Since s. 20(1)(a) subordinates an unperfected and not merely an unregistered security interest to a registered judgment, both attachment and registration of the security interest must precede the registration of the judgment in order for the security interest to have priority. This result is justified because it is attachment and not registration that gives the secured party its proprietary interest in the debtor's property. In contrast, the judgment creditor has done everything possible to "perfect" his or her interest - sued the debtor to judgment and then registered that judgment.

[48] The applicant notes that NSPI has neither a perfected nor an unperfected security interest in the attached property. Not having registered an interest, NSPI would be at most, a secured creditor that has not perfected its security interest and the applicant would have priority as a registered judgment creditor under s. 21(1)(a) of the PPSA.

[49] NSPI argues that the PPSA is a specific statutory regime with no application to the case at bar. Mr. Coles also argues that the attachment order is an interest created by law, and it would therefore not need to be registered in order to create priority.

[50] If the court concludes that NSPI has an interest in the attached property, the applicant submits that NSPI does not have priority but rather must share in the

proceeds of the property under section 3 of the *Creditors Relief Act*, pursuant to which there is no priority among judgment creditors, while section 4 provides that creditors are to share ratably. Therefore, NSPI should be in no better position than they would be if it had obtained a judgment against AMCI. Only if NSPI obtains a judgment will its interest crystallize and make it a judgment creditor. It should not be treated any differently then the applicant should the court to find that it has an interest in the seized property.

[51] NSPI submits that the attached property should remain in the hands of the Sheriff until its claim against AMCI is adjudicated upon. If NSPI is unsuccessful, there will be no dispute as to priority or the application of Rule 49. Consequently, the Court should not disturb the attachment order. NSPI submits that Rule 49 gives it priority in any event.

## CONCLUSION

[52] I conclude that the NSPI attachment order does not take priority over the applicant's judgment. The cases cited in support of NSPI's position involve conflicts among judgment creditors, and deal with different statutory schemes than are present here. In this case, the applicant is a judgment creditor of AMCI

pursuant to the *Creditors' Relief Act*, while NSPI is not. Furthermore, the registration of notice of the judgment pursuant to s. 2A(1) prevails over any conflicting provision of the *Creditors' Relief Act*, the *Judicature Act*, or the *Civil Procedure Rules*, pursuant to s. 2E. In any event, s. 35(3) refers only to judgment creditors.

[53] In short, NSPI has not established that an attachment order under Rule 49 gives it an interest in the property of AMCI that can take priority over the registered judgment held by Carbopego.

[54] The parties may provide written submissions on costs within three weeks of the release of this decision.

**J.**