

CUSTOMS AND EXCISE

EXCISE TAX ACT

Action by plaintiff seeking to recover money that defendant received from customer in payment of loan secured by mortgage — Customer, business owner, collecting but failing to remit GST — Defendant granting customer home equity line of credit, mortgage secured upon customer's house — Defendant not aware of customer's GST debts — Customer later selling house, fully repaying outstanding debt of line of credit, mortgage — Defendant not enforcing its securities against customer, discharging security interests against house — Canada Revenue Agency (CRA) issuing demand letter to defendant seeking payment of \$67 854 on basis of deemed trust mechanism pursuant to *Excise Tax Act*, R.S.C., 1985, c. E-15 (ETA), s. 222 with respect to customer's failures to remit GST — Defendant refusing to pay amount — Main issues whether s. 222 imposing on defendant obligation to repay amount received from customer, whether defendant may assert, in defence, that it is *bona fide* purchaser for value of money received from customer, whether defendant no longer secured creditor when obligation to pay triggered — Defendant having statutory obligation to repay money to plaintiff — Amounts paid by customer to defendant "proceeds" of sale of his property, which was subject of deemed trust — ETA, s. 222, *Income Tax Act*, R.S.C., 1985 (5th Supp), c. 1 (ITA), s. 227 similar, both establishing deemed trust, delineating what property subject to it — Both also creating obligation ("statutory obligation") to pay proceeds of trust property to Receiver General — Word "proceeds" usually understood in broader sense, not limited to proceeds of forced sale or realization of security interests — Phrase "the proceeds of the property shall be paid to the Receiver General" in ETA, s. 222(3) encompassing proceeds flowing from voluntary sale of tax debtor's property — Upon such sale, tax debtor having obligation to pay proceeds to Receiver General — If tax debtor failing to do so, paying secured creditor instead, that creditor having obligation to repay money to plaintiff — Money obtained by customer in consideration for transfer of house to third party constituting "proceeds" of property being subject matter of deemed trust — Customer having obligation to pay his tax debt with that money — Defence of *bona fide* purchaser for value cannot be invoked by secured creditor in context of deemed trust of ETA, ITA — Supreme Court foreclosing that possibility in *First Vancouver Finance v. M.R.N.*, 2002 SCC 49, [2002] 2 S.C.R. 720 — Supreme Court therein not creating statutory version of defence of *bona fide* purchaser for value entirely independent from its equitable counterpart — Nothing in *First Vancouver* suggesting that Supreme Court relying on something other than equitable defence — Defence of *bona fide* purchaser for value not limited to "purchasers" who obtain property through contract of sale — 1998, 2000 amendments to ITA, ETA deemed trust provisions based on premise that secured creditor cannot invoke *bona fide* purchaser for value defence when enforcing its security or receiving payment from its debtor — If that defence available, secured creditors would almost always be able to invoke it to defeat mechanism of deemed trust — Secured creditors often unaware of existence of tax debt when receiving a payment — Immaterial that customer voluntarily paid debt to defendant, rather than defendant realizing upon its security — Supreme Court's comments in *First Vancouver* with respect to crystallizing events applying to both deemed trust, statutory obligation imposed on third parties receiving "proceeds" of trust property — Statutory obligation inextricably linked to deemed trust — No basis in wording of ETA, s. 222 for distinction — Defendant's loss in this case result of operation of rules establishing priorities among creditors, not attempt of one creditor to expropriate other — Action allowed.

CANADA V. TORONTO-DOMINION BANK (T-1834-15, 2018 FC 538, Grammond J., judgment dated May 25, 2018, 27 pp.)