

COURT OF APPEAL FOR ONTARIO

CITATION: Trang v. Nguyen, 2012 ONCA 885

DATE: 20121217

DOCKET: C55014

Simmons, Juriansz and Epstein JJ.A.

BETWEEN

Rosaline Trang

Plaintiff (Respondent)

and

Ha T. Nguyen (also known as Carolyn Nguyen), and Quoc Dung Tran (also known as Alexander Tran) and Her Majesty the Queen in Right of Canada (Canada Revenue Agency)

Defendants (Appellant/Respondents)

AND BETWEEN

Carolyn Nguyen

Applicant (Respondent)

and

Alexander Tran and Her Majesty the Queen in Right of Canada (Canada Revenue Agency)

Respondents (Appellant/Respondent)

Andrew Gibbs, for the appellant

Michael S. Hebert, for Rosaline Trang

Gregory A. Ste. Marie, for Carolyn Nguyen

Heard: July 20, 2012

On appeal from the judgment of Justice Colin D.A. McKinnon of the Superior Court of Justice, dated December 7, 2011, with reasons reported at 2011 ONSC 7076.

Simmons J.A.:

A. OVERVIEW

[1] The main issue in this appeal is whether an unregistered equitable interest can take priority over a lien registered by the Canada Revenue Agency against a taxpayer's real property.

[2] Alexander Tran owes the CRA approximately \$1.6 million in unpaid income taxes and GST. In 2005 and 2007, the CRA registered liens for the amounts owing against the title to three Ontario properties which Mr. Tran owns, or co-owns with his wife.

[3] Mr. Tran was convicted of income tax evasion in 2009. Following his conviction, his sister, Rosaline Trang, and his wife, Carolyn Nguyen, each brought a lawsuit against Mr. Tran seeking a declaration that they held an unregistered equitable interest in one or more of his properties.

[4] Ms. Trang claims she has equitable mortgages over all her brother's lands. Ms. Nguyen claims she is entitled to a 50% share of a business property registered in Mr. Tran's name alone based on work she did in the business.

[5] On consent, the CRA was added as a party to Ms. Nguyen's family law proceeding, which was transferred to the Ontario Superior Court to be heard together with Ms. Trang's civil claim. The CRA then brought a motion under rule 21.01(1)(a) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, to determine whether the equitable interests claimed by Ms. Trang and Ms. Nguyen could, if proven, entitle them to payment in priority to the CRA's registered liens.

[6] The motion proceeded based on an Agreed Statement of Facts. It was also assumed for the purposes of the motion that Ms. Trang and Ms. Nguyen would succeed in obtaining declarations of their equitable interests in Mr. Tran's properties as of a date prior to the date of registration of the CRA liens and that the CRA had no notice of the prior unregistered claims.

[7] On the motion, McKinnon J. held that the unregistered equitable interests of Mr. Tran's wife and sister could be payable in priority to the CRA's subsequent liens.¹

[8] In reaching this conclusion, the motion judge rejected the CRA's submission that s. 223(5)(a) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th

¹ At para. 29 of his reasons, the motion judge said the equitable claims "have priority over the liens registered by Canada Revenue Agency." However, that was not the question posed on the motion. Rather, the question was, "*Can* the plaintiffs' unregistered equitable interest in certain properties be payable in priority to the Crown's subsequent legal interest in those properties..." (emphasis added). The formal order answers the question posed in the affirmative in relation to each of Ms. Trang and Ms. Nguyen.

Supp.)² makes the CRA liens the effective equivalent of a “charge” under s. 93 of the *Land Titles Act*, R.S.O. 1990, c. L.5, thus giving them priority over pre-existing unregistered interests. Instead, the motion judge found that s. 223(5)(a) of the *Income Tax Act* gives the CRA the same status as that of a judgment creditor. That status does not override valid prior unregistered equitable interests.

[9] On appeal, the CRA does not take issue with the motion judge's conclusion concerning the effect of s. 223(5)(a) of the *Income Tax Act*. Rather, the CRA submits that the motion judge erred by failing to consider s. 223(5)(b) of the *Income Tax Act*.

[10] The CRA submits that s. 223(5)(b) of the *Income Tax Act* adopts the scheme of priority created for collection of amounts owing to the provincial Crown. The CRA says that, under the Ontario scheme, once a notice of indebtedness to the Crown is registered, it secures a “lien and charge” on a debtor's lands. By its terms, s. 93 of the *Land Titles Act* gives the “charge” priority over any unregistered interests in the land.

[11] The CRA acknowledges that it did not bring s. 223(5)(b) of the *Income Tax Act* to the motion judge's attention. However, the CRA contends that because the

² The provisions of s. 316 of the *Excise Tax Act*, R.S.C., 1985, c. E-15, mirror the provisions of s. 223 of the *Income Tax Act*. The *Excise Tax Act* provisions govern the liens registered for GST arrears while the *Income Tax Act* provisions govern the liens registered for income tax arrears. For the sake of simplicity, I will address the provisions of the *Income Tax Act*. However, my reasoning also applies to the relevant provisions of the *Excise Tax Act*.

interpretation of s. 223(5)(b) of the *Income Tax Act* involves a question of law alone, this court is not precluded from determining its effect on appeal.

[12] In any event, the CRA argues that, under the *Land Titles Act*, its interest in Mr. Tran's properties is not subject to a constructive trust claim by his spouse. Further, the CRA contends that the motion judge erred in his findings of fact relating to the nature of Ms. Trang's interest.

[13] For the reasons that follow, I would dismiss the appeal.

B. BACKGROUND

(1) The Properties

[14] According to the Agreed Statement of Facts, Mr. Tran has an interest in three properties that were relevant to the CRA's motion:

- 58 Granton Avenue, Ottawa – a residential property registered in the names of Mr. Tran and his wife, Ms. Nguyen, as joint tenants and used by them as their principal residence;
- 46 Epworth Avenue, Ottawa – registered in the names of Mr. Tran and Ms. Nguyen as joint tenants and used by them as an investment property;
- 1340 Wellington Street West, Ottawa – Mr. Tran's business property, registered in his name alone and used for his acupuncture practice.

(2) The CRA Liens

[15] In 2005, in accordance with the procedure set out in the *Excise Tax Act*, the Minister of National Revenue certified Mr. Tran's GST debt as owing and then registered the certificate in the Federal Court. As provided for by the legislation, the CRA proceeded to register a lien for the amount owing against the title to each of the three properties in which Mr. Tran has an interest. In 2007, the CRA followed a similar procedure with respect to Mr. Tran's income tax debt, this time relying on the provisions of the *Income Tax Act*.

[16] The documents registered on title by the CRA are entitled "LRO # 4 Lien". The body of the document registered under ss. 223(5) and (6) of the *Income Tax Act* includes the following statements:

WHEREAS pursuant to subsection[s] 223 (5) and (6) of the Income Tax Act, a document which the Court has issued, and which evidences a certificate of that Court upon registration on title or otherwise recorded creates a charge, lien or priority on, or a binding interest in property that the tax debtor holds;

...

Now therefore take notice that her Majesty the Queen in right of Canada as represented by the Minister of National Revenue *claims a lien and charge* against the interest of Alexander Tran... in the lands described in this notice.

Such lien charges have priority over all encumbrances or claims registered or attaching to the subject property

*subsequent to the registration of this notice. [Emphasis added.]*³

(3) The Lawsuits Brought by Ms. Nguyen and Ms. Trang

[17] In April 2009, Ms. Nguyen commenced a family law application against Mr. Tran claiming a declaration that she is entitled to: i) a 50% interest in the Wellington Street property by way of resulting or constructive trust; and ii) priority over the CRA's liens. This claim arises from work and services allegedly performed by Ms. Nguyen in her husband's acupuncture clinic between 1991 and 2002.

[18] A few weeks later, in May 2009, Ms. Trang commenced an application against Mr. Tran, Ms. Nguyen and the CRA in which she claimed, among other things: i) an equitable mortgage in the amount of \$250,000 against the Granton Avenue and Epworth Avenue properties arising from an agreement signed in

³ The document registered under the *Excise Tax Act* refers to the relevant provisions of that Act, rather than the provisions of the *Income Tax Act*. Further, instead of the third paragraph set out above, it includes the following provision:

Notwithstanding the date of registration of this lien, a portion of the lien takes priority over all other encumbrances except those that fall within the definition of "prescribed security interest" in Regulation 2201 of the *Income Tax Act*. This priority is claimed pursuant to subsections 227(4) and (4.1) of the *Income Tax Act*, and/or section 222 of the *Excise Tax Act*.

Subsections 227(4) and (4.1) of the *Income Tax Act*, and s. 222 of the *Excise Tax Act* relate to unremitted employee source deductions. In general terms, a "prescribed security interest" is a mortgage registered before the failure to remit employee source deductions occurs.

On appeal, the CRA did not refer to or rely on this provision contained in the document registered under the *Excise Tax Act*.

December 2003; and ii) a declaration that her equitable mortgage ranks in priority to the CRA liens.

[19] Ms. Trang's application was later converted to an action. In her statement of claim, Ms. Trang claimed an additional mortgage in the amount of \$100,000 against the Epworth Avenue and Wellington Street properties and priority over the CRA liens.

[20] In August and September 2010, Ms. Trang and Ms. Nguyen registered certificates of pending litigation against the properties in which they claimed an interest.

[21] In August 2011, an order was made on consent adding the CRA to Ms. Nguyen's family law application and directing that it be heard together with Ms. Trang's action.

[22] In October 2011, the CRA brought its Rule 21 motion seeking determination of the following question:

Can the plaintiffs' unregistered equitable interest in certain properties be payable in priority to the Crown's subsequent legal interest in those properties, where the Crown's interest was registered in the Land Registry Office without notice of the plaintiff's alleged equitable interest?

[23] If the answer to the question was "no", the CRA requested an order striking out those parts of the claims asserting the priority of Ms. Nguyen's and Ms. Trang's unregistered equitable interests over the CRA's registered legal interest

in those properties. It also sought an order discharging the certificates of pending litigation to facilitate the sale of the properties.

C. THE MOTION JUDGE'S DECISION

[24] The motion judge held, at para. 9, that the answer to the question posed by the CRA turned on whether or not the liens it registered against Mr. Tran's properties could properly be considered "charges" under the *Land Titles Act*. For several reasons, he concluded that they could not.

[25] First, at para. 10, the motion judge observed that the "land title registers themselves" that were filed in evidence referred to the CRA's claims as "liens".

[26] Second, at paras. 11-14, the motion judge referred to those portions of the *Income Tax Act* which provide that, when the CRA files a document evidencing a debt, that document has the same effect as a judgment of a court.

[27] Third, at para. 15, the motion judge noted that s. 223(11.1) of the *Income Tax Act* provides that where the debtor is bankrupt, the lien is deemed to be "a claim that is secured by a security" and ranks as a secured claim under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. Here, there was no bankruptcy that would serve to elevate the CRA's claims to that of a secured creditor.

[28] Fourth, at paras. 18-21, the motion judge considered the wording of s. 93 of the *Land Titles Act*, which provides, in part, that "a registered owner may ...

charge the land” (s. 93(1)), and that a registered charge is a “security upon the land thereby charged to the extent of the money or money’s worth actually advanced or supplied under the charge” (s. 93(4)).

[29] The motion judge concluded that the wording of these sections is unambiguous: only a registered owner can create a “charge” under the *Land Titles Act*, and a charge stands as security only for the money or money’s worth actually advanced under the charge. Since the CRA is not a registered owner and did not advance money or money’s worth to secure its debt, it did not hold a “charge” within the meaning of this section.

[30] Fifth, at para. 22, the motion judge held that because the CRA does not hold a “charge” within the meaning of the *Land Titles Act* and because it had neither advanced consideration for its interest nor acquired title, the question of whether or not it had notice of the equitable claims was irrelevant.

[31] Finally, the motion judge referred to case law, including from this court, to the effect that equitable doctrines and jurisdiction apply to property under the land titles regime: see for example *Mutual Trust Co. v. Creditview Estate Homes Ltd.* (1997), 34 O.R. (3d) 583 (C.A.).

D. THE STATUTORY PROVISIONS AT ISSUE

[32] The *Income Tax Act* and the *Excise Tax Act* contain the statutory provisions at issue. The relevant provisions of both acts permit the CRA to:

- i) certify an amount owing by a taxpayer on account of arrears of income tax or GST (s. 223(2));
- ii) file the certificate with the Federal Court, such that the certificate becomes the equivalent of a judgment of that Court (s. 223(3)); and
- iii) register a document evidencing the amount certified by the Minister and registered with the Federal Court against the title to real property owned by the taxpayer. This document is called “a memorial” (s. 223(5)).

[33] For convenience, I will set out ss. 223(5), (6) and (11.1) of the *Income Tax Act* and include all other relevant provisions of both Acts in an Appendix.

[34] Section 223(5) of the *Income Tax Act* permits the CRA to register a document against the title to real property owned by the taxpayer. This document, called a memorial, is issued by the Federal Court and evidences a s. 223(2) certificate registered with the Court. Sections 223(5)(a) and (b) and 223(6) are central to the issues on appeal. They describe the effect of registering a memorial on title. I will therefore set them out in full here:

223(5) A document issued by the Federal Court evidencing a certificate in respect of the debtor registered under subsection 223(3), a writ of that Court issued pursuant to the certificate or any notification of the document or writ (such document, writ or notification in this section referred to as a “memorial”) may be filed, registered or otherwise recorded for the purpose of creating a charge, lien or priority on, or a binding interest in, property in a

province, or any interest in such property, held by the debtor in the same manner as a document evidencing

- (a) a judgment of the Superior Court of the province against a person for debt owing by the person, or
- (b) an amount payable or required to be remitted by a person in the province in respect of a debt owing to Her Majesty in right of the province

may be filed, registered or otherwise recorded in accordance with or pursuant to the law of the province to create a charge, lien or priority on, or a binding interest in, the property or interest.

223(6) If a memorial has been filed, registered or otherwise recorded under subsection 223(5),

- (a) a charge, lien or priority is created on, or a binding interest is created in, property in the province, or any interest in such property, held by the debtor, or
- (b) such property or interest in the property is otherwise bound,

in the same manner and to the same extent as if the memorial were a document evidencing a judgment referred to in paragraph 223 (5) (a) or an amount referred to in paragraph 223 (5)(b), and the charge, lien, priority or binding interest created shall be subordinate to any charge, lien, priority or binding interest in respect of which all steps necessary to make it effective against other creditors were taken before the time the memorial was filed, registered or otherwise recorded.

[35] Section 223 (11.1) of the *Income Tax Act* is also important. It describes circumstances in which a charge, lien, priority or binding interest created under subsection 223(6) is deemed to be a secured claim. Section 223 (11.1) provides as follows:

(11.1) When a charge, lien, priority or binding interest created under subsection 223(6) by filing, registering or otherwise recording a

memorial under subsection 223(5) is registered in accordance with subsection 87(1) of the *Bankruptcy and Insolvency Act*, it is deemed

(a) to be a claim that is secured by a security and that, subject to subsection 87(2) of that Act, ranks as a secured claim under that Act; and

(b) to also be a claim referred to in paragraph 86(2)(a) of that Act.

[36] Section 93 of the *Land Titles Act* is also important to the issues on appeal because s. 93(3) stipulates that the interest created by a “charge” is free from any unregistered interests in the charged lands. Section 93 of the *Land Titles Act* provides as follows:

93(1) A registered owner may in the prescribed manner charge the land with the payment at an appointed time of any principal sum of money either with or without interest or as security for any other purpose and with or without a power of sale.

(2) A charge that secures the payment of money shall state the amount of the principal sum that it secures.

(3) The charge, when registered, confers upon the chargee a charge upon the interest of the chargor as appearing in the register subject to the encumbrances and qualifications to which the chargor's interest is subject, *but free from any unregistered interest in the land.* [Emphasis added.]

E. THE POSITION OF THE APPELLANT

[37] As I have explained above, before the motion judge, the CRA relied on s. 223(5)(a) of the *Income Tax Act* to argue that, once registered against the title to land under the *Land Titles Act*, a memorial creates a “charge” on land within the

meaning of s. 93(3) of the *Land Titles Act*, such that the memorial has priority over unregistered equitable interests.

[38] On appeal, the CRA relies on ss. 223(5)(b) of the *Income Tax Act* to make the same argument.

[39] Section 223(5)(b) of the *Income Tax Act* permits a memorial to be registered to create “a charge, lien or priority on” property of a taxpayer “in the same manner as a document evidencing” a debt owing to the provincial Crown.

[40] Section 223(6) provides that if a memorial has been registered under s. 223(5), “a charge, lien or priority is created” against the taxpayer's property “in the same manner ... as if the memorial were a document evidencing” a debt to the provincial Crown.

[41] The CRA points to various Ontario statutes which provide that registration of a notice of an amount owing to the provincial Crown against the title to real property creates a “lien and charge” on the real property. The CRA contends that these statutes have the effect of creating a “charge” against the real property within the meaning of s. 93(3) of the *Land Titles Act* in favour of the provincial Crown. In turn, s. 93(3) of the *Land Titles Act* stipulates that a “charge” has priority over unregistered interests.

[42] For example, the CRA relies on s. 17.1 of the *Fuel Tax Act*, R.S.O. 1990, c. F.35, as an example of how the Ontario scheme for collection of amounts owing to the province operates in relation to real property.

[43] The CRA claims that s. 17.1(3) creates a “lien and charge” against real property and that use of the language “lien and charge” signals the Legislature’s intent to create a “charge” within the meaning of s. 93(3) of the *Land Titles Act*.

The relevant portions of s. 17.1 of the *Fuel Tax Act* are as follows:

17.1 (1) *Any tax payable or required to be remitted under this Act by any taxpayer is, upon registration by the Minister in the proper land registry office of a notice claiming a lien and charge conferred by this section, a lien and charge on any interest the taxpayer liable to pay or remit the tax has in the real property described in the notice.*

(2) [Lien on personal property]

(3) *The lien and charge conferred by subsection (1) or (2) is in respect of all amounts for which the taxpayer is liable under this Act at the time of registration of the notice or any renewal of it and all amounts for which the taxpayer afterwards becomes liable while the notice remains registered and, upon registration of a notice of lien and charge, the lien and charge has priority over,*

(a) any perfected security interest registered after the notice is registered;

(b) any security interest perfected by possession after the notice is registered; and

(c) *any encumbrance or other claim that is registered against or that otherwise arises and affects the taxpayer's property after the notice is registered.*

[Emphasis added.]

[44] The CRA notes that the mechanism of using a “lien and charge” to secure amounts owing to the province was introduced into a number of Ontario taxation statutes in 1994 under *An Act to Amend Various Taxation Statutes Administered by the Minister of Finance and to Amend the Liquor Licence Act*, S.O. 1994, c. 18 – Schedule “B”.⁴

[45] Although “charge” is not defined in the *Land Titles Act*, the CRA argues that s. 2 of the *Land Registration Reform Act*, R.S.O. 1990, c. L.4 defines “charge” so as to include the interest in land created by ss. 223(5)(b) and 223(6) of the *Income Tax Act*. The definition of charge as it appears in s. 2 of the *Land Registration Reform Act* states:

“charge” means a charge on land given for the purpose of securing the payment of a debt or the performance of an obligation, and includes a charge under the *Land Titles Act* and a mortgage, but does not include a rent charge.

[46] Accordingly, the CRA argues that the combined effect of ss. 223(5)(b) and 223(6) of the *Income Tax Act*, s. 93(3) of the *Land Titles Act*, s. 2 of the *Land Registration Reform Act* and the provisions of the various debt enforcement provisions of Ontario taxing statutes is that registration of a memorial evidencing an income tax debt in a Land Titles Office gives the memorial priority over prior unregistered equitable interests.

⁴ The *Employer Health Tax Act*, the *Fuel Tax Act*, the *Gasoline Tax Act*, the *Land Transfer Tax Act*, the *Race Tracks Tax Act* and the *Tobacco Tax Act* all contain such language creating a “lien and charge”.

[47] In support of its argument, the CRA also relies on *Canada (Attorney General) v. Keith G. Collins Ltd.*, 2008 MBQB 64, 226 Man. R. (2d) 290, aff'd 2008 MBCA 92, 228 Man. R. (2d) 266.

[48] According to the CRA, the debt enforcement mechanism for debts owing to the provincial Crown varies from province to province. While some provinces provide that registration of a notice of indebtedness to the provincial Crown is the equivalent of a money judgment only ("type 1 provinces"), the CRA maintains that other provinces provide for the creation of a "lien and charge" upon the registration of a notice of indebtedness to the provincial Crown ("type 2 provinces").

[49] So, for example, in *Investors Group Trust Co. Ltd. v. Eckhoff*, 2008 SKCA 18, 307 Sask. R. 164, the Saskatchewan Court of Appeal noted that debts owing to the provincial Crown are enforceable only as if they were money judgments. The CRA contends that Saskatchewan is therefore a type 1 province.

[50] By contrast, the CRA maintains that the effect of the *Keith G. Collins Ltd.* decision is that Manitoba is a type 2 province. According to the CRA, this means that, upon registration of a notice of indebtedness to the provincial Crown, the provincial Crown acquires a security interest in all of the debtor's property. The CRA maintains that in Ontario, the effect is the same. The fact that provincial legislation specifies that the provincial Crown is entitled to a lien and charge on a

debtor's property means that, in the case of real property, the provincial Crown acquires a “charge” within the meaning of s. 93(3) of the *Land Titles Act*, thus giving it priority over prior unregistered equitable interests. As the *Income Tax Act* adopts the provincial scheme for enforcement of debts owing to the province, the CRA is entitled to the same priority.

F. DISCUSSION

(i) Should this court consider the CRA’s argument about the meaning of s. 223(5)(b), when the issue was not raised in the court below?

[51] In oral argument, counsel for the CRA offered no explanation for why it did not raise its s. 223(5)(b) argument before the motion judge. Rather, he submitted that this court should hear and consider the argument because it was a purely legal question, and because doing so would not cause any prejudice to the respondents. He suggested that any hardship caused could be addressed through costs.

[52] While it is obvious that the CRA should have raised its s. 223(5)(b) argument in the court below, I am satisfied that this court should consider its arguments on the merits. Section 223(5)(b) is obviously closely linked to s. 223(5)(a), which was the main provision at issue in the court below. The argument the CRA now makes is strictly a legal one, putting this court in as good a position as the motion judge to decide it.

[53] That said, as I will explain, I am not persuaded that the CRA fares any better under s. 223(5)(b) than it does under s. 223(5)(a). In my view, neither provision gets the CRA to the result it desires, which is a declaration that it holds a “charge” within the meaning of s. 93 of the *Land Titles Act*.

(ii) Do ss. 223(5)(b) and 223(6) of the *Income Tax Act* create a “charge” on land within the meaning of s. 93(3) of the *Land Titles Act*?

[54] I reject the CRA’s argument that the various statutory provisions it relies on have the effect of creating a “charge” on land within the meaning of s. 93(3) of the *Land Titles Act* for three reasons.

[55] First, I agree with the motion judge that a voluntary act on the part of the land owner is necessary to create a charge under s. 93 of the *Land Titles Act*. As the CRA’s liens are created by statute rather than by the voluntary act of the land owner, they do not qualify as a “charge” within the meaning of s. 93 of the *Land Titles Act*.

[56] Second, the provisions of the various Ontario tax collections statutes on which the CRA relies, contain their own priority provisions. The priority they create is not the same as the priority created under s. 93 of the *Land Titles Act*. Accordingly, I am not persuaded that the Legislature intended to create “a charge” within the meaning of the *Land Titles Act* when it enacted the various tax collection provisions on which the CRA relies.

[57] Finally, I see nothing in the *Keith G. Collins Ltd.* decision that assists the CRA.

[58] Dealing with my first point, to qualify as a “charge” within the meaning of s. 93(3) of the *Land Titles Act*, and to obtain the benefit of the priority conferred by that subsection, in my view, the CRA's liens would have to have been the product of a voluntary act on the part of the registered owner of the lands in question. As they were not the product of a voluntary act of the registered owner, but rather were conferred by statute, it follows that the CRA liens do not qualify as a “charge” under s. 93(3).

[59] As the motion judge explained, s. 93(1) of the *Land Titles Act* stipulates that *a registered owner of land* may charge land in one of two fashions: i) with the payment of money, or ii) as security for any other purpose. Here, Mr. Tran did neither.

[60] Section 68(1) of the *Land Titles Act* reinforces this interpretation of s. 93 because it states that “[n]o person, other than the registered owner, is entitled to transfer or charge registered freehold or leasehold land by a registered disposition” (emphasis added).

[61] Further, s. 93(3) of the *Land Titles Act* provides:

The *charge*, when registered, confers upon the chargee a charge upon the interest of the chargor as appearing in the register subject to the encumbrances and qualifications to which the chargor’s interest is subject,

but free from any unregistered interest in the land.
[Emphasis added.]

[62] In my opinion, it is apparent from the use of the words “[t]he charge” as the opening words of s. 93(3), that it is the charge referred to in that section, or at the very least, elsewhere in the *Land Titles Act*, that obtains the priority conferred by s. 93(3).

[63] If the CRA liens do not fall within the definition of “charge” in s. 93(3) of the *Land Titles Act* because they do not arise through the voluntary act of the landowner, the definition of “charge” in s. 2 of the *Land Registration Reform Act* is of no assistance to the CRA. It is s. 93(3) of the *Land Titles Act* that confers priority over prior unregistered interests.

[64] Similarly, the wording of the registered memorial upon which the CRA relied (i.e., the one filed under the *Income Tax Act*) does not assist it.⁵ That memorial stipulates the priority of the lien and charge of which it provides notice. It says the lien has priority over “all encumbrances or claims registered or attaching to the subject property *subsequent* to the registration of this notice” (emphasis added). However, it was agreed for the purposes of the motion, that the respondents would be successful in obtaining a declaration of their unregistered equitable interests as of a date *prior* to the registration of the CRA liens.

⁵ As previously noted, the memorial registered under the *Excise Tax Act* asserts a partial super priority with respect to unremitted employee source deductions. However, on appeal, the CRA did not refer to or rely on that provision in the memorial registered under the *Excise Tax Act*. In the circumstances, I will not comment on the effect of that provision.

[65] Second, I reach the same conclusion about the effect of the various Ontario taxing statutes upon which the CRA relies.

[66] As I explained above, the CRA referred to s. 17.1 of the *Fuel Tax Act* as an example of the wording in Ontario tax collection statutes to argue that its liens constitute a charge under the *Land Titles Act*. The CRA submits that s. 223(5)(b) of the *Income Tax Act* incorporates the remedies contained in the Ontario tax collection statutes. It relies on the fact that one of those remedies is to create “a lien and charge” on the taxpayer’s interest in real property. It contends that by conferring a “lien and charge” on real property the Ontario taxing statutes create “a charge” within the meaning of the *Land Titles Act*.

[67] In my view, the “lien and charge” conferred by the Ontario taxing statutes is not “a charge” within the meaning of s. 93 of the *Land Titles Act* for the reasons I have already explained – fundamentally, the lien and charge does not arise through the voluntary act of the real property owner.

[68] Equally important, however, is the fact that the Ontario tax collection statutes stipulate the priority of the “lien and charge” they create – and that priority is not the equivalent of the priority created under s. 93(3) of the *Land Titles Act*.

[69] So, for example, s. 17.1(3)(c) of the *Fuel Tax Act* stipulates that the lien and charge it confers upon registration against real property has priority over “any ...

claim that is registered against or *that otherwise arises* and affects the taxpayer's property *after* the notice [of the lien and charge] is registered.”

[70] On its face, s.17.1 does not purport to give the lien and charge it creates priority over any claim against real property that arose *before* registration of notice of the lien and charge.

[71] As the priority created by s. 17.1 of the *Fuel Tax Act* is different than the priority created by s. 93(3) of the *Land Titles Act*, in my view, it would be inconsistent to hold that s. 17.1 of the *Fuel Tax Act* has the effect of creating “a charge” within the meaning of s. 93 of the *Land Titles Act*.

[72] In my opinion, therefore, the Ontario taxing statutes on which the CRA relies assist neither its argument that its memorials constitute “charges” within the meaning of the *Land Titles Act*, nor its claim that it is entitled to priority over equitable interests hypothetically declared to exist prior to the date on which the CRA's liens were registered.

[73] Third, on my reading of the *Keith G. Collins Ltd.* decision, that case does not assist the CRA. Although the court relied in part on the priority created by the combined operation of s. 223(5)(b) of the *Income Tax Act* and the *Tax Administration and Miscellaneous Taxes Act*, C.C.S.M. c. T.2 (the “Manitoba Taxing Statute”), it was the priority created in relation to personal property under s. 66 of the Manitoba Taxing Statute that was relevant. In contrast, s. 65 of the

Manitoba Taxing Statute gives a certificate of a tax debt registered against real property the same priority as a judgment of the court.⁶

[74] Two final points. One, the claims advanced by Ms. Trang and Ms. Nguyen are equitable in nature. Accordingly, it seems to me that, rather than being determined on a Rule 21 motion, the issue of their priority is one uniquely for the trial judge.

[75] For example, one of the issues the trial judge may consider in assessing Ms. Nguyen's constructive trust claim is the equities as between her and the CRA: see *Stevens v. Stevens* (2006), 214 O.A.C. 201 (C.A.), at para. 21.

[76] Two, I feel obliged to observe that, like the Ontario tax collection statutes, s. 223(6) of the *Income Tax Act* appears to stipulate the priority of the memorial registered under that section.

[77] In particular, s. 223(6) of the *Income Tax Act* provides that, once registered, a memorial evidencing a debt for income tax is subordinate to any "charge, lien,

⁶ Sections 64(1), 65(1) and 65(3) of the Manitoba Taxing Statute provide:

64(1) The government has, in addition to every other remedy it has for the recovery of a tax debt, a lien on every estate or interest in real property and personal property of the tax debtor, including property acquired by the debtor after the debt arose.

65(1) The director may cause a lien under section 64 to be registered in a land titles office against specific lands of the tax debtor by filing a certificate, signed by the director, stating

- (a) the address for service of the director;
- (b) the full name of the tax debtor and the amount of the tax debt giving rise to the lien;
- (b.1) the name of the tax Act under which the tax debt arose;
- (c) the legal description of the land to be charged; and
- (d) any other matter prescribed by regulation.

65(3) Once the certificate has been registered in the land titles office, the director may take sale proceedings on the lien *as if the lien were a judgment registered under The Judgments Act*. [Emphasis added.]

priority or binding interests in respect of which all steps necessary to make it effective against other creditors were taken” before the memorial was registered.

[78] Neither the CRA nor the respondents made submissions concerning the effect of this aspect of s. 223(6). Accordingly, I will not comment further other than to observe that, if the CRA intended to rely on this provision, it should have raised it.

(iii) Is the CRA’s interest in Mr. Tran’s properties subject to a constructive trust claim by his spouse?

[79] The CRA claims that s. 62 of the *Land Titles Act* prohibits registration of “a notice of an express, implied or constructive trust”. Ms. Nguyen does not dispute that. However, that does not mean she is disentitled from registering a vesting order in the event she is successful in obtaining a declaration that she is entitled to an interest in Mr. Tran’s property by way of constructive trust. As I have explained, it will be open to the trial judge to take account of the equities between Ms. Nguyen and the CRA in deciding as of what date any such interest will be effective.

(iv) Did the motion judge err in his findings of fact relating to the nature of Ms. Trang’s interest?

[80] At para. 2 of his reasons, the motion judge said that, in addition to the \$250,000 equitable mortgage Ms. Trang claims against the Epworth and Granton Avenue properties arising from a December 2003 agreement, Ms. Trang claims a

\$100,000 equitable mortgage arising from the same agreement. We agree that this is a factual error. The pleadings in Ms. Trang's action assert a debt arising in 2008 as the basis for the claim regarding the \$100,000 equitable mortgage. This claim was therefore not part of the Rule 21 motion. Ms. Trang does not contend otherwise.

G. COSTS

[81] Given that there were arguments raised for the first time on appeal which should have been raised and dealt with in the court below, I would award the costs of the appeal to the respondents on a substantial indemnity basis. Accordingly, costs are awarded to Ms. Trang fixed in the amount of \$24,000 and costs are awarded to Ms. Nguyen fixed in the amount of \$22,000.

Released: "RGJ" December 17, 2012

"Janet Simmons J.A."

"I agree R.G. Juriansz J.A."

"I agree Gloria Epstein J.A."

**Appendix: Relevant Provisions of the *Income Tax Act* and the
*Excise Tax Act***

From the *Income Tax Act*.

Certificates

223(2) An amount payable by a person (in this section referred to as a “debtor”) that has not been paid or any part of an amount payable by the debtor that has not been paid may be certified by the Minister as an amount payable by the debtor.

[82] Registration in court

223(3) On production to the Federal Court, a certificate made under subsection 223(2) in respect of a debtor shall be registered in the Court and when so registered has the same effect, and all proceedings may be taken thereon, as if the certificate were a judgment obtained in the Court against the debtor for a debt in the amount certified plus interest thereon to the day of payment as provided by the statute or statutes referred to in subsection 223(1) under which the amount is payable and, for the purpose of any such proceedings, the certificate shall be deemed to be a judgment of the Court against the debtor for a debt due to Her Majesty, enforceable in the amount certified plus interest thereon to the day of payment as provided by that statute or statutes.

(a) a judgment of the superior court of the province against a person for a debt owing by the person, or

(b) an amount payable or required to be remitted by a person in the province in respect of a debt owing to Her Majesty in right of the province

may be filed, registered or otherwise recorded in accordance with or pursuant to the law of the province to create a charge, lien or priority on, or a binding interest in, the property or interest.

Creation of charge

223(6) If a memorial has been filed, registered or otherwise recorded under subsection 223(5),

(a) a charge, lien or priority is created on, or a binding interest is created in, property in the province, or any interest in such property, held by the debtor, or

(b) such property or interest in the property is otherwise bound,

in the same manner and to the same extent as if the memorial were a document evidencing a judgment referred to in paragraph 223(5)(a) or an amount referred to in paragraph 223(5)(b), and the charge, lien, priority or binding interest created shall be subordinate to any charge, lien, priority or binding interest in respect of which all steps necessary to make it effective against other creditors were taken before the time the memorial was filed, registered or otherwise recorded.

...

Deemed security

223(11.1) When a charge, lien, priority or binding interest created under subsection 223(6) by filing, registering or otherwise recording a memorial under subsection 223(5) is registered in accordance with subsection 87(1) of the *Bankruptcy and Insolvency Act*, it is deemed

(a) to be a claim that is secured by a security and that, subject to subsection 87(2) of that Act, ranks as a secured claim under that Act; and

(b) to also be a claim referred to in paragraph 86(2)(a) of that Act.

From the *Excise Tax Act*.

Certificates

316(1) Any tax, net tax, penalty, interest or other amount payable or remittable by a person (in this section referred to as the “debtor”) under this Part, or any part of any such amount, that has not been paid or remitted as and when required under this Part may be certified by the Minister as an amount payable by the debtor.

Registration in court

316(2) On production to the Federal Court, a certificate made under subsection (1) in respect of a debtor shall be registered in the Court and when so registered has the same effect, and all proceedings may be taken thereon, as if the certificate were a judgment obtained in the Court against the debtor for a debt in the amount certified plus interest and penalty thereon as provided under this Part to the day of payment and, for the purposes of any such proceedings, the certificate shall be deemed to be a judgment of the Court against the debtor for a debt due to Her Majesty and enforceable as such.

...

Charge on property

(4) A document issued by the Federal Court evidencing a certificate in respect of a debtor registered under subsection (2), a writ of that Court issued pursuant to the certificate or any notification of the document or writ (such document, writ or notification in this section referred to as a "memorial") may be filed, registered or otherwise recorded for the purpose of creating a charge, lien or priority on, or a binding interest in, property in a province, or any interest in such property, held by the debtor in the same manner as a document evidencing

(a) a judgment of the superior court of the province against a person for a debt owing by the person, or

(b) an amount payable or required to be remitted by a person in the province in respect of a debt owing to Her Majesty in right of the province

may be filed, registered or otherwise recorded in accordance with or pursuant to the law of the province to create a charge, lien or priority on, or a binding interest in, the property or interest.

Creation of charge

(5) If a memorial has been filed, registered or otherwise recorded under subsection (4),

(a) a charge, lien or priority is created on, or a binding interest is created in, property in the province, or any interest in such property, held by the debtor, or

(b) such property or interest in the property is otherwise bound,

in the same manner and to the same extent as if the memorial were a document evidencing a judgment referred to in paragraph (4)(a) or an amount referred to in paragraph (4)(b), and the charge, lien, priority or binding interest created shall be subordinate to any charge, lien, priority or binding interest in respect of which all steps necessary to make it effective against other creditors were taken before the time the memorial was filed, registered or otherwise recorded.

Proceedings in respect of memorial

(6) If a memorial is filed, registered or otherwise recorded in a province under subsection (4), proceedings may be taken in the province in respect of the memorial, including proceedings

(a) to enforce payment of the amount evidenced by the memorial, interest and penalty on the amount and all costs and charges paid or incurred in respect of

(i) the filing, registration or other recording of the memorial, and

(ii) proceedings taken to collect the amount,

(b) to renew or otherwise prolong the effectiveness of the filing, registration or other recording of the memorial,

(c) to cancel or withdraw the memorial wholly or in respect of any of the property or interests affected by the memorial, or

(d) to postpone the effectiveness of the filing, registration or other recording of the memorial in favour of any right, charge, lien or priority that has been or is intended to be filed, registered or otherwise recorded in respect of any property or interest affected by the memorial,

in the same manner and to the same extent as if the memorial were a document evidencing a judgment referred to in paragraph (4)(a) or an amount referred to in paragraph (4)(b), except that, if in any such proceeding or as a condition precedent to any such proceeding, any order, consent or ruling is required under the law of the province to be made or given by the superior court of the province or by a judge

or official of that court, a like order, consent or ruling may be made or given by the Federal Court or by a judge or official of the Federal Court and, when so made or given, has the same effect for the purposes of the proceeding as if it were made or given by the superior court of the province or by a judge or official of that court.