



**IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR**

Citation: *Attorney General of Canada. v. Nortip Development Corporation*, 2019 NLCA 34

Date: May 29, 2019

Docket Number: 201801H0003

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

APPELLANT

AND:

NORTIP DEVELOPMENT
CORPORATION

FIRST RESPONDENT

AND:

TRAVELERS CANADA

SECOND RESPONDENT

AND:

ELITE BUILDERS INC.

THIRD RESPONDENT

Coram: Fry C.J.N.L., White and Harrington JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
201601G2986

Appeal Heard: November 27, 2018

Judgment Rendered: May 29, 2019

Reasons for Judgment by: Harrington J.A.

Concurred in by: Fry C.J.N.L. and White J.A.

Counsel for the Appellant: Maeve Baird

Counsel for the First Respondent: Gregory Smith and Timothy Young

Counsel for the Second Respondent: No appearance

Counsel for the Third Respondent: No appearance

Harrington J.A.:

BACKGROUND

[1] This appeal concerns a priority contest between the Attorney General of Canada (the Crown) and Nortip Development Corporation (Nortip), as a mortgagee, with respect to insurance proceeds that were paid after a fire destroyed property owned by Elite Builders Inc. (Elite), the tax debtor and mortgagor. The second and third respondents, Elite and Travelers Canada, respectively, did not make appearances on appeal.

[2] The Crown relies on the deemed trust provisions of the *Income Tax Act*, R.S.C., 1985 c. 1 (5th Supp.) to claim priority over Nortip, while Nortip relies on the standard mortgage clause to argue that the insurance proceeds are not caught by the deemed trust provisions. This appeal therefore involves the interpretation of both the deemed trust provisions of the *Income Tax Act* as well as the standard mortgage clause.

[3] The parties do not contest the facts of this appeal; rather, this appeal turns on the question of whether the application judge's interpretation of the standard mortgage clause and the deemed trust provisions under the *Income Tax Act* are correct.

FACTS

[4] On May 25, 2014, property owned by Elite in St. Anthony, NL was subject to fire loss. Travelers Canada (Travelers), the insurer, filed an Originating Application with the Supreme Court of Newfoundland and Labrador, General Division to determine priority among competing claims from Elite, Nortip and the Crown with respect to the \$148,979 in insurance proceeds.

[5] Nortip had provided financing to Elite and had taken a mortgage over the property. This mortgage was the basis of Nortip's claim to the insurance proceeds. The mortgage contained the following clause:

6. (k) where the Lender has not otherwise prescribed terms or limits pursuant to subclause (j) and (k) the mortgagor shall purchase and maintain direct damage insurance against any insurable loss or damage to any structure for the replacement cost value of the structure and it shall cause each policy of insurance to indicate that loss is payable to the Lender and to include, in favour of the Lender, the current standard mortgage clause approved by the Insurance Bureau of Canada or a like clause approved in writing by the Lender;

[6] The standard mortgage clause as required by clause 6(k) of the mortgage provided, in its entirety, as follows:

It is hereby provided and agreed that:

BREACH OF CONDITIONS BY MORTGAGOR OWNER OR OCCUPANT

1. This insurance and every documented renewal thereof

- AS TO THE INTEREST OF THE MORTGAGEE ONLY THEREIN
- is and shall be in force notwithstanding any act, neglect, omission or misrepresentation attributable to the mortgagor, owner or occupant of the property insured, including transfer of interest, any vacancy or non-occupancy or the occupation of the property for purposes more hazardous than specified in the description of the risk;

PROVIDED ALWAYS that the Mortgagee shall notify forthwith the insurer (if known) of any vacancy or non-occupancy extending beyond thirty (30) consecutive days, or of any transfer of interest or increased hazard THAT SHALL COME TO THE KNOWLEDGE OF THE MORTGAGEE; and that every increase of hazard (not permitted by the policy) shall be paid for by the Mortgagee — on reasonable demand — from the date such hazard existed, according to the established scale of rates for the acceptance of such increased hazard, during the continuance of this insurance.

RIGHT OF SUBROGATION

2. Whenever the Insurer pays the Mortgagee any loss award under this policy and claims that — as to the Mortgagor or Owner — no liability therefor existed, it shall be legally subrogated to all rights of the Mortgagee against the Insured; but any subrogation shall be limited to the amount of such loss payment and the full amount of its mortgage equity in priority to the Insurer; or the Insurer may at its option pay the Mortgagee all amounts due or to become due under the mortgage or on the security

thereof, and shall thereupon receive a full assignment and transfer of the mortgage together with all securities held as collateral to the mortgage debt.

OTHER INSURANCE

3. If there be other valid and collectible insurance upon the property with loss payable to the Mortgagee — at law or in equity — then any amount payable thereunder shall be taken into account in determining the amount payable to the Mortgagee.

WHO MAY GIVE PROOF OF LOSS

4. In the absence of the insured, or the inability, refusal, or neglect of the Insured to give notice of loss or deliver the required Proof of Loss under the policy, then the Mortgagee may give the notice upon becoming aware of the loss and deliver as soon as practicable the Proof of Loss.

TERMINATION

5. The term of this mortgage clause coincides with the term of the policy; PROVIDED ALWAYS that the Insurer reserves the right to cancel the Policy as provided by Statutory provision but agrees that the Insurer will neither terminate nor alter the Policy to the prejudice of the Mortgagee without notice stipulated in such Statutory provision.

FORECLOSURE

6. Should title or ownership to said property become vested in the Mortgagee and/or assigns as owner or purchaser under foreclosure or otherwise, this insurance shall continue until expiry or cancellation for the benefit of the said Mortgagee and/or assigns.

SUBJECT TO THE TERMS OF THIS MORTGAGE CLAUSE (and these shall supersede any policy provisions in conflict therewith BUT ONLY AS TO THE INTEREST OF THE MORTGAGEE), loss under this policy is made payable to the Mortgagee.

[7] With respect to its claim to the insurance proceeds, the Crown argued that Elite was indebted to it for unremitted payroll and related amounts for the 2012 and 2013 taxation years. The Crown claimed that the amount of \$43,277.19 was deemed to be held in trust for Her Majesty in Right of Canada pursuant to its “super priority” found in sections 227(4) and (4.1) of the *Income Tax Act* (the “ITA”). The deemed trust provisions of the *ITA* provide as follows:

227(4) Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount

so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act.

(4.1) Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person and property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for a security interest (as defined in subsection 224(1.3)) would be property of the person, equal in value to the amount so deemed to be held in trust is deemed

(a) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, and

(b) to form no part of the estate or property of the person from the time the amount was so deducted or withheld, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to such a security interest

and is property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

[8] On June 9, 2016, it was ordered that the full amount of insurance monies be paid into Court, pursuant to section 21 of the *Insurance Contracts Act*, R.S.N.L. 1990, c. I-12. The order also granted leave to Nortip, the Crown and Elite to bring the matter back before the Court for determination of the entitlement to the proceeds paid into the Court.

[9] Nortip filed an Interlocutory Application on October 7, 2016 to bring the matter back before the Court. Only counsel for Nortip and the Crown appeared at that hearing, despite all parties being served.

[10] The hearing of the Interlocutory Application began on October 26, 2016, at which time it was ordered that, of the \$148,979 paid into Court, \$71,611.62 was to be paid out to Nortip. This order was made on consent from counsel for Nortip and the Crown. The order further provided that the remaining amount of

\$77,367.38 was to remain with the Court until the conclusion of the hearing of Nortip's application.

[11] The hearing for the Interlocutory Application to determine the entitlement to the funds remaining with the Court concluded on April 10, 2017. At that hearing, the Crown asserted its super priority only to its deemed trust claim of \$43,277.19. The Crown acknowledged that the amount in excess of this claim should be paid to Nortip because this amount constituted a prescribed security interest as defined in section 2201 of the *Income Tax Act Regulations*, C.R.C. 1978, c. 945 and was not subject to the deemed trust provisions. Therefore, it is the amount of \$43,277.19 that is the subject of the competing claims of Nortip and the Crown.

[12] In a decision dated December 22, 2017, the applications judge determined that the central issue in this matter was whether or not Nortip's claim to the insurance monies was a claim pursuant to a security interest (*Travelers Canada v. Elite Builders Inc.*, 2017 NLTD(G) 214). He noted that the question could also be framed as whether or not the insurance monies were property of Elite or property that would otherwise be property of Elite if not for the standard mortgage clause (at paragraph 25).

[13] The applications judge then considered the standard mortgage clause specifically. In reviewing the case law, the applications judge determined that, to examine the true nature and effect of the standard mortgage clause, there are two questions to consider. The first is whether the clause gives a mortgagee an interest in property of the mortgagor/tax debtor. The second is whether money payable pursuant to the standard mortgage clause would be money of the mortgagor/tax debtor if not for the clause. The applications judge concluded that the answer to both these questions in this case was no. He determined that the effect of the standard mortgage clause was to create a separate, independent and distinct contract of insurance between the mortgagee and the insurer. While the mortgage itself constituted a security interest, the separate contract of insurance created by the standard mortgage clause did not create a security interest within the meaning of section 227(4.1) of the *ITA*.

[14] After accepting this proposition, the applications judge determined that any money payable under the contract of insurance was not the property of the mortgagor/tax debtor because of the standard mortgage clause. The applications judge relied on the Supreme Court of Canada decision in *National Bank of Greece (Canada) v. Katsikonouris*, [1990] 2 S.C.R. 1029, 74 D.L.R. (4th) 197,

which, in his view, clarified that the effect of the standard mortgage clause is to create two separate contracts of insurance.

THE POSITION OF THE CROWN

[15] On appeal, the Crown argues that the applications judge erred in his determination that the insurance proceeds were not, and could not have been, the property of Elite “but for” the standard mortgage clause, as required by section 227(4.1) of the *ITA*. The Crown submits that this was not the relevant consideration in the “but for” analysis. According to the Crown, subsection 6(k) was the basis for Nortip’s claim to the proceeds and not the standard mortgage clause. In applying the “but for” analysis found in section 227(4.1) of the *ITA*, the analysis should be “but for” the entire mortgage between Nortip and Elite and not “but for” the standard mortgage clause. Therefore, the Crown submitted it was an error for the applications judge to conclude that the standard mortgage clause applied in this case.

[16] Even if the insurance proceeds themselves were not deemed to be held in trust for the Crown pursuant to section 227(4.1) of the *ITA*, the Crown submitted that the proceeds would nevertheless have to be paid to the Crown because they were proceeds from a deemed trust asset, meaning proceeds from the property. This, argues the Crown, is a statutory obligation imposed on the recipient of proceeds of deemed trust assets to pay those proceeds to the Crown, which serves as a second and distinct layer of protection for the Crown with respect to unremitted payroll deductions. The Crown argues that the meaning of “proceeds of property” includes insurance proceeds, as the insurance proceeds were paid as compensation for Elite’s destroyed property. Since this property was beneficially owned by Her Majesty, the Crown claims it is entitled to the remaining \$43,277.19 in insurance proceeds.

THE POSITION OF NORTIP

[17] Nortip argues that the primary issue in this case is whether the standard mortgage clause is or is not a security interest within the meaning of section 224(1.3) of the *ITA*. Nortip relies on the “two contract” theory, as discussed by La Forest J. in *Katsikonouris*, to assert that the effect of a standard mortgage clause is to create two separate and distinct contracts in one policy. Under the first contract, Nortip relies on the loss payable clause to obtain an interest in Elite’s interests in the building that are covered by Elite’s separate contract with the insurer, such as the contents of the building, other personal property, or business interruption. Under the loss payable clause, there is no contract

between Nortip and Travelers; rather, Nortip is simply designated as the recipient of the insurance payout in the event of a loss. Nortip's interest in the insurance proceeds under the loss payable clause is therefore an interest in the proceeds payable to Elite pursuant to Elite's own contract with Travelers. However, Nortip submits that it is not this first contract that is relevant to the determination of this appeal.

[18] The second contract is a separate, independent and distinct contract of insurance between the insurer (Travelers) and the mortgagee (Nortip) that is created by the standard mortgage clause. Under this contract, the standard mortgage clause insures only Nortip's interest in the building. It does not include any of the other interests covered by the loss payable clause. Through the second contract created by the standard mortgage clause, Nortip argues that it has insured its interest in the insurance proceeds, specifically. The insurance proceeds are therefore payable directly to Nortip pursuant to this second contract with Travelers.

[19] Nortip argues that a security interest, as defined in the relevant portions of the *ITA*, must create a debt obligation on the property of the debtor. Having regard to this two contract theory, Nortip argues that the insured mortgagor does not have any proprietary interest in, or entitlement to, the insurance proceeds payable pursuant to the standard mortgage clause. The proceeds are not the property of the tax debtor, which brings the proceeds outside the scope of section 227(4.1) *ITA*. Nortip further argues that money payable to a lender under a separate policy of insurance between that lender and the insurer, such as the standard mortgage clause in this case, is property belonging to the lender. Elite does not, and could not, have any interest in that money.

[20] According to Nortip, the standard mortgage clause is a simple contractual right to the insurance proceeds and it is not a security interest within the meaning of section 224(1.3) of the *ITA*. This simple contractual right to the insurance proceeds is not a secured interest.

LIST OF ISSUES

[21] The primary matter to be decided in this appeal is whether the applications judge erred in concluding that the insurance proceeds payable pursuant to the standard mortgage clause were not subject to the deemed trust in section 227(4.1) of the *ITA* and therefore payable to Nortip.

[22] In determining the matter, the primary issue is whether the standard mortgage clause gives rise to a “security interest” within the meaning of section 224(1.3) of the *ITA* and for the purposes of the deemed trust in section 227(4.1) *ITA*.

[23] A secondary issue — which was not specifically raised in the Court below but, nevertheless, within the scope of this appeal — is whether the applications judge erred in concluding that the insurance proceeds payable pursuant to the standard mortgage clause were not “proceeds of property of the tax debtor” for the purposes of section 227(4.1) of the *ITA*.

[24] In addition to these issues, there is also a preliminary objection to the Crown’s raising of what Nortip argued to be a new issue in this appeal, being that the standard mortgage clause is inoperative in this case.

STANDARD OF REVIEW

[25] The issues in this appeal primarily turn on the statutory interpretation of the deemed trust and related provisions of the *Income Tax Act (ITA)*. The parties agree that this is a question of law reviewable on a standard of correctness (*Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601 at paragraph 44).

[26] Nortip also noted that the issue of contract interpretation is relevant to the determination of this appeal, specifically the interpretation of the standard mortgage clause. Contractual interpretation generally involves questions of mixed fact and law subject to deferential review (*Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633 at paras. 50-51 and 55; *Heritage Capital Corp. v. Equitable Trust Co.*, 2016 SCC 19, [2016] 1 S.C.R. 306 at para. 21). However, contract interpretation is a question of law subject to a correctness review where: the contract is a standard form contract; the interpretation at issue is of precedential value; there is no meaningful factual matrix specific to the particular parties to assist the interpretation process; and the meaning of the standard form contract does not depend on the objective intentions of the parties (*Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23 at para. 46). I am satisfied that these conditions are present in this case and any contractual interpretation issues with respect to the standard mortgage clause are to be reviewed on a correctness standard.

ANALYSIS

Nature of Security Interest

Preliminary Issue

[27] Before addressing the main issues on appeal, it is necessary to first address the preliminary issue raised by Nortip.

[28] In its factum, the Crown argued that the standard mortgage clause was inoperative. Nortip then argued that this was a new issue on appeal, taking particular issue with respect to the use of the word “operative”.

[29] In my view, this issue is one of semantics. The operability of the standard mortgage clause in this instance goes to the heart of this appeal. While the applications judge did not use the language of whether or not this clause was *operative*, his findings on the standard mortgage clause clearly brought its application, or operation, into the scope of the appeal. The applications judge ultimate finding was that the standard mortgage clause took the property out of the ambit of the deemed trust provisions. Therefore, it cannot be said that the operation of the standard mortgage clause is a new issue on appeal.

Deemed Trust Provisions and Security Interest

[30] It is not disputed that section 227(4.1) of the *ITA* creates a deemed trust in favour of the Crown over property of the tax debtor and property held by any secured creditor of the tax debtor that, but for the secured creditor’s security interest, would be property of the tax debtor. Section 227(4.1) further provides that the proceeds of the property subject to the deemed trust shall be paid to the Receiver General in priority to all security interests in such property.

[31] Parliament has defined “security interest” in section 224(1.3) of the *ITA* as follows:

“[...] any interest in property that secures payment or performance of an obligation and includes an interest created by or arising out of a debenture, mortgage, hypothec, lien, pledge, charge, deemed or actual trust, assignment or encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for.”

[32] In *Caisse populaire Desjardins de l’Est de Drummond v. Canada*, 2009 SCC 29, [2009] 2 S.C.R. 94, the Supreme Court of Canada offered several

principles for interpreting “security interest” as defined in s. 224(1.3) of the *ITA* and for the purposes of s. 227(4.1) of the *ITA*.

[33] First, Rothstein J., writing for the Court, clarified that the definition in s. 224(1.3) of the *ITA* is the only relevant definition of “security interest” when determining the scope of a deemed trust created by s. 227(4.1) of the *ITA*. This definition is an expansive one (*Caisse populaire*, at paragraph 14).

[34] Second, an agreement between the creditor and debtor giving rise to a security interest need not take any particular form. As long as the creditor’s interest in the debtor’s property secures payment of performance of an obligation, there is a security interest within the meaning of section 224(1.3) of the *ITA* (*Caisse populaire*, at para. 15).

[35] The Court differentiated between an agreement that expressly confers on a secured creditor an interest in the property of a tax debtor to secure repayment of a debtor’s indebtedness to a secured creditor (at paras. 28 & 29) and a simple contractual right to set-off or compensation without attendant security (at para. 33). A security interest, as defined by the *ITA*, exists in the former, but not in the latter.

[36] For the reasons that follow, I would conclude that the insurance proceeds were not caught by a security interest within the meaning of s. 227(4.1) of the *ITA*.

The “Two Contract” Theory and the Standard Mortgage Clause

[37] The Supreme Court of Canada has recognized a “two contract” theory to the operation of the standard mortgage clause (*Katsikonouris*, at 1036). The standard mortgage clause creates a separate, independent and distinct contract of insurance between the insurer and the mortgagee (*Katsikonouris*, at 1054-58).

[38] Nortip argues that, under the two contract theory, the standard mortgage clause creates a separate and distinct contract of insurance between Nortip and Travelers and the proceeds are payable directly to Nortip. In turn, this means that the insurance proceeds are not the property of Elite, the tax debtor, and therefore no security interest is created within the meaning of the *ITA*.

[39] Nortip submitted that its interest under the standard mortgage clause is an interest in only the insurance proceeds, pursuant to its own separate contract with the insurer. Nortip further contended that, if a mortgagee wished to insure other interests in the property, such as interest in the building, the contents of the

building, or business interruptions, they may do so through the vehicle of a loss payable clause.

[40] Under the loss payable clause, there is no privity of contract between the insurer and the mortgagee with respect to the insurance proceeds. The mortgagee is simply designated as the person who is to be paid in the event of loss (*Katsikonouris*, at 1047).

[41] I accept that the standard mortgage clause operated as a separate contract of insurance and that the mortgagee's interest in the insurance money was payable pursuant to the standard mortgage clause. Any other interpretation of the standard mortgage clause "would strike at the very *raison d'être* of the standard mortgage clause" (*Katsikonouris*, at 1058). The standard mortgage clause is the most economical and efficient way for mortgagees to secure their interest in such proceeds (*Katsikonouris*, at 1052). It saves mortgagees the trouble of having to obtain a separate policy on a separate piece of paper (*Katsikonouris*, at 1056). It would defy logic to determine that Nortip insured only an interest in the property through the loss payable clause and did not take the added step to insure its own interests in the insurance proceeds through the standard mortgage clause.

[42] Once the two contract theory is accepted, it follows that Nortip's interest is not insured on the same terms as a "simple beneficiary of the mortgagor" (*Katsikonouris*, at 1052, 1053-54); and Nortip's insurance is not "dependent on the course of action between the insurer and the mortgagor" (*Katsikonouris*, at 1058).

[43] The standard mortgage clause, by virtue of the two contract theory, conferred a contractual right on Nortip to the insurance proceeds – not an interest in Elite's property – to secure a debt obligation. The standard mortgage clause therefore is a "simple contractual right" to the insurance proceeds "without attendant security" (*Caisse populaire*, at para. 33). The effect of this is that the standard mortgage clause did not create a security interest because it did not confer on Nortip an interest in the specific property of Elite.

[44] As previously discussed, in order to give rise to a "security interest" within the meaning of s. 224(1.3) of the *ITA*, and for the purposes of 227(4.1) of the *ITA*, the standard mortgage clause must give the mortgagee an interest in property belonging to the tax debtor/mortgagor. In order for the deemed trust provisions to apply to this case, Elite must have been entitled to the property in question: the insurance proceeds payable pursuant to the standard mortgage

clause. Only then could it follow that “but for” the standard mortgage clause, those particular insurance proceeds would be payable to Elite.

[45] Here, the insurance proceeds were payable to Nortip under its separate policy of insurance, with Travelers as insurer, created by the standard mortgage clause. Therefore, the insurance proceeds “belonged” to Nortip and could never have been considered to be property of the debtor.

[46] The definition of “security interest” in s. 224(1.3) of the *ITA* “does not permit Her Majesty to attach Her beneficial interest to property which ... in law belongs to a party other than the tax debtor”; and the deemed trust provisions in s. 227(4.1) of the *ITA* “are manifestly directed towards the property of the tax debtor” (*Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411, 143 D.L.R. (4th) 385 per Gonthier J. at para. 39). The applications judge correctly decided that the “effect of the deemed trust provisions is not to extend the deemed trust to property over which the tax debtor does not have any interest” (Application Decision, at paragraph 56).

Proceeds of Property

[47] The Crown argued that a second layer of protection for the Crown with respect to unremitted payroll deductions exists in section 227(4.1) of the *ITA*. Counsel for the Crown argued that “proceeds of such property” in s. 227(4.1) of the *ITA* includes insurance proceeds payable in respect of the property of the tax debtor, in addition to sale proceeds or proceeds of realization of the property of the tax debtor. Consequently, the insurance proceeds payable pursuant to the standard mortgage clause would fall under this definition.

[48] The exact phrase “proceeds of such property” is not defined anywhere in the *ITA*. The Crown argued that section 54 of the *ITA* defines “proceeds of disposition” as including “compensation for property destroyed and any amount payable under a policy of insurance in respect of loss or destruction of property”. In response, counsel for Nortip argued that this definition of “proceeds of disposition” of property in section 54 of the *ITA* only applies in Subdivision C of Division B of Part I *ITA* (ss. 38 through 55 *ITA*) and it does not apply for the purposes of s. 227(4.1).

[49] In my view, it is inappropriate to rely on the definition of “proceeds of disposition” elsewhere in the *Act* to infer or read in a definition for the purposes of s. 227(4.1). As Nortip noted, Subdivision C of Division B of Part I of the *ITA* deals with the determination and calculation of taxable capital gains and

allowable capital losses and the rules associated with this determination for the purposes of calculating a taxpayer's income. Therefore, this portion of the *Act* has a specific and discrete purpose that is separate from the deemed trust provisions. Any definition of "proceeds of disposition" in Subdivision C should therefore not be attributed to the definition of "proceeds of such property" in s. 227(4.1).

[50] The same definition of "proceeds of disposition" of property is also found in s. 13(21) of the *ITA*, minus the exclusions applicable in section 54. For similar reasons, the definition of "proceeds of disposition" of property in s. 13(21) of the *ITA* does not apply for the purposes of 227(4.1) of the *ITA*.

[51] If Parliament intended to include insurance proceeds in the meaning of the "proceeds of such property" for the purposes of s. 227(4.1) of the *ITA*, Parliament could have reproduced the definition used elsewhere in the *Act*, or expressly defined its meaning in the context of the deemed trust provisions, as it has done in other portions of the *Act*.

[52] Absent the inclusion of this definition in the specific context of the deemed trust provisions, I cannot conclude that the definition has any relevance to or is determinative of whether the insurance proceeds should be included in the meaning of "proceeds of such property." The Crown submitted no authority for arriving at this conclusion other than the definition in other portions of the *ITA* and, at the hearing of this appeal, counsel for the Crown acknowledged that these other portions of the *ITA* do not provide definitive direction to this Court.

[53] The phrase "proceeds of such property" should not, when read in context with section 248(1) of the *ITA*, include insurance proceeds that a tax debtor is not actually entitled to receive because section 248(1) defines a "disposition" as "any transaction or event entitling a taxpayer to proceeds of disposition of the property". For the reasons discussed above, Elite was never entitled to receive the insurance proceeds.

SUMMARY AND DISPOSITION

[54] Elite is not entitled to any amount payable pursuant to the standard mortgage clause. Such insurance proceeds are not property of Elite, or property of Nortip that but for a "security interest" would be property of Elite. Nor are they "proceeds of such property" for the purposes of section 227(4.1) of the *ITA*. In the result, the deemed trust and super priority lien in favour of the Her

Majesty in section 227(4.1) of the *ITA* does not attach to such insurance proceeds.

[55] I would dismiss the appeal and award costs under column 3 of the scale of costs under the *Court of Appeal Rules*.

M. F. Harrington J.A.

I concur: _____

D. E. Fry C.J.N.L.

I concur: _____

C. W. White J.A.