

John Ritchie Ltd. V. Canadian Bank of Commerce - Trust Fund Provisions of Mechanics' Lien Act

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Commentary

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Case Comment

JOHN RITCHIE LTD. v. CANADIAN BANK OF COMMERCE — TRUST FUND PROVISIONS OF MECHANICS' LIEN ACT. — Within the past ten years, an increasing volume of litigation has come before the Ontario Courts involving the trust fund provisions of the *Mechanics' Lien Act*.¹ Although the trust fund section was originally enacted in 1942,² it does not appear to have been considered by any Ontario court until 1955.³ Since then, the Courts have had frequent opportunity to examine the nature of the trust fund created by it and to consider the extent of its operation.⁴ The result of this judicial exercise has been the gradual delineation of the general features of this protean trust and the development of tests respecting its operation. However, on occasion, it is complained⁵ that the picture is incomplete; that there is an important and as yet unappreciated limitation on the statutory trust created by s. 3. In the recent case of *John Ritchie Ltd. v. Canadian Bank of Commerce*⁶ such an argument was advanced. The purpose of this comment, briefly, is to examine the merits of this contention. But first, it may be useful, for the purposes of exposition, to sketch in some of the background. The trust arises by reason of s. 3(1) which provides as follows:

3(1) All sums received by a builder or contractor or a subcontractor on account of the contract price are and constitute a trust fund in the hands of the builder or contractor, or of the subcontractor, as the case may be, for the benefit of the proprietor, builder or contractor, subcontractors, Workmen's Compensation Board, workmen and persons who have supplied material on account of the contract, and the builder or contractor or the subcontractor, as the case may be, is the trustee of all sums so received by him, and until all workmen and all persons who have supplied material on the contract and all subcontractors are paid for work done or material supplied on the contract and the Workmen's Compensation Board is paid any assessment with respect thereto, may not appropriate or convert any part thereof to his own use or to any use not authorized by the trust.

For the purposes of analysis, it will be helpful to separate the constituent elements of s. 3(1) and to consider them in the context of a typical construction contract. First, it is clear that the trust comes

¹ R.S.O. 1960, c. 233, s. 3.

² 1942, c. 34, s. 21; subsections (2) and (3) were introduced in 1952 c. 54, s. 1).

³ *Bank of Montreal v. Tp. of Sidney et al.*, [1955] 4 D.L.R. 87; [1955] O.W.N. 581.

⁴ For a discussion of the trust fund cases in Ontario and other Canadian jurisdictions. See: Macklem and Bristow, *Mechanics' Liens in Canada* Toronto: Carswell Co. Ltd. (1962), see chapter 9.

⁵ The earliest case in which an objection of this sort was raised in a rather unsophisticated fashion is *Re Walter Davidson Co.* (1957), 10 D.L.R. (2d) 77; [1957] O.W.N. 223, 36 C.B.R. 65.

⁶ (1963) 38 D.L.R. (2d) 546, (1963) 5 C.B.R. (N.S.) 28, [1963] 2 O.R. 116. All citations of this case in this article will be from the Dominion Law Reports.

into existence the moment funds are "received" by the contractor "on account of the contract price" from the owner, and that those funds are impressed with the trust. Secondly, the contractor as trustee is required to hold the moneys for the benefit of a designated class of beneficiaries.⁷ Lastly, the contractor-trustee is enjoined, by the concluding words of the subsection, from converting or appropriating any part of the fund "to his own use or to any use not authorized by the trust" until all those who have supplied labour or materials on the contract have been paid.

The manifest intention of the Legislature in creating the trust is to provide additional protection, beyond that of the land itself and the holdback requirement, to those who made possible the actual improvement of real property.⁸ Without such protection, the traditional lien claimant would be left with only the holdback to look to if the owner has otherwise met his obligations under the contract to the contractor, and if in the meantime the contractor has become insolvent and disposed of the moneys elsewhere. Accordingly, the right of a beneficiary to share in the trust fund is not dependent upon the existence of an enforceable lien under the other provisions of the Act.⁹ Indeed, it has been held by the Supreme Court of Canada that the trust is operative even in cases where no enforceable lien could have arisen, as is the case where work is done on a public highway.¹⁰ In this respect, the security created by s. 3 is to be treated as if conferred by separate statute.¹¹

The cases which have given rise to difficulty in this area have usually involved the additional element of a chartered bank financing the contractor's operations by way of an overdraft account. In the typical illustration, the contractor, being pressed financially, deposits with the bank funds received from the contract, which are applied to reduce his overdraft. When the contractor becomes insolvent, the unpaid workmen, suppliers and subcontractors sue the bank claiming an unlawful conversion of trust funds.

The cases have broken down into two categories, which for the sake of convenience, may be described as "assignment" and "deposit" cases¹²; each group is represented by a Supreme Court of Canada decision. (1) *Assignments*: These are cases in which the bank has taken a general assignment of all book debts owing to the contractor

⁷ It will be noticed that the "contractor" is specifically mentioned as one of the possible beneficiaries of the trust.

⁸ Statements as to the legislative purpose in enacting this provision may be found in *Minneapolis-Honeywell Regulator Co. v. Empire Brass Mfg. Co.*, [1955] 3 D.L.R. 561, [1955] S.C.R. 694 per Rand J. at page 696 and in *Bank of Montreal v. Tp. of Sidney*, [1955] O.W.N. 581, 583.

⁹ *Canadian Bank of Commerce v. T. McAvity & Sons Ltd.* (1959), 17 D.L.R. (2d) 529, [1955] S.C.R. 478, 38 C.B.R. 10 at page 13 per Rand J.

¹⁰ *Ibid.*

¹¹ *Ibid.* Note, s. 2, which precludes the existence of an enforceable lien with respect to work done on a public highway commences with the words "Nothing in this Act shall extend to any public street or highway . . ."

¹² For an analysis of these cases see: Comment in 21 Faculty of Law Review (University of Toronto) 135.

and receives by virtue of the general assignment funds which are subject to the trust under s. 3. The Supreme Court of Canada in *Minneapolis Honeywell Regulator Co. v. Empire Brass Mfg. Co.*¹³ held that in such circumstances the position of the bank as assignee was no higher than that of the contractor, and that if the contractor had committed a breach of trust, the bank took subject to it. (2) *Deposits*: Where the bank either has no such assignment or does not receive the fund in question by virtue of an assignment, but rather by way of deposit, the test for liability that was laid down in the case of *John M. M. Troup v. Royal Bank*¹⁴ is: did the bank know of the breach of trust on the part of the contractor and participate therein, or was the deposit received in the ordinary course of business. In the latter instance only will the bank be absolved and permitted to keep the money.¹⁵

While the case of *John Ritchie Ltd. v. Canadian Bank of Commerce*¹⁶ involved a general assignment of book debts, it properly falls within the second category¹⁷ and there is little doubt on the evidence as found by Gale J. that, on the test laid down in the *Troup* case, the bank was guilty of complicity in the breach of trust and would be required to disgorge the money.¹⁸ In other respects the *Ritchie* case is indistinguishable from those cases in which the bank's liability has consistently been established. It is for this reason that counsel for the bank was driven to allege an important limitation on the security created by s. 3.

In this case a general contractor, Gels Limited, had in December of 1959, undertaken the construction of a public school in the City of Toronto, pursuant to a contract with the City's Board of Education, calling for a total payment to Gels of \$833,000. In order to finance its operations, Gels had arranged a line of credit, which was not to exceed \$45,000, at a branch of the defendant bank, where it maintained a current account and did all its banking. All deposits and withdrawals made by Gels during the period were with respect to this current account. Collateral security held by the bank included personal guarantees and a general assignment of all Gels' accounts receivable. Part of the work under the contract was to be performed by employees

¹³ *Supra*, footnote 8. A discussion of this case is to be found in 34 C.B.R. 855.

¹⁴ (1962) 34 D.L.R. (2d) 566, [1962] S.C.R. 487, 3 C.B.R. (N.S.) 224. In this case the Supreme Court also upheld the constitutional validity of s. 3; see the judgment of Judson J. at page 571 of the Dominion Law Reports.

¹⁵ The New York Lien Law contains a provision similar to s. 3. Its effective operation is described in an article by Meyer "Trust Fund Provisions of the New York Mechanics' Lien Law", 10 Buffalo Law Review 314 (1961).

¹⁶ *Supra*, footnote (6).

¹⁷ In the *Troup* case the bank held a general assignment of book debts, but the majority of the Court held that nothing turned on this since the moneys in question were taken by way of deposit rather than under the assignment (Locke J., dissenting). See also the recent case of *Pillington Glass v. Canadian Imperial Bank of Commerce* (1964), 42 D.L.R. (2d) 504.

¹⁸ *Supra*, footnote (6). A careful examination of the evidence respecting the bank's participation in the breach of trust is to be found at pp. 561-571 of the report.

and suppliers to whom Gels was directly responsible, and part was to be done by subcontractors.

As work progressed on the construction project, Gels would submit requisitions, at approximately monthly intervals, for an interim payment by the Board. These requisitions represented the value of all work done on the contract up to the date of requisition. When the requisition had received the approval of certain intermediaries and an architect's certificate authorizing payment had issued, the Board would respond to the requisition by paying the authorized amount less the required holdback of 15%. The inevitable time lag between the respective dates of requisition and payment was often as long as a month. In practice, Gels would pay its own workmen and suppliers whenever wages were earned or invoices for materials received. By contrast, the subcontractors would not be paid until a draw had been received from the owner and then only to the extent of reimbursement for work done or materials supplied at the date of requisition. This meant that because of the necessary time lag between the date of the writing up of the requisition and the date of the draw being received, there were at all material times accounts owing to the subcontractors. This was because the payment which the subcontractors received from Gels only covered the work done up to the date of the requisition and did not reimburse them for work done since that date. Normally, whenever Gels received a progress payment from the owner, it would deposit the cheque in its current account at the bank, part of which would be applied to reduce the overdraft already incurred. Then Gels would issue cheques to the subcontractors to the extent of their participation in the requisition.

The material events, for our purposes, occurred in the months of September and October of 1960. By August of that year it had become apparent that Gels was in serious financial difficulty and the situation did not improve in the succeeding months. On September 30th Gels submitted its requisition for a draw of approximately \$32,000. Meanwhile, the bank, being doubtful as to the solvency of its debtor, decided to permit Gels no further extension of credit and to liquidate the overdraft at the next draw. On October 27th, when the Board issued its cheque for \$31,999.01, Gels account showed a debit balance of over \$38,000. Following its usual practice, Gels deposited the cheque into the account and proceeded to issue cheques to its subcontractors. The bank manager, however, applied the proceeds of the cheque in reduction of the overdraft and thereafter refused to honour cheques drawn on the account, including some \$19,000 payable to the subcontractors.¹⁹

In these circumstances the plaintiff, a plumbing and heating subcontractor, brought an action, for itself and on behalf of all other subcontractors with outstanding claims, for a declaration that the

¹⁹ *Ibid.* A more extensive treatment of the facts will be found in the report at pp. 547-554.

funds so received by the bank were impressed with a trust in their favour, and for an order that the bank be required to disgorge an equivalent amount. It should be emphasized that we are not here concerned with the question of liability based on notice of breach of trust. It is clear from the evidence, which Gale J. examined at great length, that if a breach of trust on the part of the contractor could be established, the bank had notice of it and participated therein, there being no exempting circumstances such as existed in the *Troup* case. But the bank resisted the claim on another ground altogether. It contended that no such trust affected these moneys.²⁰

This argument was based on the established fact that between September 30th and October 27th, the respective dates of requisition and payment, Gels had itself spent more on the School project than the total amount of the October 27th draw. Under subsection (1) the contractor is a beneficiary of the trust to the extent of his personal contribution toward the work done under the contract. This Gels had done, it was argued, in paying its own employees and suppliers in advance of the draw. Further, it had been held in the *Minneapolis-Honeywell* case, that a trustee is not required to effect a rateable distribution of the fund among the *cestuis que trust*, but may discriminate between them.²¹ Thus it was strongly urged that Gels had an unconditional right to the use of the funds, because it had already paid to some of the beneficiaries amounts in excess of the total value of the draw. Therefore, Gels could, with impunity, appropriate the whole amount of the draw to itself as reimbursement for sums which it had already expended under the contract. On this analysis, it made no difference that, at the time the appropriation was made, there existed outstanding claims of subcontractors.

Counsel for the bank reasoned that s. 3(1) contemplates the contract price as the limit of the trust fund, since it provides: "All sums received by . . . a contractor . . . on account of the contract price are and constitute a trust fund". It followed, that if a contractor had paid out money on the job, he must be able to reimburse himself to that extent out of the next draw which he receives without being in breach of trust. Otherwise he would never be able to get his own money out of a project or repay the bank, because there were always unpaid beneficiaries, whose claims would not even have been satisfied by payment of the full amount of the draw, since it related only to work done up to the date of requisition. Also, it was urged, that to hold otherwise would permit beneficiaries other than the contractor, to have security not only in the amount of the contract price, but also

²⁰ *Ibid.* The argument of counsel for the bank is summarized at pp. 556-559 of the report.

²¹ *Supra*, footnote (8) per Rand J. at p. 697: "The contractor has in this respect a discretionary power and his obligation is satisfied when the trust moneys are paid out to persons entitled whatever the division." The rule would appear to be different when bankruptcy occurs and the trustee in Bankruptcy takes over the administration of the trust fund. In such a case a rateable distribution between entitled beneficiaries is to be effected *In re Purtherbough Construction Co.* (1958), 37 C.B.R. 6.

to the extent of any moneys paid to them by the contractor. Finally, it was submitted that the addition of subsection (3) in 1952 merely served to confirm the foregoing analysis of s. 3(1). Subsection (3) provides:

3(3) Notwithstanding the other provisions of this section, where a builder, contractor or subcontractor has paid in whole or in part for any materials supplied on account of the contract, or any workman or subcontractor who has performed any work or services or placed or furnished any material in respect of such contract, the retention by such builder, contractor or subcontractor of any amount so paid by him shall not be deemed an appropriation or conversion thereof to his own use or to any use not authorized by the trust.

Mr. Justice Gale, while agreeing with the logic of the bank's argument, nevertheless considered himself bound by a previous decision of the Ontario Court of Appeal in *Fonthill Lumber Ltd. v. Bank of Montreal*²² and decided in favour of the subcontractors on this point. It is not the purpose of this comment to criticize the result reached by Gale J. Given the existing state of authority his conclusion was inevitable. In the *Fonthill* case, where a similar argument²³ had been advanced on behalf of the Bank of Montreal, Schroeder J.A., delivering the judgment of the court, held, that while s. 3(3) permitted the contractor to "retain" the moneys in question, without incurring a breach of trust, this protection did not extend to a payment by the contractor into his overdrawn account. He dismissed the bank's contention in this way:

It was urged that the bank manager might have believed that the contractor had paid out of his own money for the materials supplied on account of the contracts in question or for work performed thereon with the result, that in using the moneys on deposit to pay his own indebtedness to the bank he was not to be deemed to be appropriating or converting those moneys by virtue of the provisions of s. 3(3) of the *Mechanics' Lien Act*. Obviously the fallacy of this argument lies in the fact that he was thereby divesting himself of the money, and s. 3(3) only prevents the retention thereof by the builder from operating as a wrongful appropriation or conversion within the meaning of this section.²⁴

Quite apart from the holding in the *Fonthill* case, there is another difficulty with the argument made on behalf of the bank in the *Ritchie* case, which should be examined. It will be remembered that counsel for the bank was at great pains to indicate that the provisions of s. 3(3) were merely confirmatory of the actual operation of s. 3(1) in the circumstances which obtained in that case.²⁵ In focusing its argument on s. 3(1), counsel perhaps hoped to avoid the *Fonthill* case, but at the same time, it is submitted, he ignored the important distinction between the two subsections. While it may be true that the contractor under s. 3(1), in addition to his duties as trustee of the fund he receives, is also a beneficiary to the extent of his financial

²² (1959) 19 D.L.R. (2d) 618, [1959] O.R. 451, 38 C.B.R. 68.

²³ *Ibid.*, p. 460 O.R. for the argument of counsel for the bank.

²⁴ *Ibid.*, p. 633 D.L.R., p. 470 O.R. p. 86 C.B.R.

²⁵ *Ritchie v. Canadian Bank of Commerce*, at p. 556. *Supra*, footnote 6.

participation in the contract,²⁶ nevertheless, the concluding words of the subsection impose an absolute prohibition against his appropriating or converting any part of the fund "*to his own use or to any use not authorized by the trust*" until all those who have furnished labour and materials on the contract have been paid. The use of the disjunctive "or" in the words italicized above suggests that while an appropriation by a contractor to his own use might otherwise be considered to be permissible, that possibility is expressly foreclosed by the inclusion of the words "may not appropriate or convert any part thereof *to his own use*".²⁷ If this analysis is correct, then it is apparent that s. 3(1) enjoins the contractor from preferring himself as a beneficiary, so long as there are accounts which remain to be paid to the other beneficiaries. In simpler language, s. 3(1) has given a priority to the claims of the beneficiaries other than the contractor. However, it is submitted, that this general proposition is subject to the provisions of subsection (3). The argument which counsel for the bank addressed to s. 3(1) is equally applicable to s. 3(3) and should have been put on this footing. To have done so, however, would have necessitated meeting the decision of the Court of Appeal in the *Fonthill* case head on, a course, which at trial, counsel for the bank would be little inclined to pursue.

Properly viewed, subsection (3) is an exception to the provisions of s. 3(1). In an earlier case²⁸ the view was expressed that s. 3(3) was merely a saving provision from the penalty imposed for breach of trust by s. 3(2). However, this interpretation does not appear to be borne out by the language of the subsection. The opening words of s. 3(3) are: "*Notwithstanding the other provisions of this section . . .*". It would appear, therefore, that if s. 3(3) contains any exempting provisions with respect to activities which may or may not constitute a breach of trust, those provisions must apply with equal force to both s. 3(1) and s. 3(2). Had the legislative intention been otherwise, it would have been a simple matter for the Legislature to use some such words as "Notwithstanding the provisions of subsection

²⁶ See: footnote (7) *supra*. Under the New York *Lien Law* a contractor is precluded from reducing the trust fund by purporting to share in beneficiary rights accorded to materialmen under the statute (s. 70, s. 71(2)(a)) *Louis Greenberg Inc. v. Instant Heat & Power Corp.*, 227 N.Y.S. 2d 76 (1962). As a result, the contractor has no "property" rights in the fund he receives. *Aquilino v. United States*, 363 U.S. 509 (1960). But the situation is different with respect to banks financing a contractor under a general assignment of book debts. There is a provision for notice filing of such assignments and to the extent that money advanced by a bank is used to pay beneficiaries of the trust, the bank is given a priority, assuming that the bank has otherwise complied with the filing requirements. See Meyer *op. cit.* pp. 316-317. A greater latitude had been extended to both the contractor and the bank prior to the 1959 amendment. See for example: *Bray Bros. v. Marine Trust Co. of Buffalo*, 35 N.Y.S. (2d) 356 (1937).

²⁷ *Bank of Montreal v. Tp. of Sidney*, at pp. 583-584. *Supra*, footnote (3). However, in this case s. 3(3) was not considered beyond Le Bel J.'s statement that the purpose of s. 3 had been "made even clearer by the recent addition of two subsections" (subsections (2) and (3)).

²⁸ *Re Walter Davidson Co. v. Supra*, footnote (5). The marginal note opposite s. 3(3) is "saving", but it is clear that marginal notes may not be sought in aid of interpretation. See: *Craies on Statute Law*, 5th Ed. pp. 183-184.

(2) . . .”, since both provisions were introduced to the Act at the same time.

The key to the operation of s. 3(3) is the word “retention”. The subsection tells us that, where a contractor has put his own money into a construction project, the retention by him of an equivalent amount, from the moneys paid to him by the owner on account of the contract price, is not to be deemed a breach of trust. It is apparent from the statement of Schroeder J.A. in the *Fonthill* case, quoted above, that he viewed the contractor’s right under s. 3(3) to retain the fund in question as being in the nature of a conditional receipt. In his view, so long as the contractor continued to hold the fund, he was within the protection afforded him by the subsection, but the moment he deposited those moneys into his overdrawn account he was guilty of a breach of trust. This act constituted a “divesting” of the trust moneys and fell outside the protection of subsection (3).

By contrast, Gale J. would have been willing, in the absence of authority to the contrary, to take a less restrictive view of the meaning of the word “retention”. He expressed himself in this way.

Left to myself, I would not have been inclined to construe “retention” as it appears in s.s. (3) as limited to “holding in one’s personal custody until the contract price is paid”. Certainly, had such a meaning been contemplated it could have been easily and clearly expressed, and that being so, I would have thought that the word was used in its ordinary and natural sense, denoting the idea that a contractor or builder who receives a payment on account may unconditionally keep and use in whatever way he chooses the equivalent of all the moneys which he has paid the beneficiaries.²⁹

In another statement, the learned trial judge explains some of the reasons which would have prompted that conclusion:

I find it difficult to accept the proposition that the true meaning of the section is to have the effect of giving to beneficiaries, other than the contractor, security in the amount of the contract price plus an amount equivalent to whatever moneys the contractor himself puts into the project. Surely the intent of s.s. (3), to have any meaning, must be that when a contractor advances money, an equal amount is thereby released from the trust when he received the next draw. In other words, the trust is discharged if he pays the workmen and suppliers and subtrades or repays to himself that which he has already previously advanced to other beneficiaries. It allows the contractor to put out funds of his own without fear of losing them entirely. If it were otherwise, the building industry would have ground almost to a halt long ago, a consequence which, as it seems to me, would be completely out of harmony with the purpose of the enactment.³⁰

Assuming for the moment the interpretation of “retention” adopted in the *Fonthill* case to be the correct one, it will be pertinent to inquire what further rights, if any, are accorded the contractor by virtue of subsection (3). If all the contractor can do is hold the moneys he has received on account, without being in breach of trust, how is this any different from his obligations under s. 3(1)? Subsection (1) says nothing which requires the contractor to pay the

²⁹ *Ritchie v. Canadian Bank of Commerce, supra*, footnote (6) at p. 559.

³⁰ *Ibid.*, pp. 558-559.

beneficiaries, it merely stipulates that he is to pay the beneficiaries before he pays himself or otherwise disposes of the trust moneys. It is a familiar rule of statutory construction that where words in a statute are susceptible of some reasonable meaning, such a construction ought to be adopted in preference to another which renders the words meaningless or redundant of some other provision in the enactment. It is submitted, however, that if we are to follow the literal construction of "retention" that was adopted in the *Fonthill* case, a redundancy is the inescapable result. "Retention" in this strict sense in no way enlarges or diminishes the contractor's obligations as trustee imposed by s. 3(1). Also it would seem that a bare right given to a contractor to retain the moneys he has received without the further right of freely disposing of those moneys (except for trust purposes), would be commercially valueless. Therefore, it is submitted, that the broader meaning of the word "retention", in the sense, suggested by Gale J., of an unconditional receipt, is the better interpretation.

An interesting contrast in interpretive approach is to be found in several cases involving s. 3, in which it was argued that because the contractor had not actually received the moneys sought to be impressed with the trust, there was in fact no trust with respect to those moneys. In one case,³¹ funds were paid by the owner directly to the assignee of the contractor's accounts receivable under a general assignment; in another,³² the owner paid the fund in question into court when the contractor became insolvent. In neither case did the court have any difficulty in declaring that the trust had come into existence, notwithstanding s. 3(1) specifically provides: "All sums received by a builder or contractor or a subcontractor on account of the contract price are and constitute a trust fund *in the hands of* builder or contractor or of the subcontractor. . . ." While the language clearly suggested actual physical receipt by the contractor, in neither instance did the court find such a literal interpretation apposite, it being the purpose of the enactment in other respects to embrace the transactions in question.

This brings us to a question, already discussed in part, *viz.*: what was the legislative intention in enacting section 3 of the *Mechanics' Lien Act*? At least, one of the primary evils which the legislation was designed to eliminate was the notorious practice of "pyramiding" whereby a contractor uses moneys he received on one contract, to finance his operations on other contracts. If when the contractor becomes insolvent the owner has discharged all his obligations under the contract, the unpaid workmen and suppliers may suddenly find themselves without any security, beyond that of the holdback. The present section remedies this situation by requiring that all moneys

³¹ *Minneapolis-Honeywell v. Empire Brass*, *supra*, footnote 8.

³² *Royal Bank v. Wilson* (1963), 42 W.W.R. 1 (Man. C.A.). See also: *Re Watson and Murchison* (1963), 40 D.L.R. (2d) 1047 (B.C.S.C.).

paid to the contractor on account of the contract price are to be held for the benefit of those persons who have supplied labour and materials on the contract. It is submitted, however, that it is entirely in keeping with this broad objective of preserving the contract moneys for the unpaid beneficiaries, to concede that if some of those beneficiaries have been paid by the contractor in advance of the draw being received, an equivalent amount ought to be released from the trust when payment by the owner is actually made. The beneficiaries are not being deprived of the value of the draw, although admittedly they may receive payment at a point in time prior to its receipt by the contractor; and that fact should not be obscured by the later bankruptcy of the contractor and the discontinuance of his operations. It is not possible, we submit, looking at the section to say that the beneficiaries are entitled to security greater than the value of the draw.³³ Further, it cannot be complained that the contractor has failed to effect a rateable distribution in paying some beneficiaries and not others, because we have it on the highest authority³⁴ that he may discriminate between them. Since the language of s. 3(3) is plainly susceptible of this interpretation, it is therefore submitted that the *Fonthill* case ought not to be followed in this respect in the future.

The utility of permitting the contractor this latitude should be obvious. Lending institutions, principally banks, will be able to advance money to contractors with greater certainty of repayment unaffected by trust obligations. The contractor on his part, will know that any money he may wish to expend on the contract will not be tied up indefinitely. At the same time, the beneficiaries of the trust will still be getting the full value of any payments made by the owner. In addition, much of the uncertainty which has to date surrounded the administration of the trust will be dispelled. Finally, the inequities which seem inevitably to flow from the *Fonthill* decision would be avoided. If, however, judicial adoption of this interpretation is not forthcoming, we may be compelled to agree with the gloomy prediction of one writer who commented: "If the chartered banks are to continue their normal financing of the operations of contractors, then a speedy repeal of section 3 appears to be indicated".³⁵

J. T. KENNISH, A.B.*

³³ *Ritchie v. Canadian Bank of Commerce*, per Gale J. at p. 559: "... it must be remembered that under s.s. (3) the contractor may only retain that which he has paid out on the contract. True, he may reimburse himself for all that he has expended in this way, and by doing so perhaps compel the subcontractors to eventually look to the holdback for the balance of their moneys, but that is the nature of the protection afforded by this particular section and any subcontractor who wished better security would have to arrange for it in his contract." (my italics).

³⁴ *Minneapolis-Honeywell v. Empire Brass*, see *supra*, footnote 21.

³⁵ Comment by Houlden (1959-60) 37 Can. Bar Rev. 5. At the time of writing the *Ritchie* case is on appeal in the Ontario Court of Appeal; however, no decision has yet been given.

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