

# TAB 5

Bank of Montreal v. i Trade Finance Inc., 2011 SCC 26, 2011 CarswellOnt 3306

2011 SCC 26, 2011 CarswellOnt 3306, 2011 CarswellOnt 3307, [2011] 2 S.C.R. 360...

**Most Negative Treatment:** Distinguished

**Most Recent Distinguished:** *Jer v. Samji* | 2013 BCSC 1671, 2013 CarswellBC 2725, [2013] B.C.J. No. 1993, 232 A.C.W.S. (3d) 588, [2013] B.C.W.L.D. 8565 | (B.C. S.C., Sep 10, 2013)

2011 SCC 26  
Supreme Court of Canada

Bank of Montreal v. i Trade Finance Inc.

2011 CarswellOnt 3306, 2011 CarswellOnt 3307, 2011 SCC 26, [2011] 2 S.C.R. 360, 108 O.R. (3d) 80 (note), 17 P.P.S.A.C. (3d) 250, 201 A.C.W.S. (3d) 823, 276 O.A.C. 141, 332 D.L.R. (4th) 193, 416 N.R. 166, 77 C.B.R. (5th) 231, J.E. 2011-880

### **i Trade Finance Inc. (Appellant) and Bank of Montreal (Respondent)**

Binnie, LeBel, Deschamps, Fish, Charron, Rothstein, Cromwell JJ.

Heard: November 4, 2010  
Judgment: May 20, 2011  
Docket: 33394

Proceedings: affirming *Bank of Montreal v. i Trade Finance Inc.* (2009), 2009 ONCA 615, 310 D.L.R. (4th) 315, 56 C.B.R. (5th) 161, 2009 CarswellOnt 4782, 15 P.P.S.A.C. (3d) 188, 96 O.R. (3d) 561, (sub nom. *i Trade Finance Inc. v. Webworx Inc.*) 252 O.A.C. 291 (Ont. C.A.)

Counsel: Benjamin Salsberg, Fay Zalberg for Appellant  
Joshua J. Siegel, Michael Collis for Respondent

Subject: Restitution; Estates and Trusts; Corporate and Commercial; Insolvency; Contracts

#### **Related Abridgment Classifications**

Estates and trusts

III Trustees

III.3 Breach of trust

III.3.d Remedies

III.3.d.ii Against third parties

III.3.d.ii.A Tracing

III.3.d.ii.A.5 Property bought with trust funds

Personal property security

I Nature and scope of legislation

I.10 Miscellaneous

Personal property security

II Attachment of security interest

II.1 Elements

II.1.a Debtor's interest

Restitution and unjust enrichment

II Benefits conferred under mistake

II.1 Mistake of fact

Bank of Montreal v. i Trade Finance Inc., 2011 SCC 26, 2011 CarswellOnt 3306

2011 SCC 26, 2011 CarswellOnt 3306, 2011 CarswellOnt 3307, [2011] 2 S.C.R. 360...

## Headnote

Restitution and unjust enrichment --- Benefits conferred under mistake — Mistake of fact — Miscellaneous

I Inc. was induced to advance substantial sum of money to W Inc. — Advances were made in context of fraudulent scheme perpetrated by W Inc.'s president, A, and others — A and his spouse pledged certain shares credited to investment account, which were purchased by A with funds coming from monies advanced to W Inc. by I Inc., to bank for extension by bank of credit limit on credit card account — After fraud was discovered, I Inc. obtained judgment imposing constructive trust over all assets held by W Inc. and A that were purchased with funds fraudulently obtained from I Inc., and granting tracing order allowing tracing of those funds into hands of parties other than bona fide purchasers for value without notice — I Inc. brought successful motion for declaration that it was entitled to proceeds of sale of shares credited to investment account to exclusion of bank — Bank's appeal was allowed — I Inc. appealed — Appeal dismissed — I Inc.'s argument that it had prima facie right to recover monies paid under mistake of fact could not succeed — Principles respecting recovery of mistaken payments applied as between payor and payee — Bank was not payee, so those principles were inapplicable here.

Estates and trusts --- Trustees — Breach of trust — Remedies — Against third parties — Tracing — Property bought with trust funds

I Inc. was induced to advance substantial sum of money to W Inc. — Advances were made in context of fraudulent scheme perpetrated by W Inc.'s president, A, and others — A and his spouse pledged certain shares credited to investment account, which were purchased by A with funds coming from monies advanced to W Inc. by I Inc., to bank for extension by bank of credit limit on credit card account — After fraud was discovered, I Inc. obtained judgment imposing constructive trust over all assets held by W Inc. and A that were purchased with funds fraudulently obtained from I Inc., and granting tracing order allowing tracing of those funds into hands of parties other than bona fide purchasers for value without notice — I Inc. brought successful motion for declaration that it was entitled to proceeds of sale of shares credited to investment account to exclusion of bank — Bank's appeal was allowed — I Inc. appealed — Appeal dismissed — I Inc.'s claim to disputed funds arose from judgment giving it equitable proprietary interest by virtue of constructive trust or equitable lien — This interest was not governed by Personal Property Security Act (PPSA) — Bank's receipt of pledge gave it enforceable PPSA security interest — Pledge made bank "purchaser" within meaning of words "bona fide purchaser for value without notice" — There was no dispute that bank's purchase was bona fide and was made for value and without notice — I Inc.'s right to recover disputed funds instead of bank was limited by tracing order, and did not overcome fact that bank was bona fide purchaser for value without notice.

Personal property security --- Attachment of security interest — Elements — Debtor's interest

I Inc. was induced to advance substantial sum of money to W Inc. in context of fraudulent scheme perpetrated by W Inc.'s president, A, and others — A and spouse, R, pledged shares credited to investment account, which were purchased by A with funds from monies advanced to W Inc. by I Inc., to bank for extension of credit limit on credit card account — After fraud was discovered, I Inc. obtained judgment imposing constructive trust over all assets held by W Inc. and A that were purchased with funds fraudulently obtained from I Inc., and allowing tracing of those funds into hands of parties other than bona fide purchasers for value without notice — I Inc. brought successful motion for declaration that it was entitled to proceeds of sale of shares credited to investment account to exclusion of bank — Bank's appeal was allowed — I Inc. appealed — Appeal dismissed — I Inc.'s claim to disputed funds arose from judgment giving it equitable proprietary interest, interest not governed by Personal Property Security Act (PPSA) — Bank's receipt of pledge gave it enforceable PPSA security interest — Requirements for attachment under PPSA were met, including that A and R had "rights" in shares when they pledged them — A's acquisition of shares with funds he knew were obtained fraudulently under agreements between I Inc. and W Inc. did not preclude A and R from acquiring "rights" in shares — Fraud made agreement voidable, not void — Before I Inc.'s consent under agreements for W Inc. to use money advanced by I Inc. had been revoked, W Inc. was able to pass its interest in funds to A, and I Inc. had to bear risk of loss — I Inc.'s right to recover disputed funds instead of bank was limited by tracing order, and did not overcome fact that bank was bona fide purchaser for value without notice.

Personal property security --- Scope of legislation — Miscellaneous

Restitution et enrichissement injustifié --- Avantages conférés à cause d'une erreur — Erreur de fait — Divers

I Inc. a été amenée à avancer une importante somme d'argent à W Inc. — Fonds ont été avancés dans le contexte d'un stratagème frauduleux établi par le président de W Inc., A, et d'autres personnes — Afin de faire augmenter la limite de crédit d'un compte de carte de crédit, A et sa conjointe ont donné en gage, auprès d'une banque, certaines actions inscrites à

**Bank of Montreal v. i Trade Finance Inc., 2011 SCC 26, 2011 CarswellOnt 3306**

2011 SCC 26, 2011 CarswellOnt 3306, 2011 CarswellOnt 3307, [2011] 2 S.C.R. 360...

un compte de placement, lesquelles avaient été achetées par A à l'aide des fonds que I Inc. avait avancés à W Inc. — Après la découverte de la fraude, un jugement a été rendu en faveur de I Inc. en vertu duquel le tribunal a ordonné la création d'une fiducie par interprétation portant sur tous les actifs détenus par W Inc. et A et ayant été achetés à l'aide des fonds frauduleusement obtenus de I Inc., et a accordé un droit de suite permettant de retracer des fonds détenus par un acquéreur autre qu'un acquéreur ayant acquis les fonds de bonne foi, à titre onéreux et sans connaissance préalable de la fraude — I Inc. a demandé à faire déclarer qu'elle avait droit au produit de la vente des actions inscrites au compte d'investissement, et non la banque, avec succès — Appel interjeté par la banque a été accueilli — I Inc. a formé un pourvoi — Pourvoi rejeté — Argument de I Inc. selon lequel elle avait, à première vue, le droit de recouvrer les fonds avancés à la suite d'une erreur de fait ne pouvait pas être retenu — Principes applicables en matière de recouvrement des paiements effectués par erreur s'appliquaient au rapport qui existe entre la personne qui fait le paiement et celle qui le reçoit — Comme la banque n'avait pas reçu de paiement, ces principes ne trouvaient pas application en l'espèce.

Successions et fiducies --- Fiduciaires — Abus de confiance — Réparations — À l'encontre de tierces parties — Droit de suite — Biens achetés avec les fonds de la fiducie

I Inc. a été amenée à avancer une importante somme d'argent à W Inc. — Fonds ont été avancés dans le contexte d'un stratagème frauduleux établi par le président de W Inc., A, et d'autres personnes — Afin de faire augmenter la limite de crédit d'un compte de carte de crédit, A et sa conjointe ont donné en gage, auprès d'une banque, certaines actions inscrites à un compte de placement, lesquelles avaient été achetées par A à l'aide des fonds que I Inc. avait avancés à W Inc. — Après la découverte de la fraude, un jugement a été rendu en faveur de I Inc. en vertu duquel le tribunal a ordonné la création d'une fiducie par interprétation portant sur tous les actifs détenus par W Inc. et A et ayant été achetés à l'aide des fonds frauduleusement obtenus de I Inc., et a accordé un droit de suite permettant de retracer des fonds détenus par un acquéreur autre qu'un acquéreur ayant acquis les fonds de bonne foi, à titre onéreux et sans connaissance préalable de la fraude — I Inc. a demandé à faire déclarer qu'elle avait droit au produit de la vente des actions inscrites au compte d'investissement, et non la banque, avec succès — Appel interjeté par la banque a été accueilli — I Inc. a formé un pourvoi — Pourvoi rejeté — Réclamation de I Inc. à l'égard de la somme en litige était fondée sur le jugement lui conférant un intérêt propriétaire en equity par le biais d'une fiducie par interprétation ou d'un privilège en equity — Cet intérêt n'était pas régi par la Loi sur les sûretés mobilières (LSM) — Réception du gage par la banque lui a conféré une sûreté opposable au sens de la LSM — Gage a conféré à la banque la qualité d'« acquéreur de bonne foi, à titre onéreux et sans connaissance préalable » — Il ne faisait aucun doute que la banque avait la qualité d'acquéreur de bonne foi et qu'elle avait acquis les biens en cause à titre onéreux et sans connaissance préalable — Droit de I Inc. de recouvrer la somme en litige, à l'exclusion de la banque, était restreint par l'ordonnance lui accordant un droit de suite, et ne l'emportait pas sur le fait que la banque avait la qualité d'acquéreur de bonne foi, à titre onéreux et sans connaissance préalable.

Sûretés mobilières --- Charge effective de la sûreté — Éléments — Intérêt du débiteur

I Inc. a été amenée à avancer une importante somme d'argent à W Inc. dans le contexte d'un stratagème frauduleux établi par le président de W Inc., A, et d'autres personnes — Afin de faire augmenter la limite de crédit d'un compte de carte de crédit, A et sa conjointe, R, ont donné en gage, auprès d'une banque, des actions inscrites à un compte de placement, lesquelles avaient été achetées par A à l'aide des fonds que I Inc. avait avancés à W Inc. — Après la découverte de la fraude, un jugement a été rendu en faveur de I Inc. en vertu duquel le tribunal a ordonné la création d'une fiducie par interprétation portant sur tous les actifs détenus par W Inc. et A et ayant été achetés à l'aide des fonds frauduleusement obtenus de I Inc., et a accordé un droit de suite permettant de retracer des fonds détenus par un acquéreur autre qu'un acquéreur ayant acquis les fonds de bonne foi, à titre onéreux et sans connaissance préalable de la fraude — I Inc. a demandé à faire déclarer qu'elle avait droit au produit de la vente des actions inscrites au compte d'investissement, et non la banque, avec succès — Appel interjeté par la banque a été accueilli — I Inc. a formé un pourvoi — Pourvoi rejeté — Réclamation de I Inc. à l'égard de la somme en litige était fondée sur le jugement lui conférant un intérêt propriétaire en equity, un intérêt qui n'était pas régi par la Loi sur les sûretés mobilières (LSM) — Réception du gage par la banque lui a conféré une sûreté opposable au sens de la LSM — Conditions pour la création d'un intérêt fondé sur la LSM étaient remplies, y compris le fait que A et R avaient des « droits » sur les actions au moment où ils les ont données en gage — Acquisition par A des actions tout en sachant que les fonds utilisés à cette fin avaient été frauduleusement obtenus à la suite d'ententes entre I Inc. et W Inc. ne les empêchait pas, lui et R, d'acquiescer des « droits » à l'égard des actions — Fraude rendait une entente annulable, mais pas forcément nulle — Avant que I Inc. ne révoque son consentement aux termes des ententes permettant à W Inc. d'utiliser les fonds avancés par I Inc., W Inc. a été en mesure de transmettre à A son intérêt dans les fonds, et I Inc. devait assumer un risque de perte — Droit de I Inc. de recouvrer la somme en litige, à l'exclusion de la banque, était restreint par l'ordonnance lui accordant un droit de suite, et ne l'emportait pas sur le fait que la banque avait la qualité d'acquéreur de bonne foi, à titre onéreux et sans connaissance préalable.

**Bank of Montreal v. i Trade Finance Inc., 2011 SCC 26, 2011 CarswellOnt 3306**

2011 SCC 26, 2011 CarswellOnt 3306, 2011 CarswellOnt 3307, [2011] 2 S.C.R. 360...

## Sûretés mobilières --- Portée de la législation — Divers

I Inc. was induced to advance a substantial sum of money to W Inc. The advances were made in the context of a fraudulent scheme perpetrated by W Inc.'s president, A, and others. A and his spouse, R, pledged certain shares credited to an investment account, which were purchased by A with funds coming from monies advanced to W Inc. by I Inc., to the bank for an extension by the bank of the credit limit on a credit card account. At the time it received the pledge, the bank provided value and had no knowledge of the fraudulent scheme or the fact that the funds used to purchase the shares had originated from that scheme.

After the fraud was discovered, I Inc. obtained a judgment which imposed a constructive trust over all assets held by W Inc. and A that were purchased with funds fraudulently obtained from I Inc., and which granted a tracing order allowing tracing of those funds into the hands of parties other than bona fide purchasers for value without notice. On a motion by I Inc. for a declaration that it was entitled to the proceeds of the sale of the shares credited to the investment account to the exclusion of the bank, the motion judge determined that I Inc. was entitled to the funds. The motion judge held that the bank had not acquired an enforceable security interest under the Personal Property Security Act (PPSA) in the shares. The motion judge held that the investment account was impressed with a constructive trust in I Inc.'s favour. The motion judge held that the bona fide purchaser for value without notice defence did not preclude recovery by I Inc. because the bank had purchased its interest from A and R, not from W Inc.

The bank appealed to the Court of Appeal, which allowed the appeal and attributed the disputed funds to the bank, disagreeing with each of the motion judge's conclusions. I Inc. appealed.

**Held:** The appeal was dismissed.

Per Deschamps J. (Binnie, LeBel, Fish, Charron, Rothstein, Cromwell JJ. concurring): As the bank was not a payee, the principles respecting the recovery of monies paid under mistake of fact were inapplicable. I Inc.'s claim to the disputed funds arose from the judgment giving it an equitable proprietary interest by virtue of a constructive trust or equitable lien. This interest was not governed by the PPSA.

The bank's receipt of the pledge gave it an enforceable PPSA security interest. The requirements for attachment under the PPSA were met. First, A and R signed a security agreement that identified the collateral as the shares credited to the investment account. Second, the bank gave value to A and R by extending further credit on the credit card account of A and R. Third, A and R had "rights" in the shares when they pledged them. A's acquisition of the shares with funds he knew to have been obtained fraudulently under the agreements between I Inc. and W Inc. did not preclude him and R from acquiring "rights" in the shares. Fraud made an agreement voidable, not void. Before I Inc. revoked its consent under the agreements for W Inc. to use the money advanced by I Inc., W Inc. was able to pass its interest in the funds to A, and I Inc. had to bear a risk of loss.

The pledge made the bank a "purchaser" within the meaning of the words "bona fide purchaser for value without notice". There was no dispute that the bank's purchase was bona fide and was made for value and without notice. I Inc.'s right to recover the disputed funds instead of the bank was limited by the tracing order, and did not overcome the fact that the bank was a bona fide purchaser for value without notice.

I Inc. a été amenée à avancer une importante somme d'argent à W Inc. Les fonds ont été avancés dans le contexte d'un stratagème frauduleux établi par le président de W Inc., A, et d'autres personnes. Afin de faire augmenter la limite de crédit d'un compte de carte de crédit, A et sa conjointe, R, ont donné en gage, auprès d'une banque, certaines actions inscrites à un compte de placement, lesquelles avaient été achetées par A à l'aide des fonds que I Inc. avait avancés à W Inc. Au moment où elle a obtenu le gage, la banque a fourni une contrepartie et ignorait tout du stratagème frauduleux ou du fait que les fonds utilisés pour acheter les actions provenaient de ce stratagème.

Après la découverte de la fraude, un jugement a été rendu en faveur de I Inc. en vertu duquel le tribunal a ordonné la création d'une fiducie par interprétation portant sur tous les actifs détenus par W Inc. et A et ayant été achetés à l'aide des fonds frauduleusement obtenus de I Inc., et a accordé un droit de suite permettant de retracer des fonds détenus par un acquéreur autre qu'un acquéreur ayant acquis les fonds de bonne foi, à titre onéreux et sans connaissance préalable de la fraude. Saisi d'une demande de I Inc. visant à faire déclarer qu'elle avait droit au produit de la vente des actions inscrites au compte d'investissement, et non la banque, la juge des requêtes a conclu que I Inc. avait effectivement droit aux fonds. La juge des

**Bank of Montreal v. i Trade Finance Inc., 2011 SCC 26, 2011 CarswellOnt 3306**

2011 SCC 26, 2011 CarswellOnt 3306, 2011 CarswellOnt 3307, [2011] 2 S.C.R. 360...

requêtes a estimé que la banque n'avait pas acquis de sûreté opposable, au sens de la Loi sur les sûretés mobilières (LSM), grevant les actions. La juge des requêtes a conclu que le compte d'investissement faisait l'objet d'une fiducie par interprétation en faveur de I Inc. La juge des requêtes a estimé que la défense de l'acquéreur de bonne foi, à titre onéreux et sans connaissance préalable, n'empêchait pas I Inc. de procéder au recouvrement parce que la banque avait acquis son intérêt de A et R, et non de W Inc.

La banque a interjeté appel auprès de la Cour d'appel, laquelle a accueilli l'appel et a jugé que la somme en litige appartenait à la banque, rejetant chacune des conclusions de la juge des requêtes. I Inc. a formé un pourvoi.

**Arrêt:** Le pourvoi a été rejeté.

Deschamps, J. (Binnie, LeBel, Fish, Charron, Rothstein, Cromwell, JJ., souscrivant à son opinion) : Puisque la banque n'a pas été payée, les principes applicables en matière de recouvrement des paiements effectués par erreur ne s'appliquaient pas. La réclamation de I Inc. à l'égard de la somme en litige était fondée sur le jugement lui conférant un intérêt propriétaire en equity par le biais d'une fiducie par interprétation ou d'un privilège en equity. Cet intérêt n'était pas régi par la LSM.

La réception du gage par la banque lui a conféré une sûreté opposable au sens de la LSM. Les conditions pour la création d'un intérêt fondé sur la LSM étaient remplies. D'abord, A et R ont signé un contrat de sûreté décrivant les actions inscrites au compte d'investissement comme biens grevés. Ensuite, la banque a fourni une contrepartie à A et R en augmentant le crédit disponible à partir du compte de leur carte de crédit. Enfin, A et R avaient des « droits » sur les actions au moment où ils les ont données en gage. L'acquisition par A des actions tout en sachant que les fonds utilisés à cette fin avaient été frauduleusement obtenus à la suite d'ententes entre I Inc. et W Inc. ne les empêchait pas, lui et R, d'acquérir des « droits » à l'égard des actions. La fraude rendait une entente annulable, mais pas forcément nulle. Avant que I Inc. ne révoque son consentement aux termes des ententes permettant à W Inc. d'utiliser les fonds avancés par I Inc., W Inc. a été en mesure de transmettre à A son intérêt dans les fonds, et I Inc. devait assumer un risque de perte.

Le gage a conféré à la banque la qualité d'« acquéreur de bonne foi, à titre onéreux et sans connaissance préalable ». Il ne faisait aucun doute que la banque avait la qualité d'acquéreur de bonne foi et qu'elle avait acquis les biens en cause à titre onéreux et sans connaissance préalable. Le droit de I Inc. de recouvrer la somme en litige, à l'exclusion de la banque, était restreint par l'ordonnance lui accordant un droit de suite, et ne l'emportait pas sur le fait que la banque avait la qualité d'acquéreur de bonne foi, à titre onéreux et sans connaissance préalable.

**Table of Authorities****Cases considered by Deschamps J.:**

*Adams v. Alcroft* (1907), 1907 CarswellNB 113, 38 S.C.R. 365 (S.C.C.) — referred to

*B.M.P. Global Distribution Inc. v. Bank of Nova Scotia* (2009), 2009 SCC 15, 2009 CarswellBC 809, 2009 CarswellBC 810, 304 D.L.R. (4th) 292, 386 N.R. 296, [2009] 1 S.C.R. 504, 94 B.C.L.R. (4th) 1, [2009] 8 W.W.R. 428, 452 W.A.C. 1, 58 B.L.R. (4th) 1, 268 B.C.A.C. 1 (S.C.C.) — considered

*Barclays Bank Ltd. v. W.J. Simms Son & Cooke (Southern) Ltd.* (1979), [1979] 3 All E.R. 522, [1980] 1 Q.B. 677 (Eng. Q.B.) — considered

*Bawlf Grain Co. v. Ross* (1917), 55 S.C.R. 232, 37 D.L.R. 620, [1917] 3 W.W.R. 373, 1917 CarswellAlta 184 (S.C.C.) — considered

*Bertrand v. Racicot* (1978), 25 N.R. 181, 1978 CarswellQue 139, 1978 CarswellQue 139F, [1979] 1 S.C.R. 441 (S.C.C.) — referred to

*Citadel General Assurance Co. v. Lloyds Bank Canada* (1997), 152 D.L.R. (4th) 411, 1997 CarswellAlta 823, 1997 CarswellAlta 824, [1997] 3 S.C.R. 805, 66 Alta. L.R. (3d) 241, [1999] 4 W.W.R. 135, 19 E.T.R. (2d) 93, (sub nom. *Citadel General Life Assurance Co. v. Lloyds Bank Canada*) 206 A.R. 321, (sub nom. *Citadel General Life Assurance Co. v. Lloyds Bank Canada*) 156 W.A.C. 321, 219 N.R. 323, 47 C.C.L.I. (2d) 153, 35 B.L.R. (2d) 153 (S.C.C.) —

**Bank of Montreal v. i Trade Finance Inc., 2011 SCC 26, 2011 CarswellOnt 3306**

2011 SCC 26, 2011 CarswellOnt 3306, 2011 CarswellOnt 3307, [2011] 2 S.C.R. 360...

referred to

*Innovation Credit Union v. Bank of Montreal* (2010), 500 W.A.C. 1, (sub nom. *Bank of Montreal v. Innovation Credit Union*) [2010] 3 S.C.R. 3, 362 Sask. R. 1, 2010 SCC 47, 2010 CarswellSask 723, 2010 CarswellSask 724, 72 C.B.R. (5th) 23, 407 N.R. 294, 325 D.L.R. (4th) 605, [2011] 2 W.W.R. 581 (S.C.C.) — considered

*R. v. Canadian Imperial Bank of Commerce* (2000), 2000 CarswellOnt 3955, 138 O.A.C. 127, 151 C.C.C. (3d) 439, 51 O.R. (3d) 257 (Ont. C.A.) — considered

*United Shoe Machinery Co. of Canada v. Brunet* (1909), [1909] A.C. 330, 18 B.R. 511, 1909 CarswellQue 39, C.R. [1909] A.C. 148 at 164 (Quebec P.C.) — referred to

434438 *B.C. Ltd. v. R.S. & D. Contracting Ltd.* (2002), 2002 BCCA 423, 2002 CarswellBC 1563, 171 B.C.A.C. 111, 280 W.A.C. 111 (B.C. C.A.) — referred to

**Statutes considered:**

*Personal Property Security Act*, R.S.O. 1990, c. P.10

Generally — referred to

s. 1(1) “personal property” — considered

s. 1(1) “purchase” — considered

s. 1(1) “purchaser” — considered

s. 1(1) “security interest” — considered

s. 2 — considered

s. 2(a)(i) — considered

s. 11 — considered

s. 11(1) — considered

s. 11(2)(a) — considered

s. 11(2)(b) — considered

s. 11(2)(c) — considered

s. 72 — considered

*Personal Property Security Act, 1993*, S.S. 1993, c. P-6.2

Generally — referred to

*Securities Transfer Act, 2006*, S.O. 2006, c. 8

Generally — referred to

APPEAL from judgment reported at *Bank of Montreal v. i Trade Finance Inc.* (2009), 2009 ONCA 615, 310 D.L.R. (4th) 315, 56 C.B.R. (5th) 161, 2009 CarswellOnt 4782, 15 P.P.S.A.C. (3d) 188, 96 O.R. (3d) 561, (sub nom. *i Trade Finance Inc. v. Webworx Inc.*) 252 O.A.C. 291 (Ont. C.A.), determining that bank, rather than appellant, was entitled to certain money resulting from sale of assets traceable to fraudulently obtained funds.

POURVOI à l'encontre d'un jugement publié à *Bank of Montreal v. i Trade Finance Inc.* (2009), 2009 ONCA 615, 310

Bank of Montreal v. i Trade Finance Inc., 2011 SCC 26, 2011 CarswellOnt 3306

2011 SCC 26, 2011 CarswellOnt 3306, 2011 CarswellOnt 3307, [2011] 2 S.C.R. 360...

D.L.R. (4th) 315, 56 C.B.R. (5th) 161, 2009 CarswellOnt 4782, 15 P.P.S.A.C. (3d) 188, 96 O.R. (3d) 561, (sub nom. *i Trade Finance Inc. v. Webworx Inc.*) 252 O.A.C. 291 (Ont. C.A.), dont la conclusion était que la banque, et non l'appelante, avait droit à certaines sommes d'argent découlant de la vente d'actifs reliés à des fonds obtenus frauduleusement.

### **Deschamps J.:**

1 This appeal requires the Court to determine which of two innocent creditors is entitled to a limited pool of money resulting from the sale of assets traceable to fraudulently obtained funds. On one side is a creditor that advanced funds to the fraudster's corporation and that subsequently obtained an order authorizing it to trace those funds into the hands of persons other than *bona fide* purchasers for value without notice. On the other side is a creditor having no knowledge of the fraud, to which the fraudster and his spouse pledged securities acquired with the same funds in exchange for valuable consideration. To resolve this question, the Court must determine the nature of the interests held by these two parties and clarify the role that Ontario's *Personal Property Security Act*, R.S.O. 1990, c. P.10 ("*PPSA*"), plays in this determination.

### **I. Facts**

2 The material facts in this appeal are not in dispute. Between 2002 and 2003, the appellant, i Trade Finance Inc. ("i Trade"), was induced to advance a substantial sum of money to a corporation named Webworx Inc. ("Webworx"). The advances were made in the context of a fraudulent scheme perpetrated by Webworx's President, Rohit Ablacksingh, and others, all of whom have since been convicted of criminal conspiracy in relation to the fraud. As a result of the scheme, i Trade extended financing to Webworx on the basis of representations that Webworx had substantial contracts for computer services with a large U.S. corporation, when in fact it did not.

3 The evidence indicates that Mr. Ablacksingh received both paycheques and corporate loans from Webworx that were financed by the advances made by i Trade to Webworx. This enabled him to purchase shares that were credited to an investment account with BMO Nesbitt Burns ("Nesbitt Burns") that was held jointly in the names of Mr. Ablacksingh and his spouse, Cindy Ramsackal.

4 Mr. Ablacksingh and Ms. Ramsackal were also joint cardholders of a MasterCard account with the respondent, the Bank of Montreal ("BMO"). The initial credit limit extended on this account was \$10,000, but it was subsequently increased to \$75,000. The basis for BMO's further extension of credit was a request by the cardholders and an agreement executed by Mr. Ablacksingh and Ms. Ramsackal pledging the shares credited to the investment account to BMO. At the time of the hearing in the Court of Appeal, the outstanding balance on the MasterCard account was \$138,747.66.

5 BMO does not dispute i Trade's evidence that the shares credited to the investment account were purchased by Mr. Ablacksingh with funds coming from the monies advanced to Webworx by i Trade, and that Ms. Ramsackal herself gave no consideration for the purchase of these shares. The parties also agree that at the time it received the pledge, BMO provided value (the extension of additional credit to Mr. Ablacksingh and Ms. Ramsackal) and had no knowledge of the fraudulent scheme or of the fact that the funds used to purchase the shares had originated from that scheme. Thus, BMO could not have any knowledge of any equitable interest of i Trade attributable to these funds.

6 On February 23, 2004 — after the fraud was discovered — MacDonald J. ordered, on consent of all parties, that the shares credited to the investment account be sold and that, after certain commissions and expenses were paid, the remaining proceeds be held in trust pending further order of the court. It is these monies (\$130,117.11 plus interest accrued since March 19, 2004) that are claimed by each of the parties to this appeal.

7 Civil proceedings were commenced by i Trade. On September 5, 2006, Belobaba J. ordered Webworx and Mr. Ablacksingh to pay US\$5,193,457.30 in damages — plus aggravated, exemplary and punitive damages, interest and costs — for conspiracy, deceit and fraudulent misrepresentation, and for knowing assistance in a breach of trust (unreported judgment dated September 5, 2006, at paras. 2, 4 and 16). He also declared that Webworx and Mr. Ablacksingh held "any real or personal property or any other assets that they purchased with funds provided by [i Trade] to Webworx as constructive trustee for the benefit [of] i Trade" (para. 5). In addition, Belobaba J. granted i Trade a tracing order, which excluded assets in



**Bank of Montreal v. i Trade Finance Inc., 2011 SCC 26, 2011 CarswellOnt 3306**

2011 SCC 26, 2011 CarswellOnt 3306, 2011 CarswellOnt 3307, [2011] 2 S.C.R. 360...

the hands of *bona fide* purchasers for value without notice (para. 7). Upon execution of the tracing order, i Trade could elect in whole or in part between (1) imposing a constructive trust and/or an equitable lien; and (2) seeking a personal remedy against any party liable (para. 12).

## II. Decisions of the Courts Below

### A. Ontario Superior Court of Justice (No. 03-CV-246248CM4, October 14, 2008, Unreported)

8 Kiteley J. heard a motion by i Trade for a declaration that it was entitled to the disputed funds to the exclusion of BMO. She determined that i Trade was entitled to the funds on the basis of her resolution of three issues.

9 First, she found that BMO had not acquired an enforceable *PPSA* security interest in the shares credited to the investment account, because neither Mr. Ablacksingh nor Ms. Ramsackal had any “rights in the collateral” to pledge to BMO (para. 24). Ms. Ramsackal had not given any consideration for the shares and Mr. Ablacksingh “could not acquire an interest in the collateral that he knew was obtained through his fraud” (para. 25). For this reason, no security interest had attached within the meaning of s. 11 of the *PPSA*, which meant that none was enforceable against third parties.

10 Second, Kiteley J. considered whether i Trade could follow the funds it had advanced to Webworx and trace them into the shares in the investment account, which she understood to require a determination of whether the investment account was impressed with a constructive trust in i Trade’s favour. She thus considered whether Webworx had been unjustly enriched, since the imposition of a constructive trust and tracing were, in her view, remedies that flowed from that cause of action. Kiteley J. found that Webworx had been unjustly enriched. However, because BMO had not acquired an enforceable security interest under the *PPSA*, the purported pledge by Mr. Ablacksingh and Ms. Ramsackal was “not a juristic reason that would preclude recovery by i Trade” (para. 30). Consequently, she held that the investment account was impressed with a constructive trust in i Trade’s favour.

11 Finally, Kiteley J. considered whether the exercise of i Trade’s right to follow the funds it had advanced to Webworx and trace them into the shares credited to the investment account was precluded on the basis that BMO was a *bona fide* purchaser for value without notice. Though she found that BMO met the requirements for establishing this defence, Kiteley J. held that this did not preclude recovery by i Trade, because BMO had *purchased* its interest from Mr. Ablacksingh and Ms. Ramsackal, not from Webworx (paras. 33-34).

### B. Ontario Court of Appeal (2009 ONCA 615, 96 O.R. (3d) 561 (Ont. C.A.))

12 The Court of Appeal unanimously allowed the appeal and attributed the disputed funds to BMO. Blair J.A. (Simmons and Epstein J.J.A. concurring) disagreed with each of Kiteley J.’s conclusions.

13 Blair J.A. held that BMO had obtained, by virtue of the pledge, a security interest in the shares credited to the investment account that had attached and had been perfected under the *PPSA*. In particular, he disagreed with Kiteley J. on whether Mr. Ablacksingh had sufficient rights in the collateral to ground BMO’s acquisition of an enforceable security interest in the pledged shares from him and his spouse. In Blair J.A.’s view, when i Trade loaned money to Webworx with the intention of transferring the ownership interest in it, the transfer was sufficient, even though it had been induced by fraud unbeknownst to i Trade, to create a voidable interest that could form the basis for a security interest (para. 20). Moreover, the fact that i Trade had loaned the funds to Webworx — the corporate vehicle used by Mr. Ablacksingh to commit the fraud — and not to Mr. Ablacksingh (or his spouse) personally was “quite immaterial” to the question of whether Mr. Ablacksingh had acquired a sufficient property interest from Webworx in the funds that were used to purchase the shares that Mr. Ablacksingh and Ms. Ramsackal later pledged to BMO (paras. 24-25). The key, in Blair J.A.’s opinion, was that i Trade had originally advanced the funds with an intention to pass title.

14 In any event, Blair J.A. found that BMO’s *PPSA* security interest in the pledged shares made little difference to the result, since this was not a priority contest between i Trade and BMO under the *PPSA*. Further, i Trade’s interest in the disputed funds by way of a constructive trust or an equitable lien was arguably excluded from the purview of the *PPSA*. Most importantly, if BMO was a *bona fide* purchaser for value without notice, any ability i Trade may have had pursuant to the

**Bank of Montreal v. i Trade Finance Inc., 2011 SCC 26, 2011 CarswellOnt 3306**

2011 SCC 26, 2011 CarswellOnt 3306, 2011 CarswellOnt 3307, [2011] 2 S.C.R. 360...

order issued by Belobaba J. to recover the money it had advanced would have been lost.

15 Thus, Blair J.A. proceeded to consider whether the pledge granted to BMO had made it a *bona fide* purchaser for value without notice. He found that it had and that i Trade consequently lost its ability to trace funds into the shares that were pledged to BMO. He rejected Kiteley J.'s conclusion to the contrary, the basis for which was that BMO was a "purchaser" from Mr. Ablacksingh and Ms. Ramsackal rather than from Webworx, as follows (at para. 29):

Respectfully, that distinction is equally immaterial for these purposes. The fact that [BMO] purchased directly from the fraudster [Mr. Ablacksingh] rather than from the corporate vehicle used by the fraudster to perpetrate the fraud [Webworx] is of no moment.

16 Finally, Blair J.A. considered "whether [i Trade was] entitled to recover the [disputed funds] based on principles of unjust enrichment standing alone" (para. 30). He concluded that it was not, and that Kiteley J. had erred in focussing her unjust enrichment inquiry on Webworx and in finding that the pledge agreement with BMO was not a "juristic reason" for any enrichment that may have occurred. In Blair J.A.'s view, the unjust enrichment analysis had to be undertaken as between i Trade and BMO. Although he questioned whether BMO had in fact been "enriched" in the circumstances, he found it unnecessary to decide this question, because if BMO had been enriched there were a number of juristic reasons for that enrichment, namely (i) that the shares had been pledged in a valid contract between Mr. Ablacksingh, Ms. Ramsackal and BMO; (ii) that, in law, the debtors had sufficient rights in the collateral to create a pledge; and (iii) that BMO was a *bona fide* purchaser for value without notice (para. 36).

**III. Issue in This Court**

17 In his judgment, Belobaba J. imposed a constructive trust over all assets held by Webworx and Mr. Ablacksingh that were purchased with the funds fraudulently obtained from i Trade. Moreover, the tracing order authorized i Trade to follow the funds it had advanced to Webworx and identify assets that could be traced to these funds in the hands of parties other than *bona fide* purchasers for value without notice.

18 At the hearing of this appeal, counsel for i Trade was asked whether i Trade had asserted a direct remedy for unjust enrichment against BMO. Counsel confirmed that no such claim had been made and that, although the Court of Appeal's reasons suggested that a direct claim for unjust enrichment was available against BMO, that was not a position i Trade had advocated.

19 Simply put, i Trade's ability to recover the disputed funds is circumscribed by the tracing order issued by Belobaba J., which incorporates an exception recognized in equity: it excludes assets in the hands of "*bona fide* purchasers for value without notice". If BMO is such a purchaser, i Trade's claim to the disputed funds cannot succeed. Consequently, this appeal ultimately turns on a single issue: Is BMO a *bona fide* purchaser for value without notice?

20 Straightforward as this issue may sound, it requires consideration of a number of interrelated matters to determine what rules will apply to resolve the competing claims. The first is the nature of i Trade's interest in the disputed funds. The second is the nature of BMO's interest in them. It is on consideration of BMO's interest that the *PPSA* is engaged. The *PPSA*'s application to BMO's interest leads us to consider whether the debtors — here the pledgors Ablacksingh and Ramsackal — had a right in the shares sufficient to support granting the pledgee, BMO, a security interest. It is worth noting that the legislation in force at the relevant time has since been changed: see *Securities Transfer Act, 2006*, S.O. 2006, c. 8. However, had that legislation applied, the outcome of this appeal would not have been different.

**IV. Positions of the Parties**

21 The argument of i Trade is that it advanced the funds to Webworx under a mistake of fact and accordingly has a *prima facie* right to recover them on the basis of the principles set out in *B.M.P. Global Distribution Inc. v. Bank of Nova Scotia*, 2009 SCC 15, [2009] 1 S.C.R. 504 (S.C.C.), and *Barclays Bank Ltd. v. W.J. Simms Son & Cooke (Southern) Ltd.*, [1979] 3 All E.R. 522 (Eng. Q.B.).

**Bank of Montreal v. i Trade Finance Inc., 2011 SCC 26, 2011 CarswellOnt 3306**

2011 SCC 26, 2011 CarswellOnt 3306, 2011 CarswellOnt 3307, [2011] 2 S.C.R. 360...

22 Moreover, i Trade submits that BMO's claim to the disputed funds based on the pledge is a security interest governed by the *PPSA* and that BMO could acquire an enforceable security interest only if the pledgors themselves had rights in the collateral to pledge to BMO. This argument is based on the maxim *nemo dat quod non habet* (no one can give what he or she does not have). According to i Trade, the pledgors had acquired no interest in the shares: Ms. Ramsackal had no interest because she had given no consideration upon the purchase of the shares, and Mr. Ablacksingh could not have acquired an interest in the funds used to purchase the shares because he knew that they were attributable to the advances made by i Trade to Webworx, which he and others had procured by fraud.

23 BMO responds that the principles from *B.M.P.* and *Simms* with respect to the recovery of mistaken payments are inapplicable here because they concern the rights and obligations of payors and payees of such monies. BMO is not a payee. Even if the cases in question were applicable, this would not defeat BMO's position as a *bona fide* purchaser for value without notice, since i Trade's rights as against BMO are derived from the order, which contains an exception for such a purchaser.

24 Moreover, BMO agrees with Blair J.A. that the fact that i Trade was fraudulently induced to advance money to Webworx, and not directly to Mr. Ablacksingh or Ms. Ramsackal, is immaterial to the question of whether BMO is a *bona fide* purchaser for value without notice. BMO submits that its status in this regard is not affected by any latent defect in title. BMO also agrees with the Court of Appeal that the important point is that when i Trade lent the money to Webworx, i Trade intended to pass title in the money to Webworx, regardless of the fact that it was induced to do so by fraudulent misrepresentations.

25 Finally, BMO asserts that the resolution of the dispute between the parties is not governed by the *PPSA*, even though it had a valid *PPSA* security interest. It argues that the pledge agreement establishes that it is a *bona fide* purchaser for value without notice and that, as a result of the order issued by Belobaba J., this shields it from i Trade's claim to the disputed funds.

## V. Analysis

26 In Ontario, when a party claims a security interest in personal property to satisfy payment or performance of an obligation, the court must ask whether the *PPSA* applies: subject to limited exceptions, the application of that Act is pervasive. In *Innovation Credit Union v. Bank of Montreal*, 2010 SCC 47, [2010] 3 S.C.R. 3 (S.C.C.), this Court noted that the provisions of Saskatchewan's *Personal Property Security Act, 1993*, S.S. 1993, c. P-6.2, extend "to almost anything which serves the function of a security interest" (para. 18). The same is true in Ontario. Section 2 of the *PPSA* reads in part as follows:

2. Subject to subsection 4(1), this Act applies to,

(a) every transaction without regard to its form and without regard to the person who has title to the collateral that in substance creates a security interest including, without limiting the foregoing,

(i) a chattel mortgage, conditional sale, equipment trust, debenture, floating charge, pledge, trust indenture or trust receipt ...

27 A "security interest" is defined broadly as "an interest in personal property that secures payment or performance of an obligation", and the definition of "personal property" that applied at the relevant time included "intangibles" and "securities" (*PPSA*, s. 1(1)). The *PPSA* employs "a functional approach to determining what security interests are covered by its provisions" (*Bank of Montreal*, at para. 18). When it applies, it renders irrelevant the distinctions between the wide variety of instruments which existed at common law and in equity for taking a security interest in another person's property.

28 With this in mind, I will now consider the nature of the interests of the parties to this appeal in the disputed funds.

Bank of Montreal v. i Trade Finance Inc., 2011 SCC 26, 2011 CarswellOnt 3306

2011 SCC 26, 2011 CarswellOnt 3306, 2011 CarswellOnt 3307, [2011] 2 S.C.R. 360...

#### *A. Interest of i Trade in the Disputed Funds*

29 In i Trade's opinion, it has a *prima facie* right, as set out in *B.M.P., Simms* and other cases, to recover monies paid under a mistake of fact. This argument cannot succeed. The principles respecting the recovery of mistaken payments apply as between payor and payee. BMO is not a payee, so those principles are inapplicable here. Rather, the source of i Trade's claim to the disputed funds lies in Belobaba J.'s judgment, and more specifically in the order in which he authorized i Trade to follow and trace the assets acquired with funds it had advanced to Webworx. What i Trade now seeks to do is to recover the proceeds of sale of the shares credited to the investment account on the basis that they were impressed with a constructive trust or were subject to an equitable lien.

30 Regardless of whether i Trade elects to take the constructive trust or the equitable lien route to assert its interest, the *PPSA* does not apply to those rights. This is because i Trade acquired them as a result of Belobaba J.'s judgment granting a constructive trust or an equitable lien. The rights thus resulted from a court order, not from a "transaction ... that in substance creates a security interest" (*PPSA*, s. 2). In addition, the creation of the rights was not consensual: R. H. McLaren, *Secured Transactions in Personal Property in Canada* (2nd ed. loose-leaf), at § 1.02; F. Bennett, *Bennett on the PPSA (Ontario)* (3rd ed. 2006), at p. 15; R. C. C. Cuming, C. Walsh and R. J. Wood, *Personal Property Security Law* (2005), at pp. 85 and 96-97; J. S. Ziegel and D. L. Denomme, *The Ontario Personal Property Security Act: Commentary and Analysis* (2nd ed. 2000), at pp. 71-72.

31 Since i Trade's interest in the disputed funds is not subject to the *PPSA*, it arises in equity. The important point to bear in mind is that regardless of whether i Trade's interest resulting from Belobaba J.'s judgment was acquired by virtue of a constructive trust or an equitable lien, it is an equitable proprietary interest because it flows from one of those two equitable proprietary remedies: P. D. Maddaugh and J. D. McCamus, *The Law of Restitution* (loose-leaf), at pp. 5-4 and 5-39; A. H. Oosterhoff et al., *Oosterhoff on Trusts: Text, Commentary and Materials* (7th ed. 2009), at pp. 735-36. For the purpose of this appeal, the distinction between the constructive trust and the equitable lien is irrelevant because, if i Trade's interest prevails over that of BMO, the asset will consist of the disputed funds held in trust in lieu of the shares themselves.

32 In sum, i Trade's claim to the disputed funds arises from the judgment of Belobaba J., giving it an equitable proprietary interest in the shares credited to the investment account. This interest is not governed by the *PPSA*. The next question is whether BMO's interest prevails over i Trade's interest. This inquiry requires an examination of the consensual transaction on which BMO's interest in the disputed funds is based: the pledge by Mr. Ablacksingh and Ms. Ramsackal to BMO.

#### *B. Interest of BMO in the Disputed Funds*

33 The source of BMO's claim to the disputed funds — and of its assertion that it is a "purchaser" — is the interest it acquired when Mr. Ablacksingh and Ms. Ramsackal pledged the shares credited to the investment account. To characterize the nature of this interest, it will be necessary to review the circumstances of the pledge.

34 The documentary evidence indicates that between August and October 2002, Mr. Ablacksingh and Ms. Ramsackal requested that the credit extended on their MasterCard account with BMO be increased, first on a temporary basis and eventually on a permanent basis, from \$10,000 to \$60,000, and then to \$75,000.

35 On August 14, 2002, Mr. Ablacksingh and Ms. Ramsackal executed a "Collateral Agency Agreement" as pledgors (or "the Pledgor"). The agreement read in part as follows:

**WHEREAS** the Pledgor is, and has agreed with each of the Agent [Nesbitt Burns] and the Lender [BMO] that the Pledgor will at all times be, the beneficial owner of:

(a) the securities ... delivered to or held by the Agent herewith and credited by the Agent to the account of the Pledgor held at the Agent (the "Account") ...

Bank of Montreal v. i Trade Finance Inc., 2011 SCC 26, 2011 CarswellOnt 3306

2011 SCC 26, 2011 CarswellOnt 3306, 2011 CarswellOnt 3307, [2011] 2 S.C.R. 360...

.....

## 2. AGENT APPOINTMENT

The Lender hereby appoints the Agent to hold the Collateral on the Lender's behalf under the Pledge Agreement, and the Agent accepts such appointment subject to the terms and conditions hereof. All Collateral shall be held by the Agent under and pursuant to this Agreement as the agent of the Lender under the Pledge Agreement.

36 Two days later, on August 16, 2002, Mr. Ablacksingh and Ms. Ramsackal executed Schedule "A" to the Collateral Agency Agreement, which designated the investment account with Nesbitt Burns as the account to which the shares being pledged were credited.

37 On February 21, 2003, the pledgors signed a "Notice and Direction" in which they expressly acknowledged that they had granted a security interest in the shares credited to the investment account to BMO. This document read in part as follows:

Until revocation and termination of this Notice and Direction under paragraph 4, below [which required BMO's written consent], ... Nesbitt Burns shall retain possession of and control over property in the Account for the benefit of [BMO] and not as agent for [Mr. Ablacksingh and Ms. Ramsackal].

38 Nesbitt Burns confirmed receipt of this Notice and Direction to BMO on March 7, 2003, and subsequent monthly statements for the investment account that were sent to BMO referred to that account as the "pledge account".

39 Professor MacDougall defines a pledge as follows:

A pledge is the creation of a possessory interest in a situation where a debtor — called the pledgor — transfers possession of property — called (like the transaction itself) the pledge — to a creditor — called a pledgee. It is a consensual transaction ... and it is a type of bailment. The peculiarity of the pledge is the ability of the pledgee to sell the pledged goods without recourse to a court of law....

.....

The pledgee acquires a special property interest in the property held.

(B. MacDougall, *Personal Property Security Law in British Columbia* (2009), at p. 35 (footnotes omitted))

40 Given the *PPSA*'s functional approach to determining which security interests it covers, regard must be had to the substance of the transaction between Mr. Ablacksingh, Ms. Ramsackal and BMO, not to its form.

41 In this case, it is clear from the evidence that the transaction was in substance intended to create a security interest: the purpose of that interest was to secure payment or performance of the obligations of Mr. Ablacksingh and Ms. Ramsackal in relation to the increased credit limit for the MasterCard account. Moreover, the examples listed in s. 2(a)(i) of the *PPSA* of transactions to which the Act applies include "pledge", and none of the exceptions to the application of the Act are relevant here. In sum, the *PPSA* applies to BMO's interest in the shares credited to the investment account.

42 Since the *PPSA* applies, BMO's interest has to be shown to comply with its provisions. The interest could be enforced only as of the moment of "attachment" (*Bank of Montreal*, at para. 20). Attachment is a statutory condition that must be met for a security interest to be enforceable against third parties. The requirements for attachment are set out in s. 11 of the *PPSA*. When Mr. Ablacksingh and Ms. Ramsackal signed the Collateral Agency Agreement, Schedule "A" to that agreement and the Notice and Direction relating to the shares credited to the investment account, that section read as follows:

11. — (1) A security interest is not enforceable against a third party unless it has attached.

(2) A security interest, including a security interest in the nature of a floating charge, attaches when,

**Bank of Montreal v. i Trade Finance Inc., 2011 SCC 26, 2011 CarswellOnt 3306**

2011 SCC 26, 2011 CarswellOnt 3306, 2011 CarswellOnt 3307, [2011] 2 S.C.R. 360...

(a) the secured party or a person on behalf of the secured party other than the debtor or the debtor's agent obtains possession of the collateral or when the debtor signs a security agreement that contains a description of the collateral sufficient to enable it to be identified;

(b) value is given; and

(c) the debtor has rights in the collateral ...

43 The first two requirements for attachment of a *PPSA* interest are easily met. First, as was set out above, the debtors Mr. Ablacksingh and Ms. Ramsackal signed a security agreement that identified the collateral as the shares credited to the investment account. Second, it is clear that BMO gave value to the debtors by extending further credit on the MasterCard account of Mr. Ablacksingh and Ms. Ramsackal.

44 The real question is whether Mr. Ablacksingh and Ms. Ramsackal had rights in the shares when they pledged them to BMO. What is considered as "rights" in the collateral encompasses a range of interests beyond legal and equitable title (see McLaren, at § 2.01[2]). If Mr. Ablacksingh and Ms. Ramsackal did not have any rights in the collateral, then by operation of the *nemo dat* rule, BMO could not have acquired a statutory security interest that would be enforceable against third parties. It is not disputed that Mr. Ablacksingh purchased the shares with funds attributable to the fraud. Thus, the focus of the inquiry must be on whether Mr. Ablacksingh's acquisition of the shares with funds he knew to have been obtained fraudulently under the agreements between i Trade and Webworx precluded him and his spouse from acquiring "rights" in the shares, which they later pledged to BMO as collateral.

45 Fraud makes an agreement voidable, not void: A. Swan, *Canadian Contract Law* (2nd ed. 2009), at p. 656; G. H. L. Fridman, *The Law of Contract in Canada* (5th ed. 2006), at p. 293; *434438 B.C. Ltd. v. R.S. & D. Contracting Ltd.*, 2002 BCCA 423, 171 B.C.A.C. 111 (B.C. C.A.), at para. 34. This long-standing proposition is exemplified by *Bawlf Grain Co. v. Ross* (1917), 55 S.C.R. 232 (S.C.C.), in which Fitzpatrick C.J. wrote, at p. 233:

What is only voidable and not void cannot be held as invalid until it has been rescinded. It is not enough to avoid the contract, that nothing is done to affirm it, it must be disaffirmed. In *Deposit Life Assurance Co. v. Ayscough* [6 E. & B. 761], the defence was that the contract was induced by fraud and Lord Campbell C.J. said: —

It is now well settled that a contract tainted by fraud is not void, but only voidable at the election of the party defrauded.

See also *Adams v. Alcroft* (1907), 38 S.C.R. 365 (S.C.C.), at pp. 375-76, per Idington J.; *Bertrand v. Racicot* (1978), [1979] 1 S.C.R. 441 (S.C.C.), at p. 453, citing *United Shoe Machinery Co. of Canada v. Brunet*, [1909] A.C. 330 (Quebec P.C.), at p. 339.

46 When an agreement is induced by fraud, it is the innocent party's consent to the agreement that has been fraudulently obtained. As Professor Fridman says, "[a] contract resulting from a fraudulent misrepresentation may be avoided by the victim of the fraud. In such instances the apparent consent by the innocent party to the contract and its terms, is not a real consent [and it] may be revoked at his option" (p. 286 (footnotes omitted)). However, since the decision to revoke the consent and avoid the contract falls to the innocent party, that party may elect to waive the fraud and not to avoid the contract (Swan, at p. 657).

47 The initial relationship between i Trade and Webworx was that of creditor and debtor. When it advanced funds to Webworx under the agreements, i Trade, as creditor, acquired a chose in action in the form of the debt obligation (*Citadel General Assurance Co. v. Lloyds Bank Canada*, [1997] 3 S.C.R. 805 (S.C.C.), at para. 29). Concurrently, also pursuant to the agreements, it passed title to the funds to Webworx. There is no doubt that when it did so, i Trade consented to Webworx having use of the funds. For this reason, Webworx acquired an interest that entitled it to use the funds, subject only to i Trade revoking its consent to the agreements. The following comments from *Goode on Commercial Law* are helpful in describing the concepts of personal property law that are relevant here:

Interest is to be distinguished from title. A person's interest in an asset denotes the quantum of rights over it which he

**Bank of Montreal v. i Trade Finance Inc., 2011 SCC 26, 2011 CarswellOnt 3306**

2011 SCC 26, 2011 CarswellOnt 3306, 2011 CarswellOnt 3307, [2011] 2 S.C.R. 360...

enjoys against other persons, though not necessarily against *all* other persons. His title measures the strength of the interest he enjoys in relation to others....

Title to an absolute interest may be defeasible either because it is the second-best title, ... or because, though constituting the best title so long as it continues, it is subject to divestment, as where ... the contract under which the title was acquired was a voidable title which has been avoided by the exercise of a right of rescission.

(E. McKendrick, ed. (4th ed. 2009), at pp. 34-35 (emphasis in original; footnotes omitted))

48 In *R. v. Canadian Imperial Bank of Commerce* (2000), 51 O.R. (3d) 257 (Ont. C.A.), the Ontario Court of Appeal was confronted with a telemarketing scheme in which the fraudster, Mr. Obront, had induced victims in the United States to purchase gemstones at inflated prices from his corporation, Royal International Collectibles ("R.I.C."). The trial judge had ordered the forfeiture to the Crown of the proceeds of the fraudulent sales held in a U.S. dollar account in R.I.C.'s name at the Canadian Imperial Bank of Commerce, but the bank claimed to have a valid *PPSA* security interest in the funds in the account. In discussing whether R.I.C. had acquired rights in those funds that could ground the bank's acquisition of a security interest, the Court of Appeal wrote (at p. 260):

In this case, the victims of the gem scam did not know they were victims and intended to forward their funds to R.I.C. in exchange for the gemstones which they received. The interest of R.I.C. in the funds was voidable but not void *ab initio*. The security interest of the bank was therefore able to attach to the funds deposited into the account.

49 *Canadian Imperial Bank of Commerce* illustrates that when an innocent party consensually advances funds to another under an agreement, it voluntarily parts with those funds, and this divestiture conveys the right to use them. This right is subject to the innocent party avoiding the agreement by revoking their consent to it. Until that time, the agreement is effective by its terms.

50 Consequently, when i Trade discovered the fraud, it was entitled to revoke its consent to its agreements with Webworx, avoid any further obligations it may have had to Webworx under the agreements, and seek remedies. However, it was not required to do so, since it could have sought other forms of recourse. At the time of the agreements, i Trade had voluntarily passed title to the monies, and it had to bear a risk of loss under the agreements. As Angela Swan notes, at p. 656:

[i]f the contract is held to be voidable only, the risk of loss remains with the [initial] owner, for the contract with the rogue will not be rescinded in this situation and, as a result, title will have passed through the rogue and any subsequent *bona fide* purchaser will not be liable in conversion to the [initial] owner. It is far preferable that the loss remain with the [initial] owner, for that person had the better (and far cheaper) opportunity to avoid the risk entirely by requiring cash or some other secure form of payment.

51 The evidence before the Court indicates that the fraud perpetrated by Mr. Ablacksingh and others became clear to i Trade on March 23, 2003. A Mareva injunction freezing the assets of Webworx, Mr. Ablacksingh and others was obtained by i Trade on March 28, 2003. That order was continued by a further order dated April 7, 2003. Meanwhile, i Trade had filed a statement of claim on April 4, 2003, and this ultimately led to Belobaba J.'s judgment of September 5, 2006. That judgment ordered rescission of the agreements between i Trade and Webworx.

52 However, the evidence also indicates that before the foregoing chain of events transpired, Mr. Ablacksingh had received both paycheques and corporate loans from Webworx that were funded by the advances i Trade had made to Webworx, and that those amounts had enabled him to purchase the shares that were credited to the investment account.

53 The consequence of this chronology is that before i Trade discovered the fraud and initiated civil proceedings, Webworx had i Trade's consent under the agreements to use the money advanced by i Trade. Since Webworx was the vehicle used by Mr. Ablacksingh to perpetrate the fraud, that company was itself a party to the fraud, but this does not mean that Webworx was not entitled to use the funds. At the time Webworx was issuing paycheques and corporate loans to Mr. Ablacksingh, i Trade's consent had not been revoked and the agreements remained effective. Webworx was therefore able to

**Bank of Montreal v. i Trade Finance Inc., 2011 SCC 26, 2011 CarswellOnt 3306**

2011 SCC 26, 2011 CarswellOnt 3306, 2011 CarswellOnt 3307, [2011] 2 S.C.R. 360...

pass its interest in the funds to Mr. Ablacksingh, and i Trade had to bear a risk of loss.

54 I cannot agree with the distinction drawn by i Trade on the basis of the fact that Webworx, rather than Mr. Ablacksingh, was the party to which i Trade advanced the funds. Nor can I accede to the corollary argument that Mr. Ablacksingh was unable to use the funds to acquire an interest in the shares credited, in his name and that of his spouse, to the investment account. The key is that at the time Webworx acquired the funds, it had i Trade's *consent* to their use, which brings into play the principle that a contract tainted by fraud is not void, but voidable. Webworx was entitled to use the funds. In turn, Mr. Ablacksingh was able to acquire the same interest in the funds as Webworx, and the funds were used to purchase the shares.

55 According to i Trade, to countenance this outcome would amount either to inappropriately lifting Webworx's corporate veil so as to favour Mr. Ablacksingh, or to sanctioning criminal activity. I do not accept these characterizations. Mr. Ablacksingh received no greater interest in the funds from Webworx than Webworx had received from i Trade. Because Webworx was entitled to use the funds, Mr. Ablacksingh and Ms. Ramsackal were able to acquire "rights" in the shares using the proceeds of the paycheques and of the corporate loans. As a result, they had "rights" in the collateral that were sufficient for them to pledge the shares to BMO and thereby create a security interest: see, e.g., Cuming, Walsh and Wood, who give the example (at p. 422) of a trustee who grants a security interest in the property held in trust and who, even though this was done in breach of the trust, holds sufficient title in that property for the interest to attach to the property.

56 The documents related to the pledge of the shares credited to the investment account were executed in August 2002, and Mr. Ablacksingh and Ms. Ramsackal signed the Notice and Direction on February 21, 2003, that is, before the orders rescinding the agreements with i Trade and authorizing that company to trace the funds into the hands of persons other than "*bona fide* purchasers for value without notice". BMO's interest in the shares credited to the investment account could therefore attach, giving it an enforceable *PPSA* security interest.

57 I will now consider whether BMO's receipt of the pledge, which gave it an enforceable *PPSA* security interest, also made it a "purchaser" and thereby qualified it for the *bona fide* purchaser for value without notice exception set out in Belobaba J.'s order.

### **C. Resolution of the Competing Claims of i Trade and BMO to the Disputed Funds**

58 The *PPSA*'s priority rules do not apply here. Although BMO's interest is covered by the *PPSA*, i Trade's interest is not. As pervasive as it may be, the *PPSA* provides that, insofar as the principles of law and equity are not inconsistent with its express provisions, they supplement it and continue to apply. Section 72 reads:

72. Except in so far as they are inconsistent with the express provisions of this Act, the principles of law and equity, including the law merchant, the law relating to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake and other validating or invalidating rules of law, shall supplement this Act and shall continue to apply.

59 Recourse to the principles of law and equity does not render the *PPSA* meaningless. That Act continues to apply to BMO's statutory security interest. I find the following comment of the Court in *Bank of Montreal* (at para. 30) regarding the Saskatchewan *PPSA* illustrative of this point:

It is true that the internal priority rules of the *PPSA* cannot be invoked to resolve the dispute. However, it does not follow that the provincial security interest created under the *PPSA* does not exist outside these priority rules.

60 Traditionally, the fact that a party is a *bona fide* purchaser for value without notice has been an equitable defence. Professor Smith describes this defence as follows:

The full name of the equitable defence is 'bona fide purchase of a legal interest for value without notice of a pre-existing equitable interest'. The effect of the defence is to allow the defendant to hold its legal proprietary rights unencumbered



Bank of Montreal v. i Trade Finance Inc., 2011 SCC 26, 2011 CarswellOnt 3306

2011 SCC 26, 2011 CarswellOnt 3306, 2011 CarswellOnt 3307, [2011] 2 S.C.R. 360...

by the pre-existing equitable proprietary rights. In other terms, where the defence operates, the pre-existing equitable proprietary rights are stripped away and lost in the transaction by which the defendant acquires its legal proprietary rights.

(L. Smith, *The Law of Tracing* (1997), at p. 386 (footnotes omitted))

61 In the case at bar, the transaction by which BMO acquired its rights was the pledge. The enforceable interest acquired by BMO in this transaction is a security interest that was created by statute and is recognized at law (*Bank of Montreal*, at para. 42). As I explained above, the statutory security interest replaced the common law pledge. If BMO is found to be a *bona fide* purchaser for value without notice, therefore, i Trade's equitable proprietary right will be defeated by the transaction in which BMO acquired its statutory security interest.

62 There is no dispute that if BMO is a "purchaser", its purchase was *bona fide* and was made for value (the increased credit extended on the MasterCard account) and without notice. It remains to be determined whether BMO is in fact a purchaser.

63 The *PPSA* expressly defines "purchase" and "purchaser":

I. — (1) In this Act,

"purchase" includes taking by sale, lease, negotiation, mortgage, pledge, lien, gift or any other consensual transaction creating an interest in personal property;

"purchaser" means a person who takes by purchase;

64 In addition, a purchaser, as understood in equity, is "a person who acquires *any* interest in property, whatever its quantum and whether absolutely or by way of security" (Ziegel and Denomme, at p. 26 (emphasis in original)).

65 Thus, BMO fits both the definition of "purchaser" in the *PPSA* and the meaning of that term as understood in equity, because it acquired a pledge of — that is, an interest in — the shares credited to the investment account.

66 I therefore conclude that the transaction by which BMO acquired its enforceable *PPSA* security interest made it a "purchaser" within the meaning of the words "*bona fide* purchasers for value without notice". BMO falls within the exception to the tracing order issued by Belobaba J. Consequently, any interest asserted against BMO by i Trade on the basis of Belobaba J.'s judgment will fail by virtue of the very terms of the order.

67 Since i Trade's interest in the disputed funds has been defeated by the transaction in which BMO acquired an enforceable security interest under the *PPSA*, i Trade cannot succeed in this appeal. Its right to recover the disputed funds instead of BMO is limited by the tracing order and does not overcome the fact that BMO is a *bona fide* purchaser for value without notice.

## VI. Disposition

68 For these reasons, I would dismiss the appeal, with costs.

*Appeal dismissed.*  
*Pourvoi rejeté.*