



Case Comment: *Provincial Drywall Supply Ltd. v. Toronto-Dominion Bank* [2001] M.J. No. 112; 2001 MBCA 38 (Man. C.A.) Scott C.J.M. Huband and Philp J.J.A

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Issues

- 1) At what point will a bank become liable to unpaid sub-trades of a general contractor client for knowing receipt of trust funds;
- 2) When acting pursuant to an assignment of book debts from the general contractor what steps must a bank take to collect monies owing to the general contractor; and
- 3) Can a bank owe a fiduciary duty to the unpaid sub-trades of the general contractor?

Facts

Provincial Drywall Supply Ltd. ("Provincial") supplied building materials to G.R.H. Ventures Ltd. ("Geon Interiors") on a number of building projects between May and October 1986. Geon Interiors had financed a significant portion of its operating costs through a line of credit with the Toronto Dominion Bank (the "Bank") and had granted the Bank a security interest in its Accounts Receivable.

During the month of August 1986, Geon Interiors issued a number of cheques to Provincial on account of construction projects on which Provincial had been involved. Provincial presented the cheques for payment. The Bank refused to clear the cheques as a result of the state of Geon Interiors' indebtedness to the Bank.

On October 27, 1986, the Bank closed Geon Interiors' bank account and appointed Dunwoody Limited ("Dunwoody") as its agent pursuant to an Assignment of Book Debts. Certain funds owed to Geon Interiors were collected, and those funds impressed with a statutory trust pursuant to the *Builders' Lien Act*, R.S.M 1987, c. 891 (the "Act") were paid to Provincial. The funds collected did not satisfy all of Geon Interiors' debts to Provincial.



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Analysis

Issue 1

The Court held that so long as the Bank had no knowledge of Geon Interior's activities it owed no duty to Provincial with respect the proper application of trust funds, for to do so would make it virtually impossible to conduct commercial business (see *Thomson v. Clydesdale Bank, Limited*, [1893] A.C. 282).

However, at a certain point:

“...the Bank became aware that moneys [sic] were being paid to Geon Interiors, that they related to construction contracts, and that Provincial was not being paid on its sub-contracts which probably related to the delivery of materials to various job sites. At a minimum, the Bank was put on its inquiry to determine whether Geon Interiors was honouring its trust obligations.” (at para. 32)

The Bank's argument that it had received the funds in the ordinary course of business and was therefore free to apply them in reduction of Geon Interior's debt to the Bank was rejected. The Court stated that the Bank had notice that Geon Interiors was not honouring its trust obligations, which notice precluded the argument that the Bank was merely acting in the ordinary course of business.

Provincial was therefore entitled to recover those funds that could be identified as trust funds and were received by the Bank after it had notice that the funds were impressed with a trust which was not being honoured.

Issue 2

Provincial argued that the trust provisions of the Act imposed on the Bank:

“...all the usual duties and obligations of a trustee to [Provincial], including the duty to bring in and promptly pay over to [Provincial] all trust monies in which Provincial had a beneficial interest”. (at para.85)

The Court rejected this argument, at para. 86, holding:

"A contractor or sub-contractor may be bound in a practical sense but not in law to "bring in" contract moneys that are due to him because of obligations he may have under contracts with his sub-contractors or



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suppliers. Until he receives the contract moneys, however, no trust duties or obligations are placed upon him under the Act."

Issue 3

Provincial's argument with respect to fiduciary duty was based on the alleged mishandling of Geon Interiors' account with the bank. Provincial argued that the Bank should have called its loan earlier and that if this had been done, Provincial would not have supplied materials to Geon Interiors on credit.

The Court rejected Provincial's argument stating that neither trust nor fiduciary obligations arise on the facts of the case. The Court went on to quote from the decision of the Ontario Court of Appeal in *Toronto-Dominion Bank v. Forsythe* (2000), 47 O.R. (3d) 321 (C.A.) as follows:

"...The appellants could provide no authority for the proposition that a bank owes some special duty of care to other creditors of its customers, simply because they are creditors, to disclose to them its information as to the creditworthiness of their common debtors... They are all creditors, and the submission that the TD Bank qua creditor has an unilateral duty to other creditors to keep them abreast of the financial status of its customers, is totally lacking in authority. Apart from certain provisions in our insolvency laws or special circumstances that have not been pleaded, I know of no reason why one creditor is not entitled to consider its own interest in assessing the credit worthiness of its borrowers without alerting other creditors or its customer as to matters of concern." (at para. 116)

The Court held that no fiduciary obligations arose between the Bank and Provincial because none of the characteristics attributed to fiduciary relationships were present on the facts of this case. The Bank did not have scope for the exercise of discretion or power; the Bank could not unilaterally exercise its power or discretion to affect Provincial's legal or practical interests; and Provincial was not peculiarly vulnerable to or at the mercy of the Bank (at para. 118-19). (see *Frame v. Smith*, [1987] 2 S.C.R. 99 at 136; *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 at 598 and 646; *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534 at 543-44; and *Norberg v. Wynrib*, [1992] 2 S.C.R. 226 at 274)