COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *RGN Management Limited Partnership v. 7th Light Education Group Inc.,* 2025 BCCA 23

Date: 20250128
Docket: CA48697

Between:

RGN Management Limited Partnership by its general partner RGN Management GP Inc.

Appellant
(Plaintiff)

And

7th Light Education Group Inc. sometimes doing business as Seventh Light Education Group Inc. and sometimes doing business as Centre for Entertainment Arts

Respondent
(Defendant)

Before: The Honourable Madam Justice Horsman
The Honourable Justice Skolrood
The Honourable Justice Winteringham

On appeal from: An order of the Supreme Court of British Columbia, dated October 26, 2022 (*RGN Management Limited Partnership v. 7th Light Education Group Inc.*, 2022 BCSC 1866, Vancouver Docket S211324).

Counsel for the Appellant:	M.G. Swanson S.M. Gallagher
Counsel for the Respondent:	D. Moonje
Place and Date of Hearing:	Vancouver, British Columbia September 10, 2024
Place and Date of Judgment:	Vancouver, British Columbia January 28, 2025

Written Reasons by:
The Honourable Justice Skolrood

Concurred in by:
The Honourable Madam Justice Horsman
The Honourable Justice Winteringham

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Summary:

The appellant, RGN Management Limited Partnership (RGN) appeals from the order releasing a portion of funds paid into court in accordance with a garnishing order. RGN argues that the judge below erred in finding that the funds were impressed with a Quistclose trust, on her own initiative, without the issue being argued before her. The respondent, 7th Light Education Group Inc., concedes this was an error but submits that the order can be upheld on other grounds.

Held: The appeal is dismissed. The judge was wrong to find a Quistclose trust without giving the parties the opportunity to make submissions on the issue. However, it is unnecessary to consider if the judge was wrong in law to find a Quistclose trust. The judge was correct that the portion of the garnished funds in issue was not a liquidated "debt due" attachable under s. 3 of the Court Order Enforcement Act, R.S.B.C. 1996 c. 78 [COEA]. As such, it was just in all the circumstances to order the release of those funds in accordance with s. 5(2) of the COEA.

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Reasons for Judgment of the Honourable Justice Skolrood:

Introduction

[1] This is an appeal from a decision of a judge in chambers ordering the release of funds paid into court pursuant to a garnishing order (the "Garnishing Order") issued under s. 3 of the *Court Order Enforcement Act*, R.S.B.C. 1996, c. 78 [*COEA*].

[2] The judge's order resulted from an application brought by the respondent, 7th Light Education Group Inc. ("7L), under Rule 8-5(8) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Rules*] to set aside or vary the Garnishing Order on the basis that the Order did not satisfy the requirements of s. 3(2) of the *COEA*. Alternatively, 7L sought release of the attached funds pursuant to s. 5 of the *COEA*.

[3] The judge found that the Garnishing Order was valid and she dismissed the application to vary or set it aside. However, she went on to find that certain of the funds were subject to a *Quistclose* trust and were not properly attached by the Garnishing Order. She therefore ordered the release of those funds.

[4] The judge made this finding despite neither party raising the issue of a possible trust and without hearing submissions from the parties.

[5] The appellant, RGN Management Limited Partnership ("RGN"), submits that the judge erred in doing so. RGN further submits that the judge in any event erred in finding that a *Quistclose* trust was established in the circumstances of this case. Finally, RGN submits that the judge erred in ordering the release of the funds.

[6] 7L agrees that the judge erred in finding a *Quistclose* trust without hearing from the parties. However, 7L submits that the judge's order for the release of the funds can nonetheless be sustained on the basis that the funds did not constitute a "debt due" within the meaning of s. 3 of the *COEA*.

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

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Background

[8] RGN provides serviced offices, meeting rooms, videoconferencing facilities and related services to clients on a contractual basis.

[9] 7L provides digital animation and arts curricula to post-secondary institutions.

[10] In January 2019, 7L and Langara College ("Langara") entered into an agreement (the "Program Agreement") pursuant to which 7L was to establish and deliver a digital animation and arts program to Langara students. I will return to the key provisions of the Program Agreement below.

[11] Also in January 2019, 7L and RGN entered into an office service agreement (the "Office Service Agreement") whereby RGN granted 7L a licence to use office space and furnishings to deliver its education programs, in exchange for payment.

[12] In February 2021, RGN commenced an action against 7L for breach of the Office Service Agreement by failing to pay amounts owing under the Agreement. RGN's claim was for $2,444,375.55, which it alleged was a debt due and owing from 7L.

[13] On September 28, 2021, RGN obtained the Garnishing Order. Langara was a named garnishee and was served with the Garnishing Order on September 29, 2021. On March 8, 2022, Langara paid $795,539.52 into court pursuant to the Garnishing Order. This amount related to two invoices issued by 7L to Langara:

a) Invoice 1043 for $54,781.30; and

b) Invoice 1044 for $741,758.47.

[14] Invoice 1043 was for a profit reconciliation distribution relating to the previous semester, and 7L concedes this amount was properly attachable. Invoice 1044 was for a Program Advance payment (see below) which 7L says is not attachable because it is a conditional payment and not a debt due and owing.

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The Program Agreement

[15] The Program Agreement contains the following material terms:

> 1.1 (d) **"Direct Costs"** means all costs incurred by a Party that are directly related to and exclusive to the delivery of the Program, excepting any incentives or bonuses, Taxes, interest, depreciation and amortization;
>
> …
>
> (hh) **"7th Light Program Advance"** means a mutually agreed upon amount not in excess of the then current Reserve;
>
> (ii) **"7th Light Program Costs"** means all Direct Costs incurred by 7th Light, including without limitation, Employment Costs for 7th Light Staff, direct information technology costs, disability accommodation costs, and any other Direct Costs related to the delivery of the Program incurred by 7th Light;
>
> …
>
> 8.4 Within 20 days prior to the start of any semester, the College and 7th Light will agree on the 7th Light Program Advance for that semester; provided however, that if agreement cannot be reached on the 7th Light Program Advance, the College will have the final right to determine the amount for that semester. The 7th Light Program Advance will be used by 7th Light solely for 7th Light Program Costs. The College will make payment of the 7th Light Program Advance within 10 days of the start of a semester. Reconciliation of all 7th Light Advances will be effected at the end of each semester and any amounts due as mutually agreed by the Parties to either 7th Light or the College will be paid within 30 days thereafter.

[16] Articles 8.5–8.7 of the Program Agreement provide for financial disclosure by 7L to Langara of its costs and profits associated with delivering the education programs. Article 8.8 provides for a final annual reconciliation of all net profits owing to 7L for the preceding fiscal year ending March 31.

The *COEA*

[17] The relevant provisions of the *COEA* governing garnishing orders include the following:

> **3** (1) In this section:
>
> **"debt due"** and **"debts due"** include debts, obligations and liabilities owing, payable or accruing due and wages that would in the ordinary course of employment become owing, payable or due within 7 days after the date on which an affidavit has been sworn under subsection (2) or subsection (3);

"debts, obligations and liabilities", subject to this Act, does not include an obligation or liability not arising out of trust or contract, unless judgment has been recovered on it against the garnishee but does include, without limitation, all claims and demands of the defendant, judgment debtor, or person liable under the order for payment of money against the garnishee arising out of trusts or contract if the claims and demands could be made available under equitable execution;

(2) A judge or a registrar may, on an application made without notice to any person by

(a) a plaintiff in an action, or

(b) a judgment creditor or person entitled to enforce a judgment or order for the payment of money,

on affidavit by himself or herself or his or her solicitor or some other person aware of the facts, stating,

(c) if a judgment has been recovered or an order made,

(i) that it has been recovered or made, and

(ii) the amount unsatisfied, or

(d) if a judgment has not been recovered,

(i) that an action is pending,

(ii) the time of its commencement,

(iii) the nature of the cause of action,

(iv) the actual amount of the debt, claim or demand, and

(v) that it is justly due and owing, after making all just discounts,

and stating in either case

(e) that any other person, hereafter called the garnishee, is indebted or liable to the defendant, judgment debtor or person liable to satisfy the judgment or order, and is in the jurisdiction of the court, and

(f) with reasonable certainty, the place of residence of the garnishee,

order that all debts due from the garnishee to the defendant, judgment debtor or person liable to satisfy the judgment or order, as the case may be, is attached to the extent necessary to answer the judgment recovered or to be recovered, or the order made, as the case may be.

…

5 (1) If a garnishing order is made against a defendant or judgment debtor, he or she may apply to the registrar or to the court in which the order is made for a release of the garnishment, and if a judgment has been

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> entered against him or her, for payment of the judgment by instalments.
>
> (2) If, under subsection (1), the registrar or judge considers it just in all the circumstances, he or she may make an order releasing all or part of the garnishment and if he or she does and a judgment has been entered, he or she must set the amounts and terms of payment of the judgment by instalments.

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The Application Below

[18] 7L brought its application under Rule 8-5(8) which authorizes an affected party to apply to set aside an order made without notice.

[19] 7L took the position before the judge that the Program Advance covered by Invoice 1044 was not a debt, obligation or liability within the meaning of s. 3(1) of the *COEA* and therefore was not attachable under s. 3(2). It argued that, properly characterized, the Program Advance is a conditional advance payment based on 7L's estimated costs and that the actual amount owing by Langara to 7L could not be determined until 7L had performed its contractual obligations.

[20] According to 7L, Invoice 1044 issued to Langara did not create a debt. Rather, it was simply a mechanism to trigger an accounting function. 7L relied on a number of cases that drew a distinction between conditional and absolute debts payable from a garnishee, including *Vater v. Styles*, [1930] 3 D.L.R. 509 (B.C.C.A.) and *Garner v. Strickland*, [1955] 4 D.L.R. 329 (B.C.C.A.). On this basis, 7L argued that the garnishing order was invalid and should be set aside. In the alternative, 7L argued that the Program Advance funds should be released under s. 5(2) of the *COEA* on the basis that it would be unjust to retain funds that were not properly attached.

[21] RGN took the position that the statutory requirements for a garnishing order set out in s. 3(2)(d) of the *COEA* were met and there was therefore no basis for challenging the Garnishing Order. RGN also argued that 7L had no standing to raise the issue of whether Langara's payment under the 1044 Invoice was properly attached because only a garnishee is entitled under the *COEA* to dispute liability.

RGN submitted that 7L could only raise the issue of proper attachment if and when RGN seeks to have the funds paid out of court.

[22] The judge first considered 7L's application to set aside or vary the Garnishing Order. She noted this Court's decision in *Politeknik Metal San ve Tic A.Ş. v. AAE Holdings Ltd.*, 2015 BCCA 318 at para. 24 [*Politeknik*] where it stated that s. 3(2)(d) of the *COEA* sets out the statutory criteria for a garnishing order. However, the judge rejected the proposition that the validity of a garnishing may only be challenged on the basis that those criteria are not met. She found that 7L could challenge the Garnishing Order on the ground that the garnishee (Langara) was not indebted to it within the meaning of s. 3(2)(e): at para. 49.

[23] She also rejected RGN's argument that 7L had no standing to challenge whether the funds in issue could be attached by the Garnishing Order. While s. 16 gives a garnishee the express right to mount such a challenge, she found that this does not limit the ability of a defendant to do so as well, as evinced by the clear language of s. 5 which explicitly provides a mechanism for the defendant to challenge the order. The judge noted that this mechanism is particularly important, given that it is the defendant who will generally be most prejudiced by the payment into court of garnished funds: at paras. 60–62, 66.

[24] However, the judge dismissed 7L's application to set aside the Garnishing Order on the basis that Langara was in fact indebted to 7L. She found that this was evidenced by Invoice 1043, which 7L acknowledged set out an amount properly owing to it from Langara. The judge noted that an affidavit sworn in support of a garnishing order is not required to identify specific payments as targets of the order: at para. 52, citing *COEA* ss. 7–8. The fact that some of the funds paid into Court were properly attached meant the Garnishing Order was effectual and there was no basis for setting it aside: at paras. 56–57.

[25] The judge then turned to 7L's application in the alternative under s. 5 of the *COEA* to have the 1044 Invoice funds released. She rejected 7L's argument that the funds were a conditional payment on the grounds that there were no unsatisfied

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preconditions to Langara's contractual obligation to make the Program Advance. Rather, the judge characterized the funds as being payable subject to the condition that they be used "solely for 7th Light Program Costs": at paras. 73–74.

[26] This led the judge to consider whether the funds were subject to a *Quistclose* trust, a concept developed by the court in *Barclays Bank Ltd. v Quistclose Investments Ltd.* (1968), [1970] A.C. 567 (U.K.H.L.). The judge cited the useful description of Quistclose trusts provided by Justice Cole in *Alta West Mortgage Capital Corporation v. Strege*, 2016 BCSC 127:

> [21] *Barclays Bank Ltd. v. Quistclose Investments Ltd.* (1968), [1970] A.C. 567 (U.K. H.L.), stands for the proposition that where a party transfers money to another for the specific purpose of paying a third party, the money is impressed with a trust and cannot be used by the recipient for another purpose (D.W.M. Waters, M.R. Gillen & L.D. Smith: *Waters' Law of Trust in Canada*, 4th ed., (Toronto: Thomson Reuters Canada Limited, 2012) at p. 95). In *Bank of Montreal v. British Columbia (Milk Marketing Board)* (1994), 94 B.C.L.R. (2d) 281 (B.C. S.C.) at paras. 12-13, this Court further clarified that a *Quistclose* trust only arises where there is an express or implied agreement between the parties that the money is to be kept separate from the recipient's other funds.

[27] The judge found that the necessary conditions for a *Quistclose* trust were established. She noted that Article 8.4 of the Program Agreement stipulated that the Program Advance was made by Langara for the exclusive purpose of paying 7L's Direct Costs, including costs payable to third party creditors: at para. 77. She found further that the terms of the Program Agreement evinced an intention on the part of Langara that the funds paid under the Program Advance were not intended to become part of 7L's property, but rather remain Langara's property to be spent only in accordance with the Agreement: at para. 78.

[28] These findings led to her conclusion that:

> [82] The *COEA* definition of "debts, liabilities and obligations" does not encompass funds transferred to a defendant on conditions that preclude those funds from being paid out to the plaintiff. This is because security for payment cannot be obtained by detaining funds that cannot be applied to satisfy the plaintiff's claim.

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[29] Because the funds covered by the 1044 Invoice were subject to a trust, they were not a debt, obligation or liability owed by Langara to 7L and accordingly were not attachable. The judge therefore ordered the release of the funds pursuant to s. 5 of the *COEA*.

[30] It is useful to note the material terms of the order entered following the release of the judge's reasons:

> 1. 7th Light Education Group Inc.'s application to set aside or vary the Garnishing Order Before Judgment made on September 28, 2021 (the "Garnishing Order") for failure to comply with section 3(2) of the [*COEA*] is dismissed;
> 2. The sum of $741,539.47 paid by Langara College (Garnishee) pursuant to the Garnishing Order was not attached by the Garnishing Order and 7th Light's application for the release of same under section 5 of the [*COEA*] is granted…

Procedural History in This Court

[31] The proceeding has taken a somewhat unusual path in this Court. RGN filed its notice of appeal on November 22, 2022, challenging the second term of the order requiring release of the garnished funds. RGN's principal position set out in its factum is that the judge erred in ordering release of the funds on the basis that they were subject to a *Quistclose* trust, when that issue had not been raised by either party.

[32] In its response factum, 7L agreed that the judge so erred. However, 7L sought to maintain the order for release of the funds on the basis that they were not properly attached. 7L determined that it needed to file a cross-appeal from the first term of the order below in order to advance that position. On June 9, 2023, 7L sought and obtained an order granting it an extension of time to file a cross-appeal.

[33] RGN then filed an application seeking to require 7L to post security for the costs of the cross-appeal. That application came for hearing before Justice Grauer in chambers on August 1, 2023. In his oral reasons for judgment (2023 BCCA 333), Grauer J.A. observed that 7L's cross-appeal was misconceived in that it was seeking to uphold the judge's order for release of the funds, albeit on

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different grounds from what the judge decided. Justice Grauer also observed that the proper course of action would have been for 7L to apply to amend its response factum to make this argument.

[34] Apparently taking Grauer J.A.'s comments to heart, 7L filed an application seeking an extension of time to file an amended factum. Justice Fenlon granted that application on June 17, 2024 (2024 BCCA 220). Justice Fenlon observed that the confusion arose from the manner in which the order below was drafted. She said:

> [18] … the order should simply have directed that the sum of $741,539.47 be paid out of court to [7L]. So drafted, it would have been evident that [7L] is not required to cross-appeal to argue that order is correct and should be upheld.

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Issues on Appeal

[35] As noted, the appeal as originally framed challenged the judge's finding of a *Quistclose* trust. Given that 7L agrees that the judge erred in proceeding as she did, I do not propose to address this issue in any detail. I would note that this Court typically does not grant appeals by consent without first satisfying itself that there was in fact an error in the decision below: *Brown v. British Columbia (Director of Child, Family and Community Service)*, 2024 BCCA 248 at para. 13. Here, 7L is not consenting to the appeal being allowed, but rather agrees that aspects of the judge's analysis were flawed.

[36] I agree with the parties that it was an error for the judge to determine the application below on the basis of a finding of trust not raised by either party and without granting the parties the opportunity to address the issue: *Grewal v. Grewal*, 2016 BCCA 237 at para. 80; *Lore Krill Housing Co-operative v. Ramirez*, 2012 BCCA 223 at para. 17. To be clear, the error was in the process leading to the judge's finding. The issue of whether the judge's finding of a trust was in itself an error was not fully argued before us. In light of my conclusions below, that issue need not be addressed to dispose of this appeal.

[37] The central issue on appeal is whether the funds paid into court pursuant to Invoice 1044 were properly attached by the Garnishing Order. This requires the Court to address three questions:

a) What is the true nature of the Program Advance;

b) Was the payment properly attachable pursuant to s. 3 of the *COEA*; and

c) If not, what is the appropriate mechanism for 7L to seek release of the funds?

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Analysis

[38] It is useful to address the first two of these questions together.

[39] RGN submits that 7L does not identify clearly the nature of the Program Advance and the obligation imposed on Langara by the delivery of Invoice 1044. For example, at paras. 42–43 of its amended factum, 7L suggests that the Advance was in effect a loan to be drawn upon as services are rendered or, alternatively, it was akin to a retainer or a pre-payment for work to be done in the future. 7L also postulates that it received the Advance as “something akin to a trustee”.

[40] While I agree that 7L has not taken a firm position on how it says the Program Advance should be characterized, that question is secondary to the more pertinent issue of whether the payment is attachable under the *COEA*. In order to answer that question, it is necessary to return to the terms of the Program Agreement. I have referred to the relevant terms at paras. 15–16 above.

[41] Under the Program Agreement, 7L agreed to provide five education programs on behalf of Langara. Langara would collect tuition fees from students enrolled in the programs, from which it was entitled to retain funds to cover its overhead costs (referred in the Program Agreement as the “Langara Program Costs”) as well as a 10% Management Fee. 7L was then paid the net profit realized on the delivery of the education programs, calculated at the end of 7L’s fiscal year (Article 8.8 of the Program Agreement).

[42] Langara effectively pre-funded 7L's delivery of the education programs by way of the Program Advance. As set out in Article 8.4 of the Program Agreement, Langara and 7L were to agree in advance of each of three annual semesters on the amount of the required Advance. If they could not agree, Langara had the final say. The Program Advance was then payable to 7L by Langara within 10 days of the start of each semester.

[43] The Program Advance was to be used by 7L solely for the purpose of covering the costs of delivering the education programs. At the end of each semester, Langara and 7L would conduct a reconciliation between the amount of the Program Advance and 7L's actual costs, and any shortfall or overpayment would then be paid or repaid by or to Langara within 10 days.

[44] Under this financial structure, it is important to distinguish between the Program Advance(s) paid to 7L as an advance estimate of 7L's costs of providing the education programs, and the consideration 7L received for doing so, i.e., the net profits paid to 7L at the end of each fiscal year. The Program Advance was a feature of the contractual scheme designed to facilitate 7L's performance of its contractual obligations by moving money between the contracting parties. However, it was not consideration for 7L's services: in other words, the contractual provision for the payment of the advance did not, in itself, give 7L a vested right to the funds that would be enforceable through an action to recover a liquidated sum.

[45] The central question of whether the amount of the Program Advance encompassed by Invoice 1044 is attachable turns on whether the Advance is a debt, obligation or liability within the meaning of s. 3(1) of the *COEA*. The judge found that it was not, based on her characterization of the Program Advance as being subject to a trust. She said:

> [82] The *COEA* definition of "debts, liabilities and obligations" does not encompass funds transferred to a defendant on conditions that preclude those funds from being paid out to the plaintiff. This is because security for payment cannot be obtained by detaining funds that cannot be applied to satisfy the plaintiff's claim.

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[46] In coming to this conclusion, the judge cited the test long ago established by the Supreme Court of Canada in *Donohoe v. Hull*, (1895) 24 S.C.R. 683:

> [3] Now one elementary principle runs through all these cases, viz., to enable a judgment creditor to obtain an order compelling a third person (the garnishee) to pay to him a debt which he would otherwise have to pay the judgment debtor, the debtor must be in a position to maintain an action for it against the garnishee, and the debt must be of such a character that it would vest in the debtor's assignee or trustee in bankruptcy if he became insolvent. There are cases where, even with both of these conditions present, garnishee process will not lie, but these cases do not concern us now. There must in all cases be the beneficial interest, as well as the right of action against the garnishee in the judgment debtor. Further, the claim of the debtor must be a debt: it must arise *ex contractu* not *ex delicto*.
>
> [Emphasis added.]

[47] *Donohoe* has not been widely cited but the underlying principle that a debtor must have rights in the subject funds in order for them to be attachable has been endorsed by the BC Supreme Court: see for example *Vetshopaustralia Pty. Ltd. v. Pivotal Partners Inc.*, 2009 BCSC 29 at para. 67; *Farm Credit Canada v. Naramata Vines Inc.*, 2010 BCSC 1317 at paras. 20–26, citing *Evans, Coleman & Evans Ltd. v. R.A. Nelson Construction Ltd.*, (1958) 16 D.L.R. (2d) 123 (B.C.C.A) and *Tyrer Enterprises Ltd. v. Lytton Lumber Ltd.*, (1992) 8 B.C.A.C. 309.

[48] Here, there is no doubt that under the Program Agreement, 7L was entitled to receive the Program Advance. However, if Langara failed or refused to pay the program Advance, while 7L would have had a claim against Langara for breach of contract, the action would not lie in debt but in damages, the measure of which would be 7L's lost profit resulting from its inability to provide the education programs. In other words, 7L's claim would not be for a liquidated amount equalling the Program Advance. As such, the Garnishing Order, in purporting to attach Invoice 1044, runs afoul of the well-established principle that a garnishing order can only attach a liquidated sum: *Politeknik* at para. 24.

[49] This analysis accords with the first principles of garnishment. Garnishment orders offer a plaintiff direct access to funds owing to the defendant to which the plaintiff is entitled; pre-judgment garnishing orders, specifically, provide security for

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the plaintiff as they begin their action: *Intrawest Corp. v. Gottschalk*, 2004 BCSC 1317 at para. 11. The point is to secure funds that would, if the plaintiff succeeds, be available to satisfy a judgment award. That rationale does not support a pre-judgment garnishment order attaching funds to which the defendant is not wholly entitled. Applying this analysis to the situation here, and paraphrasing the judge's observation (at para. 82), RGN could not obtain security for its claim against 7L by attaching funds that could not be applied to satisfy the debt owed by 7L.

[50] Accordingly, although my reasons differ from those of the judge, I find that the judge did nor err in holding that the Program Advance funds encompassed in Invoice 1044 were not attachable under s. 3(1) of the *COEA*.

[51] The next issue is whether it was open to the judge to order release of the garnished funds to 7L under s. 5 of the *COEA*. This was an issue before the judge largely because RGN took the position that only the garnishee had standing to challenge whether funds were properly attached under s. 5(1).

[52] The judge rejected that argument. She said:

> [60] *COEA*, s. 5 does not reflect any such restriction. The defendant's right to apply is stated in broad and general terms:
>
> > 5 (1) If a garnishing order is made against a defendant or judgment debtor, he or she may apply to the registrar or to the court in which the order is made for a release of the garnishment, …
>
> Further, the term "in all of the circumstances" in s. 5(2) has been held to be unrestricted in scope: *Min-En Laboratories Ltd. v. Westley Mines Ltd*., [1983] B.C.J. No. 330 at paras. 8–10, 1983 CanLII 177 (B.C.C.A.).
>
> [61] A defendant will generally be the person most prejudicially affected where a garnishee pays into court and declines to have any further involvement in the parties' litigation. As observed at paras. 21–22 of *Politeknik*, the adverse impact of payment into court can be severe for a defendant. Regus has advanced no policy rationale to support the assertion that the Legislature implicitly intended to restrict defendants from raising issues of potentially critical importance to them.

[53] In this Court, RGN argues that the judge erred in finding that it was just in all the circumstances to order release of the funds under s. 5. However, its position is based on the judge's finding of a *Quistclose* trust. RGN submits that the judge could

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not make the order absent a determination of who owned the subject funds, which, it says, would have required additional evidence as well as the participation of Langara in the proceeding. RGN does not maintain on appeal its position taken below that 7L lacks standing to seek release of the funds under s. 5.

[54] In the circumstances, it is not necessary to address this point in detail other than to say that, in my view, s. 5 is sufficiently broad to permit a court to order the release of funds not properly attachable under an otherwise valid garnishing order. Specifically, under s. 5(2), I am satisfied that it would be just in all the circumstances to order the release of such funds.

[55] In *Key Insurance Services Partnership v. T. Clarke Insurance Services Ltd.*, 2010 BCSC 1857, Justice Voith, then of the trial court, discussed the principles governing an application for release of garnished funds. On the question of when it would be just to do so, he referred to circumstances of undue hardship or abuse, or where the order is unnecessary: at para. 17(i), citing *Webster v. Webster* (1979), 12 B.C.L.R. 172 (S.C.) [*Webster SC*], aff'd (1979), (1980) 101 D.L.R. (3d) 248 (C.A.) [*Webster CA*].

[56] As acknowledged by Voith J., again citing *Webster SC*, these factors are not exhaustive. Similarly, in *Sequoia Mergers & Acquisitions Corp. v. CAMACC Systems Inc.*, 2015 BCSC 2197, Justice Fitzpatrick underscored that in considering whether it is just to order release of garnished funds, the court must consider all relevant circumstances when exercising its discretion: at para. 19, citing *Webster CA* at pp. 249–250.

[57] One such highly relevant circumstance is whether the entirety of the funds paid under a garnishing order are in fact properly attachable. In my view, retention of funds not properly attached is not just in all of the circumstances. For that reason, I find that the judge did not err in ordering release of the funds paid pursuant to Invoice 1044.

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Conclusion

[58] I would dismiss the appeal.

"The Honourable Justice Skolrood"

I AGREE:

"The Honourable Madam Justice Horsman"

I AGREE:

"The Honourable Justice Winteringham"

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