COURT FILE NO.: CV-14-10766-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 47 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED; AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O., 1990, c, C.43, AS AMENDED

AND IN THE MATTER OF SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c, B-3, AS AMENDED; AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c, C.43, AS AMENDED

BETWEEN:

TRISURA GUARANTEE INSURANCE COMPANY

Applicant

- and -

EBERSOLE EXCAVATING INC. AND D&S RAILWAY CONSTRUCTION INC.

Respondents

BOOK OF AUTHORITIES OF THE CANADA REVENUE AGENCY

April 24th, 2015

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COURT FILE NO.: CV-14-10766-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 47 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED; AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O., 1990, c, C.43, AS AMENDED

AND IN THE MATTER OF SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c, B-3, AS AMENDED; AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c, C.43, AS AMENDED

B E T W E E N :

TRISURA GUARANTEE INSURANCE COMPANY

Applicant

- and -

EBERSOLE EXCAVATING INC. AND D&S RAILWAY CONSTRUCTION INC.

Respondents

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TAB

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Indexed as:
Alnav Platinum Group Inc. v. APM Delstar Inc.

IN THE MATTER OF an application pursuant to Section 47 of the Bankruptcy and Insolvency Act, R.S.C. 1985, Ch. B3, as amended
Between
Alnav Platinum Group Inc., applicant, and
APM Delstar Inc., MacCosham Van Lines (Canada) Co. Ltd., Wallace Warehouse & Cartage Ltd., Dixon Van Lines Ltd., and Western Moving & Storage Ltd., respondent

[2001] A.J. No. 1609

2001 ABQB 930

306 A.R. 233

32 C.B.R. (4th) 1

[2002] G.S.T.C. 21

110 A.C.W.S. (3d) 799

Action Nos. 85583, 85584, 85585, 85586, 85587

Alberta Court of Queen's Bench
Judicial District of Edmonton

Agrios J.

Heard: October 22, 2001.
Judgment: December 13, 2001. Filed: December 14, 2001.

(22 paras.)

Counsel:

D.N. Tkachuk, for the applicant.
Margaret A. Irving, for Her Majesty the Queen in Right of Canada as represented by the Minister of National Revenue.

REASONS FOR JUDGMENT

1 **AGRIOS J.**:-- This is a dispute, between the Minister of National Revenue and a secured creditor of a company now in bankruptcy, over the sum of $386,217.00 which the Minister states are properly G.S.T. monies which should be paid to the Crown. The Applicant, Alnav Platinum Group Inc. ("Alnav"), argues that this is a priority claim between two competing interests, namely that of Alnav and the Canada Customs and Revenue Agency ("C.C.R.A."). The Minister uses a totally different approach and argues that the monies have at all times been the property of the Crown or C.C.R.A. and are therefore beyond the reach of, and not subject to, any priority contest.

2 The facts are not in dispute and are correctly set out in the memoranda of argument submitted by the parties. Briefly stated, they are as follows: upon the application of Alnav, Pricewaterhouse Cooper ("PwC")was appointed receiver of the Respondents which includes a group of companies called the A.P.M. Delstar Group which in turn which includes MacCosham Van Lines (Canada) Co. Ltd. MacCosham collected the G.S.T. monies in dispute. The documentation quoted in these reasons makes reference to the Delstar Group, but for convenience I shall refer to the Group as "MacCosham." unless otherwise required.

3 The Receiver was appointed on September 15, 2000 (the order being amended and restated on September 20, 2000). On December 15, 2000 MacCosham was adjudged bankrupt and PwC was appointed trustee of the Respondents' estate. To the date of this application Alnav has advanced to the receiver over $7,700,000.00 to permit the receiver to carry out its powers and has been reimbursed for approximately $1,100,000.00.

4 The Minister, through the C.C.R.A., states that MacCosham's current Goods and Services Tax ("G.S.T.") indebtedness to the C.C.R.A., including interest and penalties, to the date of bankruptcy is $617,150.52.

5 Shortly prior to PwC's appointment, another secured creditor of the MacCosham group had appointed another firm of accountants to collect accounts receivables. The particulars of this and various agreements between PwC and the other creditor are somewhat germane to this dispute, in particular a Proceeds Agreement outlined below, and the fact that between September 15, 2000 and November 13, 2000, that other secured creditor collected $4,829,000 of which $315,915.89 would represent G.S.T. monies for taxable supplies made prior to September 15, 2000. During the period between November 24, 2000 and December 15, 2000, PwC collected a further $688,395.93, of which $45,035.25 would represent G.S.T. monies for taxable supplies made prior to September 15, 2000. These G.S.T. amounts are calculated as 7/107 of the respective amounts collected; they were not sums specifically set aside, at this point, as G.S.T. monies.

6 The other secured creditor was paid in full in respect of MacCosham's indebtedness, leaving a surplus amount of $1,413,370.40 (the "Surplus Amount"), which included the G.S.T. monies collected by that other creditor. By an agreement dated November 17, 2000 between PwC and the other creditor (the "Proceeds Agreement") PwC and the other creditor agreed that the Surplus Amount, less a holdback of $200,000, would be paid to PwC and that PwC would hold that amount, and any further amounts collected (including PwC's G.S.T. monies), subject to the terms of the Proceeds Agreement. That Agreement clearly contemplates what it refers to as "Pre-Receivership G.S.T. and Other Trust Claims", and on March 23, 2001 I ordered PwC to pay into a separate account (the "G.S.T. Fund") the sum of $617,150.52 relating to the G.S.T. Claims as contemplated by that Agreement. It is now

agreed that the correct sum that may be properly referred to as monies related to these G.S.T. Claims is $386,217.00 (the "G.S.T. Monies") and that the G.S.T. Fund has a surplus. The terms of the Proceeds Agreement relevant to whether a trust is impressed on the G.S.T. Fund or Monies are outlined in detail below. The final relevant fact is that the Delstar Group, including MacCosham, were adjudged bankrupt on December 15, 2000, with a Receiving Order being made against each of them, and with PwC being appointed Trustee of their Estates.

7 Alnav now brings an application for a declaration that the C.C.R.A. has no claim to the G.S.T. Fund or Monies and that Alnav is entitled to a declaration that the costs of the interim receivership paid by Alnav have priority against the C.C.R.A.

8 The Crown argued that this application is premature since an audit is currently in progress to determine the appropriate sum of G.S.T. owing by MacCosham, as this may be adjusted, as a result of that audit, from an October 24, 2000 C.C.R.A. assessment. In view of the decision I render, which comprehends the possibility of any adjustment entailed by this audit, I believe this argument is made moot, but if an issue arises on this point, a further application may be made.

9 The Minister characterizes the issues as follows: Does a secured creditor have any claim to G.S.T. monies; and is the G.S.T. Fund part of MacCosham's estate. The Applicant, Alnav, characterizes the issues somewhat differently, asking whether the C.C.R.A. can claim priority on the basis of either a deemed trust or an actual trust and further, does provision of the Receiving Order or intervening bankruptcy alter any priority position, and finally, assuming C.C.R.A. has priority, what is the amount of the priority.

10 I need not answer the issues raised by Alnav's counsel as to whether a deemed trust arises in favour of the C.C.R.A., as the Minister makes no claim under this head. I think the Minister is wise to have declined this argument, as any deemed trust on G.S.T. monies created by the relevant section of the Excise Tax Act R.S.C. 1985, c. E-15 (as amended) is, pursuant to that same Act, undone by MacCosham's assignment into bankruptcy. Nor do I find, on the facts of this case, the existence of any deemed trust prior to bankruptcy to be helpful in determining if an actual trust exists on the G.S.T. Fund or Monies, as it is clear from the reasons of McLachlin J. (as she then was) in B.C. v. Henfrey Sampson Belair Ltd., [1989] 5 W.W.R. 577 (SCC), that deemed statutory trusts do not constitute valid trusts in accordance with ordinary general principles of law, rather they are a priority scheme set up to give the Crown priority over secured and other creditors. That deemed trust is not applicable post-bankruptcy, and as it is not a true trust per se I regard it, if it existed, as irrelevant to determining any of the issues on this application.

11 Having considered the able arguments by counsel, I have decided that the G.S.T. Monies in the G.S.T. Fund are in fact the "Government's money". Ms. Irving, counsel for the Minister, argued pointedly that "this is our money". It is her position that suppliers (like MacCosham) have no property or interest in the G.S.T. portion of their receivables and accordingly it is not possible for assignees, simply by virtue of their assignment, to attach the G.S.T.

12 I agree. Suppliers of G.S.T. taxable goods and services act as agent collecting G.S.T. on behalf of Her Majesty by virtue of a combination of various sections of the Excise Tax Act, see Minister of National Revenue v. Williston Wildcatters Oil Corp. [1997] 5 W.W.R. 55 (Sask. C.A.). In that case the Saskatchewan Court of Appeal held, as do I, that the G.S.T. monies were never the property of the bankrupt and that the supplier collected the monies as agent for the Minister. On this point, the Court of Appeal quoted and affirmed the Chambers judge's reasons, and I too find them worth quoting at length (at 66):

[para34] We now turn to the respondent's motion to vary which challenges the Minister's second claim. On this branch of the case the learned Chambers judge held at p. 215, paras. 18-20 [(1996) 145 Sask.R. 209]:

> [18] The second point in issue in the present case is the claim by the MNR to $22,186.79 now in the hands of the trustee paid by Koch as GST. In the notice of motion the only ground cited by the MNR in support of the claim to the money is ETA s. 165(1). It reads:
>
> > 165(1) Subject to this Part, every recipient of a taxable supply made in Canada shall pay to Her Majesty in right of Canada a tax in respect of the supply equal to 7% of the value of the consideration for the supply.
>
> This section could well be sufficient without reference to more in the ETA to sustain the claim of the MNR. The section requires that the purchaser of a taxable something, in the present case oil, pay the tax to Her Majesty in Right of Canada. If it is paid to a person required to collect the tax, that person must be collecting it solely for Her Majesty in Right of Canada. But that the collector of the tax does so as agent of Her Majesty is made specifically so by ETA s. 221(1).
>
> [19] In the circumstances, the bankrupt could not claim any property right in the GST collected and I do not see any way in which the trustee could have any claim on this money. It never was the property of Williston.Williston billed for and would be entitled to collect the GST only as agent for the MNR. ETA s. 265 deems a trustee in bankruptcy to become the agent of the bankrupt in relation to GST.
>
> [20] I cannot, with respect, see any basis for the trustee maintaining that GST paid as such and clearly identifiable and traceable as such in the hands of the trustee can be considered as part of the bankrupt estate divisible among creditors. On this point I find for the MNR. Property in the amount of $22,186.79 is the property of the MNR.

[para35] We agree with these reasons and conclusion. It is unnecessary for us to say more.

13 I do not regard Williston Wildcatters to be standing for the proposition that mere agency alone would be sufficient to find that G.S.T. monies collected by a person under a duty to collect them is sufficient to keep those monies out of a bankrupt's estate - for G.S.T. monies are probably invariably collected by persons who could be seen to be acting as agent for Her Majesty. Once, however, those monies are collected as agent and are clearly identifiable or traceable in the hands of the trustee they, in my view, bypass the bankrupt's estate. Those monies, may also, if they meet the three certainties required to find a trust, bypass the bankrupt's estate on that basis, regardless of any agency relationship between the collector of the monies and Her Majesty.

14 Mr. Tkachuk for the Applicant argues that the Williston Wildcatters decision was rendered just prior to the decision of the Supreme Court of Canada in Royal Bank of Canada v. Sparrow Electric Corp. [1997] 2 W.W.R. 457 and, accordingly, the rationale set forth in Williston Wildcatters has been overturned. There is no disagreement that as a result of Sparrow Electric, where the Supreme Court of Canada held in favour of the secured creditor on the priority issue with C.C.R.A., s. 227 of the Income Tax Act R.S.C. 1985, c. 1 (5th Supp.) is amended to its current wording. However, it is agreed that s. 222(1) of the Excise Tax Act was not amended until October 20, 2000, to parallel with current wording of the Income Tax Act, so, the pre-October 20, 2000 wording in s. 221(1) of the Excise Tax Act is applicable to this application.

15 I do not agree in any event with the Applicant's submission that Sparrow Electric overturns Williston Wildcatters. In Sparrow Electric the bankrupt had made income tax payroll deductions but failed to remit them to the Minister of National Revenue. The Chambers judge held that the Crown had priority over the proceeds from the inventory by reason of a deemed statutory trust in favour of the Minister. This secured creditor appealed and the appeal was allowed on the basis that the Bank Act S.C. 1991, c. 46. transferred title from the borrower to the Bank. The Minister's deemed trust arose, if at all, too late. The Supreme Court of Canada upheld the decision and added that the deemed trust provisions in favour of the Crown found in the Income Tax Act are not a mechanism for undoing an existing security interest. The deemed trust cannot be effective, that is, unless it is first determined there is some unencumbered asset out of which the trust may be deemed. The Bank's general security agreement gave it a fixed and specific charge against the borrower's inventory and the licence of the bankrupt to sell and to incur debts in the ordinary course of business did not derogate from that security interest. In Sparrow Electric the monies had been deducted but not paid to Her Majesty. In the current case, neither MacCosham nor the secured creditor has any property or interest in these monies. There is in fact, as the Minister argues, the formation of an express trust with the three certainties, those of intention, subject matter, and object being met. The G.S.T. Fund is identifiable and traceable and is an actual trust as contemplated by the Supreme Court of Canada in B.C. v. Henfrey Sampson Belair Ltd. (supra).

16 The three certainties required for an express trust in Equity are made evident in the Proceeds Agreement noted above, which agreement was created before MacCosham's bankruptcy. That Agreement was approved by myself in a Court Order of November 21, 2000 where PwC was authorized and directed to carry out the terms and obligations as set out in the Agreement. The Agreement clearly contemplates the existence of the G.S.T. Claims and the holding of monies relating to those claims for the purpose of payment to Her Majesty. First, one of the recitals of the Agreement states: "The Bank holds a first charge on the Accounts, subject only to such statutory priorities and trust claims which may rank ahead of the Bank Security." Article 3.2 of the Agreement states:

> 3.2 Upon
>
> (a) the granting of receiving orders under the BIA against each member of the APM Delstar Group; and
>
> (b) either
>
> > i) the granting of a final order declaring that amounts claimed by CCRA under the Excise Tax Act (Canada) for goods and services tax ... do not have priority over the Bank Security as a result of such receiving orders; or
> >
> > ii)

> an agreement being reached between the Interim Receiver, CCRA, the applicable provincial authorities and the Bank, approved by the court, as to the quantum and payment of Pre-Receivership GST and Other Trust Claims,
>
> the balance of the Proceeds Account shall be released to the Interim Receiver.

17 Although a Receiving Order has been granted, I regard the following provision as further evidence that the Proceeds Agreement contemplates that the Interim Receiver holds G.S.T. monies in the Proceeds Account for payment to Her Majesty in discharge of any G.S.T. Claims:

> 3.3 In the event that a receiving order is not granted for any member of the APM Delstar Group within a reasonable time from the issue of petitions and filing of notices of dispute, the Interim Receiver shall either
>
> a) reach an agreement with CCRA, the Bank and the applicable provincial authorities, approved by the court; or
> b) apply to the Court on notice to the CCRA, the Bank, the applicable provincial authorities and such other interested parties for an order
>
> determining the full amount outstanding for Pre-Receivership GST and Other Trust Claims.

18 The Agreement further recognizes the G.S.T. monies as earmarked for payment to Her Majesty in the following provision:

> 3.5 Upon a final order being granted or an agreement being reached determining the amount owing for Pre-Receivership GST and Other Trust Claims by any member of the APM Delstar Group for which a receiving order has not been granted, as required by paragraph 3.3 above, the Interim Receiver shall disburse from the Surplus Account GST Portion and, if insufficient, from the Proceeds Account, such amount to discharge the Pre-Receivership GST and Other Trust Claims in full.

19 It is abundantly clear, in my view, that the Proceeds Agreement recognizes, prior to MacCosham's bankruptcy, that monies relating to any G.S.T. Claims are earmarked for distribution to Her Majesty. The degree of identification of those monies, as evidenced in the Proceeds Agreement, provides a sufficient degree of certainty of intent, subject matter, and object that I find an express trust on them pursuant to the principles of trust law in Equity. Those monies were impressed with a trust prior to MacCosham's bankruptcy, and prior to their having been moved, by Court Order, into a separate account pursuant to clause 3.2(b)(ii) of the Proceeds Agreement. Those trust monies now are identifiable in, and traceable to, the G.S.T. Fund as the G.S.T. Monies, as those two terms have been defined above. I have already noted that the exact sum of G.S.T. due Her Majesty may be varied based on an audit conducted by the C.C.R.A. This does not impair the certainty of subject matter in respect of those monies being impressed with an actual trust, as is trite law that if the correct amount can be easily identifiable out of funds earmarked that purpose, which is the case here, it does not matter that the precise amount was not actually identified. The funds out of which easily calculated

G.S.T. Claims would be determined were themselves clearly identified, and the G.S.T. Monies further identified out of them.

20 A similar decision, in respect of a court finding an actual trust, was reached by my Court of Appeal in Re Armcorp 4-18 Ltd. (1999), 10 C.B.R. (4th) 65. This case clearly post-dates Sparrow Electric (supra) and once again held that there was an express trust on monies which were sufficiently identifiable and traceable. As in this case, it is irrelevant whether any deemed trust was created. I read Re Armcorp 4-18 Ltd. to say that the monies had always been earmarked for G.S.T. and the G.S.T. portion of the Fund belonged, in this case, to Her Majesty from the outset for all of the reasons stated above.

21 In the result, I find that the G.S.T. Monies, as defined above, and as varied by the audit referred to above, do not fall into the bankrupt's estate, and those monies, up to a maximum of the sums of the receivables actually collected, namely $360,951.14, are payable as G.S.T. monies due to Her Majesty the Queen through her agency the C.C.R.A.

22 Counsel may speak to costs at their convenience.

AGRIOS J.

cp/i/qlrds/qlcas

8

Indexed as:
British Columbia v. Henfrey Samson Belair Ltd.

Her Majesty The Queen in right of the Province of British Columbia, appellant;
v.
Henfrey Samson Belair Ltd., respondent;
and
The Attorney General of Canada, the Attorney General for Ontario, the Attorney General of Quebec, the Attorney General of Nova Scotia, the Attorney General for New Brunswick, the Attorney General of Manitoba, the Attorney General for Alberta and the Attorney General of Newfoundland, interveners.

[1989] 2 S.C.R. 24

[1989] S.C.J. No. 78

File No.: 20515.

Supreme Court of Canada

1989: April 21 / 1989: July 13.

Present: Lamer, Wilson, La Forest, L'Heureux-Dubé, Gonthier, Cory and McLachlin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Bankruptcy -- Priority -- Statutorily created trust for tax collected -- Tax collected commingled with bankrupt's assets -- All assets applied to reduce bank's indebtedness -- Whether or not province should be given priority over other creditors because of statutorily created trust -- Bankruptcy Act, R.S.C. 1970, c. B-3, ss. 47(a), 107(1)(j) -- Social Service Tax Act, R.S.B.C. 1979, c. 388, s. 18.

Tops Pontiac Buick Ltd. collected provincial sales tax in the course of its business operations, as required by the Social Service Tax Act, and mingled the tax collected with its other assets. A creditor placed Tops in receivership and Tops then made an assignment in bankruptcy. The receiver sold the assets and applied the full proceeds to reduce the bank's indebtedness.

The province contended that the Social Service Tax Act created a statutory trust over the assets of Tops equal to the amount of the sales tax collected but not remitted, and that it had priority over the bank and all other creditors for this amount. The chambers judge [page25] held that the Social Service

Tax Act did not create a trust and that the province had no priority under the Bankruptcy Act. The Court of Appeal held that the legislation created a statutory trust but the Bankruptcy Act did not confer priority on such a trust. At issue here is whether the statutory trust created by s. 18 of the British Columbia Social Service Tax Act gives the province priority over other creditors under the Bankruptcy Act.

Held (Cory J. dissenting): The appeal should be dismissed.

Per Lamer, Wilson, La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ.: The statutory trust created by the provincial legislation is not a trust within s. 47(a) of the Bankruptcy Act but merely a Crown claim under s. 107(1)(j). Section 47(a), which concerns "property held by the bankrupt in trust for any other person", permits removal of property which can be specifically identified as not belonging to the bankrupt under general principles of trust law from the distribution scheme established by the Bankruptcy Act. Section 107(1)(j), on the other hand, does not deal with rights conferred by general law, but with the statutorily created claims of federal and provincial tax collectors. If sections 47(a) and 107(1)(j) are read in this way, no conflict arises between them. This construction of ss. 47(a) and 107(1)(j) of the Bankruptcy Act conforms with the principle that provinces cannot create priorities under the Bankruptcy Act by their own legislation.

Section 18 of Social Service Tax Act deems a statutory trust at the moment the tax is collected. The trust property is identifiable at that time and the requirements for a trust under the principles of trust law are met. The money when collected would therefore be exempt from distribution to creditors by reason of s. 47(a). The trust at common law ceases to exist, however, when the tax money collected is mingled with other money so that it cannot be traced and is no longer identifiable. The province has a claim secured only by a charge or lien created by s. 18(2) of the Social Service Tax Act, and s. 107(1)(j) of the Bankruptcy Act would accordingly apply. Here, no specific property impressed with a trust could be identified and s. 47(a) of the Bankruptcy Act did not extend to the province's claim.

Per Cory J. (dissenting): The moneys collected as sales tax by a vendor belong to the province and the vendor is in every sense of the word a trustee for them. The province did not need to rely on the vendor's [page26] keeping separate bank accounts to protect its trust property but rather could and did implement a registration system that allowed it to specify precisely the amount owing through a system of bookkeeping. If the tax were not paid to the province then a vendor must have stolen the funds, converted them to its own use or most charitably lost the funds for which it would be responsible and for which it would be accountable to the province.

The Bankruptcy Act prevents the provinces from creating priorities but it does not prevent them from creating a deemed trust or lien. It protects funds which, at the moment they were paid, were truly trust funds and the validity of the trust need not be determined exclusively on the basis of common law. Since section 18 of the Social Service Tax Act and ss. 47(a) and 107 of the Bankruptcy Act do not conflict, the doctrine of federal paramountcy cannot apply and s. 18 should prevail. The property at issue which was subject to s. 18 of the Social Service Tax Act never at any time became the property of the bankrupt and was therefore not subject to distribution as the property of the bankrupt pursuant to s. 107 of the Bankruptcy Act.

The trust, created by s. 18, contained the three essential characteristics required of a trust by equity: certainty of intention, subject matter and of objects. The statute established certainty of intention and of object and through the use of a clear formula established the trust property. A statutorily constituted trust has an advantage over a privately constituted trust in that it is recognized without the beneficiary's having to undertake the often inordinately expensive action of tracing commingled funds. This advantage should not deprive the statutory trust property of its trust character or take it outside the policies determined by this Court.

Cases Cited

By McLachlin J.

Applied: Deputy Minister of Revenue v. Rainville, [1980] 1 S.C.R. 35; Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board, [1985] 1 S.C.R. 785; referred to: Re Phoenix Paper Products Ltd. (1983), 48 C.B.R. (N.S.) 113.

[page27]

By Cory J. (dissenting)

Royal Trust Co. v. Tucker, [1982] 1 S.C.R. 250; John M. M. Troup Ltd. v. Royal Bank of Canada, [1962] S.C.R. 487; Re Deslauriers Construction Products Ltd. (1970), 3 O.R. 599; Dauphin Plains Credit Union Ltd. v. Xyloid Industries Ltd., [1980] 1 S.C.R. 1182; Multiple Access Ltd. v. McCutcheon, [1982] 2 S.C.R. 161; Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board, [1985] 1 S.C.R. 785; Re Diplock's Estate, [1948] Ch. 465, [1948] 2 All E.R. 318, aff'd sub nom. Min. of Health v. Simpson, [1951] A.C. 251, [1950] 2 All E.R. 1137 (H.L.); Deputy Minister of Revenue v. Rainville, [1980] 1 S.C.R. 35; Federal Business Development Bank v. Quebec (Commission de la santé et de la sécurité du travail), [1988] 1 S.C.R. 1061.

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Mechanics' Lien Act, R.S.O. 1950, c. 227.
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Real Estate Agents' Licensing Act, R.S.A. 1980, c. R-5, s. 14.
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APPEAL from a judgment of the British Columbia Court of Appeal (1987), 13 B.C.L.R. [page28] (2d) 346; 40 D.L.R. (4th) 728; [1987] 4 W.W.R. 673; 65 C.B.R. (N.S.) 24; 5 A.C.W.S. (3d) 47, dismissing an appeal from a judgment of Meredith J. in chambers (1986), 5 B.C.L.R. (2d) 212, 61 B.C.R. (N.S.) 59. Appeal dismissed, Cory J. dissenting.

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James M. Mabbutt, Q.C., for the intervener the Attorney General of Canada.
Janet E. Minor and Timothy Macklem, for the intervener the Attorney General for Ontario.
Yves de Montigny and Madeleine Aubé, for the intervener the Attorney General of Quebec.
Reinhold M. Endres, for the intervener the Attorney General of Nova Scotia.
Richard Burns, for the intervener the Attorney General for New Brunswick.
W. Glenn McFetridge and Dirk D. Blevins, for the intervener the Attorney General of Manitoba.
Robert C. Maybank, for the intervener the Attorney General for Alberta.
W.G. Burke-Robertson, Q.C., for the intervener the Attorney General of Newfoundland.

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The judgment of Lamer, Wilson, La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ. was delivered by

1 **McLACHLIN J.**:-- The issue on this appeal is whether the statutory trust created by s. 18 of the British Columbia Social Service Tax Act, R.S.B.C. 1979, c. 388, gives the province priority over other creditors under the Bankruptcy Act, R.S.C. 1970, c. B-3.

2 Tops Pontiac Buick Ltd. collected sales tax for the provincial government in the course of its business operations, as it was required to do by the Social Service Tax Act. Tops mingled the tax collected with its other assets. When the Canadian Imperial Bank of Commerce placed Tops in receivership pursuant to its debenture and Tops [page29] made an assignment in bankruptcy, the

receiver sold the assets of Tops and applied the full proceeds in reduction of the indebtedness of the bank.

3 The province contends that the Social Service Tax Act creates a statutory trust over the assets of Tops equal to the amount of the sales tax collected but not remitted ($58,763.23), and that it has priority over the bank and all other creditors for this amount.

4 The Chambers judge held that the Social Service Tax Act did not create a trust and that the province did not have priority. On appeal the receiver conceded that the legislation created a statutory trust, but contended that the chambers judge was correct in ruling that the Province did not have priority because the Bankruptcy Act did not confer priority on such a trust. The British Columbia Court of Appeal accepted this submission. The Province now appeals to this Court.

5 The section of the Social Service Tax Act which the Province contends gives it priority provides:

> 18. (1) Where a person collects an amount of tax under this Act
>
> (a) he shall be deemed to hold it in trust for Her Majesty in right of the Province for the payment over of that amount to Her Majesty in the manner and at the time required under this Act and regulations, and
>
> (b) the tax collected shall be deemed to be held separate from and form no part of the person's money, assets or estate, whether or not the amount of the tax has in fact been kept separate and apart from either the person's own money or the assets of the estate of the person who collected the amount of the tax under this Act.
>
> (2) The amount of taxes that, under this Act,
>
> (a) is collected and held in trust in accordance with subsection (1); or
>
> (b) is required to be collected and remitted by a vendor or lessor
>
> forms a lien and charge on the entire assets of
>
> (c) the estate of the trustee under paragraph (a); [page30]
>
> (d) the person required to collect or remit the tax under paragraph (b); or
>
> (e) the estate of the person required to collect or remit the tax under paragraph (d).

6 The Province argues that s. 18(1) creates a trust within s. 47(a) of the Bankruptcy Act, which provides:

> 47. The property of a bankrupt divisible among his creditors shall not comprise
>
> (a) property held by the bankrupt in trust for any other person,

7 The respondent, on the other hand, submits that the deemed statutory trust created by s. 18 of the Social Service Tax Act is not a trust within s. 47 of the Bankruptcy Act, in that it does not possess the attributes of a true trust. It submits that the Province's claim to the tax money is in fact a debt falling under s. 107(1)(j) of the Bankruptcy Act, the priority to which falls to be determined according to the priorities established by s. 107.

> 107. (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:
>
> . . .
>
> (j) claims of the Crown not previously mentioned in this section, in right of Canada or of any province, pari passu notwithstanding any statutory preference to the contrary.

Discussion

8 The issue may be characterized as follows. Section 47(a) of the Bankruptcy Act exempts trust property in the hands of the bankrupt from distribution to creditors, giving trust claimants absolute priority. Section 107(1) establishes priorities between creditors on distribution; s. 107(1)(j) ranks Crown claims last. Section 18 of the Social Service Tax Act creates a statutory trust which lacks the essential characteristics of a trust, namely, that the property impressed with the trust be identifiable or traceable. The question is whether the statutory trust created by the provincial legislation is a trust within s. 47(a) of the Bankruptcy Act or a mere Crown claim under s. 107(1)(j).

[page31]

9 In my opinion, the answer to this question lies in the construction of the relevant provisions of the Bankruptcy Act and the Social Service Tax Act.

10 In approaching this task, I take as my guide the following passage from Driedger, Construction of Statutes (2nd ed. 1983), at p. 105:

> The decisions ... indicate that the provisions of an enactment relevant to a particular case are to be read in the following way:
>
> 1. The Act as a whole is to be read in its entire context so as to ascertain the intention of Parliament (the law as expressly or impliedly enacted by the words), the object of the Act (the ends sought to be achieved), and the scheme of the Act (the relation between the individual provisions of the Act).
> 2. The words of the individual provisions to be applied to the particular case under consideration are then to be read in their grammatical and ordinary sense in the light of the intention of Parliament embodied in the Act as a whole, the object of the Act and the scheme of the Act, and if they are clear and unambiguous and in harmony with that

> intention, object and scheme and with the general body of the law, that is the end.

11 With these principles in mind, I turn to the construction of ss. 47(a) and 107(1)(j) of the Bankruptcy Act. The question which arises under s. 47(a) of the Act concerns the meaning of the phrase "property held by the bankrupt in trust for any other person". Taking the words in their ordinary sense, they connote a situation where there is property which can be identified as being held in trust. That property is to be removed from other assets in the hands of the bankrupt before distribution under the Bankruptcy Act because, in equity, it belongs to another person. The intention of Parliament in enacting s. 47(a), then, was to permit removal of property which can be specifically identified as not belonging to the bankrupt under general principles of trust law from the distribution scheme established by the Bankruptcy Act.

12 Section 107(1)(j), on the other hand, has been held to deal not with rights conferred by general law, but with the statutorily created claims of federal and provincial tax collectors. The purpose of s. 107(1)(j) was discussed by this Court in Deputy Minister of Revenue v. Rainville, [1980] 1 [page32] S.C.R. 35. Pigeon J., speaking for the majority, stated at p. 45:

> There is no need to consider the scope of the expression "claims of the Crown". It is quite clear that this applies to claims of provincial governments for taxes and I think it is obvious that it does not include claims not secured by Her Majesty's personal preference, but by a privilege which may be obtained by anyone under general rules of law, such as a vendor's or a builder's privilege.

13 If sections 47(a) and 107(1)(j) are read in this way, no conflict arises between them. If a trust claim is established under general principles of law, then the property subject to the trust is removed from the general distribution by reason of s. 47(a). Following the reasoning of Pigeon J. in Deputy Minister of Revenue v. Rainville, such a claim would not fall under s. 107(1)(j) because it is valid under general principles of law and is not a claim secured by the Crown's personal preference.

14 This construction of ss. 47(a) and 107(1)(j) of the Bankruptcy Act conforms with the principle that provinces cannot create priorities under the Bankruptcy Act by their own legislation, a principle affirmed by this Court in Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board, [1985] 1 S.C.R. 785. As Wilson J. stated at p. 806:

> ... the issue in Re Bourgault [Deputy Minister of Revenue v. Rainville] and Re Black Forest Restaurant Ltd. was not whether a proprietary interest has been created under the relevant provincial legislation. It was whether provincial legislation, even if it did create a proprietary interest, could defeat the scheme of distribution under s. 107(1) of the Bankruptcy Act. These cases held that it could not, that while the provincial legislation could validly secure debts on the property of the debtor in a non-bankruptcy situation, once bankruptcy occurred s. 107(1) determined the status and priority of the claims specifically dealt with in the section. It was not open to the claimant in bankruptcy to say: By virtue of the applicable provincial legislation I am a secured creditor within the meaning of the opening words of s. 107(1) of the Bankruptcy Act and therefore the priority accorded my claim under the relevant paragraph of s. 107(1) does not apply to me. In effect, this is the position adopted by the Court of Appeal and advanced [page33] before us by

> the respondent. It cannot be supported as a matter of statutory interpretation of s. 107(1) since, if the section were to be read in this way, it would have the effect of permitting the provinces to determine priorities on a bankruptcy, a matter within exclusive federal jurisdiction.

While Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board was concerned with provincial legislation purporting to give the Province the status of a secured creditor for purposes of the Bankruptcy Act, the same reasoning applies in the case at bar.

15 To interpret s. 47(a) as applying not only to trusts as defined by the general law, but to statutory trusts created by the provinces lacking the common law attributes of trusts, would be to permit the provinces to create their own priorities under the Bankruptcy Act and to invite a differential scheme of distribution on bankruptcy from province to province.

16 Practical policy considerations also recommend this interpretation of the Bankruptcy Act. The difficulties of extending s. 47(a) to cases where no specific property impressed with a trust can be identified are formidable and defy fairness and common sense. For example, if the claim for taxes equalled or exceeded the funds in the hands of the trustee in bankruptcy, the trustee would not recover the costs incurred to realize the funds. Indeed, the trustee might be in breach of the Act by expending funds to realize the bankrupt's assets. Other difficulties would arise in the case of more than one claimant to the trust property. The spectre is raised of a person who has a valid trust claim under the general principles of trust law to a specific piece of property, finding himself in competition with the Crown claiming a statutory trust in that and all the other property. Could the Crown's general claim pre-empt the property interest of the claimant under trust law? Or would the claimant under trust law prevail? To admit of such a possibility would be to run counter to the clear intention of Parliament in enacting the Bankruptcy Act of setting up a clear and orderly [page34] scheme for the distribution of the bankrupt's assets.

17 In summary, I am of the view that s. 47(a) should be confined to trusts arising under general principles of law, while s. 107(1)(j) should be confined to claims such as tax claims not established by general law but secured "by her Majesty's personal preference" through legislation. This conclusion, in my opinion, is supported by the wording of the sections in question, by the jurisprudence of this Court, and by the policy considerations to which I have alluded.

18 I turn next to s. 18 of the Social Service Tax Act and the nature of the legal interests created by it. At the moment of collection of the tax, there is a deemed statutory trust. At that moment the trust property is identifiable and the trust meets the requirements for a trust under the principles of trust law. The difficulty in this, as in most cases, is that the trust property soon ceases to be identifiable. The tax money is mingled with other money in the hands of the merchant and converted to other property so that it cannot be traced. At this point it is no longer a trust under general principles of law. In an attempt to meet this problem, s. 18(1)(b) states that tax collected shall be deemed to be held separate from and form no part of the collector's money, assets or estate. But, as the presence of the deeming provision tacitly acknowledges, the reality is that after conversion the statutory trust bears little resemblance to a true trust. There is no property which can be regarded as being impressed with a trust. Because of this, s. 18(2) goes on to provide that the unpaid tax forms a lien and charge on the entire assets of the collector, an interest in the nature of a secured debt.

19 Applying these observations on s. 18 of the Social Service Tax Act to the construction of ss. 47 (a) and 107(1)(j) of the Bankruptcy Act which [page35] I have earlier adopted, the answer to the question of whether the Province's interest under s. 18 is a "trust" under s. 47(a) or a "claim of the

Crown" under s. 107(1)(j) depends on the facts of the particular case. If the money collected for tax is identifiable or traceable, then the true state of affairs conforms with the ordinary meaning of "trust" and the money is exempt from distribution to creditors by reason of s. 47(a). If, on the other hand, the money has been converted to other property and cannot be traced, there is no "property held ... in trust" under s. 47(a). The Province has a claim secured only by a charge or lien, and s. 107(1)(j) applies.

20 In the case at bar, no specific property impressed with a trust can be identified. It follows that s. 47(a) of the Bankruptcy Act should not be construed as extending to the Province's claim in this case.

21 The province, however, argues that it is open to it to define "trust" however it pleases, property and civil rights being matters within provincial competence. The short answer to this submission is that the definition of "trust" which is operative for purposes of exemption under the Bankruptcy Act must be that of the federal Parliament, not the provincial legislatures. The provinces may define "trust" as they choose for matters within their own legislative competence, but they cannot dictate to Parliament how it should be defined for purposes of the Bankruptcy Act: Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board.

22 Nor does the argument that the tax money remains the property of the Crown throughout withstand scrutiny. If that were the case, there would be no need for the lien and charge in the Crown's favour created by s. 18(2) of the Social Service Tax Act. The Province has a trust interest and hence property in the tax funds so long as they can be identified or traced. But once they lose that character, any common law or equitable property interest disappears. The Province is left with a statutory deemed trust which does not give it the same property interest a common law trust would, [page36] supplemented by a lien and charge over all the bankrupt's property under s. 18(2).

23 The province relies on Re Phoenix Paper Products Ltd. (1983), 48 C.B.R. (N.S.) 113 (Ont. C.A.), where the Ontario Court of Appeal held that accrued vacation pay mixed with other assets of a bankrupt constituted a trust under s. 47(a) of the Bankruptcy Act. As the Court of Appeal in this case pointed out, the Ontario Court of Appeal in Re Phoenix Paper Products Ltd., in considering the two divergent lines of authority presented to it, did not have the advantage of considering what was said in Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board, and the affirmation in that case of the line of authority which the Ontario Court of Appeal rejected.

24 The appellant raised a second question in the alternative, namely:

> If the Province is divested of its trust property by reason of S. 18(1) being in conflict with S. 107(1)(j) of the Bankruptcy Act, does [that] property devolve to the secured creditor [the Bank] or is it distributed to unsecured creditors pursuant to S. 107 of the Bankruptcy Act?

This question was not raised in the courts below, nor on the application for leave to appeal. It concerns parties who were not present on the appeal. For these reasons, I would decline to consider it.

Conclusion

25 For the reasons stated, I conclude that s. 47(a) of the Bankruptcy Act does not apply in this case and the priority of the Province's claim is governed by s. 107(1)(j) of the Act. I would decline to answer the alternative question posed by the appellants.

26 I would dismiss the appeal, with costs.

The following are the reasons delivered by

27 CORY J. (dissenting):-- I have read with great interest the compelling reasons of my colleague Justice McLachlin. Unfortunately I cannot agree [page37] that s. 47(a) of the Bankruptcy Act, R.S.C. 1970, c. B-3, does not apply in this case. If section 18 of the British Columbia Social Service Tax Act, R.S.B.C. 1979, c. 388, creates a valid trust, then s. 47(a) of the Bankruptcy Act must apply. In order to determine the effect of s. 18 it may be helpful to consider the Social Service Tax Act as a whole.

Scheme of the B.C. Social Service Tax Act

28 Registration under this Act is a condition precedent to carrying on a retail sales business in the province of British Columbia. Subject to certain irrelevant and minor exceptions, the Act provides that no one may sell "tangible personal property" in the province at a retail sale without being registered with the "commissioner", the provincial official appointed to administer the Act. It is sufficient to note that the term "tangible personal property" is given a very broad definition. With the approval of the Minister, the Commissioner may cancel or suspend the certificate of anyone found guilty of an offence under the Act thus terminating the retail business. This is the ultimate form of control that the province exercises over those who collect the taxes assessed under the Act. In addition, the regulations passed pursuant to the Act provide for close scrutiny of the use of the registration certificates issued to vendors.

29 Pursuant to s. 5 of the Act, retail vendors are deemed to be agents of the Minister for the purposes of levying and collecting sales tax. Section 6 provides that these agents are deemed to be tax collectors for the purposes of the Revenue Act, R.S.B.C. 1979, c. 367, and are made subject to the provisions of ss. 22 to 28 of that Act. Sections 22 to 28 prescribe the penalties for tax collectors who fail to render their accounts as required by the statute. Pursuant to s. 27, where a collector has received money belonging to the Crown in right of the Province and has failed to pay it to the province, the defaulting collector's property may be seized. As a quid pro quo, s. 8 of the Social Service Tax Act provides that vendors are to [page38] receive remuneration for the service they provide to the government by collecting the tax.

30 Under ss. 9 and 10 of the Act every vendor is required to make returns and keep tax records in the form prescribed by the regulations and must keep a record of all purchases and sales. Division 5 of the Social Services Tax Act Regulations, B.C. Reg. 84/58, makes detailed provision for these returns and records. The regulations make clear that there is to be continuous supervision of sales tax collection. Separate monthly returns must be made for each place of business and the returns must be made no later than fifteen days after the last day of each monthly period. The regulations provide in detail for the means of calculating upon each return the commission for each vendor on the collection of sales tax.

31 The requirements concerning the keeping of records and accounts emphasize the trust nature of the arrangement. They provide that books of account must contain distinct records of all (1) sales, (2) purchases, (3) non-taxable sales, (4) taxable sales, (5) amounts of tax collected and (6) disposal of tax including commission taken. The records further stress that "all entries concerning the tax and such books of account, records and documents shall be kept separate and distinguishable from other entries made therein." (Emphasis added.) As well the tax must be shown as a separate item on all receipts given to purchasers. Section 27 of the Act provides wide powers for the inspection of these records.

32 It is against this background that s. 18 of the Social Service Tax Act must be considered. That section provides:

> 18. (1) Where a person collects an amount of tax under this Act
>
> (a) he shall be deemed to hold it in trust for Her Majesty in right of the Province for payment over of that amount to Her Majesty in the manner and at the time required under this Act and regulations, and [page39]
>
> (b) the tax collected shall be deemed to be held separate from and form no part of the person's money, assets or estate, whether or not the amount of the tax has in fact been kept separate and apart from either the person's own money or the assets of the estate of the person who collected the amount of the tax under this Act.
>
> (2) The amount of taxes that, under this Act,
>
> (a) is collected and held in trust in accordance with subsection (1); or
>
> (b) is required to be collected and remitted by a vendor or lessor
>
> forms a lien and charge on the entire assets of
>
> (c) the estate of the trustee under paragraph (a);
>
> (d) the person required to collect or remit the tax under paragraph (b); or
>
> (e) the estate of the person required to collect or remit the tax under paragraph (d).

33 It can be seen that the moneys collected by a vendor such as Tops as the tax collector of the sales tax never belongs to the vendor. The sales tax is payable by the purchaser who owes that sum to the province. The vendor never has any interest in those funds and is in every sense of the word a trustee of the funds collected for the sales tax. The vendor is simply the conduit for payment of the sales tax to the province. The province has not relied upon a requirement that separate bank accounts be kept by a vendor to protect its trust property. Rather, it has put into place a system of registration of all retail sales businesses and provided for a regulated means of record keeping and inspection. This system permits the government to specify precisely what money is due to it and to ascertain what is happening to its money on a monthly basis.

34 If the tax is not paid to the province then a vendor such as Tops must have stolen the funds, converted them to its own use or most charitably lost the funds for which it was responsible and for which it was accountable to the province.

35 From the point of view of fairness, there would seem to be no objection to the provincial government creating a lien or charge on the assets of [page40] the vendor for the amount of the sales tax (the trust funds) which the vendor was responsible for collecting and remitting to the province.

Does Section 18 Create a Valid Trust?

36 The question may be phrased more precisely by asking: If, as the chambers judge found, sales tax money "was misappropriated by Tops and mingled with its assets", does that put an end to the trust? It is said that the trust, although validly existing at the moment the funds were paid by the purchaser, ceases to exist or have any validity once the funds were mingled so that they could not be traced readily. To begin with, and somewhat simplistically, there is no prohibition in the Bankruptcy Act against the province creating a deemed trust or lien against the retail vendor's property for the extent of the sales tax nor is there a conflict between s. 18 of the Social Service Tax Act and s. 47(a) and s. 107 of the Bankruptcy Act. This is not a statutory ruse to evade the provisions of the Bankruptcy Act. It is simply an attempt to protect trust funds which are earmarked to be used for the public benefit and public use. Rather than insist that on each sale there be a separate payment to the province, the Act created a system which was in the best interest of retail purchasers, retail vendors, the business community and the province as a whole. The Act does no more than protect funds which at the moment they were paid were truly trust funds. Nor am I sure that the validity of a trust must be determined exclusively on the basis of common law. It has been held by this Court that the civil law of trust is not the same as that of common law. See Royal Trust Co. v. Tucker, [1982] 1 S.C.R. 250, at p. 261.

37 There are a number of provincial statutory provisions which create trusts. This type of legislation is common to a wide range of statutes that may benefit employees, purchasers of insurance, payers of health and insurance and many others who lack the organization or bargaining power to establish a trust for themselves. See for example, [page41] Pension Benefits Act, S.O. 1987, c. 35, s. 58; Insurance Act, R.S.O. 1980, c. 218, s. 359; Health Insurance Act, R.S.O. 1980, c. 197, s. 18; Builders' Lien Act, R.S.A. 1980, c. B-12, s. 16.1; Construction Lien Act, S.O. 1983, c. 6, s. 7; Business Corporations Act, S.A. 1981, c. B-15, s. 191(1); Employment Standards Act, R.S.A. 1980, c. E-10.1, s. 113; Insurance Act, R.S.A. 1980, c. I-5, s. 123(1); Real Estate Agents' Licensing Act, R.S.A. 1980, c. R-5, s. 14, and Health Insurance Premiums Regulation, Alta. Reg. 217/81.

38 This Court has held that a province may, to further and protect a principle of social policy, create a statutory trust. In John M. M. Troup Ltd. v. Royal Bank of Canada, [1962] S.C.R. 487, at p. 494, the trust provisions of The Mechanics' Lien Act, R.S.O. 1950, c. 227, (now the Construction Lien Act) were found to be validly enacted. The statutory trusts referred to above provide needed protection for their beneficiaries and forward salutary social objectives which the provinces have jurisdiction to pursue.

39 Subsection 23(4) of the Canada Pension Plan, R.S.C. 1985, c. C-8, creates a statutory trust using language almost identical to s. 18 of the Social Service Tax Act. In Re Deslauriers Construction Products Ltd. (1970), 3 O.R. 599 (C.A.), Gale C.J.O., for a unanimous Court, noted that the Act deemed Pension Plan moneys to be kept separate and apart from the estate of the employer "whether or not that amount has in fact been kept separate and apart from the employer's own moneys or from the assets of the estate", and commented at p. 601:

> [These words] were inserted in the Act specifically for the purpose of taking the moneys equivalent to the deductions out of the estate of the bankrupt by the [page42] creation of a trust and making those moneys the property of the Minister.

From this he drew the following conclusion at pp. 602-3:

> In the Canada Pension Plan the fund is deemed to be property which does not comprise part of the bankruptcy at all, so that the Crown under that act is not

a creditor, but is deemed to hold property which is not the property of the bankrupt.

Gale C.J.O's judgment was cited with approval by Pigeon J. writing for the majority in this Court in Dauphin Plains Credit Union Ltd. v. Xyloid Industries Ltd., [1980] 1 S.C.R. 1182, at p. 1198, who stated: "I find the reasoning in Deslauriers wholly persuasive ...."

40 The provisions of s. 18 then should prevail unless they are in conflict with the provisions of the Bankruptcy Act. Sections 47 and 107 of the Act provide:

> 47. The property of a bankrupt divisible among his creditors shall not comprise
>
> (a) property held by the bankrupt in trust for any other person;
>
> . . .
>
> 107. (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:
>
> . . .
>
> (j) claims of the Crown not previously mentioned in this section, in right of Canada or of any province, pari passu notwithstanding any statutory preference to the contrary.

41 The doctrine of federal paramountcy of legislation can only apply if there is actual conflict in the operation of the provincial and federal statutes. The principle was set forth in Multiple Access Ltd. v. McCutcheon, [1982] 2 S.C.R. 161, at p. 191, by Dickson J., as he then was, in these words:

> In principle, there would seem to be no good reasons to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says "yes" and the other says "no"; "the same citizens [page43] are being told to do inconsistent things"; compliance with one is defiance of the other.

42 In this case there is no conflict as the property which was subject to s. 18 of the Social Service Tax Act never at any time became the property of the bankrupt and is therefore not subject to distribution as the property of the bankrupt pursuant to s. 107 of the Bankruptcy Act. On a plain reading of s. 47 of the Bankruptcy Act there is no conflict created by the two statutes.

43 It is true that this Court has in Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board, [1985] 1 S.C.R. 785, recognized and emphasized that provinces cannot, by means of their own legislation, create priorities under the Bankruptcy Act. However, s. 18 has not created a priority. It did no more than give statutory recognition to a valid trust. It then eliminated the necessity of setting up a separate bank account for sales tax moneys and substituted a system of registration and record-keeping to control these funds which never at any time belonged to the vendor trustee. That latter step did not alter the existence of the valid trust of the funds collected from the purchasers for payment to the province. I do not think that the decision in Deloitte Haskins and Sells Ltd. v. Workers'

Compensation Board, supra, can be taken to have altered the meaning of the words "property of the bankrupt" contained in s. 47 of the Bankruptcy Act.

44 This appears to be the opinion expressed by Anne E. Hardy, the author of Crown Priority in Insolvency (1986). She concedes that in the interest of consistency with Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board, supra, the lien portion of the deemed trust section should probably be held to be ineffective on the bankruptcy of the trustee. Nonetheless at p. 107 she sets out her position in this way:

> Thus, as a matter of interpretation, it is questionable to limit the scope of section 47(a) of the Bankruptcy Act to trusts which either exist in fact or do not benefit the Crown or a creditor whose claim is referred to in subsection 107(1) of the Act. Until the Act is amended to permit the courts to construe section 47 in this manner, they are probably not justified in taking this [page44] approach. The Coopers & Lybrand case therefore appears to be incorrectly decided. The judgments in most cases which have upheld statutory deemed trusts in bankruptcy and refused to rank the claims covered by them under subjection 107(1) of the Act are preferable.
>
> As argued above, trusts should generally be upheld on the bankruptcy of the trustee regardless of the manner in which they arise. It is possible, however, that certain types be deemed trust provisions should be held to be ineffective and that a valid trust would therefore not come into existence. Most of the trust cases decided since Re Bourgault have distinguished that case because it did not discuss trust provisions or the relationship between the trusts covered by section 47(a) and subsection 107(1) of the Bankruptcy Act. Some of these decisions dealt with trust provisions under which an amount deemed to be held in trust had been made a lien and charge on the assets of the trustee.

That view should I think prevail.

45 Furthermore, it seems that the trust although imposed by statute contains all the essential characteristics required of a trust. In order for a trust to be recognized in equity, there had to be three fundamental aspects complied with, that is to say there had to be certainty of intention, certainty of subject matter and certainty of objects. It is conceded that the statute establishes certainty of intention and of object. The respondent argues that there cannot be certainty of subject matter because the trust property cannot be identified and that thus trust in the traditional sense has not come into existence. However, here the subject matter was clearly identified at the moment of the sales by the vendor (Tops). The only issue that remained was whether or not the trust property could be identified so that such a trust could succeed in a tracing action. This subject matter was addressed by Professor Waters in the Law of Trusts in Canada (2nd ed. 1984), at pp. 119-22:

> When the courts say that there must be certainty of subject-matter, they mean that the property must either [page45] be described in the trust instrument, or there must be "a formula or method given for identifying it."
>
> . . .

> In determining certainty, what the courts are looking for is the certainty of concept rather than whether it is too difficult to ascertain the subject-matter.

He distinguishes this question from the tracing issue:

> Initial ascertainability does not exist, so far as case law is concerned, unless specific property is earmarked as the trust property. Once this has occurred, and the trust has come into effect, the trust beneficiary can trace that property, whether it is converted into other forms, or, if money, it is mixed with other funds. [Emphasis in original.]

46 There can be no doubt that the statute provides a clear formula for establishing the trust property, that is to say the sales tax, and therefore certainty of subject matter does indeed exist. The three certainties of intention, object and subject matter are thus established by statute. It could not be said that funds which were collected by Tops for sales tax became the property of Tops on the ground that the certainties required of a trust by equity do not exist as the statute has validly created them.

47 Neither could it be said that the statutory trust funds (the sales tax collected) became the property of the bankrupt Tops by reason of the fact that Tops improperly mingled those funds with its own property. In equity, funds mingled in this way remained impressed with their trust obligations. This left the beneficiary with two possible recourses against the trustee for its wrongful conduct. The beneficiary might either seek to recover the trust property by itself through the remedy of tracing or might choose instead to seek compensation for the loss by means of an action against the trustee.

48 Although there is some dispute as to whether at common law funds can be "followed" once they have been mixed with the defendant's own funds, in equity those monies can be traced "either as a [page46] separate fund or as part of a mixed fund or as latent in property acquired by means of such a fund": Re Diplock's Estate, [1948] Ch. 465, at p. 521, [1948] 2 All E.R. 318, at p. 347 (C.A.), per Lord Green M.R.; aff'd sub nom. Min. of Health v. Simpson, [1951] A.C. 251, [1950] 2 All E.R. 1137 (H.L.). The limits to a tracing action are largely fixed by the difficulties and ultimately the prohibitive excuse of providing the necessary accounts. See D. W. M. Waters, supra, at pp. 1037 ff. There is no reason why a statutorily constituted trust cannot provide an advantage over a privately constituted trust by recognizing the existence of the trust in property held by the trustee without requiring the beneficiary to undertake the often inordinately expensive action of tracing commingled funds. This advantage should not deprive the statutory trust property of its trust character or take it outside the policies articulated in Deputy Minister of Revenue v. Rainville, [1980] 1 S.C.R. 35; Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board, supra, and Federal Business Development Bank v. Quebec (Commission de la santé et de la sécurité du travail), [1988] 1 S.C.R. 1061. It would thus seem that the statutory trust complies with the requirements of a valid trust that would be recognized in equity.

49 If as stated in Deputy Minister of Revenue v. Rainville mechanics' liens or construction liens may be recognized, although it would be impossible to trace the funds of the sub-contractors in the commingled accounts of the general contractor, so too should the statutory trust pertaining to sales tax be recognized.

50 Nor will such a conclusion create practical problems. If the proposed trustee in bankruptcy is faced with the question as to whether or not the assets are subject to a trust, an application may be made to the court to determine that issue at the outset of the proceedings. Further, if there is a dispute between those claiming a trust interest it can be determined on the basis of priority predicated upon the date on which the trust arose.

[page47]

Disposition

51 I conclude therefore that the trust described in s. 18 of the British Columbia Social Service Tax Act is not in any sense a claim against the property of the bankrupt so as to conflict with the policy underlying s. 107(1) of the Bankruptcy Act as that policy has been expounded in Deputy Minister of Revenue v. Rainville; Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board and Federal Business Development Bank v. Quebec (Commission de la santé et de la sécurité du travail) for the following reasons:

(a) The sums constituting the trust were never the property of the bankrupt, but were transferred from purchasers of vehicles to the provincial Crown, for whom Tops acted as trustee, in satisfaction of an obligation incurred by those purchasers;

(b) the trust was validly constituted in that it complied with the three certainties required of trusts by the law of equity: s. 18 of the Social Service Tax Act does not dispense with those certainties, but conforms to them, in the same way that a contractual trust instrument must;

(c) the only relevant distinction between this statutory trust and a contractual express trust lies in the deemed tracing remedy provided by the statute. The existence of this remedy

(i) does not negate the trusts;

(ii) is largely facilitative and thus does not take the trust out of the policy enunciated in Deputy Minister of Revenue v. Rainville; Deloitte Haskins & Sells Ltd. v. Workers' Compensation Board and Federal Business Development Bank v. Québec (Commission de la santé et de la sécurité de travail);

(d) The trust therefore properly falls within s. 47(a) of the Bankruptcy Act and outside the property of the bankrupt, as that term is to be understood in light of the policy underlying s. 107(1) of the Act.

52 I would therefore answer the constitutional question as follows:

[page48]

Are the provisions of s. 18(1) of the Social Service Tax Act, R.S.B.C. 1979, c. 388, as amended, inoperative by reason of being in conflict with s. 107(1)(j) of the Bankruptcy Act, R.S.C. 1970, c. B-3?

Answer: No.

53 I would allow the appeal, set aside the decision of the Court of Appeal and that of the chambers judge and direct that the special case be answered "the defendant was not correct in granting the Canadian Imperial Bank of Commerce priority over the statutory trust of the plaintiff."

3

Case Name:

Canada v. Ted LeRoy Trucking Ltd.

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.B.C. 1985, c. C-36
AND IN THE MATTER OF the Business Corporations Act, R.S.B.C. 2002, c. 57
AND IN THE MATTER OF Ted LeRoy Trucking Ltd. and 383838 B.C. Ltd.
Between
The Attorney General of Canada on behalf of Her Majesty the Queen in right of Canada, Appellant, and
Ted LeRoy Trucking Ltd., 383838 B.C. Ltd., Century Services Inc., and PricewaterhouseCoopers Inc. in its capacity as Monitor, Respondents

[2009] B.C.J. No. 918

2009 BCCA 205

[2009] G.S.T.C. 79

2009 G.T.C. 2020

270 B.C.A.C. 167

[2009] 12 W.W.R. 684

98 B.C.L.R. (4th) 242

2009 CarswellBC 1195

178 A.C.W.S. (3d) 134

Docket: CA036474

British Columbia Court of Appeal
Vancouver, British Columbia

M.V. Newbury, D.F. Tysoe and D.M. Smith JJ.A.

Heard: March 30, 2009.
Judgment: May 7, 2009.

(38 paras.)

Taxation -- Goods and Services Tax (GST) -- Collection and remittance -- Collection -- Deemed Trust -- Appeal by Crown from dismissal of its application on the eve of bankruptcy of respondent company to have funds held in trust paid to the Receiver General for Canada -- Appeal allowed -- While the chambers judge had authority to stay the Crown's right to enforce the deemed trust created by Excise Tax Act s. 222(3) during the period in which the respondent attempted to reorganize its financial affairs, after the restructuring efforts came to an end he did not have the discretion to ignore deemed trust under s. 222 or the express trust created in favour of the Crown when the respondent paid the funds into the trust account of the Monitor.

Appeal by the Crown from dismissal of its application on the eve of the bankruptcy of LeRoy Trucking to have funds being held in trust paid to the Receiver General for Canada. LeRoy Trucking obtained an order under the Companies' Creditors Arrangement Act staying all proceedings while it attempted to restructure its financial affairs, and an accounting firm was appointed as Monitor. LeRoy Trucking owed the Crown $305,202 in GST collected from third parties. LeRoy Trucking had been authorized by the court to conduct sales of its redundant equipment, and it applied on April 29, 2008 for court approval of the distribution of the sale proceeds. It proposed that, subject to a holdback of the $305,202 owed to the Crown on account of GST, an amount not exceeding $5 million be paid to Century Services, its major secured creditor. Over the objection of the Crown, which wanted the monies paid directly to it, the chambers judge agreed with the proposal and ordered that the Monitor hold the sum of $305,202 in its trust account pending further order of the court. No appeal was taken by the Crown from this order. LeRoy Trucking eventually came to the realization that it could not successfully reorganize its financial affairs and applied for court approval of the distribution of further sale proceeds and for leave to assign itself into bankruptcy. The Crown applied on the same day for an order that the monies held in trust by the Monitor be paid to the Receiver General. The chambers judge heard LeRoy Trucking's application first and granted it; he then heard and dismissed the Crown's application.

HELD: Appeal allowed. The funds paid into the trust account of the Monitor, together with interest earned thereon, were ordered to be paid to the Receiver General. While the chambers judge had the authority to stay the Crown's right to enforce the deemed trust created by s. 222(3) of the Excise Tax Act during the period in which LeRoy Trucking attempted to reorganize its financial affairs, after the restructuring efforts came to an end he did not have the discretion to ignore the deemed trust under s. 222 or the express trust that was created in favour of the Crown when LeRoy Trucking paid the funds into the trust account of the Monitor.

Statutes, Regulations and Rules Cited:

Excise Tax Act, R.S.C. 1985, c. E-15, s. 18.3(1), s. 222(3)

Counsel:

D.W. Jacyk and K.K. Khalsa: Counsel for the Appellant.

M.I.A. Buttery and M.J.G. Curtis: Counsel for the Respondent, Century Services Inc.

Reasons for Judgment

The judgment of the Court was delivered by

1 D.F. TYSOE J.A.:-- Her Majesty the Queen in right of Canada (the "Crown") appeals from an order dismissing its application on the eve of the bankruptcy of Ted LeRoy Trucking Ltd. (the "Debtor Company") to have funds being held in trust paid to the Receiver General for Canada.

2 The Debtor Company commenced proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*"), on December 14, 2007. As is typical in *CCAA* proceedings, the Debtor Company obtained an order staying all proceedings while it attempted to restructure its financial affairs, and an accounting firm was appointed as Monitor.

3 The Debtor Company owed the Crown, pursuant to the *Excise Tax Act*, R.S.C. 1985, c. E-15 (the "*ETA*"), in respect of goods and services tax ("GST") collected by the Debtor Company from third parties. The aggregate amount collected in reporting periods preceding the *CCAA* filing, but not remitted to the Receiver General, was the sum of $305,202.30.

4 The *ETA* provides the Crown with rights to enforce payment of unremitted GST collections. One example, which is not in issue on this appeal, is the right given to the Minister of Finance under s. 317 to issue a form of garnishment called a requirement to pay.

5 The enforcement right given to the Crown in issue on this appeal is contained in s. 222 of the *ETA*, and is commonly referred to as the "deemed trust" provision. Subsection (1) provides that all amounts collected on account of GST are deemed to be held by the person collecting them in trust for the Crown until they are remitted to the Receiver General. Subsection (3) creates a deemed trust in respect of the property of the person collecting the GST, as follows:

> (3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed
>
> (a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and
>
> (b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

> and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

6 The Debtor Company had been authorized by the court to conduct sales of its redundant equipment, and it applied on April 29, 2008 for court approval of the distribution of the sale proceeds. The Debtor Company proposed that, subject to a holdback of the $305,202.30 owed to the Crown on account of GST, an amount not exceeding $5 million be paid to Century Services, the major secured creditor of the Debtor Company. Over the objection of the Crown, which wanted the monies paid directly to it, the chambers judge agreed with the Debtor Company's proposal and ordered that the Monitor hold the sum of $305,202.30 in its trust account pending further order of the court. No appeal was taken by the Crown from this order.

7 The Debtor Company eventually came to the realization that it could not successfully reorganize its financial affairs. It applied on September 3, 2008 for court approval of the distribution of further sale proceeds and for leave to assign itself into bankruptcy. The Crown applied on the same day for an order that the monies held in trust by the Monitor be paid to the Receiver General. The chambers judge heard the Debtor Company's application first and granted it. He then heard and dismissed the Crown's application.

8 The reasoning of the chambers judge in dismissing the Crown's application was as follows (2008 BCSC 1805):

> [5] I recognize that the funds collected by the petitioners pre-filing were the subject [of] the deemed trust provisions in the legislation. Monies were collected by the petitioner from third parties on behalf of Canada and they were not paid over to Canada. However, the triggering date was the date of the *CCAA* filing. Under the existing *CCAA* law, the court is required to maintain the status quo amongst the parties as of that date. At the date of the first day order the outstanding GST monies were owed but had not been remitted and remained in the possession of the petitioner.
>
> [6] In my view the amounts that were segregated were done to facilitate an ultimate payment of the GST monies which were owing pre-filing, but only if a viable plan emerged at the conclusion of the *CCAA* process. That has not happened. The reality is there will never be a plan in this case, but merely a sale of assets under the *BIA* as well as under the *CCAA* continued stay. That being so, it seems to me that the Crown has simply lost its preference under the provisions of the *BIA* and that that is simply a consequence of the way in which this restructuring has ended. It is no different than if the petitioner had filed under the *BIA* at the outset. The Crown is simply in the position that it is entitled to be in under the *BIA*. It will have the rights that Parliament has chosen to confer upon it under that legislation.

9 It was agreed between the parties that two additional pieces of information could be admitted on this appeal. The first is that the Debtor Company did make an assignment in bankruptcy on September 4, 2008, and the Monitor was named the trustee in bankruptcy, as well as being appointed receiver under the security held by Century Services. The second is that the Monitor invested the $305,202.30 sum in a term deposit when the monies were received from the Debtor Company and that, on or after

September 4, the term deposit plus interest thereon ($308,245.15) was paid into the general trust account of the trustee/receiver, which contained other funds.

10 Before discussing the decision of the chambers judge, I will provide a backdrop by reviewing general principles of the *CCAA* and outlining the introduction of the provisions of the *CCAA* dealing with Crown claims. I will also briefly make reference to the nature of the deemed trust provision in favour of the Crown.

11 Much has been written about the purpose of the *CCAA* and the stay provisions of s. 11 of the Act. One of the most often cited passages is the following paragraph from *Chef Ready Foods Ltd. v. Hongkong Bank of Canada* (1990), 4 C.B.R. (3d) 311 at 315, 51 B.C.L.R. (2d) 84 (C.A.):

> [10] The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. It is available to any company incorporated in Canada with assets or business activities in Canada that is not a bank, a railway company, a telegraph company, an insurance company, a trust company, or a loan company. When a company has recourse to the C.C.A.A., the Court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success there must be a means of holding the creditors at bay, hence the powers vested in the Court under s. 11.

12 Similar comments were made in *Re Royal Oak Mines Inc.* (1999), 6 C.B.R. (4th) 314 at 317, 96 O.T.C. 272 (Ont. Ct. Jus. (Gen. Div.)):

> [7] Section 11 of the CCAA is the provision of the Act embodying the broad and flexible statutory power invested in the court to "grant its protection" to an applicant by imposing a stay of proceedings against the applicant company, subject to terms, while the company attempts to negotiate a restructuring of its debt with its creditors. It is well established that the provisions of the Act are remedial in nature, and that they should be given a broad and liberal interpretation in order to facilitate compromises and arrangements between companies and their creditors, and to keep companies in business where that end can reasonably be achieved: ... [citations omitted]

13 When the use of the *CCAA* was resurrected in the late 1980s and early 1990s after a period of dormancy, there was uncertainty as to whether the Crown was bound by orders made in *CCAA* proceedings. There were a number of conflicting decisions, including *Re Fine's Flowers Ltd.* (1993), 108 D.L.R. (4th) 765, 22 C.B.R. (3d) 1 (Ont. C.A.), where it was held that the *CCAA* did not bind the Crown. This undermined the utility of the *CCAA* and, as a result, several provisions were added to the *CCAA* in the 1997 round of amendments to the Act (S.C. 1997, c. 12). The most important of these provisions was s. 21, which specifically provides that the *CCAA* is binding on the Crown.

14 Parliament simultaneously enacted several other provisions in the *CCAA* dealing with specific Crown claims and rights of enforcement. Section 11.4 was added to provide that a stay order can stay the garnishment rights of the Crown under s. 224(1.2) of the *Income Tax Act* and similar provisions in the *Canada Pension Plan* and the *Employment Insurance Act* (and comparable provisions under provincial legislation), provided that, among other things, the debtor company remains current in respect of amounts due to the Crown after the date of the stay order. Section 18.2 was added to provide that if an order does stay the provisions referred to in s. 11.4, no compromise or arrangement shall be sanctioned by the court unless it provides for payment in full to the Crown within six months of the amounts outstanding at the date of the stay order that could have been garnished in the absence of the stay order or unless the Crown consents. Other additions dealt specifically with environmental claims (s. 11.8(3) to (9)), workers' compensation (s. 18.4), and registered security held by the Crown (s. 18.5).

15 The addition to the Act of particular importance to this matter is s. 18.3(1) dealing with deemed trusts in favour of the Crown:

> 18.3(1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

Subsection (2) of s. 18.3 provides that subsection (1) does not apply to the deemed trust provisions in certain sections of the *Income Tax Act*, the *Canada Pension Plan* and the *Employment Insurance Act* (as well as similar provincial legislation). Subsection (2) does not mention s. 222 of the *ETA*.

16 Provisions virtually identical to ss. 18.3(1) and (2) are also contained in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*"), (namely, ss. 67(2) and (3)). That is why, generally speaking, deemed trusts in favour of the Crown are not effective in a bankruptcy situation, with the result that the Crown ranks in priority behind secured creditors in respect of the unremitted amounts giving rise to the deemed trusts.

17 The Supreme Court of Canada considered the nature of the deemed trust under s. 227(4.1) of the *Income Tax Act* (which is identical in material respects to s. 222(3) of the *ETA*) in *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720. The issue in that case was whether the Crown could claim against accounts receivable that were factored by the taxpayer to a third party after the deemed trust had come into existence as a result of the failure of the taxpayer to make required remittances. In holding that the Crown could not claim against the factored accounts receivable, Mr. Justice Iacobucci likened the deemed trust to a floating charge:

> [40] In my view, the scheme envisioned by Parliament in enacting ss. 227(4) and 227(4.1) is that the deemed trust is in principle similar to a floating charge over all the assets of the tax debtor in the amount of the default. As noted above, the trust has priority from the time the source deductions are made, and remains in existence as long as the default continues. However, the trust does not attach specifically to any particular assets of the tax debtor so as to prevent their sale. As such, the debtor is free to alienate its property in the ordinary course, in which case the trust property is replaced by the proceeds of sale of such property.

18 Mr. Justice Iacobucci also commented at para. 27 that the deemed trust in s. 227(4.1) of the *Income Tax Act* had been strengthened by amendments in 1998 in response to the court's earlier decision in *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411, 143 D.L.R. (4th)

385. The deemed trust provision of the *ETA* was similarly strengthened in 2000 (S.C. 2000, c. 30, s. 50) by the enactment of the present versions of ss. 222(1) and (3). One of the changes from the previous deemed trust provision in the *ETA* was the inclusion of the opening phrase of subsection (3): "Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), ..."

19 In *Re Ottawa Senators Hockey Club Corp.* (2005), 6 C.B.R. (5th) 293, 73 O.R. (3d) 737 (C.A.), the Ontario Court of Appeal was called upon to reconcile s. 18.3(1) of the *CCAA* and s. 222(3) of the *ETA* in view of the fact that they both contained clauses with "notwithstanding" language. In that case, the Ottawa Senators Hockey Club Corporation commenced a *CCAA* proceeding but when negotiations on a restructuring proposal foundered, its assets were sold to a third party. The sale was approved by an order made in the *CCAA* proceeding. At issue was whether the deemed trust under s. 222(3) of the *ETA* was to be recognized, enabling the Crown to recover the unremitted GST out of the sale proceeds in priority to the claims of secured creditors.

20 Relying on the principles of statutory interpretation flowing from the facts that s. 18.3(1) of the *CCAA* was enacted earlier and was more specific than s. 222(3) of the *ETA*, the court held that s. 222 (3) was to be given preference. The result was that the deemed trust for GST survived in a *CCAA* proceeding; the Crown was entitled to be paid the amount of the unremitted GST from the sale proceeds before any of the sale proceeds were distributed to secured creditors.

21 In the present case, the Crown relies heavily on *Ottawa Senators* and says that the chambers judge did not have a discretion to ignore the legislative will expressed in s. 222(3) of the *ETA*. With great respect to the chambers judge, I agree. It is also my view that there was an actual or express trust that should have been recognized by the chambers judge.

22 While the chambers judge had the authority to stay the Crown's right to enforce the s. 222(3) deemed trust during the period in which the Debtor Company attempted to reorganize its financial affairs, it is my view that, after the restructuring efforts came to an end, the chambers judge did not have a discretion to ignore the deemed trust under s. 222 of the *ETA* or the express trust that was created in favour of the Crown when the Debtor Company paid the funds into the trust account of the Monitor.

23 At the time of the hearing of the application, the chambers judge was acting under the *CCAA*. There was no longer any purpose under the *CCAA* to prevent the Crown from exercising its rights under the deemed trust or from receiving the funds being held in trust. The chambers judge was being asked to make a decision on the disposition of the funds being held in trust by the Monitor. Under the statutory regime in existence on that day, the Crown was entitled to rely on the deemed trust and the express trust. There was no reason to delay the decision and, as in *Ottawa Senators*, the funds should have been ordered to be paid to the Crown. The effect of the chambers judge's decision was to apply the scheme of distribution under the *BIA* before that Act had become engaged by the bankruptcy of the Debtor Company. In my opinion, the chambers judge did not have the discretion to decide whether the pre-bankruptcy or post-bankruptcy scheme of distribution should be preferred. He was bound to apply the scheme of distribution in effect at the time he was asked to deal with the funds.

24 It is my view that an express trust was created once the chambers judge made his order of April 29, 2008 and the $305,202.30 sum was paid into the trust account of the Monitor. In my opinion, the common law requirements for a trust (being certainty of intent, subject matter and object) were all met. There is no doubt that the monies were intended to be held in trust and that the investment of the funds in a term deposit kept them identifiable.

25 It may be argued that there was not sufficient certainty of object because the April 29 order stipulated that the funds were to be held in trust pending further order of the court, and the court could have ordered the funds to be paid to someone other than the Receiver General. It is my view there was sufficient certainty of object for two reasons. The first is the wording of the order itself:

> 2. the Monitor shall, pending further Order of the Court, hold the sum of $305,202.30 in its trust account in respect of the amount owing by [the Debtor Company] to the Canada Revenue Agency for pre-filing Goods and Services Tax.

The funds were being held in trust for the pre-filing GST, which was owed to the Crown.

26 Secondly, after the payments were made pursuant to the April 29 order, I am of the view that the court did not have the option of ordering the payment of the trust funds to any person other than the Receiver General. The closing words of s. 222(3) of the *ETA* provide that the Crown has a deemed trust covering the proceeds of the property of the person who collected the GST and that "the proceeds of the property shall be paid to the Receiver General in priority to all security interests". The court could not have authorized a payment to a secured creditor out of the proceeds from the sale of assets of the Debtor Company without ensuring payment of the GST to the Receiver General. Otherwise, the court would be sanctioning a breach of trust because it would be authorizing payment of proceeds covered by the deemed trust to a secured creditor in direct contravention of the closing phrase of s. 222(3). Hence, after the payment of the majority of the sale proceeds was made to Century Services, the court was required to ultimately order that the sum put aside on account of GST be paid to the Receiver General.

27 An express trust was found in the somewhat analogous circumstances of *Alnav Platinum Group Inc. v. APM Delstar Inc.*, 2001 ABQB 930, 32 C.B.R. (4th) 1. There, a secured creditor had acted on its security and had collected accounts receivable owing to the debtor company. The amounts collected included GST. The amount collected exceeded the amount owed to the secured creditor and it paid the surplus to a receiver appointed at the instance of another secured creditor. The first secured creditor and the receiver entered into a "Proceeds Agreement" that referred to "Pre-Receivership G.S.T.", and the Alberta Queen's Bench ordered that the sum relating to GST claims be paid by the receiver into a separate account. On a subsequent application after the debtor company had been adjudged bankrupt, the court held that an express trust had been created and that the funds were to be paid to the Crown.

28 In the same fashion that the Crown relies on the decision in *Ottawa Senators*, Century Services relies heavily on two decisions, *Minister of National Revenue v. Points North Freight Forwarding Inc.*, 2000 SKQB 504, 24 C.B.R. (4th) 184, and *Re Ivaco Inc.* (2006), 275 D.L.R. (4th) 132, 25 C.B.R. (5th) 176 (Ont. C.A.).

29 In *Points North*, a stay had been granted under the *CCAA* and the Crown applied to amend the stay order to allow it to exercise its garnishment rights under s. 317(3) of the *ETA*. Mr. Justice Barclay held that despite the fact that s. 11 of the *CCAA* does not mention the garnishment provision of the *ETA* (while mentioning similar provisions in other federal statutes), it was nevertheless intended by Parliament that an order under s. 11 of the *CCAA* can stay the enforcement rights of the Crown under s. 317(3) of the *ETA*. Century Services particularly relies on the following paragraph from *Points North*:

> [14] I agree with counsel for the respondents that there is no actual conflict as an order under s. 11 merely suspends the Crown's right under s. 317 of the *Excise Tax Act* as the Court deems necessary in order to allow the debtor to submit a proposal. The Crown's rights are not taken away, they are merely suspended. If the proposal is rejected by the creditors or the stay of proceedings is lifted, the Crown is then in a position to exercise its full rights under s. 317.

30 I do not quarrel with the proposition that an order under s. 11 of the *CCAA* can stay the enforcement rights of the Crown. However, when the restructuring efforts have come to an unsuccessful end, the Crown is then in a position to exercise its rights under the deemed trust. In addition, the s. 11 stay powers do not permit the court to authorize a breach of the deemed trust for the benefit of another creditor.

31 The facts in *Ivaco* do have some similarity to the case at bar. The debtor company was not able to restructure under the *CCAA* and its assets were sold. Two secured creditors brought motions to have the *CCAA* stay lifted so that they could petition the debtor company into bankruptcy. The Ontario Superintendent of Financial Services made a concurrent motion for an order that part of the sale proceeds be paid to satisfy unpaid pension contributions which were deemed by s. 57 of the *Pension Benefits Act*, R.S.O. 1990, c. P:8, to be held in trust for the employees.

32 The Ontario Court of Appeal upheld the decision of the motions judge dismissing the Superintendent's application and allowing the bankruptcy petitions to proceed. The court rejected the Superintendent's arguments that the motions judge was required to order the segregation of the amount of the deemed trusts during the *CCAA* proceedings and that the motions judge was required in law to order that the amount of the deemed trusts be paid at the end of the *CCAA* proceeding but before bankruptcy.

33 In my opinion, *Ivaco* is distinguishable on a number of bases. In the case at bar, funds had previously been paid into a trust account in respect of GST, but no funds had been earmarked in *Ivaco*. Here, I have found an express trust in favour of the Crown, while the Superintendent in *Ivaco* was relying only on the deemed trust. The deemed trust under s. 57 of the *Pension Benefits Act* is not as strong as the deemed trust under s. 222 of the *ETA* in several respects. Section 57 does not specify any property of the debtor company to be held in trust but, rather, s. 57(3) provides that the administrator of the pension plan has a lien and charge on the assets of the debtor company. Also, s. 57 does not contain "notwithstanding" language or a requirement similar to the one in s. 222(3) that "proceeds of the property shall be paid to the Receiver General in priority to all security interests".

34 I find of interest one of the comments made by Mr. Justice Laskin in rejecting the Superintendent's second argument, where he said the following:

> [60] The CCAA itself did not require the motions judge to execute the deemed trusts. The Superintendent cannot point to any section of the statute where a legal obligation to order payment of the past service contributions can be found. Moreover, in my view, absent an agreement, I doubt that the CCAA even authorized the motions judge to order this payment. Once restructuring was not possible and the CCAA proceedings were spent, as the motions judge found and all parties acknowledged, I question whether the court had any authority to order a distribution of the sale proceeds. See for

> example *Re United Maritime Fishermen Co-op* (1988), 68 C.B.R. (N.S.) 170 (N.B.Q.B.) at 173.

In the context of the present case, the chambers judge did have authority to order the funds to be paid out of the Monitor's trust account because they were paid into the trust account pending further order of the court. It was clearly contemplated that there would be an order in the *CCAA* proceedings directing the payment of the funds out of the trust account.

35 Mr. Justice Laskin's comments are of interest because he questioned whether the motions judge had any authority to make further orders once restructuring was not possible and the *CCAA* proceedings were spent. In the case at bar, once restructuring possibilities had been exhausted and the *CCAA* proceedings were spent, there was no reason to prevent the Crown from exercising its rights in relation to the funds being held in trust. The distinction in this regard between *Ivaco* and this case is that the motions judge in *Ivaco* was being asked to execute the deemed trusts, while the chambers judge in this case was simply being asked to release monies that were being held in a trust account in respect of GST.

36 The final point I wish to address is Century Services' argument that public policy favours its position because insolvent companies should be encouraged to attempt to restructure rather than to file for bankruptcy. Century Services relies on the following two sentences from *Ivaco*:

> [64] ... Were it otherwise, creditors might be tempted to forgo efforts to restructure a debtor company and instead put the company immediately into bankruptcy. That would not be a desirable result.

The chambers judge in this case appears to have agreed with this public policy argument because he stated in para. 6 of his reasons for judgment that the result of dismissing the Crown's application was no different than if the Debtor Company had filed under the *BIA* at the outset.

37 I do not dispute that there are valid policy reasons for encouraging insolvent companies to attempt to restructure their affairs so that their business can continue with as little disruption to employees and other stakeholders as possible. It is appropriate for the courts to take such policy considerations into account, but only if it is in connection with a matter that has not been considered by Parliament. Here, Parliament must be taken to have weighed policy considerations when it enacted the amendments to the *CCAA* and *ETA* described above. As Mr. Justice MacPherson observed at para. 43 of *Ottawa Senators*, it is inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception. I also make the observation that the 1992 set of amendments to the *BIA* enabled proposals to be binding on secured creditors and, while there is more flexibility under the *CCAA*, it is possible for an insolvent company to attempt to restructure under the auspices of the *BIA*.

38 For these reasons, I would allow the appeal and order that the funds paid into the trust account of the Monitor, together with interest earned thereon, be paid to the Receiver General.

D.F. TYSOE J.A.
M.V. NEWBURY J.A.:-- I agree.
D.M. SMITH J.A.:-- I agree.

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Indexed as:

Canadian Commercial Bank v. Parlee McLaws

IN THE MATTER OF The Winding Up Act, R.S.C. 1970, Chapter W-10, as amended
AND IN THE MATTER OF the winding up of The Canadian Commercial Bank
Between
Price Waterhouse Limited, as Liquidator of the Canadian Commercial Bank and Canadian Commercial Bank, Applicants, and Parlee McLaws, Respondent
And Between
Price Waterhouse Limited, as Liquidator of the Canadian Commercial Bank and Canadian Commercial Bank, Applicants, and Freeman & Company, Respondent

[1989] A.J. No. 59

56 D.L.R. (4th) 515

64 Alta. L.R. (2d) 218

95 A.R. 321

42 B.L.R. 41

72 C.B.R. (N.S.) 39

13 A.C.W.S. (3d) 397

Action Nos. 8803-17972 and 8803-17616

Alberta Court of Queen's Bench
Judicial District of Edmonton

Wachowich J.

January 30, 1989

M. Stevens-Guille, Q.C., for Price Waterhouse Limited and Canadian Commercial Bank.
A.D. Hunter, Q.C., and L.A. Taylor, for Parlee McLaws.
Eric A. Dolden, for Freeman & Co.

WACHOWICH J.:-- These two applications were brought as special cases pursuant to Rule 232. The parties have provided agreed statements of facts and have asked for the opinion of the Court concerning the right to funds currently held by the law firms, Parlee McLaws of Edmonton and Freeman & Co. of Vancouver on behalf of the Canadian Commercial Bank ("the CCB").

Parlee McLaws is owed $192,524.34 by the CCB for legal services performed prior to the appointment of a liquidator for the CCB on September 3, 1985. Parlee McLaws has in its possession $147,521.68 belonging to the CCB, which is comprised of two different funds relating to two different files: (1) $142,678.36 in an interest bearing account ("the Elpat Funds"), and (2) $4,843.32 in a general trust account ("the Tudor Glen Funds"). Parlee McLaws was paid in full for legal services relating to the Elpat Funds, but has an outstanding account of $9,267.70 for work relating to the Tudor Glen Funds.

Freeman & Co. is owed $30,817.89 by the CCB for legal services performed prior to September 3, 1985. Freeman & Co. has money belonging to the CCB in its possession which includes $61,635.58, being comprised of two funds of $30,817.79 each being held in interest bearing trust accounts for the CCB ("the Isherwood Funds" and "the Metropolitan Funds"). None of the fees owed to Freeman & Co. relate to these funds.

The liquidator of the CCB is asking for the return of these funds from Parlee McLaws and Freeman & Co., who have both claimed the right to set off amounts owed to them by the CCB. Freeman & Co. also claims a solicitor's lien with respect to $9,913.85 of the fees owed to it by the CCB.

Set-off must be distinguished from cross-claim. Both are available by counterclaim under Rule 93. Set-off provides a defence to a claim but cross-claim does not: Aboussafy v. Abacus Cities Ltd. [1981] 4 W.W.R. 660 (Alta. C.A.). This distinction is important in the present case. If set-off applies. the law firms will be entitled to apply the money in their possession to the payment of the CCB's outstanding accounts. If set-off does not apply. they will be required to return the CCB's money and compete with other unsecured creditors.

There are two types of set-off: legal set-off and equitable set-off. The law firms claim the right to legal set-off and, alternatively, Parlee McLaws claims equitable set-off in respect of the $4,843.32 fund. The two types of set-off are discussed by the Supreme Court of Canada in Holt v. Telford [1987] 2 S.C.R. 193.

Legal set-off is sometimes referred to as set-off at law or statutory set-off. The requirements for legal set-off are summarized in 42 Halsbury's Laws (4th) at para. 421 (approved in Holt v. Telford at 204):

> "The right conferred by the Statutes of Set-Off was a right to set off mutual debts arising from transactions of a different nature which could be ascertained with certainty at the time of pleading. Thus, no legal set-off could exist against aclaim which sounded in damages, nor could a claim which sounded in damages be set off at law against a plaintiff's claim... Set-off at law operates as a defence."

Legal set-off "requires the fulfilment of two conditions. The first is that both obligations must be debts. The second is that both debts must be mutual cross obligations. Both conditions must be fulfilled at the same time": CIBC v. Tuckerr Industries [1983] 5 W.W.R. 602 at 604 (B.C.C.A.) (approved in Holt v. Telford at 204).

Any assignment of the debts destroys mutuality and precludes the operation of legal set-off: Holt v. Telford at 205. The appointment of a liquidator does not destroy mutuality. however, because of s. 73 of the Winding Up Act, R.S.C. 1970, c. W-10:

> "The law of set-off, as administered by the courts, whether of law or equity, applies to all claims on the estate of a company, and to all proceedings for the recovery of debts due or accruing due to a company at the commencement of the winding-up of the company, in the same manner and to the same extent as if the business of the company was not being wound up under this Act."

This section does not extend the law of set-off": Maritime Bank v. Troop (1888) 16 S.C.R. 456 at 464. Section 73 merely preserves the right to set-off that would otherwise be destroyed by the appointment of a liquidator: Re Central Bank, ex parte Reid [1888] C.L.T. 268 at 269-70:

> "It should, therefore, be construed as preserving to all who were creditors or debtors at the date of the filing of the petition in this case, the rights they were then entitled to under provincial law as to set-off to the same extent as if the business of the bank was not being wound up in insolvency. and under the compulsory liquidation proceedings."

All of the work for which the CCB has not paid Parlee McLaws and Freeman & Co. was performed prior to the appointment of a liquidator on September, 1985 and resulted in either debts due or accruing due at that date. Section 73 of the Winding Up Act preserves mutuality and any existing right of set-off.

Turning to the requirement that both obligations must be debts, it is clear that the money owed to the law firms by the CCB for legal services is a debt obligation. It was argued on behalf of the CCB that the money held by Parlee McLaws and Freeman & Co. tor the benefit of the CCB are not debts owed by them, but trust obligations. Dr. Waters, in Law of Trusts in Canada (2nd ed. 1984), stated that a trustee-beneficiary relationship, and not a debtor-creditor relationship, exists (at 68):

> "... when the duty of the holder of the funds or assets is to keep that property distinct from his own personal property. For this reason the banker is a debtor vis-a-vis its customer: it mixes the customer's money with its own. and is under obligation only to pay out an equivalent sum on demand... A trustee on the other band must keep the assets subject to the trust separate. and be ready to hand over those assets when the time comes."

It was argued on behalf of the law firms that the funds left with them are equivalent to deposits at a bank and that their relationships with the CCB was that of debtor-creditor. Parlee McLaws is required to keep those funds separate from its own assets according to the Rules of the Law Society of Alberta and the relationship is therefore distinguishable from that of debtor-creditor. The Rules of the Law Society of British Columbia impose a similar obligation on Freeman & Co. It has been held, for the purpose of the bankruptcy of a solicitor, that a client's money held by the solicitor is held on trust and accordingly does not vest in the trustee in bankruptcy: In re A Solicitor [1952] 1 Ch. 328 at 332-33.

Though it might be said that a solicitor is a trustee whenever he or she possesses clients' money, the common law has drawn a distinction between a solicitor's mere possession of clients' money and his or her holding of money for a specific purpose. In Stumore v. Campbell [1982] 1 Q.B. 314 at 316 (C.A.), Lord Esher, M.R. stated:

> "It appears that some money was placed in the hands of the defendants, who are solicitors, for a particular purpose. So long as that purpose existed there was a trust imposed on them, and they were bound, if they accepted the money at all, to employ it or lay it out in the particular way indicated by the trust. That trust failed, and the result of that failure was that another trust arose immediately to pay back the money to the person who gave it. It is admitted that, being trustee, no lien would attach in their favour, because the money was intrusted to them for a specific purpose. Brandao v. Barnett [12 Cl. & F. 787] is conclusive on this point. It was also admitted that there would have been no right of set-off..."

The principle in Stumore v. Campbell was applied by a five-member panel of the Manitoba Court of Appeal in Leitch v. Swystun [1942] 3 W.W.R. 341. In Maralta Oil Co. v. Industrial Incomes Ltd. (1964) 46 D.L.R. (2d) 511 at 514 (Alta C.A.). McDermid, J.A. stated:

> "It is customary in the Province of Alberta when moneys are paid to a lawyer to be used for a specific purpose that such moneys be placed in a separate account and there is no doubt that such moneys are held by the lawyer in trust. In fact, such is required by the rules of the Alberta Law Society."

Stumore v. Campbell was distinguised in Re Randall (1956) 19 W.W.R. 567 (B.C. S.C.). Mr. Randall bad sold some of his shares and his solicitors had, on his behalf, received the money from the sale. The court found that money was paid to the solicitors "in the ordinary course of a business transaction in which that firm acted as solicitors for Randall and received it as his agent": Re Randall at 569. Because the money came into the solicitors' possession for no specific purpose, the solicitors had a right of set-off for their fees.

Money given to a solicitor for a particular purpose is not subject to lien or set-off even after that purpose ends or fails unless the parties agree otherwise. The solicitor has a duty to return the money and the onus rests on the solicitor to show that the parties have agreed otherwise: In re Mid-Kent Fruit Factory [1896] 1 Ch. 567 at 570:

> "Prima facie, the money having been, admittedly, paid to the solicitors to be applied for specific purposes, it would continue in their hands for those purposes, and their duty would be to return the balance. The onus is on the solicitors to shew the company's consent to the money remaining in their hands."

Vaughan Williams, J. stated that "if the money had remained in the hands of the solicitors with the consent or knowledge of the company", there "would be a mere debt from the solicitors to the company": In re Mid-Kent Fruit Factory at 570.

In both cases at bar, it was agreed that the funds are not subject to any third party trust conditions and were being held for the general account of CCB. It is still necessary to look at the circumstances surrounding each of the funds to determine if any of the money was originally received for a particular purpose.

The Elpat Funds held by Parlee McLaws came into being during a sale transaction in which the CCB was the mortgagee of the vendor and was also to provide additional mortgage financing to the purchaser. Parlee McLaws received $256,114.55 as the deposit on the purchase and the adjusted balance to close. $100,000 of this was held in a separate account "to be applied against instalments under the mortgage" and was paid to the CCB accordingly. With the permission of the CCB. Parlee McLaws paid its fees on the file from the remainder of the fund leaving the balance of $142,678.36. It seems to me that this portion of the money was received "in the ordinary course of a business transaction" and that the principle in Re Randall applies so that the money is available to Parlee McLaws for the purposes of set-off.

The Tudor Glen Funds held by Parlee McLaws came into being during another sale transaction in which the CCB was providing the financing. Parlee McLaws received $135,100.98 from the solicitors for the vendors for the purpose of paying trade creditors. It received another $315,842.19 from the CCB to pay creditors and make adjustments between the vendor and purchaser. This money was received by Parlee McLaws for these particular purposes.

From this fund, $168,273.39 was paid to trade creditors and $110,000.00 was paid to the CCB. Parlee McLaws was later instructed to pay the remainder of the fund to the CCB and it paid all but the $4,843.32 remaining. Having first received the money for a particular purpose, Parlee McLaws is under a duty to either use the money for that purpose or return it to the CCB. Parlee McLaws has not shown that the money remained in its possession with consent of the CCB and it cannot claim set-off with respect to that money.

The Isherwood Funds and the Metropolitan Funds came into the possession of Freeman & Co. as a result of proceedings to enforce the CCB'S security. Both funds were originally subject to orders of the Supreme Court of British Columbia. The Isherwood Funds were the proceeds of a court-ordered sale of lands charged by CCB security. The sale proceeds of $512,969.95 were ordered to be paid to Freeman & Co. to be disbursed as follows: (1) to pay taxes, (2) to pay real estate commission and (3) to pay CCB with respect to the indebtedness of the mortgagor. It seems to me that Freeman & Co. having received the money pursuant to a court order, is bound to distribute the money in accordance with that order. This prevents the operation of set-off in the same manner as would receiving the money for a particular purpose.

In Jamison v. Alberta Transportation (1987) 53 Alta. L.R. (2d) 69 (C.A.), a solicitor received funds from his client, Alberta Transportation, subject to the trust condition that he "return any funds not advanced or disbursed to Alberta Transportation upon ten days' notice being given". The Court of Appeal held that accepting this trust condition "negatives any solicitor's lien claim and also any claim (as a trustee of the fund) for services in connection with the administration of it" (at 71). In the same manner, the terms of the court order by which Freeman & Co. received the Isherwood Funds negate any possible claim of set-off with respect to it.

The Metropolitan Funds came into being when the British Columbia Supreme Court ordered a hotel subject to CCB security to be sold and certain sums to be paid to Freeman & Co. to be held in trust pending the resolution of disputes respecting the amounts owing under the third, fourth and eighth mortgages held by the CCB. Those disputes were resolved and the money was paid to the CCB with the exception of $30,817.79 over which Freeman & Co. claims the right of set-off and a solicitor's lien. The Metropolitan Funds came into the possession of Freeman & Co. subject to a court order to hold the money for a particular purpose. Even if that purpose is complete, the fact that the money was initially received for a particular purpose prevents the operation of set-off or lien.

Parlee McLaws has also claimed the right of equitable set-off in relation to the second fund being the Tudor Glen Funds. Unlike legal set-off, equitable set-off does not require that there be mutuality or that the cross obligations are debts: Holt v. Telford at 206. Equitable set-off does require, however, that the cross obligations be related. As stated in Newfoundland v. Newfoundland Railway Co. (1888) 13 App. Cas. 199 at 213 (P.C.)(cited in Holt v. Telford at 208-9):

> "Unliquidated damages may now be set off as between the original parties, and also against an assignee if flowing out of and inseparably connected with the dealing and transactions which also give rise to the subject of the assignment."

Of the fees owed to Parlee McLaws by the CCB, $9,267.70 is for work related to the $4,843.32 fund. There is a sufficient connection between these two obligations for the operation of equitable set-off. However, the fact that the $4,843.32 fund was given to Parlee McLaws for a particular purpose prevents the operation of both legal and equitable set-off.

In Coba Industries Ltd. v. Millie's Holdings (Canada) Ltd. [198S] 6 W.W.R. 14 (B.C. C.A.), Macfarlane, J.A. gave five principles applicable to equitable set-off. The first two are as follows (at 22) (cited in Holt v. Telford at 212):

> "1. The party relying on a set-off must show some equitable ground for being protected against his adversary's demands: Rawson v Samuel (1841), Cr. & Ph. 161, 41 E.R. 451 (L.C.).
>
> 2. The equitable ground must go to the very root of the plaintiff's claim before a set-off will be allowed: [British Anzani v. International Marine [1979] 2 All E.R. 1063 (Q.B.D.)]."

Because Parlee McLaws accepted the $4,843.32 fund for a particular purpose and have a duty as trustees of that money to return it to the CCB. in my view, there is no equitable ground for protecting Parlee McLaws from the CCB's demand for the return of that money.

Freeman & Co. further argue that they have a solicitor's lien on the funds in question. Between July 6, 1982 and February 10, 1986, Freeman & Co. acted to defend the CCB from a claim for approximately two million dollars. During a pre-trial conference, the plaintiff indicated he was seeking damages from the CCB of between $750,000 and $800,000. In February 1986, Freeman & Co. was able to negotiate a discontinuance of the action for the CCB and was paid by the liquidator for those services rendered after September 3, 1985. The CCB still owes Freeman & Co. $9,913.85 for work on the file which was performed prior to September 3, 1985. Freeman & Co. claims that it preserved the assets of the CCB by successfully defending the action and is entitled to a solicitor's lien over those assets.

> Freeman & Co. stated that its right to a solicitor's lien is derived from s. 100 of the Barristers and Solicitors Act, R.S.B.C. 1979, c. 26, which reads in part:

> "Where a solicitor is employed to prosecute or defend a proceeding in a court of justice, the solicitor shall be deemed to have a charge on and against and a right of payment out of the property which is recovered or preserved through his services for the proper cost, charges and expenses of or in reference to the proceeding. including counsel fees, whether the solicitor also acted as counsel or not."

This is equivalent to Alberta Rule 625(1):

> "The court may, on the application of a barrister and solicitor, declare the barrister and solicitor to be entitled to a charge upon the property recovered or preserved through his instrumentality in any proceedings prosecuted or defended by him for his proper fees and disbursements in reference to the proceeding, and may make such order or orders as may be just for the raising of payment of the fees and disbursements out of that property."

Rule 625 was considered by our Court of Appeal in Jackson et al v. Western Crane Services (1986) 45 Alta. L.R. (2d) 156. Mr. Justice Harradence, speaking for the court, said (at 159):

> "By allowing the solicitors in the case at bar to have a first charge on all of the assets of the company for their costs in defending the company's assets against its unsecured creditors, the learned chambers judge, with respect, went beyond the purview of R. 625. The thrust of the rule is that only the specific property which is salvaged is subject to the solicitor's charge. It is for this reason that it must be specific and identifiable. Furthermore, in order to be properly recovered or preserved, there must be some dispute as to its ownership."

This is directly applicable to the present case. By successfully negotiating the discontinuance of the action, Freeman & Co. did not preserve any specific property of the CCB and it is not possible to give the law firm a lien over the general assets of the CCB for the amount of their fees in relation to that action. Additionally, the Isherwood Funds and the Metropolitan Funds came into the possession of Freeman & Co. for particular purposes and in my view this would negate the possibility of a lien over these funds.

I, therefore, conclude that Parlee McLaws is entitled to apply the Elpat Funds of $147,521.68 plus interest, by way of legal set-off, against the fees due to it from the CCB for work performed prior to September 3, 1985. The Tudor Glen Funds of $4,843.32 plus interest came into the possession of Parlee McLaws for a particular purpose. They are unavailable for either legal or equitable set-off and must be returned to the CCB.

Both the Isherwood Funds of $30,817.79 plus interest and the Metropolitan Funds of $30,817.79 plus interest came into the Court of British Columbia to be used for particular purposes. Accordingly, no set-off or lien can affect them and they must be returned to the CCB and, in addition, a solicitor's lien would be unavailable in any event, because these funds do not represent assets which were specifically preserved by Freeman & Co.

WACHOWICH J.

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Indexed as:

Century Services Inc. v. Canada (Attorney General)

Century Services Inc. Appellant;
v.
Attorney General of Canada on behalf of Her Majesty The Queen in Right of Canada Respondent.

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72 C.B.R. (5th) 170

12 B.C.L.R. (5th) 1

296 B.C.A.C. 1

326 D.L.R. (4th) 577

409 N.R. 201

[2011] 2 W.W.R. 383

File No.: 33239.

Supreme Court of Canada

Heard: May 11, 2010;
Judgment: December 16, 2010.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

(136 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Catchwords:

Bankruptcy and Insolvency -- Priorities -- Crown applying on eve of bankruptcy of debtor company to have GST monies held in trust paid to Receiver General of Canada -- Whether deemed trust in favour of Crown under Excise Tax Act prevails over provisions of Companies' Creditors Arrangement Act purporting to nullify deemed trusts in favour of Crown -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 18.3(1) -- Excise Tax Act, R.S.C. 1985, c. E-15, s. 222(3).

Bankruptcy and insolvency -- Procedure -- Whether chambers judge had authority to make order partially lifting stay of proceedings to allow debtor company to make assignment in bankruptcy and to stay Crown's right to enforce GST deemed trust -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

Trusts -- Express trusts -- GST collected but unremitted to Crown -- Judge ordering that GST be held by Monitor in trust account -- Whether segregation of Crown's GST claim in Monitor's account created an express trust in favour of Crown.

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Summary:

The debtor company commenced proceedings under the *Companies' Creditors Arrangement Act* ("*CCAA*"), obtaining a stay of proceedings to allow it time to reorganize its financial affairs. One of the debtor company's outstanding debts at the commencement of the reorganization was an amount of unremitted Goods and Services Tax ("GST") payable to the Crown. Section 222(3) of the *Excise Tax Act* ("*ETA*") created a deemed trust over unremitted GST, which operated despite any other enactment of Canada except the *Bankruptcy and Insolvency Act* ("*BIA*"). However, s. 18.3(1) of the *CCAA* provided that any statutory deemed trusts in favour of the Crown did not operate under the *CCAA*, subject to certain exceptions, none of which mentioned GST.

Pursuant to an order of the *CCAA* chambers judge, a payment not exceeding $5 million was approved to the debtor company's major secured creditor, Century Services. However, the chambers judge also ordered the debtor company to hold back and segregate in the Monitor's trust account an amount equal to the unremitted GST pending the outcome of the reorganization. On concluding that reorganization was not possible, the debtor company sought leave of the court to partially lift the stay of proceedings so it could make an assignment in bankruptcy under the *BIA*. The Crown moved for immediate payment of unremitted GST to the Receiver General. The chambers judge denied the Crown's motion, and allowed the assignment in bankruptcy. The Court of Appeal allowed the appeal on two grounds. First, it reasoned that once reorganization efforts had failed, the chambers judge was bound under the priority scheme provided by the *ETA* to allow payment of unremitted GST to the Crown and had no discretion under s. 11 of the *CCAA* to continue the stay against the Crown's claim. Second, the Court

of Appeal concluded that by ordering the GST funds segregated in the Monitor's trust account, the chambers judge had created an express trust in favour of the Crown. 44

Held (Abella J. dissenting): The appeal should be allowed.

Per McLachlin C.J. and Binnie, LeBel, Deschamps, Charron, Rothstein and Cromwell JJ.: The apparent conflict between s. 222(3) of the *ETA* and s. 18.3(1) of the *CCAA* can be resolved through an interpretation that properly recognizes the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by [page381] Parliament and the principles for interpreting the *CCAA* that have been recognized in the jurisprudence. The history of the *CCAA* distinguishes it from the *BIA* because although these statutes share the same remedial purpose of avoiding the social and economic costs of liquidating a debtor's assets, the *CCAA* offers more flexibility and greater judicial discretion than the rules-based mechanism under the *BIA*, making the former more responsive to complex reorganizations. Because the *CCAA* is silent on what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily provides the backdrop against which creditors assess their priority in the event of bankruptcy. The contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the *CCAA* and the *BIA*, and one of its important features has been a cutback in Crown priorities. Accordingly, the *CCAA* and the *BIA* both contain provisions nullifying statutory deemed trusts in favour of the Crown, and both contain explicit exceptions exempting source deductions deemed trusts from this general rule. Meanwhile, both Acts are harmonious in treating other Crown claims as unsecured. No such clear and express language exists in those Acts carving out an exception for GST claims.

When faced with the apparent conflict between s. 222(3) of the *ETA* and s. 18.3(1) of the *CCAA*, courts have been inclined to follow *Ottawa Senators Hockey Club Corp. (Re)* and resolve the conflict in favour of the *ETA*. *Ottawa Senators* should not be followed. Rather, the *CCAA* provides the rule. Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so expressly and elaborately. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. The internal logic of the *CCAA* appears to subject a GST deemed trust to the waiver by Parliament of its priority. A strange asymmetry would result if differing treatments of GST deemed trusts under the *CCAA* and the *BIA* were found to exist, as this would encourage statute shopping, undermine the *CCAA*'s remedial purpose and invite the very social ills that the statute was enacted to avert. The later in time enactment of the more general s. 222(3) of the *ETA* does not require application of the doctrine of implied repeal to the earlier and more specific s. 18.3(1) of the *CCAA* in the circumstances of this case. In any event, [page382] recent amendments to the *CCAA* in 2005 resulted in s. 18.3 of the Act being renumbered and reformulated, making it the later in time provision. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*. The conflict between the *ETA* and the *CCAA* is more apparent than real.

The exercise of judicial discretion has allowed the *CCAA* to adapt and evolve to meet contemporary business and social needs. As reorganizations become increasingly complex, *CCAA* courts have been called upon to innovate. In determining their jurisdiction to sanction measures in a *CCAA* proceeding, courts should first interpret the provisions of the *CCAA* before turning to their inherent or equitable jurisdiction. Noteworthy in this regard is the expansive interpretation the language of the *CCAA* is capable of supporting. The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. The requirements of appropriateness, good faith and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. The question is whether the order will usefully further efforts to avoid the social and economic losses resulting from liquidation of an insolvent company, which extends to both the purpose of the order and the means it employs. Here, the chambers judge's order staying the Crown's GST claim was in furtherance of the *CCAA*'s objectives because it blunted the impulse of creditors to interfere in an orderly liquidation and fostered a harmonious transition from the *CCAA* to the *BIA*, meeting the objective of a single proceeding that is common to both statutes. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of *BIA* proceedings, but no gap exists between the two statutes because they operate in tandem and creditors in both cases look to the *BIA* scheme of distribution to foreshadow how they will fare if the reorganization is unsuccessful. The breadth of the court's discretion under the *CCAA* is sufficient to construct a bridge to liquidation under the *BIA*. Hence, the chambers judge's order was authorized.

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No express trust was created by the chambers judge's order in this case because there is no certainty of object inferrable from his order. Creation of an express trust requires certainty of intention, subject matter and object. At the time the chambers judge accepted the proposal to segregate the monies in the Monitor's trust account there was no certainty that the Crown would be the beneficiary, or object, of the trust because exactly who might take the money in the final result was in doubt. In any event, no dispute over the money would even arise under the interpretation of s. 18.3(1) of the *CCAA* established above, because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount.

Per Fish J.: The GST monies collected by the debtor are not subject to a deemed trust or priority in favour of the Crown. In recent years, Parliament has given detailed consideration to the Canadian insolvency scheme but has declined to amend the provisions at issue in this case, a deliberate exercise of legislative discretion. On the other hand, in upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, courts have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In the context of the Canadian insolvency regime, deemed trusts exist only where there is a statutory provision creating the trust and a *CCAA* or *BIA* provision explicitly confirming its effective operation. The *Income Tax Act*, the *Canada Pension Plan* and the *Employment Insurance Act* all contain deemed trust provisions that are strikingly similar to that in s. 222 of the *ETA* but they are all also confirmed in s. 37 of the *CCAA* and in s. 67(3) of the *BIA* in clear and unmistakeable terms. The same is not true of the deemed trust created under the *ETA*. Although Parliament created a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it did not confirm the continued operation of the trust in either the *BIA* or the *CCAA*, reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

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Per Abella J. (dissenting): Section 222(3) of the *ETA* gives priority during *CCAA* proceedings to the Crown's deemed trust in unremitted GST. This provision unequivocally defines its boundaries in the clearest possible terms and excludes only the *BIA* from its legislative grasp. The language used reflects a clear legislative intention that s. 222(3) would prevail if in conflict with any other law except the *BIA*. This is borne out by the fact that following the enactment of s. 222(3), amendments to the *CCAA* were introduced, and despite requests from various constituencies, s. 18.3(1) was not amended to make the priorities in the *CCAA* consistent with those in the *BIA*. This indicates a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA*.

The application of other principles of interpretation reinforces this conclusion. An earlier, specific provision may be overruled by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails. Section 222(3) achieves this through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" other than the *BIA*. Section 18.3(1) of the *CCAA* is thereby rendered inoperative for purposes of s. 222(3). By operation of s. 44(*f*) of the *Interpretation Act*, the transformation of s. 18.3(1) into s. 37(1) after the enactment of s. 222(3) of the *ETA* has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision. This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes other than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request for payment of the GST funds during the *CCAA* proceedings.

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By Deschamps J.

Overruled: *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737; **distinguished:** *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862; **referred to:** *Reference re Companies' Creditors Arrangement Act*, [1934] S.C.R. 659; *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny*, 2009 SCC 49, [2009] 3 S.C.R. 286; *Deputy Minister of Revenue v. Rainville*, [1980] 1 S.C.R. 35; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, 30 Alta. L.R. (4) 192; *Komunik Corp. (Arrangement relatif à)*, 2009 QCCS 6332 (CanLII), leave to appeal granted, 2010 QCCA 183 (CanLII); *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411; *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720; *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4) 219; *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513; *Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106; *Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282; *Chef Ready Foods Ltd. v. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134; *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9; *Air Canada, Re* (2003), 42 C.B.R. (4) 173; *Air Canada, Re*, 2003 CanLII 49366; *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4) 158; *Skydome Corp., Re* (1998), 16 C.B.R. (4) 118; *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96, aff'g (1999), 12 C.B.R. (4) 144; *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4) 236; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25; *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108.

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By Abella J. (dissenting)

Ottawa Senators Hockey Club Corp. (Re) (2005), 73 O.R. (3d) 737; *Tele-Mobile Co. v. Ontario*, 2008 SCC 12, [2008] 1 S.C.R. 305; *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862; *Attorney General of Canada v. Public Service Staff Relations Board*, [1977] 2 F.C. 663.

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History and Disposition:

APPEAL from a judgment of the British Columbia Court of Appeal (Newbury, Tysoe and Smith JJ.A.), 2009 BCCA 205, 98 B.C.L.R. (4) 242, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, [2009] G.S.T.C. 79, [2009] B.C.J. No. 918 (QL), 2009 CarswellBC 1195, reversing a judgment of Brenner C.J.S.C., 2008 BCSC 1805, [2008] G.S.T.C. 221, [2008] B.C.J. No. 2611 (QL), 2008 CarswellBC 2895, dismissing a Crown application for payment of GST monies. Appeal allowed, Abella J. dissenting.

Counsel:

Mary I. A. Buttery, *Owen J. James* and *Matthew J. G. Curtis*, for the appellant.

Gordon Bourgard, *David Jacyk* and *Michael J. Lema*, for the respondent.

The judgment of McLachlin C.J. and Binnie, LeBel, Deschamps, Charron, Rothstein and Cromwell JJ. was delivered by

1 **DESCHAMPS J.**:-- For the first time this Court is called upon to directly interpret the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). In that respect, two questions are raised. The first requires reconciliation of provisions of the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), which lower courts have held to be in conflict with one another. The second concerns the scope of a court's discretion when supervising reorganization. The relevant statutory provisions are reproduced in the Appendix. On the first question, having considered the evolution of Crown priorities in the context of insolvency and the wording of the various statutes creating Crown priorities, I conclude that it is the *CCAA* and not the *ETA* that provides the rule. On the second question, I conclude that the broad discretionary jurisdiction conferred on the supervising judge must be interpreted having regard to the remedial nature of the *CCAA* and insolvency legislation generally. Consequently, the court had the discretion to partially lift a stay of proceedings to allow the debtor to make an assignment under the *Bankruptcy and Insolvency [page389] Act*, R.S.C. 1985, c. B-3 ("*BIA*"). I would allow the appeal.

1. <u>Facts and Decisions of the Courts Below</u>

2 Ted LeRoy Trucking Ltd. ("LeRoy Trucking") commenced proceedings under the *CCAA* in the Supreme Court of British Columbia on December 13, 2007, obtaining a stay of proceedings with a view to reorganizing its financial affairs. LeRoy Trucking sold certain redundant assets as authorized by the order.

3 Amongst the debts owed by LeRoy Trucking was an amount for Goods and Services Tax ("GST") collected but unremitted to the Crown. The *ETA* creates a deemed trust in favour of the Crown for amounts collected in respect of GST. The deemed trust extends to any property or proceeds held by the person collecting GST and any property of that person held by a secured creditor, requiring that property to be paid to the Crown in priority to all security interests. The *ETA* provides

that the deemed trust operates despite any other enactment of Canada except the *BIA*. However, the *CCAA* also provides that subject to certain exceptions, none of which mentions GST, deemed trusts in favour of the Crown do not operate under the *CCAA*. Accordingly, under the *CCAA* the Crown ranks as an unsecured creditor in respect of GST. Nonetheless, at the time LeRoy Trucking commenced *CCAA* proceedings the leading line of jurisprudence held that the *ETA* took precedence over the *CCAA* such that the Crown enjoyed priority for GST claims under the *CCAA*, even though it would have lost that same priority under the *BIA*. The *CCAA* underwent substantial amendments in 2005 in which some of the provisions at issue in this appeal were renumbered and reformulated (S.C. 2005, c. 47). However, these amendments only came into force on September 18, 2009. I will refer to the amended provisions only where relevant.

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4 On April 29, 2008, Brenner C.J.S.C., in the context of the *CCAA* proceedings, approved a payment not exceeding $5 million, the proceeds of redundant asset sales, to Century Services, the debtor's major secured creditor. LeRoy Trucking proposed to hold back an amount equal to the GST monies collected but unremitted to the Crown and place it in the Monitor's trust account until the outcome of the reorganization was known. In order to maintain the *status quo* while the success of the reorganization was uncertain, Brenner C.J.S.C. agreed to the proposal and ordered that an amount of $305,202.30 be held by the Monitor in its trust account.

5 On September 3, 2008, having concluded that reorganization was not possible, LeRoy Trucking sought leave to make an assignment in bankruptcy under the *BIA*. The Crown sought an order that the GST monies held by the Monitor be paid to the Receiver General of Canada. Brenner C.J.S.C. dismissed the latter application. Reasoning that the purpose of segregating the funds with the Monitor was "to facilitate an ultimate payment of the GST monies which were owed pre-filing, but only if a viable plan emerged", the failure of such a reorganization, followed by an assignment in bankruptcy, meant the Crown would lose priority under the *BIA* (2008 BCSC 1805, [2008] G.S.T.C. 221).

6 The Crown's appeal was allowed by the British Columbia Court of Appeal (2009 BCCA 205, 270 B.C.A.C. 167). Tysoe J.A. for a unanimous court found two independent bases for allowing the Crown's appeal.

7 First, the court's authority under s. 11 of the *CCAA* was held not to extend to staying the Crown's application for immediate payment of the GST funds subject to the deemed trust after it was clear that reorganization efforts had failed and [page391] that bankruptcy was inevitable. As restructuring was no longer a possibility, staying the Crown's claim to the GST funds no longer served a purpose under the *CCAA* and the court was bound under the priority scheme provided by the *ETA* to allow payment to the Crown. In so holding, Tysoe J.A. adopted the reasoning in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), which found that the *ETA* deemed trust for GST established Crown priority over secured creditors under the *CCAA*.

8 Second, Tysoe J.A. concluded that by ordering the GST funds segregated in the Monitor's trust account on April 29, 2008, the judge had created an express trust in favour of the Crown from which the monies in question could not be diverted for any other purposes. The Court of Appeal therefore ordered that the money held by the Monitor in trust be paid to the Receiver General.

2. <u>Issues</u>

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9 This appeal raises three broad issues which are addressed in turn:

(1) Did s. 222(3) of the *ETA* displace s. 18.3(1) of the *CCAA* and give priority to the Crown's *ETA* deemed trust during *CCAA* proceedings as held in *Ottawa Senators*?
(2) Did the court exceed its *CCAA* authority by lifting the stay to allow the debtor to make an assignment in bankruptcy?
(3) Did the court's order of April 29, 2008 requiring segregation of the Crown's GST claim in the Monitor's trust account create an express trust in favour of the Crown in respect of those funds?

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3. Analysis

10 The first issue concerns Crown priorities in the context of insolvency. As will be seen, the *ETA* provides for a deemed trust in favour of the Crown in respect of GST owed by a debtor "[d]espite ... any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)" (s. 222(3)), while the *CCAA* stated at the relevant time that "notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be [so] regarded" (s. 18.3(1)). It is difficult to imagine two statutory provisions more apparently in conflict. However, as is often the case, the apparent conflict can be resolved through interpretation.

11 In order to properly interpret the provisions, it is necessary to examine the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by Parliament, and the principles that have been recognized in the jurisprudence. It will be seen that Crown priorities in the insolvency context have been significantly pared down. The resolution of the second issue is also rooted in the context of the *CCAA*, but its purpose and the manner in which it has been interpreted in the case law are also key. After examining the first two issues in this case, I will address Tysoe J.A.'s conclusion that an express trust in favour of the Crown was created by the court's order of April 29, 2008.

3.1 *Purpose and Scope of Insolvency Law*

12 Insolvency is the factual situation that arises when a debtor is unable to pay creditors (see generally, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), at p. 16). Certain legal proceedings become available upon insolvency, which typically allow a debtor to obtain a court order staying its creditors' enforcement actions and attempt to obtain [page393] a binding compromise with creditors to adjust the payment conditions to something more realistic. Alternatively, the debtor's assets may be liquidated and debts paid from the proceeds according to statutory priority rules. The former is usually referred to as reorganization or restructuring while the latter is termed liquidation.

13 Canadian commercial insolvency law is not codified in one exhaustive statute. Instead, Parliament has enacted multiple insolvency statutes, the main one being the *BIA*. The *BIA* offers a self-contained legal regime providing for both reorganization and liquidation. Although bankruptcy legislation has a long history, the *BIA* itself is a fairly recent statute -- it was enacted in 1992. It is characterized by a rules-based approach to proceedings. The *BIA* is available to insolvent debtors owing $1000 or more, regardless of whether they are natural or legal persons. It contains mechanisms

for debtors to make proposals to their creditors for the adjustment of debts. If a proposal fails, the *BIA* contains a bridge to bankruptcy whereby the debtor's assets are liquidated and the proceeds paid to creditors in accordance with the statutory scheme of distribution.

14 Access to the *CCAA* is more restrictive. A debtor must be a company with liabilities in excess of $5 million. Unlike the *BIA*, the *CCAA* contains no provisions for liquidation of a debtor's assets if reorganization fails. There are three ways of exiting *CCAA* proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either [page394] the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership. As discussed in greater detail below, the key difference between the reorganization regimes under the *BIA* and the *CCAA* is that the latter offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations.

15 As I will discuss at greater length below, the purpose of the *CCAA* -- Canada's first reorganization statute -- is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. Proposals to creditors under the *BIA* serve the same remedial purpose, though this is achieved through a rules-based mechanism that offers less flexibility. Where reorganization is impossible, the *BIA* may be employed to provide an orderly mechanism for the distribution of a debtor's assets to satisfy creditor claims according to predetermined priority rules.

16 Prior to the enactment of the *CCAA* in 1933 (S.C. 1932-33, c. 36), practice under existing commercial insolvency legislation tended heavily towards the liquidation of a debtor company (J. Sarra, *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations* (2003), at p. 12). The battering visited upon Canadian businesses by the Great Depression and the absence of an effective mechanism for reaching a compromise between debtors and creditors to avoid liquidation required a legislative response. The *CCAA* was innovative as it allowed the insolvent debtor to attempt reorganization under judicial supervision outside the existing insolvency legislation which, once engaged, almost invariably resulted in liquidation (*Reference re Companies' Creditors [page395] Arrangement Act*, [1934] S.C.R. 659, at pp. 660-61; Sarra, *Creditor Rights*, at pp. 12-13).

17 Parliament understood when adopting the *CCAA* that liquidation of an insolvent company was harmful for most of those it affected -- notably creditors and employees -- and that a workout which allowed the company to survive was optimal (Sarra, *Creditor Rights*, at pp. 13-15).

18 Early commentary and jurisprudence also endorsed the *CCAA*'s remedial objectives. It recognized that companies retain more value as going concerns while underscoring that intangible losses, such as the evaporation of the companies' goodwill, result from liquidation (S. E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 *Can. Bar Rev.* 587, at p. 592). Reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs (*ibid.*, at p. 593). Insolvency could be so widely felt as to impact stakeholders other than creditors and employees. Variants of these views resonate today, with reorganization justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation.

19 The *CCAA* fell into disuse during the next several decades, likely because amendments to the Act in 1953 restricted its use to companies issuing bonds (S.C. 1952-53, c. 3). During the economic downturn of the early 1980s, insolvency lawyers and courts adapting to the resulting wave of insolvencies resurrected the statute and deployed it in response to new economic challenges. Participants in insolvency proceedings grew to recognize and appreciate the statute's distinguishing feature: a grant of broad and flexible authority to the supervising court to make [page396] the orders necessary to facilitate the reorganization of the debtor and achieve the *CCAA*'s objectives. The manner in which courts have used *CCAA* jurisdiction in increasingly creative and flexible ways is explored in greater detail below.

20 Efforts to evolve insolvency law were not restricted to the courts during this period. In 1970, a government-commissioned panel produced an extensive study recommending sweeping reform but Parliament failed to act (see *Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation* (1970)). Another panel of experts produced more limited recommendations in 1986 which eventually resulted in enactment of the *Bankruptcy and Insolvency Act* of 1992 (S.C. 1992, c. 27) (see *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)). Broader provisions for reorganizing insolvent debtors were then included in Canada's bankruptcy statute. Although the 1970 and 1986 reports made no specific recommendations with respect to the *CCAA*, the House of Commons committee studying the *BIA*'s predecessor bill, C-22, seemed to accept expert testimony that the *BIA*'s new reorganization scheme would shortly supplant the *CCAA*, which could then be repealed, with commercial insolvency and bankruptcy being governed by a single statute (*Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 15, 3rd Sess., 34th Parl., October 3, 1991, at 15:15-15:16).

21 In retrospect, this conclusion by the House of Commons committee was out of step with reality. It overlooked the renewed vitality the *CCAA* enjoyed in contemporary practice and the advantage that a [page397] flexible judicially supervised reorganization process presented in the face of increasingly complex reorganizations, when compared to the stricter rules-based scheme contained in the *BIA*. The "flexibility of the *CCAA* [was seen as] a great benefit, allowing for creative and effective decisions" (Industry Canada, Marketplace Framework Policy Branch, *Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2002), at p. 41). Over the past three decades, resurrection of the *CCAA* has thus been the mainspring of a process through which, one author concludes, "the legal setting for Canadian insolvency restructuring has evolved from a rather blunt instrument to one of the most sophisticated systems in the developed world" (R. B. Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 481).

22 While insolvency proceedings may be governed by different statutory schemes, they share some commonalities. The most prominent of these is the single proceeding model. The nature and purpose of the single proceeding model are described by Professor Wood in *Bankruptcy and Insolvency Law*:

> They all provide a collective proceeding that supersedes the usual civil process available to creditors to enforce their claims. The creditors' remedies are collectivized in order to prevent the free-for-all that would otherwise prevail if creditors were permitted to exercise their remedies. In the absence of a collective process, each creditor is armed with the knowledge that if they do not strike hard and swift to seize the debtor's assets, they will be beat out by other creditors. [pp. 2-3]

The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing, [page398] rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise. With a view to achieving that purpose, both the *CCAA* and the *BIA* allow a court to order all actions against a debtor to be stayed while a compromise is sought.

23 Another point of convergence of the *CCAA* and the *BIA* relates to priorities. Because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful. In addition, one of the important features of legislative reform of both statutes since the enactment of the *BIA* in 1992 has been a cutback in Crown priorities (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, ss. 73 and 125; S.C. 2000, c. 30, s. 148; S.C. 2005, c. 47, ss. 69 and 131; S.C. 2009, c. 33, s. 25; see also *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny*, 2009 SCC 49, [2009] 3 S.C.R. 286; *Deputy Minister of Revenue v. Rainville*, [1980] 1 S.C.R. 35; *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency*).

24 With parallel *CCAA* and *BIA* restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation (see *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, 30 Alta. L.R. (4th) 192, at para. 19).

25 Mindful of the historical background of the *CCAA* and *BIA*, I now turn to the first question at issue.

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3.2 *GST Deemed Trust Under the CCAA*

26 The Court of Appeal proceeded on the basis that the *ETA* precluded the court from staying the Crown's enforcement of the GST deemed trust when partially lifting the stay to allow the debtor to enter bankruptcy. In so doing, it adopted the reasoning in a line of cases culminating in *Ottawa Senators*, which held that an *ETA* deemed trust remains enforceable during *CCAA* reorganization despite language in the *CCAA* that suggests otherwise.

27 The Crown relies heavily on the decision of the Ontario Court of Appeal in *Ottawa Senators* and argues that the later in time provision of the *ETA* creating the GST deemed trust trumps the provision of the *CCAA* purporting to nullify most statutory deemed trusts. The Court of Appeal in this case accepted this reasoning but not all provincial courts follow it (see, e.g., *Komunik Corp. (Arrangement relatif à)*, 2009 QCCS 6332 (CanLII), leave to appeal granted, 2010 QCCA 183 (CanLII)). Century Services relied, in its written submissions to this Court, on the argument that the court had authority under the *CCAA* to continue the stay against the Crown's claim for unremitted GST. In oral argument, the question of whether *Ottawa Senators* was correctly decided nonetheless arose. After the hearing, the parties were asked to make further written submissions on this point. As appears evident from the reasons of my colleague Abella J., this issue has become prominent before this Court. In those circumstances, this Court needs to determine the correctness of the reasoning in *Ottawa Senators*.

28 The policy backdrop to this question involves the Crown's priority as a creditor in insolvency situations which, as I mentioned above, has evolved considerably. Prior to the 1990s, Crown claims [page400] largely enjoyed priority in insolvency. This was widely seen as unsatisfactory as shown by both the 1970 and 1986 insolvency reform proposals, which recommended that Crown claims receive no preferential treatment. A closely related matter was whether the *CCAA* was binding at all upon the Crown. Amendments to the *CCAA* in 1997 confirmed that it did indeed bind the Crown (see *CCAA*, s. 21, as added by S.C. 1997, c. 12, s. 126).

29 Claims of priority by the state in insolvency situations receive different treatment across jurisdictions worldwide. For example, in Germany and Australia, the state is given no priority at all, while the state enjoys wide priority in the United States and France (see B. K. Morgan, "Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy" (2000), 74 *Am. Bankr. L.J.* 461, at p. 500). Canada adopted a middle course through legislative reform of Crown priority initiated in 1992. The Crown retained priority for source deductions of income tax, Employment Insurance ("EI") and Canada Pension Plan ("CPP") premiums, but ranks as an ordinary unsecured creditor for most other claims.

30 Parliament has frequently enacted statutory mechanisms to secure Crown claims and permit their enforcement. The two most common are statutory deemed trusts and powers to garnish funds third parties owe the debtor (see F. L. Lamer, *Priority of Crown Claims in Insolvency* (loose-leaf), at s.2).

31 With respect to GST collected, Parliament has enacted a deemed trust. The *ETA* states that every person who collects an amount on account of GST is deemed to hold that amount in trust for the Crown (s. 222(1)). The deemed trust extends to other property of the person collecting the tax equal in value to the amount deemed to be in trust if that amount has not been remitted in accordance with the *ETA*. The deemed trust also extends to property [page401] held by a secured creditor that, but for the security interest, would be property of the person collecting the tax (s. 222(3)).

32 Parliament has created similar deemed trusts using almost identical language in respect of source deductions of income tax, EI premiums and CPP premiums (see s. 227(4) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"), ss. 86(2) and (2.1) of the *Employment Insurance Act*, S.C. 1996, c. 23, and ss. 23(3) and (4) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8). I will refer to income tax, EI and CPP deductions as "source deductions".

33 In *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411, this Court addressed a priority dispute between a deemed trust for source deductions under the *ITA* and security interests taken under both the *Bank Act*, S.C. 1991, c. 46, and the Alberta *Personal Property Security Act*, S.A. 1988, c. P-4.05 ("*PPSA*"). As then worded, an *ITA* deemed trust over the debtor's property equivalent to the amount owing in respect of income tax became effective at the time of liquidation, receivership, or assignment in bankruptcy. *Sparrow Electric* held that the *ITA* deemed trust could not prevail over the security interests because, being fixed charges, the latter attached as soon as the debtor acquired rights in the property such that the *ITA* deemed trust had no property on which to attach when it subsequently arose. Later, in *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720, this Court observed that Parliament had legislated to strengthen the statutory deemed trust in the *ITA* by deeming it to operate from the moment the deductions were not paid to the Crown as required by the *ITA*, and by granting the Crown priority over all security interests (paras. 27-29) (the "*Sparrow Electric* amendment").

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34 The amended text of s. 227(4.1) of the *ITA* and concordant source deductions deemed trusts in the *Canada Pension Plan* and the *Employment Insurance Act* state that the deemed trust operates notwithstanding any other enactment of Canada, except ss. 81.1 and 81.2 of the *BIA*. The *ETA* deemed trust at issue in this case is similarly worded, but it excepts the *BIA* in its entirety. The provision reads as follows:

> **222...** .
>
> ...
>
> (3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed ... .

35 The Crown submits that the *Sparrow Electric* amendment, added by Parliament to the *ETA* in 2000, was intended to preserve the Crown's priority over collected GST under the *CCAA* while subordinating the Crown to the status of an unsecured creditor in respect of GST only under the *BIA*. This is because the *ETA* provides that the GST deemed trust is effective "despite" any other enactment except the *BIA*.

36 The language used in the *ETA* for the GST deemed trust creates an apparent conflict with the *CCAA*, which provides that subject to certain exceptions, property deemed by statute to be held in trust for the Crown shall not be so regarded.

37 Through a 1997 amendment to the *CCAA* (S.C. 1997, c. 12, s. 125), Parliament appears to have, [page403] subject to specific exceptions, nullified deemed trusts in favour of the Crown once reorganization proceedings are commenced under the Act. The relevant provision reads:

> **18.3** (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

This nullification of deemed trusts was continued in further amendments to the *CCAA* (S.C. 2005, c. 47), where s. 18.3(1) was renumbered and reformulated as s. 37(1):

> **37.** (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

38 An analogous provision exists in the *BIA*, which, subject to the same specific exceptions, nullifies statutory deemed trusts and makes property of the bankrupt that would otherwise be subject to a deemed trust part of the debtor's estate and available to creditors (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, s. 73; *BIA*, s. 67(2)). It is noteworthy that in both the *CCAA* and the *BIA*, the exceptions concern source deductions (*CCAA*, s. 18.3(2); *BIA*, s. 67(3)). The relevant provision of the *CCAA* reads:

> **18.3** ...
>
> (2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*... .

Thus, the Crown's deemed trust and corresponding priority in source deductions remain effective both in reorganization and in bankruptcy.

[page404]

39 Meanwhile, in both s. 18.4(1) of the *CCAA* and s. 86(1) of the *BIA*, other Crown claims are treated as unsecured. These provisions, establishing the Crown's status as an unsecured creditor, explicitly exempt statutory deemed trusts in source deductions (*CCAA*, s. 18.4(3); *BIA*, s. 86(3)). The *CCAA* provision reads as follows:

> **18.4** ...
>
> ...
>
> (3) Subsection (1) [Crown ranking as unsecured creditor] does not affect the operation of
>
> (*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,
>
> (*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution ... .

Therefore, not only does the *CCAA* provide that Crown claims do not enjoy priority over the claims of other creditors (s. 18.3(1)), but the exceptions to this rule (i.e., that Crown priority is maintained for source deductions) are repeatedly stated in the statute.

40 The apparent conflict in this case is whether the rule in the *CCAA* first enacted as s. 18.3 in 1997, which provides that subject to certain explicit exceptions, statutory deemed trusts are ineffective under the *CCAA*, is overridden by the one in the *ETA* enacted in 2000 stating that GST deemed trusts operate despite any enactment of Canada except the *BIA*. With respect for my colleague Fish J., I do not think the apparent conflict can be resolved by denying it and creating a rule requiring both a statutory provision enacting the deemed trust, and a second statutory provision confirming it. Such a rule is unknown to the law. Courts must recognize [page405] conflicts, apparent or real, and resolve them when possible.

41 A line of jurisprudence across Canada has resolved the apparent conflict in favour of the *ETA*, thereby maintaining GST deemed trusts under the *CCAA*. *Ottawa Senators*, the leading case, decided the matter by invoking the doctrine of implied repeal to hold that the later in time provision of the *ETA* should take precedence over the *CCAA* (see also *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4th) 219 (Alta. Q.B.); *Gauntlet*).

42 The Ontario Court of Appeal in *Ottawa Senators* rested its conclusion on two considerations. First, it was persuaded that by explicitly mentioning the *BIA* in *ETA* s. 222(3), but not the *CCAA*, Parliament made a deliberate choice. In the words of MacPherson J.A.:

> The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

43 Second, the Ontario Court of Appeal compared the conflict between the *ETA* and the *CCAA* to that before this Court in *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862, and found them to be "identical" (para. 46). It therefore considered *Doré* binding (para. 49). In *Doré*, a limitations provision in the more general and recently enacted *Civil Code of Québec*, S.Q. 1991, c. 64 ("*C.C.Q.*"), was held to have repealed a more specific provision of the earlier Quebec *Cities and Towns Act*, R.S.Q., c. C-19, with which it conflicted. By analogy, [page406] the Ontario Court of Appeal held that the later in time and more general provision, s. 222(3) of the *ETA*, impliedly repealed the more specific and earlier in time provision, s. 18.3(1) of the *CCAA* (paras. 47-49).

44 Viewing this issue in its entire context, several considerations lead me to conclude that neither the reasoning nor the result in *Ottawa Senators* can stand. While a conflict may exist at the level of the statutes' wording, a purposive and contextual analysis to determine Parliament's true intent yields the conclusion that Parliament could not have intended to restore the Crown's deemed trust priority in GST claims under the *CCAA* when it amended the *ETA* in 2000 with the *Sparrow Electric* amendment.

45 I begin by recalling that Parliament has shown its willingness to move away from asserting priority for Crown claims in insolvency law. Section 18.3(1) of the *CCAA* (subject to the s. 18.3(2) exceptions) provides that the Crown's deemed trusts have no effect under the *CCAA*. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so explicitly and elaborately. For example, s. 18.3(2) of the *CCAA* and s. 67(3) of the *BIA* expressly provide that deemed trusts for source deductions remain effective in insolvency. Parliament has, therefore, clearly carved out exceptions from the general rule that deemed trusts are ineffective in insolvency. The *CCAA* and *BIA* are in harmony, preserving deemed trusts and asserting Crown priority only in respect of source deductions. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. Unlike source deductions, which are clearly and expressly dealt with under both these insolvency statutes, no such clear and express language exists [page407] in those Acts carving out an exception for GST claims.

46 The internal logic of the *CCAA* also militates against upholding the *ETA* deemed trust for GST. The *CCAA* imposes limits on a suspension by the court of the Crown's rights in respect of source deductions but does not mention the *ETA* (s. 11.4). Since source deductions deemed trusts are granted explicit protection under the *CCAA*, it would be inconsistent to afford a better protection to the *ETA* deemed trust absent explicit language in the *CCAA*. Thus, the logic of the *CCAA* appears to subject the *ETA* deemed trust to the waiver by Parliament of its priority (s. 18.4).

47 Moreover, a strange asymmetry would arise if the interpretation giving the *ETA* priority over the *CCAA* urged by the Crown is adopted here: the Crown would retain priority over GST claims during *CCAA* proceedings but not in bankruptcy. As courts have reflected, this can only encourage statute shopping by secured creditors in cases such as this one where the debtor's assets cannot satisfy both the secured creditors' and the Crown's claims (*Gauntlet*, at para. 21). If creditors' claims were better protected by liquidation under the *BIA*, creditors' incentives would lie overwhelmingly with avoiding proceedings under the *CCAA* and not risking a failed reorganization. Giving a key player in any insolvency such skewed incentives against reorganizing under the *CCAA* can only undermine that statute's remedial objectives and risk inviting the very social ills that it was enacted to avert.

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48 Arguably, the effect of *Ottawa Senators* is mitigated if restructuring is attempted under the *BIA* instead of the *CCAA*, but it is not cured. If *Ottawa Senators* were to be followed, Crown priority over GST would differ depending on whether restructuring took place under the *CCAA* or the *BIA*. The anomaly of this result is made manifest by the fact that it would deprive companies of the option to restructure under the more flexible and responsive *CCAA* regime, which has been the statute of choice for complex reorganizations.

49 Evidence that Parliament intended different treatments for GST claims in reorganization and bankruptcy is scant, if it exists at all. Section 222(3) of the *ETA* was enacted as part of a wide-ranging budget implementation bill in 2000. The summary accompanying that bill does not indicate that Parliament intended to elevate Crown priority over GST claims under the *CCAA* to the same or a higher level than source deductions claims. Indeed, the summary for deemed trusts states only that amendments to existing provisions are aimed at "ensuring that employment insurance premiums and Canada Pension Plan contributions that are required to be remitted by an employer are fully recoverable by the Crown in the case of the bankruptcy of the employer" (Summary to S.C. 2000, c. 30, at p. 4a). The wording of GST deemed trusts resembles that of statutory deemed trusts for source deductions and incorporates the same overriding language and reference to the *BIA*. However, as noted above, Parliament's express intent is that only source deductions deemed trusts remain operative. An exception for the *BIA* in the statutory language establishing the source deductions deemed trusts accomplishes very little, because the explicit language of the *BIA* itself (and the *CCAA*) carves out these source deductions deemed trusts and maintains their effect. It is however noteworthy that no equivalent language maintaining GST deemed trusts exists under either the *BIA* or the *CCAA*.

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50 It seems more likely that by adopting the same language for creating GST deemed trusts in the *ETA* as it did for deemed trusts for source deductions, and by overlooking the inclusion of an exception for the *CCAA* alongside the *BIA* in s. 222(3) of the *ETA*, Parliament may have inadvertently succumbed to a drafting anomaly. Because of a statutory lacuna in the *ETA*, the GST deemed trust could be seen as remaining effective in the *CCAA*, while ceasing to have any effect under the *BIA*, thus creating an apparent conflict with the wording of the *CCAA*. However, it should be seen for what it is: a facial conflict only, capable of resolution by looking at the broader approach taken to Crown priorities and by giving precedence to the statutory language of s. 18.3 of the *CCAA* in a manner that does not produce an anomalous outcome.

51 Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. It merely creates an apparent conflict that must be resolved by statutory interpretation. Parliament's intent when it enacted *ETA* s. 222(3) was therefore far from unambiguous. Had it sought to give the Crown a priority for GST claims, it could have done so explicitly as it did for source deductions. Instead, one is left to infer from the language of *ETA* s. 222(3) that the GST deemed trust was intended to be effective under the *CCAA*.

52 I am not persuaded that the reasoning in *Doré* requires the application of the doctrine of implied repeal in the circumstances of this case. The main issue in *Doré* concerned the impact of the adoption of the *C.C.Q.* on the administrative law rules with respect to municipalities. While Gonthier J. concluded in that case that the limitation provision in art. 2930 *C.C.Q.* had repealed by implication a limitation provision in the *Cities and Towns Act*, he did so on the basis of more than a textual analysis. The conclusion in *Doré* was reached after thorough [page410] contextual analysis of both pieces of legislation, including an extensive review of the relevant legislative history (paras. 31-41). Consequently, the circumstances before this Court in *Doré* are far from "identical" to those in the present case, in terms of text, context and legislative history. Accordingly, *Doré* cannot be said to require the automatic application of the rule of repeal by implication.

53 A noteworthy indicator of Parliament's overall intent is the fact that in subsequent amendments it has not displaced the rule set out in the *CCAA*. Indeed, as indicated above, the recent amendments to the *CCAA* in 2005 resulted in the rule previously found in s. 18.3 being renumbered and reformulated as s. 37. Thus, to the extent the interpretation allowing the GST deemed trust to remain effective under the *CCAA* depends on *ETA* s. 222(3) having impliedly repealed *CCAA* s. 18.3(1) because it is later in time, we have come full circle. Parliament has renumbered and reformulated the provision of the *CCAA* stating that, subject to exceptions for source deductions, deemed trusts do not survive the *CCAA* proceedings and thus the *CCAA* is now the later in time statute. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*.

54 I do not agree with my colleague Abella J. that s. 44(*f*) of the *Interpretation Act*, R.S.C. 1985, c. I-21, can be used to interpret the 2005 amendments as having no effect. The new statute can hardly be said to be a mere re-enactment of the former statute. Indeed, the *CCAA* underwent a substantial review in 2005. Notably, acting consistently with its goal of treating both the *BIA* and the *CCAA* as sharing the same approach to insolvency, Parliament made parallel amendments to both statutes with respect to corporate proposals. In addition, new provisions were introduced regarding [page411] the treatment of contracts, collective agreements, interim financing and governance agreements. The appointment and role of the Monitor was also clarified. Noteworthy are the limits imposed by *CCAA* s. 11.09 on the court's discretion to make an order staying the Crown's source deductions deemed trusts, which were formerly found in s. 11.4. No mention whatsoever is made of GST deemed trusts (see Summary to S.C. 2005, c. 47). The review went as far as looking at the very expression used to describe the statutory override of deemed trusts. The comments cited by my colleague only emphasize the clear intent of Parliament to maintain its policy that only source deductions deemed trusts survive in *CCAA* proceedings.

55 In the case at bar, the legislative context informs the determination of Parliament's legislative intent and supports the conclusion that *ETA* s. 222(3) was not intended to narrow the scope of the *CCAA*'s override provision. Viewed in its entire context, the conflict between the *ETA* and the *CCAA* is more apparent than real. I would therefore not follow the reasoning in *Ottawa Senators* and affirm that *CCAA* s. 18.3 remained effective.

56 My conclusion is reinforced by the purpose of the *CCAA* as part of Canadian remedial insolvency legislation. As this aspect is particularly relevant to the second issue, I will now discuss how courts have interpreted the scope of their discretionary powers in supervising a *CCAA* reorganization and how Parliament has largely endorsed this interpretation. Indeed, the interpretation courts have given to the *CCAA* helps in understanding how the *CCAA* grew to occupy such a prominent role in Canadian insolvency law.

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3.3 *Discretionary Power of a Court Supervising a CCAA Reorganization*

57 Courts frequently observe that "[t]he *CCAA* is skeletal in nature" and does not "contain a comprehensive code that lays out all that is permitted or barred" (*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, at para. 44, *per* Blair J.A.). Accordingly, "[t]he history of CCAA law has been an evolution of judicial interpretation" (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Ct. (Gen. Div.)), at para. 10, *per* Farley J.).

58 *CCAA* decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly describes as "the hothouse of real-time litigation" has been the primary method by which the *CCAA* has been adapted and has evolved to meet contemporary business and social needs (see Jones, at p. 484).

59 Judicial discretion must of course be exercised in furtherance of the *CCAA*'s purposes. The remedial purpose I referred to in the historical overview of the Act is recognized over and over again in the jurisprudence. To cite one early example:

> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.
>
> (*Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282
> , at para. 57, *per* Doherty J.A., dissenting)

60 Judicial decision making under the *CCAA* takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by [page413] staying enforcement actions by creditors to allow the debtor's business to continue, preserving the *status quo* while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed (see, e.g., *Chef Ready Foods Ltd. v. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84 (C.A.), at pp. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134, at para. 27). In doing so, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company (see, e.g., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9, at para. 144, *per* Paperny J. (as she then was); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J.), at para. 3; *Air Canada, Re*, 2003 CanLII 49366 (Ont. S.C.J.), at para. 13, *per* Farley J.; Sarra, *Creditor Rights*, at pp. 181-92 and 217-26). In addition, courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed (see, e.g., *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (Ont. S.C.J.), at para. 2, *per* Blair J. (as he then was); Sarra, *Creditor Rights*, at pp. 195-214).

61 When large companies encounter difficulty, reorganizations become increasingly complex. *CCAA* courts have been called upon to innovate accordingly in exercising their jurisdiction beyond merely staying proceedings against the debtor to allow breathing room for reorganization. They have been asked to sanction measures for which there is no explicit authority in the *CCAA*. Without exhaustively cataloguing the various measures taken under the authority of the *CCAA*, it is useful to refer briefly to a few examples to illustrate the flexibility the statute affords supervising courts.

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62 Perhaps the most creative use of *CCAA* authority has been the increasing willingness of courts to authorize post-filing security for debtor in possession financing or super-priority charges on the debtor's assets when necessary for the continuation of the debtor's business during the reorganization (see, e.g., *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118 (Ont. Ct. (Gen. Div.)); *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96, aff'g (1999), 12 C.B.R. (4th) 144 (S.C.); and generally, J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at pp. 93-115). The *CCAA* has also been used to release claims against third parties as part of approving a comprehensive plan of arrangement and compromise, even over the objections of some dissenting creditors (see *Metcalfe & Mansfield*). As well, the appointment of a Monitor to oversee the reorganization was originally a measure taken pursuant to the *CCAA*'s supervisory authority; Parliament responded, making the mechanism mandatory by legislative amendment.

63 Judicial innovation during *CCAA* proceedings has not been without controversy. At least two questions it raises are directly relevant to the case at bar: (1) What are the sources of a court's authority during *CCAA* proceedings? (2) What are the limits of this authority?

64 The first question concerns the boundary between a court's statutory authority under the *CCAA* and a court's residual authority under its inherent and equitable jurisdiction when supervising a reorganization. In authorizing measures during *CCAA* proceedings, courts have on occasion purported to rely upon their equitable jurisdiction to advance the purposes of the Act or their inherent

jurisdiction to fill gaps in the statute. Recent appellate decisions have counselled against [page415] purporting to rely on inherent jurisdiction, holding that the better view is that courts are in most cases simply construing the authority supplied by the *CCAA* itself (see, e.g., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236, at paras. 45-47, *per* Newbury J.A.; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), at paras. 31-33, *per* Blair J.A.).

65 I agree with Justice Georgina R. Jackson and Professor Janis Sarra that the most appropriate approach is a hierarchical one in which courts rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding (see G. R. Jackson and J. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2007* (2008), 41, at p. 42). The authors conclude that when given an appropriately purposive and liberal interpretation, the *CCAA* will be sufficient in most instances to ground measures necessary to achieve its objectives (p. 94).

66 Having examined the pertinent parts of the *CCAA* and the recent history of the legislation, I accept that in most instances the issuance of an order during *CCAA* proceedings should be considered an exercise in statutory interpretation. Particularly noteworthy in this regard is the expansive interpretation the language of the statute at issue is capable of supporting.

67 The initial grant of authority under the *CCAA* empowered a court "where an application is made under this Act in respect of a company ... on the application of any person interested in the [page416] matter, ... subject to this Act, [to] make an order under this section" (*CCAA*, s. 11(1)). The plain language of the statute was very broad.

68 In this regard, though not strictly applicable to the case at bar, I note that Parliament has in recent amendments changed the wording contained in s. 11(1), making explicit the discretionary authority of the court under the *CCAA*. Thus, in s. 11 of the *CCAA* as currently enacted, a court may, "subject to the restrictions set out in this Act, ... make any order that it considers appropriate in the circumstances" (S.C. 2005, c. 47, s. 128). Parliament appears to have endorsed the broad reading of *CCAA* authority developed by the jurisprudence.

69 The *CCAA* also explicitly provides for certain orders. Both an order made on an initial application and an order on subsequent applications may stay, restrain, or prohibit existing or new proceedings against the debtor. The burden is on the applicant to satisfy the court that the order is appropriate in the circumstances and that the applicant has been acting in good faith and with due diligence (*CCAA*, ss. 11(3), (4) and (6)).

70 The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* -- avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all [page417] stakeholders are treated as advantageously and fairly as the circumstances permit.

71 It is well established that efforts to reorganize under the *CCAA* can be terminated and the stay of proceedings against the debtor lifted if the reorganization is "doomed to failure" (see *Chef Ready*, at p. 88; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (B.C.C.A.), at paras. 6-7). However, when an order is sought that does realistically advance the *CCAA*'s purposes, the ability to make it is within the discretion of a *CCAA* court.

72 The preceding discussion assists in determining whether the court had authority under the *CCAA* to continue the stay of proceedings against the Crown once it was apparent that reorganization would fail and bankruptcy was the inevitable next step.

73 In the Court of Appeal, Tysoe J.A. held that no authority existed under the *CCAA* to continue staying the Crown's enforcement of the GST deemed trust once efforts at reorganization had come to an end. The appellant submits that in so holding, Tysoe J.A. failed to consider the underlying purpose of the *CCAA* and give the statute an appropriately purposive and liberal interpretation under which the order was permissible. The Crown submits that Tysoe J.A. correctly held that the mandatory language of the *ETA* gave the court no option but to permit enforcement of the GST deemed trust when lifting the *CCAA* stay to permit the debtor to make an assignment under the *BIA*. Whether the *ETA* has a mandatory effect in the context of a *CCAA* proceeding has already been discussed. I will now address the question of whether the order was authorized by the *CCAA*.

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74 It is beyond dispute that the *CCAA* imposes no explicit temporal limitations upon proceedings commenced under the Act that would prohibit ordering a continuation of the stay of the Crown's GST claims while lifting the general stay of proceedings temporarily to allow the debtor to make an assignment in bankruptcy.

75 The question remains whether the order advanced the underlying purpose of the *CCAA*. The Court of Appeal held that it did not because the reorganization efforts had come to an end and the *CCAA* was accordingly spent. I disagree.

76 There is no doubt that had reorganization been commenced under the *BIA* instead of the *CCAA*, the Crown's deemed trust priority for the GST funds would have been lost. Similarly, the Crown does not dispute that under the scheme of distribution in bankruptcy under the *BIA* the deemed trust for GST ceases to have effect. Thus, after reorganization under the *CCAA* failed, creditors would have had a strong incentive to seek immediate bankruptcy and distribution of the debtor's assets under the *BIA*. In order to conclude that the discretion does not extend to partially lifting the stay in order to allow for an assignment in bankruptcy, one would have to assume a gap between the *CCAA* and the *BIA* proceedings. Brenner C.J.S.C.'s order staying Crown enforcement of the GST claim ensured that creditors would not be disadvantaged by the attempted reorganization under the *CCAA*. The effect of his order was to blunt any impulse of creditors to interfere in an orderly liquidation. His order was thus in furtherance of the *CCAA*'s objectives to the extent that it allowed a bridge between the *CCAA* and *BIA* proceedings. This interpretation of the tribunal's discretionary power is buttressed by s. 20 of the *CCAA*. That section provides that the *CCAA* "may be applied together with the provisions of any Act of Parliament ... that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them", such as [page419] the *BIA*. Section 20 clearly indicates the intention of Parliament for the *CCAA* to operate *in tandem* with other insolvency legislation, such as the *BIA*.

77 The *CCAA* creates conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all. Because the alternative to reorganization is often bankruptcy, participants will measure the impact of a reorganization against the position they would enjoy in liquidation. In the case at bar, the order fostered a harmonious transition between reorganization and liquidation while meeting the objective of a single collective proceeding that is common to both statutes.

78 Tysoe J.A. therefore erred in my view by treating the *CCAA* and the *BIA* as distinct regimes subject to a temporal gap between the two, rather than as forming part of an integrated body of insolvency law. Parliament's decision to maintain two statutory schemes for reorganization, the *BIA* and the *CCAA*, reflects the reality that reorganizations of differing complexity require different legal mechanisms. By contrast, only one statutory scheme has been found to be needed to liquidate a bankrupt debtor's estate. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of the *BIA* proceedings. However, as Laskin J.A. for the Ontario Court of Appeal noted in a similar competition between secured creditors and the Ontario Superintendent of Financial Services seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be [page420] lost in bankruptcy (*Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, at paras. 62-63).

79 The Crown's priority in claims pursuant to source deductions deemed trusts does not undermine this conclusion. Source deductions deemed trusts survive under both the *CCAA* and the *BIA*. Accordingly, creditors' incentives to prefer one Act over another will not be affected. While a court has a broad discretion to stay source deductions deemed trusts in the *CCAA* context, this discretion is nevertheless subject to specific limitations applicable only to source deductions deemed trusts (*CCAA*, s. 11.4). Thus, if *CCAA* reorganization fails (e.g., either the creditors or the court refuse a proposed reorganization), the Crown can immediately assert its claim in unremitted source deductions. But this should not be understood to affect a seamless transition into bankruptcy or create any "gap" between the *CCAA* and the *BIA* for the simple reason that, regardless of what statute the reorganization had been commenced under, creditors' claims in both instances would have been subject to the priority of the Crown's source deductions deemed trust.

80 Source deductions deemed trusts aside, the comprehensive and exhaustive mechanism under the *BIA* must control the distribution of the debtor's assets once liquidation is inevitable. Indeed, an orderly transition to liquidation is mandatory under the *BIA* where a proposal is rejected by creditors. The *CCAA* is silent on the transition into liquidation but the breadth of the court's discretion under the Act is sufficient to construct a bridge to liquidation under the *BIA*. The court must do so in a manner that does not subvert the scheme of distribution under the *BIA*. Transition [page421] to liquidation requires partially lifting the *CCAA* stay to commence proceedings under the *BIA*. This necessary partial lifting of the stay should not trigger a race to the courthouse in an effort to obtain priority unavailable under the *BIA*.

81 I therefore conclude that Brenner C.J.S.C. had the authority under the *CCAA* to lift the stay to allow entry into liquidation.

3.4 *Express Trust*

82 The last issue in this case is whether Brenner C.J.S.C. created an express trust in favour of the Crown when he ordered on April 29, 2008, that proceeds from the sale of LeRoy Trucking's assets equal to the amount of unremitted GST be held back in the Monitor's trust account until the results of the reorganization were known. Tysoe J.A. in the Court of Appeal concluded as an alternative ground for allowing the Crown's appeal that it was the beneficiary of an express trust. I disagree.

83 Creation of an express trust requires the presence of three certainties: intention, subject matter, and object. Express or "true trusts" arise from the acts and intentions of the settlor and are distinguishable from other trusts arising by operation of law (see D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at pp. 28-29, especially fn. 42).

84 Here, there is no certainty to the object (i.e. the beneficiary) inferrable from the court's order of April 29, 2008 sufficient to support an express trust.

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85 At the time of the order, there was a dispute between Century Services and the Crown over part of the proceeds from the sale of the debtor's assets. The court's solution was to accept LeRoy Trucking's proposal to segregate those monies until that dispute could be resolved. Thus, there was no certainty that the Crown would actually be the beneficiary, or object, of the trust.

86 The fact that the location chosen to segregate those monies was the Monitor's trust account has no independent effect such that it would overcome the lack of a clear beneficiary. In any event, under the interpretation of *CCAA* s. 18.3(1) established above, no such priority dispute would even arise because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount. However, Brenner C.J.S.C. may well have been proceeding on the basis that, in accordance with *Ottawa Senators*, the Crown's GST claim would remain effective if reorganization was successful, which would not be the case if transition to the liquidation process of the *BIA* was allowed. An amount equivalent to that claim would accordingly be set aside pending the outcome of reorganization.

87 Thus, uncertainty surrounding the outcome of the *CCAA* restructuring eliminates the existence of any certainty to permanently vest in the Crown a beneficial interest in the funds. That much is clear from the oral reasons of Brenner C.J.S.C. on April 29, 2008, when he said: "Given the fact that [*CCAA* proceedings] are known to fail and filings in bankruptcy result, it seems to me that maintaining the status quo in the case at bar supports the proposal to have the monitor hold these funds in trust." Exactly who might take the money in the final result was therefore evidently in doubt. Brenner C.J.S.C.'s subsequent order of September 3, 2008 denying the Crown's application to enforce the trust once it was clear [page423] that bankruptcy was inevitable, confirms the absence of a clear beneficiary required to ground an express trust.

4. Conclusion

88 I conclude that Brenner C.J.S.C. had the discretion under the *CCAA* to continue the stay of the Crown's claim for enforcement of the GST deemed trust while otherwise lifting it to permit LeRoy Trucking to make an assignment in bankruptcy. My conclusion that s. 18.3(1) of the *CCAA* nullified the GST deemed trust while proceedings under that Act were pending confirms that the discretionary jurisdiction under s. 11 utilized by the court was not limited by the Crown's asserted GST priority, because there is no such priority under the *CCAA*.

89 For these reasons, I would allow the appeal and declare that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada is not subject to deemed trust or priority in favour of the Crown. Nor is this amount subject to an express trust. Costs are awarded for this appeal and the appeal in the court below.

The following are the reasons delivered by

FISH J. --

I

90 I am in general agreement with the reasons of Justice Deschamps and would dispose of the appeal as she suggests.

91 More particularly, I share my colleague's interpretation of the scope of the judge's discretion under s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). [page424] And I share my colleague's conclusion that Brenner C.J.S.C. did not create an express trust in favour of the Crown when he segregated GST funds into the Monitor's trust account (2008 BCSC 1805, [2008] G.S.T.C. 221).

92 I nonetheless feel bound to add brief reasons of my own regarding the interaction between the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*").

93 In upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), and its progeny have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In my respectful view, a clearly marked departure from that jurisprudential approach is warranted in this case.

94 Justice Deschamps develops important historical and policy reasons in support of this position and I have nothing to add in that regard. I do wish, however, to explain why a comparative analysis of related statutory provisions adds support to our shared conclusion.

95 Parliament has in recent years given detailed consideration to the Canadian insolvency scheme. It has declined to amend the provisions at issue in this case. Ours is not to wonder why, but rather to treat Parliament's preservation of the relevant provisions as a deliberate exercise of the legislative discretion that is Parliament's alone. With respect, I reject any suggestion that we should instead characterize the apparent conflict between s. 18.3(1) (now s. 37(1)) of the *CCAA* and s. 222 of the *ETA* as a drafting anomaly or statutory lacuna properly subject to judicial correction or repair.

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II

96 In the context of the Canadian insolvency regime, a deemed trust will be found to exist only where two complementary elements co-exist: first, a statutory provision *creating* the trust; and second, a *CCAA* or *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") provision *confirming* -- or explicitly preserving -- its effective operation.

97 This interpretation is reflected in three federal statutes. Each contains a deemed trust provision framed in terms strikingly similar to the wording of s. 222 of the *ETA*.

98 The first is the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"), where s. 227(4) *creates* a deemed trust:

> (4) Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act. [Here and below, the emphasis is of course my own.]

99 In the next subsection, Parliament has taken care to make clear that this trust is unaffected by federal or provincial legislation to the contrary:

> (4.1) Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person ... equal in value to the amount so deemed to be held in trust is deemed
>
> (*a*) to be held, from the time the amount was deducted or withheld by the person, separate and [page426] apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, ...
>
> ...
>
> ... and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

100 The continued operation of this deemed trust is expressly *confirmed* in s. 18.3 of the *CCAA*:

> **18.3** (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.
>
> (2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* ... .

101 The operation of the *ITA* deemed trust is also confirmed in s. 67 of the *BIA*:

> (2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.
>
> (3) Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* ... .

102 Thus, Parliament has first *created* and then *confirmed the continued operation of* the Crown's *ITA* deemed trust under *both* the *CCAA* and the *BIA* regimes.

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103 The second federal statute for which this scheme holds true is the *Canada Pension Plan*, R.S.C. 1985, c. C-8 ("*CPP*"). At s. 23, Parliament creates a deemed trust in favour of the Crown and specifies that it exists despite all contrary provisions in any other Canadian statute. Finally, and in almost identical terms, the *Employment Insurance Act*, S.C. 1996, c. 23 ("*EIA*"), creates a deemed trust in favour of the Crown: see ss. 86(2) and (2.1).

104 As we have seen, the survival of the deemed trusts created under these provisions of the *ITA*, the *CPP* and the *EIA* is confirmed in s. 18.3(2) of the *CCAA* and in s. 67(3) of the *BIA*. In all three cases, Parliament's intent to enforce the Crown's deemed trust through insolvency proceedings is expressed in clear and unmistakable terms.

105 The same is not true with regard to the deemed trust created under the *ETA*. Although Parliament creates a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it does not *confirm* the trust -- or expressly provide for its continued operation -- in either the *BIA* or the *CCAA*. The second of the two mandatory elements I have mentioned is thus absent reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

106 The language of the relevant *ETA* provisions is identical in substance to that of the *ITA*, *CPP*, and *EIA* provisions:

> **222.** (1) Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a [page428] security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

...

(3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and InsolvencyAct*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

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

...

... and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

107 Yet no provision of the *CCAA* provides for the continuation of this deemed trust after the *CCAA* is brought into play.

108 In short, Parliament has imposed *two* explicit conditions, or "building blocks", for survival under the *CCAA* of deemed trusts created by the *ITA*, *CPP*, and *EIA*. Had Parliament intended to likewise preserve under the *CCAA* deemed trusts created by the *ETA*, it would have included in the *CCAA* the sort of confirmatory provision that explicitly preserves other deemed trusts.

109 With respect, unlike Tysoe J.A., I do not find it "inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception" (2009 BCCA 205, 98 B.C.L.R. (4th) 242, at para. 37). *All* of the deemed trust [page429] provisions excerpted above make explicit reference to the *BIA*. Section 222 of the *ETA* does not break the pattern. Given the near-identical wording of the four deemed trust provisions, it would have been surprising indeed had Parliament not addressed the *BIA* at all in the *ETA*.

110 Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings. Accordingly, s. 222 mentions the *BIA* so as to *exclude* it from its ambit -- rather than to *include* it, as do the *ITA*, the *CPP*, and the *EIA*.

111 Conversely, I note that *none* of these statutes mentions the *CCAA* expressly. Their specific reference to the *BIA* has no bearing on their interaction with the *CCAA*. Again, it is the confirmatory provisions *in the insolvency statutes* that determine whether a given deemed trust will subsist during insolvency proceedings.

112 Finally, I believe that chambers judges should not segregate GST monies into the Monitor's trust account during *CCAA* proceedings, as was done in this case. The result of Justice Deschamps's reasoning is that GST claims become unsecured under the *CCAA*. Parliament has deliberately chosen to nullify certain Crown super-priorities during insolvency; this is one such instance.

III

113 For these reasons, like Justice Deschamps, I would allow the appeal with costs in this Court and in the courts below and order that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada [page430] be subject to no deemed trust or priority in favour of the Crown.

The following are the reasons delivered by

114 ABELLA J. (dissenting):-- The central issue in this appeal is whether s. 222 of the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), and specifically s. 222(3), gives priority during *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), proceedings to the Crown's deemed trust in unremitted GST. I agree with Tysoe J.A. that it does. It follows, in my respectful view, that a court's discretion under s. 11 of the *CCAA* is circumscribed accordingly.

115 Section 11[1] of the *CCAA* stated:

> **11.** (1) Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

To decide the scope of the court's discretion under s. 11, it is necessary to first determine the priority issue. Section 222(3), the provision of the *ETA* at issue in this case, states:

[page431]

> (3) <u>Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law</u>, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed
>
> (*a*) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and
>
> (*b*) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

> and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

116 Century Services argued that the *CCAA*'s general override provision, s. 18.3(1), prevailed, and that the deeming provisions in s. 222 of the *ETA* were, accordingly, inapplicable during *CCAA* proceedings. Section 18.3(1) states:

> **18.3** (1) ... [N]otwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

117 As MacPherson J.A. correctly observed in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), s. 222(3) of the *ETA* is in "clear conflict" with s. 18.3(1) of the *CCAA* (para. 31). Resolving the conflict between the two provisions is, essentially, what seems to me to be a relatively uncomplicated exercise in statutory [page432] interpretation: Does the language reflect a clear legislative intention? In my view it does. The deemed trust provision, s. 222(3) of the *ETA*, has unambiguous language stating that it operates notwithstanding any law except the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*").

118 By expressly excluding only one statute from its legislative grasp, and by unequivocally stating that it applies despite any other law anywhere in Canada *except* the *BIA*, s. 222(3) has defined its boundaries in the clearest possible terms. I am in complete agreement with the following comments of MacPherson J.A. in *Ottawa Senators*:

> The legislative intent of s. 222(3) of the *ETA* is clear. If there is a conflict with "any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)", s. 222(3) prevails. In these words Parliament did two things: it decided that s. 222(3) should trump all other federal laws and, importantly, it addressed the topic of exceptions to its trumping decision and identified a single exception, the *Bankruptcy and Insolvency Act*... . The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

119 MacPherson J.A.'s view that the failure to exempt the *CCAA* from the operation of the *ETA* is a reflection of a clear legislative intention, is borne out by how the *CCAA* was subsequently changed after s. 18.3(1) was enacted in 1997. In 2000, when s. 222(3) of the *ETA* came into force, amendments were also introduced to the *CCAA*. Section 18.3(1) was not amended.

120 The failure to amend s. 18.3(1) is notable because its effect was to protect the legislative *status quo*, notwithstanding repeated requests from [page433] various constituencies that s. 18.3(1) be amended to make the priorities in the *CCAA* consistent with those in the *BIA*. In 2002, for example, when Industry Canada conducted a review of the *BIA* and the *CCAA*, the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals recommended that the priority regime under the *BIA* be extended to the *CCAA* (Joint Task Force on Business Insolvency Law Reform, *Report* (March 15, 2002), Sch. B, proposal 71). The same recommendations were made by the Standing Senate Committee on Banking, Trade and Commerce in its 2003 report, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*; by the Legislative Review Task Force (Commercial) of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals in its 2005 *Report on the Commercial Provisions of Bill C-55*; and in 2007 by the Insolvency Institute of Canada in a submission to the Standing Senate Committee on Banking, Trade and Commerce commenting on reforms then under consideration.

121 Yet the *BIA* remains the only exempted statute under s. 222(3) of the *ETA*. Even after the 2005 decision in *Ottawa Senators* which confirmed that the *ETA* took precedence over the *CCAA*, there was no responsive legislative revision. I see this lack of response as relevant in this case, as it was in *Tele-Mobile Co. v. Ontario*, 2008 SCC 12, [2008] 1 S.C.R. 305, where this Court stated:

> While it cannot be said that legislative silence is necessarily determinative of legislative intention, in this case the silence is Parliament's answer to the consistent urging of Telus and other affected businesses and organizations that there be express language in the legislation to ensure that businesses can be reimbursed for the reasonable costs of complying with evidence-gathering orders. I see the legislative history as reflecting Parliament's intention that compensation not be paid for compliance with production orders. [para. 42]

[page434]

122 All this leads to a clear inference of a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA*.

123 Nor do I see any "policy" justification for interfering, through interpretation, with this clarity of legislative intention. I can do no better by way of explaining why I think the policy argument cannot succeed in this case, than to repeat the words of Tysoe J.A. who said:

> I do not dispute that there are valid policy reasons for encouraging insolvent companies to attempt to restructure their affairs so that their business can continue with as little disruption to employees and other stakeholders as possible. It is appropriate for the courts to take such policy considerations into account, but only if it is in connection with a matter that has not been considered by Parliament. Here, Parliament must be taken to have weighed policy considerations when it enacted the amendments to the *CCAA* and *ETA* described above. As Mr. Justice MacPherson observed at para. 43 of *Ottawa Senators*, it is inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception. I also make the observation that the 1992 set of amendments to the *BIA* enabled proposals to be binding on secured creditors and, while there is more flexibility under the *CCAA*, it is possible for an

> insolvent company to attempt to restructure under the auspices of the *BIA*. [para. 37]

124 Despite my view that the clarity of the language in s. 222(3) is dispositive, it is also my view that even the application of other principles of interpretation reinforces this conclusion. In their submissions, the parties raised the following as being particularly relevant: the Crown relied on the principle that the statute which is "later in time" prevails; and Century Services based its argument on the principle that the general provision gives way to the specific (*generalia specialibus non derogant*).

[page435]

125 The "later in time" principle gives priority to a more recent statute, based on the theory that the legislature is presumed to be aware of the content of existing legislation. If a new enactment is inconsistent with a prior one, therefore, the legislature is presumed to have intended to derogate from the earlier provisions (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 346-47; Pierre-André Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 358).

126 The exception to this presumptive displacement of pre-existing inconsistent legislation, is the *generalia specialibus non derogant* principle that "[a] more recent, general provision will not be construed as affecting an earlier, special provision" (Côté, at p. 359). Like a Russian Doll, there is also an exception within this exception, namely, that an earlier, specific provision may in fact be "overruled" by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails (*Doré v. Verdun (City)*, [1997] 2 S.C.R. 862).

127 The primary purpose of these interpretive principles is to assist in the performance of the task of determining the intention of the legislature. This was confirmed by MacPherson J.A. in *Ottawa Senators*, at para. 42:

> ... the overarching rule of statutory interpretation is that statutory provisions should be interpreted to give effect to the intention of the legislature in enacting the law. This primary rule takes precedence over all maxims or canons or aids relating to statutory interpretation, including the maxim that the specific prevails over the general (*generalia specialibus non derogant*). As expressed by Hudson J. in *Canada v. Williams*, [1944] S.C.R. 226, ... at p. 239 ... :
>
>> The maxim *generalia specialibus non derogant* is relied on as a rule which should dispose of the question, but the maxim is not a rule of law but a rule of construction and bows to the intention of the [page436] legislature, if such intention can reasonably be gathered from all of the relevant legislation.

(See also Côté, at p. 358, and Pierre-Andre Côté, with the collaboration of S. Beaulac and M. Devinat, *Interprétation des lois* (4th ed. 2009), at para. 1335.)

128 I accept the Crown's argument that the "later in time" principle is conclusive in this case. Since s. 222(3) of the *ETA* was enacted in 2000 and s. 18.3(1) of the *CCAA* was introduced in 1997, s. 222 (3) is, on its face, the later provision. This chronological victory can be displaced, as Century Services argues, if it is shown that the more recent provision, s. 222(3) of the *ETA*, is a general one, in which case the earlier, specific provision, s. 18.3(1), prevails (*generalia specialibus non derogant*). But, as previously explained, the prior specific provision does not take precedence if the subsequent general provision appears to "overrule" it. This, it seems to me, is precisely what s. 222(3) achieves through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" *other than the BIA*. Section 18.3(1) of the *CCAA* is thereby rendered inoperative for purposes of s. 222(3).

129 It is true that when the *CCAA* was amended in 2005,[2] s. 18.3(1) was re-enacted as s. 37(1) (S.C. 2005, c. 47, s. 131). Deschamps J. suggests that this makes s. 37(1) the new, "later in time" provision. With respect, her observation is refuted by the operation of s. 44(*f*) of the *Interpretation Act*, R.S.C. 1985, c. I-21, which expressly deals with the (non) effect of re-enacting, without significant substantive changes, a repealed provision (see *Attorney General of Canada v. Public Service Staff Relations Board*, [1977] 2 F.C. 663, dealing with the predecessor provision to s. 44(*f*)). It directs that new enactments not be construed as [page437] "new law" unless they differ in substance from the repealed provision:

> **44.** Where an enactment, in this section called the "former enactment", is repealed and another enactment, in this section called the "new enactment", is substituted therefor,
>
> ...
>
> (*f*) <u>except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment, the new enactment shall not be held to operate as new law</u>, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the former enactment;

Section 2 of the *Interpretation Act* defines an "enactment" as "an Act or regulation or <u>any portion of an Act or regulation</u>".

130 Section 37(1) of the current *CCAA* is almost identical to s. 18.3(1). These provisions are set out for ease of comparison, with the differences between them underlined:

> **37.** (1) Subject to subsection (2), <u>despite</u> any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as <u>being</u> held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.
>
> **18.3** (1) Subject to subsection (2), <u>notwithstanding</u> any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

131 The application of s. 44(*f*) of the *Interpretation Act* simply confirms the government's clearly expressed intent, found in Industry Canada's clause-by-clause review of Bill C-55, where s. 37(1) was identified as "a technical amendment to re-order the provisions of this Act". During second reading, the Hon. Bill Rompkey, then the Deputy Leader of the Government in the [page438] Senate, confirmed that s. 37(1) represented only a technical change:

> On a technical note relating to the treatment of deemed trusts for taxes, the bill [*sic*] makes no changes to the underlying policy intent, despite the fact that in the case of a restructuring under the CCAA, sections of the act [*sic*] were repealed and substituted with renumbered versions due to the extensive reworking of the CCAA.
>
> (*Debates of the Senate*, vol. 142, 1st Sess., 38th Parl., November 23, 2005, at p. 2147)

132 Had the substance of s. 18.3(1) altered in any material way when it was replaced by s. 37(1), I would share Deschamps J.'s view that it should be considered a new provision. But since s. 18.3(1) and s. 37(1) are the same in substance, the transformation of s. 18.3(1) into s. 37(1) has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision (Sullivan, at p. 347).

133 This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. The question then is how that priority affects the discretion of a court under s. 11 of the *CCAA*.

134 While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, R.S.C. 1985, c. W-11, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes *other* than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request [page439] for payment of the GST funds during the *CCAA* proceedings.

135 Given this conclusion, it is unnecessary to consider whether there was an express trust.

136 I would dismiss the appeal.

* * * * *

APPENDIX

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as at December 13, 2007)

11. (1) [Powers of court] Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

...

(3) [Initial application court orders] A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,

(*a*) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

(4) [Other than initial application court orders] A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

[page440]

(*a*) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

...

(6) [Burden of proof on application] The court shall not make an order under subsection (3) or (4) unless

(*a*) the applicant satisfies the court that circumstances exist that make such an order appropriate; and

(*b*) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

11.4 (1) [Her Majesty affected] An order made under section 11 may provide that

(*a*) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for such period as the court considers appropriate but ending not later than

(i) the expiration of the order,
(ii) the refusal of a proposed compromise by the creditors or the court,
(iii) six months following the court sanction of a compromise or arrangement,

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(iv) the default by the company on any term of a compromise or arrangement, or
(v) the performance of a compromise or arrangement in respect of the company; and

(*b*) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company where the company is a debtor under that legislation and the provision has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for such period as the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (*a*)(i) to (v) may apply.

(2) [When order ceases to be in effect] An order referred to in subsection (1) ceases to be in effect if

(*a*) the company defaults on payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,
(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, [page442] as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or
(iii) under any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that

subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(*b*) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person [page443] and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) [Operation of similar legislation] An order made under section 11, other than an order referred to in subsection (1) of this section, does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(*c*) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same [page444] effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

18.3 (1) [Deemed trusts] Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) [Exceptions] Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(*a*) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*, and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

[page445]

18.4 (1) [Status of Crown claims] In relation to a proceeding under this Act, all claims, including secured claims, of Her Majesty in right of Canada or a province or any body under an enactment respecting workers' compensation, in this section and in section 18.5 called a "workers' compensation body", rank as unsecured claims.

...

(3) [Operation of similar legislation] Subsection (1) does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(*c*) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and [page446] in respect of any related interest, penalties or other amounts.

20. [Act to be applied conjointly with other Acts] The provisions of this Act may be applied together with the provisions of any Act of Parliament or of the legislature of any province, that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as at September 18, 2009)

11. [General power of court] Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

11.02 (1) [Stays, etc. -- initial application] A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(*a*) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(2) [Stays, etc. -- other than initial application] A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(*a*) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(*a*);

[page447]

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(3) [Burden of proof on application] The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and
(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

...

11.09 (1) [Stay -- Her Majesty] An order made under section 11.02 may provide that

(*a*) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for the period that the court considers appropriate but ending not later than

(i) the expiry of the order,
(ii) the refusal of a proposed compromise by the creditors or the court,
(iii) six months following the court sanction of a compromise or an arrangement,
(iv) the default by the company on any term of a compromise or an arrangement, or

(v) the performance of a compromise or an arrangement in respect of the company; and

(*b*) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company if the company is a debtor under that legislation and the provision has a purpose similar to subsection 224(1.2) of the *Income [page448] Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for the period that the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (*a*)(i) to (v) that may apply.

(2) [When order ceases to be in effect] The portions of an order made under section 11.02 that affect the exercise of rights of Her Majesty referred to in paragraph (1)(*a*) or (*b*) cease to be in effect if

(*a*) the company defaults on the payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,
(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or
(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the [page449] collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(*b*) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,
(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or
(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection [page450] 3(1) of the *Canada Pension Plan* and the provincial legislation

establishes a "provincial pension plan" as defined in that subsection.

(3) [Operation of similar legislation] An order made under section 11.02, other than the portions of that order that affect the exercise of rights of Her Majesty referred to in paragraph (1)(*a*) or (*b*), does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(*c*) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

[page451]

37. (1) [Deemed trusts] Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) [Exceptions] Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision"), nor does it apply in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to

ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province if

> (*a*) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or
>
> (*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

Excise Tax Act, R.S.C. 1985, c. E-15 (as at December 13, 2007)

222. (1) [Trust for amounts collected] Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured [page452] creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

(1.1) [Amounts collected before bankruptcy] Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the *Bankruptcy and Insolvency Act*), to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

...

(3) [Extension of trust] Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

> (*a*) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and
>
> (*b*) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept

separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (as at December 13, 2007)

67. (1) [Property of bankrupt] The property of a bankrupt divisible among his creditors shall not comprise

[page453]

(*a*) property held by the bankrupt in trust for any other person,

(*b*) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides, or

(*b*.1) such goods and services tax credit payments and prescribed payments relating to the essential needs of an individual as are made in prescribed circumstances and are not property referred to in paragraph (*a*) or (*b*),

but it shall comprise

(*c*) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and

(*d*) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

(2) [Deemed trusts] Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.

(3) [Exceptions] Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(*a*) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

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(*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

86. (1) [Status of Crown claims] In relation to a bankruptcy or proposal, all provable claims, including secured claims, of Her Majesty in right of Canada or a province or of any body under an Act respecting workers' compensation, in this section and in section 87 called a "workers' compensation body", rank as unsecured claims.

...

(3) [Exceptions] Subsection (1) does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*;

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts; or

(*c*) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

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(ii)

> is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

Appeal allowed with costs, ABELLA J. *dissenting.*

Solicitors:

Solicitors for the appellant: Fraser Milner Casgrain, Vancouver.

Solicitor for the respondent: Attorney General of Canada, Vancouver.

1 Section 11 was amended, effective September 18, 2009, and now states:

> **11.** Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

2 The amendments did not come into force until September 18, 2009.

6

Case Name:

F.D.T. Ltd. (Trustee of) v. Arenson

IN THE MATTER OF The Bankruptcy of F.D.T. Limited.
Between
John A. E. MacDonald, The Trustee of the Estate of F.D.T. Limited, (applicant) appellant, and
Kenneth Michael Arenson, (respondent) respondent

[1980] M.J. No. 158

[1980] M.J. No. 320

116 D.L.R. (3d) 186

[1981] 1 W.W.R. 573

37 C.B.R. (N.S.) 30

Manitoba Court of Appeal

Hall, Monnin and Huband JJ.A.

Heard: September 22, 1980.
Judgment: September 26, 1980.

(17 paras.)

Counsel:

D.G. Douglas, for the applicant/appellant.
C.A. Sherbo, for the respondent/respondent.

The judgment of the Court was delivered by

1 **HUBAND J.A.**:-- There are two kinds of solicitor's liens. One type is a "retaining" lien, which enables a solicitor to maintain property owned by the client and already in his possession until he shall have been paid costs due to him in his professional capacity. The retaining lien extends to any deed, paper, or personal chattel which has come into the solicitor's possession, with the client's sanction, in the course of his employment as solicitor. It applies to money, - so long as the money belongs to the client in a form which would enable the client to do with it as he might wish.

2 In this case, a solicitor, Arenson, was retained to act on behalf of F.D.T. Limited with respect to the sale of real property. On February 17, 1977, a company, Double L. H. Enterprises Ltd., submitted an offer in writing to purchase certain land owned by F.D.T. Limited for $262,500. On February 19th, the offer was accepted, subject to agreement being reached with respect to certain amendments and conditions varying the offer to purchase. One of the conditions was that the entire transaction had to be approved by the Royal Bank of Canada. On February 22, 1977, the Royal Bank approved the transaction subject to certain conditions. One of the conditions was set forth in these terms:

> "... the net sale proceeds after payment of Mortgage No. M84436 and L17189 (in favor of the Royal Bank of Canada) and judgments in favor of Tallman Paving Ltd. (in the amount of $1,413.50) and Marshall-Wells (in the amount of $1,095.01) will be forwarded to the Royal Bank of Canada, 220 Portage Avenue, Winnipeg, Manitoba."

That condition was agreed to by F.D.T. Limited.

3 The closing date for the proposed sale was August 1, 1977. The purchaser intended to raise most of the monies necessary to complete the purchase by way of a new first mortgage, and the balance would be a cash payment, subject to adjustments. The vendor, F.D.T. Limited, was having financial difficulties which culminated in bankruptcy proceedings before the transaction was completed. A creditor, Wilkinson Trucking Ltd., filed a petition for a receiving order in bankruptcy court on September 26, 1977. On that same date, an order was granted appointing John A. E. MacDonald as interim receiver. On the same date, a copy of the order was served upon the solicitor, Arenson.

4 As of September 26, 1977, Arenson had received the cash component of the purchase price from the solicitors for the purchaser, but he was still awaiting the major part of the purchase price, which was being financed by a new first mortgage. On September 28th, Arenson transferred the sum of $1,076.25 from the client's account to his own account. The balance of the monies to complete the purchase were received by Arenson from the solicitors for the purchaser, in mid-October. On October 28, 1977, Arenson transferred a further $2,000.00, and on November 29, 1977, a final $1,075.50, was transferred from the client's account to the solicitor.

5 The total amount involved is $4,151.75, of which $101.75 appears to be disbursements incurred by the solicitor on behalf of his client. The balance appears to be charged as a solicitor's fee, although there is nothing in the record before this Court to indicate that an appropriate invoice had ever been prepared or submitted to F.D.T. Limited or the trustee in bankruptcy.

6 The solicitor transferred the monies to his own account, asserting that he had the right to do so by virtue of a solicitor's lien.

7 In this litigation, the trustee in bankruptcy claims the $4,151.75. The matter was first considered by Hunt, J. of the Court of Queen's Bench in Bankruptcy, who held in favour of the solicitor. On appeal, the trustee in bankruptcy relies upon several grounds in support of his position. I find it necessary to deal with only one such ground, because I am of the view that it is determinative of the issue.

8 The trustee contends that there can be no solicitor's lien in this case, because none of the monies which came into the possession of the solicitor, Arenson, could be said to belong to the client. Under the terms of the agreement for sale, including the conditions imposed by the Royal Bank, the first monies were to be used to discharge certain encumbrances. Thereafter, the balance was to be remitted

to the Royal Bank. When solicitor, Arenson received the funds they were impressed with a trust in favour of the bank, and the solicitor had no right to convert those monies to his use under the guise of a solicitor's lien. Arenson was fully aware of the arrangements with the bank. Under the circumstances, he was bound to look to his client for satisfaction of his account, without resort to those funds which were impressed with a trust in favour of the bank.

9 The fact that the bank is not a party to these proceedings is of no consequence. The trustee in bankruptcy requested that solicitor, Arenson turn over all funds and documents in order that the trustee might conclude the transaction, - including the fulfillment of any obligations to the bank or others, under the agreement.

10 What is significant, is that, at all times, the monies received by solicitor, Arenson, were impressed with a trust for the benefit of another, and such funds can never be the subject of a solicitor's retaining lien. In Stumore v. Campbell & Co., (1892) 1 Q.B.D. 314, the Court of Appeal of England dealt with a somewhat similar situation. The headnote to the report outlines the factual background:

> "The plaintiff, as execution creditor, applied to attach money in the hands of the defendants, the garnishees. The money had been deposited by the judgment debtor with the defendants for a special purpose that had failed. The defendants claimed that the judgment debtor was indebted to them for law costs in a larger sum than that deposited with them, and that they would be entitled to counterclaim for the amount due to them."

11 Lord Esher, M.R., wrote one of three judgments, each of which concluded that a solicitor's retaining lien could not be established. Lord Esher wrote as follows:

> "It appears that some money was placed in the hands of the defendants, who are solicitors, for a particular purpose. So long as that purpose existed there was a trust imposed on them, and they were bound, if they accepted the money at all, to employ it or lay it out in the particular way indicated by the trust. ... It is admitted that, being trustees, no lien would attach in their favour, because the money was intrusted to them for a specific purpose. Brandao v. Barnett 12 Cl. & F. 787 is conclusive on this point."

12 The trustee in bankruptcy is, therefore, entitled to a declaration that the $4,151.75 is not available for the payment of the solicitor's fees, and an order that the funds be paid to the trustee in bankruptcy.

13 This litigation was commenced by way of a notice of motion in the bankruptcy action, in which the trustee seeks a declaration that the solicitor, Arenson, is not entitled to retain the money.

14 Although the solicitor has had the funds for about three years, the trustee in bankruptcy made no claim for interest. In the hearing before us, counsel for the trustee in bankruptcy suggested that if the solicitor has maintained the funds in an identifiable form, and if the funds have earned income, then the solicitor should account for the earned income as well.

15 In my view, if a party wishes to advance a claim in rem, or wishes to claim interest on a claim in personam, it should do so clearly and decisively. Under the circumstances, the claim must be limited to $4,151.75.

16 The solicitor, of course, is entitled to rank as an ordinary creditor in bankruptcy, subject to the submission of a proper account for services rendered.

17 The trustee in bankruptcy is entitled to costs in this Court, together with a factum fee of $100.00, and costs on the motion in the Court of Queen's Bench, in Bankruptcy.

HUBAND J.A.
HALL J.A.:-- I agree.
MONNIN J.A.

qp/s/qlkam/qldjv

7

Case Name:

MARALTA OIL CO. LTD. v. INDUSTRIAL INCOMES LTD.

[1964] A.J. No. 82

46 D.L.R. (2d) 511

Alberta Supreme Court, Appellate Division

Macdonald, Porter, McDermid, JJ.A.

Judgment: June 19, 1964

(17 paras.)

Counsel:

Clarence Johnson, for plaintiff, appellant.

J. C. Major, for defendant, respondent.

The judgment of the Court was delivered by

1 MCDERMID, J.A.:--The appellant (plaintiff) sued the respondent (defendant) asking, amongst other things, for an order directing the respondent as trustee for the appellant to account for certain moneys received by the respondent from the proceeds of the production of an oil well.

2 The appellant, along with two associates, acquired from a company called Mutual Holdings Limited the right to participate in the drilling of an oil well. All of the documents of title concerning the oil well in question were not put in evidence, but it appears that Mutual Holdings Ltd. had a "farm-out" of certain oil lands from Imperial Oil Limited. Mutual Holdings Ltd. in turn made an agreement with the appellant and its two associates whereby the appellant and associates were to drill a well for oil and pay the costs thereof. Of these costs the appellant was to pay 50% and was to obtain 30% of the net proceeds of production from the well. The two associates of the appellant were to pay the balance of the drilling costs. A well was completed and obtained production. However, the appellant was unable to raise money to pay all of the costs of drilling for which it was liable, and the drilling contractor filed a mechanic's lien against the well for the amount owing to it.

3 As a result of the filing of the mechanic's lien, the interest of the appellant and its two associates became liable to forfeiture. To prevent such forfeiture and to protect its associates and creditors the appellant then entered into a number of agreements whereby it agreed that its interest of 30% in the

net proceeds of production in the said well was to be assigned to Mutual Holdings Ltd. and by Mutual Holdings Ltd. to Rocky Mountain Supply Company Limited. In turn, Rocky Mountain Supply Co., Mountain Drilling Company Limited (the contractor who drilled the well and to whom the appellant was indebted) and the appellant entered into an agreement dated May 1st, 1953 whereby Rocky Mountain Supply Co. agreed to pay the amount owing by the appellant to Mountain Drilling Co., being $39,596.22, by crediting such amount on an account of Mountain Drilling Co. with it. The drilling company agreed to accept such crediting as payment of its claim against the appellant and to discontinue the action and proceedings it had commenced against the appellant. Rocky Mountain Supply Co. agreed that:

> ... it will deposit the share of proceeds of production from the well ... in a separate account in The Royal Bank of Canada, Third Street West Branch, Calgary, Alberta, and will distribute the same on the last business day of each month, commencing with the last business day of May, 1953, as follows:
>
> (a) to its own account until it has received the sum of Thirty-nine Thousand, Five Hundred and Ninety-six Dollars and Twenty-two Cents ($39,596.22); then
>
> (b) rateably among the creditors of Maralta [the appellant] ..., until such creditors have received an aggregate amount not in excess of Fifty-two Thousand ($52,000.00) Dollars, or such lesser amount as may be owing to such creditors by Maralta as at the date hereof;
>
> and thereafter the separate account shall be closed and Rocky shall own and be entitled to all further amounts as may be received by it in respect of the said share of proceeds.

4 By agreement dated April 1, 1954, Rocky Mountain Supply Co. assigned the 30% interest in the net proceeds of production from the said well to Industrial Incomes Limited, the respondent in this action, and the respondent agreed to carry out the terms of the agreement between the appellant and Rocky Mountain Supply Co. The said agreement specifically provided that the respondent would deposit the proceeds of the 30% interest in the oil well in a separate account in the Royal Bank of Canada, Third Street West Branch, Calgary, Alberta, and would distribute the same on the last business day of each month commencing with the last business day of April, 1954, as follows:

> (a) to its own account until it has received the sum of Twenty-six Thousand, Seven Hundred and Seventy-four Dollars and Twenty-seven Cents ($26,774.27); then
>
> [Rocky Mountain Supply had already received $12,811.95, thus reducing the amount it was entitled to retain from $39,596.22 to $26,774.27.]
>
> (b) rateably among the creditors of Maralta [the appellant] as at the 1st day of May, 1953 ... until such creditors have received an aggregate amount not in excess of Fifty-two Thousand Dollars ($52,000.00), or such lesser amount as may be owing to such creditors, or such lesser amount as such creditors may agree to accept in full settlement of their claims against Maralta;

> and thereafter the separate account shall be closed and Industrial shall own and be entitled to all further amounts as may be received by it by way of the said share of proceeds of production.

5 According to ex. 11 filed by the appellant, the respondent from the said 30% received $26,774.27 by the end of February, 1956. From that date to September, 1962, the date this action was commenced, it has received approximately $50,000.

6 The learned trial Judge held that the documents did not create a trust. With the greatest respect I cannot agree with this conclusion.

7 It is clear law that no technical language is required to create a trust. It is not necessary to use the words "trust", "trustee", "*cestui que trust*", or such terms. However, it is necessary that the intention to create a trust can be clearly inferred from the language used or the surrounding circumstances. In my opinion, when the appellant, in entering into the agreement of May 1, 1953 with Rocky Mountain Supply Co. and Mountain Drilling Co., provided that the 30% of the proceeds from the oil well were to be held in a separate account and applied as set out in the agreement, it demonstrated clearly that it intended to create a trust. If it was the intention that there was only to be the contractual relationship of debtor and creditor, it was quite unnecessary that the proceeds be placed in a separate account. It is customary in the Province of Alberta when moneys are paid to a lawyer to be used for a specific purpose that such moneys be placed in a separate account and there is no doubt that such moneys are held by the lawyer in trust. In fact, such is required by the rules of the Alberta Law Society. I have no doubt that such practice would be present to the minds of the lawyers who drew the agreements in question. In dealing with the position of an agent, Channell, J., in *Henry v. Hammond*, [1913] 2 K.B. 515 at p. 521, stated:

> It is clear that if the terms upon which the person receives the money are that he is bound to keep it separate, either in a bank or elsewhere, and to hand that money so kept as a separate fund to the person entitled to it, then he is a trustee of that money and must hand it over to the person who is his cestui que trust. If on the other hand he is not bound to keep the money separate, but is entitled to mix it with his own money and deal with it as he pleases, and when called upon to hand over an equivalent sum of money, then, in my opinion, he is not a trustee of the money, but merely a debtor .... I am aware that, if the defendant was bound to keep the money separate, the fact that he did not do so cannot assist him; he has committed a breach of his obligation. The only use of looking at the facts to see whether in the particular case he has kept the money as a separate fund is to see whether he has recognized his obligation, the obligation itself being the essential thing.

8 See also *Hydro-Electric Power Com'n v. Brown*, 21 D.L.R. (2d) 551, [1960] O.R. 91. These cases were apparently not brought to the attention of the trial Judge.

9 The learned trial Judge stated:

> I have said that I do not feel that a trust was created. It is my conception that at the basis of the law dealing with the creating of a trust that there are certain essentials that must be met, and the prime essential is an intention to create a trust. The documents themselves, in my view, do not indicate an

> intention to create a trust, and that is fortified by the evidence of Mr. Cameron who in the witness-box said that at the time these transactions were entered into he at least did not contemplate that Maralta would get any benefit under the agreement even if the amount required to satisfy creditors was less than $52,000. In other words, that if there were a surplus in the so-called fund of $52,000, that it would not belong to Maralta but belong in the first instance to Mutual and then to Rocky Mountain Supply. That of itself negatives, in my view, any indication that a trust was intended in favour of Maralta.

10 It is quite true that according to the agreement entered into, if the debts of the appellant did not total $52,000, Rocky Mountain Supply, and subsequently the respondent, would be entitled to keep for its own benefit the difference between such debts and $52,000, just as by the terms of the agreement Rocky Mountain Supply and its assignee, the respondent, were entitled to keep for their own benefit the surplusage of net proceeds over $39,596.22 and the amount owing to the creditors of the appellant. The fact that the appellant was to get no benefit except the payment of its creditors, in my view, does not negative a trust. In fact, in most trusts set up for creditors the payment of the creditors is the only benefit the debtor receives but there is, none the less, a trust.

11 It is axiomatic that as the respondent took the trust property from the original trustee, Rocky Mountain Supply Company Limited, with full knowledge of the trust, it is bound by the terms of the trust.

12 The question as to whether this was a trust for the creditors or whether the appellant was the *cestui que trust* was not argued before us. However, this question did come before Kirby, J., in an action brought by one of the creditors against the respondent in which action it was decided by Kirby, J., that the relationship of trustee and *cestui que trust* could not be inferred between the defendant in that case (the respondent in this appeal) and the particular creditors who were the plaintiffs in that action. See *Seller v. Industrial Incomes Ltd.* (1963), 41 D.L.R. (2d) 329, 44 W.W.R. 485. This, of course, would not bind the other creditors who were not a party to the action. However, from the evidence before us, it would appear that the creditors had no notice of the trust nor did they consent to it.

13 As the agreement between the appellant and the original trustee provided that the trust related only to $52,000 or such lesser amount as might be owing to such creditors by the appellant as at May 1, 1953, it is necessary that the amount owing to such creditors by the appellant be ascertained.

14 We were told by counsel that all creditors of the appellant as at the relevant time, May 1, 1953, had been paid or settled with, except the creditors concerned in the case of *Seller v. Industrial Incomes Ltd., supra*. Once the amount owing to creditors as at May 1, 1953, is ascertained, then from such amount or $52,000, whichever is the lesser, the respondent may deduct the aggregate of amounts paid by it to the creditors either in payment of such claims or in purchase of such claims. The appellant will be entitled to the balance. Where the respondent has purchased a claim at less than the actual amount owing, it may only claim credit for the amount actually paid and not the original amount owing, for a trustee may not benefit by buying up debts: see *Lewin on Trusts*, 15th ed., p. 202.

15 As this is an express trust, the *Limitation of Actions Act*, R.S.A. 1955, c. 177, has no application.

16 There will be judgment for the appellant for the amount so ascertained with costs, in double column 5, of the trial, including discoveries, Rule 738 not to apply, and with costs of this appeal.

17 If counsel are unable to agree as to the amount of this judgment, the matter shall be referred to the trial Judge.

8

WATERS' LAW OF TRUSTS IN CANADA

Fourth Edition

By

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I. INTRODUCTION

For a trust to come into existence, it must have three essential characteristics. As Lord Langdale M.R. remarked in *Knight v. Knight*,[1] in words adopted by Barker J. in *Renehan v. Malone*[2] and considered fundamental in common law Canada,[3] (1) the language of the alleged settlor must be imperative; (2) the subject-matter or trust property must be certain; (3) the objects of the trust must be certain. This means that the alleged settlor, whether he is giving the property on the terms of a trust or is transferring property on trust in exchange for consideration, must employ language which clearly shows his intention that the recipient should hold on trust. No trust exists if the recipient is to take absolutely, but he is merely put under a moral obligation as to what is to be done with the property. If such imperative language exists, it must, second, be shown that the settlor has so clearly described the property which is to be subject to the trust that it can be definitively ascertained.[4] Third, the objects of the trust must be equally and clearly delineated. There must be no uncertainty as to whether a person is, in fact, a beneficiary. If any one of these three certainties does not exist, the trust fails to come into existence or, to put it differently, is void.

The principle of the three certainties has been fundamental at least since the days of Lord Eldon, and no one today could seek to challenge the principle; the problems that exist concern the issue of what constitutes certainty.

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1 (1840), 3 Beav. 148, 49 E.R. 58 (Eng. Ch.).

2 (1897), 1 N.B. Eq. 506 (N.B. S.C. [In Equity]).

3 Numerous Canadian cases have referred to the three certainties as essential to the existence of an express trust. A few relatively recent examples include *Goodman Estate v. Geffen* (1987), (sub nom. *Goodman v. Geffen*) 52 Alta. L.R. (2d) 210 (Alta. Q.B.), reversed (1989), 68 Alta. L.R. (2d) 289 (Alta. C.A.), additional reasons at (1990), 80 Alta. L.R. (2d) 289 (Alta. C.A.), reversed (1991), 80 Alta. L.R. (2d) 293 (S.C.C.), leave to appeal allowed (1989), 101 A.R. 160 (note) (S.C.C.); *Quesnel & District Credit Union v. Smith* (1987), 19 B.C.L.R. (2d) 105 (B.C. C.A.); *Bank of Nova Scotia v. Société Générale (Canada)* (1988), 58 Alta. L.R. (2d) 193 (Alta. C.A.); *Faucher v. Tucker Estate* (1993), [1994] 2 W.W.R. 1 (Man. C.A.); *Howitt v. Howden Group Canada Ltd.* (1999), 170 D.L.R. (4th) 423, 26 E.T.R. (2d) 1 (Ont. C.A.); *Canada Trust Co. v. Price Waterhouse Ltd.* (2001), 288 A.R. 387 (Alta. Q.B.); *Arkay Casino Management & Equipment (1985) Ltd. v. Alberta (Attorney General)* (1998), 227 A.R. 280, (sub nom. *Arkay Casino Ltd. v. Alberta (Attorney General)*) 64 Alta. L.R. (3d) 368, [1999] 4 W.W.R. 334 (Alta. Q.B.); *Parsons v. Cook* (2004), 238 Nfld. & P.E.I.R. 16, 7 E.T.R. (3d) 92 (N.L. T.D.); *McMillan v. Hughes* (2004), 11 E.T.R. (3d) 290 (B.C. S.C.); *Saugestad v. Saugestad*, 2006 CarswellBC 3170, 28 E.T.R. (3d) 210 (B.C. S.C.) at para. 82, reversed in part on other grounds 2008 CarswellBC 123, 37 E.T.R. (3d) 19, 77 B.C.L.R. (4th) 170 (B.C. C.A.); *Re Graphicshoppe Ltd.*, 2005 CarswellOnt 7008, 78 O.R. (3d) 401 (Ont. C.A.) at para. 10; *VanDenBussche v. Craig VanDenBussche Trust (Trustee of)*, 2009 CarswellMan 557, (sub nom. *VanDenBussche v. VanDenBussche Trust*) 247 Man. R. (2d) 174, 55 E.T.R. (3d) 179 (Man. Q.B.); and *Sun Life Assurance Co. of Canada v. Taylor* (2008), 2008 CarswellSask 678, 322 Sask. R. 153, [2009] 2 W.W.R. 286 (Sask. Q.B.).

4 The property interest which each beneficiary is to take must also be clearly defined. See *infra*, Part III D.

B

1

CANADA

CONSOLIDATION

CODIFICATION

Canada Pension Plan

Régime de pensions du Canada

R.S.C., 1985, c. C-8

L.R.C. (1985), ch. C-8

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Limitation on assessments

(3) Notwithstanding subsection (1) or (2), no assessment, re-assessment or additional assessment of an amount payable by an employer under this Act may be made by the Minister under this section after four years have elapsed from the earliest of the days on or before which any contribution in relation to which that amount is payable should have been paid, unless the employer has made any misrepresentation or committed any fraud in filing any return or in supplying any information pursuant to this Part in relation thereto.

R.S., c. C-5, s. 23.

Recovery of contributions, etc., as debt due to Her Majesty

23. (1) All contributions, interest, penalties and other amounts payable by a person under this Act are debts due to Her Majesty and recoverable as such in the Federal Court or any other court of competent jurisdiction or in any other manner provided for by this Act.

Application of *Income Tax Act* provisions

(2) Section 160, subsections 161(11) and 220(3.1), (4) and (5), sections 221.1 and 223 to 224.3, subsections 227(9.1) and (10), sections 229, 236 and 244 (except subsections 244(1) and (4)) and subsections 248(7) and (11) of the *Income Tax Act* apply, with such modifications as the circumstances require, in relation to all contributions, interest, penalties and other amounts payable by a person under this Act, and for the purposes of this subsection,

(*a*) the reference in subsection 224(1.2) of that Act to "subsection 227(10.1) or a similar provision" shall be read as a reference to "section 22 of the *Canada Pension Plan*"; and

(*b*) subsection 224(1.2) of the *Income Tax Act* shall apply to employer's contributions, employee's contributions, and related interest, penalties or other amounts, subject to subsections 69(1) and 69.1(1) of the *Bankruptcy and Insolvency Act* and section 11.09 of the *Companies' Creditors Arrangement Act*.

Where amount deducted not remitted

(3) Where an employer has deducted an amount from the remuneration of an employee as or on account of any contribution required to

Limitation des évaluations

(3) Nonobstant le paragraphe (1) ou (2), aucune évaluation, nouvelle évaluation ou évaluation supplémentaire d'un montant payable par un employeur aux termes de la présente loi ne peut être fixée par le ministre en vertu du présent article après que quatre ans se sont écoulés depuis la plus antérieure des dates auxquelles ou avant lesquelles toute cotisation à l'égard de laquelle ce montant est payable aurait dû être versée, à moins que l'employeur n'ait fait une fausse déclaration ou commis une fraude en produisant une déclaration ou en fournissant des renseignements à cet égard, en conformité avec la présente partie.

S.R., ch. C-5, art. 23.

Recouvrement des cotisations, etc. comme créances de Sa Majesté

23. (1) Les cotisations, intérêts, pénalités et autres montants payables par une personne en vertu de la présente loi constituent des créances de Sa Majesté, dont le recouvrement peut être poursuivi à ce titre soit devant la Cour fédérale ou tout autre tribunal compétent, soit selon toute autre modalité prévue par la présente loi.

Application de dispositions de la *Loi de l'impôt sur le revenu*

(2) L'article 160, les paragraphes 161(11) et 220(3.1), (4) et (5), les articles 221.1 et 223 à 224.3, les paragraphes 227(9.1) et (10), les articles 229, 236 et 244 (sauf les paragraphes 244(1) et (4)) et les paragraphes 248(7) et (11) de la *Loi de l'impôt sur le revenu* s'appliquent, avec les adaptations nécessaires, aux cotisations, intérêts, pénalités et autres montants payables par une personne en vertu de la présente loi. Pour l'application du présent paragraphe :

a) le passage « du paragraphe 227(10.1) ou d'une disposition semblable » au paragraphe 224(1.2) de cette loi vaut mention de « de l'article 22 du *Régime de pensions du Canada* »;

b) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* s'applique aux cotisations d'employeur, aux cotisations d'employé et aux intérêts, pénalités ou autres sommes afférents, sous réserve des paragraphes 69(1) et 69.1(1) de la *Loi sur la faillite et l'insolvabilité* et de l'article 11.09 de la *Loi sur les arrangements avec les créanciers des compagnies*.

Montant déduit non remis

(3) L'employeur qui a déduit de la rémunération d'un employé un montant au titre de la cotisation que ce dernier est tenu de verser, ou

be made by the employee but has not remitted the amount to the Receiver General, the employer is deemed, notwithstanding any security interest (as defined in subsection 224(1.3) of the *Income Tax Act*) in the amount so deducted, to hold the amount separate and apart from the property of the employer and from property held by any secured creditor (as defined in subsection 224(1.3) of the *Income Tax Act*) of that employer that but for the security interest would be property of the employer, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act.

Extension of trust

(4) Notwithstanding the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection (3) to be held by an employer in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the employer and property held by any secured creditor (as defined in subsection 224(1.3) of the *Income Tax Act*) of that employer that but for a security interest (as defined in subsection 224(1.3) of the *Income Tax Act*) would be property of the employer, equal in value to the amount so deemed to be held in trust is deemed

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

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

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

à valoir sur celle-ci, mais ne l'a pas remis au receveur général est réputé, malgré toute autre garantie au sens du paragraphe 224(1.3) de la *Loi de l'impôt sur le revenu* concernant le montant, le détenir en fiducie pour Sa Majesté, séparé de ses propres biens et des biens détenus par son créancier garanti, au sens de ce paragraphe qui, en l'absence de la garantie, seraient ceux de l'employeur, et en vue de le verser à Sa Majesté selon les modalités et dans le délai prévus par la présente loi.

Non-versement

(4) Malgré la *Loi sur la faillite et l'insolvabilité* (sauf ses articles 81.1 et 81.2), toute autre loi fédérale, toute loi provinciale ou toute règle de droit, en cas de non-versement à Sa Majesté, selon les modalités et dans le délai prévus par la présente loi, d'un montant qu'un employeur est réputé par le paragraphe (3) détenir en fiducie pour Sa Majesté, les biens de l'employeur, et les biens détenus par son créancier garanti au sens du paragraphe 224(1.3) de la *Loi de l'impôt sur le revenu*, qui, en l'absence d'une garantie au sens du même paragraphe, seraient ceux de l'employeur, d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté, à compter du moment où le montant est déduit, séparés des propres biens de l'employeur, qu'ils soient ou non assujettis à une telle garantie;

b) ne pas faire partie du patrimoine ou des biens de l'employeur à compter du moment où le montant est déduit, que ces biens aient été ou non tenus séparés de ses propres biens ou de son patrimoine et qu'ils soient on non assujettis à une telle garantie.

Ces biens sont des biens dans lesquels Sa Majesté a un droit de bénéficiaire malgré toute autre garantie sur ces biens ou sur le produit en découlant, et le produit découlant de ces biens est payé au receveur général par priorité sur une telle garantie.

Meaning of "security interest"

(4.1) For the purposes of subsections (3) and (4), a security interest does not include a prescribed security interest.

Certificate before distribution

(5) Every person, other than a trustee in bankruptcy, who is an assignee, liquidator, receiver, receiver-manager, administrator, executor, liquidator of a succession or any other like person, in this section referred to as the "responsible representative", administering, winding-up, controlling or otherwise dealing with a property, business or estate of another person, before distributing to one or more persons any property over which he or she has control in his or her capacity as the responsible representative, shall obtain a certificate from the Minister certifying that all amounts

(*a*) for which any employer is liable under this Act up to and including the date of distribution, and

(*b*) for the payment of which the responsible representative is or can reasonably be expected to become liable in his capacity as the responsible representative

have been paid or that security for the payment thereof has been accepted by the Minister.

Personal liability

(5.1) Where a responsible representative distributes to one or more persons property over which he has control in his capacity as the responsible representative, without obtaining a certificate under subsection (5) in respect of the amounts referred to in that subsection, the responsible representative is personally liable for the payment of those amounts to the extent of the value of the property distributed and the Minister may assess the responsible representative therefor in the same manner and with the same effect as an assessment made under section 22.

Trustee in bankruptcy

(6) Where an employer has become a bankrupt, the trustee in bankruptcy shall be deemed to be the agent of the bankrupt for all purposes of this Act.

(7) to (13) [Repealed, 1993, c. 24, s. 154]

R.S., 1985, c. C-8, s. 23; R.S., 1985, c. 5 (2nd Supp.), s. 1, c. 38 (3rd Supp.), s. 1; 1991, c. 49, s. 206; 1992, c. 27, s. 90; 1993, c. 24, s. 154; 1994, c. 21, s. 123; 1997, c. 40, s. 63; 1998, c. 19, s. 252; 2000, c. 30, s. 155; 2004, c. 25, s. 113; 2005, c. 47, s. 137; 2007, c. 36, s. 108.

Sens de garantie

(4.1) Pour l'application des paragraphes (3) et (4), n'est pas une garantie celle qui est visée par règlement.

Certificat avant répartition

(5) Quiconque (à l'exclusion d'un syndic de faillite) est cessionnaire, liquidateur, séquestre, séquestre-gérant, administrateur, liquidateur de succession, exécuteur testamentaire, ou une autre personne semblable — appelé « responsable» au présent article —, chargé de gérer, liquider ou garder quelque bien, entreprise ou patrimoine d'une autre personne ou de s'en occuper autrement, est tenu, avant de répartir entre plusieurs personnes ou d'attribuer à une seule des biens sous sa garde en sa qualité de responsable, d'obtenir du ministre un certificat attestant qu'ont été versés tous les montants :

a) d'une part, dont un employeur est redevable en vertu de la présente loi jusqu'à la date de répartition ou d'attribution;

b) d'autre part, du paiement desquels le responsable est, en cette qualité, redevable ou dont on peut raisonnablement s'attendre à ce qu'il le devienne,

ou attestant que le ministre a accepté une garantie pour le paiement de ces montants.

Responsabilité personnelle

(5.1) Le responsable qui, en cette qualité, répartit entre plusieurs personnes ou attribue à une seule des biens sous sa garde sans le certificat prévu au paragraphe (5) à l'égard des montants visés à ce paragraphe est personnellement redevable de ces montants, jusqu'à concurrence de la valeur des biens répartis ou attribués; le ministre peut alors cotiser le responsable de la façon prévue à l'article 22, et cette cotisation a le même effet qu'une cotisation établie en vertu de cet article.

Syndic de faillite

(6) Lorsqu'un employeur est mis en faillite, le syndic de faillite est réputé être le mandataire du failli pour l'application de la présente loi.

(7) à (13) [Abrogés, 1993, ch. 24, art. 154]

L.R. (1985), ch. C-8, art. 23; L.R. (1985), ch. 5 (2e suppl.), art. 1, ch. 38 (3e suppl.), art. 1; 1991, ch. 49, art. 206; 1992, ch. 27, art. 90; 1993, ch. 24, art. 154; 1994, ch. 21, art. 123; 1997, ch. 40, art. 63; 1998, ch. 19, art. 252; 2000, ch. 30, art. 155; 2004, ch. 25, art. 113; 2005, ch. 47, art. 137; 2007, ch. 36, art. 108.

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Employment Insurance Act

Loi sur l'assurance-emploi

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L.C. 1996, ch. 23

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payer immédiatement à Sa Majesté la somme indiquée.

Limitation on assessments

(3) No assessment, reassessment or additional assessment of an amount payable by an employer under this Act may be made by the Minister under this section after three years have elapsed after the end of the year in which any premium in relation to which that amount is payable should have been paid, unless the employer has made a misrepresentation or committed fraud in filing a return or in supplying information about the return under this Part.

Prescription

(3) Aucune évaluation initiale, révisée ou complémentaire d'une somme payable par un employeur en vertu de la présente loi ne peut être établie par le ministre en vertu du présent article plus de trois ans après la fin de l'année au cours de laquelle aurait dû être payée la cotisation ou l'une des cotisations pour lesquelles cette somme est payable, sauf si l'employeur a fait une fausse déclaration ou commis une fraude en fournissant à ce sujet une déclaration écrite ou d'autres renseignements en application de la présente partie.

Mailing or sending date

(4) The day of mailing or sending, as the case may be, of a notice of assessment described in subsection (2) is, in the absence of any evidence to the contrary, deemed to be the day appearing from the notice to be the date of the notice unless called into question by the Minister or by a person acting for the Minister or for Her Majesty.

Date d'envoi

(4) La date d'envoi ou de mise à la poste d'un avis d'évaluation visé au paragraphe (2) est réputée, à défaut de preuve contraire, être la date qui, au vu de cet avis, paraît être la date d'envoi, sauf si elle est contestée par le ministre ou par une personne agissant pour lui ou pour Sa Majesté.

Date electronic notice sent

(5) For the purposes of this Act, if a notice or other communication in respect of a person or partnership is made available in electronic format such that it can be read or perceived by a person or a computer system or other similar device, the notice or other communication is presumed to be sent to the person or partnership and received by the person or partnership on the date that an electronic message is sent, to the electronic address most recently provided before that date by the person or partnership to the Minister for the purposes of this subsection, informing the person or partnership that a notice or other communication requiring the person or partnership's immediate attention is available in the person or partnership's secure electronic account. A notice or other communication is considered to be made available if it is posted by the Minister in the person or partnership's secure electronic account and the person or partnership has authorized that notices or other communications may be made available in this manner and has not before that date revoked that authorization in a manner specified by the Minister.

1996, c. 23, s. 85; 2010, c. 25, s. 71.

Date d'envoi d'un avis électronique

(5) Pour l'application de la présente loi, tout avis ou autre communication concernant une personne ou une société de personnes qui est rendu disponible sous une forme électronique pouvant être lue ou perçue par une personne ou par un système informatique ou un dispositif semblable est présumé être envoyé à la personne ou à la société de personnes, et être reçu par elle, à la date où un message électronique est envoyé — à l'adresse électronique la plus récente que la personne ou la société de personnes a fournie au ministre pour l'application du présent paragraphe — pour l'informer qu'un avis ou une autre communication nécessitant son attention immédiate se trouve dans son compte électronique sécurisé. Un avis ou une autre communication est considéré comme étant rendu disponible s'il est affiché par le ministre sur le compte électronique sécurisé de la personne ou de la société de personnes et si celle-ci a donné son autorisation pour que des avis ou d'autres communications soient rendus disponibles de cette manière et n'a pas retiré cette autorisation avant cette date selon les modalités fixées par le ministre.

1996, ch. 23, art. 85; 2010, ch. 25, art. 71.

Recovery

86. (1) All premiums, interest, penalties and other amounts payable by an employer under this Act are debts due to Her Majesty and are

Recouvrement

86. (1) Les cotisations, intérêts, pénalités et autres sommes payables par un employeur en vertu de la présente loi constituent des créances recoverable in the Federal Court or any other court of competent jurisdiction or in any other manner provided for by this Act.

Amounts deducted and not remitted

(2) Where an employer has deducted an amount from the remuneration of an insured person as or on account of any employee's premium required to be paid by the insured person but has not remitted the amount to the Receiver General, the employer is deemed, notwithstanding any security interest (as defined in subsection 224(1.3) of the *Income Tax Act*) in the amount so deducted, to hold the amount separate and apart from the property of the employer and from property held by any secured creditor (as defined in subsection 224(1.3) of the *Income Tax Act*) of that employer that but for the security interest would be property of the employer, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act.

Extension of trust

(2.1) Notwithstanding the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection (2) to be held by an employer in trust for Her Majesty in the manner and at the time provided under this Act, property of the employer and property held by any secured creditor (as defined in subsection 224(1.3) of the *Income Tax Act*) of that employer that but for a security interest (as defined in subsection 224(1.3) of the *Income Tax Act*) would be property of the employer, equal in value to the amount so deemed to be held in trust is deemed

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

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

and is property beneficially owned by Her Majesty notwithstanding any security interest

de Sa Majesté, dont le recouvrement peut être poursuivi à ce titre soit devant la Cour fédérale ou tout autre tribunal compétent, soit selon toute autre modalité prévue par la présente loi.

Montant déduit non remis

(2) L'employeur qui a retenu une somme sur la rétribution d'un assuré au titre des cotisations ouvrières que l'assuré doit payer, mais n'a pas versé cette somme au receveur général est réputé, malgré toute autre garantie au sens du paragraphe 224(1.3) de la *Loi de l'impôt sur le revenu* la concernant, la détenir en fiducie pour Sa Majesté, séparée de ses propres biens et des biens détenus par son créancier garanti au sens de ce paragraphe qui, en l'absence de la garantie, seraient ceux de l'employeur, et en vue de la verser à Sa Majesté selon les modalités et au moment prévus par la présente loi.

Non-versement

(2.1) Malgré la *Loi sur la faillite et l'insolvabilité* (sauf ses articles 81.1 et 81.2), tout autre texte législatif fédéral ou provincial ou toute règle de droit, en cas de non-versement à Sa Majesté, selon les modalités et au moment prévus par la présente loi, d'une somme qu'un employeur est réputé par le paragraphe (2) détenir en fiducie pour Sa Majesté, les biens de l'employeur, et les biens détenus par son créancier garanti au sens du paragraphe 224(1.3) de la *Loi de l'impôt sur le revenu* qui, en l'absence d'une garantie au sens du même paragraphe, seraient ceux de l'employeur, d'une valeur égale à cette somme sont réputés :

a) être détenus en fiducie pour Sa Majesté, à compter du moment où la somme est retenue, séparés des propres biens de l'employeur, qu'ils soient ou non assujettis à une telle garantie;

b) ne pas faire partie du patrimoine ou des biens de l'employeur à compter du moment où la somme est retenue, que ces biens aient été ou non tenus séparés de ses propres biens ou de son patrimoine et qu'ils soient ou non assujettis à une telle garantie.

Ces biens sont des biens dans lesquels Sa Majesté a un droit de bénéficiaire malgré toute autre garantie sur ces biens ou sur le produit en découlant, et le produit découlant de ces biens in such property or in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

est payé au receveur général par priorité sur une telle garantie.

Meaning of security interest

(2.2) For the purposes of subsections (2) and (2.1), a security interest does not include a prescribed security interest.

Sens de garantie

(2.2) Pour l'application des paragraphes (2) et (2.1), n'est pas une garantie celle qui est visée par règlement.

Certificate before distribution

(3) Before distributing any property over which a responsible representative has control in that capacity, the responsible representative shall obtain a certificate from the Minister certifying the payment, or acceptance by the Minister of security for payment, of all amounts

(*a*) for which an employer is liable under this Act up to and including the date of distribution; and

(*b*) for the payment of which the responsible representative is or can reasonably be expected to become liable in that capacity.

Certificat avant répartition

(3) Le responsable est tenu, avant de répartir entre plusieurs personnes ou d'attribuer à une seule des biens sous sa garde en sa qualité de responsable, d'obtenir du ministre un certificat attestant qu'ont été versés tous les montants :

a) d'une part, dont un employeur est redevable en vertu de la présente loi jusqu'à la date de répartition ou d'attribution,

b) d'autre part, du paiement desquels il est, en sa qualité de responsable, redevable ou le deviendra vraisemblablement,

ou attestant que le ministre a accepté une garantie pour le paiement de ces montants.

Personal liability

(4) If the responsible representative distributes to one or more persons property over which the responsible representative has control in that capacity, without obtaining the certificate, the responsible representative is personally liable for the payment of the amounts to the extent of the value of the property distributed and the Minister may assess the responsible representative for the amounts in the same manner and with the same effect as an assessment made under section 85.

Responsabilité personnelle

(4) Le responsable qui, en cette qualité, répartit entre plusieurs personnes ou attribue à une seule des biens sous sa garde sans le certificat est personnellement redevable de ces montants, jusqu'à concurrence de la valeur des biens répartis ou attribués; le ministre peut alors le cotiser de la façon prévue à l'article 85, et cette cotisation a le même effet qu'une cotisation établie en vertu de cet article.

Security

(5) If the Minister considers it advisable in a particular case, the Minister may accept security for payment of premiums by way of mortgage, hypothec or other charge of any kind whatever on property of the employer or any other person or by way of guarantee from other persons.

Garantie

(5) Le ministre peut, s'il le juge opportun dans un cas particulier, accepter en garantie du paiement de cotisations une hypothèque ou une charge sur les biens de l'employeur ou d'une autre personne ou une autre garantie fournie par d'autres personnes.

Trustee in bankruptcy

(6) If an employer has become bankrupt, the trustee in bankruptcy is deemed to be the agent of the bankrupt for the purposes of this Act.

Syndic de faillite

(6) Lorsqu'un employeur est failli, le syndic de faillite est réputé, pour l'application de la présente loi, être le mandataire du failli.

Definition of "responsible representative"

(7) For the purposes of this section, "responsible representative" means a person, other than a trustee in bankruptcy, who is an assignee, liquidator, receiver, receiver-manager, administrator, executor, liquidator of the succession or any other like person administering, winding

Définition de «responsable»

(7) Dans le présent article, «responsable» désigne quiconque — à l'exclusion d'un syndic de faillite — est cessionnaire, liquidateur, séquestre, séquestre-gérant, administrateur, exécuteur testamentaire, liquidateur de la succession, ou une autre personne semblable, chargé de gérer, liquider ou garder quelque bien, entre-

up, controlling or otherwise dealing with a property, business or estate of another person.

1996, c. 23, s. 86; 1998, c. 19, s. 266; 2001, c. 4, s. 77(F).

prise ou patrimoine d'une autre personne ou de s'en occuper autrement.

1996, ch. 23, art. 86; 1998, ch. 19, art. 266; 2001, ch. 4, art. 77(F).

Records and books

87. (1) An employer paying remuneration to a person they employ in insurable employment shall keep records and books of account at the employer's place of business or residence in Canada, or at such other place as may be designated by the Minister, in such form and containing such information, including the Social Insurance Number of each insured person, as will enable the determination of any premiums payable under this Act or any premiums or other amounts that should have been deducted or paid.

Registres et livres

87. (1) Tout employeur payant une rétribution à une personne qui exerce à son service un emploi assurable doit tenir, aux bureaux de son entreprise ou à sa résidence au Canada, ou à tel autre endroit que peut désigner le ministre, des registres et livres comptables en la forme et contenant les renseignements, notamment le numéro d'assurance sociale de chaque assuré, qui permettront de déterminer quelles sont les cotisations payables en vertu de la présente loi ou les cotisations ou autres sommes qui auraient dû être retenues ou versées.

Specification of required books and records

(2) If the employer has failed to keep adequate records and books of account, the Minister may require the employer to keep such records and books of account as the Minister may specify, and the employer shall keep the required records and books of account.

Tenue des registres et livres

(2) Lorsqu'un tel employeur n'a pas tenu des registres et livres comptables adéquats, le ministre peut exiger qu'il tienne les registres et livres comptables qu'il spécifie. L'employeur est alors tenu de se conformer à cette exigence.

Retention for six years

(3) The employer shall retain the records and books of account and every account and voucher necessary to verify the information contained in them for six years after the year for which they are kept, or until written permission for their prior disposal is given by the Minister.

Conservation pendant six ans

(3) Tout employeur requis aux termes du présent article de tenir des registres et livres comptables doit conserver l'ensemble de ces registres et livres comptables et des comptes et pièces justificatives nécessaires à leur contrôle pendant six ans suivant la fin de l'année à l'égard de laquelle les documents en cause ont été tenus, sauf autorisation écrite du ministre de s'en départir avant la fin de cette période.

Electronic records

(3.1) Every employer required by this section to keep records who does so electronically shall retain them in an electronically readable format for the retention period referred to in subsection (3).

Registres électroniques

(3.1) L'employeur qui tient des registres, comme l'en oblige le présent article, par voie électronique doit les conserver sous une forme électronique intelligible pendant la durée de conservation visée au paragraphe (3).

Exemption

(3.2) The Minister may, on such terms and conditions as are acceptable to the Minister, exempt an employer or a class of employers from the requirement in subsection (3.1).

Dispense

(3.2) Le ministre peut, selon des modalités qu'il estime acceptables, dispenser un employeur ou une catégorie d'employeurs de l'exigence visée au paragraphe (3.1).

Retention for ruling or appeal

(4) If the employer or one of their employees is subject to a ruling under section 90 or has made an appeal to the Minister under section 91, the employer shall retain every record, book of account, account and voucher necessary for dealing with the ruling or the appeal until the ruling is made or the appeal is disposed of and any further appeal is disposed of or the time for filing a further appeal has expired.

1996, c. 23, s. 87; 1998, c. 19, s. 267.

Conservation de documents

(4) Tout employeur doit — lorsque lui-même ou l'un de ses employés est concerné par une décision rendue au titre de l'article 90 ou un appel au ministre en vertu de l'article 91 — conserver les registres, livres comptables, comptes et pièces justificatives nécessaires au règlement jusqu'à ce que la question ou l'appel soit réglé et que tout appel ultérieur y afférent

3

CANADA

CONSOLIDATION

CODIFICATION

Income Tax Act

Loi de l'impôt sur le revenu

R.S.C. 1985, c. 1 (5th Supp.)

S.R.C. 1985, ch. 1 (5e suppl.)

NOTE

Application provisions are not included in the consolidated text; see relevant amending Acts.

NOTE

Les dispositions d'application ne sont pas incluses dans la présente codification; voir les lois modificatives appropriées.

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year is filed by way of electronic filing, it shall be deemed to be a return of income filed with the Minister in prescribed form on the day the Minister acknowledges acceptance of it.

année d'imposition qui est transmise par voie électronique est réputée produite auprès du ministre sur formulaire prescrit le jour où celui-ci en accuse réception.

Declaration

(4) Where a return of income of a taxpayer for a taxation year is filed by way of electronic filing by a particular person (in this subsection referred to as the "filer") other than the person who is required to file the return, the person who is required to file the return shall make an information return in prescribed form containing prescribed information, sign it, retain a copy of it and provide the filer with the information return, and that return and the copy shall be deemed to be a record referred to in section 230 in respect of the filer and the other person.

Attestation

(4) Lorsque la déclaration de revenu d'un contribuable pour une année d'imposition est transmise par voie électronique par un déclarant autre que la personne qui est tenue de la produire, cette dernière est tenue d'établir une déclaration de renseignements sur formulaire prescrit contenant les renseignements prescrits, de la signer, d'en conserver une copie et de remettre la déclaration au déclarant. La déclaration et la copie sont réputées être un registre visé à l'article 230 du déclarant et de cette personne.

Application to other Parts

(5) This section also applies to Parts I.2 to XIII, with such modifications as the circumstances require.

NOTE: Application provisions are not included in the consolidated text; see relevant amending Acts. 1994, c. 7, Sch. VIII, s. 89, c. 21, s. 75; 2001, c. 17, s. 148; 2009, c. 2, s. 57; 2012, c. 19, s. 9.

Champ d'application

(5) Le présent article s'applique également aux parties I.2 à XIII, avec les adaptations nécessaires.

NOTE : Les dispositions d'application ne sont pas incluses dans la présente codification; voir les lois modificatives appropriées. 1994, ch. 7, ann. VIII, art. 89, ch. 21, art. 75; 2001, ch. 17, art. 148; 2009, ch. 2, art. 57; 2012, ch. 19, art. 9.

Estimate of Tax

Estimate of tax

151. Every person required by section 150 to file a return of income shall in the return estimate the amount of tax payable.

NOTE: Application provisions are not included in the consolidated text; see relevant amending Acts. 1970-71-72, c. 63, s. 1"151".

Estimation de l'impôt

Estimation de l'impôt

151. Quiconque est tenu de produire une déclaration de revenu en vertu de l'article 150 doit, dans la déclaration, estimer le montant de l'impôt payable.

NOTE : Les dispositions d'application ne sont pas incluses dans la présente codification; voir les lois modificatives appropriées. 1970-71-72, ch. 63, art. 1« 151 ».

Assessment

Assessment

152. (1) The Minister shall, with all due dispatch, examine a taxpayer's return of income for a taxation year, assess the tax for the year, the interest and penalties, if any, payable and determine

(*a*) the amount of refund, if any, to which the taxpayer may be entitled by virtue of section 129, 131, 132 or 133 for the year; or

(*b*) the amount of tax, if any, deemed by subsection 120(2) or (2.2), 122.5(3), 122.51(2), 122.7(2) or (3), 122.8(2) or (3), 125.4(3), 125.5(3), 127.1(1), 127.41(3) or 210.2(3) or (4) to be paid on account of the taxpayer's tax payable under this Part for the year.

Cotisation

Cotisation

152. (1) Le ministre, avec diligence, examine la déclaration de revenu d'un contribuable pour une année d'imposition, fixe l'impôt pour l'année, ainsi que les intérêts et les pénalités éventuels payables et détermine :

a) le montant du remboursement éventuel auquel il a droit en vertu des articles 129, 131, 132 ou 133, pour l'année;

b) le montant d'impôt qui est réputé, par les paragraphes 120(2) ou (2.2), 122.5(3), 122.51(2), 122.7(2) ou (3), 122.8(2) ou (3), 125.4(3), 125.5(3), 127.1(1), 127.41(3) ou 210.2(3) ou (4), avoir été payé au titre de l'impôt payable par le contribuable en vertu de la présente partie pour l'année.

subsection 142.6(1.6), in respect of property held by the taxpayer, if

(*a*) the taxpayer has filed for the particular taxation year the return of income required by section 150; and

(*b*) the taxpayer files with the Minister a prescribed form amending the return, on or before the filing-due date for the taxpayer's taxation year that

(i) if the filing is in respect of paragraph (*d*) of that definition "excluded property", includes the acquisition of control time referred to in that paragraph, and

(ii) if the filing is in respect of subsection 142.6(1.6), immediately follows the particular taxation year.

142.6(1.6), relativement aux biens détenus par le contribuable si les conditions suivantes sont réunies :

a) le contribuable a produit pour l'année donnée la déclaration de revenu qu'il est tenu de produire en application de l'article 150;

b) le contribuable présente au ministre un formulaire prescrit modifiant la déclaration, au plus tard à la date d'échéance de production qui lui est applicable pour celle des années d'imposition suivantes qui est applicable :

(i) si le formulaire est produit à l'égard de l'alinéa *d*) de cette définition de « bien exclu », l'année d'imposition du contribuable qui comprend le moment de l'acquisition du contrôle visé à cet alinéa,

(ii) si le formulaire est produit à l'égard du paragraphe 142.6(1.6), l'année d'imposition du contribuable qui suit l'année donnée.

Reassessment for section 119 credit

(6.3) If a taxpayer has filed for a particular taxation year the return of income required by section 150 and an amount is subsequently claimed by the taxpayer, or on the taxpayer's behalf, for the particular year as a deduction under section 119 in respect of a disposition in a subsequent taxation year, and the taxpayer files with the Minister a prescribed form amending the return on or before the filing-due date of the taxpayer for the subsequent taxation year, the Minister shall reassess the taxpayer's tax for any relevant taxation year (other than a taxation year preceding the particular taxation year) in order to take into account the deduction claimed.

(6.3) Lorsqu'un contribuable a produit, pour une année d'imposition donnée, la déclaration de revenu exigée par l'article 150, que, par la suite, une somme est demandée pour cette année par lui ou pour son compte à titre de déduction, en application de l'article 119, relativement à une disposition effectuée au cours d'une année d'imposition ultérieure et que le contribuable présente au ministre un formulaire prescrit modifiant la déclaration au plus tard à la date d'échéance de production qui lui est applicable pour l'année ultérieure, le ministre établit une nouvelle cotisation concernant l'impôt du contribuable pour toute année d'imposition pertinente, sauf celles antérieures à l'année donnée, pour tenir compte de la déduction demandée.

Nouvelle cotisation — crédit prévu à l'article 119

Assessment not dependent on return or information

(7) The Minister is not bound by a return or information supplied by or on behalf of a taxpayer and, in making an assessment, may, notwithstanding a return or information so supplied or if no return has been filed, assess the tax payable under this Part.

(7) Le ministre n'est pas lié par les déclarations ou renseignements fournis par un contribuable ou de sa part et, lors de l'établissement d'une cotisation, il peut, indépendamment de la déclaration ou des renseignements ainsi fournis ou de l'absence de déclaration, fixer l'impôt à payer en vertu de la présente partie.

Cotisation indépendante de la déclaration ou des renseignements fournis

Assessment deemed valid and binding

(8) An assessment shall, subject to being varied or vacated on an objection or appeal under this Part and subject to a reassessment, be deemed to be valid and binding notwithstanding any error, defect or omission in the assess-

(8) Sous réserve des modifications qui peuvent y être apportées ou de son annulation lors d'une opposition ou d'un appel fait en vertu de la présente partie et sous réserve d'une nouvelle cotisation, une cotisation est réputée

Présomption de validité de la cotisation ment or in any proceeding under this Act relating thereto.

Alternative basis for assessment

(9) The Minister may advance an alternative argument in support of an assessment at any time after the normal reassessment period unless, on an appeal under this Act

(*a*) there is relevant evidence that the taxpayer is no longer able to adduce without the leave of the court; and

(*b*) it is not appropriate in the circumstances for the court to order that the evidence be adduced.

Tax deemed not assessed

(10) Notwithstanding any other provision of this section, an amount of tax is deemed, for the purpose of any agreement entered into by or on behalf of the Government of Canada under section 7 of the *Federal-Provincial Fiscal Arrangements Act*, not to have been assessed under this Act until

(*a*) the end of the period during which the security is accepted by the Minister, if adequate security for the tax is accepted by the Minister under subsection 220(4.5) or (4.6); or

(*b*) the amount is collected by the Minister, if information relevant to the assessment of the amount was provided to the Canada Revenue Agency under a contract entered into by a person under a program administered by the Canada Revenue Agency to obtain information relating to tax non-compliance.

NOTE: Application provisions are not included in the consolidated text; see relevant amending Acts. R.S., 1985, c. 1 (5th Supp.), s. 152; 1994, c. 7, Sch. II, s. 125, Sch. VII, s. 15, Sch. VIII, s. 90, c. 8, s. 20, c. 21, s. 76; 1995, c. 3, s. 46; 1996, c. 21, s. 39; 1998, c. 19, ss. 42, 181; 1999, c. 22, s. 63.1; 2000, c. 19, s. 44; 2001, c. 17, s. 149; 2002, c. 8, s. 184; 2005, c. 19, s. 36; 2007, c. 35, s. 48; 2009, c. 2, s. 58; 2010, c. 25, s. 38; 2011, c. 15, s. 3; 2012, c. 19, s. 10, c. 31, s. 39; 2013, c. 34, ss. 15, 34, 74, 309, c. 40, s. 67; 2014, c. 20, s. 22, c. 39, s. 55.

être valide et exécutoire malgré toute erreur, tout vice de forme ou toute omission dans cette cotisation ou dans toute procédure s'y rattachant en vertu de la présente loi.

Nouvel argument à l'appui d'une cotisation

(9) Le ministre peut avancer un nouvel argument à l'appui d'une cotisation après l'expiration de la période normale de nouvelle cotisation, sauf si, sur appel interjeté en vertu de la présente loi :

a) d'une part, il existe des éléments de preuve que le contribuable n'est plus en mesure de produire sans l'autorisation du tribunal;

b) d'autre part, il ne convient pas que le tribunal ordonne la production des éléments de preuve dans les circonstances.

Cotisation réputée ne pas avoir été établie

(10) Malgré les autres dispositions du présent article, un montant d'impôt est réputé, pour l'application de tout accord conclu par le gouvernement du Canada, ou pour son compte, en vertu de l'article 7 de la *Loi sur les arrangements fiscaux entre le gouvernement fédéral et les provinces*, ne pas avoir fait l'objet d'une cotisation en vertu de la présente loi jusqu'à ce que, selon le cas :

a) la période au cours de laquelle la garantie est acceptée par le ministre prenne fin, dans le cas où une garantie suffisante pour l'impôt est acceptée par le ministre aux termes des paragraphes 220(4.5) ou (4.6);

b) le montant soit perçu par le ministre, dans le cas où des renseignements relatifs à la cotisation établie à l'égard du montant ont été fournis à l'Agence du revenu du Canada aux termes d'un contrat conclu par une personne dans le cadre d'un programme administré par l'Agence du revenu du Canada qui permet d'obtenir des renseignements concernant l'inobservation fiscale.

NOTE : Les dispositions d'application ne sont pas incluses dans la présente codification; voir les lois modificatives appropriées. L.R. (1985), ch. 1 (5e suppl.), art. 152; 1994, ch. 7, ann. II, art. 125, ann. VII, art. 15, ann. VIII, art. 90, ch. 8, art. 20, ch. 21, art. 76; 1995, ch. 3, art. 46; 1996, ch. 21, art. 39; 1998, ch. 19, art. 42 et 181; 1999, ch. 22, art. 63.1; 2000, ch. 19, art. 44; 2001, ch. 17, art. 149; 2002, ch. 8, art. 184; 2005, ch. 19, art. 36; 2007, ch. 35, art. 48; 2009, ch. 2, art. 58; 2010, ch. 25, art. 38; 2011, ch. 15, art. 3; 2012, ch. 19, art. 10, ch. 31, art. 39; 2013, ch. 34, art. 15, 34, 74 et 309, ch. 40, art. 67; 2014, ch. 20, art. 22, ch. 39, art. 55.

No appeal from review order

(13) No appeal lies from an order of a judge made pursuant to subsection 225.2(11).

NOTE: Application provisions are not included in the consolidated text; see relevant amending Acts. 1985, c. 45, s. 116; 1988, c. 55, s. 170.

Taxpayer leaving Canada

226. (1) Where the Minister suspects that a taxpayer has left or is about to leave Canada, the Minister may, before the day otherwise fixed for payment, by notice served personally or by registered letter addressed to the taxpayer's latest known address, demand payment of the amount of all taxes, interest and penalties for which the taxpayer is liable or would be liable if the time for payment had arrived, and that amount shall be paid forthwith by the taxpayer notwithstanding any other provision of this Act.

Seizure in case of default of payment

(2) If a taxpayer fails to pay, as required, any tax, interest or penalties demanded under this section, the Minister may direct that the goods and chattels, or movable property, of the taxpayer be seized and subsections 225(2) to (5) apply, with respect to the seizure, with any modifications that the circumstances require.

NOTE: Application provisions are not included in the consolidated text; see relevant amending Acts. R.S., 1985, c. 1 (5th Supp.), s. 226; 1994, c. 7, Sch. II, s. 185; 2013, c. 34, s. 164.

Withholding taxes

227. (1) No action lies against any person for deducting or withholding any sum of money in compliance or intended compliance with this Act.

Return filed with person withholding

(2) Where a person (in this subsection referred to as the "payer") is required by regulations made under subsection 153(1) to deduct or withhold from a payment to another person an amount on account of that other person's tax for the year, that other person shall, from time to time as prescribed, file a return with the payer in prescribed form.

Failure to file return

(3) Every person who fails to file a return as required by subsection (2) is liable to have the deduction or withholding under section 153 on account of the person's tax made as though the person were a person who is neither married nor in a common-law partnership and is without dependants.

Ordonnance sans appel

(13) L'ordonnance rendue par un juge en application du paragraphe (11) est sans appel.

NOTE : Les dispositions d'application ne sont pas incluses dans la présente codification; voir les lois modificatives appropriées. 1985, ch. 45, art. 116; 1988, ch. 55, art. 170.

Contribuable quittant le Canada

226. (1) Si le ministre soupçonne qu'un contribuable a quitté le Canada ou est sur le point de le faire, il peut, avant le jour par ailleurs fixé pour le paiement, par avis signifié à personne ou par lettre recommandée envoyée à la dernière adresse connue du contribuable, exiger le paiement des impôts, intérêts et pénalités dont le contribuable est redevable ou serait redevable si le moment du paiement était arrivé. Le contribuable est tenu d'acquitter ces montants sans délai, malgré les autres dispositions de la présente loi.

Saisie en cas de défaut de paiement

(2) Lorsqu'un contribuable ne paye pas l'impôt, les intérêts ou les pénalités exigés aux termes du présent article, comme il est requis de le faire, le ministre peut ordonner la saisie des biens meubles ou personnels du contribuable. Dès lors, les paragraphes 225(2) à (5) s'appliquent, avec les adaptations nécessaires.

NOTE : Les dispositions d'application ne sont pas incluses dans la présente codification; voir les lois modificatives appropriées. L.R. (1985), ch. 1 (5e suppl.), art. 226; 1994, ch. 7, ann. II, art. 185; 2013, ch. 34, art. 164.

Retenue des impôts

227. (1) Nulle action ne peut être intentée contre une personne pour le fait de déduire ou de retenir une somme d'argent quelconque en conformité, réelle ou intentionnelle, avec la présente loi.

Déclaration à produire auprès de la personne qui fait les retenues

(2) Lorsqu'une personne (appelée le « payeur » au présent paragraphe) est tenue en vertu des dispositions réglementaires prises en application du paragraphe 153(1) de déduire d'un paiement à une autre personne ou de retenir sur un tel paiement un montant au titre de l'impôt de cette autre personne pour l'année, cette autre personne doit, selon les modalités de temps fixées par ces dispositions, produire auprès du payeur une déclaration selon le formulaire prescrit.

Défaut de produire la déclaration

(3) Toute personne qui omet de produire un formulaire, ainsi que le requiert le paragraphe (2), est susceptible de subir la déduction ou retenue en vertu de l'article 153 au titre de son impôt au même titre que si elle était sans personne à charge, n'était pas mariée et ne vivait pas en union de fait.

Trust for moneys deducted

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

Montant détenu en fiducie

(4) Toute personne qui déduit ou retient un montant en vertu de la présente loi est réputée, malgré toute autre garantie au sens du paragraphe 224(1.3) le concernant, le détenir en fiducie pour Sa Majesté, séparé de ses propres biens et des biens détenus par son créancier garanti au sens de ce paragraphe qui, en l'absence de la garantie, seraient ceux de la personne, et en vue de le verser à Sa Majesté selon les modalités et dans le délai prévus par la présente loi.

Extension of trust

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

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

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

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

Non-versement

(4.1) Malgré les autres dispositions de la présente loi, la *Loi sur la faillite et l'insolvabilité* (sauf ses articles 81.1 et 81.2), tout autre texte législatif fédéral ou provincial ou toute règle de droit, en cas de non-versement à Sa Majesté, selon les modalités et dans le délai prévus par la présente loi, d'un montant qu'une personne est réputée par le paragraphe (4) détenir en fiducie pour Sa Majesté, les biens de la personne, et les biens détenus par son créancier garanti au sens du paragraphe 224(1.3) qui, en l'absence d'une garantie au sens du même paragraphe, seraient ceux de la personne, d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté, à compter du moment où le montant est déduit ou retenu, séparés des propres biens de la personne, qu'ils soient ou non assujettis à une telle garantie;

b) ne pas faire partie du patrimoine ou des biens de la personne à compter du moment où le montant est déduit ou retenu, que ces biens aient été ou non tenus séparés de ses propres biens ou de son patrimoine et qu'ils soient ou non assujettis à une telle garantie.

Ces biens sont des biens dans lesquels Sa Majesté a un droit de bénéficiaire malgré toute autre garantie sur ces biens ou sur le produit en découlant, et le produit découlant de ces biens est payé au receveur général par priorité sur une telle garantie.

Meaning of security interest

(4.2) For the purposes of subsections 227(4) and 227(4.1), a security interest does not include a prescribed security interest.

Sens de garantie

(4.2) Pour l'application des paragraphes (4) et (4.1), n'est pas une garantie celle qui est visée par règlement.

Court File No.: C59790

TRISURA GUARANTEE INSURANCE COMPANY and **EBERSOLE EXCAVATING INC., ET AL**

Applicant — Respondents

SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding Commenced at Toronto

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