

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

**IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C.
1985, c. C-36, AS AMENDED**

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
DUNDEE OIL AND GAS LIMITED**

FACTUM & BRIEF OF AUTHORITIES
(Application returnable 13 February 2018)

Date: 12 February 2018

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FACTUM

PART I--THE APPLICATION

1. This is an Application by Dundee Oil and Gas Limited (“**DOGL**”) seeking an Order taking up and continuing under the Companies’ Creditors Arrangement Act (the “**CCAA**”) proposal proceedings commenced by DOGL and Dundee Energy Limited Partnership (“**DELP**” and, together with DOGL, the “**Debtors**”) under Part III of the Bankruptcy and Insolvency Act (the “**BIA**”).

PART II--FACTS

2. DELP is a limited partnership created pursuant to the *Limited Partnership Act* (Ontario). DOGL is a company incorporated pursuant to the *Business Corporation Act* (Ontario) and is the General Partner of the DELP. DOGL's only asset is its interest in DELP.¹

3. DELP holds on-and off-shore oil and natural gas producing assets consisting of: (a) wells located on freehold real property in Southwestern Ontario; (b) wells located on offshore leasehold real property (Crown leases) in Lake Erie; and (c) wells located on onshore leasehold real property in Southwestern Ontario. In addition to these oil and natural gas assets, DELP owns: (a) a fleet of drill and service barges and supply boats to service the offshore wells and pipeline infrastructure; and (b) an onshore rotary drilling rig. DELP employs a number people on a full-time basis. It also employs people on a contract basis as may be required.²

4. The Debtors’ primary secured creditor is the National Bank of Canada (the “**Bank**”). As at 26 January 2018, the Debtors owed the Bank over \$54 million.³ The Debtors and the Bank have entered into a forbearance agreement.⁴

5. Proceedings under Part III of the BIA were commenced in respect of each of DELP and DOGL on or about 15 August 2017 and FTI Consulting Canada Inc. (“**FTI**”) was appointed as a

¹ Affidavit of Lucie Presot sworn 8 February 2018 (“**Prescot Affidavit**”), para 3.

² Fourth Report of FTI dated 7 February 2018 (“**Fourth Report**”), paras 4.1 and Presot Affidavit, paras 4 and 5.

³ Presot Affidavit, para 7 and Fourth Report, para 4.3.

⁴ Fourth Report, para 4.5.

proposal trustee in respect of each company.⁵ The Bank is an unaffected creditor in the BIA proceedings.⁶

6. The BIA proceedings in respect of the Debtors were procedurally consolidated pursuant to an Order made on 16 August 2017 (the "**First Day Order**"). The First Day Order also, *inter alia*: (a) approved a sale solicitation process (the "**BIA SSP**") for all of the Debtors' assets, undertakings and properties under the supervision of FTI; (b) authorized DELP to continue to obtain and borrow, repay and re-borrow additional monies under the credit facility made available to DELP by the Bank; and (c) granted, and established the relative priority of, various charges in favour of the Bank, FTI, FTI's counsel, the Debtors' counsel and the Debtors' officers and directors.⁷

7. The time by which the Debtors were required to file proposals was extended multiple times and now expires on 15 February 2018. Under the BIA, the Debtors are not entitled to any further extension of the time by which they are required to file proposals.⁸

8. The BIA SSP is being conducted by FTI.⁹ The BIA SSP has not yet concluded and is unlikely to be concluded prior to 15 February 2018 such that the Debtors will not be able to file proposals prior to the date that the Debtors are required to do so under the BIA. The Debtors wish to have the current proceedings under the BIA taken up and continued under the CCAA to provide FTI with time to complete the BIA SSP.¹⁰

PART III--LAW AND ARGUMENT

9. **BIA SSP.** The Debtors' ability to reorganize for the benefit of creditors and other stakeholders is dependent of the sale of their assets, undertaking and property to satisfy the Bank's secured claim. Pursuant to the First Day Order, the Bankruptcy Court approved and authorized FTI to conduct the BIA SSP to locate a purchaser or purchasers for the Debtors'

⁵ Fourth Report of FTI dated 7 February 2018 ("**Fourth Report**"), para 1.1 and 1.2.

⁶ Fourth Report, para 4.3.

⁷ Fourth Report, para 1.3 and Appendix A.

⁸ Fourth Report, para 1.2.

⁹ See Fourth Report, paras 6.1-6.3.

¹⁰ Fourth Report, para 9.1.

assets, property and undertaking. The purpose of the continuance of the Debtors' restructuring proceeding under the CCAA is to allow FTI time to complete the BIA SSP.¹¹

10. **Continuance under the CCAA.** The time by which the Debtors are required to file proposals will expire on 15 February 2018 and the Debtors are unable to apply to the Bankruptcy Court for further extensions of time to file proposals in order to complete the BIA SSP. They will be deemed to have made an assignment for the benefit of creditors if proposals aren't filed by 15 February 2018.¹²

11. Section 11.6 of the CCAA provides that a restructuring proceeding commenced under Part III of the BIA may be taken up and continued under the CCAA provided that a proposal has not been filed under that Part.¹³ DOGL is requesting that: (a) the proposal proceedings it commenced under the BIA be taken up and continued under the CCAA; and (b) the stay granted in the DOGL CCAA proceeding extend to DELP.

12. **DOGL.** DOGL has not filed a proposal under the BIA¹⁴. It is a "debtor company" within the meaning of the CCAA—it is a corporation, insolvent and owes creditors in excess of \$5 million.

13. **Continuation consistent with the purpose of the CCAA.** The proposed continuation of DOGL's proposal proceedings under the CCAA is consistent with the purposes of the CCAA¹⁵. The Debtors are, through the BIA SSP, in the process of attempting to find a purchaser for their assets, undertaking and property as part of efforts to restructure for the benefit of its creditors and other stakeholders. The BIA SSP was sanctioned by the Bankruptcy Court and the effective completion of the BIA SSP requires that: (a) the proposal proceedings in respect of DOGL be taken up and continued under the CCAA; and (b) a stay of proceedings be granted in respect of DELP.

¹¹ Fourth Report, para 9.2.

¹² BIA, s. 50.4(8).

¹³ BIA, s. 11.6.

¹⁴ This is the sole statutory condition for the application of s. 11.6: see *Clothing for Modern Times Ltd. (Re)*, 2011 ONSC 7522 (CanLII), para 9

¹⁵ *Urbancorp Inc. (Re)*, 2016 ONSC 3288 (CanLII), para 38. See also *Clothing for Modern Times Ltd. (Re)*, 2011 ONSC 7522 (CanLII), para 12

14. **Financial Statements and Cash Flows.** In *Clothing for Modern Times Ltd. (Re)*, the Court found that on an Application under s. 11.6, the Court should have before it evidence that serves as a “reasonable surrogate” for the evidence required on an Initial Application under the CCAA, i.e. (a) a weekly cash flow projection in respect of the Applicant; (b) a Report containing the prescribed representations regarding the preparation of the cash flow projections; and (c) copies of the Applicant’s most recent financial statements.¹⁶ The materials in support of this Application include all of that documentation.¹⁷

15. **DELP.** DELP is not a “debtor company” within the meaning of the CCAA. It is insolvent and owes creditors in excess of \$5 million, but is a limited partnership and not a corporation. The issue with respect to DELP is not whether the CCAA should be applied to DELP, but whether the stay imposed in the CCAA proceedings in respect of DOGL should be extended to DELP to, *inter alia*, stay the automatic bankruptcy of DELP that would result from the application of s. 50.4(8) of the BIA.

16. **Extension of the stay to DELP.** Pursuant to s. 11 of the CCAA the Court has broad jurisdiction to make any order that it considers appropriate in the circumstances subject to any restrictions contained in the CCAA. Section 11 applies notwithstanding any of provisions of the BIA.¹⁸

17. There are no provisions in the CCAA which prohibit the Court from extending the stay granted in a CCAA proceeding to include non-debtor entities and there is precedent for the extension of the stay in proceedings under the CCAA to include limited partnerships. In *Urbancorp Inc. (Re)*, the Court found that:

A CCAA court may exercise its jurisdiction to extend protection by way of the stay of proceedings to a partnership related to an applicant where it is just and reasonable or just and convenient to do so. The courts have held that this relief is appropriate where the operations of a debtor company are so intertwined with those of a partner or limited partnership in question that not extending the stay

¹⁶ *Clothing for Modern Times Ltd. (Re)*, 2011 ONSC 7522 (CanLII), para 9 and CCAA, s. 10(2).

¹⁷ Fourth Report, Appendices B and C.

¹⁸ CCAA, s. 11.

would significantly impair the effectiveness of a stay in respect of the debtor company.¹⁹

18. In this case, DOGL and DELP are entirely integrated. DOGL is the general partner of DELP and DOGL's only asset is its interest in DELP. This was the basis for the procedural consolidation of the BIA proceedings in respect of the Debtors pursuant to the First Day Order.

19. **Stay of deemed assignment.** The Supreme Court of Canada found that whether an Order is "appropriate" under s. 11 of the CCAA is to be 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.²⁰ There is no dispute that the sale of a debtor's property in the context of reorganization proceeding under the CCAA (or the BIA) is an appropriate purpose and within the proper scope of a reorganization.

20. The BIA SSP was approved by the Bankruptcy Court and the purpose of the Order being requested by DOGL *vis-a-vis* DELP is to permit the BIA SSP to be completed.

21. The purpose of having the proposal proceedings in respect of DOGL taken up and continued under the CCAA is to permit FTI to complete the BIA SSP to locate a purchaser or purchasers for the Debtors' property. In order for the proposal proceeding in respect of DOGL to be effectively taken up and continued under the CCAA so that the BIA SSP can be completed, it is necessary to extend the CCAA stay in respect of DOGL to include DELP and to stay the automatic bankruptcy of DELP.

22. In the absence of a stay, DELP will automatically become bankrupt on 15 February 2018 by operation of s. 50.4(8) of the BIA. This will very likely adversely impact the BIA SSP and the interest of the Debtors' stakeholders. The property that is the subject of the BIA SSP belongs to DELP and not extending the CCAA stay to DELP such that DELP will become bankrupt on 15 February 2018 will impair the effectiveness of the CCAA proceedings in respect of DOGL. The impact of a bankruptcy on DELP's Crown leases is, for example, likely detrimental to FTI's efforts to locate a purchaser or purchasers for DELP's property, and the co-ordination of the

¹⁹ *Urbancorp Inc. (Re)*, 2016 ONSC 3288 (CanLII), para 43. See also *Target Canada Co. (Re)*, 2015 ONSC 303 (Can LII).

²⁰ *Century Services Inc. v. Canada (Attorney General)*, [2010] 3 SCR 379, 2010 SCC 60 (CanLII), paras 67-70.

bankruptcy of DELP and the CCAA proceedings in respect of DOGL and will add costs and an unnecessary layer of complexity to the proceedings.

23. The Order being sought *vis-a-vis* DELP involves the exercise of jurisdiction under s. 11 of the CCAA to facilitate the harmonization of the BIA proceedings in respect of DELP with the CCAA proceedings with respect to DOGL. As noted by the Supreme Court of Canada in *Century Services Inc. v. Canada (Attorney General)*:

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.

...

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.....²¹

24. There is case law to the effect that the Bankruptcy Court does not have jurisdiction under the BIA to: (a) extend the time for filing a cash flow *ex post facto* to **reverse** a deemed assignment that had occurred by operation of the BIA²²; or (b) “stay” an assignment once it has been made²³. In this case, however, the deemed assignment has not yet occurred and the Court is not being asked to reverse the effect of s. 50.4(8) of the BIA. The Court has jurisdiction under s. 11 of the CCAA to stay the automatic bankruptcy of DELP and that it is appropriate in the circumstances that the Court exercise its jurisdiction and stay the deemed assignment.²⁴

PART IV--ORDER SOUGHT

25. The Debtors request an Order substantially in the form of the draft form of Order attached to the Notice of Application.

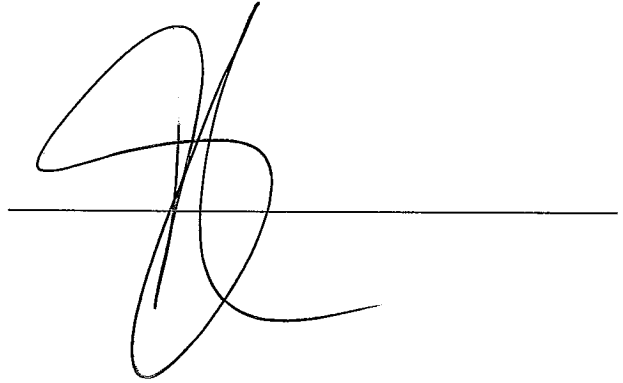
²¹ *Century Services Inc. v. Canada (Attorney General)*, [2010] 3 SCR 379, 2010 SCC 60 (CanLII), paras 24 and 61.

²² *IDG Environmental Solutions Inc. (Re)* (1993), 16 C.B.R. (3d) 317.

²³ See *Wale (Re)*, 1996 CanLII 8275 (ON SC).

²⁴ *Edell v. Canada Revenue Agency*, 2011 ONSC 1943 (CanLII), para 18-21.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of February 2018.

A handwritten signature in black ink is written over a solid horizontal line. The signature is stylized and appears to be a cursive or semi-cursive name, possibly starting with a large 'S' or 'J'.

TAB A

SCHEDULE A

Clothing for Modern Times Ltd. (Re), 2011 ONSC 7522 (CanLII).

Urbancorp Inc. (Re), 2016 ONSC 3288 (CanLII).

Target Canada Co. (Re), 2015 ONSC 303 (Can LII).

Century Services Inc. v. Canada (Attorney General), [2010] 3 SCR 379, 2010 SCC 60 (CanLII).

IDG Environmental Solutions Inc. (Re) (1993), 16 C.B.R. (3d) 317.

Wale (Re), 1996 CanLII 8275 (ON SC).

Edell v. Canada Revenue Agency, 2011 ONSC 1943 (CanLII).

TAB B

SCHEDULE B

Bankruptcy and Insolvency Act, RSC 1985, c B-3

50.4 (8) Where an insolvent person fails to comply with subsection (2), or where the trustee fails to file a proposal with the official receiver under subsection 62(1) within a period of thirty days after the day the notice of intention was filed under subsection (1), or within any extension of that period granted under subsection (9),

- (a) the insolvent person is, on the expiration of that period or that extension, as the case may be, deemed to have thereupon made an assignment;
- (b) the trustee shall, without delay, file with the official receiver, in the prescribed form, a report of the deemed assignment;
- (b.1) the official receiver shall issue a certificate of assignment, in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed under section 49; and
- (c) the trustee shall, within five days after the day the certificate mentioned in paragraph (b.1) is issued, send notice of the meeting of creditors under section 102, at which meeting the creditors may by ordinary resolution, notwithstanding section 14, affirm the appointment of the trustee or appoint another licensed trustee in lieu of that trustee.

(9) The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that

- (a) the insolvent person has acted, and is acting, in good faith and with due diligence;
- (b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
- (c) no creditor would be materially prejudiced if the extension being applied for were granted.

85 (1) This Act applies to limited partnerships in like manner as if limited partnerships were ordinary partnerships, and, on all the general partners of a limited partnership becoming bankrupt, the property of the limited partnership vests in the trustee.

Companies' Creditors Arrangement Act, RSC 1985, c C-36

2 (1) In this Act

“debtor company” means any company that

- (a) is bankrupt or insolvent,
- (b) has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* or is deemed insolvent within the meaning of the *Winding-up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts,
- (c) has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, or
- (d) is in the course of being wound up under the *Winding-up and Restructuring Act* because the company is insolvent;

3 (1) This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than \$5,000,000 or any other amount that is prescribed.

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.

11.6 Notwithstanding the *Bankruptcy and Insolvency Act*,

- (a) proceedings commenced under Part III of the *Bankruptcy and Insolvency Act* may be taken up and continued under this Act only if a proposal within the meaning of the *Bankruptcy and Insolvency Act* has not been filed under that Part; and

- (b) an application under this Act by a bankrupt may only be made with the consent of inspectors referred to in section 116 of the *Bankruptcy and Insolvency Act* but no application may be made under this Act by a bankrupt whose bankruptcy has resulted from
- (i) the operation of subsection 50.4(8) of the *Bankruptcy and Insolvency Act*,
or
 - (ii) the refusal or deemed refusal by the creditors or the court, or the annulment, of a proposal under the *Bankruptcy and Insolvency Act*.

TAB 1

CITATION: (Re) Clothing for Modern Times Ltd., 2011 ONSC 7522
COURT FILE NO.: 31-1513595
DATE: 20111216

2011 ONSC 7522 (CanLII)

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: IN THE MATTER OF THE Notice of Intention to make a Proposal of Clothing for Modern Times Ltd.

BEFORE: D. M. Brown J.

COUNSEL: M. Poliak and H. Chaiton, for the Applicant

M. Forte, for A. Farber & Partners Inc., the Proposal Trustee and Proposed Monitor

I. Aversa, for Roynat Asset Finance

D. Bish, for Cadillac Fairview

L. Galessiere, for Ivanhoe Cambridge Inc., Oxford Properties Group Inc., Primaris Retail Estate Investment Trust, Morguard Investment Limited and 20 VIC Management Inc.

M. Weinczuk, for 7951388 Canada Inc.

HEARD: December 16, 2011

REASONS FOR DECISION

I. Motion to continue *BIA* Part III proposal proceedings under the *CCAA*

[1] Clothing for Modern Times Ltd. (“CMT”), a retailer of fashion apparel, filed a Notice of Intention to Make a Proposal pursuant to section 50.4 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, on June 27, 2011. A. Farber & Partners Inc. was appointed CMT’s proposal trustee. At the time of the filing of the NOI CMT operated 116 retail stores from leased locations across Canada. CMT sold fashion apparel under the trade names Urban Behavior, Costa Blanca and Costa Blanca X.

[2] CMT has obtained from this Court several extensions of time to file a proposal. That time will expire on December 22, 2011. Under section 50.4(9) of the *BIA*, no further extensions are possible.

[3] Accordingly, CMT moves under section 11.6(a) of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 for an order, effective December 22, 2011, continuing CMT's restructuring proceeding under the *CCAA* and granting an Initial Order, as well as approving a sale process as a going concern for part of CMT's business.

II. Key background events

[4] Following the filing of the NOI, pursuant to orders of this Court, CMT conducted a self-liquidation of underperforming stores across Canada and, as well, a going-concern sale of its Urban Behavior business. The latter transaction is scheduled to close on January 16, 2012.

[5] At the time of the filing of the NOI there were three major secured creditors of CMT: Roynat Asset Finance, CIC Asset Management Inc., and CMT Sourcing. The company's indebtedness to those creditors totaled approximately \$28.3 million. CMT anticipates that the proceeds from the Urban Behavior transaction and the liquidation of under-performing stores will prove sufficient to repay its loan obligations to Roynat in full before the expiration of a forbearance period on January 16, 2012.

[6] When CMT was last in court on November 7, 2011 it stated it intended to make a proposal to its unsecured creditors, an intention supported by the two remaining secured creditors, CIC and CMT Sourcing. Subsequently CMT met with representatives of certain landlords and commenced discussions about its proposed restructuring plan. As a result of those discussions CMT lacks the confidence that its proposal would be approved by the requisite majority of its unsecured creditors, and it does not believe that it can make a viable proposal to its creditors. Instead, CMT thinks that a going-concern sale of its Costa Blanca business would be in the best interests of stakeholders and would preserve employment for about 500 remaining employees, both full-time and hourly retail staff.

[7] In its Sixth Report dated December 14, 2011 Farber agrees that a going concern sale of the Costa Blanca business would be in the best interests of CMT's stakeholders, maximize recoveries to the two secured creditors, CIC and CMT Sourcing, and preserve employment for CMT's remaining employees. Farber supports CMT's request to continue its restructuring under the *CCAA*. Farber consents to act as the Monitor under *CCAA* proceedings and to administer the proposed sale process.

III. Continuation under the *CCAA*

A. Principles governing motions to continue *BIA* Part III proposal proceedings under the *CCAA*

[8] Continuations of *BIA* Part III proposal proceedings under the *CCAA* are governed by section 11.6(a) of that Act which provides:

11.6 Notwithstanding the *Bankruptcy and Insolvency Act*,

(a) proceedings commenced under Part III of the *Bankruptcy and Insolvency Act* may be taken up and continued under this Act only if a proposal within the meaning of the *Bankruptcy and Insolvency Act* has not been filed under that Part.

[9] It strikes me that on a motion to continue under the *CCAA* an applicant company should place before the court evidence dealing with three issues:

- (i) The company has satisfied the sole statutory condition set out in section 11.6(a) of the *CCAA* that it has not filed a proposal under the *BIA*;
- (ii) The proposed continuation would be consistent with the purposes of the *CCAA*; and,
- (iii) Evidence which serves as a reasonable surrogate for the information which section 10(2) of the *CCAA* requires accompany any initial application under the Act.

Let me deal with each in turn

B. The applicant has not filed a proposal under the *BIA*

[10] The evidence shows that CMT has satisfied this statutory condition.

C. The continuation would be consistent with the purposes of the *CCAA*

[11] In *Century Services Inc. v. Canada (Attorney General)*,¹ the Supreme Court of Canada articulated the purpose of the *CCAA* in several ways:

- (i) To permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets;²
- (ii) To provide 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;³
- (iii) To avoid the social and economic losses resulting from liquidation of an insolvent company;⁴

¹ 2010 SCC 60.

² *Century Services*, para. 15.

³ *Ibid.*, para. 59.

⁴ *Ibid.*, para. 70.

(iv) To create conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all.⁵

As the Supreme Court noted in *Century Services*, proposals to creditors under the *BIA* serve the same remedial purpose, though this is achieved “through a rules-based mechanism that offers less flexibility.”⁶ In the present case CMT bumped up against one of those less flexible rules – the inability of a court to extend the time to file a proposal beyond six months after the filing of the NOI.

[12] The jurisprudence under the *CCAA* accepts that in appropriate circumstances the purposes of the *CCAA* will be met even though the re-organization involves the sale of the company as a going concern, with the consequence that the debtor no longer would continue to carry on the business, as is contemplated in the present case. In *Re Stelco Inc.* Farley J. observed that if a restructuring of a company is not feasible, “then there is the exploration of the feasibility of the sale of the operations/enterprise as a going concern (with continued employment) in whole or in part”.⁷ It also is well-established in the jurisprudence that a court may approve a sale of assets in the course of a *CCAA* proceeding before a plan of arrangement has been approved by creditors.⁸ In *Re Nortel Networks Inc.* Morawetz J. set out the rationale for this judicial approach:

The value of equity in an insolvent debtor is dubious, at best, and, in my view, it follows that the determining factor should not be whether the business continues under the debtor's stewardship or under a structure that recognizes a new equity structure. An equally important factor to consider is whether the case can be made to continue the business as a going concern.⁹

[13] The evidence filed by CMT and Farber supports a finding that a continuation under the *CCAA* to enable a going-concern sale of the Costa Blanca business and assets would be consistent with the purposes of the *CCAA*. Such a sale likely would maximize the recovery for the two remaining secured creditors, CIC and CMT Sourcing, preserve employment for many of the 500 remaining employees, and provide a tenant to the landlords of the 35 remaining Costa Blanca stores. Avoidance of the social and economic losses which would result from a liquidation and the maximization of value would best be achieved outside of a bankruptcy.

⁵ *Ibid.*, para. 77.

⁶ *Ibid.*, para. 15.

⁷ (2004), 6 C.B.R. (5th) 316 (Ont. S.C.J.), para. 1. In *Consumers Packaging Inc., Re*, 2001 CarswellOnt 3482 the Court of Appeal held that a sale of a business as a going concern during a *CCAA* proceeding is consistent with the purposes of that Act.

⁸ See the cases collected by Morawetz J. in *Re Nortel Networks Corp.* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J.), paras. 35 to 39. See also section 36 of the *CCAA*.

⁹ *Ibid.*, para. 40.

D. Evidence which serves as a reasonable surrogate for CCAA s. 10(2) information

[14] As the Supreme Court of Canada observed in *Century Services*, “the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising CCAA authority.”¹⁰ On an initial application under the CCAA a court will have before it the information specified in section 10(2) which assists it in considering the appropriateness, good faith and due diligence of the application. Section 10(2) of the CCAA provides:

10. (2) An initial application must be accompanied by

(a) a statement indicating, on a weekly basis, the projected cash flow of the debtor company;

(b) a report containing the prescribed representations of the debtor company regarding the preparation of the cash-flow statement; and

(c) copies of all financial statements, audited or unaudited, prepared during the year before the application or, if no such statements were prepared in that year, a copy of the most recent such statement.

[15] Section 11.6 of the CCAA does not stipulate the information which must be filed in support of a continuation motion, but a court should have before it sufficient financial and operating information to assess the viability of a continuation under the CCAA. In the present case CMT has filed, on a confidential basis,¹¹ cash flows for the period ending January 31, 2012, which show a net positive cash flow for the period and that CMT has sufficient resources to continue operating in the CCAA proceeding, as well as to conduct a sale process without the need for additional financing.

[16] In addition, the Proposal Trustee filed on this motion its Sixth Report in which it reported on its review of the cash flow statements. Although its opinion was expressed in the language of a double negative, I take from its report that it regards the cash flow statements as reasonable.

[17] Finally, the previous extension orders made by this Court under section 50.4(9) of the BIA indicate that CMT satisfied the Court that it has been acting in good faith and with due diligence.

¹⁰ *Century Services*, para. 70.

¹¹ CMT has filed evidence explaining that disclosure of the cash flows prior to the closing of the Urban Behavior transaction would make public the proceeds expected from that transaction. I agree that such information should not be made public until the deal has closed. CMT has satisfied the principles set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 and a sealing order should issue.

E. Conclusion

[18] No interested person opposes CMT's motion to continue under the *CCAA*. Its two remaining secured creditors, CIC and CMT Sourcing, support the motion. From the evidence filed I am satisfied that CMT has satisfied the statutory condition contained in section 16(a) of the *CCAA* and that a continuation of its re-structuring under the *CCAA* would be consistent with the purposes of that Act.

IV. Sale Process

[19] In *Re Nortel Networks Corp.* Morawetz J. identified the factors which a court should consider when reviewing a proposed sale process under the *CCAA* in the absence of a plan:

- (a) is a sale transaction warranted at this time?
- (b) will the sale benefit the whole "economic community"?
- (c) do any of the debtors' creditors have a *bona fide* reason to object to a sale of the business?
- (d) is there a better viable alternative?¹²

[20] No objection has been taken to CMT's proposed sale of its Costa Blanca business or the proposed sale process under the direction of Farber as Monitor. Chris Johnson, CMT's CFO, deposed that CMT is not in a position to make a viable proposal to its creditors and has concluded that a going-concern sale of the Costa Blanca business would be the most appropriate course of action. The Proposal Trustee concurs with that assessment. In light of those opinions, an immediate sale of the Costa Blanca business would be warranted in order to attract the best bids for that business on a going-concern basis. Such a sale, according to the evidence, stands the best chance of maximizing recovery by the remaining secured creditors and preserving the employment of a large number of people. No better viable alternative has been put forward.

[21] Accordingly, I approve the proposed sale process as described in paragraph 37 of the affidavit of Chris Johnson.

V. Administration Charges

[22] CMT seeks approval under section 11.52 of the *CCAA* of an Administration Charge over the assets of CMT to secure the professional fees and disbursements of Farber as Monitor and its counsel, as well as the fees of Ernst & Young Orenda Corporate Finance Inc. ("E&Y"), who has been acting as CMT's financial advisor, together with its counsel. The order sought reflects, in

¹² *Nortel Networks, supra.*, para. 49. See also *Re Brainhunter Inc.* (2009), 62 C.B.R. (5th) 41 (Ont. S.C.J.), para. 13.

large part, the priorities of various charges approved during the *BIA* Part III proposal process. CMT proposes that the Professionals Charge approved under the *BIA* orders and the CCAA Administration Charge rank *pari passu*, and that whereas the *BIA* orders treated as ranking fourth “the balance of any indebtedness under the Professionals Charge”, the *CCAA* order would place a cap of \$250,000 on such portions of the Professionals and CCAA Administration Charges.

[23] No interested person opposes the charges sought.

[24] I am satisfied that the charge requested is appropriate given the importance of the professional advice to the completion of the Urban Behavior transaction and the sale process for the Costa Blanca business.

VI. Order granted

[25] I have reviewed the draft Initial Order submitted by CMT and am satisfied that an order should issue in that form.

[26] CMT also seeks a variation of paragraph 3 of the Approval and Vesting Order of Morawetz J. made November 7, 2011 in respect of the Urban Behavior transaction to include, in the released claims, the Professionals Charge and the CCAA Administration Charge. None of the secured creditors objects to the variation sought and it is consistent with the intent of the existing language of that order. I therefore grant the variation sought and I have signed the order.

(original signed by)

D. M. Brown J.

Date: December 16, 2011

TAB 2

CITATION: Urbancorp Inc. (Re) 2016 ONSC 3288
COURT FILE NO.: CV-16-11389-00CL
CV-16-11392-00CL
DATE: 20160525

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

IN THE MATTER OF THE COMPANIES' CREDITORS
ARRANGEMENT ACT, R.S.C. 1985, c. c-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF URBANCORP TORONTO
MANAGEMENT INC., URBANCORP (ST. CLAIR VILLAGE)
INC., URBANCORP (PATRICIA) INC., URBANCORP
(MALLOW) INC., URBANCORP (LAWRENCE) INC.,
URBANCORP DOWNSVIEW PARK DEVELOPMENT INC.,
URBANCORP RESIDENTIAL INC., URBANCORP (952 QUEEN
WEST) INC., KING RESIDENTIAL INC., URBANCORP 60 ST.
CLAIR INC., HIGH RES. INC., BRIDGE ON KING INC.
(Collectively the "Applicants") AND THE AFFILIATED
ENTITIES LISTED IN SCHEDULE "A" HERETO

AND IN THE MATTER OF URBANCORP INC.

APPLICATION OF GUY GISSIN, THE FOREIGN
REPRESENTATIVE OF URBANCORP INC., UNDER SECTION
46 OF THE *COMPANIES' CREDITORS ARRANGEMENTS ACT*,
R.S.C. 1985, c. C-36, AS AMENDED

HEARD: May 18, 2016

COUNSEL: *Edmund F.B. Lamek and Rachael Belanger*, for the Applicants

L. Joseph Latham and Tamryn Jacobson, for Guy Gissin, the Foreign
Representative of Urbancorp Inc.

Robin B. Schwill and Jay Swartz, for KSV Kofman Inc.

Jane Dietrich, for Mattany (Downsview) Inc.

Scott Bomhof, for King Liberty North Corporation

Adam Slavens, for Tarion Warranty Corporation

Heather Meredith, for Bank of Nova Scotia

Clifton P. Prophet and Frank Lamie, for Canadian Imperial Bank of Commerce

John Paul Ventrella, for Atrium Mortgage Investment Mortgage

Aubrey E. Kauffman, for Travelers Guarantee Company of Canada

Brian Empey, for Parc Downsview Park Inc.

2016 ONSC 3288 (CanLII)

NEWBOULD J.

[1] A number of Urbancorp Inc. (“UC Inc.”) subsidiaries applied on May 18, 2016 for relief under the CCAA, including relief in respect of a number of non-applicant affiliated limited partnerships which may not be insolvent.¹ Some of the applicants earlier filed a notice of intent to make a proposal under section 50.4(1) of the BIA. These applicants apply to continue the NOI proceedings in this CCAA proceeding.

[2] UC Inc. is not an applicant in this CCAA proceeding. However, it issued debentures which traded on the Tel Aviv Stock Exchange. The trustee of those bonds alleged default by UC Inc. and, after the NOI proceedings were started in Canada, initiated a claim for relief in the District Court of Tel Aviv-Yafo, Israel (the “Israeli Court”). Orders were made granting relief to the trustee and Mr. Guy Gissin was appointed by the Israeli Court as the functionary officer and foreign representative of UC Inc. He has brought proceedings under Part IV of the CCAA for an initial recognition order and a supplemental order recognizing orders made by the Israeli Court.

¹ Urbancorp New Kings Inc. was inadvertently included as an applicant when this proceeding was first commenced. It has been removed as an applicant as it is not an insolvent corporation.

[3] It is evident that these two competing applications, if not resolved in some consensual way, would cause great difficulty in any restructuring of the Urbancorp Group. Fortunately, due to the efforts of Mr. Gissin and KSV, the proposal trustee and now the proposed Monitor, and their counsel, an agreement in principle to co-operate on a process to realize upon the assets of the Urbancorp Group has been reached and is contained in a Co-operation Protocol signed by Mr. Gissin and KSV.

[4] At the conclusion of the hearing, I granted the Initial Order and the recognition and supplemental orders sought by Mr. Gissin as the foreign representative, including the approval of the Co-Operation Protocol, for reasons to follow. These are my reasons.

Factual background

[5] The Urbancorp Group was founded in 1991 by Alan Saskin. As is typical in the real estate development industry, the Urbancorp Group generally uses single purpose project specific corporations to engage in the development, construction and sale of residential properties in the greater Toronto area. Since 2015, the Urbancorp Group has essentially been organized into two branches – the corporations which are owned directly or indirectly by Mr. Saskin or members of his family, which includes UTMI, and the entities that, as of December 2015, became UC Inc. subsidiaries. The majority of the Urbancorp corporations that are applicants in this proceeding have been formed as single purposes entities in connection with the construction and ownership of specific development projects.

[6] The Urbancorp Group has redeveloped over 100 acres of former industrial lands in the GTA, turning them into downtown neighbourhoods. The Urbancorp Group was the first developer in the King West village area of Toronto and created the neighbourhood named “King West Village”. In the West Queen West Triangle area of Toronto, across from the Drake hotel, the Urbancorp Group developed most of the homes, over 1,600 in that neighbourhood. In partnership with Artscape, a nonprofit provider of affordable artist housing, the Urbancorp

Group developed 72 units of affordable artist housing in West Queen West. The Urbancorp Group has donated land and paid for public parks in the City of Toronto, including four public parks in the King and Queen West areas.

[7] The Urbancorp Group has built over 5500 homes. It delivered 1,028 homes in the past two years, and currently has 1,058 additional homes under construction.

[8] However, as a result of the recent lack of liquidity described in detail in the affidavit of Mr. Siskin, the applicants are insolvent and cannot meet their liabilities generally as they become due, and as a result, the operations of all of the Urbancorp applicants and related entities has been put at risk.

[9] Mr. Saskin in his affidavit states that the primary financial challenge facing the Urbancorp applicants and related entities at this time, particularly the entities that filed NOI proceedings, is their inability to raise the necessary financing to advance their major projects beyond their current stages of development. This is due to a number of events, including the recent steps by Tarion Warranty Corporation to revoke certain Tarion registration certificates, and events relating to UC Inc. and its issuance of debentures in Israel. These events and the publicity and press surrounding them have materially threatened the ability of the non-applicant UC entities to carry on business in the ordinary course.

[10] UC Inc. is an Ontario company created for the purpose of issuing debentures to the Israeli public on the Tel Aviv Stock Exchange. Prior to listing the debentures Mr. Saskin and his family members agreed to transfer into UC Inc. their interests in five corporations within the Urbancorp Group that directly or indirectly held interests in several investment properties, rental properties and geothermal assets in Toronto

[11] UC Inc. issued NIS 180,583,000 (approx. \$64 million based on the exchange rate at that time) par value of debentures which traded on the Tel Aviv Stock Exchange. The terms of the

debentures contemplate UC Inc. repaying the debentures in five unequal installments on December 31, 2017, June 30, 2018, December 31, 2018, June 30, 2019 and December 31, 2019. The exclusive jurisdiction to determine all matters related to the debentures lies with a competent court in the State of Israel and pursuant to the governing laws of Israel.

[12] On March 31, 2015, Tarion Warranty Corporation, which provides warranties on new residential builds in Ontario for registered builders, issued a notice of proposal to revoke 17 of the Urbancorp Group's registrations as a result of concerns about the Urbancorp Group's financial position and the high number of warranty claims made against two non UC Inc. entities. The Urbancorp Group has since appealed Tarion's decision for 11 of the 17 registrations, and allowed the balance to expire. No decision has been rendered in connection with the appeal as of this date.

[13] The indenture trustee of the Israeli debentures alleged that UC Inc. had defaulted under the terms of the debenture trust. On April 24, 2016, the trustee initiated court proceedings against UC Inc. in the Israeli Court. Prior to those proceedings being initiated, the Urbancorp Group's Israeli auditors, Israeli legal counsel and UC Inc.'s board of directors resigned, leaving Mr. Saskin as the sole director of UC Inc. The trustee's application was initially heard on the morning of Sunday, April 24, 2016, at which time the Vice President of the Israeli Court issued an injunction to prevent UC Inc. or Mr. Saskin from taking any further steps to deal with UC Inc.'s assets.

[14] On Monday, April 25, 2016, the Israeli Court appointed Mr. Gissin as the functionary officer of UC Inc., with full management control and powers over its subsidiaries. The authority granted to Mr. Gissin under the order included the authority to seize all of UC Inc.'s assets, to exercise UC Inc.'s power of control over its subsidiaries and to approach the Canadian court as an authorized representative of UC Inc. The orders of the Israeli Court would clearly have prevented Mr. Siskin from taking steps to cause the subsidiaries of UC Inc. to file for protection

under the CCAA and would have permitted Mr. Gissin to take steps to prevent the applicants from doing so.

[15] On May 4, 2016, Mr. Gissin and his counsel met with KSV and its counsel, the result of which was an agreement in principle to co-operate on a process to realize upon the assets of the Urbancorp Group through a CCAA process, with KSV having augmented powers to control management and operations of the Urbancorp Group entities which would be filing, effectively removing Saskin as a decision-maker for those companies, all as set forth in a Co-operation Protocol finalized on May 13, 2016.

[16] On May 13, 2016, each of the Urbancorp CCAA applicants and related entities, as borrowers, and UC King South, as lender, entered into an intercompany interim credit facility term sheet whereby UC King South agreed to make available to the Urbancorp entities that had filed a NOI proceeding a revolving credit facility in the amount of \$1.9 million to finance their day-to-day operations and ongoing projects. UC King South is not an applicant in this proceeding. All proceeds of the interim loan continue to be held by KSV in its trust account. Based upon the anticipated cash flow needs of the Urbancorp CCAA applicants and related entities during these restructuring proceedings, including professional fees associated with these proceedings, it is likely that the \$1.9 million may not be sufficient to see the restructuring through to its completion. As a result, the applicants intend to commence a process to secure third party debtor-in-possession financing in the near term.

Issues and analysis

(1) Recognition of Foreign Proceeding

[17] Section 46(1) of the CCAA provides for the application by a foreign representative to recognize a foreign proceeding. Pursuant to section 47(1) of the CCAA, the court shall make an

order recognizing the foreign proceeding if (i) the proceeding is a foreign proceeding and (ii) the applicant is a foreign representative of that proceeding.

[18] A foreign proceeding is broadly defined in section 47(1) to mean a judicial or an administrative proceeding in a jurisdiction outside Canada dealing with creditor's collective interests generally under any law relating to bankruptcy or insolvency in which a debtor's property and affairs are subject to control or supervision by a foreign court for the purpose of reorganization or liquidation.

[19] It is clear in this case that the proceeding in the Israeli Court is a foreign proceeding within the meaning of the CCAA. It is a judicial proceeding brought under Israel's regulations relating to requests for compromise or arrangements, and the relief granted by the Israeli Court, including the appointment of a functionary officer, was for the purpose of enhancing creditors' collective interests.

[20] Section 45(1) of the CCAA defines a foreign representative as a person or body who is authorized in a foreign proceeding in respect of a debtor company to (a) administer the debtor's property or affairs for the purpose of reorganization or liquidation or (b) act as a representative in respect of the foreign proceeding.

[21] It is also the case that the Mr. Gissin is a foreign representative in respect of the foreign proceeding. He was appointed to monitor UCI's business and financial affairs and to act as a representative in respect of the foreign proceeding. He was provided with the express authority to seize all of UC Inc.'s assets, to exercise UC Inc.'s power of control of its subsidiaries and to approach the Canadian court as an authorized representative of UC Inc.

[22] Thus the foreign proceeding in the Israeli Court is to be recognized as a foreign proceeding under section 47(1) of the CCAA.

[23] Section 47(2) requires a finding as to whether the foreign proceeding is a foreign main proceeding or a foreign non-main proceeding. If the foreign proceeding is recognized as a main proceeding, there is an automatic stay provided in section 48(1) of the CCAA against law suits concerning the debtor's property, debts, liabilities or obligations and prohibitions against selling or disposing of property in Canada. If the foreign proceeding is recognized as a non-main proceeding, there is no such automatic stay and prohibition and it is necessary for an application to be made under section 49(1) to obtain such relief. For that reason, it is advantageous for a foreign representative to seek an order recognizing the foreign proceeding as a main proceeding. Mr. Gissin in this case has made such a request.

[24] A foreign main proceeding is defined in section 45(1) as a foreign proceeding in a jurisdiction where the debtor company has the centre of its main interests (COMI). Section 45(2) provides that in the absence of proof to the contrary, a debtor company's registered office is deemed to be the centre of its main interests.

[25] In this case, UC Inc.'s registered office is in Ontario. Pursuant to the Co-operation Protocol Mr. Gissin as the foreign representative has applied to have the Israeli Court proceeding recognized as a foreign main proceeding.

[26] The Co-operation Protocol sets out in some detail an agreement to work cooperatively to maximize recoveries through an orderly process for the stakeholders of UC Inc. and the applicants. Without such an agreement, there would no doubt have been contentious proceedings between the two spheres, being the Israeli sphere and the Canadian sphere. That has been avoided. The Co-operation Protocol provides that Mr. Gissin will apply under Part IV of the CCAA to be recognized as the foreign representative of a foreign main proceeding. The applicants in the CCAA proceedings will propose that the Monitor have augmented powers to control the ordinary course management and receipt and disbursements of funds for the applicants and acknowledge that Mr. Gissin shall have standing in these proceedings to represent UC Inc. The Monitor and Mr. Gissin shall attempt to agree on the restructuring or sale process

but if they cannot agree the decision will be made by this Court on the application of the Monitor. It is agreed that so long as the Monitor acts in good faith and has not engaged in wilful conduct or gross negligence, Mr. Gissin will not take any steps to remove KSV as the Monitor or to suggest that KSV must take instruction from Mr. Gissin or the Israeli Court.

[27] Thus the parties have agreed that while the Israeli proceeding will be considered to be a foreign main proceeding, Mr. Gissin as the foreign representative has agreed that his sole control of UC Inc. and its assets that was granted to him by the Israeli Court will to a large extent be exercised by the Monitor acting under the CCAA so long as the Monitor acts in good faith collaboratively with Mr. Gissin in accordance with the Co-operation Protocol. This is a very unusual situation in that as a practical matter it is not intended that orders will be made in the future in the foreign main proceeding directing the restructuring of UC Inc. and its subsidiaries with recognition orders being sought in Canada to have such orders carried out in Canada.

[28] It is not clear that the COMI of UC Inc. is in Israeli. The proceedings started in Israel because the Prospectus and the Deed of Trust made clear that Israeli courts were to have exclusive jurisdiction to deal with matters related to UC Inc., and that insolvency proceedings regarding UC Inc. could only be brought in the State of Israel.

[29] I am reluctant however to upset the balance that has been struck in this case by the Co-operation Protocol. Mr. Gissin in his affidavit has emphasized the importance of the proceedings to the stakeholders of UC Inc. in Israel and the importance of the different legal regimes working together. He has stated:

32. This matter is one of incredible significance to stakeholders in the State of Israel, including the real estate capital markets in general. To date, to the best of my knowledge, a total of 17 North American real estate companies have issued over NIS 11 billion of bonds in Israel. UCI [UC Inc.] was the first such North American company to have gone into insolvency proceedings, and that within four months from the issuance of the Debentures. Given the size of this industry in Israel, this case is being watched very carefully to see how the different legal

regimes can work together. I am hopeful that the co-operation evidenced to date in this matter, and in particular through the Co-Operation Protocol, can be continued for the benefit of all affected stakeholders.

[30] In this case, so long as the Co-operation Protocol exists, it may not be of much importance in Canada whether the foreign proceeding is a foreign main proceeding, as Mr. Gissin would be entitled as a matter of discretion under a foreign non-main proceeding to a granting of a stay of proceedings against UC Inc. and to an order prohibiting a sale of its property in Canada without leave of the Court. It probably is of more importance in Israel in insuring that if the co-operation between the foreign representative and the Monitor no longer exists and the Monitor acts in bad faith or engages in wilful conduct or gross negligence, the foreign representative will have the ability to go back to the Israeli Court as the court in a foreign main proceeding to seek appropriate relief that could then be sought to be recognized in Canada.

[31] The applicants, the Monitor and the foreign representative are all in agreement that an order be sought declaring the Israeli proceedings as the foreign main proceedings and no one appearing is opposing the order sought. In these unusual circumstances I am prepared to make an order that the proceeding in Israel is a foreign main proceeding. It follows that the initial recognition order is to provide a stay of any proceedings against UC Inc. and prohibit UC Inc. from selling or disposing of property in Canada without leave of the Court.

[32] It would be expected that if the Israeli Court in the future changed Mr. Gissin's mandate to increase or decrease his authorities or functions or provide any additional mandate in respect of UC Inc., such orders would be brought to the attention of this Court and any application made in connection with them would be made in these Part IV proceedings.

[33] It is also appropriate that a supplemental order be made (i) recognizing the decision made in the foreign proceeding by the Israeli Court, (ii) appointing KSV as the information officer, (iii) approving the Co-operation Protocol, (iv) staying any proceedings against or in respect of Mr. Gissin as foreign representative of UC Inc., (v) granting an administration charge of

\$400,000 for the costs of the foreign representative, its legal and financial advisors and of the information officer and its counsel and (vi) approval of the funding of the costs of the foreign representative, its legal and financial advisors and of the information officer and its counsel to be covered by the interim funding charge.

[34] With respect to the administration charge, there are no secured creditors of UC Inc. The principal creditors are the Israeli bondholders under the debentures. The foreign representative and the information officer are important to the process and the quantum of the charge is reasonable.

[35] With respect to the interim financing and the charge for it, KSV presently has the amount of CAD \$1,900,000 in a trust account, which funds KSV received from UC KING SOUTH, and which funds KSV proposes to utilize as a form of interim funding for certain costs in connection with the CCAA proceedings. It is appropriate for this charge to also cover the professional fees and other reasonable costs incurred by the foreign representative in the CCAA proceedings and of the Information Officer and its counsel.

(2) Continuation under the CCAA

[36] Section 11.6(a) provides:

11.6 Notwithstanding the Bankruptcy and Insolvency Act,

(a) proceedings commenced under Part III of the Bankruptcy and Insolvency Act may be taken up and continued under this Act only if a proposal within the meaning of the Bankruptcy and Insolvency Act has not been filed under that Part;

[37] None of the Urbancorp entities that filed a notice of intention under Subsection 50.4(1) of the BIA has filed a proposal.

[38] In *Clothing for Modern Times (Re)*, 2011 ONSC 7522, Brown J. (as he then was) expressed the view that on a motion to continue under the CCAA an applicant company should place before the court evidence that the proposed continuation would be consistent with the purposes of the CCAA. Morawetz J. (as he then was) referred to and adopted the same point of view in *Comstock Canada Ltd. (Re)* (2013), 4 C.B.R. (6th) 47. I take this to be a reflection of the fact that an initial order should be made in a CCAA proceeding only if the purpose of the application is consistent with the purposes of the CCAA.

[39] In my view, the proposed continuation of the NOI proceedings as a CCAA proceeding is in accordance and consistent with the purposes of the CCAA. The purpose here is to attempt a restructuring of the Urbancorp business which is the subject of this application, including those entities which had filed NOI proceedings and other highly interconnected entities. It is under the CCAA and the jurisprudence that has developed that permits protection being provided both to the applicant companies and its related limited partnership entities that may not be insolvent. The continuation also assists in the co-operative proceeding with Mr. Gissin as the foreign representative of UC Inc. who is being recognized under Part IV of the CCAA.

[40] I am satisfied that the NOI proceedings commenced under the BIA should be taken up and continued under the CCAA.

(3) Protection under the CCAA

[41] The applicants and their related entities have total claims against them in excess of \$5 million.

[42] I am satisfied that the applicants meet the *Stelco* test of insolvency enunciated by Justice Farley in *Re Stelco Inc.* (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J.); leave to appeal to C.A. refused, [2004] O.J. No. 1903; leave to appeal to SCC refused, [2004] S.C.C.A. No. 336. The applicants are currently unable or will imminently be unable to meet such claims generally as

they become due. The primary financial challenge facing the Urbancorp applicants and their related entities is their inability to raise the necessary financing to advance their major projects beyond their current stages of development. This is due to a number of events, including the recent steps by Tarion to revoke certain Tarion registration certificates, and events relating to UC Inc. and the Israeli debentures. These events and the publicity and press surrounding them have materially threatened the ability of the non-applicant Urbancorp entities to carry on business in the ordinary course.

[43] A CCAA court may exercise its jurisdiction to extend protection by way of the stay of proceedings to a partnership related to an applicant where it is just and reasonable or just and convenient to do so. The courts have held that this relief is appropriate where the operations of a debtor company are so intertwined with those of a partner or limited partnership in question that not extending the stay would significantly impair the effectiveness of a stay in respect of the debtor company. See *Re Prizm Income Fund* (2011), 75 C.B.R. (5th) 213 per Morawetz J. The stay is not granted under section 11 of the CCAA but rather under the court's inherent jurisdiction. It has its genesis in *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 and has been followed in several cases, including *Re Canwest Publishing Inc.* (2010) 63 C.B.R. (5th) 115, *Re Calpine Energy Canada Ltd.* (2006), 19 C.B.R. (5th) 187 and *4519922 Canada Inc. (Re)* (2015), 22 C.B.R. (6th) 44.

[44] I am satisfied that the stay of proceedings provided for in the Initial Order should extend to the related limited partnerships. Each is significantly interrelated to the business of the insolvent applicants as they and their stakeholders, assets (in many cases beneficial ownership of the assets of applicants), and intercompany payables and receivables in particular, form an integral part of the operations of the Urbancorp Group. Although they are not currently technically insolvent, the evidence is that it was reasonably expected at the time of filing that, without the benefit of a stay of proceedings, they will run out of liquidity before the time that would reasonably be required to implement a restructuring.

[45] The applicants seek an interim lender's charge to secure the interim funding from UC King South. It is to be secured against those Urbancorp entities that utilize any of the funds. The applicants also seek the authority for the Monitor to utilize an aggregate of up to \$1 million of cash which exists within the Urbancorp CCAA entities, to fund the cash flow requirements of other Urbancorp CCAA affiliates on an intercompany basis during these proceedings, secured by an intercompany lender's charge over the borrower entity's assets, properties and undertakings in favour of the lender entity, to rank *pari passu* with the interim lender's charge.

[46] I am satisfied after a consideration of the factors set out in section 11.2(4) of the CCAA that these charges should be granted. The charges will be subordinate to existing secured creditors and lienholders and will not secure any pre-filing obligations². The money is clearly needed for the restructuring process and the charges are supported by the proposed Monitor who will have enhanced powers to operate the business during the restructuring with the authority to approve the advances.

[47] Other charges normal in CCAA cases are proposed. They are a director's and officer's charge in the amount of \$300,000 for the sole remaining director of the applicants after Mr. Siskin's retirement as a director and an administrative charge in the amount of \$750,000. These charges are reasonable and supported by the proposed Monitor. They are approved.

[48] At the conclusion of the hearing on May 18, 2016 I signed the Initial Order in the applicants' CCAA application and the Initial Order and supplemental orders on the application of Mr. Gissin under Part IV of the CCAA.

² An exception to the subordination to secured creditors is the Reznick Trust under the Israeli debenture which is to be subordinate to the Charges. Apparently there is still some issue because of the lack of time to deal with it as to what security if any there is to support the Reznick Trust. It may be that some future motion may be necessary to deal with this subordination exception.

Newbould J.

Released: May 25, 2016

CITATION: Urbancorp Inc. (Re) 2016 ONSC 3288
COURT FILE NO.: CV-16-11389-00CL
CV-16-11392-00CL
DATE: 20160525

**SUPERIOR COURT OF JUSTICE-ONTARIO
COMMERCIAL LIST**

**IN THE MATTER OF THE COMPANIES'
CREDITORS ARRANGEMENT ACT, R.S.C. 1985,
c. c-36, AS AMENDED**

**AND IN THE MATTER OF A PLAN OF
COMPROMISE OR ARRANGEMENT OF
URBANCORP TORONTO MANAGEMENT INC.,
URBANCORP (ST. CLAIR VILLAGE) INC.,
URBANCORP (PATRICIA) INC., URBANCORP
(MALLOW) INC., URBANCORP (LAWRENCE)
INC., URBANCORP DOWNSVIEW PARK
DEVELOPMENT INC., URBANCORP
RESIDENTIAL INC., URBANCORP (952 QUEEN
WEST) INC., KING RESIDENTIAL INC.,
URBANCORP 60 ST. CLAIR INC., HIGH RES.
INC., BRIDGE ON KING INC. (Collectively the
"Applicants") AND THE AFFILIATED
ENTITIES LISTED IN SCHEDULE "A" HERETO**

AND IN THE MATTER OF URBANCORP INC.

**APPLICATION OF GUY GISSIN, THE FOREIGN
REPRESENTATIVE OF URBANCORP INC.,
UNDER SECTION 46 OF THE *COMPANIES'
CREDITORS ARRANGEMENTS ACT*, R.S.C. 1985,
c. C-36, AS AMENDED**

REASONS FOR JUDGMENT

NEWBOULD J.

Released: May 25, 2016

TAB 3

CITATION: Target Canada Co. (Re), 2015 ONSC 303
COURT FILE NO.: CV-15-10832-00CL
DATE: 2015-01-16

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C., 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF TARGET CANADA CO., TARGET CANADA
HEALTH CO., TARGET CANADA MOBILE GP CO., TARGET CANADA
PHARMACY (BC) CORP., TARGET CANADA PHARMACY (ONTARIO)
CORP., TARGET CANADA PHARMACY CORP., TARGET CANADA
PHARMACY (SK) CORP., and TARGET CANADA PROPERTY LLC.

BEFORE: Regional Senior Justice Morawetz

COUNSEL: *Tracy Sandler and Jeremy Dacks*, for the Target Canada Co., Target Canada
Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp.,
Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target
Canada Pharmacy (SK) Corp., and Target Canada Property LLC (the
"Applicants")

Jay Swartz, for the Target Corporation

Alan Mark, Melaney Wagner, and Jesse Mighton, for the Proposed Monitor,
Alvarez and Marsal Canada ULC ("Alvarez")

Terry O'Sullivan, for The Honourable J. Ground, Trustee of the Proposed
Employee Trust

Susan Philpott, for the Proposed Employee Representative Counsel for employees
of the Applicants

HEARD and ENDORSED: January 15, 2015

REASONS: January 16, 2015

ENDORSEMENT

[1] Target Canada Co. ("TCC") and the other applicants listed above (the "Applicants") seek relief under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, as amended (the "CCAA"). While the limited partnerships listed in Schedule "A" to the draft Order (the "Partnerships") are not applicants in this proceeding, the Applicants seek to have a stay of

proceedings and other benefits of an initial order under the CCAA extended to the Partnerships, which are related to or carry on operations that are integral to the business of the Applicants.

[2] TCC is a large Canadian retailer. It is the Canadian operating subsidiary of Target Corporation, one of the largest retailers in the United States. The other Applicants are either corporations or partners of the Partnerships formed to carry on specific aspects of TCC's Canadian retail business (such as the Canadian pharmacy operations) or finance leasehold improvements in leased Canadian stores operated by TCC. The Applicants, therefore, do not represent the entire Target enterprise; the Applicants consist solely of entities that are integral to the Canadian retail operations. Together, they are referred as the "Target Canada Entities".

[3] In early 2011, Target Corporation determined to expand its retail operations into Canada, undertaking a significant investment (in the form of both debt and equity) in TCC and certain of its affiliates in order to permit TCC to establish and operate Canadian retail stores. As of today, TCC operates 133 stores, with at least one store in every province of Canada. All but three of these stores are leased.

[4] Due to a number of factors, the expansion into Canada has proven to be substantially less successful than expected. Canadian operations have shown significant losses in every quarter since stores opened. Projections demonstrate little or no prospect of improvement within a reasonable time.

[5] After exploring multiple solutions over a number of months and engaging in extensive consultations with its professional advisors, Target Corporation concluded that, in the interest of all of its stakeholders, the responsible course of action is to cease funding the Canadian operations.

[6] Without ongoing investment from Target Corporation, TCC and the other Target Canada Entities cannot continue to operate and are clearly insolvent. Due to the magnitude and complexity of the operations of the Target Canada Entities, the Applicants are seeking a stay of proceedings under the CCAA in order to accomplish a fair, orderly and controlled wind-down of their operations. The Target Canada Entities have indicated that they intend to treat all of their stakeholders as fairly and equitably as the circumstances allow, particularly the approximately 17,600 employees of the Target Canada Entities.

[7] The Applicants are of the view that an orderly wind-down under Court supervision, with the benefit of inherent jurisdiction of the CCAA, and the oversight of the proposed monitor, provides a framework in which the Target Canada Entities can, among other things:

- a) Pursue initiatives such as the sale of real estate portfolios and the sale of inventory;
- b) Develop and implement support mechanisms for employees as vulnerable stakeholders affected by the wind-down, particularly (i) an employee trust (the "Employee Trust") funded by Target Corporation; (ii) an employee representative counsel to safeguard employee interests; and (iii) a key

employee retention plan (the “KERP”) to provide essential employees who agree to continue their employment and to contribute their services and expertise to the Target Canada Entities during the orderly wind-down;

- c) Create a level playing field to ensure that all affected stakeholders are treated as fairly and equitably as the circumstances allow; and
- d) Avoid the significant maneuvering among creditors and other stakeholders that could be detrimental to all stakeholders, in the absence of a court-supervised proceeding.

[8] The Applicants are of the view that these factors are entirely consistent with the well-established purpose of a CCAA stay: to give a debtor the “breathing room” required to restructure with a view to maximizing recoveries, whether the restructuring takes place as a going concern or as an orderly liquidation or wind-down.

[9] TCC is an indirect, wholly-owned subsidiary of Target Corporation and is the operating company through which the Canadian retail operations are carried out. TCC is a Nova Scotia unlimited liability company. It is directly owned by Nicollet Enterprise 1 S. à r.l. (“NE1”), an entity organized under the laws of Luxembourg. Target Corporation (which is incorporated under the laws of the State of Minnesota) owns NE1 through several other entities.

[10] TCC operates from a corporate headquarters in Mississauga, Ontario. As of January 12, 2015, TCC employed approximately 17,600 people, almost all of whom work in Canada. TCC’s employees are not represented by a union, and there is no registered pension plan for employees.

[11] The other Target Canada Entities are all either: (i) direct or indirect subsidiaries of TCC with responsibilities for specific aspects of the Canadian retail operation; or (ii) affiliates of TCC that have been involved in the financing of certain leasehold improvements.

[12] A typical TCC store has a footprint in the range of 80,000 to 125,000 total retail square feet and is located in a shopping mall or large strip mall. TCC is usually the anchor tenant. Each TCC store typically contains an in-store Target brand pharmacy, Target Mobile kiosk and a Starbucks café. Each store typically employs approximately 100 – 150 people, described as “Team Members” and “Team Leaders”, with a total of approximately 16,700 employed at the “store level” of TCC’s retail operations.

[13] TCC owns three distribution centres (two in Ontario and one in Alberta) to support its retail operations. These centres are operated by a third party service provider. TCC also leases a variety of warehouse and office spaces.

[14] In every quarter since TCC opened its first store, TCC has faced lower than expected sales and greater than expected losses. As reported in Target Corporation’s Consolidated Financial Statements, the Canadian segment of the Target business has suffered a significant loss in every quarter since TCC opened stores in Canada.

[15] TCC is completely operationally funded by its ultimate parent, Target Corporation, and related entities. It is projected that TCC's cumulative pre-tax losses from the date of its entry into the Canadian market to the end of the 2014 fiscal year (ending January 31, 2015) will be more than \$2.5 billion. In his affidavit, Mr. Mark Wong, General Counsel and Secretary of TCC, states that this is more than triple the loss originally expected for this period. Further, if TCC's operations are not wound down, it is projected that they would remain unprofitable for at least 5 years and would require significant and continued funding from Target Corporation during that period.

[16] TCC attributes its failure to achieve expected profitability to a number of principal factors, including: issues of scale; supply chain difficulties; pricing and product mix issues; and the absence of a Canadian online retail presence.

[17] Following a detailed review of TCC's operations, the Board of Directors of Target Corporation decided that it is in the best interests of the business of Target Corporation and its subsidiaries to discontinue Canadian operations.

[18] Based on the stand-alone financial statements prepared for TCC as of November 1, 2014 (which consolidated financial results of TCC and its subsidiaries), TCC had total assets of approximately \$5.408 billion and total liabilities of approximately \$5.118 billion. Mr. Wong states that this does not reflect a significant impairment charge that will likely be incurred at fiscal year end due to TCC's financial situation.

[19] Mr. Wong states that TCC's operational funding is provided by Target Corporation. As of November 1, 2014, NE1 (TCC's direct parent) had provided equity capital to TCC in the amount of approximately \$2.5 billion. As a result of continuing and significant losses in TCC's operations, NE1 has been required to make an additional equity investment of \$62 million since November 1, 2014.

[20] NE1 has also lent funds to TCC under a Loan Facility with a maximum amount of \$4 billion. TCC owed NE1 approximately \$3.1 billion under this Facility as of January 2, 2015. The Loan Facility is unsecured. On January 14, 2015, NE1 agreed to subordinate all amounts owing by TCC to NE1 under this Loan Facility to payment in full of proven claims against TCC.

[21] As at November 1, 2014, Target Canada Property LLC ("TCC Propco") had assets of approximately \$1.632 billion and total liabilities of approximately \$1.643 billion. Mr. Wong states that this does not reflect a significant impairment charge that will likely be incurred at fiscal year end due to TCC Propco's financial situation. TCC Propco has also borrowed approximately \$1.5 billion from Target Canada Property LP and TCC Propco also owes U.S. \$89 million to Target Corporation under a Demand Promissory Note.

[22] TCC has subleased almost all the retail store leases to TCC Propco, which then made real estate improvements and sub-sub leased the properties back to TCC. Under this arrangement, upon termination of any of these sub-leases, a "make whole" payment becomes owing from TCC to TCC Propco.

[23] Mr. Wong states that without further funding and financial support from Target Corporation, the Target Canada Entities are unable to meet their liabilities as they become due, including TCC's next payroll (due January 16, 2015). The Target Canada Entities, therefore state that they are insolvent.

[24] Mr. Wong also states that given the size and complexity of TCC's operations and the numerous stakeholders involved in the business, including employees, suppliers, landlords, franchisees and others, the Target Canada Entities have determined that a controlled wind-down of their operations and liquidation under the protection of the CCAA, under Court supervision and with the assistance of the proposed monitor, is the only practical method available to ensure a fair and orderly process for all stakeholders. Further, Mr. Wong states that TCC and Target Corporation seek to benefit from the framework and the flexibility provided by the CCAA in effecting a controlled and orderly wind-down of the Canadian operations, in a manner that treats stakeholders as fairly and as equitably as the circumstances allow.

[25] On this initial hearing, the issues are as follows:

- a) Does this court have jurisdiction to grant the CCAA relief requested?
 - a) Should the stay be extended to the Partnerships?
 - b) Should the stay be extended to "Co-tenants" and rights of third party tenants?
 - c) Should the stay extend to Target Corporation and its U.S. subsidiaries in relation to claims that are derivative of claims against the Target Canada Entities?
 - d) Should the Court approve protections for employees?
 - e) Is it appropriate to allow payment of certain pre-filing amounts?
 - f) Does this court have the jurisdiction to authorize pre-filing claims to "critical" suppliers;
 - g) Should the court should exercise its discretion to authorize the Applicants to seek proposals from liquidators and approve the financial advisor and real estate advisor engagement?
 - h) Should the court exercise its discretion to approve the Court-ordered charges?

[26] "Insolvent" is not expressly defined in the CCAA. However, for the purposes of the CCAA, a debtor is insolvent if it meets the definition of an "insolvent person" in section 2 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 ("BIA") or if it is "insolvent" as described in *Stelco Inc. (Re)*, [2004] O.J. No. 1257, [*Stelco*], leave to appeal refused, [2004] O.J. No. 1903, leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 336, where Farley, J. found that "insolvency" includes a corporation "reasonably expected to run out of liquidity within [a]

reasonable proximity of time as compared with the time reasonably required to implement a restructuring” (at para 26). The decision of Farley, J. in *Stelco* was followed in *Prizm Income Fund (Re)*, [2011] O.J. No. 1491 (SCJ), 2011 and *Canwest Global Communications Corp. (Re)*, [2009] O.J. No. 4286, (SCJ) [*Canwest*].

[27] Having reviewed the record and hearing submissions, I am satisfied that the Target Canada Entities are all insolvent and are debtor companies to which the CCAA applies, either by reference to the definition of “insolvent person” under the *Bankruptcy and Insolvency Act* (the “BIA”) or under the test developed by Farley J. in *Stelco*.

[28] I also accept the submission of counsel to the Applicants that without the continued financial support of Target Corporation, the Target Canada Entities face too many legal and business impediments and too much uncertainty to wind-down their operations without the “breathing space” afforded by a stay of proceedings or other available relief under the CCAA.

[29] I am also satisfied that this Court has jurisdiction over the proceeding. Section 9(1) of the CCAA provides that an application may be made to the court that has jurisdiction in (a) the province in which the head office or chief place of business of the company in Canada is situated; or (b) any province in which the company’s assets are situated, if there is no place of business in Canada.

[30] In this case, the head office and corporate headquarters of TCC is located in Mississauga, Ontario, where approximately 800 employees work. Moreover, the chief place of business of the Target Canada Entities is Ontario. A number of office locations are in Ontario; 2 of TCC’s 3 primary distribution centres are located in Ontario; 55 of the TCC retail stores operate in Ontario; and almost half the employees that support TCC’s operations work in Ontario.

[31] The Target Canada Entities state that the purpose for seeking the proposed initial order in these proceedings is to effect a fair, controlled and orderly wind-down of their Canadian retail business with a view to developing a plan of compromise or arrangement to present to their creditors as part of these proceedings. I accept the submissions of counsel to the Applicants that although there is no prospect that a restructured “going concern” solution involving the Target Canada Entities will result, the use of the protections and flexibility afforded by the CCAA is entirely appropriate in these circumstances. In arriving at this conclusion, I have noted the comments of the Supreme Court of Canada in *Century Services Inc. v. Canada (Attorney General)*, [2010] SCC 50 (“*Century Services*”) that “courts frequently observe that the CCAA is skeletal in nature”, and does not “contain a comprehensive code that lays out all that is permitted or barred”. The flexibility of the CCAA, particularly in the context of large and complex restructurings, allows for innovation and creativity, in contrast to the more “rules-based” approach of the BIA.

[32] Prior to the 2009 amendments to the CCAA, Canadian courts accepted that, in appropriate circumstances, debtor companies were entitled to seek the protection of the CCAA where the outcome was not going to be a going concern restructuring, but instead, a “liquidation” or wind-down of the debtor companies’ assets or business.

[33] The 2009 amendments did not expressly address whether the CCAA could be used generally to wind-down the business of a debtor company. However, I am satisfied that the enactment of section 36 of the CCAA, which establishes a process for a debtor company to sell assets outside the ordinary course of business while under CCAA protection, is consistent with the principle that the CCAA can be a vehicle to downsize or wind-down a debtor company's business.

[34] In this case, the sheer magnitude and complexity of the Target Canada Entities business, including the number of stakeholders whose interests are affected, are, in my view, suited to the flexible framework and scope for innovation offered by this "skeletal" legislation.

[35] The required audited financial statements are contained in the record.

[36] The required cash flow statements are contained in the record.

[37] Pursuant to s. 11.02 of the CCAA, the court may make an order staying proceedings, restraining further proceedings, or prohibiting the commencement of proceedings, "on any terms that it may impose" and "effective for the period that the court considers necessary" provided the stay is no longer than 30 days. The Target Canada Entities, in this case, seek a stay of proceedings up to and including February 13, 2015.

[38] Certain of the corporate Target Canada Entities (TCC, TCC Health and TCC Mobile) act as general or limited partners in the partnerships. The Applicants submit that it is appropriate to extend the stay of proceedings to the Partnerships on the basis that each performs key functions in relation to the Target Canada Entities' businesses.

[39] The Applicants also seek to extend the stay to Target Canada Property LP which was formerly the sub-leasee/sub-sub lessor under the sub-sub lease back arrangement entered into by TCC to finance the leasehold improvements in its leased stores. The Applicants contend that the extension of the stay to Target Canada Property LP is necessary in order to safeguard it against any residual claims that may be asserted against it as a result of TCC Propco's insolvency and filing under the CCAA.

[40] I am satisfied that it is appropriate that an initial order extending the protection of a CCAA stay of proceedings under section 11.02(1) of the CCAA should be granted.

[41] Pursuant to section 11.7(1) of the CCAA, Alvarez & Marsal Inc. is appointed as Monitor.

[42] It is well established that the court has the jurisdiction to extend the protection of the stay of proceedings to Partnerships in order to ensure that the purposes of the CCAA can be achieved (see: *Lehndorff General Partner Ltd. (1993)*, 17 CBR (3d) 24 (Ont. Gen. Div.); *Re Prizm Income Fund*, 2011 ONSC 2061; *Re Canwest Publishing Inc.* 2010 ONSC 222 ("*Canwest Publishing*") and *Re Canwest Global Communications Corp.*, 2009 CarswellOnt 6184 ("*Canwest Global*").

[43] In these circumstances, I am also satisfied that it is appropriate to extend the stay to the Partnerships as requested.

[44] The Applicants also seek landlord protection in relation to third party tenants. Many retail leases of non-anchored tenants provide that tenants have certain rights against their landlords if the anchor tenant in a particular shopping mall or centre becomes insolvent or ceases operations. In order to alleviate the prejudice to TCC's landlords if any such non-anchored tenants attempt to exercise these rights, the Applicants request an extension of the stay of proceedings (the "Co-Tenancy Stay") to all rights of these third party tenants against the landlords that arise out of the insolvency of the Target Canada Entities or as a result of any steps taken by the Target Canada Entities pursuant to the Initial Order.

[45] The Applicants contend that the authority to grant the Co-Tenancy Stay derives from the broad jurisdiction under sections 11 and 11.02(1) of the CCAA to make an initial order on any terms that the court may impose. Counsel references *Re T. Eaton Co.*, 1997 CarswellOnt 1914 (Gen. Div.) as a precedent where a stay of proceedings of the same nature as the Co-Tenancy Stay was granted by the court in Eaton's second CCAA proceeding. The Court noted that, if tenants were permitted to exercise these "co-tenancy" rights during the stay, the claims of the landlord against the debtor company would greatly increase, with a potentially detrimental impact on the restructuring efforts of the debtor company.

[46] In these proceedings, the Target Canada Entities propose, as part of the orderly wind-down of their businesses, to engage a financial advisor and a real estate advisor with a view to implementing a sales process for some or all of its real estate portfolio. The Applicants submit that it is premature to determine whether this process will be successful, whether any leases will be conveyed to third party purchasers for value and whether the Target Canada Entities can successfully develop and implement a plan that their stakeholders, including their landlords, will accept. The Applicants further contend that while this process is being resolved and the orderly wind-down is underway, the Co-Tenancy Stay is required to postpone the contractual rights of these tenants for a finite period. The Applicants contend that any prejudice to the third party tenants' clients is significantly outweighed by the benefits of the Co-Tenancy Stay to all of the stakeholders of the Target Canada Entities during the wind-down period.

[47] The Applicants therefore submit that it is both necessary and appropriate to grant the Co-Tenancy Stay in these circumstances.

[48] I am satisfied the Court has the jurisdiction to grant such a stay. In my view, it is appropriate to preserve the status quo at this time. To the extent that the affected parties wish to challenge the broad nature of this stay, the same can be addressed at the "comeback hearing".

[49] The Applicants also request that the benefit of the stay of proceedings be extended (subject to certain exceptions related to the cash management system) to Target Corporation and its U.S. subsidiaries in relation to claims against these entities that are derivative of the primary liability of the Target Canada Entities.

[50] I am satisfied that the Court has the jurisdiction to grant such a stay. In my view, it is appropriate to preserve the status quo at this time and the stay is granted, again, subject to the proviso that affected parties can challenge the broad nature of the stay at a comeback hearing directed to this issue.

[51] With respect to the protection of employees, it is noted that TCC employs approximately 17,600 individuals.

[52] Mr. Wong contends that TCC and Target Corporation have always considered their employees to be integral to the Target brand and business. However, the orderly wind-down of the Target Canada Entities' business means that the vast majority of TCC employees will receive a notice immediately after the CCAA filing that their employment is to be terminated as part of the wind-down process.

[53] In order to provide a measure of financial security during the orderly wind-down and to diminish financial hardship that TCC employees may suffer, Target Corporation has agreed to fund an Employee Trust to a maximum of \$70 million.

[54] The Applicants seek court approval of the Employee Trust which provides for payment to eligible employees of certain amounts, such as the balance of working notice following termination. Counsel contends that the Employee Trust was developed in consultation with the proposed monitor, who is the administrator of the trust, and is supported by the proposed Representative Counsel. The proposed trustee is The Honourable J. Ground. The Employee Trust is exclusively funded by Target Corporation and the costs associated with administering the Employee Trust will be borne by the Employee Trust, not the estate of Target Canada Entities. Target Corporation has agreed not to seek to recover from the Target Canada Entities estates any amounts paid out to employee beneficiaries under the Employee Trust.

[55] In my view, it is questionable as to whether court authorization is required to implement the provisions of the Employee Trust. It is the third party, Target Corporation, that is funding the expenses for the Employee Trust and not one of the debtor Applicants. However, I do recognize that the implementation of the Employee Trust is intertwined with this proceeding and is beneficial to the employees of the Applicants. To the extent that Target Corporation requires a court order authorizing the implementation of the employee trust, the same is granted.

[56] The Applicants seek the approval of a KERP and the granting of a court ordered charge up to the aggregate amount of \$6.5 million as security for payments under the KERP. It is proposed that the KERP Charge will rank after the Administration Charge but before the Directors' Charge.

[57] The approval of a KERP and related KERP Charge is in the discretion of the Court. KERPs have been approved in numerous CCAA proceedings, including *Re Nortel Networks Corp.*, 2009 CarswellOnt 1330 (S.C.J.) [*Nortel Networks (KERP)*], and *Re Grant Forest Products Inc.*, 2009 CarswellOnt 4699 (Ont. S.C.J.). In *U.S. Steel Canada Inc.*, 2014 ONSC 6145, I recently approved the KERP for employees whose continued services were critical to the stability of the business and for the implementation of the marketing process and whose services

could not easily be replaced due, in part, to the significant integration between the debtor company and its U.S. parent.

[58] In this case, the KERP was developed by the Target Canada Entities in consultation with the proposed monitor. The proposed KERP and KERP Charge benefits between 21 and 26 key management employees and approximately 520 store-level management employees.

[59] Having reviewed the record, I am of the view that it is appropriate to approve the KERP and the KERP Charge. In arriving at this conclusion, I have taken into account the submissions of counsel to the Applicants as to the importance of having stability among the key employees in the liquidation process that lies ahead.

[60] The Applicants also request the Court to appoint Koskie Minsky LLP as employee representative counsel (the "Employee Representative Counsel"), with Ms. Susan Philpott acting as senior counsel. The Applicants contend that the Employee Representative Counsel will ensure that employee interests are adequately protected throughout the proceeding, including by assisting with the Employee Trust. The Applicants contend that at this stage of the proceeding, the employees have a common interest in the CCAA proceedings and there appears to be no material conflict existing between individual or groups of employees. Moreover, employees will be entitled to opt out, if desired.

[61] I am satisfied that section 11 of the CCAA and the *Rules of Civil Procedure* confer broad jurisdiction on the court to appoint Representative Counsel for vulnerable stakeholder groups such as employee or investors (see *Re Nortel Networks Corp.*, 2009 CarswellOnt 3028 (S.C.J.) (Nortel Networks Representative Counsel)). In my view, it is appropriate to approve the appointment of Employee Representative Counsel and to provide for the payment of fees for such counsel by the Applicants. In arriving at this conclusion, I have taken into account:

- (i) the vulnerability and resources of the groups sought to be represented;
- (ii) the social benefit to be derived from the representation of the groups;
- (iii) the avoidance of multiplicity of legal retainers; and
- (iv) the balance of convenience and whether it is fair and just to creditors of the estate.

[62] The Applicants also seek authorization, if necessary, and with the consent of the Monitor, to make payments for pre-filing amounts owing and arrears to certain critical third parties that provide services integral to TCC's ability to operate during and implement its controlled and orderly wind-down process.

[63] Although the objective of the CCAA is to maintain the status quo while an insolvent company attempts to negotiate a plan of arrangement with its creditors, the courts have expressly acknowledged that preservation of the status quo does not necessarily entail the preservation of the relative pre-stay debt status of each creditor.

[64] The Target Canada Entities seek authorization to pay pre-filing amounts to certain specific categories of suppliers, if necessary and with the consent of the Monitor. These include:

- a) Logistics and supply chain providers;
- b) Providers of credit, debt and gift card processing related services; and
- c) Other suppliers up to a maximum aggregate amount of \$10 million, if, in the opinion of the Target Canada Entities, the supplier is critical to the orderly wind-down of the business.

[65] In my view, having reviewed the record, I am satisfied that it is appropriate to grant this requested relief in respect of critical suppliers.

[66] In order to maximize recovery for all stakeholders, TCC indicates that it intends to liquidate its inventory and attempt to sell the real estate portfolio, either en bloc, in groups, or on an individual property basis. The Applicants therefore seek authorization to solicit proposals from liquidators with a view to entering into an agreement for the liquidation of the Target Canada Entities inventory in a liquidation process.

[67] TCC's liquidity position continues to deteriorate. According to Mr. Wong, TCC and its subsidiaries have an immediate need for funding in order to satisfy obligations that are coming due, including payroll obligations that are due on January 16, 2015. Mr. Wong states that Target Corporation and its subsidiaries are no longer willing to provide continued funding to TCC and its subsidiaries outside of a CCAA proceeding. Target Corporation (the "DIP Lender") has agreed to provide TCC and its subsidiaries (collectively, the "Borrower") with an interim financing facility (the "DIP Facility") on terms advantageous to the Applicants in the form of a revolving credit facility in an amount up to U.S. \$175 million. Counsel points out that no fees are payable under the DIP Facility and interest is to be charged at what they consider to be the favourable rate of 5%. Mr. Wong also states that it is anticipated that the amount of the DIP Facility will be sufficient to accommodate the anticipated liquidity requirements of the Borrower during the orderly wind-down process.

[68] The DIP Facility is to be secured by a security interest on all of the real and personal property owned, leased or hereafter acquired by the Borrower. The Applicants request a court-ordered charge on the property of the Borrower to secure the amount actually borrowed under the DIP Facility (the "DIP Lenders Charge"). The DIP Lenders Charge will rank in priority to all unsecured claims, but subordinate to the Administration Charge, the KERP Charge and the Directors' Charge.

[69] The authority to grant an interim financing charge is set out at section 11.2 of the CCAA. Section 11.2(4) sets out certain factors to be considered by the court in deciding whether to grant the DIP Financing Charge.

[70] The Target Canada Entities did not seek alternative DIP Financing proposals based on their belief that the DIP Facility was being offered on more favourable terms than any other

potentially available third party financing. The Target Canada Entities are of the view that the DIP Facility is in the best interests of the Target Canada Entities and their stakeholders. I accept this submission and grant the relief as requested.

[71] Accordingly, the DIP Lenders' Charge is granted in the amount up to U.S. \$175 million and the DIP Facility is approved.

[72] Section 11 of the CCAA provides the court with the authority to allow the debtor company to enter into arrangements to facilitate a restructuring under the CCAA. The Target Canada Entities wish to retain Lazard and Northwest to assist them during the CCAA proceeding. Both the Target Canada Entities and the Monitor believe that the quantum and nature of the remuneration to be paid to Lazard and Northwest is fair and reasonable. In these circumstances, I am satisfied that it is appropriate to approve the engagement of Lazard and Northwest.

[73] With respect to the Administration Charge, the Applicants are requesting that the Monitor, along with its counsel, counsel to the Target Canada Entities, independent counsel to the Directors, the Employee Representative Counsel, Lazard and Northwest be protected by a court ordered charge and all the property of the Target Canada Entities up to a maximum amount of \$6.75 million as security for their respective fees and disbursements (the "Administration Charge"). Certain fees that may be payable to Lazard are proposed to be protected by a Financial Advisor Subordinated Charge.

[74] In *Canwest Publishing Inc.*, 2010 ONSC 222, Pepall J. (as she then was) provided a non-exhaustive list of factors to be considered in approving an administration charge, including:

- a. The size and complexity of the business being restructured;
- b. The proposed role of the beneficiaries of the charge;
- c. Whether there is an unwarranted duplication of roles;
- d. Whether the quantum of the proposed Charge appears to be fair and reasonable;
- e. The position of the secured creditors likely to be affected by the Charge; and
- f. The position of the Monitor.

[75] Having reviewed the record, I am satisfied, that it is appropriate to approve the Administration Charge and the Financial Advisor Subordinated Charge.

[76] The Applicants seek a Directors' and Officers' charge in the amount of up to \$64 million. The Directors Charge is proposed to be secured by the property of the Target Canada Entities and to rank behind the Administration Charge and the KERP Charge, but ahead of the DIP Lenders' Charge.

[77] Pursuant to section 11.51 of the CCAA, the court has specific authority to grant a “super priority” charge to the directors and officers of a company as security for the indemnity provided by the company in respect of certain obligations.

[78] I accept the submissions of counsel to the Applicants that the requested Directors’ Charge is reasonable given the nature of the Target Canada Entities retail business, the number of employees in Canada and the corresponding potential exposure of the directors and officers to personal liability. Accordingly, the Directors’ Charge is granted.

[79] In the result, I am satisfied that it is appropriate to grant the Initial Order in these proceedings.

[80] The stay of proceedings is in effect until February 13, 2015.

[81] A comeback hearing is to be scheduled on or prior to February 13, 2015. I recognize that there are many aspects of the Initial Order that go beyond the usual first day provisions. I have determined that it is appropriate to grant this broad relief at this time so as to ensure that the status quo is maintained.

[82] The comeback hearing is to be a “true” comeback hearing. In moving to set aside or vary any provisions of this order, moving parties do not have to overcome any onus of demonstrating that the order should be set aside or varied.

[83] Finally, a copy of Lazard’s engagement letter (the “Lazard Engagement Letter”) is attached as Confidential Appendix “A” to the Monitor’s pre-filing report. The Applicants request that the Lazard Engagement Letter be sealed, as the fee structure contemplated in the Lazard Engagement Letter could potentially influence the structure of bids received in the sales process.

[84] Having considered the principles set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 211 D.L.R (4th) 193 2 S.C.R. 522, I am satisfied that it is appropriate in the circumstances to seal Confidential Appendix “A” to the Monitor’s pre-filing report.

[85] The Initial Order has been signed in the form presented.

Regional Senior Justice Morawetz

Date: January 16, 2015

TAB 4

Century Services Inc. *Appellant*

v.

**Attorney General of Canada on behalf
of Her Majesty The Queen in Right of
Canada** *Respondent*INDEXED AS: CENTURY SERVICES INC. v. CANADA
(ATTORNEY GENERAL)

2010 SCC 60

File No.: 33239.

2010: May 11; 2010: December 16.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps,
Fish, Abella, Charron, Rothstein and Cromwell JJ.ON APPEAL FROM THE COURT OF APPEAL FOR
BRITISH COLUMBIA

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.

Century Services Inc. *Appelante*

c.

**Procureur général du Canada au
nom de Sa Majesté la Reine du chef du
Canada** *Intimé*RÉPERTORIÉ : CENTURY SERVICES INC. c. CANADA
(PROCUREUR GÉNÉRAL)

2010 CSC 60

N° du greffe : 33239.

2010 : 11 mai; 2010 : 16 décembre.

Présents : La juge en chef McLachlin et les juges Binnie,
LeBel, Deschamps, Fish, Abella, Charron, Rothstein et
Cromwell.EN APPEL DE LA COUR D'APPEL DE LA
COLOMBIE-BRITANNIQUE

Faillite et insolvabilité — Priorités — Demande de la Couronne à la société débitrice, la veille de la faillite, sollicitant le paiement au receveur général du Canada de la somme détenue en fiducie au titre de la TPS — La fiducie réputée établie par la Loi sur la taxe d'accise en faveur de la Couronne l'emporte-t-elle sur les dispositions de la Loi sur les arrangements avec les créanciers des compagnies censées neutraliser ces fiducies? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36, art. 18.3(1) — Loi sur la taxe d'accise, L.R.C. 1985, ch. E-15, art. 222(3).

Faillite et insolvabilité — Procédure — Le juge en cabinet avait-il le pouvoir, d'une part, de lever partiellement la suspension des procédures pour permettre à la compagnie débitrice de faire cession de ses biens en faillite et, d'autre part, de suspendre les mesures prises par la Couronne pour bénéficier de la fiducie réputée se rapportant à la TPS? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36, art. 11.

Fiducies — Fiducies expresses — Somme perçue au titre de la TPS mais non versée à la Couronne — Ordonnance du juge exigeant que la TPS soit détenue par le contrôleur dans son compte en fiducie — Le fait que le montant de TPS réclamé par la Couronne soit détenu séparément dans le compte du contrôleur a-t-il créé une fiducie expresse en faveur de la Couronne?

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.

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

La compagnie débitrice a déposé une requête sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies* (« LACC ») et obtenu la suspension des procédures dans le but de réorganiser ses finances. Parmi les dettes de la compagnie débitrice au début de la réorganisation figurait une somme due à la Couronne, mais non versée encore, au titre de la taxe sur les produits et services (« TPS »). Le paragraphe 222(3) de la *Loi sur la taxe d'accise* (« LTA ») crée une fiducie réputée visant les sommes de TPS non versées. Cette fiducie s'applique malgré tout autre texte législatif du Canada sauf la *Loi sur la faillite et l'insolvabilité* (« LFI »). Toutefois, le par. 18.3(1) de la LACC prévoyait que, sous réserve de certaines exceptions, dont aucune ne concerne la TPS, les fiducies réputées établies par la loi en faveur de la Couronne ne s'appliquaient pas sous son régime.

Le juge siégeant en son cabinet chargé d'appliquer la LACC a approuvé par ordonnance le paiement à Century Services, le principal créancier garanti du débiteur, d'une somme d'au plus cinq millions de dollars. Toutefois, il a également ordonné à la compagnie débitrice de retenir un montant égal aux sommes de TPS non versées et de le déposer séparément dans le compte en fiducie du contrôleur jusqu'à l'issue de la réorganisation. Ayant conclu que la réorganisation n'était pas possible, la compagnie débitrice a demandé au tribunal de lever partiellement la suspension des procédures pour lui permettre de faire cession de ses biens en vertu de la LFI. La Couronne a demandé par requête le paiement immédiat au receveur général des sommes de TPS non versées. Le juge siégeant en son cabinet a rejeté la requête de la Couronne et autorisé la cession des biens. La Cour d'appel a accueilli l'appel pour deux raisons. Premièrement, elle a conclu que, après que la tentative de réorganisation eut échoué, le juge siégeant en son cabinet était tenu, en raison de la priorité établie par la LTA, d'autoriser le paiement à la Couronne des sommes qui lui étaient dues au titre de la TPS, et que l'art. 11 de la LACC ne lui conférait pas le pouvoir discrétionnaire de maintenir la suspension de la demande de la Couronne. Deuxièmement, la Cour d'appel a conclu que, en ordonnant la ségrégation des sommes de TPS dans le compte en fiducie du contrôleur, le juge siégeant en son cabinet avait créé une fiducie expresse en faveur de la Couronne.

Arrêt (la juge Abella est dissidente) : Le pourvoi est accueilli.

La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Charron, Rothstein et Cromwell : Il est possible de résoudre le conflit apparent entre le par. 222(3) de la LTA et le par. 18.3(1) de la LACC en les interprétant d'une manière qui tienne compte adéquatement de l'historique de la LACC, de la fonction de cette loi parmi

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,

l'ensemble des textes adoptés par le législateur fédéral en matière d'insolvabilité et des principes d'interprétation de la *LACC* reconnus dans la jurisprudence. L'historique de la *LACC* permet de distinguer celle-ci de la *LFI* en ce sens que, bien que ces lois aient pour objet d'éviter les coûts sociaux et économiques liés à la liquidation de l'actif d'un débiteur, la *LACC* offre plus de souplesse et accorde aux tribunaux un plus grand pouvoir discrétionnaire que le mécanisme fondé sur des règles de la *LFI*, ce qui rend la première mieux adaptée aux réorganisations complexes. Comme la *LACC* ne précise pas ce qui arrive en cas d'échec de la réorganisation, la *LFI* fournit la norme de référence permettant aux créanciers de savoir s'ils ont la priorité dans l'éventualité d'une faillite. Le travail de réforme législative contemporain a principalement visé à harmoniser les aspects communs à la *LACC* et à la *LFI*, et l'une des caractéristiques importantes de cette réforme est la réduction des priorités dont jouit la Couronne. Par conséquent, la *LACC* et la *LFI* contiennent toutes deux des dispositions neutralisant les fiducies réputées établies en vertu d'un texte législatif en faveur de la Couronne, et toutes deux comportent des exceptions expresses à la règle générale qui concernent les fiducies réputées établies à l'égard des retenues à la source. Par ailleurs, ces deux lois considèrent les autres créances de la Couronne comme des créances non garanties. Ces lois ne comportent pas de dispositions claires et expresses établissant une exception pour les créances relatives à la TPS.

Les tribunaux appelés à résoudre le conflit apparent entre le par. 222(3) de la *LTA* et le par. 18.3(1) de la *LACC* ont été enclins à appliquer l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* et à trancher en faveur de la *LTA*. Il ne convient pas de suivre cet arrêt. C'est plutôt la *LACC* qui énonce la règle applicable. Le paragraphe 222(3) de la *LTA* ne révèle aucune intention explicite du législateur d'abroger l'art. 18.3 de la *LACC*. Quand le législateur a voulu protéger certaines créances de la Couronne au moyen de fiducies réputées et voulu que celles-ci continuent de s'appliquer en situation d'insolvabilité, il l'a indiqué de manière explicite et minutieuse. En revanche, il n'existe aucune disposition législative expresse permettant de conclure que les créances relatives à la TPS bénéficient d'un traitement préférentiel sous le régime de la *LACC* ou de la *LFI*. Il semble découler de la logique interne de la *LACC* que la fiducie réputée établie à l'égard de la TPS est visée par la renonciation du législateur à sa priorité. Il y aurait une étrange asymétrie si l'on concluait que la *LACC* ne traite pas les fiducies réputées à l'égard de la TPS de la même manière que la *LFI*, car cela encouragerait les créanciers à recourir à la loi la plus favorable, minerait les objectifs réparateurs de la *LACC* et risquerait de favoriser les maux sociaux que l'édition de ce texte législatif visait justement à

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.

prévenir. Le paragraphe 222(3) de la *LTA*, une disposition plus récente et générale que le par. 18.3(1) de la *LACC*, n'exige pas l'application de la doctrine de l'abrogation implicite dans les circonstances de la présente affaire. En tout état de cause, par suite des modifications apportées récemment à la *LACC* en 2005, l'art. 18.3 a été reformulé et renuméroté, ce qui en fait la disposition postérieure. Cette constatation confirme que c'est dans la *LACC* qu'est exprimée l'intention du législateur en ce qui a trait aux fiducies réputées visant la TPS. Le conflit entre la *LTA* et la *LACC* est plus apparent que réel.

L'exercice par les tribunaux de leurs pouvoirs discrétionnaires a fait en sorte que la *LACC* a évolué et s'est adaptée aux besoins commerciaux et sociaux contemporains. Comme les réorganisations deviennent très complexes, les tribunaux chargés d'appliquer la *LACC* ont été appelés à innover. Les tribunaux doivent d'abord interpréter les dispositions de la *LACC* avant d'invoquer leur compétence inhérente ou leur compétence en equity pour établir leur pouvoir de prendre des mesures dans le cadre d'une procédure fondée sur la *LACC*. À cet égard, il faut souligner que le texte de la *LACC* peut être interprété très largement. La possibilité pour le tribunal de rendre des ordonnances plus spécifiques n'a pas pour effet de restreindre la portée des termes généraux utilisés dans la *LACC*. L'opportunité, la bonne foi et la diligence sont des considérations de base que le tribunal devrait toujours garder à l'esprit lorsqu'il exerce les pouvoirs conférés par la *LACC*. Il s'agit de savoir si l'ordonnance contribuera utilement à la réalisation de l'objectif d'éviter les pertes sociales et économiques résultant de la liquidation d'une compagnie insolvable. Ce critère s'applique non seulement à l'objectif de l'ordonnance, mais aussi aux moyens utilisés. En l'espèce, l'ordonnance du juge siégeant en son cabinet qui a suspendu l'exécution des mesures de recouvrement de la Couronne à l'égard de la TPS contribuait à la réalisation des objectifs de la *LACC*, parce qu'elle avait pour effet de dissuader les créanciers d'entraver une liquidation ordonnée et favorisait une transition harmonieuse entre la *LACC* et la *LFI*, répondant ainsi à l'objectif — commun aux deux lois — qui consiste à avoir une seule procédure. Le passage de la *LACC* à la *LFI* peut exiger la levée partielle d'une suspension de procédures ordonnée en vertu de la *LACC*, de façon à permettre l'engagement des procédures fondées sur la *LFI*, mais il n'existe aucun hiatus entre ces lois étant donné qu'elles s'appliquent de concert et que, dans les deux cas, les créanciers examinent le régime de distribution prévu par la *LFI* pour connaître la situation qui serait la leur en cas d'échec de la réorganisation. L'ampleur du pouvoir discrétionnaire conféré au tribunal par la *LACC* suffit pour établir une passerelle vers une liquidation opérée sous le régime de la *LFI*. Le juge siégeant en son cabinet pouvait donc rendre l'ordonnance qu'il a prononcée.

No express trust was created by the chambers judge's order in this case because there is no certainty of object inferable 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 unmistakable 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.

L'ordonnance du juge siégeant en son cabinet n'a pas créé de fiducie expresse en l'espèce, car aucune certitude d'objet ne peut être inférée de cette ordonnance. La création d'une fiducie expresse exige la présence de certitudes quant à l'intention, à la matière et à l'objet. Lorsque le juge siégeant en son cabinet a accepté la proposition que les sommes soient détenues séparément dans le compte en fiducie du contrôleur, il n'existait aucune certitude que la Couronne serait le bénéficiaire ou l'objet de la fiducie, car il y avait un doute quant à la question de savoir qui au juste pourrait toucher l'argent en fin de compte. De toute façon, suivant l'interprétation du par. 18.3(1) de la *LACC* dégagée précédemment, aucun différend ne saurait même exister quant à l'argent, étant donné que la priorité accordée aux réclames de la Couronne fondées sur la fiducie réputée visant la TPS ne s'applique pas sous le régime de la *LACC* et que la Couronne est reléguée au rang de créancier non garanti à l'égard des sommes en question.

Le juge Fish : Les sommes perçues par la débitrice au titre de la TPS ne font l'objet d'aucune fiducie réputée ou priorité en faveur de la Couronne. Au cours des dernières années, le législateur fédéral a procédé à un examen approfondi du régime canadien d'insolvabilité, mais il a refusé de modifier les dispositions qui sont en cause dans la présente affaire. Il s'agit d'un exercice délibéré du pouvoir discrétionnaire de légiférer. Par contre, en maintenant, malgré l'existence des procédures d'insolvabilité, la validité de fiducies réputées créées en vertu de la *LTA*, les tribunaux ont protégé indûment des droits de la Couronne que le Parlement avait lui-même choisi de subordonner à d'autres créances prioritaires. Dans le contexte du régime canadien d'insolvabilité, il existe une fiducie réputée uniquement lorsqu'une disposition législative crée la fiducie et qu'une disposition de la *LACC* ou de la *LFI* confirme explicitement l'existence de la fiducie. La *Loi de l'impôt sur le revenu*, le *Régime de pensions du Canada* et la *Loi sur l'assurance-emploi* renferment toutes des dispositions relatives aux fiducies réputées dont le libellé offre une ressemblance frappante avec celui de l'art. 222 de la *LTA*, mais le maintien en vigueur des fiducies réputées créées en vertu de ces dispositions est confirmé à l'art. 37 de la *LACC* et au par. 67(3) de la *LFI* en termes clairs et explicites. La situation est différente dans le cas de la fiducie réputée créée par la *LTA*. Bien que le législateur crée en faveur de la Couronne une fiducie réputée dans laquelle seront conservées les sommes recueillies au titre de la TPS mais non encore versées, et bien qu'il prétende maintenir cette fiducie en vigueur malgré les dispositions à l'effet contraire de toute loi fédérale ou provinciale, il ne confirme pas l'existence de la fiducie dans la *LFI* ou la *LACC*, ce qui témoigne de son intention de laisser la fiducie réputée devenir caduque au moment de l'introduction de la procédure d'insolvabilité.

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.

La juge Abella (dissidente) : Le paragraphe 222(3) de la *LTA* donne préséance, dans le cadre d'une procédure relevant de la *LACC*, à la fiducie réputée qui est établie en faveur de la Couronne à l'égard de la TPS non versée. Cette disposition définit sans équivoque sa portée dans des termes on ne peut plus clairs et n'exclut que la *LFI* de son champ d'application. Les termes employés révèlent l'intention claire du législateur que le par. 222(3) l'emporte en cas de conflit avec toute autre loi sauf la *LFI*. Cette opinion est confortée par le fait que des modifications ont été apportées à la *LACC* après l'édiction du par. 222(3) et que, malgré les demandes répétées de divers groupes, le par. 18.3(1) n'a pas été modifié pour aligner l'ordre de priorité établi par la *LACC* sur celui de la *LFI*. Cela indique que le législateur a délibérément choisi de soustraire la fiducie réputée établie au par. 222(3) à l'application du par. 18.3(1) de la *LACC*.

Cette conclusion est renforcée par l'application d'autres principes d'interprétation. Une disposition spécifique antérieure peut être supplantée par une loi ultérieure de portée générale si le législateur, par les mots qu'il a employés, a exprimé l'intention de faire prévaloir la loi générale. Le paragraphe 222(3) accomplit cela de par son libellé, lequel précise que la disposition l'emporte sur tout autre texte législatif fédéral, tout texte législatif provincial ou « toute autre règle de droit » sauf la *LFI*. Le paragraphe 18.3(1) de la *LACC* est par conséquent rendu inopérant aux fins d'application du par. 222(3). Selon l'alinéa 44f) de la *Loi d'interprétation*, le fait que le par. 18.3(1) soit devenu le par. 37(1) à la suite de l'édiction du par. 222(3) de la *LTA* n'a aucune incidence sur l'ordre chronologique du point de vue de l'interprétation, et le par. 222(3) de la *LTA* demeure la disposition « postérieure ». Il s'ensuit que la disposition créant une fiducie réputée que l'on trouve au par. 222(3) de la *LTA* l'emporte sur le par. 18.3(1) dans le cadre d'une procédure fondée sur la *LACC*. Bien que l'art. 11 accorde au tribunal le pouvoir discrétionnaire de rendre des ordonnances malgré les dispositions de la *LFI* et de la *Loi sur les liquidations*, ce pouvoir discrétionnaire demeure assujéti à l'application de toute autre loi fédérale. L'exercice de ce pouvoir discrétionnaire est donc circonscrit par les limites imposées par toute loi autre que la *LFI* et la *Loi sur les liquidations*, et donc par la *LTA*. En l'espèce, le juge siégeant en son cabinet était donc tenu de respecter le régime de priorités établi au par. 222(3) de la *LTA*. Ni le par. 18.3(1), ni l'art. 11 de la *LACC* ne l'autorisaient à en faire abstraction. Par conséquent, il ne pouvait pas refuser la demande présentée par la Couronne en vue de se faire payer la TPS dans le cadre de la procédure introduite en vertu de la *LACC*.

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By Fish J.

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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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APPEAL from a judgment of the British Columbia Court of Appeal (Newbury, Tysoe and Smith J.J.A.), 2009 BCCA 205, 98 B.C.L.R. (4th) 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.

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 J.J. 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*

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (les juges Newbury, Tysoe et Smith), 2009 BCCA 205, 98 B.C.L.R. (4th) 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, qui a infirmé une décision du juge en chef Brenner, 2008 BCSC 1805, [2008] G.S.T.C. 221, [2008] B.C.J. No. 2611 (QL), 2008 CarswellBC 2895, qui a rejeté la demande de la Couronne sollicitant le paiement de la TPS. Pourvoi accueilli, la juge Abella est dissidente.

Mary I. A. Buttery, Owen J. James et Matthew J. G. Curtis, pour l'appelante.

Gordon Bourgard, David Jacyk et Michael J. Lema, pour l'intimé.

Version française du jugement de la juge en chef McLachlin et des juges Binnie, LeBel, Deschamps, Charron, Rothstein et Cromwell rendu par

[1] LA JUGE DESCHAMPS — C'est la première fois que la Cour est appelée à interpréter directement les dispositions de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« LACC »). À cet égard, deux questions sont soulevées. La première requiert la conciliation d'une disposition de la LACC et d'une disposition de la *Loi sur la taxe d'accise*, L.R.C. 1985, ch. E-15 (« LTA »), qui, selon des juridictions inférieures, sont en conflit l'une avec l'autre. La deuxième concerne la portée du pouvoir discrétionnaire du tribunal qui surveille une réorganisation. Les dispositions législatives pertinentes sont reproduites en annexe. Pour ce qui est de la première question, après avoir examiné l'évolution des priorités de la Couronne en matière d'insolvabilité et le libellé des diverses lois qui établissent ces priorités, j'arrive à la conclusion que c'est la LACC, et non la LTA, qui énonce la règle applicable. Pour ce qui est de la seconde question, je conclus qu'il faut interpréter les larges pouvoirs discrétionnaires conférés au juge en tenant compte de la nature réparatrice de la LACC et de la législation sur l'insolvabilité en général. Par conséquent, le tribunal avait le pouvoir

Act, R.S.C. 1985, c. B-3 (“*BIA*”). I would allow the appeal.

1. Facts and Decisions of the Courts Below

[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.

discrétionnaire de lever partiellement la suspension des procédures pour permettre au débiteur de faire cession de ses biens en vertu de la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* »). Je suis d'avis d'accueillir le pourvoi.

1. Faits et décisions des juridictions inférieures

[2] Le 13 décembre 2007, Ted LeRoy Trucking Ltd. (« LeRoy Trucking ») a déposé une requête sous le régime de la *LACC* devant la Cour suprême de la Colombie-Britannique et obtenu la suspension des procédures dans le but de réorganiser ses finances. L'entreprise a vendu certains éléments d'actif excédentaires, comme l'y autorisait l'ordonnance.

[3] Parmi les dettes de LeRoy Trucking figurait une somme perçue par celle-ci au titre de la taxe sur les produits et services (« TPS ») mais non versée à la Couronne. La *LTA* crée en faveur de la Couronne une fiducie réputée visant les sommes perçues au titre de la TPS. Cette fiducie réputée s'applique à tout bien ou toute recette détenue par la personne qui perçoit la TPS et à tout bien de cette personne détenu par un créancier garanti, et le produit découlant de ces biens doit être payé à la Couronne par priorité sur tout droit en garantie. Aux termes de la *LTA*, la fiducie réputée s'applique malgré tout autre texte législatif du Canada sauf la *LFI*. Cependant, la *LACC* prévoit également que, sous réserve de certaines exceptions, dont aucune ne concerne la TPS, ne s'appliquent pas sous son régime les fiducies réputées qui existent en faveur de la Couronne. Par conséquent, pour ce qui est de la TPS, la Couronne est un créancier non garanti dans le cadre de cette loi. Néanmoins, à l'époque où LeRoy Trucking a débuté ses procédures en vertu de la *LACC*, la jurisprudence dominante indiquait que la *LTA* l'emportait sur la *LACC*, la Couronne jouissant ainsi d'un droit prioritaire à l'égard des créances relatives à la TPS dans le cadre de la *LACC*, malgré le fait qu'elle aurait perdu cette priorité en vertu de la *LFI*. La *LACC* a fait l'objet de modifications substantielles en 2005, et certaines des dispositions en cause dans le présent pourvoi ont alors été renumérotées et reformulées (L.C. 2005, ch. 47). Mais ces modifications ne sont entrées en vigueur que le 18 septembre 2009. Je ne me reporterai aux dispositions modifiées que lorsqu'il sera utile de le faire.

[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

[4] Le 29 avril 2008, le juge en chef Brenner de la Cour suprême de la Colombie-Britannique, dans le contexte des procédures intentées en vertu de la LACC, a approuvé le paiement à Century Services, le principal créancier garanti du débiteur, d'une somme d'au plus cinq millions de dollars, soit le produit de la vente d'éléments d'actif excédentaires. LeRoy Trucking a proposé de retenir un montant égal aux sommes perçues au titre de la TPS mais non versées à la Couronne et de le déposer dans le compte en fiducie du contrôleur jusqu'à ce que l'issue de la réorganisation soit connue. Afin de maintenir le statu quo, en raison du succès incertain de la réorganisation, le juge en chef Brenner a accepté la proposition et ordonné qu'une somme de 305 202,30 \$ soit détenue par le contrôleur dans son compte en fiducie.

[5] Le 3 septembre 2008, ayant conclu que la réorganisation n'était pas possible, LeRoy Trucking a demandé à la Cour suprême de la Colombie-Britannique l'autorisation de faire cession de ses biens en vertu de la LFI. Pour sa part, la Couronne a demandé au tribunal d'ordonner le paiement au receveur général du Canada de la somme détenue par le contrôleur au titre de la TPS. Le juge en chef Brenner a rejeté cette dernière demande. Selon lui, comme la détention des fonds dans le compte en fiducie du contrôleur visait à [TRADUCTION] « faciliter le paiement final des sommes de TPS qui étaient dues avant que l'entreprise ne débute les procédures, mais seulement si un plan viable était proposé », l'impossibilité de procéder à une telle réorganisation, suivie d'une cession de biens, signifiait que la Couronne perdrait sa priorité sous le régime de la LFI (2008 BCSC 1805, [2008] G.S.T.C. 221).

[6] La Cour d'appel de la Colombie-Britannique a accueilli l'appel interjeté par la Couronne (2009 BCCA 205, 270 B.C.A.C. 167). Rédigeant l'arrêt unanime de la cour, le juge Tysoe a invoqué deux raisons distinctes pour y faire droit.

[7] Premièrement, le juge d'appel Tysoe a conclu que le pouvoir conféré au tribunal par l'art. 11 de la LACC n'autorisait pas ce dernier à rejeter la demande de la Couronne sollicitant le paiement immédiat des sommes de TPS faisant l'objet de la fiducie réputée,

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. Issues

[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?

après qu'il fut devenu clair que la tentative de réorganisation avait échoué et que la faillite était inévitable. Comme la restructuration n'était plus une possibilité, il ne servait plus à rien, dans le cadre de la *LACC*, de suspendre le paiement à la Couronne des sommes de TPS et le tribunal était tenu, en raison de la priorité établie par la *LTA*, d'en autoriser le versement à la Couronne. Ce faisant, le juge Tysoe a adopté le raisonnement énoncé dans l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), suivant lequel la fiducie réputée que crée la *LTA* à l'égard des sommes dues au titre de la TPS établissait la priorité de la Couronne sur les créanciers garantis dans le cadre de la *LACC*.

[8] Deuxièmement, le juge Tysoe a conclu que, en ordonnant la ségrégation des sommes de TPS dans le compte en fiducie du contrôleur le 29 avril 2008, le tribunal avait créé une fiducie expresse en faveur de la Couronne, et que les sommes visées ne pouvaient être utilisées à quelque autre fin que ce soit. En conséquence, la Cour d'appel a ordonné que les sommes détenues par le contrôleur en fiducie pour la Couronne soient versées au receveur général.

2. Questions en litige

[9] Le pourvoi soulève trois grandes questions que j'examinerai à tour de rôle :

- (1) Le paragraphe 222(3) de la *LTA* l'emporte-t-il sur le par. 18.3(1) de la *LACC* et donne-t-il priorité à la fiducie réputée qui est établie par la *LTA* en faveur de la Couronne pendant des procédures régies par la *LACC*, comme il a été décidé dans l'arrêt *Ottawa Senators*?
- (2) Le tribunal a-t-il outrepassé les pouvoirs qui lui étaient conférés par la *LACC* en levant la suspension des procédures dans le but de permettre au débiteur de faire cession de ses biens?
- (3) L'ordonnance du tribunal datée du 29 avril 2008 exigeant que le montant de TPS réclamé par la Couronne soit détenu séparément dans le compte en fiducie du contrôleur a-t-elle créé une fiducie expresse en faveur de la Couronne à l'égard des fonds en question?

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

3. Analyse

[10] La première question porte sur les priorités de la Couronne dans le contexte de l’insolvabilité. Comme nous le verrons, la *LTA* crée en faveur de la Couronne une fiducie réputée à l’égard de la TPS due par un débiteur « [m]algré [. . .] tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l’insolvabilité*) » (par. 222(3)), alors que selon la disposition de la *LACC* en vigueur à l’époque, « par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d’assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme [tel] » (par. 18.3(1)). Il est difficile d’imaginer deux dispositions législatives plus contradictoires en apparence. Cependant, comme c’est souvent le cas, le conflit apparent peut être résolu au moyen des principes d’interprétation législative.

[11] Pour interpréter correctement ces dispositions, il faut examiner l’historique de la *LACC*, la fonction de cette loi parmi l’ensemble des textes adoptés par le législateur fédéral en matière d’insolvabilité et les principes reconnus dans la jurisprudence. Nous verrons que les priorités de la Couronne en matière d’insolvabilité ont été restreintes de façon appréciable. La réponse à la deuxième question repose aussi sur le contexte de la *LACC*, mais l’objectif de cette loi et l’interprétation qu’en a donnée la jurisprudence jouent également un rôle essentiel. Après avoir examiné les deux premières questions soulevées en l’espèce, j’aborderai la conclusion du juge Tysoe selon laquelle l’ordonnance rendue par le tribunal le 29 avril 2008 a eu pour effet de créer une fiducie expresse en faveur de la Couronne.

3.1 *Objectif et portée du droit relatif à l’insolvabilité*

[12] L’insolvabilité est la situation de fait qui se présente quand un débiteur n’est pas en mesure de payer ses créanciers (voir, généralement, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), p. 16). Certaines procédures judiciaires peuvent être intentées en cas d’insolvabilité. Ainsi, le débiteur peut généralement obtenir une ordonnance judiciaire

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

ayant pour effet de suspendre les mesures d'exécution de ses créanciers, puis tenter de conclure avec eux une transaction à caractère exécutoire contenant des conditions de paiement plus réalistes. Ou alors, les biens du débiteur sont liquidés et ses dettes sont remboursées sur le produit de cette liquidation, selon les règles de priorité établies par la loi. Dans le premier cas, on emploie habituellement les termes de réorganisation ou de restructuration, alors que dans le second, on parle de liquidation.

[13] Le droit canadien en matière d'insolvabilité commerciale n'est pas codifié dans une seule loi exhaustive. En effet, le législateur a plutôt adopté plusieurs lois sur l'insolvabilité, la principale étant la *LFI*. Cette dernière établit un régime juridique autonome qui concerne à la fois la réorganisation et la liquidation. Bien qu'il existe depuis longtemps des mesures législatives relatives à la faillite, la *LFI* elle-même est une loi assez récente — elle a été adoptée en 1992. Ses procédures se caractérisent par une approche fondée sur des règles préétablies. Les débiteurs insolvables — personnes physiques ou personnes morales — qui doivent 1 000 \$ ou plus peuvent recourir à la *LFI*. Celle-ci comporte des mécanismes permettant au débiteur de présenter à ses créanciers une proposition de rajustement des dettes. Si la proposition est rejetée, la *LFI* établit la démarche aboutissant à la faillite : les biens du débiteur sont liquidés et le produit de cette liquidation est versé aux créanciers conformément à la répartition prévue par la loi.

[14] La possibilité de recourir à la *LACC* est plus restreinte. Le débiteur doit être une compagnie dont les dettes dépassent cinq millions de dollars. Contrairement à la *LFI*, la *LACC* ne contient aucune disposition relative à la liquidation de l'actif d'un débiteur en cas d'échec de la réorganisation. Une procédure engagée sous le régime de la *LACC* peut se terminer de trois façons différentes. Le scénario idéal survient dans les cas où la suspension des recours donne au débiteur un répit lui permettant de rétablir sa solvabilité et où le processus régi par la *LACC* prend fin sans qu'une réorganisation soit nécessaire. Le deuxième scénario le plus souhaitable est le cas où la transaction ou l'arrangement proposé par le débiteur est

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*

accepté par ses créanciers et où la compagnie réorganisée poursuit ses activités au terme de la procédure engagée en vertu de la *LACC*. Enfin, dans le dernier scénario, la transaction ou l'arrangement échoue et la compagnie ou ses créanciers cherchent habituellement à obtenir la liquidation des biens en vertu des dispositions applicables de la *LFI* ou la mise sous séquestre du débiteur. Comme nous le verrons, la principale différence entre les régimes de réorganisation prévus par la *LFI* et la *LACC* est que le second établit un mécanisme plus souple, dans lequel les tribunaux disposent d'un plus grand pouvoir discrétionnaire, ce qui rend le mécanisme mieux adapté aux réorganisations complexes.

[15] Comme je vais le préciser davantage plus loin, la *LACC* — la première loi canadienne régissant la réorganisation — a pour objectif de permettre au débiteur de continuer d'exercer ses activités et, dans les cas où cela est possible, d'éviter les coûts sociaux et économiques liés à la liquidation de son actif. Les propositions faites aux créanciers en vertu de la *LFI* répondent au même objectif, mais au moyen d'un mécanisme fondé sur des règles et offrant moins de souplesse. Quand la réorganisation s'avère impossible, les dispositions de la *LFI* peuvent être appliquées pour répartir de manière ordonnée les biens du débiteur entre les créanciers, en fonction des règles de priorité qui y sont établies.

[16] Avant l'adoption de la *LACC* en 1933 (S.C. 1932-33, ch. 36), la liquidation de la compagnie débitrice constituait la pratique la plus courante en vertu de la législation existante en matière d'insolvabilité commerciale (J. Sarra, *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations* (2003), p. 12). Les ravages de la Grande Dépression sur les entreprises canadiennes et l'absence d'un mécanisme efficace susceptible de permettre aux débiteurs et aux créanciers d'arriver à des compromis afin d'éviter la liquidation commandaient une solution législative. La *LACC* a innové en permettant au débiteur insolvable de tenter une réorganisation sous surveillance judiciaire, hors du cadre de la législation existante en matière d'insolvabilité qui, une fois entrée en jeu,

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

aboutissait presque invariablement à la liquidation (*Reference re Companies' Creditors Arrangement Act*, [1934] R.C.S. 659, p. 660-661; Sarra, *Creditor Rights*, p. 12-13).

[17] Le législateur comprenait, lorsqu'il a adopté la LACC, que la liquidation d'une compagnie insolvable causait préjudice à la plupart des personnes touchées — notamment les créanciers et les employés — et que la meilleure solution consistait dans un arrangement permettant à la compagnie de survivre (Sarra, *Creditor Rights*, p. 13-15).

[18] Les premières analyses et décisions judiciaires à cet égard ont également entériné les objectifs réparateurs de la LACC. On y reconnaissait que la valeur de la compagnie demeurait plus grande lorsque celle-ci pouvait poursuivre ses activités, tout en soulignant les pertes intangibles découlant d'une liquidation, par exemple la disparition de la clientèle (S. E. Edwards, « Reorganizations Under the Companies' Creditors Arrangement Act » (1947), 25 *R. du B. can.* 587, p. 592). La réorganisation sert l'intérêt public en permettant la survie de compagnies qui fournissent des biens ou des services essentiels à la santé de l'économie ou en préservant un grand nombre d'emplois (*ibid.*, p. 593). Les effets de l'insolvabilité pouvaient même toucher d'autres intéressés que les seuls créanciers et employés. Ces arguments se font entendre encore aujourd'hui sous une forme un peu différente, lorsqu'on justifie la réorganisation par la nécessité de remettre sur pied des compagnies qui constituent des volets essentiels d'un réseau complexe de rapports économiques interdépendants, dans le but d'éviter les effets négatifs de la liquidation.

[19] La LACC est tombée en désuétude au cours des décennies qui ont suivi, vraisemblablement parce que des modifications apportées en 1953 ont restreint son application aux compagnies émettant des obligations (S.C. 1952-53, ch. 3). Pendant la récession du début des années 1980, obligés de s'adapter au nombre grandissant d'entreprises en difficulté, les avocats travaillant dans le domaine de l'insolvabilité ainsi que les tribunaux ont redécouvert cette loi et s'en sont servis pour relever les nouveaux défis de l'économie. Les participants aux

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

procédures en sont peu à peu venus à reconnaître et à apprécier la caractéristique propre de la loi : l'attribution, au tribunal chargé de surveiller le processus, d'une grande latitude lui permettant de rendre les ordonnances nécessaires pour faciliter la réorganisation du débiteur et réaliser les objectifs de la LACC. Nous verrons plus loin comment les tribunaux ont utilisé de façon de plus en plus souple et créative les pouvoirs qui leur sont conférés par la LACC.

[20] Ce ne sont pas seulement les tribunaux qui se sont employés à faire évoluer le droit de l'insolvabilité pendant cette période. En 1970, un comité constitué par le gouvernement a mené une étude approfondie au terme de laquelle il a recommandé une réforme majeure, mais le législateur n'a rien fait (voir *Faillite et insolvabilité : Rapport du comité d'étude sur la législation en matière de faillite et d'insolvabilité* (1970)). En 1986, un autre comité d'experts a formulé des recommandations de portée plus restreinte, qui ont finalement conduit à l'adoption de la *Loi sur la faillite et l'insolvabilité* de 1992 (L.C. 1992, ch. 27) (voir *Propositions d'amendements à la Loi sur la faillite : Rapport du Comité consultatif en matière de faillite et d'insolvabilité* (1986)). Des dispositions à caractère plus général concernant la réorganisation des débiteurs insolvables ont alors été ajoutées à la loi canadienne relative à la faillite. Malgré l'absence de recommandations spécifiques au sujet de la LACC dans les rapports de 1970 et 1986, le comité de la Chambre des communes qui s'est penché sur le projet de loi C-22 à l'origine de la LFI a semblé accepter le témoignage d'un expert selon lequel le nouveau régime de réorganisation de la LFI supplanterait rapidement la LACC, laquelle pourrait alors être abrogée et l'insolvabilité commerciale et la faillite seraient ainsi régies par un seul texte législatif (*Procès-verbaux et témoignages du Comité permanent des Consommateurs et Sociétés et Administration gouvernementale*, fascicule n° 15, 3^e sess., 34^e lég., 3 octobre 1991, 15:15-15:16).

[21] En rétrospective, cette conclusion du comité de la Chambre des communes ne correspondait pas à la réalité. Elle ne tenait pas compte de la nouvelle vitalité de la LACC dans la pratique contemporaine,

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,

ni des avantages qu’offrait, en présence de réorganisations de plus en plus complexes, un processus souple de réorganisation sous surveillance judiciaire par rapport au régime plus rigide de la *LFI*, fondé sur des règles préétablies. La « souplesse de la *LACC* [était considérée comme offrant] de grands avantages car elle permet de prendre des décisions créatives et efficaces » (Industrie Canada, Direction générale des politiques-cadres du marché, *Rapport sur la mise en application de la Loi sur la faillite et l’insolvabilité et de la Loi sur les arrangements avec les créanciers des compagnies* (2002), p. 50). Au cours des trois dernières décennies, la résurrection de la *LACC* a donc été le moteur d’un processus grâce auquel, selon un auteur, [TRADUCTION] « le régime juridique canadien de restructuration en cas d’insolvabilité — qui était au départ un instrument plutôt rudimentaire — a évolué pour devenir un des systèmes les plus sophistiqués du monde développé » (R. B. Jones, « The Evolution of Canadian Restructuring : Challenges for the Rule of Law », dans J. P. Sarra, dir., *Annual Review of Insolvency Law 2005* (2006), 481, p. 481).

[22] Si les instances en matière d’insolvabilité peuvent être régies par des régimes législatifs différents, elles n’en présentent pas moins certains points communs, dont le plus frappant réside dans le modèle de la procédure unique. Le professeur Wood a décrit ainsi la nature et l’objectif de ce modèle dans *Bankruptcy and Insolvency Law* :

[TRADUCTION] Elles prévoient toutes une procédure collective qui remplace la procédure civile habituelle dont peuvent se prévaloir les créanciers pour faire valoir leurs droits. Les recours des créanciers sont collectivisés afin d’éviter l’anarchie qui régnerait si ceux-ci pouvaient exercer leurs recours individuellement. En l’absence d’un processus collectif, chaque créancier sait que faute d’agir de façon rapide et déterminée pour saisir les biens du débiteur, il sera devancé par les autres créanciers. [p. 2-3]

Le modèle de la procédure unique vise à faire échec à l’inefficacité et au chaos qui résulteraient de l’insolvabilité si chaque créancier engageait sa propre procédure dans le but de recouvrer sa créance. La réunion — en une seule instance relevant d’un même tribunal — de toutes les actions possibles contre le débiteur a pour effet de faciliter la négociation avec

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.

les créanciers en les mettant tous sur le même pied. Cela évite le risque de voir un créancier plus combatif obtenir le paiement de ses créances sur l'actif limité du débiteur pendant que les autres créanciers tentent d'arriver à une transaction. La *LACC* et la *LFI* autorisent toutes deux pour cette raison le tribunal à ordonner la suspension de toutes les actions intentées contre le débiteur pendant qu'on cherche à conclure une transaction.

[23] Un autre point de convergence entre la *LACC* et la *LFI* concerne les priorités. Comme la *LACC* ne précise pas ce qui arrive en cas d'échec de la réorganisation, la *LFI* fournit la norme de référence pour ce qui se produira dans une telle situation. De plus, l'une des caractéristiques importantes de la réforme dont ces deux lois ont fait l'objet depuis 1992 est la réduction des priorités de la Couronne (L.C. 1992, ch. 27, art. 39; L.C. 1997, ch. 12, art. 73 et 125; L.C. 2000, ch. 30, art. 148; L.C. 2005, ch. 47, art. 69 et 131; L.C. 2009, ch. 33, art. 25; voir aussi *Québec (Revenu) c. Caisse populaire Desjardins de Montmagny*, 2009 CSC 49, [2009] 3 R.C.S. 286; *Sous-ministre du Revenu c. Rainville*, [1980] 1 R.C.S. 35; *Propositions d'amendements à la Loi sur la faillite : Rapport du Comité consultatif en matière de faillite et d'insolvabilité*).

[24] Comme les régimes de restructuration parallèles de la *LACC* et de la *LFI* constituent désormais une caractéristique reconnue dans le domaine du droit de l'insolvabilité, le travail de réforme législative contemporain a principalement visé à harmoniser, dans la mesure du possible, les aspects communs aux deux régimes et à privilégier la réorganisation plutôt que la liquidation (voir la *Loi édictant la Loi sur le Programme de protection des salariés et modifiant la Loi sur la faillite et l'insolvabilité, la Loi sur les arrangements avec les créanciers des compagnies et d'autres lois en conséquence*, L.C. 2005, ch. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, 30 Alta L.R. (4th) 192, par. 19).

[25] Ayant à l'esprit le contexte historique de la *LACC* et de la *LFI*, je vais maintenant aborder la première question en litige.

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

3.2 *Fiducie réputée se rapportant à la TPS dans le cadre de la LACC*

[26] La Cour d'appel a estimé que la *LTA* empêchait le tribunal de suspendre les mesures prises par la Couronne pour bénéficier de la fiducie réputée se rapportant à la TPS, lorsqu'il a partiellement levé la suspension des procédures engagées contre le débiteur afin de permettre à celui-ci de faire cession de ses biens. Ce faisant, la cour a adopté un raisonnement qui s'insère dans un courant jurisprudentiel dominé par l'arrêt *Ottawa Senators*, suivant lequel il demeure possible de demander le bénéfice d'une fiducie réputée établie par la *LTA* pendant une réorganisation opérée en vertu de la *LACC*, et ce, malgré les dispositions de la *LACC* qui semblent dire le contraire.

[27] S'appuyant largement sur l'arrêt *Ottawa Senators* de la Cour d'appel de l'Ontario, la Couronne plaide que la disposition postérieure de la *LTA* créant la fiducie réputée visant la TPS l'emporte sur la disposition de la *LACC* censée neutraliser la plupart des fiducies réputées qui sont créées par des dispositions législatives. Si la Cour d'appel a accepté ce raisonnement dans la présente affaire, les tribunaux provinciaux ne l'ont pas tous adopté (voir, p. ex., *Komunik Corp. (Arrangement relatif à)*, 2009 QCCS 6332 (CanLII), autorisation d'appel accordée, 2010 QCCA 183 (CanLII)). Dans ses observations écrites adressées à la Cour, Century Services s'est fondée sur l'argument suivant lequel le tribunal pouvait, en vertu de la *LACC*, maintenir la suspension de la demande de la Couronne visant le paiement de la TPS non versée. Au cours des plaidoiries, la question de savoir si l'arrêt *Ottawa Senators* était bien fondé a néanmoins été soulevée. Après l'audience, la Cour a demandé aux parties de présenter des observations écrites supplémentaires à ce sujet. Comme il ressort clairement des motifs de ma collègue la juge Abella, cette question a pris une grande importance devant notre Cour. Dans ces circonstances, la Cour doit statuer sur le bien-fondé du raisonnement adopté dans l'arrêt *Ottawa Senators*.

[28] Le contexte général dans lequel s'inscrit cette question concerne l'évolution considérable, signalée plus haut, de la priorité dont jouit la Couronne en tant que créancier en cas d'insolvabilité. Avant les

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 §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

années 1990, les créances de la Couronne bénéficiaient dans une large mesure d’une priorité en cas d’insolvabilité. Cette situation avantageuse suscitait une grande controverse. Les propositions de réforme du droit de l’insolvabilité de 1970 et de 1986 en témoignent — elles recommandaient que les créances de la Couronne ne fassent l’objet d’aucun traitement préférentiel. Une question connexe se posait : celle de savoir si la Couronne était même assujettie à la *LACC*. Les modifications apportées à la *LACC* en 1997 ont confirmé qu’elle l’était bel et bien (voir *LACC*, art. 21, ajouté par L.C. 1997, ch. 12, art. 126).

[29] Les revendications de priorité par l’État en cas d’insolvabilité sont abordées de différentes façons selon les pays. Par exemple, en Allemagne et en Australie, l’État ne bénéficie d’aucune priorité, alors qu’aux États-Unis et en France il jouit au contraire d’une large priorité (voir 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, p. 500). Le Canada a choisi une voie intermédiaire dans le cadre d’une réforme législative amorcée en 1992 : la Couronne a conservé sa priorité pour les sommes retenues à la source au titre de l’impôt sur le revenu et des cotisations à l’assurance-emploi (« AE ») et au Régime de pensions du Canada (« RPC »), mais elle est un créancier ordinaire non garanti pour la plupart des autres sommes qui lui sont dues.

[30] Le législateur a fréquemment adopté des mécanismes visant à protéger les créances de la Couronne et à permettre leur exécution. Les deux plus courants sont les fiducies présumées et les pouvoirs de saisie-arrêt (voir F. L. Lamer, *Priority of Crown Claims in Insolvency* (feuilles mobiles), §2).

[31] Pour ce qui est des sommes de TPS perçues, le législateur a établi une fiducie réputée. La *LTA* précise que la personne qui perçoit une somme au titre de la TPS est réputée la détenir en fiducie pour la Couronne (par. 222(1)). La fiducie réputée s’applique aux autres biens de la personne qui perçoit la taxe, pour une valeur égale à la somme réputée détenue en fiducie, si la somme en question n’a pas été versée en conformité avec la *LTA*. La fiducie réputée vise

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”).

également les biens détenus par un créancier garanti qui, si ce n’était de la sûreté, seraient les biens de la personne qui perçoit la taxe (par. 222(3)).

[32] Utilisant pratiquement les mêmes termes, le législateur a créé de semblables fiducies réputées à l’égard des retenues à la source relatives à l’impôt sur le revenu et aux cotisations à l’AE et au RPC (voir par. 227(4) de la *Loi de l’impôt sur le revenu*, L.R.C. 1985, ch. 1 (5^e suppl.) (« *LIR* »), par. 86(2) et (2.1) de la *Loi sur l’assurance-emploi*, L.C. 1996, ch. 23, et par. 23(3) et (4) du *Régime de pensions du Canada*, L.R.C. 1985, ch. C-8). J’emploierai ci-après le terme « retenues à la source » pour désigner les retenues relatives à l’impôt sur le revenu et aux cotisations à l’AE et au RPC.

[33] Dans *Banque Royale du Canada c. Sparrow Electric Corp.*, [1997] 1 R.C.S. 411, la Cour était saisie d’un litige portant sur la priorité de rang entre, d’une part, une fiducie réputée établie en vertu de la *LIR* à l’égard des retenues à la source, et, d’autre part, des sûretés constituées en vertu de la *Loi sur les banques*, L.C. 1991, ch. 46, et de la loi de l’Alberta intitulée *Personal Property Security Act*, S.A. 1988, ch. P-4.05 (« *PPSA* »). D’après les dispositions alors en vigueur, une fiducie réputée — établie en vertu de la *LIR* à l’égard des biens du débiteur pour une valeur égale à la somme due au titre de l’impôt sur le revenu — commençait à s’appliquer au moment de la liquidation, de la mise sous séquestre ou de la cession de biens. Dans *Sparrow Electric*, la Cour a conclu que la fiducie réputée de la *LIR* ne pouvait pas l’emporter sur les sûretés, au motif que, comme celles-ci constituaient des privilèges fixes grevant les biens dès que le débiteur acquérait des droits sur eux, il n’existait pas de biens susceptibles d’être visés par la fiducie réputée de la *LIR* lorsqu’elle prenait naissance par la suite. Ultérieurement, dans *First Vancouver Finance c. M.R.N.*, 2002 CSC 49, [2002] 2 R.C.S. 720, la Cour a souligné que le législateur était intervenu pour renforcer la fiducie réputée de la *LIR* en précisant qu’elle est réputée s’appliquer dès le moment où les retenues ne sont pas versées à la Couronne conformément aux exigences de la *LIR*, et en donnant à la Couronne la priorité sur toute autre garantie (par. 27-29) (la « modification découlant de l’arrêt *Sparrow Electric* »).

[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,

[34] Selon le texte modifié du par. 227(4.1) de la *LIR* et celui des fiducies réputées correspondantes établies dans le *Régime de pensions du Canada* et la *Loi sur l'assurance-emploi* à l'égard des retenues à la source, la fiducie réputée s'applique malgré tout autre texte législatif fédéral sauf les art. 81.1 et 81.2 de la *LFI*. La fiducie réputée de la *LTA* qui est en cause en l'espèce est formulée en des termes semblables sauf que la limite à son application vise la *LFI* dans son entier. Voici le texte de la disposition pertinente :

222. . . .

(3) Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés

[35] La Couronne soutient que la modification découlant de l'arrêt *Sparrow Electric*, qui a été ajoutée à la *LTA* par le législateur en 2000, visait à maintenir la priorité de Sa Majesté sous le régime de la *LACC* à l'égard du montant de TPS perçu, tout en reléguant celle-ci au rang de créancier non garanti à l'égard de ce montant sous le régime de la *LFI* uniquement. De l'avis de la Couronne, il en est ainsi parce que, selon la *LTA*, la fiducie réputée visant la TPS demeure en vigueur « malgré » tout autre texte législatif sauf la *LFI*.

[36] Les termes utilisés dans la *LTA* pour établir la fiducie réputée à l'égard de la TPS créent un conflit apparent avec la *LACC*, laquelle précise que, sous réserve de certaines exceptions, les biens qui sont réputés selon un texte législatif être détenus en fiducie pour la Couronne ne doivent pas être considérés comme tels.

[37] Par une modification apportée à la *LACC* en 1997 (L.C. 1997, ch. 12, art. 125), le législateur

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.

semble, sous réserve d'exceptions spécifiques, avoir neutralisé les fiducies réputées créées en faveur de la Couronne lorsque des procédures de réorganisation sont engagées sous le régime de cette loi. La disposition pertinente, à l'époque le par. 18.3(1), était libellée ainsi :

18.3 (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

Cette neutralisation des fiducies réputées a été maintenue dans des modifications apportées à la *LACC* en 2005 (L.C. 2005, ch. 47), où le par. 18.3(1) a été reformulé et renuméroté, devenant le par. 37(1) :

37. (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme tel par le seul effet d'une telle disposition.

[38] La *LFI* comporte une disposition analogue, qui — sous réserve des mêmes exceptions spécifiques — neutralise les fiducies réputées établies en vertu d'un texte législatif et fait en sorte que les biens du failli qui autrement seraient visés par une telle fiducie font partie de l'actif du débiteur et sont à la disposition des créanciers (L.C. 1992, ch. 27, art. 39; L.C. 1997, ch. 12, art. 73; *LFI*, par. 67(2)). Il convient de souligner que, tant dans la *LACC* que dans la *LFI*, les exceptions visent les retenues à la source (*LACC*, par. 18.3(2); *LFI*, par. 67(3)). Voici la disposition pertinente de la *LACC* :

18.3 . . .

(2) Le paragraphe (1) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi*

Par conséquent, la fiducie réputée établie en faveur de la Couronne et la priorité dont celle-ci jouit de ce fait sur les retenues à la source continuent de s'appliquer autant pendant la réorganisation que pendant la faillite.

[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

[39] Par ailleurs, les autres créances de la Couronne sont considérées par la *LACC* et la *LFI* comme des créances non garanties (*LACC*, par. 18.4(1); *LFI*, par. 86(1)). Ces dispositions faisant de la Couronne un créancier non garanti comportent une exception expresse concernant les fiducies réputées établies par un texte législatif à l'égard des retenues à la source (*LACC*, par. 18.4(3); *LFI*, par. 86(3)). Voici la disposition de la *LACC* :

18.4 . . .

(3) Le paragraphe (1) [suivant lequel la Couronne a le rang de créancier non garanti] n'a pas pour effet de porter atteinte à l'application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation

Par conséquent, non seulement la *LACC* précise que les créances de la Couronne ne bénéficient pas d'une priorité par rapport à celles des autres créanciers (par. 18.3(1)), mais les exceptions à cette règle (maintien de la priorité de la Couronne dans le cas des retenues à la source) sont mentionnées à plusieurs reprises dans la Loi.

[40] Le conflit apparent qui existe dans la présente affaire fait qu'on doit se demander si la règle de la *LTA* adoptée en 2000, selon laquelle les fiducies réputées visant la TPS s'appliquent malgré tout autre texte législatif fédéral sauf la *LFI*, l'emporte sur la règle énoncée dans la *LACC* — qui a d'abord été édictée en 1997 à l'art. 18.3 — suivant laquelle, sous réserve de certaines exceptions explicites, les fiducies réputées établies par une disposition législative sont sans effet dans le cadre de la *LACC*. Avec égards pour l'opinion contraire exprimée par mon collègue le juge Fish, je ne crois pas qu'on puisse résoudre ce conflit apparent

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,

en niant son existence et en créant une règle qui exige à la fois une disposition législative établissant la fiducie présumée et une autre la confirmant. Une telle règle est inconnue en droit. Les tribunaux doivent reconnaître les conflits, apparents ou réels, et les résoudre lorsque la chose est possible.

[41] Un courant jurisprudentiel pancanadien a résolu le conflit apparent en faveur de la *LTA*, confirmant ainsi la validité des fiducies réputées à l’égard de la TPS dans le cadre de la *LACC*. Dans l’arrêt déterminant à ce sujet, *Ottawa Senators*, la Cour d’appel de l’Ontario a invoqué la doctrine de l’abrogation implicite et conclu que la disposition postérieure de la *LTA* devait avoir préséance sur la *LACC* (voir aussi *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4th) 219 (B.R. Alb.); *Gauntlet*).

[42] Dans *Ottawa Senators*, la Cour d’appel de l’Ontario a fondé sa conclusion sur deux considérations. Premièrement, elle était convaincue qu’en mentionnant explicitement la *LFI* — mais pas la *LACC* — au par. 222(3) de la *LTA*, le législateur a fait un choix délibéré. Je cite le juge MacPherson :

[TRADUCTION] La *LFI* et la *LACC* sont des lois fédérales étroitement liées entre elles. Je ne puis concevoir que le législateur ait pu mentionner expressément la *LFI* à titre d’exception, mais ait involontairement omis de considérer la *LACC* comme une deuxième exception possible. À mon avis, le fait que la *LACC* ne soit pas mentionnée au par. 222(3) de la *LTA* était presque assurément une omission mûrement réfléchie de la part du législateur. [par. 43]

[43] Deuxièmement, la Cour d’appel de l’Ontario a comparé le conflit entre la *LTA* et la *LACC* à celui dont a été saisie la Cour dans *Doré c. Verdun (Ville)*, [1997] 2 R.C.S. 862, et les a jugés [TRADUCTION] « identiques » (par. 46). Elle s’estimait donc tenue de suivre l’arrêt *Doré* (par. 49). Dans cet arrêt, la Cour a conclu qu’une disposition d’une loi de nature plus générale et récemment adoptée établissant un délai de prescription — le *Code civil du Québec*, L.Q. 1991, ch. 64 (« *C.c.Q.* ») — avait eu pour effet d’abroger une disposition plus spécifique

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

d'un texte de loi antérieur, la *Loi sur les cités et villes* du Québec, L.R.Q., ch. C-19, avec laquelle elle entrait en conflit. Par analogie, la Cour d'appel de l'Ontario a conclu que le par. 222(3) de la *LTA*, une disposition plus récente et plus générale, abrogeait implicitement la disposition antérieure plus spécifique, à savoir le par. 18.3(1) de la *LACC* (par. 47-49).

[44] En examinant la question dans tout son contexte, je suis amenée à conclure, pour plusieurs raisons, que ni le raisonnement ni le résultat de l'arrêt *Ottawa Senators* ne peuvent être adoptés. Bien qu'il puisse exister un conflit entre le libellé des textes de loi, une analyse téléologique et contextuelle visant à déterminer la véritable intention du législateur conduit à la conclusion que ce dernier ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la *LACC*, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a apporté à la *LTA*, en 2000, la modification découlant de l'arrêt *Sparrow Electric*.

[45] Je rappelle d'abord que le législateur a manifesté sa volonté de mettre un terme à la priorité accordée aux créances de la Couronne dans le cadre du droit de l'insolvabilité. Selon le par. 18.3(1) de la *LACC* (sous réserve des exceptions prévues au par. 18.3(2)), les fiducies réputées de la Couronne n'ont aucun effet sous le régime de cette loi. Quand le législateur a voulu protéger certaines créances de la Couronne au moyen de fiducies réputées et voulu que celles-ci continuent de s'appliquer en situation d'insolvabilité, il l'a indiqué de manière explicite et minutieuse. Par exemple, le par. 18.3(2) de la *LACC* et le par. 67(3) de la *LFI* énoncent expressément que les fiducies réputées visant les retenues à la source continuent de produire leurs effets en cas d'insolvabilité. Le législateur a donc clairement établi des exceptions à la règle générale selon laquelle les fiducies réputées n'ont plus d'effet dans un contexte d'insolvabilité. La *LACC* et la *LFI* sont en harmonie : elles préservent les fiducies réputées et établissent la priorité de la Couronne seulement à l'égard des retenues à la source. En revanche, il n'existe aucune disposition législative expresse permettant de conclure que les créances relatives à la

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.

TPS bénéficient d'un traitement préférentiel sous le régime de la *LACC* ou de la *LFI*. Alors que les retenues à la source font l'objet de dispositions explicites dans ces deux lois concernant l'insolvabilité, celles-ci ne comportent pas de dispositions claires et expresses analogues établissant une exception pour les créances relatives à la TPS.

[46] La logique interne de la *LACC* va également à l'encontre du maintien de la fiducie réputée établie dans la *LTA* à l'égard de la TPS. En effet, la *LACC* impose certaines limites à la suspension par les tribunaux des droits de la Couronne à l'égard des retenues à la source, mais elle ne fait pas mention de la *LTA* (art. 11.4). Comme les fiducies réputées visant les retenues à la source sont explicitement protégées par la *LACC*, il serait incohérent d'accorder une meilleure protection à la fiducie réputée établie par la *LTA* en l'absence de dispositions explicites en ce sens dans la *LACC*. Par conséquent, il semble découler de la logique de la *LACC* que la fiducie réputée établie par la *LTA* est visée par la renonciation du législateur à sa priorité (art. 18.4).

[47] De plus, il y aurait une étrange asymétrie si l'interprétation faisant primer la *LTA* sur la *LACC* préconisée par la Couronne était retenue en l'espèce : les créances de la Couronne relatives à la TPS conserveraient leur priorité de rang pendant les procédures fondées sur la *LACC*, mais pas en cas de faillite. Comme certains tribunaux l'ont bien vu, cela ne pourrait qu'encourager les créanciers à recourir à la loi la plus favorable dans les cas où, comme en l'espèce, l'actif du débiteur n'est pas suffisant pour permettre à la fois le paiement des créanciers garantis et le paiement des créances de la Couronne (*Gauntlet*, par. 21). Or, si les réclamations des créanciers étaient mieux protégées par la liquidation sous le régime de la *LFI*, les créanciers seraient très fortement incités à éviter les procédures prévues par la *LACC* et les risques d'échec d'une réorganisation. Le fait de donner à un acteur clé de telles raisons de s'opposer aux procédures de réorganisation fondées sur la *LACC* dans toute situation d'insolvabilité ne peut que miner les objectifs réparateurs de ce texte législatif et risque au contraire de favoriser les maux sociaux que son édicton visait justement à prévenir.

[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*.

[48] Peut-être l’effet de l’arrêt *Ottawa Senators* est-il atténué si la restructuration est tentée en vertu de la *LFI* au lieu de la *LACC*, mais il subsiste néanmoins. Si l’on suivait cet arrêt, la priorité de la créance de la Couronne relative à la TPS différerait selon le régime — *LACC* ou *LFI* — sous lequel la restructuration a lieu. L’anomalie de ce résultat ressort clairement du fait que les compagnies seraient ainsi privées de la possibilité de se restructurer sous le régime plus souple et mieux adapté de la *LACC*, régime privilégié en cas de réorganisations complexes.

[49] Les indications selon lesquelles le législateur voulait que les créances relatives à la TPS soient traitées différemment dans les cas de réorganisations et de faillites sont rares, voire inexistantes. Le paragraphe 222(3) de la *LTA* a été adopté dans le cadre d’un projet de loi d’exécution du budget de nature générale en 2000. Le sommaire accompagnant ce projet de loi n’indique pas que, dans le cadre de la *LACC*, le législateur entendait élever la priorité de la créance de la Couronne à l’égard de la TPS au même rang que les créances relatives aux retenues à la source ou encore à un rang supérieur à celles-ci. En fait, le sommaire mentionne simplement, en ce qui concerne les fiducies réputées, que les modifications apportées aux dispositions existantes visent à « faire en sorte que les cotisations à l’assurance-emploi et au Régime de pensions du Canada qu’un employeur est tenu de verser soient pleinement recouvrables par la Couronne en cas de faillite de l’employeur » (Sommaire de la L.C. 2000, ch. 30, p. 4a). Le libellé de la disposition créant une fiducie réputée à l’égard de la TPS ressemble à celui des dispositions créant de telles fiducies relatives aux retenues à la source et il comporte la même formule dérogoire et la même mention de la *LFI*. Cependant, comme il a été souligné précédemment, le législateur a expressément précisé que seules les fiducies réputées visant les retenues à la source demeurent en vigueur. Une exception concernant la *LFI* dans la disposition créant les fiducies réputées à l’égard des retenues à la source est sans grande conséquence, car le texte explicite de la *LFI* elle-même (et celui de la *LACC*) établit ces fiducies et maintient leur effet. Il convient toutefois de souligner que ni la *LFI* ni la *LACC* ne comportent de disposition équivalente assurant le maintien en vigueur des fiducies réputées visant la TPS.

[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

[50] Il semble plus probable qu'en adoptant, pour créer dans la *LTA* les fiducies réputées visant la TPS, le même libellé que celui utilisé pour les fiducies réputées visant les retenues à la source, et en omettant d'inclure au par. 222(3) de la *LTA* une exception à l'égard de la *LACC* en plus de celle établie pour la *LFI*, le législateur ait par inadvertance commis une anomalie rédactionnelle. En raison d'une lacune législative dans la *LTA*, il serait possible de considérer que la fiducie réputée visant la TPS continue de produire ses effets dans le cadre de la *LACC*, tout en cessant de le faire dans le cas de la *LFI*, ce qui entraînerait un conflit apparent avec le libellé de la *LACC*. Il faut cependant voir ce conflit comme il est : un conflit apparent seulement, que l'on peut résoudre en considérant l'approche générale adoptée envers les créances prioritaires de la Couronne et en donnant préséance au texte de l'art. 18.3 de la *LACC* d'une manière qui ne produit pas un résultat insolite.

[51] Le paragraphe 222(3) de la *LTA* ne révèle aucune intention explicite du législateur d'abroger l'art. 18.3 de la *LACC*. Il crée simplement un conflit apparent qui doit être résolu par voie d'interprétation législative. L'intention du législateur était donc loin d'être dépourvue d'ambiguïté quand il a adopté le par. 222(3) de la *LTA*. S'il avait voulu donner priorité aux créances de la Couronne relatives à la TPS dans le cadre de la *LACC*, il aurait pu le faire de manière aussi explicite qu'il l'a fait pour les retenues à la source. Or, au lieu de cela, on se trouve réduit à inférer du texte du par. 222(3) de la *LTA* que le législateur entendait que la fiducie réputée visant la TPS produise ses effets dans les procédures fondées sur la *LACC*.

[52] Je ne suis pas convaincue que le raisonnement adopté dans *Doré* exige l'application de la doctrine de l'abrogation implicite dans les circonstances de la présente affaire. La question principale dans *Doré* était celle de l'impact de l'adoption du *C.c.Q.* sur les règles de droit administratif relatives aux municipalités. Bien que le juge Gonthier ait conclu, dans cet arrêt, que le délai de prescription établi à l'art. 2930 dt *C.c.Q.* avait eu pour effet d'abroger implicitement une disposition de la *Loi sur les cités et villes* portant sur la prescription, sa conclusion n'était pas

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

fondée seulement sur une analyse textuelle. Il a en effet procédé à une analyse contextuelle approfondie des deux textes, y compris de l’historique législatif pertinent (par. 31-41). Par conséquent, les circonstances du cas dont était saisie la Cour dans *Doré* sont loin d’être « identiques » à celles du présent pourvoi, tant sur le plan du texte que sur celui du contexte et de l’historique législatif. On ne peut donc pas dire que l’arrêt *Doré* commande l’application automatique d’une règle d’abrogation implicite.

[53] Un bon indice de l’intention générale du législateur peut être tiré du fait qu’il n’a pas, dans les modifications subséquentes, écarté la règle énoncée dans la *LACC*. D’ailleurs, par suite des modifications apportées à cette loi en 2005, la règle figurant initialement à l’art. 18.3 a, comme nous l’avons vu plus tôt, été reprise sous une formulation différente à l’art. 37. Par conséquent, dans la mesure où l’interprétation selon laquelle la fiducie réputée visant la TPS demeurerait en vigueur dans le contexte de procédures en vertu de la *LACC* repose sur le fait que le par. 222(3) de la *LTA* constitue la disposition postérieure et a eu pour effet d’abroger implicitement le par. 18.3(1) de la *LACC*, nous revenons au point de départ. Comme le législateur a reformulé et renuméroté la disposition de la *LACC* précisant que, sous réserve des exceptions relatives aux retenues à la source, les fiducies réputées ne survivent pas à l’engagement de procédures fondées sur la *LACC*, c’est cette loi qui se trouve maintenant à être le texte postérieur. Cette constatation confirme que c’est dans la *LACC* qu’est exprimée l’intention du législateur en ce qui a trait aux fiducies réputées visant la TPS.

[54] Je ne suis pas d’accord avec ma collègue la juge Abella pour dire que l’al. 44f) de la *Loi d’interprétation*, L.R.C. 1985, ch. I-21, permet d’interpréter les modifications de 2005 comme n’ayant aucun effet. La nouvelle loi peut difficilement être considérée comme une simple refonte de la loi antérieure. De fait, la *LACC* a fait l’objet d’un examen approfondi en 2005. En particulier, conformément à son objectif qui consiste à faire concorder l’approche de la *LFI* et celle de la *LACC* à l’égard de l’insolvabilité, le législateur a apporté aux deux textes des modifications allant dans le même sens en ce qui concerne les

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.

propositions présentées par les entreprises. De plus, de nouvelles dispositions ont été ajoutées au sujet des contrats, des conventions collectives, du financement temporaire et des accords de gouvernance. Des clarifications ont aussi été apportées quant à la nomination et au rôle du contrôleur. Il convient par ailleurs de souligner les limites imposées par l'art. 11.09 de la *LACC* au pouvoir discrétionnaire du tribunal d'ordonner la suspension de l'effet des fiducies réputées créées en faveur de la Couronne relativement aux retenues à la source, limites qui étaient auparavant énoncées à l'art. 11.4. Il n'est fait aucune mention des fiducies réputées visant la TPS (voir le Sommaire de la L.C. 2005, ch. 47). Dans le cadre de cet examen, le législateur est allé jusqu'à se pencher sur les termes mêmes utilisés dans la loi pour écarter l'application des fiducies réputées. Les commentaires cités par ma collègue ne font que souligner l'intention manifeste du législateur de maintenir sa politique générale suivant laquelle seules les fiducies réputées visant les retenues à la source survivent en cas de procédures fondées sur la *LACC*.

[55] En l'espèce, le contexte législatif aide à déterminer l'intention du législateur et conforte la conclusion selon laquelle le par. 222(3) de la *LTA* ne visait pas à restreindre la portée de la disposition de la *LACC* écartant l'application des fiducies réputées. Eu égard au contexte dans son ensemble, le conflit entre la *LTA* et la *LACC* est plus apparent que réel. Je n'adopterais donc pas le raisonnement de l'arrêt *Ottawa Senators* et je confirmerais que l'art. 18.3 de la *LACC* a continué de produire ses effets.

[56] Ma conclusion est renforcée par l'objectif de la *LACC* en tant que composante du régime réparateur instauré la législation canadienne en matière d'insolvabilité. Comme cet aspect est particulièrement pertinent à propos de la deuxième question, je vais maintenant examiner la façon dont les tribunaux ont interprété l'étendue des pouvoirs discrétionnaires dont ils disposent lorsqu'ils surveillent une réorganisation fondée sur la *LACC*, ainsi que la façon dont le législateur a dans une large mesure entériné cette interprétation. L'interprétation de la *LACC* par les tribunaux aide en fait à comprendre comment celle-ci en est venue à jouer un rôle si important dans le droit canadien de l'insolvabilité.

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

3.3 Pouvoirs discrétionnaires du tribunal chargé de surveiller une réorganisation fondée sur la LACC

[57] Les tribunaux font souvent remarquer que [TRADUCTION] « [l]a LACC est par nature schématique » et ne « contient pas un code complet énonçant tout ce qui est permis et tout ce qui est interdit » (*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, par. 44, le juge Blair). Par conséquent, [TRADUCTION] « [l]’histoire du droit relatif à la LACC correspond à l’évolution de ce droit au fil de son interprétation par les tribunaux » (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (C. Ont. (Div. gén.)), par. 10, le juge Farley).

[58] Les décisions prises en vertu de la LACC découlent souvent de l’exercice discrétionnaire de certains pouvoirs. C’est principalement au fil de l’exercice par les juridictions commerciales de leurs pouvoirs discrétionnaires, et ce, dans des conditions décrites avec justesse par un praticien comme constituant [TRADUCTION] « la pépinière du contentieux en temps réel », que la LACC a évolué de façon graduelle et s’est adaptée aux besoins commerciaux et sociaux contemporains (voir Jones, p. 484).

[59] L’exercice par les tribunaux de leurs pouvoirs discrétionnaires doit évidemment tendre à la réalisation des objectifs de la LACC. Le caractère réparateur dont j’ai fait état dans mon aperçu historique de la Loi a à maintes reprises été reconnu dans la jurisprudence. Voici l’un des premiers exemples :

[TRADUCTION] La loi est réparatrice au sens le plus pur du terme, en ce qu’elle fournit un moyen d’éviter les effets dévastateurs, — tant sur le plan social qu’économique — de la faillite ou de l’arrêt des activités d’une entreprise, à l’initiation des créanciers, pendant que des efforts sont déployés, sous la surveillance du tribunal, en vue de réorganiser la situation financière de la compagnie débitrice.

(*Elan Corp. c. Comiskey* (1990), 41 O.A.C. 282, par. 57, le juge Doherty, dissident)

[60] Le processus décisionnel des tribunaux sous le régime de la LACC comporte plusieurs aspects. Le tribunal doit d’abord créer les conditions propres à permettre au débiteur de tenter une réorganisation.

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.

Il peut à cette fin suspendre les mesures d'exécution prises par les créanciers afin que le débiteur puisse continuer d'exploiter son entreprise, préserver le statu quo pendant que le débiteur prépare la transaction ou l'arrangement qu'il présentera aux créanciers et surveiller le processus et le mener jusqu'au point où il sera possible de dire s'il aboutira (voir, p. ex., *Chef Ready Foods Ltd. c. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84 (C.A.), p. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134, par. 27). Ce faisant, le tribunal doit souvent déterminer les divers intérêts en jeu dans la réorganisation, lesquels peuvent fort bien ne pas se limiter aux seuls intérêts du débiteur et des créanciers, mais englober aussi ceux des employés, des administrateurs, des actionnaires et même de tiers qui font affaire avec la compagnie insolvable (voir, p. ex., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9, par. 144, la juge Paperny (maintenant juge de la Cour d'appel); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (C.S.J. Ont.), par. 3; *Air Canada, Re*, 2003 CanLII 49366 (C.S.J. Ont.), par. 13, le juge Farley; Sarra, *Creditor Rights*, p. 181-192 et 217-226). En outre, les tribunaux doivent reconnaître que, à l'occasion, certains aspects de la réorganisation concernent l'intérêt public et qu'il pourrait s'agir d'un facteur devant être pris en compte afin de décider s'il y a lieu d'autoriser une mesure donnée (voir, p. ex., *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (C.S.J. Ont.), par. 2, le juge Blair (maintenant juge de la Cour d'appel); Sarra, *Creditor Rights*, p. 195-214).

[61] Quand de grandes entreprises éprouvent des difficultés, les réorganisations deviennent très complexes. Les tribunaux chargés d'appliquer la LACC ont ainsi été appelés à innover dans l'exercice de leur compétence et ne se sont pas limités à suspendre les procédures engagées contre le débiteur afin de lui permettre de procéder à une réorganisation. On leur a demandé de sanctionner des mesures non expressément prévues par la LACC. Sans dresser la liste complète des diverses mesures qui ont été prises par des tribunaux en vertu de la LACC, il est néanmoins utile d'en donner brièvement quelques exemples, pour bien illustrer la marge de manœuvre que la loi accorde à ceux-ci.

[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

[62] L'utilisation la plus créative des pouvoirs conférés par la LACC est sans doute le fait que les tribunaux se montrent de plus en plus disposés à autoriser, après le dépôt des procédures, la constitution de sûretés pour financer le débiteur demeuré en possession des biens ou encore la constitution de charges super-prioritaires grevant l'actif du débiteur lorsque cela est nécessaire pour que ce dernier puisse continuer d'exploiter son entreprise pendant la réorganisation (voir, p. ex., *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118 (C. Ont. (Div. gén.)); *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96, conf. (1999), 12 C.B.R. (4th) 144 (C.S.); et, d'une manière générale, J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), p. 93-115). La LACC a aussi été utilisée pour libérer des tiers des actions susceptibles d'être intentées contre eux, dans le cadre de l'approbation d'un plan global d'arrangement et de transaction, malgré les objections de certains créanciers dissidents (voir *Metcalfe & Mansfield*). Au départ, la nomination d'un contrôleur chargé de surveiller la réorganisation était elle aussi une mesure prise en vertu du pouvoir de surveillance conféré par la LACC, mais le législateur est intervenu et a modifié la loi pour rendre cette mesure obligatoire.

[63] L'esprit d'innovation dont ont fait montre les tribunaux pendant des procédures fondées sur la LACC n'a toutefois pas été sans susciter de controverses. Au moins deux des questions que soulève leur approche sont directement pertinentes en l'espèce : (1) Quelles sont les sources des pouvoirs dont dispose le tribunal pendant les procédures fondées sur la LACC? (2) Quelles sont les limites de ces pouvoirs?

[64] La première question porte sur la frontière entre les pouvoirs d'origine législative dont dispose le tribunal en vertu de la LACC et les pouvoirs résiduels dont jouit un tribunal en raison de sa compétence inhérente et de sa compétence en equity, lorsqu'il est question de surveiller une réorganisation. Pour justifier certaines mesures autorisées à l'occasion de procédures engagées sous le régime de la LACC, les tribunaux ont parfois prétendu se fonder sur leur compétence en equity dans le but

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

de réaliser les objectifs de la Loi ou sur leur compétence inhérente afin de combler les lacunes de celle-ci. Or, dans de récentes décisions, des cours d’appel ont déconseillé aux tribunaux d’invoquer leur compétence inhérente, concluant qu’il est plus juste de dire que, dans la plupart des cas, les tribunaux ne font simplement qu’interpréter les pouvoirs se trouvant dans la LACC elle-même (voir, p. ex., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236, par. 45-47, la juge Newbury; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), par. 31-33, le juge Blair).

[65] Je suis d’accord avec la juge Georgina R. Jackson et la professeure Janis Sarra pour dire que la méthode la plus appropriée est une approche hiérarchisée. Suivant cette approche, les tribunaux procèdent d’abord à une interprétation des dispositions de la LACC avant d’invoquer leur compétence inhérente ou leur compétence en equity pour justifier des mesures prises dans le cadre d’une procédure fondée sur la LACC (voir G. R. Jackson et J. Sarra, « Selecting the Judicial Tool to get the Job Done : An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters », dans J. P. Sarra, dir., *Annual Review of Insolvency Law 2007* (2008), 41, p. 42). Selon ces auteurs, pourvu qu’on lui donne l’interprétation téléologique et large qui s’impose, la LACC permettra dans la plupart des cas de justifier les mesures nécessaires à la réalisation de ses objectifs (p. 94).

[66] L’examen des parties pertinentes de la LACC et de l’évolution récente de la législation me font adhérer à ce point de vue jurisprudentiel et doctrinal : dans la plupart des cas, la décision de rendre une ordonnance durant une procédure fondée sur la LACC relève de l’interprétation législative. D’ailleurs, à cet égard, il faut souligner d’une façon particulière que le texte de loi dont il est question en l’espèce peut être interprété très largement.

[67] En vertu du pouvoir conféré initialement par la LACC, le tribunal pouvait, « chaque fois qu’une demande [était] faite sous le régime de la présente loi à l’égard d’une compagnie, [. . .] sur demande

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

d’un intéressé, [. . .] sous réserve des autres dispositions de la présente loi [. . .] rendre l’ordonnance prévue au présent article » (*LACC*, par. 11(1)). Cette formulation claire était très générale.

[68] Bien que ces dispositions ne soient pas strictement applicables en l’espèce, je signale à ce propos que le législateur a, dans des modifications récentes, apporté au texte du par. 11(1) un changement qui rend plus explicite le pouvoir discrétionnaire conféré au tribunal par la *LACC*. Ainsi, aux termes de l’art. 11 actuel de la *LACC*, le tribunal peut « rendre [. . .] sous réserve des restrictions prévues par la présente loi [. . .] toute ordonnance qu’il estime indiquée » (*L.C.* 2005, ch. 47, art. 128). Le législateur semble ainsi avoir jugé opportun de sanctionner l’interprétation large du pouvoir conféré par la *LACC* qui a été élaborée par la jurisprudence.

[69] De plus, la *LACC* prévoit explicitement certaines ordonnances. Tant à la suite d’une demande initiale que d’une demande subséquente, le tribunal peut, par ordonnance, suspendre ou interdire toute procédure contre le débiteur, ou surseoir à sa continuation. Il incombe à la personne qui demande une telle ordonnance de convaincre le tribunal qu’elle est indiquée et qu’il a agi et continue d’agir de bonne foi et avec la diligence voulue (*LACC*, par. 11(3), (4) et (6)).

[70] La possibilité pour le tribunal de rendre des ordonnances plus spécifiques n’a pas pour effet de restreindre la portée des termes généraux utilisés dans la *LACC*. Toutefois, l’opportunité, la bonne foi et la diligence sont des considérations de base que le tribunal devrait toujours garder à l’esprit lorsqu’il exerce les pouvoirs conférés par la *LACC*. Sous le régime de la *LACC*, le tribunal évalue l’opportunité de l’ordonnance demandée en déterminant si elle favorisera la réalisation des objectifs de politique générale qui sous-tendent la Loi. Il s’agit donc de savoir si cette ordonnance contribuera utilement à la réalisation de l’objectif réparateur de la *LACC* — à savoir éviter les pertes sociales et économiques résultant de la liquidation d’une compagnie insolvable. J’ajouterais que le critère de l’opportunité s’applique non seulement à l’objectif de l’ordonnance, mais aussi aux moyens utilisés. Les tribunaux

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.

doivent se rappeler que les chances de succès d’une réorganisation sont meilleures lorsque les participants arrivent à s’entendre et que tous les intéressés sont traités de la façon la plus avantageuse et juste possible dans les circonstances.

[71] Il est bien établi qu’il est possible de mettre fin aux efforts déployés pour procéder à une réorganisation fondée sur la LACC et de lever la suspension des procédures contre le débiteur si la réorganisation est [TRADUCTION] « vouée à l’échec » (voir *Chef Ready*, p. 88; *Philip’s Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (C.A.C.-B.), par. 6-7). Cependant, quand l’ordonnance demandée contribue vraiment à la réalisation des objectifs de la LACC, le pouvoir discrétionnaire dont dispose le tribunal en vertu de cette loi l’habilite à rendre à cette ordonnance.

[72] L’analyse qui précède est utile pour répondre à la question de savoir si le tribunal avait, en vertu de la LACC, le pouvoir de maintenir la suspension des procédures à l’encontre de la Couronne, une fois qu’il est devenu évident que la réorganisation échouerait et que la faillite était inévitable.

[73] En Cour d’appel, le juge Tysoe a conclu que la LACC n’habilitait pas le tribunal à maintenir la suspension des mesures d’exécution de la Couronne à l’égard de la fiducie réputée visant la TPS après l’arrêt des efforts de réorganisation. Selon l’appelante, en tirant cette conclusion, le juge Tysoe a omis de tenir compte de l’objectif fondamental de la LACC et n’a pas donné à ce texte l’interprétation téléologique et large qu’il convient de lui donner et qui autorise le prononcé d’une telle ordonnance. La Couronne soutient que le juge Tysoe a conclu à bon droit que les termes impératifs de la *LTA* ne laissaient au tribunal d’autre choix que d’autoriser les mesures d’exécution à l’endroit de la fiducie réputée visant la TPS lorsqu’il a levé la suspension de procédures qui avait été ordonnée en application de la LACC afin de permettre au débiteur de faire cession de ses biens en vertu de la *LFI*. J’ai déjà traité de la question de savoir si la *LTA* a un effet contraignant dans une procédure fondée sur la LACC. Je vais maintenant traiter de la question de savoir si l’ordonnance était autorisée par la LACC.

[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

[74] Il n'est pas contesté que la *LACC* n'assujettit les procédures engagées sous son régime à aucune limite temporelle explicite qui interdirait au tribunal d'ordonner le maintien de la suspension des procédures engagées par la Couronne pour recouvrer la TPS, tout en levant temporairement la suspension générale des procédures prononcée pour permettre au débiteur de faire cession de ses biens.

[75] Il reste à se demander si l'ordonnance contribuait à la réalisation de l'objectif fondamental de la *LACC*. La Cour d'appel a conclu que non, parce que les efforts de réorganisation avaient pris fin et que, par conséquent, la *LACC* n'était plus d'aucune utilité. Je ne partage pas cette conclusion.

[76] Il ne fait aucun doute que si la réorganisation avait été entreprise sous le régime de la *LFI* plutôt qu'en vertu de la *LACC*, la Couronne aurait perdu la priorité que lui confère la fiducie réputée visant la TPS. De même, la Couronne ne conteste pas que, selon le plan de répartition prévu par la *LFI* en cas de faillite, cette fiducie réputée cesse de produire ses effets. Par conséquent, après l'échec de la réorganisation tentée sous le régime de la *LACC*, les créanciers auraient eu toutes les raisons de solliciter la mise en faillite immédiate du débiteur et la répartition de ses biens en vertu de la *LFI*. Pour pouvoir conclure que le pouvoir discrétionnaire dont dispose le tribunal ne l'autorise pas à lever partiellement la suspension des procédures afin de permettre la cession des biens, il faudrait présumer l'existence d'un hiatus entre la procédure fondée sur la *LACC* et celle fondée sur la *LFI*. L'ordonnance du juge en chef Brenner suspendant l'exécution des mesures de recouvrement de la Couronne à l'égard de la TPS faisait en sorte que les créanciers ne soient pas désavantagés par la tentative de réorganisation fondée sur la *LACC*. Cette ordonnance avait pour effet de dissuader les créanciers d'entraver une liquidation ordonnée et, de ce fait, elle contribuait à la réalisation des objectifs de la *LACC*, dans la mesure où elle établit une passerelle entre les procédures régies par la *LACC* d'une part et celles régies par la *LFI* d'autre part. Cette interprétation du pouvoir discrétionnaire du tribunal se trouve renforcée par

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

l'art. 20 de la *LACC*, qui précise que les dispositions de la Loi « peuvent être appliquées conjointement avec celles de toute loi fédérale [. . .] autorisant ou prévoyant l'homologation de transactions ou arrangements entre une compagnie et ses actionnaires ou une catégorie de ces derniers », par exemple la *LFI*. L'article 20 indique clairement que le législateur entend voir la *LACC* être appliquée *de concert* avec les autres lois concernant l'insolvabilité, telle la *LFI*.

[77] La *LACC* établit les conditions qui permettent de préserver le statu quo pendant qu'on tente de trouver un terrain d'entente entre les intéressés en vue d'une réorganisation qui soit juste pour tout le monde. Étant donné que, souvent, la seule autre solution est la faillite, les participants évaluent l'impact d'une réorganisation en regard de la situation qui serait la leur en cas de liquidation. En l'espèce, l'ordonnance favorisait une transition harmonieuse entre la réorganisation et la liquidation, tout en répondant à l'objectif — commun aux deux lois — qui consiste à avoir une seule procédure collective.

[78] À mon avis, le juge d'appel Tysoe a donc commis une erreur en considérant la *LACC* et la *LFI* comme des régimes distincts, séparés par un hiatus temporel, plutôt que comme deux lois faisant partie d'un ensemble intégré de règles du droit de l'insolvabilité. La décision du législateur de conserver deux régimes législatifs en matière de réorganisation, la *LFI* et la *LACC*, reflète le fait bien réel que des réorganisations de complexité différente requièrent des mécanismes légaux différents. En revanche, un seul régime législatif est jugé nécessaire pour la liquidation de l'actif d'un débiteur en faillite. Le passage de la *LACC* à la *LFI* peut exiger la levée partielle d'une suspension de procédures ordonnée en vertu de la *LACC*, de façon à permettre l'engagement des procédures fondées sur la *LFI*. Toutefois, comme l'a signalé le juge Laskin de la Cour d'appel de l'Ontario dans un litige semblable opposant des créanciers garantis et le Surintendant des services financiers de l'Ontario qui invoquait le bénéfice d'une fiducie réputée, [TRADUCTION] « [I]es deux lois sont

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

liées » et il n'existe entre elles aucun « hiatus » qui permettrait d'obtenir l'exécution, à l'issue de procédures engagées sous le régime de la *LACC*, de droits de propriété qui seraient perdus en cas de faillite (*Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, par. 62-63).

[79] La priorité accordée aux réclamations de la Couronne fondées sur une fiducie réputée visant des retenues à la source n'affaiblit en rien cette conclusion. Comme ces fiducies réputées survivent tant sous le régime de la *LACC* que sous celui de la *LFI*, ce facteur n'a aucune incidence sur l'intérêt que pourraient avoir les créanciers à préférer une loi plutôt que l'autre. S'il est vrai que le tribunal agissant en vertu de la *LACC* dispose d'une grande latitude pour suspendre les réclamations fondée sur des fiducies réputées visant des retenues à la source, cette latitude n'en demeure pas moins soumise à des limitations particulières, applicables uniquement à ces fiducies réputées (*LACC*, art. 11.4). Par conséquent, si la réorganisation tentée sous le régime de la *LACC* échoue (p. ex. parce que le tribunal ou les créanciers refusent une proposition de réorganisation), la Couronne peut immédiatement présenter sa réclamation à l'égard des retenues à la source non versées. Mais il ne faut pas en conclure que cela compromet le passage harmonieux au régime de faillite ou crée le moindre « hiatus » entre la *LACC* et la *LFI*, car le fait est que, peu importe la loi en vertu de laquelle la réorganisation a été amorcée, les réclamations des créanciers auraient dans les deux cas été subordonnées à la priorité de la fiducie réputée de la Couronne à l'égard des retenues à la source.

[80] Abstraction faite des fiducies réputées visant les retenues à la source, c'est le mécanisme complet et exhaustif prévu par la *LFI* qui doit régir la répartition des biens du débiteur une fois que la liquidation est devenue inévitable. De fait, une transition ordonnée aux procédures de liquidation est obligatoire sous le régime de la *LFI* lorsqu'une proposition est rejetée par les créanciers. La *LACC* est muette à l'égard de cette transition, mais l'ampleur du pouvoir discrétionnaire conféré au tribunal par cette loi est suffisante pour établir une passerelle vers une liquidation opérée sous le régime

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) inferable from the court's order of April 29, 2008 sufficient to support an express trust.

de la LFI. Ce faisant, le tribunal doit veiller à ne pas perturber le plan de répartition établi par la LFI. La transition au régime de liquidation nécessite la levée partielle de la suspension des procédures ordonnée en vertu de la LACC, afin de permettre l'introduction de procédures en vertu de la LFI. Il ne faudrait pas que cette indispensable levée partielle de la suspension des procédures provoque une ruée des créanciers vers le palais de justice pour l'obtention d'une priorité inexistante sous le régime de la LFI.

[81] Je conclus donc que le juge en chef Brenner avait, en vertu de la LACC, le pouvoir de lever la suspension des procédures afin de permettre la transition au régime de liquidation.

3.4 *Fiducie expresse*

[82] La dernière question à trancher en l'espèce est celle de savoir si le juge en chef Brenner a créé une fiducie expresse en faveur de la Couronne quand il a ordonné, le 29 avril 2008, que le produit de la vente des biens de LeRoy Trucking — jusqu'à concurrence des sommes de TPS non remises — soit détenu dans le compte en fiducie du contrôleur jusqu'à ce que l'issue de la réorganisation soit connue. Un autre motif invoqué par le juge Tysoe de la Cour d'appel pour accueillir l'appel interjeté par la Couronne était que, selon lui, celle-ci était effectivement la bénéficiaire d'une fiducie expresse. Je ne peux souscrire à cette conclusion.

[83] La création d'une fiducie expresse exige la présence de trois certitudes : certitude d'intention, certitude de matière et certitude d'objet. Les fiducies expresses ou « fiducies au sens strict » découlent des actes et des intentions du constituant et se distinguent des autres fiducies découlant de l'effet de la loi (voir D. W. M. Waters, M. R. Gillen et L. D. Smith, dir., *Waters' Law of Trusts in Canada* (3^e éd. 2005), p. 28-29, particulièrement la note en bas de page 42).

[84] En l'espèce, il n'existe aucune certitude d'objet (c.-à-d. relative au bénéficiaire) pouvant être inférée de l'ordonnance prononcée le 29 avril 2008 par le tribunal et suffisante pour donner naissance à une fiducie expresse.

[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

[85] Au moment où l'ordonnance a été rendue, il y avait un différend entre Century Services et la Couronne au sujet d'une partie du produit de la vente des biens du débiteur. La solution retenue par le tribunal a consisté à accepter, selon la proposition de LeRoy Trucking, que la somme en question soit détenue séparément jusqu'à ce que le différend puisse être réglé. Par conséquent, il n'existait aucune certitude que la Couronne serait véritablement le bénéficiaire ou l'objet de la fiducie.

[86] Le fait que le compte choisi pour conserver séparément la somme en question était le compte en fiducie du contrôleur n'a pas à lui seul un effet tel qu'il suppléerait à l'absence d'un bénéficiaire certain. De toute façon, suivant l'interprétation du par. 18.3(1) de la *LACC* dérogée précédemment, aucun différend ne saurait même exister quant à la priorité de rang, étant donné que la priorité accordée aux réclamations de la Couronne fondées sur la fiducie réputée visant la TPS ne s'applique pas sous le régime de la *LACC* et que la Couronne est reléguée au rang de créancier non garanti à l'égard des sommes en question. Cependant, il se peut fort bien que le juge en chef Brenner ait estimé que, conformément à l'arrêt *Ottawa Senators*, la créance de la Couronne à l'égard de la TPS demeurerait effective si la réorganisation aboutissait, ce qui ne serait pas le cas si le passage au processus de liquidation régi par la *LFI* était autorisé. Une somme équivalente à cette créance serait ainsi mise de côté jusqu'à ce que le résultat de la réorganisation soit connu.

[87] Par conséquent, l'incertitude entourant l'issue de la restructuration tentée sous le régime de la *LACC* exclut l'existence d'une certitude permettant de conférer de manière permanente à la Couronne un intérêt bénéficiaire sur la somme en question. Cela ressort clairement des motifs exposés de vive voix par le juge en chef Brenner le 29 avril 2008, lorsqu'il a dit : [TRADUCTION] « Comme il est notoire que [des procédures fondées sur la *LACC*] peuvent échouer et que cela entraîne des faillites, le maintien du statu quo en l'espèce me semble militer en faveur de l'acceptation de la proposition d'ordonner au contrôleur de détenir ces fonds en fiducie. » Il y avait donc manifestement un doute quant à la question de savoir qui au juste pourrait toucher l'argent

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*").

en fin de compte. L'ordonnance ultérieure du juge en chef Brenner — dans laquelle ce dernier a rejeté, le 3 septembre 2008, la demande de la Couronne sollicitant le bénéfice de la fiducie présumée après qu'il fut devenu évident que la faillite était inévitable — confirme l'absence du bénéficiaire certain sans lequel il ne saurait y avoir de fiducie expresse.

4. Conclusion

[88] Je conclus que le juge en chef Brenner avait, en vertu de la *LACC*, le pouvoir discrétionnaire de maintenir la suspension de la demande de la Couronne sollicitant le bénéfice de la fiducie réputée visant la TPS, tout en levant par ailleurs la suspension des procédures de manière à permettre à LeRoy Trucking de faire cession de ses biens. Ma conclusion selon laquelle le par. 18.3(1) de la *LACC* neutralisait la fiducie réputée visant la TPS pendant la durée des procédures fondées sur cette loi confirme que les pouvoirs discrétionnaires exercés par le tribunal en vertu de l'art. 11 n'étaient pas limités par la priorité invoquée par la Couronne au titre de la TPS, puisqu'il n'existe aucune priorité de la sorte sous le régime de la *LACC*.

[89] Pour ces motifs, je suis d'avis d'accueillir le pourvoi et de déclarer que la somme de 305 202,30 \$ perçue par LeRoy Trucking au titre de la TPS mais non encore versée au receveur général du Canada ne fait l'objet d'aucune fiducie réputée ou priorité en faveur de la Couronne. Cette somme ne fait pas non plus l'objet d'une fiducie expresse. Les dépens sont accordés à l'égard du présent pourvoi et de l'appel interjeté devant la juridiction inférieure.

Version française des motifs rendus par

LE JUGE FISH —

I

[90] Je souscris dans l'ensemble aux motifs de la juge Deschamps et je disposerais du pourvoi comme elle le propose.

[91] Plus particulièrement, je me rallie à son interprétation de la portée du pouvoir discrétionnaire conféré au juge par l'art. 11 de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C.

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.

1985, ch. C-36 (« LACC »). Je partage en outre sa conclusion suivant laquelle le juge en chef Brenner n'a pas créé de fiducie expresse en faveur de la Couronne en ordonnant que les sommes recueillies au titre de la TPS soient détenues séparément dans le compte en fiducie du contrôleur (2008 BCSC 1805, [2008] G.S.T.C. 221).

[92] J'estime néanmoins devoir ajouter de brefs motifs qui me sont propres au sujet de l'interaction entre la LACC et la *Loi sur la taxe d'accise*, L.R.C. 1985, ch. E-15 (« LTA »).

[93] En maintenant, malgré l'existence des procédures d'insolvabilité, la validité de fiducies réputées créées en vertu de la LTA, l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), et les décisions rendues dans sa foulée ont eu pour effet de protéger indûment des droits de la Couronne que le Parlement avait lui-même choisi de subordonner à d'autres créances prioritaires. À mon avis, il convient en l'espèce de rompre nettement avec ce courant jurisprudenciel.

[94] La juge Deschamps expose d'importantes raisons d'ordre historique et d'intérêt général à l'appui de cette position et je n'ai rien à ajouter à cet égard. Je tiens toutefois à expliquer pourquoi une analyse comparative de certaines dispositions législatives connexes vient renforcer la conclusion à laquelle ma collègue et moi-même en arrivons.

[95] Au cours des dernières années, le législateur fédéral a procédé à un examen approfondi du régime canadien d'insolvabilité. Il a refusé de modifier les dispositions qui sont en cause dans la présente affaire. Il ne nous appartient pas de nous interroger sur les raisons de ce choix. Nous devons plutôt considérer la décision du législateur de maintenir en vigueur les dispositions en question comme un exercice délibéré du pouvoir discrétionnaire de légiférer, pouvoir qui est exclusivement le sien. Avec égards, je rejette le point de vue suivant lequel nous devrions plutôt qualifier l'apparente contradiction entre le par. 18.3(1) (maintenant le par. 37(1)) de la LACC et l'art. 222 de la LTA d'anomalie rédactionnelle ou de lacune législative susceptible d'être corrigée par un tribunal.

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

II

[96] Dans le contexte du régime canadien d’insolvabilité, on conclut à l’existence d’une fiducie réputée uniquement lorsque deux éléments complémentaires sont réunis : en premier lieu, une disposition législative qui *crée* la fiducie et, en second lieu, une disposition de la *LACC* ou de la *Loi sur la faillite et l’insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* ») qui *confirme* l’existence de la fiducie ou la maintient explicitement en vigueur.

[97] Cette interprétation se retrouve dans trois lois fédérales, qui renferment toutes une disposition relative aux fiducies réputées dont le libellé offre une ressemblance frappante avec celui de l’art. 222 de la *LTA*.

[98] La première est la *Loi de l’impôt sur le revenu*, L.R.C. 1985, ch. 1 (5^e suppl.) (« *LIR* »), dont le par. 227(4) *crée* une fiducie réputée :

(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. [Dans la présente citation et dans celles qui suivent, les soulignements sont évidemment de moi.]

[99] Dans le paragraphe suivant, le législateur prend la peine de bien préciser que toute disposition législative fédérale ou provinciale à l’effet contraire n’a aucune incidence sur la fiducie ainsi constituée :

(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 [. . .] 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,

apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, . . .

séparés des propres biens de la personne, qu'ils soient ou non assujettis à une telle garantie;

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

. . . et le produit découlant de ces biens est payé au receveur général par priorité sur une telle garantie.

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

[100] Le maintien en vigueur de cette fiducie réputée est expressément *confirmé* à l'art. 18.3 de la LACC :

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.

18.3(1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

(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*

(2) Le paragraphe (1) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi*

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

[101] L'application de la fiducie réputée prévue par la *LIR* est également confirmée par l'art. 67 de la *LFI* :

(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.

(2) Sous réserve du paragraphe (3) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens du failli ne peut, pour l'application de l'alinéa (1)a), être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

(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*

(3) Le paragraphe (2) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi*

[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.

[102] Par conséquent, le législateur a *créé*, puis *confirmé le maintien en vigueur* de la fiducie réputée établie par la *LIR* en faveur de Sa Majesté *tant* sous le régime de la *LACC* que sous celui de la *LFI*.

[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

[103] La deuxième loi fédérale où l’on retrouve ce mécanisme est le *Régime de pensions du Canada*, L.R.C. 1985, ch. C-8 (« *RPC* »). À l’article 23, le législateur crée une fiducie réputée en faveur de la Couronne et précise qu’elle existe malgré les dispositions contraires de toute autre loi fédérale. Enfin, la *Loi sur l’assurance-emploi*, L.C. 1996, ch. 23 (« *LAE* »), crée dans des termes quasi identiques, une fiducie réputée en faveur de la Couronne : voir les par. 86(2) et (2.1).

[104] Comme nous l’avons vu, le maintien en vigueur des fiducies réputées créées en vertu de ces dispositions de la *LIR*, du *RPC* et de la *LAE* est confirmé au par. 18.3(2) de la *LACC* et au par. 67(3) de la *LFI*. Dans les trois cas, le législateur a exprimé en termes clairs et explicites sa volonté de voir la fiducie réputée établie en faveur de la Couronne produire ses effets pendant le déroulement de la procédure d’insolvabilité.

[105] La situation est différente dans le cas de la fiducie réputée créée par la *LTA*. Bien que le législateur crée en faveur de la Couronne une fiducie réputée dans laquelle seront conservées les sommes recueillies au titre de la TPS mais non encore versées, et bien qu’il prétende maintenir cette fiducie en vigueur malgré les dispositions à l’effet contraire de toute loi fédérale ou provinciale, il ne *confirme* pas l’existence de la fiducie — ni ne prévoit expressément le maintien en vigueur de celle-ci — dans la *LFI* ou dans la *LACC*. Le second des deux éléments obligatoires que j’ai mentionnés fait donc défaut, ce qui témoigne de l’intention du législateur de laisser la fiducie réputée devenir caduque au moment de l’introduction de la procédure d’insolvabilité.

[106] Le texte des dispositions en cause de la *LTA* est substantiellement identique à celui des dispositions de la *LIR*, du *RPC* et de la *LAE* :

222. (1) La personne qui perçoit un montant au titre de la taxe prévue à la section II est réputée, à toutes fins utiles et malgré tout droit en garantie le concernant, le détenir en fiducie pour Sa Majesté du chef du Canada, séparé de ses propres biens et des biens détenus par ses créanciers garantis qui, en l’absence du droit en garantie, seraient ceux de la personne, jusqu’à ce qu’il soit

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 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 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

versé au receveur général ou retiré en application du paragraphe (2).

(3) Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté du chef du Canada, à compter du moment où le montant est perçu par la personne, séparés des propres biens de la personne, qu'ils soient ou non assujettis à un droit en garantie;

. . . et le produit découlant de ces biens est payé au receveur général par priorité sur tout droit en garantie.

[107] Pourtant, aucune disposition de la *LACC* ne prévoit le maintien en vigueur de la fiducie réputée une fois que la *LACC* entre en jeu.

[108] En résumé, le législateur a imposé *deux* conditions explicites — ou « composantes de base » — devant être réunies pour que survivent, sous le régime de la *LACC*, les fiducies réputées qui ont été établies par la *LIR*, le *RPC* et la *LAE*. S'il avait voulu préserver de la même façon, sous le régime de la *LACC*, les fiducies réputées qui sont établies par la *LTA*, il aurait inséré dans la *LACC* le type de disposition confirmatoire qui maintient explicitement en vigueur d'autres fiducies réputées.

[109] Avec égards pour l'opinion contraire exprimée par le juge Tysoe de la Cour d'appel, je ne trouve pas [TRADUCTION] « inconceivable que le législateur, lorsqu'il a adopté la version actuelle du par. 222(3) de la *LTA*, ait désigné expressément la *LFI* comme une exception sans envisager que la *LACC* puisse constituer une deuxième exception » (2009 BCCA

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

205, 98 B.C.L.R. (4th) 242, par. 37). *Toutes* les dispositions établissant des fiducies réputées qui sont reproduites ci-dessus font explicitement mention de la *LFI*. L'article 222 de la *LTA* ne rompt pas avec ce modèle. Compte tenu du libellé presque identique des quatre dispositions établissant une fiducie réputée, il aurait d'ailleurs été étonnant que le législateur ne fasse aucune mention de la *LFI* dans la *LTA*.

[110] L'intention du législateur était manifestement de rendre inopérantes les fiducies réputées visant la TPS dès l'introduction d'une procédure d'insolvabilité. Par conséquent, l'art. 222 mentionne la *LFI* de manière à *l'exclure* de son champ d'application — et non de l'y *inclure*, comme le font la *LIR*, le *RPC* et la *LAE*.

[111] En revanche, je constate qu'*aucune* de ces lois ne mentionne expressément la *LACC*. La mention explicite de la *LFI* dans ces textes n'a aucune incidence sur leur interaction avec la *LACC*. Là encore, ce sont les dispositions confirmatoires que l'on trouve *dans les lois sur l'insolvabilité* qui déterminent si une fiducie réputée continuera d'exister durant une procédure d'insolvabilité.

[112] Enfin, j'estime que les juges siégeant en leur cabinet ne devraient pas, comme cela s'est produit en l'espèce, ordonner que les sommes perçues au titre de la TPS soient détenues séparément dans le compte en fiducie du contrôleur pendant le déroulement d'une procédure fondée sur la *LACC*. Il résulte du raisonnement de la juge Deschamps que les réclamations de TPS deviennent des créances non garanties sous le régime de la *LACC*. Le législateur a délibérément décidé de supprimer certaines superpriorités accordées à la Couronne pendant l'insolvabilité; nous sommes en présence de l'un de ces cas.

III

[113] Pour les motifs qui précèdent, je suis d'avis, à l'instar de la juge Deschamps, d'accueillir le pourvoi avec dépens devant notre Cour et devant les juridictions inférieures, et d'ordonner que la somme de 305 202,30 \$ — qui a été perçue par LeRoy Trucking

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 11¹ 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:

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.

au titre de la TPS mais n’a pas encore été versée au receveur général du Canada — ne fasse l’objet d’aucune fiducie réputée ou priorité en faveur de la Couronne.

Version française des motifs rendus par

[114] LA JUGE ABELLA (dissidente) — La question qui est au cœur du présent pourvoi est celle de savoir si l’art. 222 de la *Loi sur la taxe d’accise*, L.R.C. 1985, ch. E-15 (« *LTA* »), et plus particulièrement le par. 222(3), donnent préséance, dans le cadre d’une procédure relevant de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« *LACC* »), à la fiducie réputée qui est établie en faveur de la Couronne à l’égard de la TPS non versée. À l’instar du juge Tysoe de la Cour d’appel, j’estime que tel est le cas. Il s’ensuit, à mon avis, que le pouvoir discrétionnaire conféré au tribunal par l’art. 11 de la *LACC* est circonscrit en conséquence.

[115] L’article 11¹ de la *LACC* disposait :

11. (1) Malgré toute disposition de la *Loi sur la faillite et l’insolvabilité* ou de la *Loi sur les liquidations*, chaque fois qu’une demande est faite sous le régime de la présente loi à l’égard d’une compagnie, le tribunal, sur demande d’un intéressé, peut, sous réserve des autres dispositions de la présente loi et avec ou sans avis, rendre l’ordonnance prévue au présent article.

Pour être en mesure de déterminer la portée du pouvoir discrétionnaire conféré au tribunal par l’art. 11, il est nécessaire de trancher d’abord la question de la priorité. Le paragraphe 222(3), la disposition de la *LTA* en cause en l’espèce, prévoit ce qui suit :

¹ L’article 11 a été modifié et le texte modifié, qui est entré en vigueur le 18 septembre 2009, est rédigé ainsi :

11. Malgré toute disposition de la *Loi sur la faillite et l’insolvabilité* ou de la *Loi sur les liquidations et les restructurations*, le tribunal peut, dans le cas de toute demande sous le régime de la présente loi à l’égard d’une compagnie débitrice, rendre, sur demande d’un intéressé, mais sous réserve des restrictions prévues par la présente loi et avec ou sans avis, toute ordonnance qu’il estime indiquée.

(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.

[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

(3) Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté du chef du Canada, à compter du moment où le montant est perçu par la personne, séparés des propres biens de la personne, qu'ils soient ou non assujettis à un droit en garantie;

b) ne pas faire partie du patrimoine ou des biens de la personne à compter du moment où le montant est perçu, 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 un droit en garantie.

Ces biens sont des biens dans lesquels Sa Majesté du chef du Canada a un droit de bénéficiaire malgré tout autre droit en 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 tout droit en garantie.

[116] Selon Century Services, la disposition dérogatoire générale de la *LACC*, le par. 18.3(1), l'emportait, et les dispositions déterminatives à l'art. 222 de la *LTA* étaient par conséquent inapplicables dans le cadre d'une procédure fondée sur la *LACC*. Le paragraphe 18.3(1) dispose :

18.3 (1) . . . [P]ar dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

[117] Ainsi que l'a fait observer le juge d'appel MacPherson, dans l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), le par. 222(3) de la *LTA* [TRADUCTION] « entre nettement en conflit » avec le par. 18.3(1) de la *LACC* (par. 31). Essentiellement, la résolution du conflit entre ces deux dispositions requiert à mon sens une

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

opération relativement simple d’interprétation des lois : Est-ce que les termes employés révèlent une intention claire du législateur? À mon avis, c’est le cas. Le texte de la disposition créant une fiducie réputée, soit le par. 222(3) de la *LTA*, précise sans ambiguïté que cette disposition s’applique malgré toute autre règle de droit sauf la *Loi sur la faillite et l’insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* »).

[118] En excluant explicitement une seule loi du champ d’application du par. 222(3) et en déclarant de façon non équivoque qu’il s’applique malgré toute autre loi ou règle de droit au Canada *sauf* la *LFI*, le législateur a défini la portée de cette disposition dans des termes on ne peut plus clairs. Je souscris sans réserve aux propos suivants du juge d’appel MacPherson dans l’arrêt *Ottawa Senators* :

[TRADUCTION] L’intention du législateur au par. 222(3) de la *LTA* est claire. En cas de conflit avec « tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l’insolvabilité*) », c’est le par. 222(3) qui l’emporte. En employant ces mots, le législateur fédéral a fait deux choses : il a décidé que le par. 222(3) devait l’emporter sur tout autre texte législatif fédéral et, fait important, il a abordé la question des exceptions à cette préséance en en mentionnant une seule, la *Loi sur la faillite et l’insolvabilité* [. . .] La *LFI* et la *LACC* sont des lois fédérales étroitement liées entre elles. Je ne puis concevoir que le législateur ait pu mentionner expressément la *LFI* à titre d’exception, mais ait involontairement omis de considérer la *LACC* comme une deuxième exception possible. À mon avis, le fait que la *LACC* ne soit pas mentionnée au par. 222(3) de la *LTA* était presque assurément une omission mûrement réfléchie de la part du législateur. [par. 43]

[119] L’opinion du juge d’appel MacPherson suivant laquelle le fait que la *LACC* n’ait pas été soustraite à l’application de la *LTA* témoigne d’une intention claire du législateur est confortée par la façon dont la *LACC* a par la suite été modifiée après l’édiction du par. 18.3(1) en 1997. En 2000, lorsque le par. 222(3) de la *LTA* est entré en vigueur, des modifications ont également été apportées à la *LACC*, mais le par. 18.3(1) de cette loi n’a pas été modifié.

[120] L’absence de modification du par. 18.3(1) vaut d’être soulignée, car elle a eu pour effet de maintenir le statu quo législatif, malgré les

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]

demandes répétées de divers groupes qui souhaitaient que cette disposition soit modifiée pour aligner l'ordre de priorité établi par la *LACC* sur celui de la *LFI*. En 2002, par exemple, lorsque Industrie Canada a procédé à l'examen de la *LFI* et de la *LACC*, l'Institut d'insolvabilité du Canada et l'Association canadienne des professionnels de l'insolvabilité et de la réorganisation ont recommandé que les règles de la *LFI* en matière de priorité soient étendues à la *LACC* (Joint Task Force on Business Insolvency Law Reform, *Report* (15 mars 2002), ann. B, proposition 71). Ces recommandations ont été reprises en 2003 par le Comité sénatorial permanent des banques et du commerce dans son rapport intitulé *Les débiteurs et les créanciers doivent se partager le fardeau : Examen de la Loi sur la faillite et l'insolvabilité et de la Loi sur les arrangements avec les créanciers des compagnies*, ainsi qu'en 2005 par le Legislative Review Task Force (Commercial) de l'Institut d'insolvabilité du Canada et de l'Association canadienne des professionnels de l'insolvabilité et de la réorganisation dans son *Report on the Commercial Provisions of Bill C-55*, et en 2007 par l'Institut d'insolvabilité du Canada dans un mémoire soumis au Comité sénatorial permanent des banques et du commerce au sujet de réformes alors envisagées.

[121] La *LFI* demeure néanmoins la seule loi soustraite à l'application du par. 222(3) de la *LTA*. Même à la suite de l'arrêt rendu en 2005 dans l'affaire *Ottawa Senators*, qui a confirmé que la *LTA* l'emportait sur la *LACC*, le législateur n'est pas intervenu. Cette absence de réaction de sa part me paraît tout aussi pertinente en l'espèce que dans l'arrêt *Société Télé-Mobile c. Ontario*, 2008 CSC 12, [2008] 1 R.C.S. 305, où la Cour a déclaré ceci :

Le silence du législateur n'est pas nécessairement déterminant quant à son intention, mais en l'espèce, il répond à la demande pressante de Telus et des autres entreprises et organisations intéressées que la loi prévoie expressément la possibilité d'un remboursement des frais raisonnables engagés pour communiquer des éléments de preuve conformément à une ordonnance. L'historique législatif confirme selon moi que le législateur n'a pas voulu qu'une indemnité soit versée pour l'obtempération à une ordonnance de communication. [par. 42]

[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*).

[122] Tout ce qui précède permet clairement d’inférer que le législateur a délibérément choisi de soustraire la fiducie réputée établie au par. 222(3) à l’application du par. 18.3(1) de la *LACC*.

[123] Je ne vois pas non plus de « considération de politique générale » qui justifierait d’aller à l’encontre, par voie d’interprétation législative, de l’intention aussi clairement exprimée par le législateur. Je ne saurais expliquer mieux que ne l’a fait le juge d’appel Tysoe les raisons pour lesquelles l’argument invoquant des considérations de politique générale ne peut, selon moi, être retenu en l’espèce. Je vais donc reprendre à mon compte ses propos à ce sujet :

[TRADUCTION] Je ne conteste pas qu’il existe des raisons de politique générale valables qui justifient d’inciter les entreprises insolvables à tenter de se restructurer de façon à pouvoir continuer à exercer leurs activités avec le moins de perturbations possibles pour leurs employés et pour les autres intéressés. Les tribunaux peuvent légitimement tenir compte de telles considérations de politique générale, mais seulement si elles ont trait à une question que le législateur n’a pas examinée. Or, dans le cas qui nous occupe, il y a lieu de présumer que le législateur a tenu compte de considérations de politique générale lorsqu’il a adopté les modifications susmentionnées à la *LACC* et à la *LTA*. Comme le juge MacPherson le fait observer au par. 43 de l’arrêt *Ottawa Senators*, il est inconcevable que le législateur, lorsqu’il a adopté la version actuelle du par. 222(3) de la *LTA*, ait désigné expressément la *LFI* comme une exception sans envisager que la *LACC* puisse constituer une deuxième exception. Je signale par ailleurs que les modifications apportées en 1992 à la *LFI* ont permis de rendre les propositions concordataires opposables aux créanciers garantis et que, malgré la plus grande souplesse de la *LACC*, il est possible pour une compagnie insolvable de se restructurer sous le régime de la *LFI*. [par. 37]

[124] Bien que je sois d’avis que la clarté des termes employés au par. 222(3) tranche la question, j’estime également que cette conclusion est même renforcée par l’application d’autres principes d’interprétation. Dans leurs observations, les parties indiquent que les principes suivants étaient, selon elles, particulièrement pertinents : la Couronne a invoqué le principe voulant que la loi « postérieure » l’emporte; Century Services a fondé son argumentation sur le principe de la préséance de la loi spécifique sur la loi générale (*generalia specialibus non derogant*).

[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

[125] Le principe de la préséance de la « loi postérieure » accorde la priorité à la loi la plus récente, au motif que le législateur est présumé connaître le contenu des lois alors en vigueur. Si, dans la loi nouvelle, le législateur adopte une règle inconciliable avec une règle préexistante, on conclura qu’il a entendu déroger à celle-ci (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5^e éd. 2008), p. 346-347; Pierre-André Côté, *The Interpretation of Legislation in Canada* (3^e éd. 2000), p. 358).

[126] L’exception à cette supplantation présumée des dispositions législatives préexistantes incompatibles réside dans le principe exprimé par la maxime *generalia specialibus non derogant* selon laquelle une disposition générale plus récente n’est pas réputée déroger à une loi spéciale antérieure (Côté, p. 359). Comme dans le jeu des poupées russes, cette exception comporte elle-même une exception. En effet, une disposition spécifique antérieure peut dans les faits être « supplantée » par une loi ultérieure de portée générale si le législateur, par les mots qu’il a employés, a exprimé l’intention de faire prévaloir la loi générale (*Doré c. Verdun (Ville)*, [1997] 2 R.C.S. 862).

[127] Ces principes d’interprétation visent principalement à faciliter la détermination de l’intention du législateur, comme l’a confirmé le juge d’appel MacPherson dans l’arrêt *Ottawa Senators*, au par. 42 :

[TRADUCTION] ... en matière d’interprétation des lois, la règle cardinale est la suivante : les dispositions législatives doivent être interprétées de manière à donner effet à l’intention du législateur lorsqu’il a adopté la loi. Cette règle fondamentale l’emporte sur toutes les maximes, outils ou canons d’interprétation législative, y compris la maxime suivant laquelle le particulier l’emporte sur le général (*generalia specialibus non derogant*). Comme l’a expliqué le juge Hudson dans l’arrêt *Canada c. Williams*, [1944] R.C.S. 226, [. . .] à la p. 239 ... :

On invoque la maxime *generalia specialibus non derogant* comme une règle qui devrait trancher la question. Or cette maxime, qui n’est pas une règle de droit mais un principe d’interprétation, cède le pas

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

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

devant l'intention du législateur, s'il est raisonnablement possible de la dégager de l'ensemble des dispositions législatives pertinentes.

(Voir aussi Côté, p. 358, et Pierre-André Côté, avec la collaboration de S. Beaulac et M. Devinat, *Interprétation des lois* (4^e éd. 2009), par. 1335.)

[128] J'accepte l'argument de la Couronne suivant lequel le principe de la loi « postérieure » est déterminant en l'espèce. Comme le par. 222(3) de la *LTA* a été édicté en 2000 et que le par. 18.3(1) de la *LACC* a été adopté en 1997, le par. 222(3) est, de toute évidence, la disposition postérieure. Cette victoire chronologique peut être neutralisée si, comme le soutient Century Services, on démontre que la disposition la plus récente, le par. 222(3) de la *LTA*, est une disposition générale, auquel cas c'est la disposition particulière antérieure, le par. 18.3(1), qui l'emporte (*generalia specialibus non derogant*). Mais, comme nous l'avons vu, la disposition particulière antérieure n'a pas préséance si la disposition générale ultérieure paraît la « supplanter ». C'est précisément, à mon sens, ce qu'accomplit le par. 222(3) de par son libellé, lequel précise que la disposition l'emporte sur tout autre texte législatif fédéral, tout texte législatif provincial ou « toute autre règle de droit » *sauf la LFI*. Le paragraphe 18.3(1) de la *LACC* est par conséquent rendu inopérant aux fins d'application du par. 222(3).

[129] Il est vrai que, lorsque la *LACC* a été modifiée en 2005², le par. 18.3(1) a été remplacé par le par. 37(1) (L.C. 2005, ch. 47, art. 131). Selon la juge Deschamps, le par. 37(1) est devenu, de ce fait, la disposition « postérieure ». Avec égards pour l'opinion exprimée par ma collègue, cette observation est réfutée par l'al. 44f) de la *Loi d'interprétation*, L.R.C. 1985, ch. I-21, qui décrit expressément l'effet (inexistant) qu'a le remplacement — sans modifications notables sur le fond — d'un texte antérieur qui a été abrogé (voir *Procureur général du Canada c. Commission des relations de travail dans la Fonction publique*, [1977] 2 C.F. 663, qui portait sur

2 Les modifications ne sont entrées en vigueur que le 18 septembre 2009.

“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) 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, 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 any portion of an Act or regulation”.

[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), 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.

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.

[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

la disposition qui a précédé l’al. 44f)). Cet alinéa précise que le nouveau texte ne doit pas être considéré de « droit nouveau », sauf dans la mesure où il diffère au fond du texte abrogé :

44. En cas d’abrogation et de remplacement, les règles suivantes s’appliquent :

f) sauf dans la mesure où les deux textes diffèrent au fond, le nouveau texte n’est pas réputé de droit nouveau, sa teneur étant censée constituer une refonte et une clarification des règles de droit du texte antérieur;

Le mot « texte » est défini ainsi à l’art. 2 de la *Loi d’interprétation* : « Tout ou partie d’une loi ou d’un règlement. »

[130] Le paragraphe 37(1) de la *LACC* actuelle est pratiquement identique quant au fond au par. 18.3(1). Pour faciliter la comparaison de ces deux dispositions, je les ai reproduites ci-après :

37. (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d’assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme tel par le seul effet d’une telle disposition.

18.3 (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d’assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l’absence de la disposition législative en question, il ne le serait pas.

[131] L’application de l’al. 44f) de la *Loi d’interprétation* vient tout simplement confirmer l’intention clairement exprimée par le législateur, qu’a indiquée Industrie Canada dans l’analyse du Projet de loi C-55, où le par. 37(1) était qualifié de « modification d’ordre technique concernant le réaménagement des dispositions de la présente loi ». Par ailleurs, durant la deuxième lecture du projet de loi

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

au Sénat, l'honorable Bill Rompkey, qui était alors leader adjoint du gouvernement au Sénat, a confirmé que le par. 37(1) représentait seulement une modification d'ordre technique :

Sur une note administrative, je signale que, dans le cas du traitement de fiducies présumées aux fins d'impôt, le projet de loi ne modifie aucunement l'intention qui sous-tend la politique, alors que dans le cas d'une restructuration aux termes de la *LACC*, des articles de la loi ont été abrogés et remplacés par des versions portant de nouveaux numéros lors de la mise à jour exhaustive de la *LACC*.

(*Débats du Sénat*, vol. 142, 1^{re} sess., 38^e lég., 23 novembre 2005, p. 2147)

[132] Si le par. 18.3(1) avait fait l'objet de modifications notables sur le fond lorsqu'il a été remplacé par le par. 37(1), je me rangerais à l'avis de la juge Deschamps qu'il doit être considéré comme un texte de droit nouveau. Mais comme les par. 18.3(1) et 37(1) ne diffèrent pas sur le fond, le fait que le par. 18.3(1) soit devenu le par. 37(1) n'a aucune incidence sur l'ordre chronologique du point de vue de l'interprétation, et le par. 222(3) de la *LTA* demeure la disposition « postérieure » (Sullivan, p. 347).

[133] Il s'ensuit que la disposition créant une fiducie réputée que l'on trouve au par. 222(3) de la *LTA* l'emporte sur le par. 18.3(1) dans le cadre d'une procédure fondée sur la *LACC*. La question qui se pose alors est celle de savoir quelle est l'incidence de cette préséance sur le pouvoir discrétionnaire conféré au tribunal par l'art. 11 de la *LACC*.

[134] Bien que l'art. 11 accorde au tribunal le pouvoir discrétionnaire de rendre des ordonnances malgré les dispositions de la *LFI* et de la *Loi sur les liquidations*, L.R.C. 1985, ch. W-11, ce pouvoir discrétionnaire demeure assujéti à l'application de toute autre loi fédérale. L'exercice de ce pouvoir discrétionnaire est donc circonscrit par les limites imposées par toute loi *autre* que la *LFI* et la *Loi sur les liquidations*, et donc par la *LTA*. En l'espèce, le juge siégeant en son cabinet était donc tenu de respecter le régime de priorités établi au par. 222(3) de la *LTA*. Ni le par. 18.3(1) ni l'art. 11 de la *LACC* ne l'autorisaient à en faire abstraction. Par conséquent,

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,

il ne pouvait pas refuser la demande présentée par la Couronne en vue de se faire payer la TPS dans le cadre de la procédure introduite en vertu de la *LACC*.

[135] Vu cette conclusion, il n'est pas nécessaire d'examiner la question de savoir s'il existait une fiducie expresse en l'espèce.

[136] Je rejetterais le présent pourvoi.

ANNEXE

Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36 (en date du 13 décembre 2007)

11. (1) [Pouvoir du tribunal] Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations*, chaque fois qu'une demande est faite sous le régime de la présente loi à l'égard d'une compagnie, le tribunal, sur demande d'un intéressé, peut, sous réserve des autres dispositions de la présente loi et avec ou sans avis, rendre l'ordonnance prévue au présent article.

. . .

(3) [Demande initiale — ordonnances] Dans le cas d'une demande initiale visant une compagnie, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour une période maximale de trente jours :

a) suspendre, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, les procédures intentées contre la compagnie au titre des lois mentionnées au paragraphe (1), ou qui pourraient l'être;

b) surseoir, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, au cours de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, d'intenter ou de continuer toute action, poursuite ou autre procédure contre la compagnie.

(4) [Autres demandes — ordonnances] Dans le cas d'une demande, autre qu'une demande initiale, visant une compagnie, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période qu'il estime indiquée :

(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,

a) suspendre, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, les procédures intentées contre la compagnie au titre des lois mentionnées au paragraphe (1), ou qui pourraient l'être;

b) surseoir, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, au cours de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, d'intenter ou de continuer toute action, poursuite ou autre procédure contre la compagnie.

(6) [Preuve] Le tribunal ne rend l'ordonnance visée aux paragraphes (3) ou (4) que si :

a) le demandeur le convainc qu'il serait indiqué de rendre une telle ordonnance;

b) dans le cas de l'ordonnance visée au paragraphe (4), le demandeur le convainc en outre qu'il a agi — et continue d'agir — de bonne foi et avec toute la diligence voulue.

11.4 (1) [Suspension des procédures] Le tribunal peut ordonner :

a) la suspension de l'exercice par Sa Majesté du chef du Canada des droits que lui confère le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* ou toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie à ce paragraphe et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents, à l'égard d'une compagnie lorsque celle-ci est un débiteur fiscal visé à ce paragraphe ou à cette disposition, pour une période se terminant au plus tard :

- (i) à l'expiration de l'ordonnance rendue en application de l'article 11,
- (ii) au moment du rejet, par le tribunal ou les créanciers, de la transaction proposée,
- (iii) six mois après que le tribunal a homologué la transaction ou l'arrangement,

(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,

(iv) au moment de tout défaut d’exécution de la transaction ou de l’arrangement,

(v) au moment de l’exécution intégrale de la transaction ou de l’arrangement;

b) la suspension de l’exercice par Sa Majesté du chef d’une province, pour une période se terminant au plus tard au moment visé à celui des sous-alinéas a)(i) à (v) qui, le cas échéant, est applicable, des droits que lui confère toute disposition législative de cette province à l’égard d’une compagnie, lorsque celle-ci est un débiteur visé par la loi provinciale et qu’il s’agit d’une disposition dont l’objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d’une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d’un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l’impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l’impôt sur le revenu*,

(ii) soit est de même nature qu’une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

(2) [Cessation] L’ordonnance cesse d’être en vigueur dans les cas suivants :

a) la compagnie manque à ses obligations de paiement pour un montant qui devient dû à Sa Majesté après l’ordonnance et qui pourrait faire l’objet d’une demande aux termes d’une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l’assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu* et qui prévoit la perception d’une cotisation, au sens du *Régime de pensions du Canada*, ou d’une cotisation ouvrière ou

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

d’une cotisation patronale, au sens de la *Loi sur l’assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents,

(iii) toute disposition législative provinciale dont l’objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d’une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d’un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l’impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l’impôt sur le revenu*,

(B) soit est de même nature qu’une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe;

b) un autre créancier a ou acquiert le droit de réaliser sa garantie sur un bien qui pourrait être réclamé par Sa Majesté dans l’exercice des droits que lui confère l’une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l’assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu* et qui prévoit la perception d’une cotisation, au sens du *Régime de pensions du Canada*, ou d’une cotisation ouvrière ou d’une cotisation patronale, au sens de la *Loi sur l’assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents,

(iii) toute disposition législative provinciale dont l’objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d’une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne,

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

ou déduite d’un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l’impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l’impôt sur le revenu*,

(B) soit est de même nature qu’une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

(3) [Effet] Les ordonnances du tribunal, autres que celles rendues au titre du paragraphe (1), n’ont pas pour effet de porter atteinte à l’application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l’impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l’assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu* et qui prévoit la perception d’une cotisation, au sens du *Régime de pensions du Canada*, ou d’une cotisation ouvrière ou d’une cotisation patronale, au sens de la *Loi sur l’assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents;

c) toute disposition législative provinciale dont l’objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d’une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d’un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l’impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l’impôt sur le revenu*,

(ii) soit est de même nature qu’une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

Pour l’application de l’alinéa c), la disposition législative provinciale en question est réputée avoir, à l’encontre de tout créancier et malgré tout texte législatif fédéral ou

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.

provincial et toute règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa c)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa c)(ii), et quant aux intérêts, pénalités ou autres montants y afférents, quelle que soit la garantie dont bénéficie le créancier.

18.3 (1) [Fiducies présumées] Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

(2) [Exceptions] Le paragraphe (1) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* (chacun étant appelé « disposition fédérale » au présent paragraphe) ou à l'égard des montants réputés détenus en fiducie aux termes de toute loi d'une province créant une fiducie présumée dans le seul but d'assurer à Sa Majesté du chef de cette province la remise de sommes déduites ou retenues aux termes d'une loi de cette province, dans la mesure où, dans ce dernier cas, se réalise l'une des conditions suivantes :

a) la loi de cette province prévoit un impôt semblable, de par sa nature, à celui prévu par la *Loi de l'impôt sur le revenu*, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*;

b) cette province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) du *Régime de pensions du Canada*, la loi de cette province institue un « régime provincial de pensions » au sens de ce paragraphe, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 23(3) ou (4) du *Régime de pensions du Canada*.

Pour l'application du présent paragraphe, toute disposition de la loi provinciale qui crée une fiducie présumée est réputée avoir, à l'encontre de tout créancier du failli et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que la disposition fédérale correspondante, quelle que soit la garantie dont bénéficie le créancier.

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.

18.4 (1) [Réclamations de la Couronne] Dans le cadre de procédures intentées sous le régime de la présente loi, toutes les réclamations de Sa Majesté du chef du Canada ou d'une province ou d'un organisme compétent au titre d'une loi sur les accidents du travail, y compris les réclamations garanties, prennent rang comme réclamations non garanties.

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

(3) [Effet] Le paragraphe (1) n'a pas pour effet de porter atteinte à l'application des dispositions suivantes :

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

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;

(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

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents;

(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

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(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

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(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,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

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

Pour l'application de l'alinéa c), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa c)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa c)(ii),

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);

et quant aux intérêts, pénalités ou autres montants y afférents, quelle que soit la garantie dont bénéficie le créancier.

20. [La loi peut être appliquée conjointement avec d'autres lois] Les dispositions de la présente loi peuvent être appliquées conjointement avec celles de toute loi fédérale ou provinciale, autorisant ou prévoyant l'homologation de transactions ou arrangements entre une compagnie et ses actionnaires ou une catégorie de ces derniers.

Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36 (en date du 18 septembre 2009)

11. [Pouvoir général du tribunal] Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*, le tribunal peut, dans le cas de toute demande sous le régime de la présente loi à l'égard d'une compagnie débitrice, rendre, sur demande d'un intéressé, mais sous réserve des restrictions prévues par la présente loi et avec ou sans avis, toute ordonnance qu'il estime indiquée.

11.02 (1) [Suspension : demande initiale] Dans le cas d'une demande initiale visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période maximale de trente jours qu'il estime nécessaire :

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*;

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

(2) [Suspension : demandes autres qu'initiales] Dans le cas d'une demande, autre qu'une demande initiale, visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période qu'il estime nécessaire :

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime des lois mentionnées à l'alinéa (1)a);

(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*

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

(3) [Preuve] Le tribunal ne rend l'ordonnance que si :

a) le demandeur le convainc que la mesure est opportune;

b) dans le cas de l'ordonnance visée au paragraphe (2), le demandeur le convainc en outre qu'il a agi et continue d'agir de bonne foi et avec la diligence voulue.

11.09 (1) [Suspension des procédures : Sa Majesté] L'ordonnance prévue à l'article 11.02 peut avoir pour effet de suspendre :

a) l'exercice par Sa Majesté du chef du Canada des droits que lui confère le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* ou toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie à ce paragraphe et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents, à l'égard d'une compagnie qui est un débiteur fiscal visé à ce paragraphe ou à cette disposition, pour la période se terminant au plus tard :

(i) à l'expiration de l'ordonnance,

(ii) au moment du rejet, par le tribunal ou les créanciers, de la transaction proposée,

(iii) six mois après que le tribunal a homologué la transaction ou l'arrangement,

(iv) au moment de tout défaut d'exécution de la transaction ou de l'arrangement,

(v) au moment de l'exécution intégrale de la transaction ou de l'arrangement;

b) l'exercice par Sa Majesté du chef d'une province, pour la période que le tribunal estime indiquée et se terminant au plus tard au moment visé à celui des sous-alinéas a)(i) à (v) qui, le cas échéant, est applicable, des droits que lui confère toute disposition

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

législative de cette province à l’égard d’une compagnie qui est un débiteur visé par la loi provinciale, s’il s’agit d’une disposition dont l’objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d’une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d’un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l’impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l’impôt sur le revenu*,

(ii) soit est de même nature qu’une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe.

(2) [Cessation d’effet] Les passages de l’ordonnance qui suspendent l’exercice des droits de Sa Majesté visés aux alinéas (1)a) ou b) cessent d’avoir effet dans les cas suivants :

a) la compagnie manque à ses obligations de paiement à l’égard de toute somme qui devient due à Sa Majesté après le prononcé de l’ordonnance et qui pourrait faire l’objet d’une demande aux termes d’une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l’assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu* et qui prévoit la perception d’une cotisation, au sens du *Régime de pensions du Canada*, ou d’une cotisation ouvrière ou d’une cotisation patronale, au sens de la *Loi sur l’assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents,

(iii) toute disposition législative provinciale dont l’objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la

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

perception d’une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d’un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l’impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l’impôt sur le revenu*,

(B) soit est de même nature qu’une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe;

b) un autre créancier a ou acquiert le droit de réaliser sa garantie sur un bien qui pourrait être réclamé par Sa Majesté dans l’exercice des droits que lui confère l’une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l’assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu* et qui prévoit la perception d’une cotisation, au sens du *Régime de pensions du Canada*, ou d’une cotisation ouvrière ou d’une cotisation patronale, au sens de la *Loi sur l’assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents,

(iii) toute disposition législative provinciale dont l’objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d’une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d’un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l’impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l’impôt sur le revenu*,

(B) soit est de même nature qu’une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens

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.

du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe.

(3) [Effet] L’ordonnance prévue à l’article 11.02, à l’exception des passages de celle-ci qui suspendent l’exercice des droits de Sa Majesté visés aux alinéas (1)a) ou b), n’a pas pour effet de porter atteinte à l’application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l’impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l’assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu* et qui prévoit la perception d’une cotisation, au sens du *Régime de pensions du Canada*, ou d’une cotisation ouvrière ou d’une cotisation patronale, au sens de la *Loi sur l’assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents;

c) toute disposition législative provinciale dont l’objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d’une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d’un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l’impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l’impôt sur le revenu*,

(ii) soit est de même nature qu’une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe.

Pour l’application de l’alinéa c), la disposition législative provinciale en question est réputée avoir, à l’encontre de tout créancier et malgré tout texte législatif fédéral ou provincial et toute autre règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu* quant à la somme visée au sous-alinéa c)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa c)(ii), et quant aux intérêts, pénalités et autres charges afférents, quelle que soit la garantie dont bénéficie le créancier.

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

37. (1) [Fiducies présumées] Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d’assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme tel par le seul effet d’une telle disposition.

(2) [Exceptions] Le paragraphe (1) ne s’applique pas à l’égard des sommes réputées détenues en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l’impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l’assurance-emploi* (chacun étant appelé « disposition fédérale » au présent paragraphe) ou à l’égard des sommes réputées détenues en fiducie aux termes de toute loi d’une province créant une fiducie présumée dans le seul but d’assurer à Sa Majesté du chef de cette province la remise de sommes déduites ou retenues aux termes d’une loi de cette province, si, dans ce dernier cas, se réalise l’une des conditions suivantes :

a) la loi de cette province prévoit un impôt semblable, de par sa nature, à celui prévu par la *Loi de l’impôt sur le revenu*, et les sommes déduites ou retenues au titre de cette loi provinciale sont de même nature que celles visées aux paragraphes 227(4) ou (4.1) de la *Loi de l’impôt sur le revenu*;

b) cette province est une province instituant un régime général de pensions au sens du paragraphe 3(1) du *Régime de pensions du Canada*, la loi de cette province institue un régime provincial de pensions au sens de ce paragraphe, et les sommes déduites ou retenues au titre de cette loi provinciale sont de même nature que celles visées aux paragraphes 23(3) ou (4) du *Régime de pensions du Canada*.

Pour l’application du présent paragraphe, toute disposition de la loi provinciale qui crée une fiducie présumée est réputée avoir, à l’encontre de tout créancier de la compagnie et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que la disposition fédérale correspondante, quelle que soit la garantie dont bénéficie le créancier.

Loi sur la taxe d’accise, L.R.C. 1985, ch. E-15 (en date du 13 décembre 2007)

222. (1) [Montants perçus détenus en fiducie] La personne qui perçoit un montant au titre de la taxe prévue à la section II est réputée, à toutes fins utiles et malgré tout droit en garantie le concernant, le détenir en fiducie pour Sa Majesté du chef du Canada, séparé de ses propres biens et des biens détenus par ses créanciers garantis qui, en l’absence du droit en garantie, seraient ceux de la

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

personne, jusqu'à ce qu'il soit versé au receveur général ou retiré en application du paragraphe (2).

(1.1) [Montants perçus avant la faillite] Le paragraphe (1) ne s'applique pas, à compter du moment de la faillite d'un failli, au sens de la *Loi sur la faillite et l'insolvabilité*, aux montants perçus ou devenus percevables par lui avant la faillite au titre de la taxe prévue à la section II.

(3) [Non-versement ou non-retrait] Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté du chef du Canada, à compter du moment où le montant est perçu par la personne, séparés des propres biens de la personne, qu'ils soient ou non assujettis à un droit en garantie;

b) ne pas faire partie du patrimoine ou des biens de la personne à compter du moment où le montant est perçu, 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 un droit en garantie.

Ces biens sont des biens dans lesquels Sa Majesté du chef du Canada a un droit de bénéficiaire malgré tout autre droit en 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 tout droit en garantie.

Loi sur la faillite et l'insolvabilité, L.R.C. 1985, ch. B-3 (en date du 13 décembre 2007)

67. (1) [Biens du failli] Les biens d'un failli, constituant le patrimoine attribué à ses créanciers, ne comprennent pas les biens suivants :

(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

a) les biens détenus par le failli en fiducie pour toute autre personne;

b) les biens qui, à l’encontre du failli, sont exempts d’exécution ou de saisie sous le régime des lois applicables dans la province dans laquelle sont situés ces biens et où réside le failli;

b.1) dans les circonstances prescrites, les paiements au titre de crédits de la taxe sur les produits et services et les paiements prescrits qui sont faits à des personnes physiques relativement à leurs besoins essentiels et qui ne sont pas visés aux alinéas a) et b),

mais ils comprennent :

c) tous les biens, où qu’ils soient situés, qui appartiennent au failli à la date de la faillite, ou qu’il peut acquérir ou qui peuvent lui être dévolus avant sa libération;

d) les pouvoirs sur des biens ou à leur égard, qui auraient pu être exercés par le failli pour son propre bénéfice.

(2) [Fiducies présumées] Sous réserve du paragraphe (3) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d’assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens du failli ne peut, pour l’application de l’alinéa (1)a), être considéré comme détenu en fiducie pour Sa Majesté si, en l’absence de la disposition législative en question, il ne le serait pas.

(3) [Exceptions] Le paragraphe (2) ne s’applique pas à l’égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l’impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l’assurance-emploi* (chacun étant appelé « disposition fédérale » au présent paragraphe) ou à l’égard des montants réputés détenus en fiducie aux termes de toute loi d’une province créant une fiducie présumée dans le seul but d’assurer à Sa Majesté du chef de cette province la remise de sommes déduites ou retenues aux termes d’une loi de cette province, dans la mesure où, dans ce dernier cas, se réalise l’une des conditions suivantes :

a) la loi de cette province prévoit un impôt semblable, de par sa nature, à celui prévu par la *Loi de l’impôt sur le revenu*, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 227(4) ou (4.1) de la *Loi de l’impôt sur le revenu*;

(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

b) cette province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) du *Régime de pensions du Canada*, la loi de cette province institue un « régime provincial de pensions » au sens de ce paragraphe, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 23(3) ou (4) du *Régime de pensions du Canada*.

Pour l’application du présent paragraphe, toute disposition de la loi provinciale qui crée une fiducie présumée est réputée avoir, à l’encontre de tout créancier du failli et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que la disposition fédérale correspondante, quelle que soit la garantie dont bénéficie le créancier.

86. (1) [Réclamations de la Couronne] Dans le cadre d’une faillite ou d’une proposition, les réclamations prouvables — y compris les réclamations garanties — de Sa Majesté du chef du Canada ou d’une province ou d’un organisme compétent au titre d’une loi sur les accidents du travail prennent rang comme réclamations non garanties.

(3) [Effet] Le paragraphe (1) n’a pas pour effet de porter atteinte à l’application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l’impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l’assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu* et qui prévoit la perception d’une cotisation, au sens du *Régime de pensions du Canada*, ou d’une cotisation ouvrière ou d’une cotisation patronale, au sens de la *Loi sur l’assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents;

c) toute disposition législative provinciale dont l’objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d’une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d’un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l’impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l’impôt sur le revenu*,

(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 for the appellant: Fraser Milner Casgrain, Vancouver.

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

(ii) soit est de même nature qu’une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

Pour l’application de l’alinéa c), la disposition législative provinciale en question est réputée avoir, à l’encontre de tout créancier et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu* quant à la somme visée au sous-alinéa c)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa c)(ii), et quant aux intérêts, pénalités ou autres montants y afférents, quelle que soit la garantie dont bénéficie le créancier.

Pourvoi accueilli avec dépens, la juge ABELLA est dissidente.

Procureurs de l’appelante : Fraser Milner Casgrain, Vancouver.

Procureur de l’intimé : Procureur général du Canada, Vancouver.

TAB 5

Most Negative Treatment: Distinguished

Most Recent Distinguished: Birchshade Farms Ltd., Re | 2000 CarswellNB 115, 95 A.C.W.S. (3d) 1021, [2000] A.N.B. No. 118, [2000] N.B.J. No. 118, 578 A.P.R. 243, 225 N.B.R. (2d) 243, 16 C.B.R. (4th) 34 | (N.B. Q.B., Feb 21, 2000)

1993 CarswellOnt 181
Ontario Court of Justice (General Division), In Bankruptcy

IDG Environmental Solutions Inc., Re

1993 CarswellOnt 181, [1993] O.J. No. 771, 16 C.B.R. (3d) 317, 38 A.C.W.S. (3d) 15

Re Proposal of IDG ENVIRONMENTAL SOLUTIONS INC.

Registrar Ferron

Heard: January 19, 1993

Judgment: January 20, 1993

Docket: Doc. 32-59173

Counsel: *Brian H. Somer*, for moving party, Quon Associates Ltd.

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency

VI Proposal

VI.2 Time period to file

VI.2.a Extension of time

Headnote

Bankruptcy --- Proposal — General

Proposals — Procedure — Filing of cash-flow statement — Section 187(11) not permitting court to extend time limited for filing cash-flow statement — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 187(11).

An insolvent company filed a notice of intention to file a proposal with the official receiver. The company did not, however, file a cash-flow statement within the 10 days after filing the notice of intention as required by s. 50.4(2) of the *Bankruptcy and Insolvency Act*. The company brought a motion for an order extending the time to file the cash-flow statement.

The issue before the court was whether s. 187(11) of the Act allows the court to extend the time to file a cash-flow statement after the expiration of the time limited to do so.

Held:

The motion was dismissed.

Section 187(11) is applicable only in those cases where there is no intervening statutory event consequent upon default. In this situation, as a consequence of default, bankruptcy occurs. The bankruptcy is automatic and, by operation of the Act, immediate on the expiration of the 10 days. No motion nor action by anyone is required to deem the insolvent person a bankrupt.

The phrase "or that extension" in s. 50.4(8) refers to an extension granted under s. 50.4(9) for the filing of the proposal and does not permit an extension of the time limited by s. 50.4(2).

Were a court to extend the time for filing the cash-flow statement, it would in effect be setting aside an assignment and abrogating the rights of creditors and others, acquired or occurring on the bankruptcy. The rights of creditors are impaired by the notice of intention and any undue delay through extensions would have significant commercial consequences.

Table of Authorities

Cases considered:

Battiston Bros. Construction Ltd., Re (1986), 62 C.B.R. (N.S.) 50, 3 B.C.L.R. (2d) 135 (S.C.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 —

s. 50.4(2)

s. 50.4(8)

s. 50.4(9)

s. 187(11)

Words and phrases considered:

or that extension — as used in s. 50.4(8) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, refers to an extension granted under s. 50.4(9) for the filing of a proposal and does not permit an extension of the time limited by s. 50.4(2) of the Act.

Motion for order extending time to file cash-flow statement under s. 50.4(2) of Bankruptcy and Insolvency Act.

Registrar Ferron:

1 This motion, made after the time limited, is for an order extending the time to file the cash-flow statement required by s. 50.4(2) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3.

2 The notice of intention to file a proposal by IDG Environmental Solutions Inc. was filed with the official receiver on December 31, 1992. The cash-flow statement was not filed until January 15.

3 Section 50.4(2) of the *Bankruptcy and Insolvency Act* provides that "within ten days after filing a notice of intention ..., the insolvent person shall file with the official receiver ..." a cash-flow statement and the other documents mentioned in the subsection.

4 Unlike subs. 9 of s. 50.4, subs. 2 makes no provision for an extension of time for filing, so that if the time is to be extended, one must look elsewhere in the Act for authority.

5 Section 187(11) of the Act provides as follows:

Where by this Act the time for doing any act or thing is limited, the court may extend the time either before or after the expiration thereof on such terms, if any, as it thinks fit to impose.

(emphasis added)

6 The question is whether s. 187(11) applies so as to permit the court to extend the time to file a cash-flow statement after the expiration of the time limited to do so.

7 In my opinion, that section is not applicable. Section 187(11) is applicable only in those cases where there is no intervening statutory event consequent upon default. Here, as a consequence of the default, a very significant event occurs; bankruptcy intervenes.

8 Subsection 8 of s. 50.4 provides that where an insolvent person fails to file the cash-flow statement within 10 days of the filing of the notice of intention, "... the insolvent person shall, on the expiration of that period or that extension, as the case may be, be deemed to have made an assignment ..." The phrase "or that extension" obviously refers back

to an extension granted under subs. 9 for the filing of the proposal, and has no reference or to permit an extension of the time limited by subs. 2.

9 The bankruptcy of the insolvent person in these circumstances is automatic and by operation of the statute, immediate, on the expiration of the 10 days following the filing of the notice of intention in cases where the cash-flow statement is not filed. No motion nor action by anyone is required to deem the insolvent person a bankrupt.

10 Anderson L.J.S.C. in *Re Battiston Bros. Construction Ltd.* (1986), 62 C.B.R. (N.S.) 50, 3 B.C.L.R. (2d) 135 (S.C.), has collected those cases which interpret the word "deemed". It is clear from a reading of those cases that "deemed" within the context of subs. 8 of s. 50.4 means that it is, by the Act, conclusively established that on the failure to file the cash-flow statement, there is a bankruptcy.

11 Certain consequences flow from an assignment in bankruptcy in the circumstances. For example:

1. If the insolvent person is an individual, there are civil consequences which flow from the insolvent person's change of status on which persons outside the bankruptcy may and are entitled to rely; (See Poultney, "The Status of a Bankrupt", 19 C.B.R. (N.S.) 105.)

2. The property of the insolvent person, on bankruptcy, devolves immediately on the trustee, and the bankrupt loses all capacity to deal with it;

3. The stay imposed by s. 69 on secured creditors is lifted, and they acquire rights which had been suspended on the filing of the notice of intention;

4. The trustee and creditors gain wider rights of attack in respect of the avoidance sections of the Act in those cases where there is a prior petition; and

5. Payments, in certain cases, under contracts are, on bankruptcy, accelerated.

12 At this point, that is, the date of the motion, the insolvent person is bankrupt, rights have accrued and the devolution of asset accomplished. A court which, in effect, attempts to cure the default in filing the cash-flow statement by a nunc pro tunc extension of time order would be, in fact, setting aside an assignment, and abrogating the rights of creditors and others, acquired or occurring on the bankruptcy which, as I have pointed out, becomes a fact on the expiration of the 10 days referred to in subs. 2.

13 There is, moreover, in Pt. III a concern with time. Times for accomplishing each step are carefully prescribed and even [as in s. 50.4(9)] where an extension of time is authorized, the latitude given to the court is circumscribed, to prevent delay and maintain a certain flow or rhythm in the process.

14 Obviously, the rights of creditors and, particularly, secured creditors are impaired by the notice of intention and any undue delay through extensions would have significant commercial consequences.

15 With this in mind, it is consistent with the intent and purpose of the proposal provisions of the Act to ascribe to the "shall file" requirement of s. 50.4(2) its proper and natural meaning, namely, that a peremptory mandate is imposed.

16 I am mindful that the application of s. 187(11) is specifically excluded in respect of the limitation imposed by s. 50.4(9). It does not follow, however, that its exclusion in one instance makes it applicable in all other subsections where a time limitation is imposed.

17 In my opinion, the court has no power to extend the time to file the cash-flow statement. The motion must be dismissed, and the remedy refused.

Motion dismissed.

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TAB 6

Ontario Supreme Court
Wale, Re
Date: 1996-11-29

In the matter of the bankruptcy of Henry John Wale

Ontario Court of Justice (General Division) [In Bankruptcy] O'Connor J.

Judgment – November 29, 1996.

Mona Anis, for Applicant.

Ross Thompson, for Bankrupt.

Harold Poultney, Q.C., for Trustee.

(Doc. Owen Sound 35-063684)

[1] November 29, 1996. O'CONNOR J.:—Henry John Wale's assignment in bankruptcy was date-stamped by the Official Receiver an hour and a half before the commencement of his family law trial. His former wife brings this motion, under s. 181 of the *Bankruptcy and Insolvency Act*, to annul the bankruptcy and to vest his property in her pending the outcome of the family law trial, or to exempt her claims from the usual stay of creditor proceedings under s. 69.3, and other relief. She argues his filing was motivated solely by his desire to defeat her family law claims and was an abuse of the process of the court. He says he had no such intention, he is an "insolvent person", as defined by the act and is entitled to its' protection.

History of the proceedings

[2] Ms. Wale commenced family law proceedings by application on August 11, 1994. The parties were divorced in October 1995 and he has remarried. On December 15, 1995 McKay J., made an interim order, inter alia, restraining Mr. Wale from dissipating assets except in the ordinary course of business. At the outset of the trial on October 16, 1996, Ms. Wale sought an order declaring Mr. Wale in contempt for breach of the interim order, alleging he had sold his inventory and tools, removed all the furnishings from the matrimonial home and attempted to place other assets out of her reach. The court was also advised Mr. Wale had attended on a trustee in bankruptcy the previous week and filed an assignment late Friday afternoon, October 13, 1996. It was received and date-stamped by the Official Receiver at 8:30 am,

October 16, 1996, the first day of trial. After one day's evidence and argument the matter was adjourned to October 28, 1996 to permit Ms. Wale to bring this motion to annul the bankruptcy assignment. Pending return of the matter, I ordered Mr. Wale's interest in the matrimonial home and all his assets be held in trust, the contents of the home be returned to it, that he make the mortgage and other payments, that Ms. Wale may occupy the home and the parties cooperate in selling it.

[3] The annulment motion was served on the parties, the trustee and all the creditors. Upon return of the motion the parties and the trustee were represented by counsel. None of the creditors attended or was represented. Pending this ruling I ordered several measures intended to preserve the *status quo*, including postponing the creditors meeting and requiring Mr. Wale deliver to the trustee \$4500 (part of what he received on the sale of his inventory), out of which the trustee is required to pay the mortgage and other household expenses.

Evidence Summary

[4] The Wales lived together and were married for a total of eighteen years. He is a skilled cabinet-maker, specializing in custom-built kitchens. They developed a successful business, first designing and constructing pine furniture and then building and installing kitchens. They built a workshop and showroom behind their home in Chatsworth. She did the books and some of the sales and customer relations work and he built and installed the kitchens. During the several years before their separation in May, 1994 the business prospered and the Wales lived comfortably. At separation she moved out and he stayed in the matrimonial home and continued to run the business. She has one daughter living with her and he has a son and daughter living with him. In October 1995 they were divorced and he has remarried. Ms. Wale's claims in the matrimonial action include child and spousal support and an unequal division of the matrimonial property.

[5] Although it is difficult to determine exact figures for the business because some of it was done for cash, its' reported net incomes for the several years before separation were:

<u>Year ended</u>	<u>Net income</u>
February 1990	\$73,072
February 1991	\$44,182
February 1992	\$8,540
February 1993	\$27,682

February 1994

\$30,575

[6] He says that his business declined severely during 1995 and 1996. He was forced to declare bankruptcy, the close timing to the family law trial being merely coincidental. His reported net incomes for the years after separation were:

<u>Year ended</u>	<u>Net Income</u>
February 1995	\$22,908
December 1995	\$(15,334)

[7] However during a part of the year prior to his declaration Mr. Wale continued paying in excess of \$1,500 per month against the mortgage, an accelerated rate of about three times that required by the bank About a week prior to the commencement of the family law trial Mr. Wale met with Richard Burnside, a trustee in bankruptcy. Mr. Burnside advised him an assignment would stay all creditors claims, including those of Ms. Wale, except for support. In the week prior to his declaration Mr. Wale removed all his tools and equipment from his workshop. They were appraised at \$18,915 and are security for a line of credit with Scotiabank of about the same amount. He sold his inventory for \$8,500 and used this money to pay some creditors and his trustees' fee, \$750 to board his dog and cat and he kept \$4,500 for "Room and board for 3 children @ \$1500 each". He took from the home all the furnishings and contents, appraised at \$8896, and stored them at an unknown location. He left a mobile 4' x 6' sign at the bottom of the driveway, on Hwy. 10, which read, "Joyce Wale Your Kids Lost Their Home God Bless You. Closed Sorry".

[8] Although he says he lost money over 1996 and is unable to obtain credit to carry on his business, it appears he has been doing a considerable cash business. His trade creditors are owed less than \$5700. When confronted with business records Ms. Wale found in the garbage after he moved out, he admitted receiving \$17,885.27 in September and October of 1996. When he filed his assignment he had orders for at least five kitchen projects and had received deposits from four of these customers, totalling \$3800. Ms. Wale says his usual practice was to take deposits of about 20% of the value of a project before starting it. Projecting the 20% figure, the deposits are evidence of orders for work worth about \$19,000. His 1956 MGA sportscar was appraised at \$9000 and a lawn tractor at \$1200. He claims both are held by a repairman who is owed much of their values.

[9] In his Statement of Affairs, Mr. Wale declares assets of \$157,000 and debts of \$105,800. However, the values he placed on some of the assets are less than the appraised values mentioned above. Using the appraised values and including the cash he received for the inventory, his assets would total about \$19,000 more than declared. Mr. Wale argues this figure may be decreased by an overstatement of the value of some assets, e.g. the home by \$7000 and his tools by \$1000.

[10] He declared income for himself and new wife of \$1593 per month and expenses of \$4428.82. However, the declared income does not take into account the \$17,855.27 received in September and October, and the expenses appear to be inflated in that they include house taxes, mortgage and other expenses which he has not paid and has no intention of paying, as he had abandoned the house before the assignment.

[11] In summary, Mr. Wale moved out of the house, stored his furniture and tools, discontinued producing kitchens despite a backlog of orders which had been partly paid for, sold his inventory to obtain cash and stopped paying the mortgage and other expenses, apparently prepared to let the house be sold under a power of sale.

[12] Particularly telling of Mr. Wale's scheming are his plans to accelerate his loan payments to the Scotiabank once he finalized the divorce proceedings, as confirmed in the bank's letter to him, and a handwritten note on a bill to him from a real estate appraiser, "Okay to pay after court case".

The Parties' Positions

[13] Ms. Wale argues the purpose of the bankruptcy filing was obvious. Mr. Wale intended to stop the family law trial from proceeding in any meaningful way by removing the couples' assets from the reach of the court and Ms. Wale's claim for an unequal division of them. She points out that even he now admits his assumption he could no longer carry on the business may have been incorrect. He was determined to move anything movable out of her reach and devalue or destroy anything immovable, i.e. the house and shop, by allowing it to be sold under power of sale.

[14] Mr. Wale and his trustee argue there was nothing improper in his assignment immediately before the trial. He met the definition of an insolvent person. He had debts over \$1000, he was "...unable to meet his obligations as they generally become due..." and he

had "...ceased paying his current obligations in the ordinary course of business...". He had a right to avail himself of the act's protection against all his creditors, including Ms. Wale, who has no special status as his former wife. To grant the annulment would give Ms. Wale a preference over other creditors, which the Court ought not do. The filing in advance of the trial would actually assist the court by apprising it of his true financial circumstances. Annulment is a rarely granted remedy reserved only for cases of clear fraud or abuse of the process of the court. These circumstances do not exist here, he and his trustee argue.

Analysis

[15] S. 181 of the *Bankruptcy and Insolvency Act* reads:

(1) Where, in the opinion of the court, a receiving order ought not to have been made or an assignment ought not to have been filed, the court may by order annul the bankruptcy.

(2) Where an order is made under subsection (1), all sales, dispositions of property, payments duly made and acts done theretofore by the trustee or other person acting under his authority, or by the court, are valid, but the property of the bankrupt shall vest in such person as the court may appoint, or, in default of any appointment, revert to the bankrupt for all the estate or interest of the trustee therein on such terms and subject to such conditions, if any, as the court may order.

[16] The jurisdiction of this court, sitting as a bankruptcy court, is limited by the special rules and procedures set out in the Act. The court has no authority, either on an interim or permanent basis to stay an assignment. However, the Act does give the court authority to annul a bankruptcy. *Kalau v. Dahl* (1985), 57 C.B.R. (N.S.) 296 (Alta. Q.B.).

[17] An annulment will be granted only where it is shown either the debtor was not an insolvent person when he made the assignment or where it is shown that the debtor abused the process of the court or committed a fraud on his creditors.

Was Mr. Wale an insolvent person when he made the assignment?

[18] An insolvent person is defined in s. 2:

"insolvent person" means a person who is not bankrupt and who resides or carries on business in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

(a) who is for any reason unable to meet his obligations as they generally become due,

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

[19] Here, Mr. Wale's liabilities exceeded \$1000 when he made the assignment. They totalled at least \$105,000, and more, if the repair accounts for the sportscar and the lawn tractor are valid. He satisfies the preamble requirement.

[20] Subsections (a), (b) and (c) of the definition are disjunctive. If he has debts exceeding \$1000 a person claiming insolvency must show either (a) he is unable to meet his obligations as they generally become due *or* (b) he has ceased paying his current obligations in the ordinary course of business *or* (c) establish his assets, if sold, would not yield sufficient money to pay his debts. Mr. Wale does not rely on ss.(c), as his assets, even allowing for devaluation caused by a quick or forced sale of them, would appear to exceed his liabilities.

[21] He argues he complies with both ss.(a) and (b). However, in considering ss.(a) it appears he had sufficient cash flow in the September and October of this year to meet his obligations as they became due. He received over \$17,800, part of which arose from the sale of his inventory, a finished kitchen and part from the receipt of deposits from new orders. His trade debts were about \$5700. He had orders for four or five kitchens or smaller jobs which would have produced further income. He declared personal living expenses of \$4427 per month, and his loan payment to the Scotiabank was \$500 per month. He clearly had an ability to meet his obligations as they generally became due. He simply chose not to do so. He does not meet the criteria under ss.(a).

[22] Mr. Wale had ceased paying his current obligations in the ordinary course of business as they generally became due. The cheques he wrote in payment of some of his trade creditors were returned NSF and he has not replaced them. Perhaps better organization of his affairs or the use of money he held as cash and put to personal use would have permitted payment of some or all of the trade creditors. However, unlike ss.(a) which requires the debtor to show an inability to meet obligations, ss.(b) requires only that the debtor "has ceased paying his current obligations in the ordinary course of business...". Unlike ss.(a) there is no requirement in ss.(b) for the debtor to show and thus no need to investigate his inability to make payments. If he has ceased paying current obligations, which he had, he meets the criteria of

this sub-section. I must assume the reference by parliament to a debtor's "inability" in ss.(a) and not in ss.(b) is intentional and the easier test in the business oriented subsection, i.e.ss.(b), was imposed for a specific reason.

[23] Mr. Wale qualifies as an insolvent person, if only marginally so, and was therefore entitled to make an assignment in bankruptcy, unless in doing so he abused the process of the court or committed a fraud on his creditors.

Was there an abuse of the court's process?

[24] Numerous cases conclude that the debtor's motive in making an assignment is not generally relevant. There is nothing unlawful in declaring bankruptcy for the sole purpose of defeating the claims of one's creditors. *Irving Oil Co. v. Murphy* (1962), 5 C.B.R. (N.S.) 203 (P.E.I. S.C.). One of the objectives of bankruptcy legislation is to permit the debtor, in the words of Evershed M.R. "to protect himself from the evils which he might otherwise suffer". *Re Dunn*, [1949] 2 All E.R. 388 (C.A.). However, this general principle must always be tempered by the caveat that fraud or abuse of the process will permit a court to annul the assignment. In *Bankruptcy and Insolvency Law of Canada*, by Holden and Morawetz, Third Edition, Vol 2, at page 6-107, the learned authors say:

The court must consider the rights not only of the debtor and of the creditors but also the rights of the public. A bankrupt should not be permitted to benefit from his own turpitude.

[25] In *Blaxland v. Fuller* (1990), 2 C.B.R. (3d) 125 (B.C. S.C.), Donald J. of the B.C. S.C. [In Bankruptcy], said at page 127: "If, however, the conduct is tainted by bad motives, then the Court remains able to annul a bankruptcy under s. 181 of the *Bankruptcy Act*".

[26] Under s. 181 the Court has a wide discretion when considering an annulment application. An exhaustive review of the circumstances surrounding the assignment should be made by the Court. There is no single test or principle to be applied. The test is flexible and fact specific. The debtor's motive is the primary consideration is determining abuse of process or fraud. After considering whether the debtor is an insolvent person some of the questions the court might pose to ascertain the debtor's motive are:

- (1) Is the debtor's financial situation genuinely overwhelming or could it have been managed?
- (2) Was the timing of the assignment related to another agenda or was bankruptcy inevitable in the near or relatively near future?

(3) Was the debtor forthcoming in revealing his situation to his creditors or did he hide assets or prefer some creditors over others?

(4) Did the debtor convert money or assets to himself which would otherwise have been assets in the bankruptcy?

(5) What had been the debtor's relationship with his creditors, particularly his major ones? Was it such that they might have assisted him, if he had approached them, by granting time or terms of repayment or had any goodwill been destroyed by past unfulfilled promises?

(6) Are there other relationships—business partnerships shareholder arrangements, spousal, competitors for an asset, or simply personal associations which could cast light on a possible bad faith motive for making an assignment?

[27] In *Re Good* (1991), 4 C.B.R. (3d) 12 (Ont. Bkcty.), Rosenberg J. of the Ontario Court (General Division) annulled a bankruptcy where he found the husband in a bitter family law dispute filed an assignment because he was "... determined to destroy himself and all of his assets rather than allow his wife the benefit of any of those assets... In my view, a clear case of abuse of process has been established."

Conclusion

[28] Here, Mr. Wale's motives and conduct compel the Court to exercise its discretion under s. 181 to annul the assignment. He barely meets the definition of an insolvent person. With a modicum of effort and good intentions on his part he could easily have worked his way through his less than formidable financial problems. He was on good terms with Scotiabank, a major creditor which had agreed to reduced payments on its fully secured loan until after his matrimonial difficulties were settled. His mortgage to National Trust, upon which he had been paying three times the required amount within the year prior to the assignment, was current. His trade debts were only \$5700 among five creditors with whom he had worked for years. He made no approaches to his mortgagee or his trade creditors to reduce or postpone parts or all of their accounts. The timing of the assignment, the day of his family law trial, is not coincidental, nor motivated by a desire to assist the Court. The visceral antipathy toward his former wife, as evidenced by the mobile sign he left at the property, the holy war that has raged between them since separation, his egregious conduct in selling assets and pocketing the cash shortly prior to the assignment, contrary to an order of the Court, and his removing and hiding the contents of the matrimonial home all overwhelmingly demonstrate *male fides* by him. I have little difficulty concluding he made his assignment with the intention of removing assets from the reach of the Court and his former wife so as to frustrate her claim

for an unequal division of them. The assignment was an abuse of the process of the bankruptcy court and a fraud on at least one of his creditors, his former wife.

Order

[29] Accordingly an order will go:

- (1) Annulling the bankruptcy of Henry John Wale.
- (2) Vesting title to the Wale matrimonial home in Joyce Wale pending its sale and distribution of the net proceeds therefrom as ordered in my judgment in the family law matter, delivered coincidentally with these reasons.
- (3) Requiring Richard Burnside, the trustee, to account for all assets in his possession and to deliver same, except the matrimonial home and contents, to Henry John Wale.
- (4) Requiring the trustee to serve a copy of these reasons on all the creditors.
- (5) Requiring Henry John Wale to pay forthwith the costs of Joyce Wale for this motion, fixed at \$3500.
- (6) There will be no order as to the payment of the trustee's costs.

Order accordingly.

TAB 7

CITATION: Edell v. Canada Revenue Agency, 2011 ONSC 1943
COURT FILE NO.: 31-1034196
DATE: 20110328

ONTARIO

SUPERIOR COURT OF JUSTICE
IN BANKRUPTCY AND INSOLVENCY

BETWEEN:)
)
STEPHEN ANTHONY EDELL) Self Represented Applicant
)
Applicant)
)
-- and --)
)
CANADA REVENUE AGENCY,) *Shahana Kar*, for the Respondent, Canada
) Revenue Agency
INDUSTRY CANADA (SUPERINTENDENT)
IN BANKRUPTCY AND OFFICIAL)
RECEIVER) and RISMAN & ZYSMAN INC.)
)
Respondents)
)
)

2011 ONSC 1943 (CanLII)

PEPALL J.

ENDORSEMENT

Facts

[1] Mr. Edell brings a motion to annul or stay his deemed assignment into bankruptcy. He also asks that the court approve his proposal that was rejected by his sole creditor, Canada Revenue Agency (“CRA”).

[2] Mr. Edell is a lawyer who was called to the bar of Ontario in 1983. He has had a history of personal difficulties with CRA which are described in detail in his affidavit filed in support of his motion. CRA audited his professional income from 1988 to 1991 and Mr. Edell disputed the subsequent assessments. He states that his adverse dealings with CRA were founded on an

innocent mistake made by his accountant. According to Mr. Edell, CRA's collections department relentlessly attempted to recover Mr. Edell's outstanding debt. Amongst other things, it tried to garnish Legal Aid payments due to him; appeared at his home and office; and repeatedly reassessed his wife such that she ultimately had to commence an action against CRA in Tax Court.

[3] Following a series of unfortunate personal and financial events, Mr. Edell made a proposal in bankruptcy pursuant to the provisions of the *Bankruptcy and Insolvency Act* (the "BIA"). His statement of affairs disclosed assets of \$1,500 and liabilities of \$875,000 consisting only of tax debt. CRA filed two proofs of claim: one for \$651,434.49 relating to 13 years of income taxes and the other for G.S.T. of \$30,281.34.

[4] In his BIA proposal, Mr. Edell offered to pay the sum of \$75,000 over four years. CRA, Mr. Edell's only creditor, voted against the proposal and gave no reasons for its position. CRA advised the Proposal Trustee, Risman & Zysman Inc., who had recommended the proposal, that it would not consider any proposal other than one that provided for full repayment of the tax debt. As the proposal was unsuccessful, pursuant to section 57(a) of the *BIA*, Mr. Edell was deemed to have made an assignment into bankruptcy.

[5] Mr. Edell maintains that there has been an escalating pattern of behavior by the CRA that ultimately resulted in its unlawful denial of his proposal. In his affidavit, he alleges unlawful conduct, bad faith, intent and malice. He believes that he has been targeted and that CRA has abandoned all objectivity in its dealings with him and eventually became punitive. Furthermore, his treatment has been aggravated by CRA's internal policies. He states that the assignment into bankruptcy would severely impact his ability to make a living. He would be unable to serve on a corporate board, operate a trust account, and have access to credit and leases.

[6] Mr. Edell commenced an action in the Federal Court of Canada naming as defendants CRA, the Superintendent in Bankruptcy and the Proposal Trustee. He sought damages arising from CRA's rejection of the proposal and lack of good faith, an order requiring CRA to accept

his proposal or such amended proposal as may seem appropriate to the court, and a stay of the deemed assignment.

[7] CRA brought a motion to strike out the action and Mr. Edell brought a motion seeking an interim stay of the deemed assignment pending the conclusion of his action. Mandamin J. of the Federal Court granted CRA's motion and struck out the action and also dismissed Mr. Edell's motion for a stay. He concluded that it was plain and obvious that the statement of claim disclosed no reasonable cause of action and stated that there was no legal authority for a court to stay the operation of section 57(a) of the BIA.

[8] Mr. Edell appealed these orders and the Federal Court of Appeal allowed the appeal in part. The Court dismissed the appeal of the stay motion stating that the *BIA* does not grant authority for a court to stay an assignment in bankruptcy on either an interim or permanent basis. Trudel J.A., writing for the Court, wrote:

Finally, the Judge dismissed the appellant's request for an interim stay because the *BIA* does not grant "authority for a court to stay the operation of a receiving order or assignment on either an interim or permanent basis" (reasons for judgment at paragraph 45; *Kalau v. Dahl* [1985] A.J. No. 572, 39 Alta. L.R. (2d) 156). Although the appellant challenged that conclusion in his Notice of Appeal, he did not renew his request at the hearing of his appeal. In any event, I agree with the Judge.

[9] The Federal Court of Appeal permitted the tort action to continue against CRA and allowed Mr. Edell to amend his statement of claim. The Court also ordered that the Superintendent in Bankruptcy and Risman & Zysman Inc. be removed as parties to the Federal Court action.

[10] Mr. Edell has since amended his statement of claim in the Federal Court action and the CRA has filed a statement of defence. The Superintendent in Bankruptcy and the Proposal Trustee are no longer in the action.

[11] Mr. Edell now seeks an order annulling the deemed assignment or failing same, an order staying the deemed assignment. He states that this is so that he can advance his cause of action in the Federal Court and enjoy a normal life until the action is determined on its merits. He contends that the CRA failed to act lawfully in the refusal of his proposal.

Issues

[12] The issues to consider are:

- a) should the deemed assignment be annulled;
- b) should the deemed assignment be stayed; and
- c) should the court sanction or amend a proposal that has not received the requisite creditor approval?

(a) Annulment

[13] Section 57(a) of the BIA addresses deemed assignments. It states:

- s.57 Where the creditors refuse a proposal in respect of an insolvent person,
- a) the insolvent person is deemed to have thereupon made an assignment.

As Mr. Edell's proposal was refused, he was deemed to have made an assignment under this section.

[14] Section 181(1) permits the court to annul an assignment that ought not to have been filed. It states:

- s. 181(1) If, in the opinion of the court, a bankruptcy order ought not to have been made or an assignment ought not to have been filed, the court may by order annul the bankruptcy.

[15] In support of his request to annul the deemed assignment, Mr. Edell relies on section 181(1). Section 181(1) addresses assignments that are filed rather than deemed but section 66(1)

of the Act provides that all the provisions of the BIA apply with such modifications as the circumstances require to proposals. As the assignment is deemed as a result of the operation of the statute, however, one cannot conclude that the assignment ought not to have been deemed. I therefore conclude that Mr. Edell's deemed assignment may not be annulled under section 181(1). Even if I am wrong in that regard, I would not annul it in this case.

[16] The remedy under section 181(1) is discretionary: *Re: Regional Steelworkers (Ottawa-1987) Inc.*¹ The question is whether the assignment ought to have been deemed in the circumstances. In *Tng Services Inc.*,² Campbell J. stated:

Bankruptcy annulment has been a rarely used remedy, and for good reason. It is to be used sparingly, in special circumstances and the discretion to be exercised by the Court must take into consideration and balance all the interests of the creditors, the bankrupt and of third parties.

[17] In the case before me, Mr. Edell swore in his Statement of Affairs that he had assets of \$1500 and liabilities of \$875,000. Certainly he is insolvent and owes a considerable sum to CRA. It was his decision to proceed with a proposal and he knew that CRA was his sole creditor. Creditors may vote for or against a proposal as they see fit. A debtor cannot compel acceptance of a proposal by a creditor. In this case, CRA could legitimately refuse to accept payment of \$75,000 over four years in satisfaction of a debt in excess of \$600,000. Therefore, even if a deemed assignment could be annulled, I would not exercise my discretion to do so.

(b) The Stay

[18] The next issue to consider is whether the deemed assignment should be stayed.

[19] The Federal Court and the Federal Court of Appeal both addressed this issue.³ Both courts relied on the decision of *Kalau v. Dahl*⁴ to the effect that the court has no power to stay

¹ (1994), 25 C.B.R. (3d) 135.

² (2009) 50 C.B.R. (5th) 194 at para. 6.

the operation of section 57 of the *BIA*. While one can make an argument that the court does have power to stay a deemed assignment, I would not grant a stay in this case.

[20] Mr. Edell relies on the decision of *ATI Technologies ULC v. Henderson Robb Group*⁵ in support of his position that the assignment should be stayed. That case involved an application by a creditor for a receiving order against a debtor who had commenced a claim for damages against the petitioning creditor. The debtor sought and was granted an order by Wilton-Siegel J. staying the application pending the trial of its action against the petitioning creditor or any further order of the court.

[21] It seems to me that Mr. Edell's case is quite different. This is not a case of a petition for a receiving order by a creditor. Rather, in recognition of his insolvency, Mr. Edell filed a proposal in bankruptcy. His subsequent lawsuit which claims damages and which the Federal Court of Appeal has permitted him to pursue does not entitle him to a stay nor am I persuaded by the facts that I should exercise my discretion and grant a stay. The request for a stay of Mr. Edell's deemed assignment is refused.

(c) Court Sanction of a Proposal

[22] The third issue to consider is whether CRA should sanction Mr. Edell's proposal even though it has not received the requisite creditor approval.

[23] No authority was advanced in support of this request. As noted in Houlden, Morawetz & Sarra in "The 2010 Annotated Bankruptcy and Insolvency Act"⁶, there is only a very limited power in the court to amend proposals. Under Rule 92, the court may correct any clerical error

³ Although section 183(1)(a) of the *BIA* vests bankruptcy jurisdiction in the Superior Court.

⁴ [1985] A.J. No. 572 at para. 11.

⁵ (2008) 41 C.B.R. (5th) 4.

⁶ 2009, Carswell, Toronto, at p.1041.

or omission if the correction does not constitute an alteration in substance. The relief requested by Mr. Edell goes much further than what is legally permissible. In my view, the order requested would improperly circumvent the express power vested by statute in the creditors. This would be contrary to both the language and spirit of the *BIA* and could not have been Parliament's intention. Mr. Edell's motion in this regard is dismissed.

Conclusion

[24] For all of these reasons, Mr. Edell's motion is dismissed. Under the circumstances, I am inclined not to make an order as to costs. If the parties wish me to give further consideration to the issue of costs, they may make written submissions.

Pepall J.

Released: March 28, 2011

CITATION: Edell v. Canada Revenue Agency, 2011 ONSC 1943
COURT FILE NO.: 31-1034196
DATE: 20110328

ONTARIO
SUPERIOR COURT OF JUSTICE
IN BANKRUPTCY AND INSOLVENCY

BETWEEN:

STEPHEN ANTHONY EDELL

Applicant

– and –

CANADA REVENUE AGENCY, INDUSTRY
CANADA (SUPERINTENDENT IN BANKRUPTCY
AND OFFICIAL RECEIVER) and RISMAN &
ZYSMAN INC.

Respondents

ENDORSEMENT

Pepall J.

Released: March 28, 2011

2011 ONSC 1943 (CanLII)

**IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF DUNDEE OIL AND GAS LIMITED**

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at TORONTO

**FACTUM & BRIEF OF AUTHORITIES
(Application returnable 13 February 2018)**

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