

NATIONAL CREDITOR DEBTOR REVIEW

General Editor: Steven J. Weisz
Blake, Cassels & Graydon LLP

VOLUME 28, NUMBER 3

Cited as 28 N.C.D. Rev.

SEPTEMBER 2013

• WHAT ABOUT FEDERAL PENSION CLAIMS? THE STATUS OF *PENSION BENEFITS STANDARDS ACT, 1985* AND *POOLED REGISTERED PENSION PLANS ACT* DEEMED TRUST CLAIMS IN INSOLVENCY •

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The priority of claims against insolvent employers for amounts owing under provincially regulated pension plans, and in particular, plans governed by the *Pension Benefits Act* (Ontario) [*PBA*]¹ has received a great deal of analysis over the past few years. These efforts reached an at least temporary peak upon the release of the decision of the Supreme Court of Canada (S.C.C.) in *Sun Indalex Finance, LLC v. United Steel Workers* [*Indalex*]² in February 2013. One issue left untouched by *Indalex* and the analysis surrounding it, however, is that of the priority of claims for amounts owing under pension plans governed by the federal *Pension Benefits Standard Act, 1985* [*PBSA*]³ or the new federal *Pooled Registered Pension Plans Act* [*PRPPA*].⁴

Despite the deemed trusts created by these Acts and despite some questionable case law concerning the effect of the *PBSA* deemed trust in particular, in this writer's view, the answer is quite simple: in an insolvency proceeding, *PBSA* and *PRPPA* claims do not benefit from any super-priority trust or security apart from the protection explicitly created by the *Bankruptcy and Insolvency Act* [*BIA*]⁵ and the *Companies' Creditors Arrangement Act* [*CCAA*].⁶

Pension Protections under the *BIA* and *CCAA*

Priority charges in bankruptcy and receivership for a limited set of pension claims (under both *PBSA* plans and provincially regulated plans) were created in July 2008 with the enactment of ss. 81.5 and 81.6 of the *BIA*. Similar protection was added in September 2009 for *BIA* proposals and *CCAA* proceedings. Finally, with the coming into force of the *PRPPA* in December 14, 2012, protections for *PRPPA* amounts were added to the pension provisions in the *BIA*

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NATIONAL CREDITOR/DEBTOR REVIEW

The *National Creditor/Debtor Review* is published quarterly by LexisNexis Canada Inc., 123 Commerce Valley Drive East, Suite 700, Markham, Ontario L3T 7W8

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ISBN: 0-409-91077-5 ISSN: 0829-2019
Publications Mail Registration No. 180831
ISBN: 0-433-44391-X (Print & PDF)
ISBN: 0-433-44689-7 (PDF)

Subscription rates: \$360/year (Print or PDF)
\$400/year (Print & PDF)

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(for bankruptcy, receivership, and proposals) and the pension provisions in the *CCAA*.

To take the example of receivership (and focusing on federal pensions), subs. 81.6 (1) and (2) of the *BIA* now read, in part, as follows:

Security for unpaid amounts re prescribed pensions plan—receivership

81.6 (1) If a person who is subject to a receivership is an employer who participated or participates in a prescribed pension plan for the benefit of the person's employees, the following amounts that are unpaid immediately before the first day on which there was a receiver in relation to the person are secured by security on all the person's assets:

(a) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund;

(b) if the prescribed pension plan is regulated by an Act of Parliament,

(i) an amount equal to the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that was required to be paid by the employer to the fund, and

(ii) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*,

(iii) an amount equal to the sum of all amounts that were required to be paid by the employer to the administrator of a pooled registered pension plan, as defined in subsection 2(1) of the *Pooled Registered Pension Plans Act*; and

...

Rank of security

(2) A security under this section ranks above every other claim, right, charge or security against the person's assets, regardless of when that other claim, right, charge or security arose, except rights under sections 81.1 and 81.2 and securities under sections 81.3 and 81.4 [emphasis added].

In terms of priority, pursuant to subs. 81.6 (2), the pension claims charge ranks subordinate only to the *BIA* super-priorities in favour of unpaid suppliers, farmers (etc.) and employees.

In the case of bankruptcies, *BIA* subs. 81.5 (1) and (2) have almost identical language to subs. 81.6 (1) and (2) with the exception that the charge in bankruptcy is also subordinate to statutory deemed trusts in favour of the Crown for source deductions (as preserved by subs. 67(3) of the *BIA*).

In terms of the scope of the charges, subparas. 81.5 (1)(b)(i) and 81.6 (1)(b)(i) refer us to subs. 2(1) of the *Pension Benefits Standards Regulations, 1985*,⁷ which in turn, defines “normal cost” as “the cost of benefits, excluding special payments, that are to accrue during a plan year, as determined on the basis of a going concern valuation [emphasis added].” Sections 81.5 and 81.6 of the *BIA* therefore only create super-priorities for any deducted but unremitted employee pension contributions, any unpaid employer defined-plan or pooled-registered-plan contributions, and any unpaid normal costs. There is no super-priority under the *BIA* for unfunded pension liabilities (whether they be direct claims or special payments ordered by the Office of the Superintendent of Financial Institutions).

The pension protections in restructurings are found in *BIA* subs. 60(1.5) and *CCAA* subs. 6(6), which prohibit a court from sanctioning any proposal or plan that does not ensure payment of the same pension amounts as are protected by the *BIA* in bankruptcies and receiverships. Pursuant to *BIA* subs. 65.13(8) and *CCAA* subs. 36(7), a court also cannot approve a going concern sale unless the same pension amounts will be paid out of the sale proceeds (or otherwise).⁸

The Federal Pension Deemed Trusts

The *PBSA* governs employers’ pension plans that are federally regulated, including, without

limitation, those engaged in maritime shipping, aviation, broadcasting, and banking, as well as plans of employers located in the Yukon, the Northwest Territories, and Nunavut. Subsections 8. (1) and (2) of the *PBSA* set up a deemed trust for amounts owing under a *PBSA* pension plan:

Amounts to be held in trust

8. (1) An employer shall ensure, with respect to its pension plan, that the following amounts are kept separate and apart from the employer’s own moneys, and the employer is deemed to hold the amounts referred to in paragraphs (a) to (c) in trust for members of the pension plan, former members, and any other persons entitled to pension benefits under the plan:

- (a) the moneys in the pension fund,
- (b) an amount equal to the aggregate of the following payments that have accrued to date:
 - (i) the prescribed payments, and
 - (ii) the payments that are required to be made under a workout agreement; and
- (c) all of the following amounts that have not been remitted to the pension fund:
 - (i) amounts deducted by the employer from members’ remuneration, and
 - (ii) other amounts due to the pension fund from the employer, including any amounts that are required to be paid under subsection 9.14(2) or 29(6).

Where bankruptcy, etc., of employer

(2) In the event of any liquidation, assignment or bankruptcy of an employer, an amount equal to the amount that by subsection (1) is deemed to be held in trust shall be deemed to be separate from and form no part of the estate in liquidation, assignment or bankruptcy, whether or not that amount has in fact been kept separate and apart from the employer’s own moneys or from the assets of the estate.

Within the scope of this *PBSA* deemed trust are, among other amounts, any special payments prescribed to meet solvency requirements due on plan termination (pursuant to *PBSA* subs. 29(6)). The *PBSA* deemed trust is

therefore more expansive than the protections provided in the *BIA* and the *CCAA*, which as explained above, exclude special payments.

Pooled registered pension plans are defined-contribution pension plans administered by financial institutions for employees and self-employed persons who do not have access to workplace pension plans. The *PRPPA* governs pooled plans in federally regulated industries and any such plans available to workers or those self-employed in the Yukon, the Northwest Territories, and Nunavut. Section 31 of the *PRPPA* creates the deemed trust:

Amounts deemed to be held in trust

31. (1) An employer must ensure that it keeps separate and apart from its own money all of the following amounts that have not been remitted to the administrator:

- (a) amounts deducted by the employer from employees' remuneration;
- (b) amounts of employer contributions; and
- (c) any other amounts required to be remitted to the administrator.

The employer is deemed to hold those amounts in trust for members of the plan.

If bankruptcy, etc., of employer

(2) In the event of the winding-up, assignment or bankruptcy of an employer, an amount equal to the amount that by subsection (1) is deemed to be held in trust is deemed to be separate from and form no part of the estate in liquidation, assignment or bankruptcy, whether or not that amount has in fact been kept separate and apart from the employer's own moneys or from the assets of the estate.

Unlike the *PBSA* deemed trust amounts, the amounts subject to the *PRPPA* deemed trust are limited to amounts already protected in the *BIA* and *CCAA*. This can largely be explained by the fact that pooled registered pension plans are, by definition, defined contribution rather than defined benefit plans. If, for example, we compare the *PRPPA* deemed trust to the protections in

receivership given by the provisions of *BIA* s. 81.6 excerpted above, we see that the unremitted source deductions covered by *PRPPA* para. 31(1)(a) are already covered by *BIA* para. 81.6(1)(a); the employer contributions covered by *PRPPA* para. 31(1)(b) are covered by *BIA* para. 81.6(b)(ii); and the other amounts required to be remitted to the plan administrator, covered by *PRPPA* para. 31(1)(c), are covered by the new *BIA* para. 81.6(b)(iii). Note that the *PRPPA* subs. 8(2) deemed trust language includes "winding-up," but not "liquidation," as a triggering event but then does go on to include "liquidation" among the circumstances in which the deemed trust property is deemed to be separate from and form no part of the employer's estate. The deemed trust may, therefore, be, in part, aimed at liquidations outside of insolvency proceedings.

The important points to note about the deemed trust language in both *PBSA* subs. 8(2) and *PRPPA* subs. 31(2) are (1) that the deemed trusts only arise upon the occurrence of certain triggering events (bankruptcy, liquidation, or winding-up) and (2) that there is no explicit language giving the deemed trusts priority over other security interests.

Do the *PBSA* or *PRPPA* Create Protections in Addition to Those in the *BIA* and *CCAA*?

As discussed above, the *PRPPA* deemed trust does not appear to extend to any amounts that are not already protected under the *BIA* and *CCAA*, but the *PBSA* deemed trust is broader in its scope.

In answering the question of whether the *PBSA* deemed trust creates protections for pension claims beyond those found in the *BIA* and *CCAA*, we should note, first, that the fact that the *PBSA* deemed trust is a creature of statute is

not fatal to it in insolvency. Since the *PBSA* deemed trust is not a trust in favour of the Crown, it is not reversed by *BIA* subs. 67(2). And although there is a long line of case law stating that *BIA* para. 67(1)(a) does not exclude from the estate of a bankrupt property subject to a provincial statutory deemed trust, the reasoning of such cases would not apply to property subject to deemed trusts created by federal statute.⁹

The deemed trust language in subs. 8(2) of the *PBSA*, unchanged since the enactment of the *PBSA* in 1986, is largely the same as the former deemed trust language in the *Income Tax Act* [*ITA*]¹⁰ that the S.C.C., in *Royal Bank v. Sparrow Electric Corp.* [*Sparrow Electric*],¹¹ held did not create a priority over a general security interest properly perfected under provincial personal property security law. As stated by Justice Iacobucci for the majority in *Sparrow Electric*:

98 It is open to my colleague to distinguish the fact situation in this appeal from the hypothetical priority contests I have mentioned on the ground that the Crown's interest in the inventory is unlike other charges against inventory in that it depends on the fictional device of deeming. What makes this case different, it might be said, is that the *ITA* deems to have been done what could have been done. On this understanding, it does not matter that the inventory was not actually sold and the proceeds were not actually remitted to the Receiver General, because ss. 227(4) and 227(5) of the *ITA* deem these things to have been done. But in my view, this answer cannot succeed because the inventory was not an unencumbered asset at the moment the taxes came due. It was subject to the respondent's security interest and therefore was legally the respondent's and not attachable by the deemed trust. As Gonthier J. himself says (at para. 39):

... [subsection 227(4)] does not permit Her Majesty to attach Her beneficial interest to property which, at the time of liquidation, assignment, receivership or bankruptcy, in law belongs to a party other than the tax debtor.

99 The deeming is thus not a mechanism for undoing an existing security interest, but rather a device for going back in time and seeking out an asset that was not, at the

moment the income taxes came due, subject to any competing security interest. In short, the deemed trust provision cannot be effective unless it is first determined that there is some unencumbered asset out of which the trust may be deemed. The deeming follows the answering of the chattel security question; it does not determine the answer.

Amendments to the *ITA* (at subs. 227(4) and (4.1)) were made in 1998 in response to *Sparrow Electric*. These amendments had two main features: (1) language was added to the effect that the deemed trust attached notwithstanding any other security interest (other than interests specifically prescribed by the regulations) and (2) the insolvency event trigger for the deemed trust was removed so that the deemed trust arose immediately upon the amounts becoming payable.¹² Similar changes were made at the same time to the deemed trust provisions in s. 23 of the *Canada Pension Plan* [*CPP*]¹³ and s. 86 of the 1996 *Employment Insurance Act* [*EIA*]¹⁴ and would be made in 2000 to s. 222 of the *Excise Tax Act* [*ETA*].¹⁵

In contrast, although there were extensive amendments made to s. 8 of the *PBSA* in 1998 and 2010 (as well as amendments made by the *PRPPA* in 2012), none of these touched subs. 8(2). No explicit priority language was ever added, and the insolvency event trigger remains to this day. Parliament therefore seems intent not to create any super-priority in the *PBSA* apart from what it created for *PBSA* plans in the 2008 and 2009 amendments to the *BIA* and *CCAA*.

The S.C.C.'s *Sparrow Electric* decision was released on February 27, 1997. Shortly prior, on January 9 of that same year, the Ontario Court of Justice, General Division (Commercial List) released a decision in *Neal v. Toronto Dominion Bank* [*Neal*],¹⁶ which held that a general security interest ranked subordinate to a deemed trust

claim under the *PBSA*. The court in *Neal* followed the S.C.C.'s 1980 decision in *R. v. Dauphin Plains Credit Union Ltd. [Dauphin Plains]*,¹⁷ which held that a general security interest was a floating charge, which only became crystallized upon enforcement, and which, therefore, did not rank ahead of deemed trust claims under the *CPP* or the *Unemployment Insurance Act, 1971*. What was not raised in *Neal* but had, by that time, already been addressed by the Alberta Court of Appeal in its *Sparrow Electric* decision was the fact that *Dauphin Plains* was decided prior to the enactment of *The Personal Property Security Act*¹⁸ in the relevant jurisdiction (Manitoba). In its *Sparrow Electric* decision, the Alberta Court of Appeal held that a security interest properly perfected under the Manitoba *Personal Property Security Act* was a fixed and specific charge. The S.C.C. in *Dauphin Plains* had held that deemed trust claims for pension plan and unemployment insurance deductions did not rank ahead of a fixed and specific charge like it did a floating charge:

25 ... [t]he claim for Pension Plan and Unemployment Insurance deductions cannot affect the proceeds of realization of property subject to a fixed and specific charge. From the moment such charge was created, the assets subject thereto, were no longer the property of the debtor except subject to that charge. The claim for the deductions arose subsequently and thus cannot affect this charge in the absence of a statute specifically so providing. However, the floating charge did not crystallize prior to the issue of the writ and the appointment of the receiver. In the present case it makes no difference which of the two dates is selected, both are subsequent to the deductions.

Following this reasoning in *Dauphin Plains*, the Alberta Court of Appeal held that deemed trust claims under the *ITA* did not rank ahead of a general security interest perfected under provincial personal property security law, because

such a security interest was a fixed and specific charge.

It therefore appears that the pension claims priority aspect of *Neal* was bad law when it was made, since the decision did not take into account the effect of the *Personal Property Security Act (Ontario) [PPSA]*¹⁹ nor consider, let alone follow, the Alberta Court of Appeal's *Sparrow Electric* decision. In any event, the S.C.C.'s subsequent decision in *Sparrow Electric* (upholding the Alberta Court of Appeal's ruling) shows conclusively that the pension priority reasoning in *Neal* is fatally flawed.

The above application of the *Sparrow Electric* reasoning to the *PBSA* deemed trust yields the same results as application of common rules of statutory interpretation. Given that the pension provisions of the *BIA* and *CCAA* came into force much later than s. 8 of the *PBSA*, normal interpretation would require that the later legislation be deemed to be remedial in nature. Likewise, since these provisions of the *BIA* and *CCAA* are the more specific provisions, normal interpretation would take them to have precedence over the general. Finally, the limited scope of the protection given to pension claims in the *BIA* and *CCAA* would, by application of the doctrine of implied exclusion, suggest that Parliament did not intend there to be any additional protection.²⁰ In enacting *BIA* subs. 60(1.5) and 65.13(8) and ss. 81.5 and 81.6 and *CCAA* subs. 6(6) and 36(7), while not amending subs. 8(2) of the *PBSA* (by adding explicit priority language or by removing the insolvency trigger), Parliament demonstrated the intent that pension claims would have protection in insolvencies and restructurings only to the limited extent set out in the *BIA* and *CCAA*.

There are three additional hurdles for anyone who wishes to assert a *PBSA* deemed trust claim

against an insolvent company for amounts not otherwise protected under the *BIA* or *CCAA*. First, in the case of a bankrupt company, *BIA* s. 136 contains no spot on the priority scheme for pension claims. Second, by the operation of *BIA* subs. 66(1), the s. 136 priority scheme also applies to Division I proposals.²¹ Third, the insolvency trigger in subs. 8(2) of the *PBSA* refers only to “liquidation, assignment or bankruptcy,” as commented on, in *obiter*, by Justice Farley in *United Air Lines Inc.*²²:

11 What then of the s. 8(2) Pension Benefits Standards Act, R.S.C. 1985, c.32 (2nd Supp)? It provides as follows:

8(2) In the event of any liquidation, assignment or bankruptcy of an employer, an amount equal to the amount that by subsection (1) is deemed to be held in trust shall be deemed to be separate from and form no part of the estate in liquidation, assignment or bankruptcy, whether or not that amount has in fact been kept separate and apart from the employer’s own moneys or from the assets of the estate.

I agree with the submissions of UAL as set out in its factum at para. 85:

85. Also, United submits that there are a number of issues which raise doubts about the application of the deemed trust set out in subsection 8(2) of the *PBSA* to the current situation. In particular, subsection 8(2) states that a deemed trust arises where there is a “liquidation, assignment or bankruptcy” of an employer. None of the parties to this motion have provided any evidence that United (the employer) is in liquidation, has made an assignment or is in bankruptcy.

Thus, even, if the *PBSA* deemed trust was sufficient to otherwise prime secured creditors, the deemed trust would not even arise in a *BIA* proposal or *CCAA* plan.²³

Conclusion

Although the *PBSA* deemed trust covers classes of pension claims not protected in the *BIA* or *CCAA*, the archaic language of this deemed trust does not create an interest that can prime a properly perfected contractual security interest. The *PBSA* deemed trust therefore does not

provide additional protection or priority for pension claims against an insolvent employer (beyond the protections provided in the *BIA* and *CCAA*). There is thus no parallel between the protection provided by the *PBSA* deemed trust and the protection potentially provided by the *PBA* deemed trust (in conjunction with subs. 30(7) of the *PPSA*),²⁴ as dealt with in *Indalex*. These limits to the *PBSA* protection do not appear to be an oversight by Parliament, as the *PBSA* is one of the very few federal deemed trust statutes that was not amended in response to *Sparrow Electric*.²⁵

Even though the *PRPPA* subs. 8(2) deemed trust language largely tracks the analogous language in the *PBSA*, the amounts actually covered by the *PRPPA* deemed trust do not appear to extend beyond the amounts already protected in the *BIA* and the *CCAA*, and thus the effect of the *PRPPA* deemed trust in insolvency in relation to secured claims is likely a moot point. That being said, a number of provinces are expected to introduce their own pooled registered pension plan regimes,²⁶ and as a result of these and the *PRPPA* regime, a great number of Canadian workers will likely have access to pensions where they never did before. The corollary is that a great number of Canadian employers will become indebted to pension plans where they never were before (especially small and medium enterprises, relatively more prone to insolvency).²⁷ We can therefore expect the number of super-priority pension claims in insolvencies and restructurings to rise in the future.

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¹ *PBA*, R.S.O. 1990, c. P.8.

² *Sun Indalex Finance, LLC v. United Steelworkers*, [2013] S.C.J. No. 6, 2013 SCC 6; reversing *Indalex Ltd. (Re)*, [2011] O.J. No. 1621, 2011 ONCA 265; reversing *Indalex Ltd. (Re)*, [2010] O.J. No. 974, 2010 ONSC 1114; and reversing in part *Indalex Ltd. (Re)*, [2011] O.J. No. 3959, 2011 ONCA 578. For a discussion of *Indalex*, see the writer's earlier article "After *Indalex*: Pension Claims under the New *CCAA*," *National Creditor Debtor Review* 28, no. 2 (June 2013): 13.

³ *PBSA*, R.S.C. 1985, c. 32 (2nd Supp.).

⁴ *PRPPA*, S.C. 2012, c. 16.

⁵ *BIA*, R.S.C. 1985, c. B-3.

⁶ *CCAA*, R.S.C. 1985, c. C-36.

⁷ SOR/87-19.

⁸ Strictly speaking, *CCAA* subs. 36(7) (as presently drafted) does not give this protection to pension amounts due to the fact that it cross-references the wrong paragraphs of s. 6. The writer has, however, argued elsewhere that this is only due to a drafting error and the subsection ought to be interpreted or corrected or both to give the pension protection as Parliament intended (see "After *Indalex*: Pension Claims under the New *CCAA*", *supra* note 2, pp. 15–16).

⁹ This line of cases was summarized by Justice Feldman in *GMAC Commercial Credit Corp.—Canada v. TCT Logistics Inc.*, [2005] O.J. No. 589, 74 O.R. (3d) 382 (Ont. C.A.) at para. 15:

15 A consistent series of cases from the Supreme Court of Canada has addressed the effect of provincial statutory deemed trusts in a bankruptcy: *Deputy Minister of Revenue (Québec) v. Rainville*, [1980] 1 S.C.R. 35; *Deloitte Haskins & Sells Ltd. v. Workers' Compensation Board*, [1985] 1 S.C.R. 785; *Federal Business Development Bank v. Québec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 1061; *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24; *Husky Oil Operations Ltd. v. M.N.R.*, [1995] 3 S.C.R. 453; and *Re Giffen*, [1998] 1 S.C.R. 91. These cases hold that because bankruptcy is a matter under federal jurisdiction, provincial statutory deemed trusts that do not conform to general trust principles cannot operate to reorder the priorities in a bankruptcy. Therefore, although such

deemed trusts are effective in accordance with the provincial legislation when a person or business is solvent and operating (see, e.g., *Ward-Price v. Mariners Haven Inc.* (2001), 57 O.R. (3d) 410 (C.A.)), upon bankruptcy the funds that are subject to a deemed trust, but are not held in accordance with general trust principles, will not be excluded from the property of the bankrupt under s. 67(1)(a) of the *BIA* and will be distributed in the priority prescribed by the *BIA*.

See also *Continental Casualty Co. v. MacLeod-Stedman Inc.*, [1996] M.J. No. 551, 141 D.L.R. (4th) 36 (Man. C.A.), wherein a number of the same S.C.C. decisions cited and followed by the Ontario Court of Appeal in *TCT Logistics* were also followed by the Manitoba Court of Appeal in finding that a deemed trust under *The Pension Benefits Act* (Manitoba), C.C.S.M. c. P32, did not survive a bankruptcy. See also *Ivaco Inc. (Re)*, [2006] O.J. No. 4152, 83 O.R. (3d) 108 (Ont. C.A.), a provincial pension deemed trust case in which the Ontario Court of Appeal echoed, in *obiter*, the *TCT Logistics* stance on provincial deemed trusts in bankruptcy.

¹⁰ *ITA*, R.S.C. 1985, c. 1 (5th Supp.). The former subs. 227. (4) and (5) read as follows:

(4) Every person who deducts or withholds any amount under this Act shall be deemed to hold the amount in so deducted or withheld in trust for Her Majesty.

(5) Notwithstanding any provision of the *Bankruptcy and Insolvency Act*, in the event of any liquidation, assignment, receivership or bankruptcy of or by a person, an amount equal to any amount:

- (a) deemed by subsection (4) to be held in trust for Her Majesty, or
- (b) deducted or withheld under an Act of a province with which the Minister of Finance has entered into an agreement for the collection of taxes payable to the province under that Act that is deemed under that Act to be held in trust for Her Majesty in right of the province

shall be deemed to be separate and apart from and form no part of the estate in liquidation, assignment, receivership or bankruptcy, whether or not that amount has in fact been kept separate and apart from the person's own moneys or from the assets of the estate.

The *PBSA* subs. 8(2) deemed trust language differs from and is, as a result, arguably even weaker than this pre-*Sparrow Electric ITA* deemed trust language, because (1) *PBSA* subs. 8(2) is not stated to be effective notwithstanding any provision of the *BIA* and (2) the insolvency trigger in *PBSA* subs. 8(2) does not

explicitly include receivership among the triggering events.

- ¹¹ *Royal Bank v. Sparrow Electric Corp. (sub nom. R. v. Royal Bank)*, [1997] S.C.J. No. 25, [1997] 1 S.C.R. 411; affirming *Royal Bank v. Sparrow Electric Corp.*, [1995] A.J. No. 248, 33 C.B.R. (3d) 34 (Alta. C.A.); reversing *Royal Bank v. Sparrow Electric Corp.*, [1994] A.J. No. 536, [1994] 9 W.W.R. 338 (Alta. Q.B.) and *Royal Bank v. Sparrow Electric Corp.*, [1993] A.J. No. 1108, 19 Alta. L.R. (3d) 183 (Alta. Q.B.).

- ¹² These amendments were made, effective as of June 15, 1994, by the *Income Tax Amendments Act, 1997*, R.S.C. 1998 c.19. The history of these changes made in response to *Sparrow Electric* was summarized by the S.C.C. in *First Vancouver Finance v. Canada (Minister of National Revenue)*, [2002] S.C.J. No. 25, 2002 SCC 49:

25 The majority of the Court concluded that, since the inventory was subject to the bank's security interest before the deductions giving rise to the deemed trust occurred, the bank's interest attached to the inventory in priority to Her Majesty's interest under the deemed trust.

26 However, in reaching this conclusion, the majority of the Court noted at para. 112 that Parliament was free to grant absolute priority to the deemed trust by adopting the appropriate language:

Finally, I wish to emphasize that it is open to Parliament to step in and assign absolute priority to the deemed trust. A clear illustration of how this might be done is afforded by s. 224(1.2) *ITA*, which vests certain moneys in the Crown "notwithstanding any security interest in those moneys" and provides that they "shall be paid to the Receiver General in priority to any such security interest". All that is needed to effect the desired result is clear language of that kind.

27 In response to *Sparrow Electric Corp.*, the deemed trust provisions were amended in 1998 (retroactively to 1994) to their current form. Most notably, the words "notwithstanding any security interest ... in the amount so deducted, or withheld" were added to s. 227(4). As well, s. 227(4.1) [formerly s. 227(5)] expanded the scope of the deemed trust to include "property held by any secured creditor ... that but for a security interest ... would be property of the person". Section 227(4.1) was also amended to remove reference to the triggering events of liquidation, bankruptcy, etc., instead deeming property of the tax debtor and of secured

creditors to be held in trust "at any time an amount deemed by subsection (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". Finally, s. 227(4.1) now explicitly deems the trust to operate "from the time the amount was deducted or withheld".

28 It is apparent from these changes that the intent of Parliament when drafting ss. 227(4) and 227(4.1) was to grant priority to the deemed trust in respect of property that is also subject to a security interest regardless of when the security interest arose in relation to the time the source deductions were made or when the deemed trust takes effect. This is clear from the use of the words "notwithstanding any security interest" in both ss. 227(4) and 227(4.1). In other words, Parliament has reacted to the interpretation of the deemed trust provisions in *Sparrow Electric Corp.*, and has amended the provisions to grant priority to the deemed trust in situations where the Minister and secured creditors of a tax debtor or both claim an interest in the tax debtor's property.

29 As noted above, Parliament has also amended the deemed trust provisions in regard to the timing of the trust. Reference to events triggering operation of the deemed trust such as liquidation or bankruptcy have been removed. Section 227(4.1) now states that the deemed trust begins to operate "at any time [source deductions are] ... not paid to Her Majesty in the manner and at the time provided under this Act" (emphasis added). Thus, the deemed trust is now triggered at the moment a default in remitting source deductions occurs. Further, pursuant to s. 227(4.1)(a), the trust is deemed to be in effect "from the time the amount was deducted or withheld". Thus, while a default in remitting source deductions triggers the operation of the trust, the trust is deemed to have been in existence retroactively to the time the source deductions were made. It is evident from these changes that Parliament has made a concerted effort to broaden and strengthen the deemed trust in order to facilitate the collection efforts of the Minister.

- ¹³ *CPP*, R.S.C. 1985, c. C-8. As with the 1998 amendments to the *ITA*, these amendments to the *CPP* were made by the *Income Tax Amendments Act, 1997* (*ibid.*).

- ¹⁴ *EIA*, S.C. 1996, c. 23. Like the contemporaneous amendments to the *ITA* and the *CPP*, the changes to the deemed trust language in the *EIA* were made by the *Income Tax Amendments Act, 1997* (*supra* note 12). It

is interesting to note that the deemed trust provisions in the *ITA*, the *CPP* and the *EIA* had all previously been amended as the *Sparrow Electric* matter made its way through the Alberta Court of the Queen's Bench and Court of Appeal. Amendments to the *ITA* and the *CPP* took effect on June 14, 1994, which removed the insolvency trigger and added a charge and lien in respect of deemed trust amounts. Matching amendments were made to the deemed trust provisions of the *EIA* effective as of June 20, 1996. The 1998 amendments to the *ITA* and the *CPP* were then deemed to have come into force as of June 14, 1994, and the 1998 amendments to the *EIA* were deemed to have come into force as of June 29, 1996 (with the nine-day difference between that and the effective date of the 1996 amendments being, one can only assume, the result of a drafting error). The 1998 amendments therefore effectively erased a prior attempt to anticipate what would be required to preserve the deemed trusts and in particular, the creation of a lien and charge. Instead of a lien and charge over the assets of the debtor in an amount equal to the deemed trust amount, the *ITA*, *CPP* and *EIA* now create a second deemed trust over assets of the debtor of value equal to the amount of the funds subject to the initial deemed trust. The effect may be the same either way, but it does seem more logical to consistently maintain a claim as trust beneficiary rather than to flip flop between trust beneficiary and secured creditor.

¹⁵ *ETA*, R.S.C. 1985, c. E-15. In June 1999, the Minister of Finance released explanatory notes to, among other pending statutes, the *Sales Tax and Excise Tax Amendment Act, 1999*, R.S.C. 2000 c. 30, which introduced the changes to, among other provisions, the *ETA* s. 222. These notes state that the amendments are a response to *Sparrow Electric* as were similar amendments made previously to s. 227 of the *ITA*:

The amendments to section 222 respond to the decision of the Supreme Court of Canada in *Her Majesty the Queen v. Royal Bank of Canada*, which held that the then existing rules in the *Income Tax Act* creating a deemed trust did not give priority to the Crown over certain assignments of inventory and that clearer language was required to assign absolute priority to the Crown. The amendments under this subclause parallel similar amendments made previously to section 227 of that Act (by c.19, S.C., 1998).

Specifically, the note states that the changes clarify that the Crown has priority through its trust over any other security interest and that amounts subject to the trust are deemed to be held separately and apart at all times

(and not just after a triggering event of liquidation, assignment, receivership, or bankruptcy). See <http://www.fin.gc.ca/drleg/99-104_2e.pdf> at p. 101.

¹⁶ *Neal v. Toronto Dominion Bank*, [1997] O.J. No. 39, 25 O.T.C. 142 (Ont. C.J.—Gen. Div. [Commercial List]).

¹⁷ *R. v. Dauphin Plains Credit Union Ltd.*, [1980] S.C.J. No. 35, [1980] 1 S.C.R. 1182.

¹⁸ C.C.S.M. c. P35.

¹⁹ R.S.O. 1990, c. P.10.

²⁰ This writer has argued elsewhere that the doctrine implied exclusion has been consistently applied by the S.C.C. to matters of *CCAA* priorities. See “After *Indalex*: Pension Claims under the New *CCAA*,” *supra* note 2, pp. 20–21.

²¹ The *BIA* s. 136 priority scheme may or may not also apply in the case of a going concern sale in a proposal proceeding, because subs. 66(1) was not amended to include the new concept of going concern sale introduced by the 2009 amendments.

²² *United Air Lines Inc., Re*, [2005] O.J. No. 1044, 9 C.B.R. (5th) 159 (Ont. S.C.J.—Commercial List).

²³ It can also be noted that where the pre-*Sparrow Electric* *ITA* deemed trust language included “receivership” as a triggering event, the *PBSA* deemed trust language does not. It would, however, likely be too much to read in an exclusion of receiverships, as “liquidation” is a broad enough term to include liquidation in receivership.

²⁴ The *PBA* deemed trust only “potentially” provides priority beyond the protections provided in the *BIA* and *CCAA*, because as the writer has argued elsewhere, *Indalex* was decided without application of the September 2009 amendments to the *CCAA* and tells us nothing about the effect of those amendments. In light of those amendments, the writer has argued, the *PBA* deemed trust ought no longer be considered to provide priority in a *CCAA* proceeding. See “After *Indalex*: Pension Claims under the New *CCAA*,” *supra* note 2.

²⁵ There are only two other statutes (of which this writer is aware) that still contain the pre-*Sparrow Electric* deemed trust language. One is the *Tax Rebate Discounting Act*, R.S.C. 1985, c. T-3, which at section 2.1, imposes a deemed trust on any overpayment the federal crown has made to an assignee of another party's tax refund. The second is the *Petroleum and Gas Revenue Tax Act*, R.S.C. 1985, c. P-12, which at s. 28, imposes a deemed trust on amounts deducted or withheld in respect of resource royalties tax.

²⁶ Quebec was the first province to introduce legislation for pooled registered pension plans or, rather, “voluntary retirement savings plans.” The first Quebec bill died on the order paper as a result of provincial

election in the Fall of 2012, but new legislation, *Bill no. 39: Voluntary Retirement Savings Plans Act*, was tabled in May 2013 with a target of January 1, 2014, for the regime to come into effect. Differing from the *PRPPA* and all other provincial bills to date, the Quebec *Bill no. 39* would make participation mandatory for qualifying employers with only an employee opt-out option. In British Columbia, *Bill 16-2013: Pooled Registered Pension Plans Act* was introduced in early 2013, but as happened in Quebec, the bill died on the order ahead of a provincial election. No replacement legislation has been introduced at the time of writing. In Saskatchewan, *Bill 91, An Act to Amend the Saskatchewan Pension Plan Act* and *Bill 92, An Act respecting Pooled Registered*

Pension Plans and making consequential amendments to certain Acts were introduced in early April 2013. Alberta *Bill 18: Pooled Registered Pension Plans Act*, also introduced in April 2013, received royal assent on May 27, 2013, but has yet to come into force at time of writing. Finally, the May 2013 Ontario budget contained a commitment to conduct consultations on a pooled registered pension plans (after an earlier private member's bill forced the issue).

²⁷ Not all employers will owe for matching contributions because the *PRPPA* does not require them to make such. All participating employers will, however, be liable for administrative expenses and any unremitted employee contributions deducted at source.

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