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are not aware of any court decisions that have addressed this question directly. A creditor's security interest will likely be characterized as a fixed and specific charge. In *Royal Bank of Canada v. Sparrow Electric Corp.*,[52] the Supreme Court of Canada held that a fixed and specific charge that has attached prior to the creation of a deemed trust would have priority over a deemed trust claim.[53] Therefore, it is reasonable to assume that a deemed trust applicable to pension contributions that has arisen prior to the creditor's security interest has priority over the secured creditor's security interest in assets other than inventory, accounts and their proceeds. Similarly, a deemed trust that arose after the secured creditor's security interest will rank below the secured creditor's interest in assets other than inventory, accounts or their proceeds.

(b) The PBA Statutory Lien

Section 57(5) of the *PBA* provides the administrator of the pension plan with a statutory lien and charge over the employer's assets in the amount of the deemed trust. The priority of this lien is not addressed in either the *PBA* or the *PPSA*. However, s. 20(2)(a)(ii) of the *PPSA* provides that the rights of a person to enforce a statutory lien arise after the lienholder has done everything required by the statute under which the lien was created to make it enforceable. Under the *PBA*, a statutory lien arises concurrently with the deemed trust. The plan administrator's right to the lien arises as soon as the plan sponsor fails to make the required payments to the plan and such amounts automatically become subject to a deemed trust. If the statutory lien arises prior to the rights of the secured creditor, the plan

52. *Royal Bank of Canada v. Sparrow Electric Corp.* (1997), 143 D.L.R. (4th) 385, [1997] 1 S.C.R. 411, [1997] 2 W.W.R. 457 [*Sparrow*].

53. An exception to the priority for prior fixed charges over deemed trusts has been set out in the recent decision of the Ontario Court of Appeal in *GMAC Commercial Credit Corp - Canada v. TCT Logistics Inc.* (2005), 74 O.R. (3d) 382, 194 O.A.C. 360, 7 C.B.R. (5th) 202 (C.A.) ["*GMAC*"], where the court found that a general security agreement was subject to the legal incidents of the debtor's trucking business, including compliance with a regulation requiring load brokers to hold certain payments in trust. However, the court held that the carriers' trust claim would only prevail if the debtor actually complied with the regulation and held the funds in trust. This approach is unlikely to apply to claims based on the *PBA* deemed trust since, generally, it is the failure of the employer to segregate the funds that compels the pension beneficiaries to rely on the *PBA* deemed trust. Further, in *Sparrow*, cited by the court in *GMAC*, the legal incidents of a business were held not to include wages and source deductions. Pension remittances, as they are tied to wages, would most likely be seen as outside the scope of the legal incidences of the business contemplated by the Court of Appeal in *GMAC*.

administrator's lien will have priority. However, if a secured creditor's security interest exists before the plan administrator's lien arises, then the secured creditor's security interest will have priority over the statutory lien in favour of the plan administrator.

On bankruptcy, the priorities of pension claims, and in particular, of the statutory deemed trust in favour of the beneficiaries and the statutory lien in favour of the plan administrator, change. Briefly, priorities created by provincial legislation that give pension claims priority over the claims of ordinary creditors are not likely to be effective in a bankruptcy. Accordingly, creditors of an insolvent employer with significant pension liabilities may be motivated to initiate bankruptcy in an attempt to improve their own recoveries by defeating the deemed trusts and statutory liens that may otherwise apply to the employer's assets. Courts have held that it is not inappropriate to institute a bankruptcy for the purpose of reversing priorities.[54]

(c) Legislative Reform

Chapter 47 provides additional protection for pension obligations. Specifically, as currently drafted, proposed s. 81.6 of the *BIA* will grant a charge over the assets of an employer in receivership, to secure the following unpaid amounts: (i)all amounts deducted from the employees' remuneration for payment to the pension fund; (ii)for federally regulated plans, an amount equal to the normal costs required to be paid by the employer and all amounts required to be paid by the employer under a defined contribution provision; and (iii) in the case of other prescribed pension plans, the amounts equal to the amounts in item (ii) that would have been required to be paid if the plan were federally regulated. The charge over the employer's assets will rank above every other charge against the employer's assets, with certain limited exceptions.[55]

54. *Ivaco Inc. (Re)* (2005), 12 C.B.R. (5th) 213, [2005] O.J. No. 3337 (QL), 141 A.C.W.S. (3d) 366 (S.C.J. (CommList)), at para. 13 (*supra*, footnote 42); *Black Bros. (1978) Ltd. (Re)* (1982), 41 C.B.R. (N.S.) 163, 13 A.C.W.S. (2d) 316 (B.C.S.C. (Bkcy)); *Bank of Montreal v. Scott Road Enterprises Ltd.* (1989), 57 D.L.R. (4th) 623, [1989] 4 W.W.R. 566, 36 B.C.L.R. (2d) 118 (C.A.).
55. The exceptions are suppliers' rights to repossess goods; special rights of farmers, fishermen and aquaculturists; and proposed unpaid wage charges (Chapter 47, s. 67).