COURT FILE NUMBER	2401-02680
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
APPLICANTS	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF RAZOR ENERGY CORP., RAZOR HOLDINGS GP CORP., AND BLADE ENERGY SERVICES CORP.
DOCUMENT	**BOOK OF AUTHORITIES FOR THE SUPPLEMENTAL BENCH BRIEF OF RAZOR ENERGY CORP., RAZOR HOLDINGS GP CORP., AND BLADE ENERGY SERVICES CORP. TO BE HEARD ON MARCH 6, 2024 AT 3:00 P.M.**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	McCarthy Tétrault LLP 4000, 421 – 7th Avenue SW Calgary, AB T2P 4K9 Attention: Sean Collins / Pantelis Kyriakakis / Nathan Stewart Tel: 403-260-3531 / 3536 / 3534 Fax: 403-260-3501 Email: scollins@mccarthy.ca / pkyriakakis@mccarthy.ca / nstewart@mccarthy.ca

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COURT FILE NUMBER	2401-02680
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LIST OF AUTHORITIES

STATUTES

1. *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, at sections 11.1, 37(1), and 40;

2. *Mines and Minerals Act*, R.S.A. 2000, c. M-17, at section 35;

3. *Petroleum Marketing Regulation*, Alta. Reg. 174/2006, at sections 3(b), 12 and 13;

CASE LAW

4. *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24;

5. *Canada v Canada North Group Inc.*, 2021 SCC 30; and,

6. *Newfoundland and Labrador v AbitibiBowater Inc.*, 2012 SCC 67, [2012] 3 S.C.R. 443.

TAB 1

CANADA

CONSOLIDATION

CODIFICATION

Companies' Creditors Arrangement Act

Loi sur les arrangements avec les créanciers des compagnies

R.S.C., 1985, c. C-36

L.R.C. (1985), ch. C-36

Current to February 20, 2024

Last amended on April 27, 2023

À jour au 20 février 2024

Dernière modification le 27 avril 2023

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OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (2) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Published consolidation is evidence

31 (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

Inconsistencies in Acts

(2) In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act*, the original statute or amendment prevails to the extent of the inconsistency.

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (2) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1er juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve

31 (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

Incompatibilité — lois

(2) Les dispositions de la loi d'origine avec ses modifications subséquentes par le greffier des Parlements en vertu de la *Loi sur la publication des lois* l'emportent sur les dispositions incompatibles de la loi codifiée publiée par le ministre en vertu de la présente loi.

LAYOUT

The notes that appeared in the left or right margins are now in boldface text directly above the provisions to which they relate. They form no part of the enactment, but are inserted for convenience of reference only.

MISE EN PAGE

Les notes apparaissant auparavant dans les marges de droite ou de gauche se retrouvent maintenant en caractères gras juste au-dessus de la disposition à laquelle elles se rattachent. Elles ne font pas partie du texte, n'y figurant qu'à titre de repère ou d'information.

NOTE

This consolidation is current to February 20, 2024. The last amendments came into force on April 27, 2023. Any amendments that were not in force as of February 20, 2024 are set out at the end of this document under the heading "Amendments Not in Force".

NOTE

Cette codification est à jour au 20 février 2024. Les dernières modifications sont entrées en vigueur le 27 avril 2023. Toutes modifications qui n'étaient pas en vigueur au 20 février 2024 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

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.

2005, c. 47, s. 128; 2009, c. 33, s. 28.

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.

2005, ch. 47, art. 128; 2009, ch. 33, art. 28.

Meaning of *regulatory body*

11.1 (1) In this section, ***regulatory body*** means a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a province and includes a person or body that is prescribed to be a regulatory body for the purpose of this Act.

Définition de *organisme administratif*

11.1 (1) Au présent article, ***organisme administratif*** s'entend de toute personne ou de tout organisme chargé de l'application d'une loi fédérale ou provinciale; y est assimilé toute personne ou tout organisme désigné à ce titre par règlement.

Regulatory bodies — order under section 11.02

(2) Subject to subsection (3), no order made under section 11.02 affects a regulatory body's investigation in respect of the debtor company or an action, suit or proceeding that is taken in respect of the company by or before the regulatory body, other than the enforcement of a payment ordered by the regulatory body or the court.

Organisme administratif — ordonnance rendue en vertu de l'article 11.02

(2) Sous réserve du paragraphe (3), l'ordonnance prévue à l'article 11.02 ne porte aucunement atteinte aux mesures — action, poursuite ou autre procédure — prises à l'égard de la compagnie débitrice par ou devant un organisme administratif, ni aux investigations auxquelles il procède à son sujet. Elles n'ont d'effet que sur l'exécution d'un paiement ordonné par lui ou le tribunal.

Exception

(3) On application by the company and on notice to the regulatory body and to the persons who are likely to be affected by the order, the court may order that subsection (2) not apply in respect of one or more of the actions, suits or proceedings taken by or before the regulatory body if in the court's opinion

(a) a viable compromise or arrangement could not be made in respect of the company if that subsection were to apply; and

(b) it is not contrary to the public interest that the regulatory body be affected by the order made under section 11.02.

Exception

(3) Le tribunal peut par ordonnance, sur demande de la compagnie et sur préavis à l'organisme administratif et à toute personne qui sera vraisemblablement touchée par l'ordonnance, déclarer que le paragraphe (2) ne s'applique pas à l'une ou plusieurs des mesures prises par ou devant celui-ci, s'il est convaincu que, à la fois :

a) il ne pourrait être fait de transaction ou d'arrangement viable à l'égard de la compagnie si ce paragraphe s'appliquait;

b) l'ordonnance demandée au titre de l'article 11.02 n'est pas contraire à l'intérêt public.

Declaration — enforcement of a payment

(4) If there is a dispute as to whether a regulatory body is seeking to enforce its rights as a creditor, the court may,

Déclaration : organisme agissant à titre de créancier

(4) En cas de différend sur la question de savoir si l'organisme administratif cherche à faire valoir ses droits à

on application by the company and on notice to the regulatory body, make an order declaring both that the regulatory body is seeking to enforce its rights as a creditor and that the enforcement of those rights is stayed.

1997, c. 12, s. 124; 2001, c. 9, s. 576; 2005, c. 47, s. 128; 2007, c. 29, s. 106, c. 36, s. 65.

11.11 [Repealed, 2005, c. 47, s. 128]

Interim financing

11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

Priority — secured creditors

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Priority — other orders

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Factors to be considered

(4) In deciding whether to make an order, the court is to consider, among other things,

(a) the period during which the company is expected to be subject to proceedings under this Act;

(b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

titre de créancier dans le cadre de la mesure prise, le tribunal peut déclarer, par ordonnance, sur demande de la compagnie et sur préavis à l'organisme, que celui-ci agit effectivement à ce titre et que la mesure est suspendue.

1997, ch. 12, art. 124; 2001, ch. 9, art. 576; 2005, ch. 47, art. 128; 2007, ch. 29, art. 106, ch. 36, art. 65.

11.11 [Abrogé, 2005, ch. 47, art. 128]

Financement temporaire

11.2 (1) Sur demande de la compagnie débitrice, le tribunal peut par ordonnance, sur préavis de la demande aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de la compagnie sont grevés d'une charge ou sûreté — d'un montant qu'il estime indiqué — en faveur de la personne nommée dans l'ordonnance qui accepte de prêter à la compagnie la somme qu'il approuve compte tenu de l'état de l'évolution de l'encaisse et des besoins de celle-ci. La charge ou sûreté ne peut garantir qu'une obligation postérieure au prononcé de l'ordonnance.

Priorité — créanciers garantis

(2) Le tribunal peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la compagnie.

Priorité — autres ordonnances

(3) Il peut également y préciser que la charge ou sûreté n'a priorité sur toute autre charge ou sûreté grevant les biens de la compagnie au titre d'une ordonnance déjà rendue en vertu du paragraphe (1) que sur consentement de la personne en faveur de qui cette ordonnance a été rendue.

Facteurs à prendre en considération

(4) Pour décider s'il rend l'ordonnance, le tribunal prend en considération, entre autres, les facteurs suivants :

a) la durée prévue des procédures intentées à l'égard de la compagnie sous le régime de la présente loi;

b) la façon dont les affaires financières et autres de la compagnie seront gérées au cours de ces procédures;

c) la question de savoir si ses dirigeants ont la confiance de ses créanciers les plus importants;

d) la question de savoir si le prêt favorisera la conclusion d'une transaction ou d'un arrangement viable à l'égard de la compagnie;

e) la nature et la valeur des biens de la compagnie;

(b) to "trustee" is to be read as a reference to "monitor"; and

(c) to "bankrupt", "insolvent person" or "debtor" is to be read as a reference to "debtor company".

2005, c. 47, s. 131; 2007, c. 36, s. 78.

Her Majesty

Deemed trusts

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.

Exceptions

(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* (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.

2005, c. 47, s. 131.

Sa Majesté

Fiducies présumées

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.

Exceptions

(2) 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

Act binding on Her Majesty

40 This Act is binding on Her Majesty in right of Canada or a province.

2005, c. 47, s. 131.

Miscellaneous

Certain sections of *Winding-up and Restructuring Act* do not apply

41 Sections 65 and 66 of the *Winding-up and Restructuring Act* do not apply to any compromise or arrangement to which this Act applies.

2005, c. 47, s. 131.

Act to be applied conjointly with other Acts

42 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.

2005, c. 47, s. 131.

Claims in foreign currency

43 If a compromise or an arrangement is proposed in respect of a debtor company, a claim for a debt that is payable in a currency other than Canadian currency is to be converted to Canadian currency as of the date of the initial application in respect of the company unless otherwise provided in the proposed compromise or arrangement.

2005, c. 47, s. 131.

Obligation de Sa Majesté

40 La présente loi lie Sa Majesté du chef du Canada ou d'une province.

2005, ch. 47, art. 131.

Dispositions diverses

Inapplicabilité de certains articles de la *Loi sur les liquidations et les restructurations*

41 Les articles 65 et 66 de la *Loi sur les liquidations et les restructurations* ne s'appliquent à aucune transaction ni à aucun arrangement auxquels la présente loi est applicable.

2005, ch. 47, art. 131.

Application concurrente d'autres lois

42 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.

2005, ch. 47, art. 131.

Créances en monnaies étrangères

43 Dans le cas où une transaction ou un arrangement est proposé à l'égard d'une compagnie débitrice, la réclamation visant une créance en devises étrangères doit être convertie en monnaie canadienne au taux en vigueur à la date de la demande initiale, sauf disposition contraire de la transaction ou de l'arrangement.

2005, ch. 47, art. 131.

PART IV

Cross-border Insolvencies

Purpose

Purpose

44 The purpose of this Part is to provide mechanisms for dealing with cases of cross-border insolvencies and to promote

(a) cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies;

(b) greater legal certainty for trade and investment;

PARTIE IV

Insolvabilité en contexte international

Objet

Objet

44 La présente partie a pour objet d'offrir des moyens pour traiter des cas d'insolvabilité en contexte international et de promouvoir les objectifs suivants :

a) assurer la coopération entre les tribunaux et les autres autorités compétentes du Canada et ceux des ressorts étrangers intervenant dans de tels cas;

TAB 2

Province of Alberta

MINES AND MINERALS ACT

Revised Statutes of Alberta 2000
Chapter M-17

Current as of July 23, 2020

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Note

All persons making use of this consolidation are reminded that it has no legislative sanction, that amendments have been embodied for convenience of reference only. The official Statutes and Regulations should be consulted for all purposes of interpreting and applying the law.

Amendments Not in Force

This consolidation incorporates only those amendments in force on the consolidation date shown on the cover. It does not include the following amendments:

2020 cG-5.5 s31 amends ss1, 2(b), 5(1), 9(a), adds s10.2, amends ss16, 17, 20, adds s33.1, amends ss36(1), 46, 54, 58, 59 and 106(b)(i).

2020 c30 s30 amends s5(1)(w)(ii) and 95(5).

Regulations

The following is a list of the regulations made under the *Mines and Minerals Act* that are filed as Alberta Regulations under the Regulations Act

	Alta. Reg.	*Amendments*
Mines and Minerals Act		
Ammonite Shell	152/2004	*305/2009, 177/2016, 110/2019*
Bitumen Valuation Methodology (Ministerial)	232/2008	*341/2009, 38/2017, 202/2019*

Crown as owner

35(1) The Crown in right of Alberta is the owner of its royalty share of the mineral at all times until that royalty share is disposed of by or on behalf of the Crown or until the Crown's title to that royalty share is transferred to a lessee or other person pursuant to the regulations, notwithstanding that its share is commingled with and indistinguishable from the lessee's share prior to or at the time of the disposal or transfer of title.

(2) If, at the place where the Crown's royalty share of a mineral is to be delivered to the Crown in right of Alberta, the Crown's royalty share of the mineral is commingled with the lessee's share of the mineral so that the Crown's royalty share cannot be identified, the Crown in right of Alberta is entitled to the quantity of the mineral of equivalent quality that is equal to the Crown's royalty share.

(3) If under the regulations or a contract or agreement under section 9 the quantity of the royalty on a mineral is calculated on the basis of all or any of the products obtained by processing that mineral or by reprocessing the products obtained by processing that mineral, unless otherwise provided a reference to the mineral in any provision in this Act or the regulations respecting the royalty on the mineral shall be read as a reference to the product obtained by the processing or reprocessing, as the case may be.

RSA 2000 cM-17 s35;2008 c36 s6

Regulations

36(1) The Lieutenant Governor in Council may make regulations

(a) prescribing the royalty on a mineral;

(b) prescribing that the quantity of the royalty on a mineral be calculated at a place other than the place where the mineral is first measured after it is recovered;

(c) prescribing that the royalty on a mineral be delivered to the Crown in right of Alberta at a place other than that at which its quantity is calculated;

(d) authorizing the Minister to determine any component or value in the calculation of the royalty on a mineral;

(e) respecting the circumstances under which the quantity of the royalty on a mineral shall be calculated on all or any of the products obtained by processing the mineral or by reprocessing any of those products instead of on the mineral;

TAB 3

Province of Alberta

PETROLEUM MARKETING ACT

MINES AND MINERALS ACT

PETROLEUM MARKETING REGULATION

Alberta Regulation 174/2006

With amendments up to and including Alberta Regulation 247/2018

Current as of December 12, 2018

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Note

All persons making use of this consolidation are reminded that it has no legislative sanction, that amendments have been embodied for convenience of reference only. The official Statutes and Regulations should be consulted for all purposes of interpreting and applying the law.

(p) "reporting deadline" means

(i) in relation to a royalty report for a delivery month, the time in the next delivery month prescribed by the Commission pursuant to section 5(1) as the deadline for the furnishing of the report, and

(ii) in relation to an amendment report, the time shown in the notice given under section 4(5) as the deadline for furnishing the amendment report;

(q) "royalty oil" means the Crown's royalty share of crude oil recovered pursuant to an agreement;

(r) "royalty report", in relation to a delivery month, means a report furnished or required to be furnished in respect of that delivery month by section 4(1);

(s) "shipper" means the person for whose account crude oil is transported by a pipeline;

(t) "underdelivery balance", in relation to a delivery month and a battery, means the quantity, according to the records of the Commission, by which

(i) the prescribed royalty quantity in respect of the battery for that delivery month

exceeds

(ii) the actual deliveries from the battery for that delivery month.

AR 174/2006 s1;140/2014

Miscellaneous interpretive rules

2(1) A reference in this Regulation to a month, whether by its name or not, shall be construed as the period commencing at 7:00 a.m. Mountain Standard Time on the first day of the month and ending immediately before 7:00 a.m. Mountain Standard Time on the first day of the next month.

(2) A reference in this Regulation to the operator of a battery for or in respect of a delivery month shall be read as a reference to the person who was, according to the records of the Alberta Energy Regulator, the operator of that battery for that delivery month.

(3) For the purposes of this Regulation,

(a) crude oil delivered to a field delivery point for the account of the Commission is deemed to be royalty oil until proven otherwise, and

(b) when crude oil recovered pursuant to an agreement is delivered to a field delivery point during a delivery month, the Crown's royalty share of that crude oil is deemed to be delivered first.

(4) The Minister may specify a date in 2007 as the "operational date" for the purposes of sections 6, 7 and 8.

AR 174/2006 s2;254/2007;89/2013

Petrinex

3(1) Subject to this section, where

(a) a royalty report or amendment report is required to be furnished to the Commission in respect of a delivery month, or

(b) a battery operator furnishes a claim for a transportation allowance in respect of a delivery month pursuant to section 22,

the report or claim must be furnished by electronic transmission to Petrinex in accordance with the directions of the Minister respecting the operation of Petrinex.

(2) The Commission may

(a) on application or its own initiative, exempt a battery operator from the requirements of subsection (1) in respect of one or more delivery months, and

(b) give directions to the operator respecting an alternative mode by which the operator must furnish reports and claims for that delivery month or those delivery months, as the case may be.

(3) Where the Commission considers it necessary to do so by reason of technical or other difficulties affecting the operation of Petrinex, the Commission may give general directions to all or any battery operators respecting an alternative mode for furnishing royalty reports, amendment reports and transportation allowance claims in respect of one or more delivery months, and in that event those reports and claims in respect of the delivery month or months must be furnished in accordance with the Commission's directions.

(4) The Commission may send to a battery operator

(a) a monthly statement, and

Part 2
Underdelivery and Overdelivery of Oil

Field delivery point for royalty oil

11(1) Subject to subsection (2), the place at which royalty oil shall be delivered to the Commission is prescribed as follows:

(a) if the battery at which the Crown's royalty share of crude oil is calculated is connected directly to a pipeline, the place where the royalty oil is to be delivered to the Commission is the point on the pipeline at which the battery is connected to it;

(b) if the battery at which the Crown's royalty share of crude oil is calculated is not connected directly to a pipeline, the place at which the royalty oil is to be delivered to the Commission is

(i) the nearest unloading facility connected to a pipeline, or

(ii) if there is another unloading facility connected to a pipeline entailing a higher net revenue return to the Crown, that other unloading facility.

(2) The Commission may in a particular case direct or consent to the delivery of royalty oil at a place other than that prescribed under subsection (1), either indefinitely or for a specified period.

Direction to deliver royalty deficiency

12(1) If there is an underdelivery balance at a battery for a delivery month, the Commission, by a notice given to the operator of the battery for that delivery month, may direct that the default under the agreement or agreements resulting from the deficient delivery be remedied by the delivery in kind to the Commission of crude oil in equal quantity and of like quality to the underdelivery balance

(a) in the month in which the direction is given,

(b) in a particular subsequent month, or

(c) in instalments in 2 or more particular subsequent months,

whichever is specified in the direction.

(2) A direction to an operator under subsection (1) relating to the underdelivery balance for a particular delivery month may include underdelivery balances for the same battery for any previous

delivery months if the operator to whom the direction is given was also the operator of that battery for each of those previous delivery months.

(3) The Commission may, with or without conditions, direct or consent to the postponement of delivery in kind of all or part of the volumes of royalty oil specified in a direction under subsection (1) to a later month or months and, on doing so, the direction is deemed to be amended accordingly.

(4) If a direction under subsection (1) is not complied with, then,

(a) to the extent that the quantity of crude oil delivered pursuant to the direction is less than the underdelivery balance or the aggregate of the underdelivery balances, as the case may be, specified in the direction, the Commission may, in a monthly statement, charge the operator with the payment to the Commission of an amount of money equal to, whichever of the following amounts is shown in the monthly statement,

(i) the amount calculated by multiplying the quantity of the undelivered royalty oil by the Commission's field price or respective field prices, as the case may be, for the delivery month or months in which the royalty oil was originally payable, or

(ii) the amount calculated by multiplying the quantity of the undelivered royalty oil by the Commission's field price or respective field prices, as the case may be, for the month or months in which the royalty oil should have been delivered in accordance with the direction,

and

(b) to the extent the quality of crude oil delivered pursuant to the direction is less than that required to be delivered pursuant to the direction, the Commission may, in a monthly statement, charge the operator with the payment to the Commission of an amount of money that in the Commission's opinion is equal to the difference in value between the crude oil delivered and that required to be delivered.

(5) When an amount of money becomes owing to the Commission under subsection (4), the direction under subsection (1) ceases to apply.

(6) The Commission may not give a notice under subsection (1) in respect of an underdelivery balance for a delivery month if it has

charged the operator under section 13(1) with the payment of a money amount in respect of the same underdelivery balance.

Money in lieu of royalty deficiency

13(1) If there is an underdelivery balance at a battery for a delivery month, the Commission, in a monthly statement sent to the operator of the battery, may charge the operator with the payment to the Commission of an amount of money calculated by multiplying the underdelivery balance by the Commission's field price for that underdelivery balance for that month.

(2) The Commission may not charge a battery operator with the payment of an amount of money under subsection (1) of this section in respect of an underdelivery balance for a delivery month if a notice has been given under section 12(1) in respect of the same underdelivery balance.

Money amounts owing under section 12 or 13

14(1) If the operator of a battery is charged with the payment of an amount of money owing in respect of an underdelivery balance pursuant to section 12(4) or 13(1),

(a) the obligation to pay the amount of money so charged replaces the obligation to deliver the underdelivery balance in kind to the Commission,

(b) full payment of the amount of money so charged operates to fulfil the obligation to deliver the underdelivery balance in kind to the Commission, and

(c) any crude oil delivered to the Commission in purported payment in kind of the underdelivery balance shall be dealt with by the Commission under section 15 as though it were an overdelivery of crude oil to which that section applies.

(2) If after a battery operator has been charged with the payment of a money amount under section 12(4) or 13(1) it is found that the amount owing to the Commission is greater or less than the amount charged, the Commission may adjust the amount owing to the Commission by decreasing or increasing it and cause the adjustment to be reflected in a subsequent monthly statement to the operator.

(3) Where a money amount is owing to the Commission under section 12(4) or 13(1) by reason of a charge contained in a monthly statement and the amount remains wholly or partly unpaid after the person so charged is succeeded as the operator of the battery concerned then, despite anything in section 12 or 13,

TAB 4

Her Majesty The Queen in right of the Province of British Columbia *Appellant*

v.

Henfrey Samson Belair Ltd. *Respondent*

and

The Attorney General of Canada, the Attorney General for Ontario, the Attorney General of Quebec, the Attorney General of Nova Scotia, the Attorney General for New Brunswick, the Attorney General of Manitoba, the Attorney General for Alberta and the Attorney General of Newfoundland *Interveners*

INDEXED AS: BRITISH COLUMBIA *v.* HENFREY SAMSON BELAIR LTD.

File No.: 20515.

1989: April 21; 1989: July 13.

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

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

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

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

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

Sa Majesté La Reine du chef de la province de la Colombie-Britannique *Appelante*

c.

Henfrey Samson Belair Ltd. *Intimée*

et

Le procureur général du Canada, le procureur général de l'Ontario, le procureur général du Québec, le procureur général de la Nouvelle-Écosse, le procureur général du Nouveau-Brunswick, le procureur général du Manitoba, le procureur général de l'Alberta et le procureur général de Terre-Neuve *Intervenants*

RÉPERTORIÉ: COLOMBIE-BRITANNIQUE *c.* HENFREY SAMSON BELAIR LTD.

N° du greffe: 20515.

1989: 21 avril; 1989: 13 juillet.

Présents: Les juges Lamer, Wilson, La Forest, L'Heureux-Dubé, Gonthier, Cory et McLachlin.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Faillite — Priorité — Fiducie créée par la Loi à l'égard des taxes perçues — Taxes perçues et confondues avec les biens de la faillie — Affectation de tous les biens de la faillie à la réduction de la créance de la Banque — La province doit-elle avoir priorité sur les autres créanciers en raison de la fiducie créée par la loi? — Loi sur la faillite, S.R.C. 1970, chap. B-3, art. 47a), 107(1)j) — Social Service Tax Act, R.S.B.C. 1979, chap. 388, art. 18.

La société Tops Pontiac Buick Ltd. a perçu la taxe provinciale de vente dans le cours de ses opérations commerciales, comme elle était tenue de le faire en vertu de la *Social Service Tax Act*, et elle a confondu les montants de taxe perçus avec ses autres biens. Un créancier de Tops l'a placée sous séquestre et Tops a alors déclaré faillite et fait cession de ses biens. Le séquestre a vendu les biens et consacré la totalité du produit de cette vente à la réduction de la créance de la Banque.

La province a soutenu que la *Social Service Tax Act* crée une fiducie sur les biens de Tops jusqu'à concurrence du montant de taxe de vente perçu mais non remis et qu'à l'égard de ce montant, elle a priorité sur la Banque et sur tous les autres créanciers. Le juge en

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

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

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

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

Per Cory J. (dissenting): The moneys collected as sales tax by a vendor belong to the province and the vendor is in every sense of the word a trustee for them. The province did not need to rely on the vendor's

chambre a statué que la *Social Service Tax Act* ne crée pas de fiducie et que la province n'a pas la priorité en vertu de la *Loi sur la faillite*. La Cour d'appel a statué que les dispositions législatives créent une fiducie, mais que la *Loi sur la faillite* ne confère pas de priorité à l'égard de cette fiducie. La question en litige est de savoir si la fiducie légale créée par l'art. 18 de la *Social Service Tax Act* de la Colombie-Britannique confère à la province la priorité sur les autres créanciers en vertu de la *Loi sur la faillite*.

Arrêt (le juge Cory est dissident): Le pourvoi est rejeté.

Les juges Lamer, Wilson, La Forest, L'Heureux-Dubé, Gonthier et McLachlin: La fiducie créée par la loi provinciale est non pas une fiducie au sens de l'al. 47*a*) de la *Loi sur la faillite*, mais simplement une réclamation de la Couronne au sens de l'al. 107(1)*j*). L'alinéa 47*a*), qui vise «les biens détenus par le failli en fiducie pour toute autre personne», permet de soustraire, du régime de répartition établi par la *Loi sur la faillite*, les biens qui peuvent être spécifiquement identifiés comme n'appartenant pas au failli selon les principes généraux du droit des fiducies. D'autre part, l'al. 107(1)*j*) porte non pas sur les droits conférés par le droit général, mais sur les créances établies par la loi en faveur du fisc fédéral et provincial. Interprétés de cette façon, les al. 47*a*) et 107(1)*j*) ne se contredisent pas. Cette interprétation des al. 47*a*) et 107(1)*j*) de la *Loi sur la faillite* respecte le principe selon lequel les provinces ne peuvent, par leur propre loi, modifier l'ordre de priorité établi en vertu de la *Loi sur la faillite*.

Aux termes de l'art. 18 de la *Social Service Tax Act*, il y a fiducie légale réputée au moment de la perception de la taxe. À ce moment-là, le bien en fiducie est identifiable et la fiducie répond aux exigences d'une fiducie établie en vertu des principes généraux du droit. Au moment de sa perception, la somme serait donc exclue, en raison de l'al. 47*a*), de la répartition des biens entre les créanciers. Cependant, il n'y a plus de fiducie, en *common law*, lorsque le montant de taxe perçu est confondu avec les autres sommes de sorte qu'il devient impossible de le retracer et de l'identifier. La province a une créance garantie seulement par un privilège créé par le par. 18(2) de la *Social Service Tax Act* et l'al. 107(1)*j*) de la *Loi sur la faillite* s'appliquerait donc. En l'espèce, il n'est possible d'identifier aucun bien précis sujet à une fiducie et l'al. 47*a*) de la *Loi sur la faillite* ne s'applique pas à la créance de la province.

Le juge Cory (dissident): Les sommes perçues par un marchand au titre de la taxe de vente appartiennent à la province et le marchand est, au sens strict du terme, un fiduciaire à l'égard des sommes ainsi perçues. La pro-

keeping separate bank accounts to protect its trust property but rather could and did implement a registration system that allowed it to specify precisely the amount owing through a system of bookkeeping. If the tax were not paid to the province then a vendor must have stolen the funds, converted them to its own use or most charitably lost the funds for which it would be responsible and for which it would be accountable to the province.

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

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

Cases Cited

By McLachlin J.

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

vince n'a pas eu besoin d'exiger que le marchand ouvre des comptes de banque distincts pour protéger ses fonds en fiducie. Elle a plutôt établi, ce qu'elle pouvait faire, un système d'enregistrement lui permettant de déterminer avec précision, par un régime de comptabilité, les sommes qui lui sont dues. Si la taxe n'est pas versée à la province, un marchand doit alors avoir ou volé ces sommes, ou les avoir détournées à son propre usage ou encore, si l'on est indulgent, avoir perdu les sommes dont il était responsable et comptable à la province.

La *Loi sur la faillite* empêche les provinces d'établir des priorités, mais elle ne les empêche pas d'établir une fiducie ou un privilège réputés. La Loi protège les sommes qui, dès leur versement, constituent véritablement des fonds en fiducie et il n'est pas nécessaire de déterminer la validité de la fiducie exclusivement en fonction de la *common law*. Puisqu'il n'y a pas de conflit entre l'art. 18 de la *Social Service Tax Act*, d'une part, et l'al. 47*a*) et l'art. 107 de la *Loi sur la faillite*, d'autre part, la théorie de la prépondérance de la loi fédérale ne peut s'appliquer et l'art. 18 devrait prévaloir. Le bien en cause, qui était visé par l'art. 18 de la *Social Service Tax Act*, n'est jamais devenu la propriété de la faillie et n'était donc pas sujet à répartition comme l'étaient les biens de la faillie en vertu de l'art. 107 de la *Loi sur la faillite*.

La fiducie créée par l'art. 18 comporte les trois caractéristiques essentielles requises d'une fiducie en *equity*: la certitude quant à l'intention, la certitude quant aux biens sujets à la fiducie et la certitude quant aux bénéficiaires. La Loi établit la certitude quant à l'intention et la certitude quant au bénéficiaire, de même qu'un moyen clair de déterminer le bien qui est en fiducie. Une fiducie établie par la loi offre un avantage sur une fiducie établie par un particulier en ce que son existence est reconnue sans que le bénéficiaire ait à engager l'action excessivement coûteuse en droit de suite sur les sommes confondues. Cet avantage ne devrait pas dépouiller les biens en fiducie légale de leur caractère fiduciaire ni les soustraire à l'application des principes énoncés par cette Cour.

Jurisprudence

Citée par le juge McLachlin

Arrêts appliqués: *Sous-ministre du Revenu c. Rainville*, [1980] 1 R.C.S. 35; *Deloitte Haskins and Sells Ltd. c. Workers' Compensation Board*, [1985] 1 R.C.S. 785; **arrêt mentionné**: *Re Phoenix Paper Products Ltd.* (1983), 48 C.B.R. (N.S.) 113.

By Cory J. (dissenting)

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

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Business Corporations Act, S.A. 1981, c. B-15, s. 191(1).
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Employment Standards Act, R.S.A. 1980, c. E-10.1, s. 113.
Health Insurance Act, R.S.O. 1980, c. 197, s. 18.
Health Insurance Premiums Regulation, Alta. Reg. 217/81.
Insurance Act, R.S.A. 1980, c. I-5, s. 123(1).
Insurance Act, R.S.O. 1980, c. 218, s. 359.
Mechanics' Lien Act, R.S.O. 1950, c. 227.
Pension Benefits Act, S.O. 1987, c. 35, s. 58.
Real Estate Agents' Licensing Act, R.S.A. 1980, c. R-5, s. 14.
Revenue Act, R.S.B.C. 1979, c. 367.
Social Service Tax Act, R.S.B.C. 1979, c. 388, ss. 5, 6, 8, 9, 10, 18(1), (2), 27.
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Citée par le juge Cory (dissident)

Royal Trust Co. c. Tucker, [1982] 1 R.C.S. 250; *John M. M. Troup Ltd. v. Royal Bank of Canada*, [1962] R.C.S. 487; *Re Deslauriers Construction Products Ltd.* (1970), 3 O.R. 599; *Dauphin Plains Credit Union Ltd. c. Xyloid Industries Ltd.*, [1980] 1 R.C.S. 1182; *Multiple Access Ltd. c. McCutcheon*, [1982] 2 R.C.S. 161; *Deloitte Haskins and Sells Ltd. c. Workers' Compensation Board*, [1985] 1 R.C.S. 785; *Re Diplock's Estate*, [1948] Ch. 465, [1948] 2 All E.R. 318, conf. sous l'intitulé *Min. of Health v. Simpson*, [1951] A.C. 251, [1950] 2 All E.R. 1137 (H.L.); *Sous-ministre du Revenu c. Rainville*, [1980] 1 R.C.S. 35; *Banque fédérale de développement c. Québec (Commission de la santé et de la sécurité du travail)*, [1988] 1 R.C.S. 1061.

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Loi sur l'assurance-maladie, L.R.O. 1980, chap. 197, art. 18.
Loi sur la faillite, S.R.C. 1970, chap. B-3, art. 47*a*), 107(1)*j*).
Loi sur les assurances, L.R.O. 1980, chap. 218, art. 359.
Mechanics' Lien Act, R.S.O. 1950, chap. 227.
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POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (1987), 13 B.C.L.R.

(2d) 346; 40 D.L.R. (4th) 728; [1987] 4 W.W.R. 673; 65 C.B.R. (N.S.) 24; 5 A.C.W.S. (3d) 47, dismissing an appeal from a judgment of Meredith J. in chambers (1986), 5 B.C.L.R. (2d) 212, 61 C.B.R. (N.S.) 59. Appeal dismissed, Cory J. dissenting.

William A. Pearce and *J. G. Pottinger*, for the appellant.

Wendy G. Baker, *Q.C.*, and *Gillian E. Parson*, for the respondent.

James M. Mabbutt, *Q.C.*, for the intervener the Attorney General of Canada.

Janet E. Minor and *Timothy Macklem*, for the intervener the Attorney General for Ontario.

Yves de Montigny and *Madeleine Aubé*, for the intervener the Attorney General of Quebec.

Reinhold M. Endres, for the intervener the Attorney General of Nova Scotia.

Richard Burns, for the intervener the Attorney General for New Brunswick.

W. Glenn McFetridge and *Dirk D. Blevins*, for the intervener the Attorney General of Manitoba.

Robert C. Maybank, for the intervener the Attorney General for Alberta.

W. G. Burke-Robertson, *Q.C.*, for the intervener the Attorney General of Newfoundland.

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

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

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

(2d) 346, 40 D.L.R. (4th) 728, [1987] 4 W.W.R. 673, 65 C.B.R. (N.S.) 24, 5 A.C.W.S. (3d) 47, qui a rejeté l'appel d'une décision du juge en chambre Meredith (1986), 5 B.C.L.R. (2d) 212, 61 C.B.R. (N.S.) 59. Pourvoi rejeté, le juge Cory est dissident.

William A. Pearce et *J. G. Pottinger*, pour l'appelante.

Wendy G. Baker, *c.r.*, et *Gillian E. Parson*, pour l'intimée.

James M. Mabbutt, *c.r.*, pour l'intervenant le procureur général du Canada.

Janet E. Minor et *Timothy Macklem*, pour l'intervenant le procureur général de l'Ontario.

Yves de Montigny et *Madeleine Aubé*, pour l'intervenant le procureur général du Québec.

Reinhold M. Endres, pour l'intervenant le procureur général de la Nouvelle-Écosse.

Richard Burns, pour l'intervenant le procureur général du Nouveau-Brunswick.

W. Glenn McFetridge et *Dirk D. Blevins*, pour l'intervenant le procureur général du Manitoba.

Robert C. Maybank, pour l'intervenant le procureur général de l'Alberta.

W. G. Burke-Robertson, *c.r.*, pour l'intervenant le procureur général de Terre-Neuve.

Version française du jugement des juges Lamer, Wilson, La Forest, L'Heureux-Dubé, Gonthier et McLachlin rendu par

LE JUGE MCLACHLIN—Le présent pourvoi soulève la question de savoir si la fiducie légale établie par l'art. 18 de la *Social Service Tax Act*, R.S.B.C. 1979, chap. 388, confère à la province la priorité sur les autres créanciers en vertu de la *Loi sur la faillite*, S.R.C. 1970, chap. B-3.

La société Tops Pontiac Buick Ltd. a perçu la taxe de vente pour le compte du gouvernement provincial dans le cours de ses opérations commerciales, comme elle était tenue de le faire en vertu de la *Social Service Tax Act*. Tops a confondu les montants de taxe perçus avec ses autres biens. Lorsque la Banque canadienne impériale de com-

made an assignment in bankruptcy, the receiver sold the assets of Tops and applied the full proceeds in reduction of the indebtedness of the bank.

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

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

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

18. (1) Where a person collects an amount of tax under this Act

(a) he shall be deemed to hold it in trust for Her Majesty in right of the Province for the payment over of that amount to Her Majesty in the manner and at the time required under this Act and regulations, and

(b) the tax collected shall be deemed to be held separate from and form no part of the person's money, assets or estate, whether or not the amount of the tax has in fact been kept separate and apart from either the person's own money or the assets of the estate of the person who collected the amount of the tax under this Act.

(2) The amount of taxes that, under this Act,

(a) is collected and held in trust in accordance with subsection (1); or

(b) is required to be collected and remitted by a vendor or lessor

forms a lien and charge on the entire assets of

(c) the estate of the trustee under paragraph (a);

merce a placé Tops sous séquestre en raison de la débenture qu'elle détenait, Tops a déclaré faillite et fait cession de ses biens; le séquestre a vendu les biens de Tops et consacré la totalité du produit de cette vente à la réduction de la créance de la Banque.

La province soutient que la *Social Service Tax Act* crée une fiducie sur les biens de Tops jusqu'à concurrence du montant de taxe de vente perçu mais non remis (58 763,23 $) et qu'à l'égard de ce montant, elle a priorité sur la Banque et tous les autres créanciers.

Le juge en chambre a statué que la *Social Service Tax Act* ne crée pas de fiducie et que la province n'a pas la priorité. En appel, le séquestre a reconnu que les dispositions législatives créent une fiducie, mais il a soutenu que le juge en chambre avait eu raison de statuer que la province n'avait pas la priorité parce que la *Loi sur la faillite* ne confère pas de priorité à l'égard de cette fiducie. La Cour d'appel de la Colombie-Britannique a fait droit à cet argument. La province se pourvoit maintenant devant cette Cour.

L'article de la *Social Service Tax Act* qui, selon la province, lui donne la priorité est ainsi conçu:

[TRADUCTION] **18.** (1) Lorsqu'une personne perçoit une taxe en application de la présente loi

a) elle est réputée détenir cette taxe en fiducie pour le compte de Sa Majesté du chef de la province en vue de son paiement à Sa Majesté de la manière et au moment prescrits par la présente loi ou par son règlement d'application, et

b) la taxe perçue est réputée être détenue de manière séparée et distincte des deniers, de l'actif ou du patrimoine de celui qui l'a perçue en vertu de la présente loi, qu'elle ait été ou non effectivement détenue de manière séparée et distincte des deniers, de l'actif ou du patrimoine de cette personne.

(2) La taxe qui, en vertu de la présente loi,

a) est perçue et détenue en fiducie conformément au paragraphe (1); ou

b) qui doit être perçue et remise par un marchand ou un locateur;

emporte un privilège sur la totalité des biens

c) du patrimoine du fiduciaire en vertu de l'alinéa a);

(d) the person required to collect or remit the tax under paragraph (b); or

(e) the estate of the person required to collect or remit the tax under paragraph (d).

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

47. The property of a bankrupt divisible among his creditors shall not comprise

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

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

107. (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:

. . .

(*j*) claims of the Crown not previously mentioned in this section, in right of Canada or of any province, *pari passu* notwithstanding any statutory preference to the contrary.

Discussion

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

d) de la personne tenue de percevoir ou de remettre la taxe en vertu de l'alinéa b); ou

e) du patrimoine de la personne tenue de percevoir ou de remettre la taxe en vertu de l'alinéa d).

La province soutient que le par. 18(1) crée une fiducie au sens de l'al. 47*a*) de la *Loi sur la faillite*, dont voici le texte:

47. Les biens d'un failli, constituant le patrimoine attribué à ses créanciers, ne comprennent pas les biens suivants:

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

De son côté, l'intimée fait valoir que la fiducie réputée créée par l'art. 18 de la *Social Service Tax Act* n'est pas une fiducie au sens de l'art. 47 de la *Loi sur la faillite*, en ce qu'elle n'a pas les attributs d'une véritable fiducie. L'intimée soutient que la réclamation du montant de la taxe par la province est en réalité une créance assujettie à l'al. 107(1)*j*) de la *Loi sur la faillite*, dont le rang est déterminé selon l'ordre de priorité établi à l'art. 107.

107. (1) Sous réserve des droits des créanciers garantis, les montants réalisés provenant des biens d'un failli doivent être distribués d'après l'ordre de priorité de paiement suivant:

. . .

j) les réclamations, non précédemment mentionnées au présent article, de la Couronne du chef du Canada ou d'une province du Canada, *pari passu*, nonobstant tout privilège statutaire à l'effet contraire.

Analyse

On peut formuler ainsi la question en litige: l'al. 47*a*) de la *Loi sur la faillite* soustrait, du patrimoine attribué aux créanciers, les biens détenus en fiducie par le failli et accorde la priorité absolue aux bénéficiaires de la fiducie. Le paragraphe 107(1) détermine le rang des différents créanciers pour les fins de la répartition; l'al. 107(1)*j*) place les créances de la Couronne au dernier rang. L'article 18 de la *Social Service Tax Act* établit une fiducie à laquelle il manque un des attributs essentiels de la fiducie, savoir un bien sujet à la fiducie qui puisse être identifié ou retracé. La question qui se pose est de savoir si la fiducie établie par la loi provinciale est une fiducie au sens de l'al. 47*a*) de la *Loi sur la faillite* ou une simple réclamation de la Couronne au sens de l'al. 107(1)*j*).

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

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

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

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

Section 107(1)(*j*), on the other hand, has been held to deal not with rights conferred by general law, but with the statutorily created claims of federal and provincial tax collectors. The purpose of s. 107(1)(*j*) was discussed by this Court in *Deputy Minister of Revenue v. Rainville*, [1980] 1

Selon moi, la réponse à cette question dépend de l'interprétation des dispositions applicables de la *Loi sur la faillite* et de la *Social Service Tax Act*.

En m'attaquant à cette tâche, je m'inspire du passage suivant de l'ouvrage de Driedger intitulé *Construction of Statutes* (2e éd. 1983), à la p. 105:

> [TRADUCTION] La jurisprudence [...] indique qu'il faut interpréter ainsi les dispositions législatives pertinentes dans une affaire particulière:
>
> 1. Il faut interpréter l'ensemble de la Loi en fonction de tout son contexte pour déterminer l'intention du législateur (la Loi selon sa teneur expresse ou implicite), l'objet de la Loi (les fins qu'elle poursuit) et l'économie de la Loi (les liens entre les différentes dispositions de la Loi).
>
> 2. Il faut ensuite interpréter les termes des dispositions particulières applicables à l'affaire en cause selon leur sens grammatical et ordinaire, en fonction de l'intention du législateur manifestée dans l'ensemble de la Loi, de l'objet de la Loi et de l'économie de la Loi. S'ils sont clairs et précis, et conformes à l'intention, à l'objet, à l'économie et à l'ensemble de la Loi, l'analyse s'arrête là.

Gardant à l'esprit ces principes, j'aborde maintenant l'interprétation des al. 47*a*) et 107(1)*j*) de la *Loi sur la faillite*. L'alinéa 47*a*) de la Loi soulève la question du sens de l'expression «les biens détenus par le failli en fiducie pour toute autre personne». Selon leur sens ordinaire, ces mots renvoient à une situation où il existe des biens qui peuvent être identifiés comme étant détenus en fiducie. Ces biens doivent être retirés des autres biens que le failli détient avant leur répartition conformément à la *Loi sur la faillite* parce qu'en *equity* ils appartiennent à une autre personne. En adoptant l'al. 47*a*), le législateur a donc voulu permettre de soustraire, du régime de répartition établi par la *Loi sur la faillite*, les biens qui peuvent être spécifiquement identifiés comme n'appartenant pas au failli selon les principes généraux du droit des fiducies.

D'autre part, on a jugé que l'al. 107(1)*j*) porte non pas sur les droits conférés par le droit général, mais sur les créances établies par la loi en faveur du fisc fédéral et provincial. Cette Cour a déjà examiné l'objet de l'al. 107(1)*j*) dans l'arrêt *Sous-ministre du Revenu c. Rainville*, [1980] 1 R.C.S.

S.C.R. 35. Pigeon J., speaking for the majority, stated at p. 45:

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

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

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

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

35, où le juge Pigeon, s'exprimant au nom de la majorité, affirme à la p. 45:

> Il ne serait pas à propos de rechercher la portée exacte de l'expression «réclamations de la Couronne». Il est bien sûr qu'elle s'applique aux créances du fisc et il me paraît évident qu'elle ne saurait embrasser des créances garanties non par un privilège propre à Sa Majesté mais par un privilège dont toute autre personne peut jouir en vertu des principes généraux du droit tel que le privilège de vendeur, celui de constructeur, etc.

Interprétés de cette façon, les al. 47*a*) et 107(1)*j*) ne se contredisent pas. Si une réclamation fondée sur une fiducie est prouvée selon les principes généraux du droit, le bien sujet à la fiducie est soustrait à la répartition générale en raison de l'al. 47*a*). Selon le raisonnement du juge Pigeon dans l'arrêt *Sous-ministre du Revenu c. Rainville*, l'al. 107(1)*j*) ne s'appliquerait pas à une telle réclamation parce qu'elle est valide en vertu des principes généraux du droit et qu'elle ne constitue pas une créance garantie par un privilège propre à Sa Majesté.

Cette interprétation des al. 47*a*) et 107(1)*j*) de la *Loi sur la faillite* respecte le principe selon lequel les provinces ne peuvent, par leur propre loi, modifier l'ordre de priorité établi en vertu de la *Loi sur la faillite*. L'arrêt de cette Cour *Deloitte Haskins and Sells Ltd. c. Workers' Compensation Board*, [1985] 1 R.C.S. 785, a consacré ce principe. Comme l'affirme le juge Wilson, à la p. 806:

> ... dans les arrêts *Re Bourgault* [*Sous-ministre du Revenu c. Rainville*] et *Re Black Forest Restaurant Ltd.*, le litige n'était pas de savoir s'il y avait eu création d'un droit de propriété en vertu des lois provinciales applicables. Il s'agissait de savoir si, même si elle créait un droit de propriété, la loi provinciale pouvait aller à l'encontre du plan de distribution prévu au par. 107(1) de la *Loi sur la faillite*. Ces arrêts ont décidé qu'elle ne le pouvait pas et que, même si la loi provinciale pouvait validement créer une sûreté pour des dettes sur les biens du débiteur en dehors de la faillite, dès qu'il y avait faillite, le par. 107(1) déterminait le statut et la priorité des réclamations expressément mentionnées dans cet article. Il n'était pas loisible au créancier de la faillite de dire: en vertu de la loi provinciale applicable, je suis un créancier garanti au sens des premiers mots du par. 107(1) de la *Loi sur la faillite* et en conséquence la priorité que l'alinéa pertinent du par. 107(1) accorde à ma réclamation ne s'applique pas à moi. En réalité, c'est

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

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

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

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

la position adoptée par la Cour d'appel et plaidée devant nous par l'intimée. Cette position n'est pas étayée par l'interprétation législative du par. 107(1) puisque, si on interprétait l'article dans ce sens, il aurait pour effet de permettre aux provinces de déterminer les priorités en cas de faillite, ce qui relève de la compétence fédérale exclusive.

Bien que l'arrêt *Deloitte Haskins and Sells Ltd. c. Workers' Compensation Board* ait porté sur une disposition législative provinciale qui avait pour objet de conférer à la province le statut de créancier garanti pour les fins de la *Loi sur la faillite*, le même raisonnement vaut pour l'espèce.

Interpréter l'al. 47*a*) comme s'appliquant non seulement aux fiducies établies en vertu du droit général, mais aussi aux fiducies légales établies par les provinces, qui ne possèdent pas les attributs des fiducies de *common law*, reviendrait à permettre aux provinces d'établir leur propre ordre de priorité applicable à la *Loi sur la faillite* et à ouvrir la porte à l'établissement de régimes de répartition en cas de faillite différents d'une province à l'autre.

Des considérations pratiques générales favorisent aussi cette interprétation de la *Loi sur la faillite*. Les difficultés que peut susciter l'application de l'al. 47*a*) aux cas où il n'est pas possible d'identifier un bien précis sujet à une fiducie sont considérables et contraires à l'équité et au bon sens. Par exemple, si les créances pour taxes sont égales ou supérieures aux sommes que détient le syndic de faillite, ce dernier sera dans l'impossibilité de se faire indemniser des frais engagés pour réaliser l'actif. Le syndic pourrait même contrevenir à la Loi en engageant des dépenses pour réaliser l'actif du failli. La présence de plus d'un créancier à l'égard du bien en fiducie soulèverait d'autres difficultés. Imaginons le cas de la personne qui aurait une réclamation fondée sur une fiducie, valide selon les principes généraux du droit, à l'égard d'un bien précis et qui se trouverait en concurrence avec Sa Majesté qui invoquerait l'existence d'une fiducie légale concernant ce même bien et tous les autres biens. La créance générale de Sa Majesté pourrait-elle avoir priorité sur le droit de propriété du créancier en vertu du droit des fiducies? Ou encore, le créancier en vertu

scheme for the distribution of the bankrupt's assets.

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

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

Applying these observations on s. 18 of the *Social Service Tax Act* to the construction of ss. 47(*a*) and 107(1)(*j*) of the *Bankruptcy Act* which

du droit des fiducies aurait-il priorité? Reconnaître l'existence d'une telle possibilité irait à l'encontre de l'intention clairement exprimée par le législateur, en adoptant la *Loi sur la faillite*, d'établir un régime clair et ordonné de répartition de l'actif d'un failli.

En résumé, j'estime que l'application de l'al. 47*a*) devrait se limiter aux fiducies établies en vertu des principes généraux du droit, alors que l'al. 107(1)*j*) devrait s'appliquer aux seules créances pour taxes qui ne découlent pas du droit général, mais qui sont garanties «par un privilège propre à Sa Majesté» par voie législative. À mon avis, le texte des dispositions en cause, la jurisprudence de cette Cour et les considérations de principe auxquelles j'ai fait allusion appuient cette conclusion.

J'examinerai maintenant l'art. 18 de la *Social Service Tax Act* et la nature des droits qu'il crée. Au moment de la perception de la taxe, il y a fiducie légale réputée. À ce moment-là, le bien en fiducie est identifiable et la fiducie répond aux exigences d'une fiducie établie en vertu des principes généraux du droit. La difficulté que présente l'espèce, qui est la même que dans la plupart des autres cas, vient de ce que le bien en fiducie cesse bientôt d'être identifiable. Le montant de la taxe est confondu avec d'autres sommes que détient le marchand et immédiatement affecté à l'acquisition d'autres biens de sorte qu'il est impossible de le retracer. Dès lors, il n'existe plus de fiducie de *common law*. Pour obvier à ce problème, l'al. 18(1)*b*) prévoit que la taxe perçue sera réputée être détenue de manière séparée et distincte des deniers, de l'actif ou du patrimoine de celui qui l'a perçue. Mais, comme l'existence de la disposition déterminative le reconnaît tacitement, en réalité, après l'affectation de la somme, la fiducie légale ressemble peu à une fiducie véritable. Il n'y a pas de bien qu'on puisse considérer comme sujet à la fiducie. Aussi, pour cette raison, le par. 18(2) ajoute que la taxe impayée emporte un privilège sur la totalité des biens de celui qui l'a perçue, c'est-à-dire un droit tenant d'une créance garantie.

Si j'applique ces observations relatives à l'art. 18 de la *Social Service Tax Act* à l'interprétation des al. 47*a*) et 107(1)*j*) de la *Loi sur la faillite* que j'ai

I have earlier adopted, the answer to the question of whether the province's interest under s. 18 is a "trust" under s. 47(*a*) or a "claim of the Crown" under s. 107(1)(*j*) depends on the facts of the particular case. If the money collected for tax is identifiable or traceable, then the true state of affairs conforms with the ordinary meaning of "trust" and the money is exempt from distribution to creditors by reason of s. 47(*a*). If, on the other hand, the money has been converted to other property and cannot be traced, there is no "property held . . . in trust" under s. 47(*a*). The province has a claim secured only by a charge or lien, and s. 107(1)(*j*) applies.

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

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

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

précédemment retenue, la réponse à la question de savoir si le droit que l'art. 18 confère à la province est une «fiducie» au sens de l'al. 47*a*) ou une «réclamation de la Couronne» au sens de l'al. 107(1)*j*) dépend des faits de l'espèce. Si la somme perçue pour fins de taxe peut-être identifiée ou retracée, la situation correspond au sens ordinaire du mot «fiducie» et la somme est exclue, en raison de l'al. 47*a*), de la répartition des biens entre les créanciers. Par contre, si la somme a servi à acquérir d'autres biens et ne peut être retracée, il n'y a pas de «biens détenus [. . .] en fiducie» au sens de l'al. 47*a*). La province a une créance garantie seulement par un privilège et l'al. 107(1)*j*) s'applique.

En l'espèce, il n'est possible d'identifier aucun bien précis sujet à une fiducie. Il s'ensuit qu'on ne saurait considérer que l'al. 47*a*) de la *Loi sur la faillite* s'applique à la créance de la province en l'espèce.

La province soutient cependant qu'il lui est loisible de définir le mot «fiducie» comme elle l'entend puisque la propriété et les droits civils relèvent de sa compétence. À cette affirmation, il suffit de répondre que la définition applicable du mot «fiducie» pour les fins des exceptions prévues à la *Loi sur la faillite* est celle du législateur fédéral et non celle des législateurs provinciaux. Les provinces peuvent définir à leur gré le mot «fiducie» pour les matières relevant de leur compétence, mais elles ne peuvent imposer au Parlement la définition que la fiducie doit recevoir pour les fins de *Loi sur la faillite*: voir l'arrêt *Deloitte Haskins and Sells Ltd. c. Workers' Compensation Board.*

L'argument voulant que le montant de taxe perçu demeure la propriété de Sa Majesté en tout temps ne résiste pas non plus à l'analyse. S'il en était ainsi, le privilège que crée le par. 18(2) de la *Social Service Tax Act* en faveur de Sa Majesté serait parfaitement inutile. La province a un droit de fiducie et donc de propriété sur les montants de taxe perçus dans la mesure où ils peuvent être identifiés ou retracés. Dès que ces sommes perdent ce caractère, tout droit de propriété découlant de la *common law* ou de l'*equity* disparaît. Il reste à la province une fiducie légale réputée qui ne lui

supplemented by a lien and charge over all the bankrupt's property under s. 18(2).

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

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

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

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

Conclusion

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

I would dismiss the appeal, with costs.

The following are the reasons delivered by

CORY J. (dissenting)—I have read with great interest the compelling reasons of my colleague Justice McLachlin. Unfortunately I cannot agree

confère pas le même droit de propriété qu'une fiducie de *common law*, auquel s'ajoute un privilège sur la totalité des biens du failli en application du par. 18(2).

La province invoque l'arrêt *Re Phoenix Paper Products Ltd.* (1983), 48 C.B.R. (N.S.) 113 (C.A. Ont.), dans lequel la Cour d'appel de l'Ontario a statué que le salaire dû pour des vacances confondu avec les autres biens d'un failli constituait un bien en fiducie au sens de l'al. 47*a*) de la *Loi sur la faillite*. Comme la Cour d'appel l'a souligné en l'espèce, quand, dans l'arrêt *Re Phoenix Paper Products Ltd.*, la Cour d'appel de l'Ontario a examiné les deux courants de jurisprudence divergents qui lui ont été soumis, elle n'avait pas eu l'occasion de prendre connaissance de l'arrêt *Deloitte Haskins and Sells Ltd. c. Workers' Compensation Board* et de constater que ce dernier arrêt confirmait le courant de jurisprudence que la Cour d'appel de l'Ontario a alors rejeté.

L'appelante soulève une deuxième question à titre subsidiaire, savoir:

[TRADUCTION] Si la province est privée du bien en fiducie parce que le par. 18(1) et l'al. 107(1)j) de la *Loi sur la faillite* se contredisent, [ce] bien échoit-il au créancier garanti [la Banque] ou est-il attribué aux créanciers non garantis conformément à l'art. 107 de la *Loi sur la faillite*?

Cette question n'a été soulevée ni devant les tribunaux d'instance inférieure, ni lors de la demande d'autorisation de pourvoi. Elle vise des parties qui n'ont pas été mises en cause dans le présent pourvoi. Pour ces motifs, je refuse de l'examiner.

Conclusion

Pour ces motifs, je suis d'avis que l'al. 47*a*) de la *Loi sur la faillite* ne s'applique pas à l'espèce, mais que le rang de la créance de la province est régi par l'al. 107(1)*j*) de la Loi. Je refuse de répondre à la question subsidiaire soulevée par l'appelante.

Je suis d'avis de rejeter le pourvoi avec dépens.

Version française des motifs rendus par

LE JUGE CORY (dissident)—J'ai lu avec beaucoup d'intérêt les motifs convaincants de ma collègue le juge McLachlin. Malheureusement, je ne

that s. 47(*a*) of the *Bankruptcy Act*, R.S.C. 1970, c. B-3, does not apply in this case. If section 18 of the British Columbia *Social Service Tax Act*, R.S.B.C. 1979, c. 388, creates a valid trust, then s. 47(*a*) of the *Bankruptcy Act* must apply. In order to determine the effect of s. 18 it may be helpful to consider the *Social Service Tax Act* as a whole.

Scheme of the B.C. *Social Service Tax Act*

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

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

puis accepter que l'al. 47*a*) de la *Loi sur la faillite*, S.R.C. 1970, chap. B-3, ne s'applique pas à l'espèce. Si l'article 18 de la *Social Service Tax Act* de la Colombie-Britannique, R.S.B.C. 1979, chap. 388, crée une fiducie valide, alors l'al. 47*a*) de la *Loi sur la faillite* doit s'appliquer. Afin de déterminer l'effet de l'art. 18, il peut être utile d'examiner l'ensemble de la *Social Service Tax Act*.

Économie de la *Social Service Tax Act* de la Colombie-Britannique

L'enregistrement prévu à cette loi constitue une condition préalable à l'exploitation d'un commerce de détail dans la province de la Colombie-Britannique. Sous réserve de certaines exceptions mineures non pertinentes en l'espèce, la Loi prescrit que personne ne peut vendre au détail un [TRADUCTION] «bien matériel personnel» dans la province sans être enregistré auprès du «commissaire», le fonctionnaire provincial chargé d'appliquer la Loi. Il suffit de souligner que l'expression «bien matériel personnel» est définie de manière très générale. Avec l'autorisation du Ministre, le commissaire peut annuler ou suspendre le certificat de quiconque est déclaré coupable d'infraction à la Loi, mettant ainsi fin au commerce de détail. C'est là la forme ultime de contrôle que la province exerce sur ceux qui perçoivent les taxes fixées en vertu de la Loi. De plus, le règlement d'application de la Loi prescrit l'examen minutieux de l'usage des certificats d'enregistrement délivrés aux marchands.

Conformément à l'art. 5 de la Loi, les marchands au détail sont réputés être des mandataires du Ministre aux fins de l'imposition et de la perception de la taxe de vente. L'article 6 prévoit que ces mandataires sont réputés être des percepteurs d'impôt pour les fins de la *Revenue Act*, R.S.B.C. 1979, chap. 367, et qu'ils sont assujettis aux dispositions des art. 22 à 28 de cette loi. Les articles 22 à 28 prescrivent des peines pour les percepteurs d'impôt qui omettent de rendre compte comme l'exige la Loi. Conformément à l'art. 27, si un percepteur a reçu des sommes appartenant à Sa Majesté du chef de la province et qu'il ne les a pas versées à la province, il est passible de saisie de ses biens. En contrepartie, l'art. 8 de la *Social Service*

receive remuneration for the service they provide to the government by collecting the tax.

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

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

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

18. (1) Where a person collects an amount of tax under this Act

(a) he shall be deemed to hold it in trust for Her Majesty in right of the Province for payment over of that amount to Her Majesty in the manner and at the time required under this Act and regulations, and

Tax Act prévoit que les marchands doivent être rémunérés pour les services qu'ils rendent au gouvernement en percevant la taxe.

Selon les art. 9 et 10 de la Loi, tout marchand est tenu de produire des déclarations et de tenir une comptabilité fiscale de la manière prescrite par le règlement et de consigner tous les achats et toutes les ventes effectués. La section 5 des *Social Services Tax Act Regulations*, B.C. Reg. 84/58, comporte des dispositions détaillées sur ces déclarations et cette comptabilité. Le règlement indique clairement qu'il doit y avoir une surveillance continue de la perception de la taxe de vente. Il faut préparer une déclaration mensuelle distincte pour chaque commerce et la produire dans les quinze jours qui suivent la fin du mois auquel elle se rapporte. Le règlement prescrit en détail la façon de calculer, dans chaque déclaration, la commission attribuée à chaque marchand pour la perception de la taxe de vente.

Les exigences relatives à la tenue de livres et de relevés de compte soulignent la nature fiduciaire de cet arrangement. On exige notamment que les livres comptables comportent des comptes distincts pour (1) les ventes, (2) les achats, (3) les ventes non taxables, (4) les ventes taxables, (5) les montants de taxe perçus et (6) l'emploi de la taxe y compris la commission retenue. Le règlement insiste également pour que [TRADUCTION] «toutes les écritures relatives à la taxe dans ces livres comptables, déclarations et pièces ... [soient] séparées et distinctes des autres inscriptions qui y sont faites.» (Je souligne.) De même le montant de la taxe doit figurer séparément sur tous les récépissés remis aux acheteurs. L'article 27 de la Loi confère des pouvoirs étendus de vérification de ces livres.

C'est dans ce contexte qu'il faut interpréter l'art. 18 de la *Social Service Tax Act*, dont voici le texte:

[TRADUCTION] **18.** (1) Lorsqu'une personne perçoit une taxe en application de la présente loi

a) elle est réputée détenir cette taxe en fiducie pour le compte de Sa Majesté du chef de la province en vue de son paiement à Sa Majesté de la manière et au moment prescrits par la présente loi ou par son règlement d'application, et

(b) the tax collected shall be deemed to be held separate from and form no part of the person's money, assets or estate, whether or not the amount of the tax has in fact been kept separate and apart from either the person's own money or the assets of the estate of the person who collected the amount of the tax under this Act.

(2) The amount of taxes that, under this Act,

(a) is collected and held in trust in accordance with subsection (1); or

(b) is required to be collected and remitted by a vendor or lessor

forms a lien and charge on the entire assets of

(c) the estate of the trustee under paragraph (a);

(d) the person required to collect or remit the tax under paragraph (b); or

(e) the estate of the person required to collect or remit the tax under paragraph (d).

b) la taxe perçue est réputée être détenue de manière séparée et distincte des deniers, de l'actif ou du patrimoine de celui qui l'a perçue en vertu de la présente loi, qu'elle ait été ou non effectivement détenue de manière séparée et distincte des deniers, de l'actif ou du patrimoine de cette personne.

(2) La taxe qui, en vertu de la présente loi,

a) est perçue et détenue en fiducie conformément au paragraphe (1); ou

b) qui doit être perçue et remise par un marchand ou un locateur;

emporte un privilège sur la totalité des biens

c) du patrimoine du fiduciaire en vertu de l'alinéa a);

d) de la personne tenue de percevoir ou de remettre la taxe en vertu de l'alinéa b); ou

e) du patrimoine de la personne tenue de percevoir ou de remettre la taxe en vertu de l'alinéa d).

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

On peut constater que les sommes perçues par un marchand comme Tops, à titre de percepteur de la taxe de vente, ne deviennent jamais la propriété du marchand. La taxe de vente est payable par l'acheteur et elle est due à la province. Le marchand n'a jamais droit à cette somme, il est, au sens strict du terme, un fiduciaire à l'égard des sommes perçues au titre de la taxe de vente. Le marchand ne sert que d'intermédiaire pour le paiement de la taxe de vente à la province. La province n'a pas été jusqu'à exiger que le marchand ouvre des comptes de banque distincts pour protéger ses fonds en fiducie. Elle a plutôt instauré un système d'enregistrement de tous les commerces de détail et établi un régime réglementé de comptabilité et d'inspection. Ce système permet au gouvernement de déterminer avec précision les sommes qui lui sont dues et de vérifier ce qui advient de ces sommes d'un mois à l'autre.

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

Si la taxe n'est pas versée à la province, un marchand comme Tops doit alors avoir ou volé ces sommes, ou les avoir détournées à son propre usage ou encore, si l'on est indulgent, avoir perdu les sommes dont il était responsable et comptable à la province.

From the point of view of fairness, there would seem to be no objection to the provincial government's creating a lien or charge on the assets of

Sur le plan de l'équité, il ne semblerait pas y avoir d'empêchement à la création, par la province, d'un privilège ou d'une sûreté grevant les

the vendor for the amount of the sales tax (the trust funds) which the vendor was responsible for collecting and remitting to the province.

Does Section 18 Create a Valid Trust?

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

There are a number of provincial statutory provisions which create trusts. This type of legislation is common to a wide range of statutes that may benefit employees, purchasers of insurance, payers of health and insurance and many others who lack the organization or bargaining power to establish a trust for themselves. See for example,

biens du marchand pour le montant de la taxe de vente (les fonds en fiducie) qu'il est chargé de percevoir et de remettre à la province.

L'article 18 crée-t-il une fiducie valide?

On peut formuler la question de façon plus précise en se demandant si, après que le juge de première instance eut constaté que le montant de la taxe de vente [TRADUCTION] «avait été détourné par Tops qui l'avait confondu avec ses biens», c'en était fait de la fiducie. On a dit que même si la fiducie existait régulièrement au moment où les sommes ont été payées par les acheteurs, elle a cessé d'exister ou d'être valide dès que les sommes eurent été confondues de telle manière qu'il était difficile de les retracer. Commençons par affirmer de façon un peu simpliste qu'il n'y a rien dans la *Loi sur la faillite* qui empêche une province d'établir une fiducie ou un privilège réputés sur les biens du détaillant jusqu'à concurrence du montant de taxe de vente perçu et il n'y a pas d'incompatibilité entre, d'une part, l'art. 18 de la *Social Service Tax Act* et, d'autre part, l'al. 47*a*) et l'art. 107 de la *Loi sur la faillite*. Il n'y a pas là de subterfuge légal pour se soustraire aux dispositions de la *Loi sur la faillite*. Ce n'est qu'une tentative de protéger les fonds en fiducie qui sont destinés à l'usage et à l'avantage du public. Plutôt que d'insister pour qu'à chaque vente il y ait un versement distinct à la province, la Loi a établi un régime avantageux pour l'acheteur au détail, le détaillant, le monde des affaires et l'ensemble de la province. La Loi ne fait rien de plus que de protéger les sommes qui, dès leur versement, constituent véritablement des fonds en fiducie. Je ne suis pas certain non plus que la validité d'une fiducie puisse se déterminer exclusivement en fonction de la *common law*. Cette Cour a déjà affirmé que le droit civil des fiducies diffère de celui de la *common law*. Voir *Royal Trust Co. c. Tucker*, [1982] 1 R.C.S. 250, à la p. 261.

Il existe de nombreuses dispositions législatives provinciales qui créent des fiducies. Ce genre de disposition est courant dans une vaste catégorie de lois susceptibles de bénéficier aux salariés, aux acheteurs d'assurance, aux cotisants à des régimes d'assurance-santé et à plusieurs autres catégories de gens qui ne disposent pas de l'organisation ou

Pension Benefits Act, S.O. 1987, c. 35, s. 58; *Insurance Act*, R.S.O. 1980, c. 218, s. 359; *Health Insurance Act*, R.S.O. 1980, c. 197, s. 18; *Builders' Lien Act*, R.S.A. 1980, c. B-12, s. 16.1; *Construction Lien Act, 1983*, S.O. 1983, c. 6, s. 7; *Business Corporations Act*, S.A. 1981, c. B-15, s. 191(1); *Employment Standards Act*, R.S.A. 1980, c. E-10.1, s. 113; *Insurance Act*, R.S.A. 1980, c. I-5, s. 123(1); *Real Estate Agents' Licensing Act*, R.S.A. 1980, c. R-5, s. 14, and *Health Insurance Premiums Regulation*, Alta. Reg. 217/81.

du pouvoir de négociation nécessaire pour établir une fiducie en leur propre faveur. Voir, par exemple, les lois suivantes: *Loi de 1987 sur les régimes de retraite*, L.O. 1987, chap. 35, art. 58; *Loi sur les assurances*, L.R.O. 1980, chap. 218, art. 359; *Loi sur l'assurance-maladie*, L.R.O. 1980, chap. 197, art. 18; *Builders' Lien Act*, R.S.A. 1980, chap. B-12, art. 16.1; *Loi de 1983 sur le privilège dans l'industrie de la construction*, L.O. 1983, chap. 6, art. 7; *Business Corporations Act*, S.A. 1981, chap. B-15, par. 191(1); *Employment Standards Act*, R.S.A. 1980, chap. E-10.1, art. 113; *Insurance Act*, R.S.A. 1980, chap. I-5, par. 123(1); *Real Estate Agents' Licensing Act*, R.S.A. 1980, chap. R-5, art. 14, et *Health Insurance Premiums Regulation*, Alta. Reg. 217/81.

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

Cette Cour a déjà statué qu'une province peut, pour favoriser ou protéger un principe de politique sociale, créer une fiducie légale. Dans l'arrêt *John M. M. Troup Ltd. v. Royal Bank of Canada*, [1962] R.C.S. 487, à la p. 494, les dispositions en matière de fiducie de *The Mechanics' Lien Act*, R.S.O. 1950, chap. 227 (maintenant appelée *Loi sur le privilège dans l'industrie de la construction*) ont été confirmées. Les fiducies légales mentionnées plus haut fournissent la protection voulue à leurs bénéficiaires et favorisent la réalisation d'objectifs sociaux salutaires que les provinces ont le pouvoir de poursuivre.

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

Le paragraphe 23(4) du *Régime de pensions du Canada*, L.R.C. (1985), chap. C-8, crée une fiducie en des termes presque identiques à ceux de l'art. 18 de la *Social Service Tax Act*. Dans *Re Deslauriers Construction Products Ltd.* (1970), 3 O.R. 599 (C.A.), le juge en chef Gale de l'Ontario a, au nom de la cour à l'unanimité, souligné que, selon la Loi, les sommes relatives au Régime de pensions sont réputées être détenues de manière séparée et distincte du patrimoine de l'employeur qu'elles [TRADUCTION] «ai[ent] ou non effectivement été conservé[es] dans un compte séparé et distinct des propres fonds de l'employeur ou de la masse des biens» et il ajoute, à la p. 601:

[These words] were inserted in the Act specifically for the purpose of taking the moneys equivalent to the deductions out of the estate of the bankrupt by the

[TRADUCTION] [Ces mots ont] été inséré[s] dans la Loi expressément dans le but de soustraire de la masse des biens du failli, par la création d'une fiducie, un

creation of a trust and making those moneys the property of the Minister.

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

In the *Canada Pension Plan* the fund is deemed to be property which does not comprise part of the bankruptcy at all, so that the Crown under that act is not a creditor, but is deemed to hold property which is not the property of the bankrupt.

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

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

47. The property of a bankrupt divisible among his creditors shall not comprise

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

. . .

107. (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:

. . .

(*j*) claims of the Crown not previously mentioned in this section, in right of Canada or of any province, *pari passu* notwithstanding any statutory preference to the contrary.

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

In principle, there would seem to be no good reasons to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says "yes" and the other says "no"; "the same citizens

montant équivalent aux déductions et d'en faire la propriété du Ministre.

Puis il en conclut ceci, aux pp. 602 et 603:

[TRADUCTION] Dans le *Régime de pensions du Canada*, les fonds sont présumés être des biens exclus de façon absolue de la faillite de sorte qu'en vertu de la Loi, Sa Majesté n'est pas un créancier, mais est réputée détenir un bien qui n'appartient pas au failli.

Le juge Pigeon a, au nom de cette Cour à la majorité, cité et approuvé l'avis du juge en chef Gale dans l'arrêt *Dauphin Plains Credit Union Ltd. c. Xyloid Industries Ltd.*, [1980] 1 R.C.S. 1182, à la p. 1198, en affirmant: «Je trouve le raisonnement suivi dans l'arrêt *Deslauriers* tout à fait convaincant . . .»

Les dispositions de l'art. 18 devraient donc prévaloir à moins d'incompatibilité avec celles de la *Loi sur la faillite*. Les articles 47 et 107 de la Loi sont ainsi conçus:

47. Les biens d'un failli, constituant le patrimoine attribué à ses créanciers, ne comprennent pas les biens suivants:

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

. . .

107. (1) Sous réserve des droits des créanciers garantis, les montants réalisés provenant des biens d'un failli doivent être distribués d'après l'ordre de priorité de paiement suivant:

. . .

j) les réclamations, non précédemment mentionnées au présent article, de la Couronne du chef du Canada ou d'une province du Canada, *pari passu*, nonobstant tout privilège statutaire à l'effet contraire.

La théorie de la prépondérance de la loi fédérale ne peut s'appliquer que s'il y un conflit véritable dans l'application des lois fédérale et provinciale. Ce principe a été énoncé dans l'arrêt *Multiple Access Ltd. c. McCutcheon*, [1982] 2 R.C.S. 161, dans lequel le juge Dickson, maintenant Juge en chef, affirme à la p. 191:

En principe, il ne semble y avoir aucune raison valable de parler de prépondérance et d'exclusion sauf lorsqu'il y a un conflit véritable, comme lorsqu'une loi dit «oui» et que l'autre dit «non»; «on demande aux mêmes citoyens

are being told to do inconsistent things"; compliance with one is defiance of the other.

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

It is true that this Court has in *Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board*, [1985] 1 S.C.R. 785, recognized and emphasized that provinces cannot, by means of their own legislation, create priorities under the *Bankruptcy Act*. However, s. 18 has not created a priority. It did no more than give statutory recognition to a valid trust. It then eliminated the necessity of setting up a separate bank account for sales tax moneys and substituted a system of registration and record-keeping to control these funds which never at any time belonged to the vendor trustee. That latter step did not alter the existence of the valid trust of the funds collected from the purchasers for payment to the province. I do not think that the decision in *Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board*, *supra*, can be taken to have altered the meaning of the words "property of the bankrupt" contained in s. 47 of the *Bankruptcy Act*.

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

> Thus, as a matter of interpretation, it is questionable to limit the scope of section 47(*a*) of the Bankruptcy Act to trusts which either exist in fact or do not benefit the Crown or a creditor whose claim is referred to in subsection 107(1) of the Act. Until the Act is amended to permit the courts to construe section 47 in this manner, they are probably not justified in taking this

d'accomplir des actes incompatibles»; l'observance de l'une entraîne l'inobservance de l'autre.

En l'espèce, il n'y a pas de conflit puisque le bien visé par l'art. 18 de la *Social Service Tax Act* n'est jamais devenu la propriété de la faillie et n'est donc pas sujet à répartition comme le sont les biens de la faillie en vertu de l'art. 107 de la *Loi sur la faillite*. Selon le sens clair de l'art. 47 de la *Loi sur la faillite*, il n'y a pas de conflit entre les deux lois.

Il est vrai que, dans l'arrêt *Deloitte Haskins and Sells Ltd. c. Workers' Compensation Board*, [1985] 1 R.C.S. 785, cette Cour a reconnu et souligné que les provinces ne peuvent, par leurs propres lois, établir un ordre de priorité en vertu de la *Loi sur la faillite*. Cependant, l'art. 18 n'établit pas de priorité. Il ne fait rien de plus que reconnaître la validité d'une fiducie. Il élimine ainsi la nécessité d'établir un compte de banque distinct pour les montants de taxe de vente perçus en y substituant un système d'enregistrement et de comptabilité qui permet de contrôler ces fonds qui n'appartiennent jamais au marchand fiduciaire. Cette dernière mesure n'affecte pas la validité de la fiducie relative aux sommes perçues des acheteurs pour fins de versement à la province. Je ne crois pas qu'on puisse considérer que l'arrêt *Deloitte Haskins and Sells Ltd. c. Workers' Compensation Board*, précité, a changé le sens de l'expression «les biens d'un failli» figurant à l'art. 47 de la *Loi sur la faillite*.

Cela semble être l'avis qu'exprime Anne E. Hardy, dans son ouvrage intitulé *Crown Priority in Insolvency* (1986). Elle reconnaît que si l'on se conforme à l'arrêt *Deloitte Haskins and Sells Ltd. c. Workers' Compensation Board*, précité, il faut tenir pour inopérante la disposition relative au privilège dans l'article qui traite de la fiducie réputée, en cas de faillite du fiduciaire. Néanmoins, elle exprime l'avis suivant, à la p. 107:

> [TRADUCTION] Donc, il est douteux d'adopter une interprétation qui restreint la portée de l'alinéa 47*a*) de la Loi sur la faillite aux fiducies qui existent dans les faits ou à celles qui ne profitent pas à la Couronne ou à un créancier dont la réclamation est mentionnée au paragraphe 107(1) de la Loi. Tant que la Loi n'aura pas été modifiée pour permettre aux tribunaux d'interpréter

approach. The *Coopers & Lybrand* case therefore appears to be incorrectly decided. The judgments in most cases which have upheld statutory deemed trusts in bankruptcy and refused to rank the claims covered by them under subsection 107(1) of the Act are preferable.

As argued above, trusts should generally be upheld on the bankruptcy of the trustee regardless of the manner in which they arise. It is possible, however, that certain types be deemed trust provisions should be held to be ineffective and that a valid trust would therefore not come into existence. Most of the trust cases decided since *Re Bourgault* have distinguished that case because it did not discuss trust provisions or the relationship between the trusts covered by section 47(*a*) and subsection 107(1) of the Bankruptcy Act. Some of these decisions dealt with trust provisions under which an amount deemed to be held in trust had been made a lien and charge on the assets of the trustee.

That view should I think prevail.

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

When the courts say that there must be certainty of subject-matter, they mean that the property must either

ainsi l'article 47, il ne leur sera probablement pas possible de le faire. L'arrêt *Coopers & Lybrand* semble donc critiquable. Les décisions plus nombreuses qui ont confirmé la validité des fiducies légales réputées, en cas de faillite, et refusé d'établir la priorité des réclamations qui y sont assujetties selon le paragraphe 107(1) de la Loi sont préférables.

Comme je l'ai déjà dit, il faut généralement confirmer les fiducies en cas de faillite du fiduciaire quelle que soit leur origine. Il est toutefois possible que certains types de dispositions relatives aux fiducies réputées doivent être tenus pour inopérants et qu'une fiducie valide ne voie pas le jour. Dans la plupart des décisions qui ont porté sur des fiducies depuis la décision *Re Bourgault*, on a établi des distinctions d'avec cette dernière puisque celle-ci ne traitait pas des dispositions portant fiducie ou du lien entre les fiducies visées par l'alinéa 47*a*) et le paragraphe 107(1) de la Loi sur la faillite. Certaines de ces décisions portaient sur des dispositions en matière de fiducie en vertu desquelles une somme réputée détenue en fiducie constituait un privilège et une sûreté grevant les biens du fiduciaire.

C'est l'avis qu'il faut, selon moi, adopter.

De plus, il semble que même si elle est imposée par la loi, la fiducie comporte toutes les caractéristiques essentielles requises d'une fiducie. Pour être valide en *equity*, la fiducie devait remplir trois conditions fondamentales: il devrait y avoir certitude quant à l'intention, certitude quant aux biens sujets à la fiducie et certitude quant aux bénéficiaires. On reconnaît que la Loi établit la certitude quant à l'intention et la certitude quant au bénéficiaire. L'intimée soutient qu'il ne peut y avoir de certitude quant aux biens sujets à la fiducie puisqu'il est impossible d'identifier les biens en fiducie et qu'en conséquence aucune fiducie, au sens traditionnel du terme, n'a vu le jour. Cependant, en l'espèce, les biens sujets à la fiducie ont été clairement identifiés au moment des ventes effectuées par le marchand (Tops). La seule question qu'il restait à résoudre était de savoir si les biens en fiducie pouvaient être identifiés de manière à ce que cette fiducie puisse avoir gain de cause dans une action en droit de suite. Le professeur Waters a abordé cette question dans l'ouvrage intitulé *Law of Trusts in Canada* (2e éd. 1984), aux pp. 119 à 122:

[TRADUCTION] Quand les tribunaux affirment qu'il doit y avoir certitude quant aux biens sujets à la fiducie,

be described in the trust instrument, or there must be "a formula or method given for identifying it."

. . .

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

He distinguishes this question from the tracing issue:

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

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

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

Although there is some dispute as to whether at common law funds can be "followed" once they have been mixed with the defendant's own funds, in equity those monies can be traced "either as a

ils veulent dire que ces biens doivent être décrits dans l'acte de fiducie ou qu'il doit «exister une formule ou méthode permettant de les identifier.»

. . .

Pour déterminer la certitude, les tribunaux s'intéressent à la certitude de notion plutôt qu'à la question de savoir s'il est trop difficile de vérifier quels sont les biens sujets à la fiducie.

Il distingue cette question de celle du droit de suite:

[TRADUCTION] Selon la jurisprudence, il n'y a aucune possibilité de vérification au départ s'il n'y a pas de biens précis définis comme étant *les* biens en fiducie. Du moment que cela a été fait et que la fiducie a vu le jour, son bénéficiaire peut exercer un droit de suite sur ces biens, peu importe que ceux-ci aient été transformés ou, s'il s'agit d'une somme d'argent, qu'elle ait été confondue avec d'autres fonds. [En italique dans l'original.]

Il n'y a pas de doute que la Loi établit un moyen clair de déterminer le bien qui est en fiducie, c'est-à-dire la taxe de vente, de sorte qu'il y a certitude quant au bien sujet à la fiducie. Les trois certitudes, savoir la certitude quant à l'intention, la certitude quant aux biens sujets à la fiducie et la certitude quant au bénéficiaire sont établies par la Loi. On ne saurait dire que les montants de taxe de vente perçus par Tops sont devenus sa propriété parce que les certitudes requises pour qu'il y ait fiducie en *equity* n'existent pas puisque la Loi les a validement établies.

On ne saurait dire non plus que les fonds en fiducie légale (la taxe de vente perçue) sont devenues la propriété de la faillie Tops du fait que celle-ci les a confondus, à tort, avec ses propres biens. En *equity*, les fonds ainsi confondus demeurent assujettis aux obligations découlant de la fiducie. Dans ce cas, le bénéficiaire disposait de deux recours possibles contre le fiduciaire en raison de la conduite injustifiée de ce dernier. Le bénéficiaire pourrait soit chercher à récupérer les biens en fiducie eux-mêmes par action en droit de suite ou il pourrait choisir de se faire indemniser de la perte par action intentée contre le fiduciaire.

Bien qu'il y ait une certaine controverse quant à savoir si, en *common law*, ces fonds sont susceptibles de droit de suite après avoir été confondus avec les propres fonds du défendeur, en *equity* ces

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

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

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

sommes peuvent faire l'objet d'un droit de suite [TRADUCTION] «soit à titre de sommes distinctes, soit à titre de sommes confondues ou à titre de bien caché dans les biens acquis avec ces sommes»: *Re Diplock's Estate*, [1948] Ch. 465, à la p. 521, [1948] 2 All E.R. 318, à la p. 347 (C.A.), le maître des rôles lord Greene, décision confirmée sous l'intitulé *Min. of Health v. Simpson*, [1951] A.C. 251, [1950] 2 All E.R. 1137 (H.L.) Les difficultés et, en fin de compte, le coût prohibitif de la comptabilité nécessaire fixent dans une large mesure les limites de l'action en droit de suite. Voir D. W. M. Waters, précité, aux pp. 1037 et suiv. Rien n'interdit qu'une fiducie établie par la loi offre un avantage sur une fiducie établie par un particulier en reconnaissant l'existence d'une fiducie à l'égard des biens détenus par le fiduciaire sans que le bénéficiaire ait à engager l'action excessivement coûteuse en droit de suite sur les sommes confondues. Cet avantage ne devrait pas dépouiller les biens en fiducie légale de leur caractère fiduciaire ni les soustraire à l'application des principes énoncés dans les arrêts *Sous-ministre du Revenu c. Rainville*, [1980] 1 R.C.S. 35, *Deloitte Haskins and Sells Ltd. c. Workers' Compensation Board*, précité, et *Banque fédérale de développement c. Québec (Commission de la santé et de la sécurité du travail)*, [1988] 1 R.C.S. 1061. Il semblerait donc que les fiducies établies par la loi remplissent les conditions de validité des fiducies reconnues en *equity*.

Si comme on le dit dans l'arrêt *Sous-ministre du Revenu c. Rainville*, il est possible de reconnaître un privilège de constructeur malgré l'impossibilité de retracer les sommes des sous-traitants dans les comptes confondus de l'entrepreneur général, il faut aussi reconnaître l'existence de la fiducie légale relative à la taxe de vente.

Cette conclusion ne crée pas non plus de problème pratique. Si le syndic de faillite proposé doit déterminer si les biens font l'objet d'une fiducie, il pourra s'adresser aux tribunaux pour faire trancher cette question dès le début des procédures. De plus, s'il surgit un différend entre ceux qui invoquent une fiducie, il pourra être résolu en fonction de l'ordre de priorité qui découle de la date à laquelle la fiducie a vu le jour.

Disposition

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

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

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

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

(i) does not negate the trusts;

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

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

I would therefore answer the constitutional question as follows:

Dispositif

Je conclus donc que la fiducie décrite à l'art. 18 de la *Social Service Tax Act* ne constitue nullement une réclamation contre les biens de la faillie de manière à entrer en conflit avec le principe sous-jacent du par. 107(1) de la *Loi sur la faillite*, énoncé dans les arrêts *Sous-ministre du Revenu c. Rainville, Deloitte Haskins and Sells Ltd. c. Workers' Compensation Board* et *Banque fédérale de développement c. Québec (Commission de la santé et de la sécurité du travail)*, pour les motifs suivants:

a) les sommes en fiducie ne sont jamais devenues la propriété de la faillie, mais elles sont passées des acquéreurs de véhicules à Sa Majesté du chef de la province, pour le compte de laquelle Tops agissait en qualité de fiduciaire, conformément à une obligation contractée par ces acquéreurs;

b) la fiducie a été constituée régulièrement parce qu'elle comportait les trois certitudes requises pour qu'il y ait fiducie en *equity*; l'art. 18 de la *Social Service Tax Act* ne dispense pas de satisfaire à ces trois certitudes, mais les respecte de la même manière qu'un acte de fiducie conventionnel doit le faire;

c) la seule différence pertinente entre cette fiducie légale et une fiducie conventionnelle expresse réside dans le recours réputé en droit de suite qu'accorde la Loi. L'existence de ce recours

i) ne rend pas la fiducie nulle;

ii) est surtout auxiliaire et ne soustrait donc pas la fiducie à l'application du principe énoncé dans les arrêts *Sous-ministre du Revenu c. Rainville, Deloitte Haskins and Sells Ltd. c. Workers' Compensation Board*, et *Banque fédérale de développement c. Québec (Commission de la santé et de la sécurité du travail)*;

d) la fiducie relève donc de l'al. 47*a*) de la *Loi sur la faillite* et ne fait pas partie des biens du failli au sens que doit avoir cette expression selon le principe qui sous-tend le par. 107(1) de la Loi.

Je suis donc d'avis de répondre ainsi à la question constitutionnelle:

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

Answer: No.

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

Appeal dismissed, CORY J. *dissenting.*

Solicitor for the appellant: The Ministry of the Attorney General of British Columbia, Victoria.

Solicitors for the respondent: Davis & Company, Vancouver.

Solicitor for the intervener the Attorney General of Canada: The Deputy Attorney General of Canada, Ottawa.

Solicitor for the intervener the Attorney General for Ontario: The Ministry of the Attorney General, Toronto.

Solicitor for the intervener the Attorney General of Quebec: The Attorney General of Quebec, Ste-Foy.

Solicitor for the intervener the Attorney General of Nova Scotia: The Department of the Attorney General of Nova Scotia, Halifax.

Solicitor for the intervener the Attorney General for New Brunswick: The Attorney General for New Brunswick, Fredericton.

Solicitor for the intervener the Attorney General of Manitoba: Gordon E. Pilkey, Winnipeg.

Solicitor for the intervener the Attorney General for Alberta: The Attorney General for Alberta, Edmonton.

Solicitor for the intervener the Attorney General of Newfoundland: The Attorney General of Newfoundland. St. John's.

Les dispositions du par. 18(1) de la *Social Service Tax Act*, R.S.B.C. 1979, chap. 388 et ses modifications, sont-elles inopérantes pour le motif qu'elles sont incompatibles avec les dispositions de l'al. 107(1)*j*) de la *Loi sur la faillite*, S.R.C. 1970, chap. B-3?

Réponse: Non

Je suis d'avis d'accueillir le pourvoi, d'infirmer l'arrêt de la Cour d'appel et la décision rendue par le juge en chambre et d'ordonner de répondre ceci à l'exposé de cause: «la défenderesse a eu tort d'accorder à la Banque canadienne impériale de commerce la priorité sur la fiducie légale de la demanderesse».

Pourvoi rejeté, le juge CORY *est dissident.*

Procureur de l'appelante: Le ministère du Procureur général de la Colombie-Britannique, Victoria.

Procureurs de l'intimée: Davis & Company, Vancouver.

Procureur de l'intervenant le procureur général du Canada: Le sous-procureur général du Canada, Ottawa.

Procureur de l'intervenant le procureur général de l'Ontario: Le ministère du Procureur général, Toronto.

Procureur de l'intervenant le procureur général du Québec: Le procureur général du Québec, Ste-Foy.

Procureur de l'intervenant le procureur général de la Nouvelle-Écosse: Le ministère du Procureur général de la Nouvelle-Écosse, Halifax.

Procureur de l'intervenant le procureur général du Nouveau-Brunswick: Le procureur général du Nouveau-Brunswick, Fredericton.

Procureur de l'intervenant le procureur général du Manitoba: Gordon E. Pilkey, Winnipeg.

Procureur de l'intervenant le procureur général de l'Alberta: Le procureur général de l'Alberta, Edmonton.

Procureur de l'intervenant le procureur général de Terre-Neuve: Le procureur général de Terre-Neuve, St. John's.

TAB 5

SUPREME COURT OF CANADA

CITATION: Canada *v.* Canada North Group Inc., 2021 SCC 30

APPEAL HEARD: December 1, 2020
JUDGMENT RENDERED: July 28, 2021
DOCKET: 38871

BETWEEN:

Her Majesty The Queen in Right of Canada
Appellant

and

Canada North Group Inc., Canada North Camps Inc., Campcorp Structures Ltd., DJ Catering Ltd., 816956 Alberta Ltd., 1371047 Alberta Ltd., 1919209 Alberta Ltd., Ernst & Young Inc. in its capacity as monitor and Business Development Bank of Canada
Respondents

- and -

Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals
Interveners

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

REASONS: (paras. 1 to 74) Côté J. (Wagner C.J. and Kasirer J. concurring)

CONCURRING REASONS: (paras. 75 to 182) Karakatsanis J. (Martin J. concurring)

JOINT DISSENTING REASONS: (paras. 183 to 253)	Brown and Rowe JJ. (Abella J. concurring)
DISSENTING REASONS: (paras. 254 to 265)	Moldaver J.

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

Her Majesty The Queen in Right of Canada *Appellant*

v.

Canada North Group Inc.,
Canada North Camps Inc.,
Campcorp Structures Ltd.,
DJ Catering Ltd.,
816956 Alberta Ltd.,
1371047 Alberta Ltd.,
1919209 Alberta Ltd.,
Ernst & Young Inc. in its capacity as monitor and
Business Development Bank of Canada *Respondents*

and

Insolvency Institute of Canada and
Canadian Association of Insolvency and Restructuring Professionals *Interveners*

Indexed as: Canada *v.* Canada North Group Inc.

2021 SCC 30

File No.: 38871.

2020: December 1; 2021: July 28.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA

Bankruptcy and insolvency — Priority — Source deductions — Priming charges — Employee source deductions not remitted to Crown by companies in receivership — Judge supervising restructuring proceedings under Companies' Creditors Arrangement Act ordering priming charges over debtor companies' assets in favour of interim lender, monitor and directors — Order giving priority to priming charges over claims of secured creditors and providing that they are not to be limited or impaired in any way by provisions of any federal or provincial statute — Property of debtor companies subject to deemed trust in favour of Crown for unremitted source deductions under Income Tax Act — Whether court has authority to rank priming charges ahead of Crown's deemed trust for unremitted source deductions — Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), s. 227(4.1) — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 11, 11.2, 11.51, 11.52.

Canada North Group and six related corporations initiated restructuring proceedings under the *Companies' Creditors Arrangement Act* ("*CCAA*"). In their initial *CCAA* application, they requested a package of relief including the creation of three priming charges (or court-ordered super-priority charges): an administration charge in favour of counsel, a monitor and a chief restructuring officer for the fees they incurred, a financing charge in favour of an interim lender, and a directors' charge

protecting their directors and officers against liabilities incurred after the commencement of the proceedings. The application included an affidavit from one of their directors attesting to a debt to Her Majesty The Queen for unremitted employee source deductions and GST. The *CCAA* judge made an order ("Initial Order") that the priming charges were to "rank in priority to all other security interests, . . . charges and encumbrances, claims of secured creditors, statutory or otherwise", and that they were not to be "otherwise . . . limited or impaired in any way by . . . the provisions of any federal or provincial statutes" ("Priming Charges"). The Crown subsequently filed a motion for variance, arguing that the Priming Charges could not take priority over the deemed trust created by s. 227(4.1) of the *Income Tax Act* ("*ITA*") for unremitted source deductions. The motion to vary was dismissed, and the Crown's appeal to the Court of Appeal was also dismissed.

Held (Abella, Moldaver, Brown and Rowe JJ. dissenting): The appeal should be dismissed.

Per Wagner C.J. and **Côté** and Kasirer JJ.: The Priming Charges prevail over the deemed trust. Section 227(4.1) does not create a proprietary interest in the debtor's property. Further, a court-ordered super-priority charge under the *CCAA* is not a security interest within the meaning of s. 224(1.3) of the *ITA*. As a result, there is no conflict between s. 227(4.1) of the *ITA* and the Initial Order made in this case, or between the *ITA* and s. 11 of the *CCAA*.

In general, courts supervising a *CCAA* reorganization have the authority to order super-priority charges to facilitate the restructuring process. The most important feature of the *CCAA* is the broad discretionary power it vests in the supervising court: s. 11 of the *CCAA* confers jurisdiction on the supervising court to "make any order that it considers appropriate in the circumstances". This jurisdiction is constrained only by restrictions set out in the *CCAA* itself and the requirement that the order made be appropriate in the circumstances — its general language is not restricted by the availability of more specific orders in ss. 11.2, 11.4, 11.51 and 11.52. As restructuring under the *CCAA* often requires the assistance of many professionals, giving super priority to priming charges in favour of those professionals is required to derive the most value for the stakeholders. For a monitor and financiers to put themselves at risk to restructure and develop assets, only to later discover that a deemed trust supersedes all claims, would defy fairness and common sense.

Her Majesty does not have a proprietary interest in a debtor's property that is adequate to prevent the exercise of a supervising judge's discretion to order super-priority charges under s. 11 of the *CCAA* or any of the sections that follow it. Section 227(4.1) does not create a beneficial interest that can be considered a proprietary interest, and it does not give the Crown the same property interest a common law trust would. Without attaching to specific property, creating the usual right to the enjoyment of property or the fiduciary obligations of a trustee, the interest created by s. 227(4.1) lacks the qualities that allow a court to refer to a beneficiary as a beneficial owner.

Furthermore, under Quebec civil law, it is clear that s. 227(4.1) does not establish a legal trust as it does not meet the three requirements set out in arts. 1260 and 1261 of the *Civil Code of Québec*. Although s. 227(4.1) provides that the assets are deemed to be held "separate and apart from the property of the person" and "to form no part of the estate or property of the person", the main element of a civilian trust is absent in the deemed trust established by s. 227(4.1): no specific property is transferred to a trust patrimony, and there is no autonomous patrimony to which specific property is transferred.

Section 227(4.1) states that the Receiver General shall be paid the proceeds of a debtor's property "in priority to all such security interests", as defined in s. 224(1.3), but court-ordered super-priority charges under s. 11 of the *CCAA* or any of the sections that follow it are not security interests within the meaning of s. 224(1.3). Section 224(1.3) defines "security interest" as meaning "any interest in, or for civil law any right in, property that secures payment or performance of an obligation" and including "an interest, or for civil law a right, created by or arising out of a debenture, mortgage, hypothec, lien, pledge, charge, deemed or actual trust, assignment or encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for". The grammatical structure of this provision evidences Parliament's intent that the list have limiting effect, such that only the instruments enumerated and instruments that are similar in nature fall within the definition. Court-ordered super-priority charges are utterly different from any of the interests listed in s. 227(4.1) because they were not made for the sole benefit of the holder of the

charge, nor were they made by consensual agreement or by operation of law. Instead, they were ordered by the *CCAA* judge to facilitate the restructuring in furtherance of the interests of all stakeholders. This interpretation is consistent with the presumption against tautology, which suggests that Parliament intended interpretive weight to be placed on the examples, and with the *ejusdem generis* principle, which limits the generality of the final words on the basis of the narrow enumeration that precedes them.

Preserving the deemed trusts under s. 37(2) of the *CCAA* does not modify the characteristics of these trusts. They continue to operate as they would have if the insolvent company had not sought *CCAA* protection. Similarly, granting Her Majesty the right to insist that a compromise or arrangement not be sanctioned by a court unless it provides for payment in full under s. 6(3) does not modify the deemed trust created by s. 227(4.1) in any way. In any event, s. 6(3) comes into operation only at the end of the *CCAA* process when parties seek court approval of their arrangement or compromise.

Finally, whether Her Majesty is a "secured creditor" under the *CCAA* or not, the supervising court's power in s. 11 provides a very broad jurisdiction that is not restricted by the availability of more specific orders. Although ss. 11.2, 11.51 and 11.52 of the *CCAA* may attach only to the property of the debtor's company, there is no such restriction in s. 11. That said, courts should still recognize the distinct nature of Her Majesty's interest and ensure that they grant a charge with priority over the deemed trust only when necessary.

Per **Karakatsanis** and Martin JJ.: There is no conflict between the *ITA* and *CCAA* provisions at issue in this appeal. The broad discretionary power under s. 11 of the *CCAA* permits a court to rank priming charges ahead of the Crown's deemed trust for unremitted source deductions.

Section 227(4.1) of the *ITA* provides that a deemed trust attaches to property of the employer to the extent of unremitted source deductions "notwithstanding any security interest in such property" or "any other enactment of Canada". Although this provision clearly specifies that the Crown's right operates notwithstanding other security interests, the content of that right for the purposes of insolvency cannot be inferred solely from the text of the *ITA*. Section 227(4.1) states that the amount of the unremitted source deductions is "beneficially owned" by the Crown, but there is no settled doctrinal meaning of the term "beneficial ownership", and s. 227(4.1) modifies even those features of beneficial ownership that are widely associated with it under the common law.

As a creature of statute, a statutory deemed trust does not have to fulfill the ordinary requirements of trust law. In the case of the deemed trust in s. 227(4.1), there is no identifiable trust property and therefore no certainty of subject matter. Moreover, without specific property being transferred to the trust patrimony, s. 227(4.1) does not satisfy the requirements of an autonomous patrimony contemplated by the *Civil Code of Québec* in arts. 1260, 1261 and 1278. As a result, s. 227(4.1) traces the value of the unremitted source deductions, capping the Crown's right at that value, and the specific

property that constitutes the debtor's estate remains unchanged, with the debtor continuing to have control over it.

The *Bankruptcy and Insolvency Act* ("*BIA*") and the *CCAA* each give the deemed trust meaning for their own purposes. The purpose of a *BIA* liquidation is to give the debtor a fresh start and pay out creditors to the extent possible. To realize these goals, the *BIA* is strictly rules-based and has a comprehensive scheme for the liquidation process. In the *BIA*, the deemed trust for unremitted source deductions appears in s. 67(3). Section 67(1)(a) excludes property held in trust by the bankrupt from property of the bankrupt that is divisible among creditors. Section 67(2) provides an exception for deemed trusts that are not true trusts. Section 67(3) provides a further exception by stating that s. 67(2) does not apply in respect of the Crown's deemed trust for unremitted source deductions under the *ITA* and other statutes. The result of this scheme is that the debtor's estate — to the extent of the unremitted source deductions — is not "property of a bankrupt divisible among his creditors", as required by s. 67(1) of the *BIA*. Section 67 therefore gives content to the Crown's right of beneficial ownership under s. 227(4.1) of the *ITA*: the amount of the unremitted source deductions is taken out of the pool of money that is distributed to creditors in a *BIA* liquidation.

In contrast, the purpose of the *CCAA* is remedial; it provides a means for companies to avoid the devastating social and economic consequences of commercial bankruptcies. Due to its remedial nature, the *CCAA* is famously skeletal in nature and there is no rigid formula for the division of assets. When a debtor's restructuring is on

the table, the goal pivots, and interim financing is introduced to facilitate restructuring. Entitlements and priorities shift to accommodate the presence of the interim lender — a new and necessary player who is absent from the liquidation scheme under the *BIA*.

The Crown's right to unremitted source deductions in a *CCAA* restructuring is protected by both ss. 37(2) and 6(3) of the *CCAA*. Section 37(2) provides that the Crown continues to beneficially own the debtor's property equal in value to the unremitted source deductions; the unremitted source deductions "shall . . . be regarded as being held in trust for Her Majesty". Although this signals that, unlike deemed trusts captured by s. 37(1), the Crown's deemed trust continues and confers a stronger right, s. 37(2) does not explain what to do with that right for the purposes of a *CCAA* proceeding. It does not, for example, provide that trust property should be put aside, as it would be in the *BIA* context. Section 6(3) gives specific effect to the Crown's right by requiring that a plan of compromise provide for payment in full of the Crown's deemed trust claims within six months of the plan's approval. As such, the Crown can demand to be paid in full in priority to all "security interests", including priming charges. The remedial goal of the *CCAA* is at the forefront of providing flexibility in preserving the Crown's right to unremitted source deductions in s. 37(2), and in giving a concrete effect to that right in s. 6(3) of the *CCAA*. The fact that the Crown's right under s. 227(4.1) of the *ITA* is treated differently between the two statutes is consistent with the different schemes and purposes of the *BIA* and *CCAA*.

Sections 11.2, 11.51 and 11.52 of the *CCAA*, which allow the court to order priming charges over a company's property, do not give the court the authority to rank priming charges ahead of the Crown's deemed trust for unremitted source deductions. Instead, that authority comes from s. 11 of the *CCAA*. Section 11 allows the court to make any order that it considers appropriate in the circumstances, subject to the requirements of good faith and due diligence on the part of the applicant. It can be used to rank priming charges ahead of the Crown's deemed trust for unremitted source deductions for two reasons. First, ranking a priming charge ahead of the Crown's deemed trust does not conflict with the *ITA* provision. So long as the Crown is paid in full under a plan of compromise, the Crown's right under s. 227(4.1) remains intact "notwithstanding any security interest" in the amount of the unremitted source deductions. Second, depending on the circumstances, such an order may further the remedial objectives of the *CCAA*. Interim financing is often crucial to the restructuring process. If there is evidence that interim lending cannot be obtained without ranking the interim loan ahead of the Crown's deemed trust, such an order could further the *CCAA*'s remedial goals. In general, the court should have flexibility to order super-priority charges in favour of parties whose function is to facilitate the proposal of a plan of compromise that, in any event, will be required to pay the Crown in full.

Per Abella, **Brown** and **Rowe** JJ. (dissenting): The appeal should be allowed. The text, context, and purpose of s. 227(4.1) of the *ITA* support the conclusion that s. 227(4.1) and the related deemed trust provisions under the the *ITA*, the *CPP*, and the *EIA* (collectively, the "Fiscal Statutes") bear only one plausible interpretation: the

Crown's deemed trust enjoys priority over all other claims, including priming charges granted under the *CCAA*. Parliament's intention when it amended and expanded s. 227(4) and 227(4.1) of the *ITA* was clear and unmistakable: it granted this unassailable priority by employing the unequivocal language of "notwithstanding any . . . enactment of Canada". This is a blanket paramountcy clause; it prevails over all other statutes. No similar "notwithstanding" provision appears in the *CCAA*. Indeed, it is quite the opposite: unlike most deemed trusts which are nullified in *CCAA* proceedings by the operation of s. 37(1) of the *CCAA*, s. 37(2) preserves the deemed trusts of the Fiscal Statutes.

The Fiscal Statutes give absolute priority to the deemed trusts for source deductions over all security interests notwithstanding the *CCAA*, and the priming charges provisions in ss. 11.2(1), 11.51(1) and 11.52(1) of the *CCAA* fall under the definition of "security interest", because they are "interests in the debtor's property securing payment or performance of an obligation", i.e. the payment of the monitor, the interim lender, and directors. As the definition of "security interest" in the *ITA* includes "encumbrances of any kind, whatever, however or whenever arising, created, deemed to arise or otherwise provided for", there is no reason that the definition would preclude the inclusion of an interest that is designed to operate to the benefit of all creditors. This is sufficient to decide the appeal.

This finding does not leave the deemed trust provisions in the Fiscal Statutes in conflict with the *CCAA*. Section 11 of the *CCAA* contains a grant of broad

supervisory discretion and the power to "make any order that it considers appropriate in the circumstances", but that grant of authority is not unlimited. Parliament avoided any conflict between the *CCAA* and the *ITA* by imposing three restrictions that are significant here. First, although s. 37(1) of the *CCAA* provides that "property of the 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", s. 37(2) provides for the continued operation of the deemed trusts under the Fiscal Statutes in a *CCAA* proceeding. In addition, while the deemed trusts are not "true trusts" and the commingling of assets renders the money subject to the deemed trusts untraceable, tracing has no application to s. 227(4.1). Second, the unremitted source deductions are deemed not to form part of the property of the debtor's company. If there is a default in remittances, the Crown is deemed to obtain beneficial ownership in the tax debtor's property in the amount of the unremitted source deductions that it can collect "notwithstanding" any other enactment or security interest. However, priming charges can attach only to the debtor's property, so the Crown's interest under the deemed trust is not subject to the Priming Charges. Third, under the definition of "secured creditor" in s. 2 of the *CCAA*, the Crown is not a "secured creditor" in respect of its deemed trust claims under the Fiscal Statutes. That definition must be read as "secured creditor means . . . a holder of any bond of the debtor company secured by . . . a trust in respect of, all or any property of the debtor company", which makes it manifestly clear that the Crown is not a "secured creditor" in respect of its deemed trust claims under the Fiscal Statutes.

Giving effect to Parliament's clear intent to grant absolute priority to the deemed trust does not render s. 6(3) or s. 11.09 of the *CCAA* meaningless. To the contrary, s. 6(3) and s. 11.09 respect the ultimate priority of the deemed trusts by allowing for the ultimate priority of the Crown claim to persist, while not frustrating the remedial purpose of the *CCAA*. Section 6(3) of the *CCAA*, which protects the Crown's claims under the deemed trusts as well as claims not subject to the deemed trusts under the Fiscal Statutes, operates only where there is an arrangement or compromise put to the court. In contrast, the deemed trusts arise immediately and operate continuously from the time the amount was deducted or withheld from employee's remuneration, and apply to only unremitted source deductions. Without s. 6(3), the Crown would be guaranteed entitlement only to unremitted source deductions when the court sanctions a compromise or arrangement, and not to its other claims under s. 224(1.2) of the *ITA*, because most of the Crown's claims rank as unsecured under s. 38 of the *CCAA*. However, s. 6(3) does not explain the survival of the deemed trust or the rights conferred on the Crown under the deemed trust. Their survival is explained by s. 37(2), which continues the operation of s. 227(4.1), or by s. 227(4.1), which provides that the proceeds of the trust property "shall be paid to the Receiver General in priority to all such security interests". Finally, s. 6(3) protects different interests than those captured by the deemed trusts, and the right not to have to compromise under s. 6(3) is a right independent of the Crown's right under deemed trusts.

Section 11.09 of the *CCAA*, which permits the court to stay the Crown's enforcement of its claims under the deemed trust claims, can apply to the Crown's deemed trust claims, but it does not remove the priority granted by the deemed trusts.

Further, no concerns regarding certainty of subject matter or autonomous patrimony arise here. The deemed trust is not a "true" trust and it does not confer an ownership interest or the rights of a beneficiary to the Crown as they are understood at common law or within the meaning of the *Civil Code of Québec*. The requirements of "true" trusts of civil and common law are irrelevant to ascertaining the operation of a statutorily deemed trust as the deemed trust is a legal fiction with *sui generis* characteristics that are described in s. 227(4) and (4.1) of the *ITA*.

Finally, concluding that the deemed trusts under the Fiscal Statutes have priority over the priming charges would not lead to absurd consequences. The conclusion that interim financing would simply end was not supported by the record, and there are usually enough funds available to satisfy both the Crown claim and the court-ordered priming charges. Equally unfounded is the claim that confirming the priority of the deemed trusts would inject an unacceptable level of uncertainty into the insolvency process. Interim lenders can rely on the company's financial statements to evaluate the risk of providing financing.

Per **Moldaver** J. (dissenting): There is substantial agreement with the analysis and conclusions of Brown and Rowe JJ. However, there are two points to be addressed. First, the question of the nature of the Crown's interest should be left to

another day. This is because, properly interpreted, the relevant provisions of the *CCAA* and *ITA* work in harmony to direct that the Crown's interest under s. 227(4.1) of the *ITA* — in whatever form it takes — must be given priority over court-ordered priming charges. This conclusion is sufficient to dispose of the appeal.

Second, while there is agreement that s. 37(2) of the *CCAA* can be interpreted as an internal restriction on s. 11, if this interpretation is mistaken, s. 11 is nonetheless restricted by s. 227(4.1), as Parliament has expressly indicated the supremacy of s. 227(4.1) over the provisions of the *CCAA*. The Crown's deemed trust claim must thus take priority over all court-ordered priming charges, whether they arise under the specific priming charge provisions, or under the court's discretionary authority. A necessary consequence of the absolute supremacy of the Crown's deemed trust claim is that the Crown's interest under s. 227(4.1) cannot be given effect by s. 6(3) of the *CCAA*. Unlike s. 227(4.1), which is focused on ensuring the priority of the Crown's claim, s. 6(3) merely establishes a six-month timeframe for payment to the Crown in the event that the debtor company succeeds in staying viable as a going concern. Accordingly, if s. 6(3) gave effect to the Crown's interest, the Crown could be ranked last, so long as it is paid within six months of any arrangement. Such an outcome would be plainly inconsistent with the absolute priority of the Crown's claim. Further, as s. 6(3) does not apply where a liquidation occurs under the *CCAA*, the Crown would be deprived of its priority over security interests in such circumstances.

It cannot be doubted that Parliament considered the potential consequences of its legislative actions, including any consequences for *CCAA* proceedings. If circumstances do arise in which the priority of the Crown's claim threatens the viability of a particular restructuring, it clearly lies with the Crown to be flexible so as to avoid any consequences that would undermine the remedial purposes of the *CCAA*.

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By Côté J.

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relatif à), 2009 QCCS 1202; *Chef Ready Foods Ltd. v. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84; *Canada (Attorney General) v. Caisse populaire d'Amos*, 2004 FCA 92, 324 N.R. 31; *Bank of Nova Scotia v. Thibault*, 2004 SCC 29, [2004] 1 S.C.R. 758; *Valard Construction Ltd. v. Bird Construction Co.*, 2018 SCC 8, [2018] 1 S.C.R. 224; *Pecore v. Pecore*, 2007 SCC 17, [2007] 1 S.C.R. 795; *Csak v. Aumon* (1990), 69 D.L.R. (4th) 567; *Dauphin Plains Credit Union Ltd. v. Xyloid Industries Ltd.*, [1980] 1 S.C.R. 1182; *National Bank of Greece (Canada) v. Katsikonouris*, [1990] 2 S.C.R. 1029; *McDiarmid Lumber Ltd. v. God's Lake First Nation*, 2006 SCC 58, [2006] 2 S.C.R. 846; *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20, [2006] 1 S.C.R. 715.

By Karakatsanis J.

Considered: *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720; *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411; *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379; *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny*, 2009 SCC 49, [2009] 3 S.C.R. 286; **referred to:** *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271; *Saulnier v. Royal Bank of Canada*, 2008 SCC 58, [2008] 3 S.C.R. 166; *Wotherspoon v. Canadian Pacific Ltd.*, [1987] 1 S.C.R. 952; *Town of Lunenburg v. Municipality of Lunenburg*, [1932] 1 D.L.R. 386; *R. v. D.L.W.*, 2016 SCC 22, [2016] 1 S.C.R. 402; *Canada (Attorney General) v. Caisse populaire d'Amos*, 2004 FCA 92, 324 N.R. 31; *Guarantee Company of North America v. Royal Bank of*

Canada, 2019 ONCA 9, 144 O.R. (3d) 225; *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24; *Friends of Toronto Public Cemeteries Inc. v. Public Guardian and Trustee*, 2020 ONCA 282, 59 E.T.R. (4th) 174; *Bank of Nova Scotia v. Thibault*, 2004 SCC 29, [2004] 1 S.C.R. 758; *Rawluk v. Rawluk*, [1990] 1 S.C.R. 70; *Foskett v. McKeown*, [2001] 1 A.C. 102; *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10; *Elan Corp. v. Comiskey* (1990), 1 O.R. (3d) 289; *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5; *U.S. Steel Canada Inc., Re*, 2016 ONCA 662, 402 D.L.R. (4th) 450; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453; *Canada (Superintendent of Bankruptcy) v. 407 ETR Concession Company Ltd.*, 2013 ONCA 769, 118 O.R. (3d) 161; *Royal Oak Mines Inc., Re* (1999), 7 C.B.R. (4th) 293; *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314; *Urbancorp Cumberland 2 GP Inc. (Re)*, 2020 ONCA 197, 444 D.L.R. (4th) 273; *Temple City Housing Inc., Re*, 2007 ABQB 786, 42 C.B.R. (5th) 274.

By Brown and Rowe JJ. (dissenting)

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379; *Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*, 2005 SCC 70, [2005] 3 S.C.R. 425; *Caisse populaire Desjardins de l'Est de Drummond v. Canada*, 2009 SCC 29, [2009] 2 S.C.R. 94; *DaimlerChrysler Financial Services (Debis) Canada Inc. v. Mega Pets Ltd.*, 2002 BCCA 242, 1 B.C.L.R. (4th) 237; *Minister of National Revenue v. Schwab Construction Ltd.*, 2002 SKCA 6, 213 Sask. R. 278; *Temple City Housing Inc., Re*, 2007 ABQB 786, 42 C.B.R. (5th) 274; *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5; *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24; *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26, [2005] 1 S.C.R. 533; *Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.*, [1976] 2 S.C.R. 475; *R. v. Caron*, 2011 SCC 5, [2011] 1 S.C.R. 78; *Lévis (City) v. Fraternité des policiers de Lévis Inc.*, 2007 SCC 14, [2007] 1 S.C.R. 591; *Elan Corp. v. Comiskey* (1990), 1 O.R. (3d) 289; *R. v. McIntosh*, [1995] 1 S.C.R. 686.

By Moldaver J. (dissenting)

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APPEAL from a judgment of the Alberta Court of Appeal (Rowbotham, Wakeling and Schutz JJ.A.), 2019 ABCA 314, 93 Alta. L.R. (6th) 29, 437 D.L.R. (4th) 122, 72 C.B.R. (6th) 161, 95 B.L.R. (5th) 222, [2019] 12 W.W.R. 635, 11 P.P.S.A.C. (4th) 157, 2019 D.T.C. 5111, [2019] A.J. No. 1154 (QL), 2019 CarswellAlta 1815 (WL Can.), affirming a decision of Topolniski J., 2017 ABQB 550, 60 Alta. L.R. (6th) 103,

52 C.B.R. (6th) 308, [2018] 2 W.W.R. 731, [2017] A.J. No. 930 (QL), 2017 CarswellAlta 1631 (WL Can.). Appeal dismissed, Abella, Moldaver, Brown and Rowe JJ. dissenting.

Michael Taylor and *Louis L'Heureux,* for the appellant.

Darren R. Bieganek, Q.C., and *Brad Angove,* for the respondents Canada North Group Inc., Canada North Camps Inc., Campcorp Structures Ltd., DJ Catering Ltd., 816956 Alberta Ltd., 1371047 Alberta Ltd., 1919209 Alberta Ltd. and Ernst & Young Inc. in its capacity as monitor.

Jeffrey Oliver and *Mary I. A. Buttery, Q.C.*, for the respondent the Business Development Bank of Canada.

Kelly J. Bourassa, for the intervener the Insolvency Institute of Canada.

Randal Van de Mosselaer, for the intervener the Canadian Association of Insolvency and Restructuring Professionals.

The reasons of Wagner C.J. and Côté and Kasirer. JJ. were delivered by

CÔTÉ J. —

I. Overview

[1] The *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), has a long and storied history. From its origins in the Great Depression to its revival and reinvention during the 1970s and 1980s, the *CCAA* has played an important role in Canada's economy. Today, the *CCAA* provides an opportunity for insolvent companies with more than $5,000,000 in liabilities to restructure their affairs through a plan of arrangement. The goal of the *CCAA* process is to avoid bankruptcy and maximize value for all stakeholders.

[2] In order to facilitate the restructuring process, courts supervising *CCAA* restructurings may authorize an insolvent company to incur certain critical costs associated with this process. Supervising courts may also secure payment of these costs by ordering a super-priority charge against the insolvent company's assets. Today, our Court is called upon to determine whether a supervising court may order super-priority charges over assets that are subject to a claim of Her Majesty protected by a deemed trust created by s. 227(4.1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*").

[3] The Crown raises two arguments as to why a supervising court should be unable to subordinate Her Majesty's interest to super-priority charges. First, the Crown says that s. 227(4.1) creates a proprietary interest in a debtor's assets and a court cannot attach a super-priority charge to assets subject to Her Majesty's interest. Second, the Crown says that even if s. 227(4.1) does not create a proprietary interest, it creates a

security interest that has statutory priority over all other security interests, including super-priority charges.

[4] Both of these arguments must fail. As this Court has previously held, the *CCAA* generally empowers supervising judges to order super-priority charges that have priority over all other claims, including claims protected by deemed trusts. In all cases where a supervising court is faced with a deemed trust, the court must assess the nature of the interest established by the empowering enactment, and not simply rely on the title of deemed trust. In this case, when the relevant provisions of the *ITA* are examined in their entirety, it is clear that the *ITA* does not establish a proprietary interest because Her Majesty's claim does not attach to any specific asset. Further, there is no conflict between the *CCAA* order and the *ITA*, as the deemed trust created by the *ITA* has priority only over a defined set of security interests. A super-priority charge ordered under s. 11 of the *CCAA* does not fall within that definition. For the reasons that follow, I would therefore dismiss the appeal.

II. Background

[5] Canada North Group and six related corporations ("Debtors") initiated restructuring proceedings under s. 50.4(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), but soon changed course and sought to restructure under the *CCAA*. In their initial *CCAA* application, they requested a package of relief standard to *CCAA* proceedings, including a thirty-day stay on all proceedings against them, the appointment of a monitor and the creation of three super-priority charges. The first

charge they requested was an administration charge of up to $1,000,000 in favour of counsel, a monitor and a chief restructuring officer for the fees they incurred. The second was a $1,000,000 financing charge in favour of an interim lender. The third was a $150,000 directors' charge protecting their directors and officers against liabilities incurred after the commencement of the proceedings. The Debtors included in their initial motion an affidavit from one of their directors attesting to a $1,140,000 debt to Her Majesty The Queen for source deductions and Goods and Services Tax ("GST").

[6] Justice Nielsen of the Court of Queen's Bench heard the motion together with a cross-motion by the Debtors' primary lender, Canadian Western Bank, seeking the appointment of a receiver. Justice Nielsen granted an initial order in favour of the Debtors on the terms requested in the initial application, aside from a $500,000 reduction in the administration charge (Alta. Q.B., No. 1703-12327, July 5, 2017 ("Initial Order")). The terms of that order included the following with regard to priority:

> Each of the Directors' Charge, Administration Charge and the Interim Lender's Charge (all as constituted and defined herein) shall constitute a charge on the Property and subject always to section 34(11) of the CCAA such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "Encumbrances") in favour of any Person. [Emphasis deleted; para. 44.]

Justice Nielsen further ordered that these charges "shall not otherwise be limited or impaired in any way by . . . (d) the provisions of any federal or provincial statutes" (para. 46).

[7] Three weeks after the Initial Order was granted, the Debtors sought supplementary orders extending the stay of proceedings and increasing the interim financing to $2,500,000. Canadian Western Bank again filed a motion to appoint a receiver. At the hearing of the three motions, counsel for Her Majesty appeared in order to advise that Her Majesty would be filing a motion to vary the Initial Order on the ground that the order failed to recognize Her priority interest in unremitted source deductions (the portion of remuneration that employers are required to withhold from employees and remit directly to the Canada Revenue Agency ("CRA")).

[8] The Crown filed the motion soon after. Its argument for variance was grounded in the nature of Her Majesty's interest in the Debtors' property. It argued that the nature of Her Majesty's interest is determined by s. 227(4.1) of the *ITA* and that that provision creates a proprietary interest:

> **(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.
>
> **(4.1)** Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person and property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for a security interest (as defined in subsection 224(1.3)) would be

property of the person, equal in value to the amount so deemed to be held in trust is deemed

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

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

III. Judgments Below

A. *Court of Queen's Bench, 2017 ABQB 550, 60 Alta. L.R. (6th) 103*

[9] Justice Topolniski heard Her Majesty's motion to vary the Initial Order. Despite the delay between the Initial Order and the motion to vary, Topolniski J. found that she had jurisdiction to hear the motion based on the discretion and flexibility conferred by the *CCAA*. However, she dismissed the motion on the ground that s. 227(4.1) of the *ITA* creates a security interest that can be subordinated to court-ordered super-priority charges.

[10] Justice Topolniski relied upon *Temple City Housing Inc., Re*, 2007 ABQB 786, 42 C.B.R. (5th) 274, and *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002]

2 S.C.R. 720, to conclude that the deemed trust created by s. 227(4.1) of the *ITA* is not a proprietary interest. Rather, the *ITA* creates something similar to a floating charge over all the debtor's assets, which permits the debtor to alienate property subject to the deemed trust. These characteristics are inconsistent with a proprietary interest, and thus s. 227(4.1) does not create such an interest.

[11] Justice Topolniski also considered whether s. 227(4.1) creates a security interest that requires Her Majesty's interest to take priority over court-ordered charges. She acknowledged that the *CCAA* preserves the operation of the deemed trust, but she found that it also authorizes the reorganization of priorities by court order. Because each of the charges included in the Initial Order was critical to the restructuring process, they were necessarily required by the *CCAA* regime.

B. *Leave to Appeal, 2017 ABCA 363, 54 C.B.R. (6th) 5*

[12] Following the dismissal of the Crown's motion, the Debtors determined that there were sufficient assets in the estate to satisfy both Her Majesty and the beneficiaries of the three court-ordered super-priority charges in full. However, the Crown sought and obtained leave to appeal in order to seek appellate guidance on the nature of Her Majesty's priority.

C. *Court of Appeal of Alberta, 2019 ABCA 314, 93 Alta. L.R. (6th) 29*

[13] The Court of Appeal dismissed the appeal. It was divided as to whether the super-priority charges had priority over Her Majesty's claim. Justice Rowbotham wrote for the majority and agreed with the motion judge that s. 227(4.1) of the *ITA* creates a security interest, in accordance with this Court's earlier finding in *First Vancouver* that the deemed trust is like a "floating charge over all of the assets of the tax debtor in the amount of the default" (*First Vancouver*, at para. 40). She found further support for this in the fact that the deemed trust also falls squarely within the *ITA*'s definition of "security interest" in s. 224(1.3).

[14] After determining that Her Majesty's interest in the Debtors' property was a security interest, Rowbotham J.A. turned to the question of whether the deemed trust could be subordinated to the court-ordered super-priority charges. She found that "while a conflict may appear to exist at the level of the 'black letter' wording" of the *ITA* and the *CCAA*, "the presumption of statutory coherence require[d] that the provisions be read to work together" (para. 45). A deemed trust that could not be subordinated to super-priority charges would undermine both Acts' objectives because fewer restructurings could succeed and thus less tax revenue could be collected. If the Crown's position prevailed, then absurd consequences could follow. Approximately 75 percent of restructurings require interim lenders. Without the assurance that they would be repaid in priority, these lenders would not come forward, nor would monitors or directors. The reality is that all of these services are provided in reliance on super priorities. Without these priorities, *CCAA* restructurings may be severely curtailed or

at least delayed until Her Majesty's exact claim could be ascertained, by which point the company might have totally collapsed.

[15] Justice Wakeling dissented. In his view, none of the arguments raised by the majority could overcome the text of the *ITA*. On his reading, the text of s. 227(4.1) is clear: Her Majesty is the beneficial owner of the amounts deemed to be held separate and apart from the debtor's property, and these amounts must be paid to Her Majesty notwithstanding any type of security interest, including super-priority charges. In his view, nothing in the *CCAA* overrides this proprietary interest. Section 11 of the *CCAA* cannot permit discretion to be exercised without regard for s. 227(4.1) of the *ITA*, nor can ss. 11.2, 11.51 and 11.52 of the *CCAA* be used, as they only allow a court to make orders regarding "all or part of the company's property" (s. 11.2(1)). In conclusion, since no part of the *CCAA* authorizes a court to override s. 227(4.1), a court must give effect to the clear text of s. 227(4.1) and cannot subordinate Her Majesty's claims to super-priority charges.

IV. Issue

[16] The central issue in this appeal is whether the *CCAA* authorizes courts to grant super-priority charges with priority over a deemed trust created by s. 227(4.1) of the *ITA*. In order to answer this question, I proceed in three stages. First, I assess the nature of the *CCAA* regime and the power of supervising courts to order such charges. Given that supervising courts generally have the authority to order super-priority charges with priority over all other claims, I then turn to s. 227(4.1) of the *ITA* to

determine whether it gives Her Majesty an interest that cannot be subordinated to super-priority charges. Here I assess the Crown's two arguments as to why s. 227(4.1) provides for an exception to the general rule, namely that Her Majesty has a proprietary or ownership interest in the insolvent company's assets and that, even if Her Majesty does not have such an interest, s. 227(4.1) provides Her with a security interest that has absolute priority over all claims. I conclude by assessing how courts should exercise their authority to order super-priority charges where Her Majesty has a claim against an insolvent company protected by a s. 227(4.1) deemed trust.

V. Analysis

[17] In order to determine whether the *CCAA* empowers a court to order super-priority charges over assets subject to a deemed trust created by s. 227(4.1) of the *ITA*, we must understand both the *CCAA* regime and the nature of the interest created by s. 227(4.1).

A. *CCAA Regime*

[18] The *CCAA* is part of Canada's system of insolvency law, which also includes the *BIA* and the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11, s. 6(1), for banks and other specified institutions. Although both the *CCAA* and the *BIA* create reorganization regimes, what distinguishes the *CCAA* regime is that it is restricted to companies with liabilities of more than $5,000,000 and "offers a more flexible mechanism with greater judicial discretion, making it more responsive to

complex reorganizations" (*Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 14).

[19] The *CCAA* works by creating breathing room for an insolvent debtor to negotiate a way out of insolvency. Upon an initial application, the supervising judge makes an order that ordinarily preserves the status quo by freezing claims against the debtor while allowing it to remain in possession of its assets in order to continue carrying on business. During this time, it is hoped that the debtor will negotiate a plan of arrangement with creditors and other stakeholders. The goal is to enable the parties to reach a compromise that allows the debtor to reorganize and emerge from the *CCAA* process as a going concern (*Century Services*, at para. 18).

[20] The view underlying the entire *CCAA* regime is thus that debtor companies retain more value as going concerns than in liquidation scenarios (*Century Services*, at para. 18). The survival of a going-concern business is ordinarily the result with the greatest net benefit. It often enables creditors to maximize returns while simultaneously benefiting shareholders, employees, and other firms that do business with the debtor company (para. 60). Thus, this Court recently held that the *CCAA* embraces "the simultaneous objectives of maximizing creditor recovery, preservation of going-concern value where possible, preservation of jobs and communities affected by the firm's financial distress . . . and enhancement of the credit system generally" (*9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, at para. 42, quoting

J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2nd ed. 2013), at p. 14).

[21] The most important feature of the *CCAA* — and the feature that enables it to be adapted so readily to each reorganization — is the broad discretionary power it vests in the supervising court (*Callidus Capital*, at paras. 47-48). Section 11 of the *CCAA* confers jurisdiction on the supervising court to "make any order that it considers appropriate in the circumstances". This power is vast. As the Chief Justice and Moldaver J. recently observed in their joint reasons, "On the plain wording of the provision, the jurisdiction granted by s. 11 is constrained only by restrictions set out in the *CCAA* itself, and the requirement that the order made be 'appropriate in the circumstances'" (*Callidus Capital*, at para. 67). Keeping in mind the centrality of judicial discretion in the *CCAA* regime, our jurisprudence has developed baseline requirements of appropriateness, good faith and due diligence in order to exercise this power. The supervising judge must be satisfied that the order is appropriate and that the applicant has acted in good faith and with due diligence (*Century Services*, at para. 69). The judge must also be satisfied as to appropriateness, which is assessed by considering whether the order would advance the policy and remedial objectives of the *CCAA* (para. 70). For instance, given that the purpose of the *CCAA* is to facilitate the survival of going concerns, when crafting an initial order, "[a] court must first of all provide the conditions under which the debtor can attempt to reorganize" (para. 60).

[22] On review of a supervising judge's order, an appellate court should be cognizant that supervising judges have been given this broad discretion in order to fulfill their difficult role of continuously balancing conflicting and changing interests. Appellate courts should also recognize that orders are generally temporary or interim in nature and that the restructuring process is constantly evolving. These considerations require not only that supervising judges be endowed with a broad discretion, but that appellate courts exercise particular caution before interfering with orders made in accordance with that discretion (*Pacific National Lease Holding Corp., Re* (1992), 72 B.C.L.R. (2d) 368 (C.A.), at paras. 30-31).

[23] In addition to s. 11, there are more specific powers in some of the provisions following that section. They include the power to order a super-priority security or charge on all or part of a company's assets in favour of interim financiers (s. 11.2), critical suppliers (s. 11.4), the monitor and financial, legal or other experts (s. 11.52), or indemnification of directors or officers (s. 11.51). Each of these provisions empowers the court to "order that the security or charge rank in priority over the claim of any secured creditor of the company" (ss. 11.2(2), 11.4(4), 11.51(2) and 11.52(2)).

[24] As this Court held in *Century Services*, at para. 70, the general language of s. 11 is not restricted by the availability of these more specific orders. In fact, courts regularly grant super-priority charges in favour of persons not specifically referred to in the aforementioned provisions, including through orders that have priority over

orders made under the specific provisions. These include, for example, key employee retention plan charges (*Grant Forest Products Inc., Re* (2009), 57 C.B.R. (5th) 128 (Ont. S.C.J.); *Timminco Ltd., Re*, 2012 ONSC 506, 85 C.B.R. (5th) 169), and bid protection charges (*In the Matter of a Plan of Compromise or Arrangement of Green Growth Brands Inc.*, 2020 ONSC 3565, 84 C.B.R. (6th) 146).

[25] In *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271, at para. 60, quoting the amended initial order in that case, this Court confirmed that a court-ordered financing charge with priority over "all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise", had priority over a deemed trust established by the *Personal Property Security Act*, R.S.O. 1990, c. P.10 ("*PPSA*"), to protect employee pensions. Justice Deschamps wrote for a unanimous Court on this point. She found that the existence of a deemed trust did not preclude orders granting first priority to financiers: "This will be the case only if the provincial priorities provided for in s. 30(7) of the *PPSA* ensure that the claim of the Salaried Plan's members has priority over the [debtor-in-possession ("DIP")] charge" (para. 48).

[26] Justice Deschamps first assessed the supervising judge's order to determine whether it had truly been necessary to give the financing charge priority over the deemed trust. Even though the supervising judge had not specifically considered the deemed trust in the order authorizing a super-priority charge, he had found that there was no alternative but to make the order. Financing secured by a super priority was

necessary if the company was to remain a going concern (para. 59). Justice Deschamps rejected the suggestion "that the DIP lenders would have accepted that their claim ranked below claims resulting from the deemed trust", because "[t]he harsh reality is that lending is governed by the commercial imperatives of the lenders, not by the interests of the plan members or the policy considerations that lead provincial governments to legislate in favour of pension fund beneficiaries" (para. 59).

[27] After determining that the order was necessary, she turned to the statute creating the deemed trust's priority. Section 30(7) of the *PPSA* provided that the deemed trust would have priority over all security interests. In her view, this created a conflict between the court-ordered super priority and the statutory priority of the claim protected by the deemed trust. The super priority therefore prevailed by virtue of federal paramountcy (para. 60).

[28] There are also practical considerations that explain why supervising judges must have the discretion to order other charges with priority over deemed trusts. Restructuring under the *CCAA* often requires the assistance of many professionals. As Wagner C.J. and Moldaver J. recently recognized for a unanimous Court, the role the monitor plays in a *CCAA* proceeding is critical: "The monitor is an independent and impartial expert, acting as 'the eyes and the ears of the court' throughout the proceedings . . . . The core of the monitor's role includes providing an advisory opinion to the court as to the fairness of any proposed plan of arrangement and on orders sought by parties, including the sale of assets and requests for interim financing" (*Callidus*

Capital, at para. 52, quoting *Ernst & Young Inc. v. Essar Global Fund Ltd.*, 2017 ONCA 1014, 139 O.R. (3d) 1, at para. 109). In the words of Morawetz J. (as he then was), "[i]t is not reasonable to expect that professionals will take the risk of not being paid for their services, and that directors and officers will remain if placed in a compromised position" (*Timminco*, at para. 66).

[29] This Court has similarly found that financing is critical as "case after case has shown that 'the priming of the DIP facility is a key aspect of the debtor's ability to attempt a workout'" (*Indalex*, at para. 59, quoting J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 97). As lower courts have affirmed, "Professional services are provided, and DIP funding is advanced, in reliance on super-priorities contained in initial orders. To ensure the integrity, predictability and fairness of the *CCAA* process, certainty must accompany the granting of such super-priority charges" (*First Leaside Wealth Management Inc. (Re)*, 2012 ONSC 1299, at para. 51 (CanLII)).

[30] Super-priority charges in favour of the monitor, financiers and other professionals are required to derive the most value for the stakeholders. They are beneficial to all creditors, including those whose claims are protected by a deemed trust. The fact that they require super priority is just a part of "[t]he harsh reality . . . that lending is governed by the commercial imperatives of the lenders" (*Indalex*, at para. 59). It does not make commercial sense to act when there is a high level of risk involved. For a monitor and financiers to put themselves at risk to restructure and

develop assets, only to later discover that a deemed trust supersedes all claims, smacks of unfairness. As McLachlin J. (as she then was) said, granting a deemed trust absolute priority where it does not amount to a trust under general principles of law would "defy fairness and common sense" (*British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24, at p. 33).

[31] It is therefore clear that, in general, courts supervising a *CCAA* reorganization have the authority to order super-priority charges to facilitate the restructuring process. Similarly, courts have ensured that the *CCAA* is given a liberal construction to fulfill its broad purpose and to prevent this purpose from being neutralized by other statutes: [TRANSLATION] "As the courts have ruled time and again, the purpose of the *CCAA* and orders made under it cannot be affected or neutralized by another [Act], whether of public order or not" (*Triton Électronique inc. (Arrangement relatif à)*, 2009 QCCS 1202, at para. 35 (CanLII)). "This case is not so much about the rights of employees as creditors, but the right of the court under the [*CCAA*] to serve not the special interests of the directors and officers of the company but the broader constituency referred to in *Chef Ready Foods Ltd.* [*v. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84 (C.A.)] . . . Such a decision may inevitably conflict with provincial legislation, but the broad purposes of the [*CCAA*] must be served" (*Pacific National Lease Holding*, at para. 28). Courts have been particularly cautious when interpreting security interests so as to ensure that the *CCAA*'s important purpose can be fulfilled. For instance, in *Chef Ready Foods*, Gibbs J.A. observed that if a bank's rights under the *Bank Act*, S.C. 1991, c. 46, were to be interpreted as being immune from the

provisions of the *CCAA*, then the benefits of *CCAA* proceedings would be "largely illusory" (p. 92). "There will be two classes of debtor companies: those for whom there are prospects for recovery under the [*CCAA*]; and those for whom the [*CCAA*] may be irrelevant dependent upon the whim of the [creditor]" (p. 92). It is important to keep in mind that *CCAA* proceedings operate for the benefit of the creditors as a group and not for the benefit of a single creditor. Without clear and direct instruction from Parliament, we cannot countenance the possibility that it intended to create a security interest that would limit or eliminate the prospect of reorganization and recovery under the *CCAA* for some companies. To do so would turn the *CCAA* into a dead letter. With this in mind, I turn to the specific provision at issue in this appeal.

B. *Nature of the Interest Created by Section 227(4.1) of the ITA*

[32] The Crown argues that, despite the authority a supervising court may have to order super-priority charges, Her Majesty's claim to unremitted source deductions is protected by a deemed trust, and that ordering charges with priority over the deemed trust is contrary to s. 227(4.1) of the *ITA*. To determine whether this is true, we must begin by understanding how the deemed trust comes about.

[33] Section 153(1) of the *ITA* requires employers to withhold income tax from employees' gross pay and forward the amounts withheld to the CRA. When an employer withholds income tax from its employees in accordance with the *ITA*, it assumes its employees' liability for those amounts (s. 227(9.4)). As a result, Her Majesty cannot have recourse to the employees if the employer fails to remit the

withheld amounts. Instead, Her Majesty's interest is protected by a deemed trust. Section 227(4) of the *ITA* provides that amounts withheld are deemed to be held separate and apart from the employer's assets and in trust for Her Majesty. If an employer fails to remit the amounts withheld in the manner provided by the *ITA*, s. 227(4.1) extends the trust to all of the employer's assets. In this case, the Debtors failed to remit the amounts withheld to the CRA, bringing s. 227(4.1) into operation.

[34] When a company seeks protection under the *CCAA*, s. 37(1) of the *CCAA* provides that most of Her Majesty's deemed trusts are nullified (unless the property in question would be regarded as held in trust in the absence of the statutory provision creating the deemed trust). However, s. 37(2) of the *CCAA* exempts the deemed trusts created by s. 227(4) and (4.1) of the *ITA* from the nullification provided for in s. 37(1). These deemed trusts continue to operate throughout the *CCAA* process (*Century Services*, at para. 45). In my view, this preservation by the *CCAA* of the deemed trusts created by the *ITA* does not modify the characteristics of these trusts. They continue to operate as they would have if the insolvent company had not sought *CCAA* protection. Therefore, the Crown's arguments must be assessed by reviewing the nature of the interest created by s. 227(4.1) of the *ITA*.

[35] Before doing so, and while it is not strictly speaking required of me given the reasons I set out below, I pause here to clarify the role of s. 6(3) of the *CCAA*, which provides as follows:

> **(3)** Unless Her Majesty agrees otherwise, the court may sanction a compromise or arrangement only if the compromise or arrangement provides for the payment in full to Her Majesty in right of Canada or a province, within six months after court sanction of the compromise or arrangement, of all amounts that were outstanding at the time of the application for an order under section 11 or 11.02 and that are of a kind that could be subject to a demand under
>
> **(a)** subsection 224(1.2) of the *Income Tax Act* . . . .

[36] Section 6(3) merely grants Her Majesty the right to insist that a compromise or arrangement not be sanctioned by a court unless it provides for payment in full to Her Majesty of certain claims within six months after court sanction. Section 6(3) does not say that it modifies the deemed trust created by s. 227(4.1) of the *ITA* in any way, and it comes into operation only at the end of the *CCAA* process when parties seek court approval of their arrangement or compromise. Section 6(3) also applies to numerous claims that are not protected by the deemed trust, including penalties, interest, withholdings on non-resident dispositions and certain retirement contributions (see ss. 224(1.2) and 227(10.1) of the *ITA*, the latter of which refers to amounts payable under ss. 116, 227(9), (9.2), (9.3), (9.4) and (10.2), Part XII.5 and Part XIII). Equating the deemed trust with the right under s. 6(3) renders s. 37(2) of the *CCAA* and the deemed trust meaningless. I therefore proceed, as this Court did in *Indalex*, by assessing the interest created by s. 227(4.1) of the *ITA* without regard to the *CCAA* (*Indalex*, at para. 48).

[37] Section 227(4.1) provides:

> **(4.1)** Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person and property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for a security interest (as defined in subsection 224(1.3)) would be property of the person, equal in value to the amount so deemed to be held in trust is deemed
>
> > **(a)** to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, and
> >
> > **(b)** to form no part of the estate or property of the person from the time the amount was so deducted or withheld, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to such a security interest
>
> and is property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

(1) Does Section 227(4.1) of the *ITA* Create a Proprietary or Ownership Interest in the Debtor's Assets?

[38] This appeal — like previous appeals to this Court — does not require the Court to exhaustively define the nature and content of the interest created by s. 227(4.1) of the *ITA* (*Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411, and *First Vancouver*). All that is necessary is to determine whether s. 227(4.1) confers upon Her Majesty an interest in the debtor's property that precludes a court from ordering charges with priority over Her Majesty's claim. The Crown argues that s. 227(4.1) does so by giving Her Majesty a proprietary interest in the debtor's assets, which "causes

those assets to become the property of the Crown" (A.F., at para. 46). The Crown rests this argument on the wording of the section. First, it says that property equal in value to the amount deemed to be held in trust by a person is deemed to be held "separate and apart from the property of the person". Second, it says that the property deemed to be held in trust is deemed "to form no part of the estate or property of the person". Third, it says that the property deemed to be held in trust "is property beneficially owned by Her Majesty notwithstanding any security interest in such property". The Crown submits that, as a result of Her Majesty's proprietary interest, amounts subject to the deemed trust cannot be considered assets of the debtor in *CCAA* proceedings.

[39] In order to determine whether s. 227(4.1) confers a proprietary or ownership interest upon Her Majesty, we must look at the nature of the rights afforded to Her Majesty by the deemed trust and compare them to the rights ordinarily afforded to an owner. To begin with, it is clear that the statute does not purport to transfer legal title to any property to Her Majesty. Instead, the Crown's argument places considerable weight on the common law meaning of the words "beneficially owned by Her Majesty" and "in trust". Trusts and beneficial ownership are equitable concepts that are part of the common law. As in all cases of statutory interpretation, the meaning of these words is a question of parliamentary intent. In the interpretation of a federal statute that uses concepts of property and civil rights, reference must be had to ss. 8.1 and 8.2 of the *Interpretation Act*, R.S.C. 1985, c. I-21. These sections provide:

> **8.1** Both the common law and the civil law are equally authoritative and recognized sources of the law of property and civil rights in Canada and,

> unless otherwise provided by law, if in interpreting an enactment it is necessary to refer to a province's rules, principles or concepts forming part of the law of property and civil rights, reference must be made to the rules, principles and concepts in force in the province at the time the enactment is being applied.
>
> **8.2** Unless otherwise provided by law, when an enactment contains both civil law and common law terminology, or terminology that has a different meaning in the civil law and the common law, the civil law terminology or meaning is to be adopted in the Province of Quebec and the common law terminology or meaning is to be adopted in the other provinces.

[40] In other words, where Parliament uses a private law expression and is silent as to its meaning, courts must refer to the applicable provincial private law. This is known as the principle of complementarity. However, as both these sections also make clear, Parliament is free to derogate from provincial private law and create a uniform rule across all provinces (see R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at pp. 158-59).

[41] In this case, Parliament has expressly chosen to dissociate itself from provincial private law. Section 227(4.1) says that it operates "[n]otwithstanding 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". In *Caisse populaire Desjardins de l'Est de Drummond v. Canada*, 2009 SCC 29, [2009] 2 S.C.R. 94, the majority found that, through these words, Parliament has created a standalone scheme of uniform application across all provinces (paras. 11-13). The nature of the deemed trust created by s. 227(4.1) must thus be understood on its own terms.

[42] With that said, it is also clear that Parliament has chosen to use terms with established legal meanings in constructing the deemed trust. While the meaning of these terms is not to be based on their precise meaning under Alberta common law, it is difficult to attempt to understand s. 227(4.1) without any reference to how these concepts generally operate. Despite the protestations of my colleagues Justices Brown and Rowe, I do not see how we could begin to understand the meaning of the words "deemed trust", "held in trust" or "beneficially owned" without reference to the civil law or common law. The law of trusts in both civil law and common law thus provides critical context for understanding Parliament's intent. From a civil law perspective, some courts have found it awkward to apply the idea of beneficial ownership under s. 227(4.1) in Quebec "on the ground that it is a concept that is obviously derived from the common law" (*Canada (Attorney General) v. Caisse populaire d'Amos*, 2004 FCA 92, 324 N.R. 31, at para. 48). I agree with the following observation by Noël J.A. (as he then was):

> It is not the task of the judiciary to determine whether it is appropriate for Parliament to use common law concepts in Quebec (or to use civil law concepts elsewhere in Canada) for the purpose of giving effect to federal legislation. The task of the courts is limited to discovering Parliament's intention and giving effect to it. [para. 49]

[43] Under Quebec civil law, it is clear that s. 227(4.1) does not establish a trust within the meaning of the *Civil Code of Québec* ("*C.C.Q.*"). Articles 1260 and 1261 *C.C.Q.* provide the following:

> **1260.** A trust results from an act whereby a person, the settlor, transfers property from his patrimony to another patrimony constituted by him which he appropriates to a particular purpose and which a trustee undertakes, by his acceptance, to hold and administer.
>
> **1261.** The trust patrimony, consisting of the property transferred in trust, constitutes a patrimony by appropriation, autonomous and distinct from that of the settlor, trustee or beneficiary and in which none of them has any real right.

As this Court held in *Bank of Nova Scotia v. Thibault*, 2004 SCC 29, [2004] 1 S.C.R. 758, at para. 31, "Three requirements must therefore be met in order for a trust to be constituted [under Quebec civil law]: property must be transferred from an individual's patrimony to another patrimony by appropriation; the property must be appropriated to a particular purpose; and the trustee must accept the property."

[44] Under s. 227(4.1) of the *ITA*, however, no specific property is transferred to a trust patrimony. Indeterminacy remains as to which assets are subject to the deemed trust, *ergo*, as to which assets left the settlor's patrimony and entered the trust's patrimony. Although s. 227(4.1) provides that the assets are deemed to be held "separate and apart from the property of the person" and "to form no part of the estate or property of the person", this is not sufficient to constitute an autonomous patrimony such as the one contemplated by the civilian trust regime. It flows from the autonomous nature of the trust patrimony that assets held in trust must be property in which none of the settlor, trustee or beneficiary has any property right. But this runs afoul of the interest created by s. 227(4.1), because nothing in that provision deprives the person whose assets are subject to a deemed trust of property rights in these assets. Therefore,

the main element of a civilian trust is absent in the deemed trust established by s. 227(4.1): there is no autonomous patrimony to which specific property is transferred.

[45] Furthermore, under s. 227(4.1), the person whose assets are subject to the deemed trust would act as trustee. Again, this is inconsistent with the definition of a trustee in civil law. The person whose assets are subject to a deemed trust pursuant to s. 227(4.1) does not "undertak[e], by his acceptance, to hold and administer" a trust patrimony (art. 1260 *C.C.Q.*). But most importantly, the fact that assets subject to the deemed trust are indeterminate makes the trustee's role effectively impossible to play. The *C.C.Q.* provides that the trustee "has the control and the exclusive administration of the trust patrimony" and "acts as the administrator of the property of others charged with full administration" (art. 1278). Thus, the trustee under s. 227(4.1) would be required to administer its own property — or at least an indefinite part of it — in the interest of Her Majesty (art. 1306 *C.C.Q.*). The trustee would be subject to obligations impossible to fulfill, such as the obligation not to mingle the administered property with its own (art. 1313 *C.C.Q.*). Obviously, one cannot act as an administrator of the property of others with respect to one's own property. It is therefore clear that the interest created by s. 227(4.1) has little, if anything, in common with the trust in civil law.

[46] In the common law, a trust arises when legal ownership and beneficial ownership of a particular property are separated (see *Valard Construction Ltd. v. Bird Construction Co.*, 2018 SCC 8, [2018] 1 S.C.R. 224, at para. 18). "Because a trust

divides legal and beneficial title to property between a trustee and a beneficiary, respectively, the 'hallmark' characteristic of a trust is the fiduciary relationship existing between the trustee and the beneficiary, by which the trustee is to hold the trust property solely for the beneficiary's enjoyment" (para. 17 (footnote omitted)). As Rothstein J. wrote, because of this fiduciary relationship, "[t]he beneficial owner of property has been described as 'the real owner of property even though it is in someone else's name'" (*Pecore v. Pecore*, 2007 SCC 17, [2007] 1 S.C.R. 795, at para. 4, quoting *Csak v. Aumon* (1990), 69 D.L.R. (4th) 567 (Ont. H.C.J.), at p. 570).

[47] While the precise rights given to a beneficial owner may vary according to the terms of the trust and the principles of equity, I agree with the Crown that, where this type of interest exists, it will generally be inappropriate for the supervising judge to order a super-priority charge over the property subject to the interest, although the broad power conferred on the court by s. 11 of the *CCAA* would enable it to do so. Property held in trust cannot be said to belong to the trustee because "in equity, it belongs to another person" (*Henfrey*, at p. 31). However, a close examination of the nature of the interest created by s. 227(4.1) of the *ITA* reveals that it does not create this type of interest because "[t]he employer is not actually required to hold the money separate and apart, the usual fiduciary obligations of a trustee are absent, and the trust exists without a *res*. The law of tracing is similarly corrupted" (R. J. Wood and R. T. G. Reeson, "The Continuing Saga of the Statutory Deemed Trust: *Royal Bank v. Tuxedo Transportation Ltd.*" (2000), 15 *B.F.L.R.* 515, at p. 532). In other words, the

key attributes that allow the common law to refer to beneficial ownership as being a proprietary interest are missing.

[48] According to the common law understanding of a trust, the legal owner or trustee owes a fiduciary duty to the equitable owner or beneficiary. The fiduciary relationship impresses the office of trustee with three fundamental duties: the trustee must act honestly and with reasonable skill and prudence, the trustee cannot delegate the office, and the trustee cannot personally profit from its dealings with the trust property or its beneficiaries (see *Valard*, at para. 17). This severely restricts what the trustee may do with trust property and creates a relationship significantly different from the one between a debtor and a creditor. For instance, while a debtor may attempt to reduce its debt or reach a compromise, a trustee cannot, since it must always act in the best interest of the beneficiary and cannot consider its own interests. Similarly, while a debtor is liable to a creditor until the debt is repaid, a trustee is not liable to a beneficial owner where property is lost, unless it was lost through a breach of the standard of care owed (see E. E. Gillese, *The Law of Trusts* (3rd ed. 2014), at p. 14). In the case of the deemed trust, however, Parliament did not create such a fiduciary relationship. Parliament expressly contemplated a potential compromise between Her Majesty and the debtor in s. 6(3) of the *CCAA*. In addition, the terms of the *ITA* do not require that the debtor actually keep the property subject to the deemed trust separate and use it solely for the benefit of Her Majesty. In fact, Her Majesty does not enjoy the benefit of Her interest in the property while the property is held by the debtor. Instead, Parliament

contemplated that the debtor would continue to use and dispose of the property subject to the trust for its own business purposes (see *First Vancouver*, at paras. 42-46).

[49] Another core attribute of beneficial ownership is certainty as to the property that is subject to the trust (see Gillese, at p. 39). Many deemed trusts fail to provide for certainty of subject matter. For instance, in *Henfrey*, the Court considered the deemed trust created by the British Columbia *Social Service Tax Act*, R.S.B.C. 1979, c. 388. Like s. 227(4.1) of the *ITA*, the *Social Service Tax Act* provided that tax collected but not remitted was deemed to be held in trust for Her Majesty. It further provided that unremitted amounts were deemed to be held separate and apart from and form no part of the assets or estate of the tax collector. While McLachlin J. found that the property was identifiable at the time the tax was collected, she noted that "[t]he difficulty in this, as in most cases, is that trust property soon ceases to be identifiable. The tax money is mingled" (p. 34). Therefore, she concluded that there was no trust under general principles of equity. The legislature's attempt to resolve this problem by deeming the amounts to be separate from and form no part of the tax debtor's property was merely a tacit acknowledgment that "the reality is that after conversion the statutory trust bears little resemblance to a true trust. There is no property which can be regarded as being impressed with a trust" (p. 34).

[50] In *First Vancouver*, this Court examined the nature of the interest created by s. 227(4.1) of the *ITA*. Writing for the Court, Iacobucci J. held that this provision creates a charge which "is in principle similar to a floating charge over all the assets of

the tax debtor in the amount of the default" (para. 40). He concluded that Parliament specifically intended to create a charge with fluidity, a charge that could readily float over all of the debtor's assets rather than attach to a particular one (para. 33). Parliament's intention was to capture any property that comes into the possession of the tax debtor whilst simultaneously allowing any asset to be alienated and the proceeds of disposition to be captured (para. 5).

[51] This lack of certainty as to the subject matter of the trust is even starker in the present case than in *Henfrey* or in *Sparrow Electric*, where there was certainty as to the assets until they were mingled. Section 227(4.1) purports to bring all assets owned by the debtor within its reach. Despite the wording of the section, this interest — one of the same nature as a "floating charge" — has no particular property to which it attaches. Without certainty of subject matter, equity cannot know which property the debtor has a fiduciary obligation to maintain in the beneficiary's interest and thus "[t]he notion of a trust without a *res* simply cannot be made sensible or coherent" (Wood and Reeson, at pp. 532-33 (footnote omitted); see also *Sparrow Electric*, at para. 31).

[52] Parliament's decision to avoid certainty of subject matter was an intentional modification to the deemed trust following this Court's decision in *Dauphin Plains Credit Union Ltd. v. Xyloid Industries Ltd.*, [1980] 1 S.C.R. 1182. In *Dauphin Plains*, the Court refused to enforce Her Majesty's claim because the Crown had failed to establish that the moneys purported to be deducted actually existed or were kept in

such a way as to be traceable (p. 1197). Traceability is another key aspect of a beneficial interest, since it allows the beneficial owner to enjoy the benefits of ownership, such as income from the property. It also ensures that the beneficial owner is responsible for the costs of ownership. By choosing not to attach Her Majesty's claim to any particular asset, Parliament has protected Her Majesty from the risks associated with asset ownership, including damage, depreciation and loss. I agree with Gonthier J., who, speaking of the predecessor to s. 227(4.1) (albeit in dissent), said that "this subsection is antithetical to tracing in the traditional sense, to the extent that it requires no link at all between the subject matter of the trust and the fund or asset which the subject matter is being traced into" (*Sparrow Electric*, at para. 37). Had Parliament wanted to confer a beneficial ownership interest upon Her Majesty, it would have had to impose these associated risks as well.

[53] For the same reason as in *Henfrey*, the statement that property is deemed to be removed from the debtor's estate is equally ineffective at preventing a judge from ordering super priorities over the debtor's property. Because the deemed trust does not attach to specific property and the debtor remains free to alienate any of its assets, no property is actually removed from the debtor's estate.

[54] This interpretation is supported by the existence of s. 227(4.2) of the *ITA*, which specifically anticipates other interests taking priority over the deemed trust (something that would be impossible if there were an ownership interest). It states that "[f]or the purposes of subsections 227(4) and 227(4.1), a security interest does not

include a prescribed security interest". In the *Income Tax Regulations*, C.R.C., c. 945, s. 2201(1), the Governor in Council has defined "prescribed security interest" as a registered mortgage "that encumbers land or a building, where the mortgage is registered . . . before the time the amount is deemed to be held in trust by the person". Therefore, in certain situations, mortgage holders take priority over Her Majesty.

[55] I reiterate that, without specific property to attach to, there can be no trust. The fact that s. 227(4.1) specifically anticipates that the character of assets will change over time and automatically releases any assets that the debtor chooses to alienate from the deemed trust means that Parliament had in mind something different from beneficial ownership in the common law sense of the word. I tend to agree with Noël J.A.'s assessment of s. 227(4.1): "The deemed trust mechanism, whether applied in Quebec or elsewhere, effectively creates in favour of the Crown a security interest . . ." (*Caisse populaire d'Amos*, at para. 46).

[56] Other scholars agree that s. 227(4.1) "merely secures payment or performance of an obligation" (R. J. Wood, "Irresistible Force Meets Immovable Object: *Canada v. Canada North Group Inc.*" (2020), 63 *Can. Bus. L.J.* 85, at p. 95; see also A. Duggan and J. Ziegel, "Justice Iacobucci and the Canadian Law of Deemed Trusts and Chattel Security" (2007), 57 *U.T.L.J.* 227, at pp. 245-46). Wood and Reeson reach the particularly damning conclusion that "[t]he concept of a trust is used in the legislation, but in virtually every respect the characteristics of a trust are lacking" and thus "the use of inappropriate legal concepts" has led to the creation of a "statutory

provision [that] is deeply flawed" (pp. 531-32). They "suspec[t] that the intention of the drafters was that Revenue Canada should obtain a charge on all the assets of the debtor", and they state that "the statutory deemed trust is nothing more than a legislative mechanism that is intended to create a non-consensual security interest in the assets of the employer" (p. 533).

[57] Nonetheless, for our purposes it is not necessary to conclusively determine whether the interest created by s. 227(4.1) should be characterized as a security interest. What is clear is that s. 227(4.1) does not create a beneficial interest that can be considered a proprietary interest. Like the deemed trust at issue in *Henfrey*, it "does not give [the Crown] the same property interest a common law trust would" (p. 35). Without attaching to specific property, creating the usual right to the enjoyment of property or the fiduciary obligations of a trustee, the interest created by s. 227(4.1) lacks the qualities that allow a court to refer to a beneficiary as a beneficial owner. Therefore, I do not accept the Crown's argument that Her Majesty has a proprietary interest in a debtor's property that is adequate to prevent the exercise of a supervising judge's discretion to order super-priority charges under s. 11 of the *CCAA* or any of the sections that follow it.

(2) Does Section 227(4.1) of the *ITA* Create a Super Priority That Conflicts With a Court-Ordered Super-Priority Charge?

[58] The Crown also refers to the part of s. 227(4.1) which states that the Receiver General shall be paid the proceeds of a debtor's property "in priority to all

such security interests", as defined in s. 224(1.3). In the Crown's view, court-ordered super-priority charges under s. 11 of the *CCAA* or any of the sections that follow it are security interests within the meaning of s. 224(1.3) and therefore Her Majesty's interest has priority over them.

[59] My colleagues Justices Brown and Rowe point to the legislative history of s. 227(4.1) as evidence that Parliament intended Her Majesty's deemed trust to have "absolute priority" over all other security interests (para. 201). In particular, they rely upon Justice Iacobucci's comment in *Sparrow Electric* that "it is open to Parliament to step in and assign absolute priority to the deemed trust" by using the words "shall be paid to the Receiver General in priority to any such security interest" (reasons of Brown and Rowe JJ., at para. 202, citing *Sparrow Electric,* at para. 112). They further rely upon the press release accompanying the amendments, which stated that the deemed trust was to have absolute priority.

[60] With respect, I disagree with this reasoning. *Sparrow Electric* dealt with a type of interest very different from the one before us now. In *Sparrow Electric*, this Court held that a fixed and specific charge over the tax debtor's inventory had priority over Her Majesty's deemed trust created by the *ITA*. Thus the purpose of the amendments was to "clarify that the deemed trusts for unremitted source deductions and GST apply whether or not other security interests have been granted in respect of the inventory or trade receivables of a business" (Department of Finance Canada, *Unremitted Source Deductions and Unpaid GST* (April 7, 1997), at p. 2). If Parliament

had intended that the deemed trust have absolute priority, it would not have enacted s. 227(4.2) at the same time. As noted above, s. 227(4.2) provides that "a security interest does not include a prescribed security interest", and thus specifically envisions that the deemed trust will not have absolute priority. In my view, by using the words "in priority to all such security interests" in s. 227(4.1), Parliament intended that the priority be absolute not over all possible interests, but only over security interests as defined in s. 224(1.3). What must therefore be determined is whether a court-ordered super-priority charge under the *CCAA* falls within that definition.

[61] Section 224(1.3) reads as follows:

> ***security interest*** means any interest in, or for civil law any right in, property that secures payment or performance of an obligation and includes an interest, or for civil law a right, created by or arising out of a debenture, mortgage, hypothec, lien, pledge, charge, deemed or actual trust, assignment or encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for . . . .

[62] This definition is expansive. However, the list of illustrative security interests makes it clear that a super-priority charge created under the *CCAA* cannot fall within its meaning. Court-ordered super-priority charges are utterly different from any of the interests listed. These super-priority charges are granted, not for the sole benefit of the holder of the charge, but to facilitate restructuring in furtherance of the interests of all stakeholders. In this way, they benefit the creditors as a group. The fact that Parliament chose to provide a list of examples whose nature is so unlike that of a court-ordered super-priority charge demonstrates that it must have had a very different type

of interest in mind when drafting s. 224(1.3). I could not agree more with Professor Wood about the limited class of interests that Parliament had in mind:

> [Court-ordered super-priority charges] are fundamentally different in nature from security interests that arise by way of agreement between the parties and from non-consensual security interests that arise by operation of law. Court-ordered charges are unlike conventional consensual and non-consensual security interests in that they are integrally connected to insolvency proceedings that operate for the benefit of the creditors as a group. Given the fundamentally different character of court-ordered charges, it would be reasonable to expect that they would be specifically mentioned in the ITA definition of a security interest if they were to be included. [Emphasis added; p. 98.]

[63] My colleagues Brown and Rowe JJ. allege that this interpretation of s. 224(1.3) is contrary to our Court's decision in *Caisse populaire Desjardins de l'Est de Drummond*, where Rothstein J. wrote that the provided examples "do not diminish the broad scope of the words 'any interest in property' (para. 15; see also para. 14). With respect, I disagree with my colleagues. As Justice Rothstein explained at para. 40, his comments were made in response to the argument that the list of examples of security interests was exhaustive. I agree with him that the list of examples provided is not exhaustive. However, the examples remain illustrative of the types of interests that Parliament had in mind and are clearly united by a common theme or class because Parliament employed a compound "means . . . and includes" structure to establish its definition: "*security interest* means any interest in, or for civil law any right in, property that secures payment or performance of an obligation and includes . . . ". In my view, this structure evidences Parliament's intent that the list have limiting effect, such that only the instruments enumerated and instruments that are similar in nature fall within

the definition. The critical difference between the listed security interests and super-priority charges ordered under s. 11 of the *CCAA* or any of the sections that follow it explains both why the latter are excluded from the list of specific instruments and why there can be no suggestion that they may be included in the broader term "encumbrance" at the end of that list. The *ejusdem generis* principle supports this position by limiting the generality of the final words on the basis of the narrow enumeration that precedes them (*National Bank of Greece (Canada) v. Katsikonouris*, [1990] 2 S.C.R. 1029, at p. 1040). All of the other instruments arise by agreement or by operation of law. Therefore, court-ordered super-priority charges under s. 11 or any of the sections that follow it are different in kind from anything on the list.

[64] Using the list of specific examples to ascertain Parliament's intent in this case is also consistent with the presumption against tautology. In *McDiarmid Lumber Ltd. v. God's Lake First Nation*, 2006 SCC 58, [2006] 2 S.C.R. 846, McLachlin C.J. defined this presumption in the following way:

> It is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain: Sullivan, at p. 158. Thus, "[e]very word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose" (p. 158). This principle is often invoked by courts to resolve ambiguity or to determine the scope of general words.

(Para. 36, quoting R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 158; see also *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20, [2006] 1 S.C.R. 715, at para. 45.)

[65] The *ITA* contains two definitions of "security interest", in s. 224(1.3) and s. 18(5). For the purposes of computing taxpayer income, Parliament chose to define "security interest" in s. 18(5) in nearly the same manner as in s. 224(1.3), but without listing the ten specific security instruments: "*security interest*, in respect of a property, means an interest in, or for civil law a right in, the property that secures payment of an obligation". The presumption against tautology means that we must presume that Parliament included the specific additional words in s. 224(1.3) because they "have a specific role to play in advancing the legislative purpose" (*Placer Dome*, at para. 45, quoting R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 159). Applying the presumption against tautology demonstrates that Parliament intended interpretive weight to be placed on the examples.

[66] To come back to *Caisse populaire Desjardins de l'Est de Drummond*, I agree with Rothstein J. that the definition of "security interest" in s. 224(1.3) of the *ITA* is expansive such that it "does not require that the agreement between the creditor and debtor take any particular form" (para. 15). However, I am of the view that there is a key restriction in this expansive definition. The definition focuses on interests created either by consensual agreement or by operation of law, and these types of interests are usually designed to protect the rights of a single creditor, usually to the detriment of other creditors. In that case, the Court was considering whether a right to compensation conferred on a single creditor by a contract entered into between that creditor and the debtor was a security interest within the meaning of s. 224(1.3). The situation at issue in that case was completely different than the one at issue in the present case. Indeed,

in the present case, the interest of the participants in the restructuring is created by a court order, not by an agreement or by operation of law. As I have said above, when a judge orders a super-priority charge in *CCAA* proceedings, it is quite a different type of interest as the *CCAA* restructuring process benefits all creditors and not one in particular.

[67] Finally, if Parliament had wanted to include court-ordered super-priority charges in the definition of "security interest", it would have said so specifically. Parliament must be taken to have legislated with the operation of the *CCAA* in mind. In the words of Professor Sullivan, "The legislature is presumed to know its own statute book and to draft each new provision with regard to the structures, conventions, and habits of expression as well as the substantive law embodied in existing legislation" (Sullivan (2014), at p. 422 (footnote omitted)). Given that, in *Indalex*, this Court has already found that granting super-priority charges is critical as "a key aspect of the debtor's ability to attempt a workout", one would expect Parliament to use clearer language where such a definition could jeopardize the operation of another one of its Acts. I am therefore in total disagreement with my colleagues Justices Brown and Rowe that "nothing in the definition of security interest in the *ITA* precludes the inclusion of an interest that is designed to operate to the benefit of all creditors" (para. 210). To the contrary, everything hints at priming charges being excluded from the definition of security interest.

[68] In conclusion, a court-ordered super-priority charge under the *CCAA* is not a security interest within the meaning of s. 224(1.3) of the *ITA*. As a result, there is no conflict between s. 227(4.1) of the *ITA* and the Initial Order made in this case. I therefore respectfully disagree with my colleague Justice Moldaver's suggestion that there may be a conflict between s. 11 of the *CCAA* and the *ITA* (para. 258). The Initial Order's super-priority charges prevail over the deemed trust.

C. *Was It Necessary for the Initial Order to Subordinate Her Majesty's Claim Protected by a Deemed Trust in This Case?*

[69] Finally, I must now identify the provision in which the Initial Order here should be grounded. While the initial order under consideration in *Indalex* was based on the court's equitable jurisdiction, in most instances, orders in *CCAA* proceedings should be considered an exercise of statutory power (*Century Services*, at paras. 65-66).

[70] As discussed above, a supervising court's authority to order super-priority charges is grounded in its broad discretionary power under s. 11 of the *CCAA* and also in the more specific grants of authority under ss. 11.2, 11.4, 11.51 and 11.52. Those provisions authorize the court to grant certain priming charges that rank ahead of the claims of "any secured creditor". While I have already concluded that Her Majesty does not have a proprietary interest as a result of Her deemed trust, it is less certain whether Her Majesty is a "secured creditor" under the *CCAA*. Professor Wood is of the view that Her Majesty is not a "secured creditor" under the *CCAA* by virtue of Her deemed trust interest; rather, ss. 37 to 39 of the *CCAA* create "two distinct approaches — one

that applies to a deemed trust, the other that applies when a statute gives the Crown the status of a secured creditor" (p. 96). Therefore, the ranking of a priming charge ahead of the deemed trust would fall outside the scope of the express priming charge provisions. I do not need to definitively determine if Her Majesty falls within the definition of "secured creditor" under the *CCAA* by virtue of Her trust. Instead, I would ground the supervising court's power in s. 11, which "permits courts to create priming charges that are not specifically provided for in the *CCAA*" (p. 98). I respectfully disagree with the suggestion of my colleagues Brown and Rowe JJ. that Professor Wood or any other author has suggested that s. 11 is limited by the specific provisions that follow it (para. 228). To the contrary, this Court said in *Century Services*, at paras. 68-70, that s. 11 provides a very broad jurisdiction that is not restricted by the availability of more specific orders.

[71] My colleagues Brown and Rowe JJ. also argue that "priming charges cannot supersede the Crown's deemed trust claim because they may attach *only* to *the property of the debtor's company*" (para. 223 (emphasis in original)). With respect, this argument cannot stand because, although ss. 11.2, 11.51 and 11.52 of the *CCAA* contain this restriction, there is no such restriction in s. 11. As Lalonde J. recognized, [TRANSLATION] "In exercising the authority conferred by the *CCAA*, including inherent powers, the courts have not hesitated to use this jurisdiction to intervene in contractual relationships between a debtor and its creditors, even to make orders affecting the rights of third parties" (*Triton Électronique*, at para. 31). There may be circumstances where it is appropriate for a court to attach charges to property that does not belong to the

debtor — if, for instance, this deemed trust were to be equivalent to a proprietary interest. However, that circumstance does not arise in this case because the property subject to Her Majesty's deemed trust remains the property of the debtor, as the deemed trust does not create a proprietary interest. My colleagues' reliance on s. 37(2) of the *CCAA* is similarly ill-founded. As I said earlier, s. 37(2) simply preserves the status quo. It does not alter Her Majesty's interest. It merely continues that interest and excludes it from the operation of s. 37(1), which would otherwise downgrade it to the interest of an ordinary creditor.

[72] That said, courts should still recognize the distinct nature of Her Majesty's interest and ensure that they grant a charge with priority over the deemed trust only when necessary. In creating a super-priority charge, a supervising judge must always consider whether the order will achieve the objectives of the *CCAA*. When there is the spectre of a claim by Her Majesty protected by a deemed trust, the judge must also consider whether a super priority is necessary. The record before us contains no reasons for the Initial Order, so this is difficult to determine in this case. Given that Her Majesty has been paid and that the case is in fact moot, it is not critical for us to determine whether the supervising judge believed it was necessary to subordinate Her Majesty's claim to the super-priority charges. Based on Justice Topolniski's reasons for denying the Crown's motion to vary the Initial Order, it is clear that she would have found that the super-priority charges deserved priority over Her Majesty's interest (paras. 100-104). However, I wish to say a few words on when it may be necessary for a supervising judge to subordinate Her Majesty's interest to super-priority charges.

[73] It may be necessary to subordinate Her Majesty's deemed trust where the supervising judge believes that, without a super-priority charge, a particular professional or lender would not act. This may often be the case. On the other hand, I agree with Professor Wood that, although subordinating super-priority charges to Her Majesty's claim will often increase the costs and complexity of restructuring, there will be times when it will not. For instance, when Her Majesty's claim is small or known with a high degree of certainty, commercial parties will be able to manage their risks and will not need a super priority. After all, there is an order of priority even amongst super-priority charges, and therefore it is clear that these parties are willing to have their claims subordinated to some fixed claims. A further example of where different considerations may be in play is in so-called liquidating *CCAA* proceedings. As this Court recently recognized, *CCAA* proceedings whose fundamental objective is to liquidate — rather than to rescue a going concern — have a legitimate place in the *CCAA* regime and have been accepted by Parliament through the enactment of s. 36 (*Callidus Capital*, at paras. 42-45). Liquidating *CCAA* proceedings often aim to maximize returns for creditors, and thus the subordination of Her Majesty's interest has less justification beyond potential unjust enrichment arguments.

VI. Disposition

[74] I would dismiss the appeal with costs in this Court in accordance with the tariff of fees and disbursements set out in Schedule B of the *Rules of the Supreme Court of Canada*, SOR/2002-156.

The reasons of Karakatsanis and Martin JJ. were delivered by

KARAKATSANIS J. —

I. Overview

[75] When a company seeks to restructure its affairs in order to avoid bankruptcy, the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (*CCAA*), allows the court to order charges in favour of parties that are necessary to the restructuring process: lenders who provide interim financing, the monitor who administers the company's restructuring, and directors and officers who captain the sinking ship (among others). These charges, often referred to as "priming charges", are meant to encourage investment in the company as it undergoes reorganization. A company's reorganization, as an alternative to the devastating effects of bankruptcy, serves the public interest by benefitting creditors, employees, and the health of the economy more generally.

[76] In this case, the *CCAA* judge ordered priming charges over the estates of Canada North Group and six related companies (Debtor Companies) in favour of an interim lender, the monitor, and directors. Property of two of the Debtor Companies, however, was also subject to a deemed trust in favour of the Crown, under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (*ITA*), for unremitted source deductions consisting of employees' income tax, Canada Pension Plan contributions, and

employment insurance premiums. While this appeal is moot because there are sufficient assets to satisfy both the Crown's deemed trust claim and the priming charges, this Court is asked to determine which has priority in the restructuring: the priming charges under the *CCAA* or the deemed trust under the *ITA*.

[77] Section 227(4.1) of the *ITA* provides that, when an employer fails to remit source deductions to the Crown, a deemed trust attaches to the property of the employer to the extent of the unremitted source deductions. The deemed trust operates "notwithstanding any security interest in such property" and "[n]otwithstanding . . . any other enactment of Canada". Sections 11.2, 11.51 and 11.52 of the *CCAA* give the court authority to order priming charges over a company's property in favour of interim lenders, directors and officers, and estate administrators. Priming charges can rank ahead of any other secured claim. Read on their own, these provisions appear to give different parties super-priority in an insolvency. This issue of statutory interpretation has been described as the collision of an unstoppable force with an immoveable object (R. J. Wood, "Irresistible Force Meets Immovable Object: *Canada v. Canada North Group Inc.*" (2020), 63 *Can. Bus. L.J.* 85).

[78] The appellant, the Crown, argues that s. 227(4.1) of the *ITA* creates a proprietary right in the Crown because, through the mechanism of a deemed trust, it gives the Crown beneficial ownership of the amount of the unremitted source deductions. In other words, that *amount* is the Crown's property and a *CCAA* judge

cannot, therefore, order a charge over it; it should be taken out of the estate and can play no role in the restructuring process.

[79] In contrast, the respondents argue that s. 227(4.1) creates a security interest in the Crown squarely contemplated by ss. 11.2, 11.51 and 11.52 of the *CCAA*. They further submit that there is no conflict between the relevant provisions because the policies underlying both Acts can be harmonized in favour of giving effect to the *CCAA* provisions.

[80] For the reasons below, I conclude that there is no conflict between the *ITA* and *CCAA* provisions. The right that attaches to "beneficial ownership" under s. 227(4.1) of the *ITA* must be interpreted in the specific statutory context in which it arises. Here, the Crown's right to unremitted source deductions in a *CCAA* restructuring is protected by the requirement that the plan of compromise pay the Crown in full. Because I do not conclude that the Crown's interest fits within the relevant statutory definition of "secured creditor" under the *CCAA*, it is not captured by the court's authority to order priming charges under ss. 11.2, 11.51 and 11.52 of the *CCAA*. However, in my view, the broad discretionary power under s. 11 of the *CCAA* permits a court to rank priming charges ahead of the Crown's deemed trust for unremitted source deductions. This conclusion harmonizes the purposes of both federal statutes. I would dismiss the appeal.

II. Facts

[81] In July 2017, the Court of Queen's Bench of Alberta issued an order granting the Debtor Companies protection under the *CCAA* (Alta. Q.B., No. 1703-12327, July 5, 2017 (Initial Order)). The Initial Order provided for priming charges in the following order of priority: (1) an Administration Charge of $500,000 in favour of the court-appointed Monitor, Ernst & Young Inc.; (2) an Interim Lender's Charge of $1,000,000 in favour of the interim lender, Business Development Bank of Canada (BDBC); and (3) a Directors' Charge of $150,000 (together, Priming Charges). The Interim Lender's Charge was later increased to $3,500,000 and the Administration Charge to $950,000.

[82] Paragraph 44 of the Initial Order provided that the Priming Charges have priority over the claims of secured creditors:

> Each of the Directors' Charge, Administration Charge and the Interim Lender's Charge . . . shall constitute a charge on the Property and subject always to section 34(11) of the CCAA such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise . . . in favour of any Person.

[83] Paragraph 46 of the Initial Order provided that the Priming Charges "shall not otherwise be limited or impaired in any way by . . . (d) the provisions of any federal or provincial statutes".

[84] At the time of the Initial Order, two of the Debtor Companies had failed to remit source deductions and owed the Crown $685,542.93. The Crown applied to vary

the Priming Charges in the Initial Order on the basis that paras. 44 and 46(d) failed to recognize the Crown's legislated interest in unremitted source deductions. The Crown argued that s. 227(4.1) of the *ITA*, s. 23(4) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (*CPP*), and s. 86(2.1) of the *Employment Insurance Act*, S.C. 1996, c. 23 (*EIA*), require the Crown's claims for unremitted source deductions to have priority over the claims of all other creditors of a debtor, notwithstanding any other federal statute, including the *CCAA*. In these reasons, I will only refer to s. 227(4.1) of the *ITA* as the relevant *ITA*, *CPP* and *EIA* provisions are identical and the latter two statutes cross-reference the *ITA*.

III. Decisions Below

A. *Court of Queen's Bench of Alberta, 2017 ABQB 550, 60 Alta. L.R. (6th) 103 (Topolniski J.)*

[85] The application judge held that court-ordered priming charges under ss. 11.2, 11.51 and 11.52 of the *CCAA* have priority over the Crown's deemed trust for unremitted source deductions. First, she concluded that the Crown's deemed trust under s. 227(4.1) of the *ITA* creates a security interest rather than a proprietary interest because the definition of "security interest" in the *ITA* includes an interest created by a deemed or actual trust, and it would be inconsistent to interpret the Crown's interest under s. 227(4.1) contrary to its enabling statute. She also reasoned that the deemed trust is a security interest because it lacks certainty of subject matter and is therefore not a true trust.

[86] Second, the application judge concluded that s. 227(4.1) of the *ITA* and ss. 11.2, 11.51 and 11.52 of the *CCAA* are not inconsistent because any conflict can be avoided by interpretation. She reasoned that the policy objectives of both Acts have to be respected because they were enacted by the same government. On the one hand, the collection of source deductions is at the heart of the *ITA*. On the other, the *CCAA* aims to facilitate business survival. The application judge concluded that, without the court's ability to order priming charges, interim lending "would simply end", along with "the hope of positive *CCAA* outcomes" (para. 102). The goals of both Acts can therefore only be achieved if priority is given "to those charges necessary for restructuring", while the deemed trust ranks in priority to all other secured creditors (para. 112).

B. *Court of Appeal of Alberta, 2019 ABCA 314, 93 Alta. L.R. (6th) 29 (Rowbotham and Schutz JJ.A., Wakeling J.A. Dissenting)*

[87] A majority of the Court of Appeal dismissed the Crown's appeal. It agreed with the application judge that the Crown's deemed trust under s. 227(4.1) of the *ITA* creates a security interest rather than a proprietary interest. It also agreed that the Crown's position failed to reconcile the objectives of the *ITA* and *CCAA*, and given the importance of interim lending, concluded that absurd consequences could follow if the Crown's position prevailed.

[88] Wakeling J.A. disagreed. He concluded that s. 227(4.1) of the *ITA* makes two unequivocal statements: first, that the Crown is the beneficial owner of the debtor's property to the extent of the unremitted source deductions; and second, that this amount

must be paid to the Crown notwithstanding the security interests of any other secured creditors, including, in his opinion, the holders of a priming charge. As a result, it was unnecessary to reconcile policy objectives. In his view, the notwithstanding clause in s. 227(4.1) was conclusive because the relevant *CCAA* provisions lacked the same language. As a result, there was "no need to look beyond the four corners of s. 227(4.1) to determine the scope of the unassailable priority it creates" (para. 135). Finally, Wakeling J.A. noted that there is perfect correlation between the purpose of the *ITA* and the plain meaning of s. 227(4.1).

IV. Parties' Submissions

A. *The Appellant the Crown*

[89] The Crown's submissions before this Court echo the dissent at the Court of Appeal: the text of s. 227(4.1) unequivocally states that unremitted source deductions become the property of the Crown. The Crown argues that the plain meaning of s. 227(4.1) aligns with its purpose, which is to protect the largest source of government revenue.

[90] The Crown makes two principal submissions. First, it submits that the Crown's interest under s. 227(4.1) of the *ITA* is a proprietary interest rather than a security interest because the text of s. 227(4.1) causes the unremitted source deductions to become the property of the Crown. There is no need to rely on the "notwithstanding clause" in s. 227(4.1) because the *ITA* and *CCAA* provisions work harmoniously; the

priming charges can only attach to a company's property and s. 227(4.1) provides that the unremitted source deductions are beneficially owned by the Crown.

[91] Second, the Crown submits in the alternative that, even if its interest is a security interest, it ranks ahead of the priming charges. This is because a priming charge under the *CCAA* is a security interest within the meaning of the *ITA*, and s. 227(4.1) specifically states that the deemed trust ranks ahead of all other security interests.

B. *The Respondent Business Development Bank of Canada*

[92] The respondent BDBC, urges this Court to follow the approach taken by the courts below. It submits that the Crown's interest under the deemed trust is a security interest because (1) the enabling statute, the *ITA*, defines a deemed trust as a security interest; (2) this Court, in *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720, characterized the deemed trust as a "floating charge", which is a security interest; and (3) the opposite conclusion, that it is a proprietary interest, would be at odds with commercial reality. As the definition of "secured creditor" in the *CCAA* includes the holder of a deemed trust, that Act contemplates that a priming charge can rank ahead of the Crown's deemed trust. Thus, ss. 11.2, 11.51 and 11.52 of the *CCAA* contemplate that a priming charge can rank ahead of the Crown's deemed trust.

C. *The Respondent Ernst & Young, in its Capacity as Monitor*

[93] Both BDBC and Ernst & Young (together, Respondents) submit that the Crown's deemed trust is a security interest and that the statutes can be interpreted harmoniously to avoid a conflict. The Monitor submits that a court-ordered priming charge is not a security interest within the meaning of s. 227(4.1) of the *ITA* because it is not specifically listed in the definition of security interest under the *ITA*, and as a taxing statute, the *ITA* requires a strict, textual approach to interpretation.

[94] The Monitor also highlights that the Crown is a unique creditor because it has immediate information available to it respecting remittance and can certify and pursue amounts owing immediately.

V. Issue

[95] The issue on appeal is whether court-ordered priming charges under the *CCAA* can rank ahead of the Crown's deemed trust for unremitted source deductions, as created by s. 227(4.1) of the *ITA* and related provisions of the *CPP* and *EIA*. It is clear from the wording of s. 227(4.1) of the *ITA* that, if there is any conflict with a provision from another Act, s. 227(4.1) is to prevail. Accordingly, this appeal turns on whether, and to what extent, the *CCAA* regime conflicts with s. 227(4.1) of the *ITA*. In answering that question, I proceed in four steps:

1. What rights does s. 227(4.1) of the *ITA* confer on the Crown in respect of unremitted source deductions?

2. How is the Crown's deemed trust for unremitted source deductions treated in Parliament's insolvency regime?

3. Do ss. 11.2, 11.51 and 11.52 of the *CCAA* permit the court to rank priming charges ahead of the Crown's deemed trust for unremitted source deductions?

4. If not, does s. 11 of the *CCAA* allow the court to rank priming charges ahead of the Crown's deemed trust for unremitted source deductions?

VI. Analysis

A. *What Rights Does Section 227(4.1) of the ITA Confer on the Crown in Respect of Unremitted Source Deductions?*

(1) General Scheme and Background of Sections 227(4) and 227(4.1) of the *ITA*

[96] Section 153(1) of the *ITA* requires employers to deduct and withhold amounts from their employees' wages (source deductions) and remit those amounts to the Receiver General by a specified due date. When source deductions are made, s. 227(4) deems that they are held separate and apart from the property of the employer and from property held by any secured creditor of the employer, notwithstanding any security interest in that property. Source deductions are deemed to be held in trust for Her Majesty for payment by the specified due date.

[97] If source deductions are not paid by the specified due date, s. 227(4.1) extends the trust in s. 227(4). It deems that a trust attaches to the employer's property to the extent of any unremitted source deductions; that the trust existed from the moment the source deductions were made; and that the trust did not form part of the estate or property of the employer from the moment the source deductions were made (all regardless of whether the employer's property is subject to a security interest). It also deems that, to the extent of any unremitted source deductions, the employer's property is property "beneficially owned" by the Crown, notwithstanding any security interest in the employer's property:

> **(4.1)** Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person and property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for a security interest (as defined in subsection 224(1.3)) would be property of the person, equal in value to the amount so deemed to be held in trust is deemed
>
> > **(a)** to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, and
> >
> > **(b)** to form no part of the estate or property of the person from the time the amount was so deducted or withheld, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to such a security interest
>
> and is property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

[98] The *ITA* defines "security interest" in s. 224(1.3):

> ***security interest*** means any interest in, or for civil law any right in, property that secures payment or performance of an obligation and includes an interest, or for civil law a right, created by or arising out of a debenture, mortgage, hypothec, lien, pledge, charge, deemed or actual trust, assignment or encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for . . . .

[99] As emphasized by the Crown, ss. 227(4) and 227(4.1) were amended to their current form — excerpted above — to reverse the effect of this Court's decision in *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411. The Crown submits that, in explicitly reversing *Sparrow Electric*'s result, Parliament meant to always give the Crown super-priority in an insolvency. I do not agree that such a broad conclusion can be drawn from this legislative history. In *Sparrow Electric*, the issue was who, between a lending bank and the Crown, had priority in the debtor's bankruptcy. The bank had a general security agreement over all of the debtor's property, which it entered into several months before successfully petitioning the debtor into bankruptcy. While the debtor also owed the Crown $625,990.86 in unremitted source deductions at the time of the bankruptcy, the first instance of non-remittance to the Crown was *after* the bank entered its general security agreement.

[100] Iacobucci J., writing for a majority of the Court, held in favour of the bank. At that time, the deemed trust was worded differently, triggering only upon an event of "liquidation, assignment, receivership or bankruptcy", and the amount of the unremitted source deductions was only deemed to be held "separate from and form no

part of the estate in liquidation, assignment, receivership or bankruptcy" (para. 13 (emphasis added)). The majority therefore concluded that the deemed trust did not attach to the debtor's property because, at the relevant time, that property was already "legally the [bank's]" (para. 98). Because the bank had a fixed and specific charge over all of the debtor's property, there was nothing left for the trust to attach to. The trust could not be effective unless there was some unencumbered asset in the bankruptcy out of which the trust could be deemed (para. 99).

[101] After *Sparrow Electric*, Parliament amended the deemed trust to ensure that, in a case like *Sparrow Electric*, the deemed trust attached notwithstanding any security interest held in the debtor's property (*First Vancouver*, at para. 27). As Iacobucci J. explained in *First Vancouver*, Parliament intended "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" (para. 28).[1]

[102] In this appeal, the Crown argues that a court-ordered priming charge under the *CCAA* is a security interest for the purposes of the Crown's deemed trust. I agree that the definition of "security interest" in s. 224(1.3) of the *ITA* is broad, capturing

[1] It bears noting, however, that ss. 227(4) and 227(4.1) of the *ITA* do not give the Crown priority over all creditors. They explicitly carve out an exception for the rights of unpaid suppliers (*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 81.1) and the rights of farmers, fisherman, and aquaculturists (s. 81.2). In addition, s. 227(4.2) of the *ITA* carves out an exception for a prescribed security interest, defined in the *Income Tax Regulations*, C.R.C., c. 945, s. 2201. Broadly, a prescribed security interest is a mortgage in land or a building which is registered before the failure to remit the source deductions at issue (Regulatory Impact Analysis Statement, SOR/99-322, *Canada Gazette*, Part II, vol. 133, No. 17, August 18, 1999, at pp. 2041-42).

"any interest in . . . property that secures payment or performance of an obligation and includes an interest . . . created by or arising out of a . . . charge . . ., however or whenever arising, created, deemed to arise or otherwise provided for". However, Wood makes the observation that court-ordered charges are fundamentally different in nature from the security interests that arise by consensual agreement or by operation of law enumerated in s. 224(1.3) because "they are integrally connected to insolvency proceedings that operate for the benefit of the creditors as a group" (Wood (2020), at p. 98). As a result, he reasons that "it would be reasonable to expect that they would be specifically mentioned in the ITA definition of security interest if they were to be included" (p. 98).

[103] While s. 227(4.1) undeniably operates notwithstanding any security interest — and priming charge — over the debtor's property, the legislative history post-*Sparrow Electric* says nothing about the Crown's specific right to unremitted source deductions, pursuant to the deemed trust, when a company undergoes restructuring under the *CCAA*. Even if, as the Crown insists, a priming charge under the *CCAA* is a security interest for the purposes of the Crown's deemed trust (and I do not settle that debate in these reasons), that does not define what *rights* the Crown has, in a *CCAA* restructuring, pursuant to its deemed trust. This Court has never considered how s. 227(4.1) of the *ITA* interacts with the *CCAA* regime in light of the seminal insolvency decisions in *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, and *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271. This appeal calls on this Court to do so.

(2) The Right of Beneficial Ownership in Section 227(4.1) of the *ITA*

[104] The Crown argues that s. 227(4.1) creates a proprietary right in the Crown because it gives the Crown beneficial ownership of the amount of the unremitted source deductions. Because this is an *ownership* right, the amount of the unremitted source deductions is taken out of the debtor's estate, effectively giving the Crown super-priority. In other words, the Crown agrees with the dissent in the Court of Appeal: that property is the Crown's property and a *CCAA* judge cannot order a charge over it. The Respondents, in line with the Court of Appeal majority, submit that s. 227(4.1) creates a security interest and can therefore be subordinated to a priming charge under the *CCAA*.

[105] These submissions rely heavily on characterizing the Crown's interest as either a "security interest" or as "proprietary" in nature. However, in my view, defining an entitlement as one or the other does not resolve the issues on appeal because neither characterization has essential features in the abstract. Rather, a statutory entitlement takes its character from the statutory provision. General concepts of "proprietary right" and "security interest" — or of "property," "trust" and "beneficial ownership" — are of limited assistance in this analysis.

[106] This Court has noted that property is often understood as a "bundle of rights" and obligations (*Saulnier v. Royal Bank of Canada*, 2008 SCC 58, [2008] 3 S.C.R. 166, at para. 43). Depending on which rights someone holds, their "bundle of rights" can be viewed as a weak or robust proprietary interest. For this reason, the

holder of a security interest has been described as having a proprietary right in its security. In *Sparrow Electric*, for example, both Iacobucci J., writing for the majority, and Gonthier J., writing for the dissent, explained the secured creditor in that case as having a proprietary right in, and effectively owning, the debtor's property that secured its debt (paras. 42 and 98).

[107] Similarly, Ronald C. C. Cuming, Catherine Walsh and Roderick J. Wood state that, in the context of personal property security legislation, a secured creditor holds a proprietary right in collateral. This is because, for these authors, "[t]he defining characteristic of a proprietary right . . . is that it is . . . enforceable against the world", and the right of a secured creditor with a perfected security interest is enforceable against the world (*Personal Property Security Law* (2nd ed. 2012), at p. 613). Without an explanation for what the terms mean in a particular context, it is difficult to draw any conclusion from characterizing something as one or the other. (While there is a clear difference between a right *in rem* (available against the world at large) and a right *in personam* (available against a determinate set of individuals), whether the term "proprietary right" means a "right *in rem*" or the term "security interest" means a "right *in personam*" depends upon the statutory context. In any event, the submissions before this Court were not framed in these terms).

[108] This Court explained in *Saulnier* that, when analyzing the definition of property under a statute, there is little use in considering property in the abstract or even under the common law because "Parliament can and does create its own lexicon" for

particular purposes (para. 16; see also *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny*, 2009 SCC 49, [2009] 3 S.C.R. 286, at paras. 11-12). Indeed, "interests unknown to the common law may be created by statute" (*Wotherspoon v. Canadian Pacific Ltd.*, [1987] 1 S.C.R. 952, at p. 999, citing Ross J. in *Town of Lunenburg v. Municipality of Lunenburg*, [1932] 1 D.L.R. 386 (N.S.S.C.), at p. 390). As a result, caution is required before importing definitions from other contexts, relying on statements or description from cases out of context, and employing general concepts like "proprietary right" and "security interest". It is crucial in this appeal to stay within the bounds of the statutory provisions being interpreted.

[109] Section 227(4.1) states that the amount of the unremitted source deductions is "beneficially owned" by the Crown. However, it does not follow that this right of beneficial ownership is absolute or that the term imports specific rights that flow from it. This is not a case where Parliament has used a term with an established legal meaning — leading to an inference that Parliament has given the term that meaning in the statute in question (*R. v. D.L.W.*, 2016 SCC 22, [2016] 1 S.C.R. 402, at para. 20). The concept of beneficial ownership does not have a precise doctrinal meaning in the common law of Canada, and it does not exist in the civil law of Quebec. It is also not used consistently in the *ITA*. The meaning of "beneficially owned" in s. 227(4.1) can only be understood in the specific, relevant statutory context in which it arises. To that end, while s. 227(4.1) uses the mechanism of a trust and confers some type of beneficial ownership on the Crown, it modifies even those features of beneficial ownership that are widely associated with it under the common law.

[110] As a federal statute with national application, the *ITA* rests on the private law of the provinces. This relationship of complementarity is codified in s. 8.1 of the *Interpretation Act*, R.S.C. 1985, c. I-21. However, the federal statute can derogate and dissociate itself from the private law when it legislates on a matter that falls within its jurisdiction: see M. Lamoureux, "*The Harmonization of Tax Legislation Dissociation: A Mechanism of Exception Part III*" (online). As I shall explain, the trust created by s. 227(4.1) disassociates itself from the requirements of a trust in both the provincial common law and civil law.

[111] I proceed as follows: (1) there is no settled doctrinal meaning of the term beneficial ownership; and (2) s. 227(4.1) does not create a true trust because there is no certainty of subject matter. A lack of certainty of subject matters means that the Crown cannot, through tracing, claim appreciation of trust value and the trustee (tax debtor) is free to dispose of trust property. These features render the Crown's beneficial ownership weaker than generally understood at common law. The result is an interest "unknown to the common [or civil] law". We cannot, therefore, look at s. 227(4.1) in isolation to define the way in which the Crown's "beneficially owned" property under s. 227(4.1) should be treated in an insolvency — that clarification must come from, and indeed does come from, Parliament's insolvency legislation.

(i) No Settled Doctrinal Meaning

[112] Beneficial ownership is most commonly used in the law of trusts to broadly distinguish between who has legal title to property (the trustee) and who has beneficial

enjoyment of that property (the beneficiary). *Black's Law Dictionary* (11th ed. 2019), for example, defines a "beneficial owner" as "[o]ne recognized in equity as the owner of something because use and title belong to that person, even though legal title may belong to someone else, esp. one for whom property is held in trust" (p. 1331).

[113] Despite this common usage, there is no clear definition of the rights flowing from the term "beneficial ownership" under the common law (see, e.g., C. Brown, "Beneficial Ownership and the Income Tax Act" (2003), 51 *Can. Tax J.* 401; M. D. Brender, "Beneficial Ownership in Canadian Income Tax Law: Required Reform and Impact on Harmonization of Quebec Civil Law and Federal Legislation" (2003), 51 *Can. Tax J.* 311, at p. 316). As well, the *Civil Code of Québec* does not have a concept of beneficial ownership (see *Canada (Attorney General) v. Caisse populaire d'Amos*, 2004 FCA 92, 324 N.R. 31, at paras. 48-49).

[114] The term itself is also contentious within the academy, giving rise to a heated debate about whether a trust beneficiary should be thought of as an *owner* at all (see, e.g., D. W. M. Waters, "The Nature of the Trust Beneficiary's Interest" (1967), 45 *Can. Bar Rev.* 219; L. D. Smith, "Trust and Patrimony" (2008), 38 *R.G.D.* 379; B. McFarlane and R. Stevens, "The nature of equitable property" (2010), 4 *J. Eq.* 1; J. E. Penner, "The (True) Nature of a Beneficiary's Equitable Proprietary Interest under a Trust" (2014), 27 *Can. J.L. & Jur.* 473; Brender, at p. 316). The conventional view is that a trust beneficiary only has a right *in personam* against the trustee to enforce the terms of the trust, which is not a proprietary right in the trust property. A different view

is that a trust beneficiary has equitable ownership of trust property, despite the existence of an intermediary with legal title (Brown, at pp. 413-14). Some suggest that there is a midway approach in Canada: depending on the context, a beneficiary's right is either a personal right against the trustee or a proprietary right in trust property (Brender, at p. 316).

[115] In "Beneficial Ownership and the Income Tax Act", Brown notes the debate in the academy and analyzes how the terms "beneficial ownership", "beneficial owner", and "beneficially owned" are used in the *ITA*. After examining 26 provisions invoking beneficial ownership in the *ITA*, she concludes that its meaning is "no longer obvious" (p. 452).

[116] This Court need not resolve the ongoing debate. However, it serves to highlight that "the real question is what is the nature of a beneficiary's interest in a trust when considered in the context of the legislation that is sought to be applied" (Brown, at p. 419). In the *ITA* context, Brown concludes that "the matter of what 'beneficial ownership' means for tax purposes must be settled within the structure of the ITA" (p. 435). Further, whether the beneficiary's rights within the *ITA* are *in rem* or *in personam* will often depend on a combination of factors, like the wording of the deeming provision, private law concepts, case law, and tax policy (see pp. 435-36).

[117] In my view, the works cited above belie the notion that s. 227(4.1) of the *ITA*, and its use of the concept of beneficial ownership, is unequivocal in meaning. Not only is there no settled definition of beneficial ownership under the common law, there

also appears to be no consistent meaning of the term in the *ITA*. And the concept does not exist in Quebec civil law. The meaning of beneficial ownership when used in a statute must always be construed within the context of the particular provision in which it occurs. What is necessary is careful scrutiny of s. 227(4.1), and specifically, the right of beneficial ownership it gives the Crown, particularly in the context of a statutory deemed trust with no specific subject matter.

(ii) Section 227(4.1) Does Not Create a "True" Trust

[118] A statutory deemed trust is a unique legal vehicle. Unlike an express trust, which can be created by contract, will, or oral and written declarations, and unlike a trust that arises by operation of law, a statutory deemed trust "is a trust that legislation brings into existence by constituting certain property as trust property and a certain person as the trustee of that property" (*Guarantee Company of North America v. Royal Bank of Canada*, 2019 ONCA 9, 144 O.R. (3d) 225, at para. 18; see also A. Grenon, "Common Law and Statutory Trusts: In Search of Missing Links" (1995), 15 *Est. & Tr. J.* 109, at p. 110).

[119] Being a creature of statute, a statutory deemed trust does not have to fulfill the ordinary requirements of trust law, namely, certainty of intention, certainty of subject matter, and certainty of object (*British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24; see also *Friends of Toronto Public Cemeteries Inc. v. Public Guardian and Trustee*, 2020 ONCA 282, 59 E.T.R. (4th) 174, at para. 163).

[120] Section 227(4.1), for example, does not fulfill the ordinary requirements of the common law of trusts (see R. J. Wood and R. T. G. Reeson, "The Continuing Saga of the Statutory Deemed Trust: *Royal Bank v. Tuxedo Transportation Ltd.*" (2000), 15 *B.F.L.R.* 515, at pp. 522-24). There is no identifiable trust property and therefore no certainty of subject matter (*Henfrey*, at p. 35). To use the terminology in *Henfrey*, s. 227(4.1) is not a "true" trust (p. 34). Moreover, without specific property being transferred to the trust patrimony, s. 227(4.1) does not satisfy the requirements of an autonomous patrimony contemplated by the *Civil Code of Québec* in arts. 1260, 1261 and 1278: see *Bank of Nova Scotia v. Thibault*, 2004 SCC 29, [2004] 1 S.C.R. 758, at para. 31.

[121] This departure from a standard requirement of trust formation — certainty of subject matter — results in at least two features of s. 227(4.1) that are at odds with the operation of ordinary trusts. First, through equitable tracing, the beneficiary of a trust can claim appreciation in trust value, but this advantage is impossible without identifiable trust property (*Rawluk v. Rawluk*, [1990] 1 S.C.R. 70, at pp. 79 and 92-93; *Foskett v. McKeown*, [2001] 1 A.C. 102 (H.L.), at pp. 129-31; L. D. Smith, *The Law of Tracing* (1997), at pp. 347-48). The tracing mechanism in s. 227(4.1) provides that the value of any unremitted source deductions continues to survive in the assets remaining in the tax debtor's hands. Section 227(4.1) traces the *value* of the unremitted source deductions, necessarily capping the Crown's right at that value. In *Sparrow Electric*, Gonthier J. explained that such a tracing mechanism is "antithetical to tracing in the traditional sense, to the extent that it requires no link at all between the subject matter

of the trust and the fund or asset which the subject matter is being traced into" (para. 37; see also Wood and Reeson, at p. 518; Smith (1997), at pp. 310-20 and 347-48; R. J. Wood, "The Floating Charge in Canada" (1989), 27 *Alta. L. Rev.* 191, at p. 221).

[122] While s. 227(4.1) gives the Crown beneficial ownership in the value of unremitted source deductions, it does not allow the Crown to claim more than the value of the source deductions. In other words, it gives the Crown the right of beneficial ownership without at least some of the advantages that beneficial ownership often entails.

[123] Second, a trustee cannot normally dispose of trust property in the ordinary course of the trustee's business. Section 227(4.1), however, allows the tax debtor to dispose of its property, conveying clear title to property subject to the trust.

[124] This was the point made by Iacobucci J. in *First Vancouver* when he likened the deemed trust in s. 227(4.1) to a floating charge. Because a floating charge is a security interest, the Respondents rely on Iacobucci J.'s analogy to argue that s. 227(4.1) only creates a security interest as opposed to a proprietary right. I disagree with the Respondents' submission — the limited analogy to a floating charge in that context cannot be relied on in this case to liken the Crown's interest to a security interest for the purposes of the *CCAA*.

[125] One of the issues in *First Vancouver* was whether the deemed trust in s. 227(4.1) continued to attach to property that had been sold by the tax debtor to a

third-party purchaser for value. The Court concluded that, in the event of a sale to a third party, "the trust property is replaced by the proceeds of sale of such property" (para. 40). This is because the deemed trust "does not attach specifically to any particular assets of the tax debtor so as to prevent their sale" and the tax debtor is thereby "free to alienate its property in the ordinary course" (para. 40). In this way, "the deemed trust is in principle similar to a floating charge over all the assets of the tax debtor" (para. 40). As a result, the deemed trust in s. 227(4.1) would not override the rights of third-party purchasers for value (para. 44).

[126] In short, the deemed trust in s. 227(4.1) clearly "anticipate[s] that the character of the tax debtor's property will change over time" (*First Vancouver*, at para. 41). In making these statements, Iacobucci J. did not, however, equate the deemed trust in s. 227(4.1) to a floating charge for all purposes. Otherwise, the trust would not attach until an event of crystallization, and s. 227(4.1) clearly contemplates that the trust attaches from the moment source deductions are made or withheld (see s. 227(4.1)(a) and (b); see also A. Duggan and J. Ziegel, "Justice Iacobucci and the Canadian Law of Deemed Trusts and Chattel Security" (2007), 57 *U.T.L.J.* 227, at p. 246; Wood (1989), at p. 195).

[127] The Court's limited analogy to a floating charge in *First Vancouver* helps explain why "beneficial ownership" in s. 227(4.1) again means something narrower than it does outside of that statutory context. The Crown's right of beneficial ownership does not prevent the trustee from disposing of trust property until the Canada Revenue

Agency (CRA) enforces the deemed trust (Canada Revenue Agency, *Tax collections policies* (online); see also *ITA*, ss. 222, 223(1) to (3), (5) and (6) and 224(1)). Freely disposing of trust property, including for one's own business purposes, is obviously not something a trustee can do under the common law.

[128] The Crown's reliance on s. 227(4.1)(b) of the *ITA* is misplaced for similar reasons. That clause specifies that the amount of the unremitted source deductions is deemed to "form no part of the estate or property of the person from the time the amount was so deducted or withheld". The Crown argues that this is further clarification that a *CCAA* judge cannot order a charge over that amount. Again, the deeming words of s. 227(4.1)(b) must be interpreted in the context of a trust without certainty of subject matter. To say that a certain *amount* does not form part of the debtor's estate or property reiterates that the Crown has an interest in that amount; it also clarifies that the debtor's interest in its estate is reduced by that amount. However, it does not change the *makeup* of the estate itself — it does not change the specific property that constitutes the debtor's estate. So long as the thing that is deemed not to form part of the debtor's estate or property is an amount or value of money rather than property with a specific subject matter, the debtor's estate remains unchanged and the debtor continues to have control over it.

[129] To conclude, beneficial ownership under s. 227(4.1) is a manipulation of the concept of beneficial ownership under ordinary principles of trust law. The logical

incoherence of s. 227(4.1) has prompted some scholars to criticize the provision as using inappropriate legal concepts. For example, Wood and Reeson state:

> . . . we believe that the design of [s. 227(4.1) of the *ITA*] is deeply flawed. . . . In large measure, the difficulties have as their source the use of inappropriate legal concepts. The concept of a trust is used in the legislation, but in virtually every respect the characteristics of a trust are lacking. The employer is not actually required to hold the money separate and apart, the usual fiduciary obligations of a trustee are absent, and the trust exists without a *res*. The law of tracing is similarly corrupted. The tracing exercise does not seek to identify a chain of substitutions, and a proprietary claim is available without the need for a proprietary base.
>
> . . .
>
> The misuse of the trust concept and the perversion of conventional tracing principles empty these concepts of meaning and will pose a threat to the rationality of the law. [Footnote omitted; pp. 531-33.]

[130] Others have similarly commented that, in substance, s. 227(4.1) only creates a security interest (J. S. Ziegel, "Crown Priorities, Deemed Trusts and Floating Charges: *First Vancouver Finance v. Minister of National Revenue*" (2004), 45 C.B.R. (4th) 244, at p. 248; Duggan and Ziegel, at pp. 239 and 245-46; M. J. Hanlon, V. Tickle and E. Csiszar, "Conflicting Case Law, Competing Statutes, and the Confounding Priority Battle of the Interim Financing Charge and the Crown's Deemed Trust for Source Deductions", in J. P. Sarra et al., eds., *Annual Review of Insolvency Law 2018* (2019), 897).

[131] Similarly, in *Caisse populaire Desjardins de Montmagny*, this Court rejected the Crown's argument that s. 222(3) of the *Excise Tax Act*, R.S.C. 1985, c. E-15 (*ETA*), which is nearly identical to s. 227(4.1) of the *ITA*, created a proprietary

right in the Crown (paras. 20-27). In that case, the debtor companies owed goods and services tax (GST) at the time of their respective bankruptcies. As the Crown's GST claims are unsecured in bankruptcy, the tax authorities took the position that amounts owing up to the date of the bankruptcy were the Crown's property. This Court unanimously disagreed with that position, concluding that the manner and mechanism of collecting GST was not consistent with a proprietary right (paras. 21-23).

[132] In any event, treating s. 227(4.1) as only effectively creating a security interest would not resolve the issues in this appeal without reference to how the Crown's interest arises under the *CCAA*. As noted above, broad general characterizations do not help in defining the specific attributes of this deemed trust. This Court must grapple with the fact that s. 227(4.1) is both structured as a security interest, like a charge, but also uses the mechanism of a deemed trust.

[133] The takeaway for this appeal is that the structure of s. 227(4.1), on its own, does not shed light on what to do with the Crown's beneficial ownership of unremitted source deductions in the insolvency regimes. Although the provision is clear that the Crown's right operates notwithstanding other security interests, the content of that right for the purposes of insolvency cannot be inferred solely from the text of the *ITA*. The unique statutory device manipulates private law concepts and cannot be carried through to a logical conclusion for the purposes of insolvency. For this reason, it is not surprising that the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (*BIA*) and the

CCAA specifically articulate how the deemed trust for unremitted source deductions should be treated.

[134] I now turn to that half of the equation: Parliament's insolvency regime.

B. *How Is the Crown's Deemed Trust for Unremitted Source Deductions Treated in Parliament's Insolvency Regime?*

(1) Parliament's Insolvency Regime

[135] There are three main statutes in Parliament's insolvency regime: the *CCAA*, which is at issue in this appeal, the *BIA* and the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11 (*WURA*). (The *WURA* covers insolvencies of financial institutions and certain other corporations, like insurance companies, and is not relevant to this appeal (s. 6(1); *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, at para. 39)). In *Century Services*, Deschamps J., writing for the majority, described insolvency as

> the factual situation that arises when a debtor is unable to pay creditors . . . . 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 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. [para. 12]

[136] The *BIA* contains both a liquidation regime and a restructuring regime (*Century Services*, at paras. 13 and 78). The liquidation regime provides a detailed statutory scheme of distribution whereby the debtor's assets are liquidated and distributed to creditors. In contrast, the restructuring regime allows debtors to make proposals to their creditors for the adjustment and reorganization of debt. The *BIA* is available to debtors, either natural or legal persons, owing $1000 or more (s. 43(1)).

[137] The *CCAA* is predominantly a restructuring statute and access is restricted to companies with liabilities in excess of $5 million (s. 3(1)). As Deschamps J. explained in *Century Services*, the purpose of the *CCAA* is remedial; it provides a means for companies to avoid the devastating social and economic consequences of commercial bankruptcies (paras. 15 and 59, quoting *Elan Corp. v. Comiskey* (1990), 1 O.R. (3d) 289 (C.A.), at p. 306, per Doherty J.A., dissenting). Liquidations do not only harm creditors, but employees and other stakeholders as well. The *CCAA* permits companies to continue to operate, "preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all" (*Century Services*, at para. 77). In enacting a restructuring statute, Parliament recognized that companies have more value as going concerns, especially since they are "key elements in a complex web of interdependent economic relationships" (para. 18).

[138] Due to its remedial nature, the *CCAA* is famously skeletal in nature (*Century Services*, at paras. 57-62). It does not "contain a comprehensive code that lays

out all that is permitted or barred" (para. 57, quoting *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, at para. 44, per Blair J.A.). Under s. 11, for example, the court may make any order that it considers appropriate in the circumstances, subject to the restrictions set out in the Act. Section 11 has been described as "the engine that drives this broad and flexible statutory scheme" (*Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), at para. 36; see also *9354-9186 Québec inc.*, at para. 48). Deschamps J. observed in *Century Services* that these discretionary grants of jurisdiction to the courts have been key in allowing the *CCAA* to adapt and evolve to meet contemporary business and social needs. Although judicial discretion must always be exercised in furtherance of the *CCAA*'s remedial purpose, it takes many forms and has proven to be flexible, innovative, and necessary (paras. 58-61; *U.S. Steel Canada Inc., Re*, 2016 ONCA 662, 402 D.L.R. (4th) 450, at para. 102).

[139] This is in contrast to the liquidation regime in the *BIA*, which has slightly different purposes. In *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, Gonthier J. explained that bankruptcy serves two goals: it "ensure[s] the equitable distribution of a bankrupt debtor's assets among the estate's creditors *inter se* [and it ensures] the financial rehabilitation of insolvent individuals" (para. 7; see also *9354-9186 Québec inc.*, at para. 46). Similarly, Sarra and Houlden and Morawetz JJ. describe the purposes of the *BIA* as permitting both "an honest debtor, who has been unfortunate, to secure a discharge so that he or she can make a fresh start and resume his or her place in the business community" and "the orderly and

fair distribution of the property of a bankrupt among his or her creditors on a *pari passu* basis" (*The 2020-2021 Annotated Bankruptcy And Insolvency Act* (2020), at p. 2).

[140] To realize its goals, the *BIA* is strictly rules-based and has a comprehensive scheme for the liquidation process (*Century Services*, at para. 13; *Husky Oil*, at para. 85). It "provide[s] an orderly mechanism for the distribution of a debtor's assets to satisfy creditor claims according to predetermined priority rules" (*Century Services*, at para. 15). The *BIA*'s comprehensive nature ensures, among other things, that there is a single proceeding in which creditors are placed on an equal footing and know their rights. It also ensures that, post-discharge, the bankrupt will have enough to live on and can have a fresh start (*Canada (Superintendent of Bankruptcy) v. 407 ETR Concession Company Ltd.*, 2013 ONCA 769, 118 O.R. (3d) 161, at para. 41). While proposals under the *BIA*'s restructuring regime similarly serve a remedial purpose, "this is achieved through a rules-based mechanism that offers less flexibility" (*Century Services*, at para. 15).

[141] Importantly, the specific goals of restructuring in the *CCAA*, in contrast to liquidation, result in the introduction of a key player: the interim lender. Interim financing, previously referred to as debtor-in-possession financing, is a judicially-supervised mechanism whereby an insolvent company is loaned funds for use during and for the purposes of the restructuring process. Before the 2009 amendments, there were no statutory provisions on interim financing in the *CCAA*, but the institution was well-established in the jurisprudence (L. W. Houlden, G. B. Morawetz and J. Sarra,

Bankruptcy and Insolvency Law of Canada (4th ed. rev. (loose-leaf)), vol. 4, at N§93; see also *Century Services*, at para. 62). The 2009 amendments codified much of the existing jurisprudence, and I discuss the statutory provisions in detail below.

[142] Interim financing is crucial to the restructuring process. It allows the debtor to continue to operate on a day-to-day basis while a workout solution is being arranged. A plan of compromise would be futile if, in the interim six months, the debtor was forced to close its doors. For this reason, Farley J., in *Royal Oak Mines Inc., Re* (1999), 7 C.B.R. (4th) 293 (Ont. C.J. (Gen. Div.)), at para. 1, quoting *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314 (Ont. C.J. (Gen. Div.)), at para. 24, observed that interim financing helps "keep the lights . . . on". Similarly, in *Indalex*, Deschamps J. explained that giving interim lenders super-priority "is a key aspect of the debtor's ability to attempt a workout" (para. 59, quoting J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 97). Without interim financing and the ability to prime (i.e., to give it priority) the interim lender's loan, the remedial purposes of the *CCAA* can be frustrated (para. 58).

[143] With this background in mind, I turn now to consider the treatment of the Crown's deemed trust for unremitted source deductions in Parliament's insolvency regime.

(2) The Deemed Trust for Unremitted Source Deductions in the *BIA* and *CCAA*

[144] The statutes in this case are all federal statutes. The *ITA*, *BIA*, and *CCAA* make up a co-existing and harmonious statutory scheme, enacted by one level of government (see, e.g., R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at p. 337, on the presumption of coherence). An example of this co-existence is when, in the insolvency regime, Parliament modifies entitlements that it otherwise grants the Crown outside of insolvency. For example, through s. 222(3) of the *ETA*, Parliament provides for a statutory deemed trust in favour of the Crown for unremitted GST. Parliament also renders that deemed trust, which is nearly identical in language to s. 227(4.1) of the *ITA*, ineffective in the *BIA* and *CCAA* (*BIA*, ss. 67(2) and 86(3); *CCAA*, s. 37(1); *Century Services*, at paras. 51-56). As I shall explain, Parliament also deals specifically with the deemed trust in s. 227(4.1) of the *ITA* in the *BIA* and *CCAA*, albeit in different ways.

[145] In the *BIA*, the deemed trust for unremitted source deductions appears in s. 67(3). Section 67 is under the heading "Property of the Bankrupt". Section 67(1)(a) excludes property held in trust by the bankrupt from property of the bankrupt that is divisible among creditors. Section 67(2) provides that any provincial or federal deemed trust in favour of the Crown does not qualify as a trust under s. 67(1)(a) unless it would qualify as a trust absent the deeming provision (in other words, unless it would qualify as a common law or true trust) (see *Caisse populaire Desjardins de Montmagny*, at para. 15; *Urbancorp Cumberland 2 GP Inc. (Re)*, 2020 ONCA 197, 444 D.L.R. (4th) 273, at paras. 32-33). Section 67(3) states that s. 67(2) does not apply in respect of the Crown's deemed trust for unremitted source deductions under the *ITA*, *CPP* or *EIA*.

Thus, while s. 67(2) provides in general terms an exception to s. 67(1)(a), that exception does not apply to the Crown's deemed trust for unremitted source deductions by virtue of s. 67(3).

[146] The result of this scheme is that the debtor's estate — to the extent of the unremitted source deductions — is not "property of a bankrupt divisible among his creditors" (*BIA*, s. 67(1)). For the purposes of the *BIA*'s liquidation regime, it is effectively the Crown's *property*. Together, ss. 67(1)(a) and 67(3) give content to the Crown's right of beneficial ownership under s. 227(4.1) of the *ITA*: the amount of the unremitted source deductions is taken out of the pool of money that is distributed to creditors in a *BIA* liquidation.

[147] In the *CCAA*, the Crown's deemed trust appears in ss. 37(2) and 6(3), alongside other deemed trusts and devices. Section 37(2) explicitly preserves the operation of s. 227(4.1) in *CCAA* proceedings:

> 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.
>
> **(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* (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.

[148] Due to this language, the Court in *Century Services* variously described the s. 227(4.1) trust as "surviv[ing]", "continu[ing]", and "remain[ing] effective" in the *CCCA* (see paras. 38, 45, 49, 53 and 79). The Crown relies on these observations to argue that the deemed trust remains fully intact in the *CCAA*, conferring a proprietary right on the Crown that cannot be subordinated to any other party.

[149] In my view, the Crown's submission overextends the analysis in *Century Services*. The issue in that case was whether the deemed trust under s. 222(3) of the *ETA* for unremitted GST was effective in the *CCAA*. As mentioned, s. 222(3) is almost identical in wording to s. 227(4.1) of the *ITA*, providing that the deemed trust extends to property of the tax debtor equal in value to the amount of the unremitted GST and extends to property otherwise held by a secured creditor pursuant to a security interest.

Section 222(3) of the *ETA* also provides that the deemed trust operates despite any other enactment of Canada, except the *BIA*. Thus, under the *BIA*, the Crown priority for unremitted GST is lost. However, under the *CCAA*, s. 37(1) provides that statutory deemed trusts in favour of the Crown should not be regarded as trusts unless they would qualify as trusts absent the deeming language. The Court in *Century Services* grappled with the apparent conflict between s. 222(3) of the *ETA* and s. 37(1) (then s. 18.3(1)) of the *CCAA*.

[150] A majority of the Court reasoned that, through statutory interpretation, the apparent conflict could be resolved in favour of the *CCAA* (*Century Services*, at para. 44). Parliament had shown a tendency to move away from asserting Crown priority in insolvency. Under both the *BIA* and *CCAA*, it had enacted a general rule that deemed trusts in favour of the Crown are ineffective in insolvency. It had also explicitly carved out an exception to that general rule for unremitted source deductions. The logic of the *CCAA* suggested that only the deemed trust for unremitted source deductions survived (paras. 45-46).

[151] Thus, while the Court emphasized that the deemed trust in s. 227(4.1) "survives" in the *CCAA*, it did not comment on *how* it survives. This Court has never considered the scope of the deemed trust under the *CCAA*, especially in light of the purposes of the *CCAA* and the equivocal nature of the beneficial ownership conferred through the deeming provision. For this appeal, it is necessary to probe into ss. 37(2)

and 6(3) to determine *how* the *CCAA* construes the Crown's right to unremitted source deductions.

[152] To that end, although s. 37(2) of the *CCAA* is almost identical to s. 67(3) of the *BIA*, it does not have the same effect because it is not nested under a provision like s. 67(1)(a). Section 37(2) of the *CCAA* carves out an exception to s. 37(1), which is different from s. 67(1)(a). While s. 67(1)(a) excludes trust property from property of the bankrupt divisible among creditors, s. 37(1) only provides that "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". Unlike the *BIA*, the *CCAA* is silent on how trust property should be treated and silent on what constitutes property of the debtor in a restructuring context — indeed, there is no definition of property in the *CCAA* at all. This is in keeping with the *CCAA*'s comparatively skeletal nature.

[153] The result is that s. 37(2) provides that the Crown continues to beneficially own the debtor's property equal in value to the unremitted source deductions; the unremitted source deductions "shall . . . be regarded as being held in trust for Her Majesty". However, although this signals that, unlike deemed trusts captured by s. 37(1), the Crown's deemed trust continues and confers a stronger right, s. 37(2) does not explain what to do with that right for the purposes of a *CCAA* proceeding. It does not, for example, provide that trust property should be put aside, as it would be in the *BIA* context. In keeping with the *CCAA*'s flexibility, s. 37(2) says little about what the Crown's unique right of beneficial ownership under s. 227(4.1) of the *ITA* requires. But

as I shall explain, s. 11 gives the court broad discretion to consider and give effect to the Crown's interest recognized in s. 37(2).

[154] In addition, s. 6(3) of the *CCAA* gives specific effect to the Crown's right under the deemed trust. Under that provision, the court cannot sanction a plan of compromise unless it pays the Crown in full for unremitted source deductions within six months of the plan's sanction (assuming the Crown does not agree otherwise):

> **(3)** Unless Her Majesty agrees otherwise, the court may sanction a compromise or arrangement only if the compromise or arrangement provides for the payment in full to Her Majesty in right of Canada or a province, within six months after court sanction of the compromise or arrangement, of all amounts that were outstanding at the time of the application for an order under section 11 or 11.02 and that are of a kind that could be subject to a demand under
>
> **(a)** subsection 224(1.2) of the *Income Tax Act* . . . .

[155] Pursuant to s. 6(3), then, the Crown's right under s. 227(4.1) includes a right *not to have to compromise*. The Crown can demand to be paid in full under the plan "in priority to all . . . security interests". The right is therefore different in kind than a security interest. While there may be some risk to the Crown that the plan may fail, and the Crown may not be paid in full if the restructuring dissolves into liquidation and the estate is depleted in the interim, the *CCAA* recognizes that there is societal value in helping a company remain a going concern. This remedial goal is at the forefront of providing flexibility in preserving the Crown's right to unremitted source deductions in s. 37(2), and in giving a concrete effect to that right in s. 6(3) of the *CCAA*.

[156] In my view, the reason for this difference between the *BIA* and *CCAA* is straightforward. The purpose of a *BIA* liquidation is to give the debtor a fresh start and pay out creditors to the extent possible. The debtor's property has to be divided according to the statute's rigid priority scheme. To begin the process of distribution, it is necessary to pool together the debtor's funds and determine what is, and is not, available for creditors. A comprehensive definition of property of the debtor is necessary, and no flexibility is needed in the regime to facilitate the liquidation process. There is also no other overarching goal, like facilitating the debtor's restructuring, that requires an institution like interim financing or requires modifying entitlements.

[157] In a restructuring proceeding under the *CCAA*, however, there is no rigid formula for the division of assets. Certain debt might be restructured; other debt might be paid out. When a debtor's restructuring is on the table, the goal pivots, and interim financing is introduced to facilitate the restructuring. Entitlements and priorities shift to accommodate the presence of the interim lender — a new and necessary player who is absent from the liquidation scene.

[158] The fact that the Crown's right under s. 227(4.1) of the *ITA* is treated differently between the two statutes is therefore consistent with the different schemes and purposes of the Acts. This is not a circumstance where Parliament attempted to harmonize entitlements across the regimes (see, e.g., *Indalex*, at para. 51, per Deschamps J.). The *CCAA* gives the deemed trust meaning for its purposes. The

concrete meaning given is that a plan of compromise must pay the Crown in full within six months of approval.

C. *Do Sections 11.2, 11.51 and 11.52 of the CCAA Permit the Court to Rank Priming Charges Ahead of the Crown's Deemed Trust for Unremitted Source Deductions?*

[159] In this case, the Initial Order subordinated the Crown's deemed trust to the Priming Charges. The courts below found that this authority is derived from ss. 11.2, 11.51 and 11.52 of the *CCAA*, which allow the court to order priming charges over a company's property in favour of interim lenders, directors and officers, and estate administrators. Priming charges can rank ahead of any other secured claim. For example, the relevant portions of s. 11.2, which are substantially similar to the relevant portions of ss. 11.51 and 11.52, read as follows:

> **11.2 (1)** On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.
>
> **(2)** The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[160] As priming charges can "rank in priority over the claim of any secured creditor", the definition of "secured creditor" in s. 2(1) is key:

> ***secured creditor*** means a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company, or a holder of any bond of a debtor company secured by a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, or a trust in respect of, all or any property of the debtor company, whether the holder or beneficiary is resident or domiciled within or outside Canada, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds . . . .

[161] The Respondents submit, in line with the courts below, that the Crown is a "secured creditor" under the *CCAA* in respect of its interest in unremitted source deductions because the enabling statute, the *ITA*, itself defines the holder of a deemed trust as holding a "security interest" (see *Temple City Housing Inc., Re*, 2007 ABQB 786, 42 C.B.R. (5th) 274). The Respondents also rely on the analogy in *First Vancouver* likening the Crown's deemed trust to a floating charge (which is a security interest). Accordingly, the Respondents argue that ss. 11.2, 11.51 and 11.52 give the court authority to rank priming charges ahead of the Crown's deemed trust.

[162] The Crown, like the dissent at the Court of Appeal, argues that the Crown is not a "secured creditor" because the definition of "secured creditor" in the *CCAA* does not list the holder of a deemed trust and because ss. 37 to 39 of the *CCAA* clearly draw a distinction between the Crown's deemed trust for unremitted source deductions, on the one hand, and the Crown's secured and unsecured claims on the other. Accordingly, the Crown argues that ss. 11.2, 11.51 and 11.52 do *not* give the court authority to rank priming charges ahead of the Crown's deemed trust.

[163] As I shall detail, I conclude that ss. 11.2, 11.51 and 11.52 do not give the court the authority to rank priming charges ahead of the Crown's deemed trust for unremitted source deductions.

[164] First, I agree with the Respondents that the general definition of security interest under the *ITA* includes the holder of a deemed or actual trust (s. 224(1.3)). However the reference to security interest in s. 227(4.1) is not to the Crown's interest but to others' interest in the debtor's property. In my view, any definition of security interest in the *ITA* is not relevant to defining the Crown's interest since it serves an entirely different purpose. What matters is whether the *CCAA* provisions give the court authority to rank priming charges ahead of the Crown's deemed trust for unremitted source deductions. This is determined by interpreting the words of the *CCAA* and how the *CCAA* defines secured creditor.

[165] I also agree with the Crown that the definition of "secured creditor" in the *CCAA* does not specifically list the holder of a deemed or actual trust. In addition, the Crown's interest cannot simply be called a "charge". As explained above, although the Crown's deemed trust has some parallels with a floating charge, the provision also employs some aspects of beneficial ownership. I would also hesitate to draw analogies with any of the other terms listed in the *CCAA* definition. The holders of several of these instruments are often described as having proprietary rights in their security. It was a legislative choice to define them as secured creditors for the purposes of the *CCAA*. It is difficult to shoehorn the Crown's deemed trust into the definition of

"secured creditor" in the *CCAA*, particularly as the *CCAA* specifically refers to the deemed trust in s. 37(2).

[166] Moreover, I agree with the Crown that ss. 37 to 39 of the *CCAA* treat the Crown's deemed trust and the Crown's secured claims as distinct interests. After s. 37 of the *CCAA*, dealing with deemed trusts, s. 38(1) provides a general rule that secured claims of the Crown rank as unsecured claims. Section 38(2) contains an exemption from s. 38(1) for consensual security interests that are granted to the Crown. Section 38(3) contains an exemption for the CRA's enhanced requirement to pay. Finally, s. 39(1) preserves the Crown's secured creditor status if it registers before the commencement of a *CCAA* proceeding, and s. 39(2) subordinates a Crown security or charge to prior perfected security interests.

[167] As Wood notes, "These provisions adopt two distinct approaches — one that applies to a deemed trust, the other that applies when a statute gives the Crown the status of a secured creditor" (Wood (2020), at p. 96). If s. 227(4.1) of the *ITA* gave the Crown the status of a secured creditor, then the CRA would presumably need to comply with ss. 38 and 39 by registering its security interest. No one suggests that the Crown has to register its claim for unremitted source deductions. In my view, ss. 37 to 39 draw a distinction between deemed trusts on the one hand and secured and unsecured claims on the other, and the Crown is not, therefore, a "secured creditor" under the *CCAA* for its right to unremitted source deductions.

[168] This is dispositive for the purposes of ss. 11.2, 11.51 and 11.52 of the *CCAA*. These sections do not give the court the authority to rank priming charges ahead of the Crown's deemed trust for unremitted source deductions.

D. *Does Section 11 of the CCAA Allow the Court to Rank Priming Charges Ahead of the Crown's Deemed Trust for Unremitted Source Deductions?*

[169] The remaining issue is whether another provision in the *CCAA*, namely s. 11, confers that jurisdiction. As noted above, s. 11 allows the court to make any order that it considers appropriate in the circumstances, subject to the restrictions set out in the Act:

> **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.

[170] In *9354-9186 Québec inc.*, this Court explained that the discretionary authority in s. 11 is broad, but not boundless (para. 49). There are three "baseline considerations": (1) the order sought must be appropriate; (2) the applicant must be acting in good faith; and (3) the applicant must demonstrate due diligence (*Century Services*, at para. 70; *9354-9186 Québec inc.*, at para. 49). Appropriateness is assessed by inquiring whether the order sought advances the remedial objectives of the *CCAA*. The general language of s. 11 should not, however, be "restricted by the availability of more specific orders" (*Century Services*, at para. 70).

[171] In keeping with its broad language, s. 11 of the *CCAA* has been used to make a wide array of orders. Most recently, for example, this Court clarified that it can be used to bar a creditor from voting on a plan where the creditor has acted for an improper purpose (*9354-9186 Québec inc.*, at paras. 56 and 66).

[172] The issue in this case is whether s. 11 can be used to rank an interim lender's loan, or other priming charge, ahead of the Crown's deemed trust for unremitted source deductions. In my view, it can, for two reasons.

[173] First, given my conclusion about the content of the Crown's right under s. 227(4.1) of the *ITA* for the purposes of the *CCAA* (requiring that it at least be paid in full under a plan of compromise), ranking a priming charge ahead of the Crown's deemed trust does not conflict with the *ITA* provision. So long as the Crown is paid in full under a plan of compromise, the Crown's right under s. 227(4.1) remains intact "notwithstanding any security interest" in the amount of the unremitted source deductions. For this reason, it is irrelevant whether a priming charge under ss. 11, 11.2, 11.51 or 11.52 of the *CCAA* is a "security interest" within the meaning of s. 227(4) and (4.1) of the *ITA*. The analysis above does not depend on finding that a priming charge is not captured within the *ITA* definition.

[174] In addition, depending on the circumstances, such an order may further the remedial objectives of the *CCAA*. For example, interim financing is often crucial to the restructuring process. If there is evidence that interim lending cannot be obtained without ranking the interim loan ahead of the Crown's deemed trust, such an order

could, again depending on the circumstances, further the remedial objectives of the *CCAA*. In general, the court should have flexibility to order super-priority charges in favour of parties whose function is to facilitate the proposal of a plan of compromise that, in any event, will be required to pay the Crown in full.

[175] Second, I do not accept the Crown's argument that s. 11 is unavailable because other *CCAA* provisions, namely ss. 11.2, 11.51 and 11.52, confer more specific jurisdiction (see *9354-9186 Québec inc.*, at paras. 67-68).

[176] While I agree that s. 11 is restricted by the provisions set out in the *CCAA* and cannot be used to violate specific provisions in the Act, s. 11 is not "restricted by the availability of more specific orders". The fact that specific provisions of the *CCAA* allow the court to rank priming charges ahead of a secured creditor does not mean that the court can *only* rank priming charges ahead of a secured creditor. Such an interpretation would amount to reading words into ss. 11.2, 11.51 and 11.52 that do not exist. An order that ranks a priming charge ahead of the beneficiary of the deemed trust is different in kind than the orders contemplated by ss. 11.2, 11.51 and 11.52, which contemplate the subordination of secured creditors. There is no provision in the *CCAA* stipulating what the court can do with trust property and no provision in the *CCAA* conferring more specific jurisdiction on whether a priming charge can rank ahead of the beneficiary of a deemed trust. So long as the order does not conflict with other provisions in the Act, namely ss. 37(2) and 6(3), and so long as it fulfills the "baseline considerations" of appropriateness, good faith, and due diligence, an order ranking a

priming charge ahead of the Crown's deemed trust would fall under the jurisdiction conferred by s. 11 (*Century Services*, at para. 70; *9354-9186 Québec inc.*, at para. 49). As explained above, there would be no conflict with ss. 37(2) and 6(3) of the *CCAA*.

[177] Both parties invoked policy concerns to assist in the interpretative exercise. I do not find it necessary to resort to such arguments. However, it is far from evident that interim lending would simply end if the Crown's deemed trust had super-priority in an appropriate case. It is also far from evident that the Crown would suffer significantly if the priming charges had super-priority in an appropriate case, given the existence of s. 6(3) of the *CCAA* requiring full payment, and the Crown's favourable treatment in the *BIA* liquidation regime in the event the restructuring failed. What is clear is that interim lending is crucial to the restructuring process, and the Crown's deemed trust for unremitted source deductions is crucial to tax collection. It will be up to the *CCAA* judge to weigh and balance the moving pieces.

[178] To that end, s. 11 of the *CCAA* gives the court discretion and flexibility to weigh several considerations in ranking a priming charge ahead of the Crown's deemed trust for unremitted source deductions. It requires the court to take a focused look at the specific facts of a case to determine whether such an order is necessary and appropriate. Where relevant, the court will consider the Crown's interest in the deemed trust as a result of s. 37(2). Courts may no doubt look to the factors already listed in s. 11.2(4) — the likely duration of *CCAA* proceedings, plans for managing the company during those proceedings, views of the company's major creditors and the monitor, and

the company's ability to benefit from interim financing, among others — for guidance. Section 11.2(4) of the *CCAA* states:

> **(4)** In deciding whether to make an order, the court is to consider, among other things,
>
> > **(a)** the period during which the company is expected to be subject to proceedings under this Act;
> >
> > **(b)** how the company's business and financial affairs are to be managed during the proceedings;
> >
> > **(c)** whether the company's management has the confidence of its major creditors;
> >
> > **(d)** whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
> >
> > **(e)** the nature and value of the company's property;
> >
> > **(f)** whether any creditor would be materially prejudiced as a result of the security or charge; and
> >
> > **(g)** the monitor's report referred to in paragraph 23(1)(b), if any.

[179] In addition, it seems to me that courts may consider:

- whether the interim lender has indicated, in good faith, that it will not lend to the debtor without ranking ahead of the Crown's deemed trust;
- the relative amounts of the interim loan and the unremitted source deductions (if the amount of the unremitted source deductions is a small fraction of the amount of the interim loan, the interim lender may not be significantly prejudiced without super-priority);

- whether, and for how long, the Crown allowed source deductions to go unremitted without taking action (see, e.g., Hanlon, Tickle and Csiszar); and
- finally, the prospects of success of a restructuring; and whether the *CCAA* is likely to be used to sell the debtor's assets.

[180] Finally, different considerations will apply if a court is considering ranking a different party's charge, like the Monitor's or Directors' Charge, ahead of the Crown's deemed trust.

VII. Conclusion

[181] I would dismiss the appeal and clarify that the authority to rank priming charges ahead of the Crown's deemed trust for unremitted source deductions is derived from s. 11 of the *CCAA* rather than ss. 11.2, 11.51 and 11.52. The Crown's interest under s. 227(4.1) of the *ITA* is a deemed trust interest, but beneficial ownership of deemed trust property is a manipulation of private law concepts, without settled meaning. Accordingly, the specific nature of beneficial ownership of deemed trust property must be determined in the relevant context in which it is asserted. Here, the Crown's right to unremitted source deductions in a *CCAA* restructuring is protected by both ss. 37(2) and 6(3). The former is flexible, requiring the Crown's deemed trust property to be considered when appropriate under the Act; the latter specifically requires that a plan of compromise provide for payment in full of the Crown's deemed trust claims within six months of the plan's approval. The Crown's right differs under

the *BIA*, in keeping with the different goals and schemes of liquidation and restructuring. Given the content of the Crown's right to unremitted source deductions in a *CCAA* restructuring, there is no conflict between s. 227(4.1) of the *ITA* and s. 11 of the *CCAA*. The schemes of both federal Acts can be harmonized and the objectives of both statutes furthered.

[182] The Respondents will have their costs in accordance with the tariff of fees and disbursements set out in Schedule B of the *Rules of the Supreme Court of Canada*, SOR/2002-156.

The reasons of Abella, Brown and Rowe JJ. were delivered by

BROWN AND ROWE JJ. —

I. Overview

[183] At issue in this appeal is whether the Crown's deemed trust claim for unremitted source deductions under s. 227(4) and (4.1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"), s. 23(3) and (4) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8 ("*CPP*"), and ss. 23(4) and 86(2) and (2.1) of the *Employment Insurance Act*, S.C. 1996, c. 23 ("*EIA*") (collectively, the "Fiscal Statutes"), have priority over court-ordered priming charges under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*").

[184] The present iteration of the deemed trust provision, s. 227(4.1) of the *ITA*, was the result of a 1997 amendment enacted by Parliament directly in response to this Court's interpretation of the provision's predecessor in *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (Department of Finance Canada, *Unremitted Source Deductions and Unpaid GST* (April 7, 1997)). That provision was itself the result of several amendments, beginning in 1942, with the amendment introducing the deemed trust in s. 92(6) and (7) of the *Income War Tax Act*, R.S.C. 1927, c. 97 (previously S.C. 1917, c. 28) (*An Act to amend the Income War Tax Act*, S.C. 1942-43, c. 28, s. 31). The provision and the historical amendments demonstrate Parliament's intention to safeguard its ability to collect employee source deductions under the relevant statutes, in priority to all other claims against a debtor's property.

[185] The Crown appeals from the decision of the Court of Appeal of Alberta which, like the chambers judge, held that the *CCAA* court could subordinate the deemed trust claims under the Fiscal Statutes to the priming charges (2019 ABCA 314, 93 Alta. L.R. 29, aff'g 2017 ABQB 550, 60 Alta. L.R. (6th) 103). Having examined the pertinent provisions of the Fiscal Statutes, and for the reasons that follow, we find ourselves in respectful disagreement with that conclusion, and prefer the view of the dissenting judge, Wakeling J.A. The Crown's deemed trust claims under the Fiscal Statutes have ultimate priority and cannot be subordinated by priming charges.

[186] In our view, the text of the impugned provisions in the Fiscal Statutes is clear: the Crown's deemed trust operates "[n]otwithstanding . . . any other enactment

of Canada" (*ITA*, s. 227(4.1)).[2] Parliament used unequivocal language — indeed, *the very language suggested by this Court* in *Sparrow Electric* — to give ultimate priority to the Crown's claim. Further, and again in clear and unequivocal text, Parliament imposed limits on the broad grant of authority by which a court can prioritize priming charges, thereby making plain the superiority of deemed trust claims. Finally, no provision of the *CCAA* is rendered meaningless by this interpretation. Unlike in other contexts such as the legislative scheme governing the GST/HST, Parliament has left no room for subordinating the deemed trusts under the Fiscal Statutes in pursuit of other legislative objectives. We would, therefore, allow the appeal.

II. Analysis

A. *General Comments on the Nature of the Deemed Trusts Under the Fiscal Statutes*

[187] The deemed trust created by the *ITA* is an essential instrument to collect source deductions (*First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720, at para. 22). The *ITA* grants special priority to the Crown to collect unremitted source deductions, reflecting its status as an "involuntary creditor" (*First Vancouver*, at para. 23).

[188] Section 227(4) and (4.1) of the *ITA* reads:

[2] The wording of the deemed trust provisions in the relevant provisions of the Fiscal Statutes is materially identical. This decision focuses on the deemed trusts in s. 227(4) and (4.1) of the *ITA*. The reasoning herein, however, applies with equal force to each of the other statutes.

> **(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.
>
> **(4.1)** Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person and property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for a security interest (as defined in subsection 224(1.3)) would be property of the person, equal in value to the amount so deemed to be held in trust is deemed
>
> > **(a)** to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, and
> >
> > **(b)** to form no part of the estate or property of the person from the time the amount was so deducted or withheld, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to such a security interest
>
> and is property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

[189] These sections describe two relevant events. First, at the time of the deduction, a trust is deemed in favour of the Crown, binding every person (the "tax debtor") who collects source deductions in the amount withheld until the person remits the source deductions (*ITA*, s. 227(4)). Section 227(4) deems the tax debtor to hold the

source deductions "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".

[190] The second event occurs where the tax debtor has failed to remit the source deductions in accordance with the manner and time provided by the *ITA*. Section 227(4.1) extends the deemed trust to all "property of the person and property held by any secured creditor . . . equal in value to the amount so deemed to be held in trust". This is achieved by deeming the source deductions to be held "in trust for Her Majesty" from the moment the amount was "deducted or withheld by the person, separate and apart from the property of the person". Parliament further provided that the unremitted source deductions under the Fiscal Statutes "form no part of the estate or property of the person" from the time of deduction or withholding, and is "property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests".

[191] This Court has held that the deemed trust is a "creatur[e] of statute" and "is not in truth a real [trust], as the subject matter of the trust cannot be identified from the date of creation of the trust" (*Sparrow Electric,* at para. 31, per Gonthier J., citing D. W. M. Waters, *Law of Trusts in Canada* (2nd ed. 1984), at p. 117, and adopted in *First Vancouver,* at para. 37). This statement fuelled a debate in this appeal about whether the deemed trust is a security interest or a proprietary interest, with the

respondents arguing that the Crown cannot hold a proprietary interest in the debtor's property because there is a lack of certainty in the subject matter.

[192] We agree with each of our colleagues Justices Karakatsanis and Côté that the deemed trust is not a "true" trust and that it does not confer an ownership interest or the rights of a beneficiary on the Crown as they are understood at common law or within the meaning of the *Civil Code of Québec* (Karakatsanis J.'s reasons, at paras. 119-20; Côté J.'s reasons, at paras. 43 and 49). Respectfully, however, our colleagues miss the point of the *deemed* quality of the trust. The matters of a property interest, certainty of subject matter and autonomous patrimony that arise from attempts to describe the operation of the deemed trust are entirely irrelevant and do not assist in deciding this appeal, nor in understanding Parliament's intent. The deemed trust is a legal fiction, with *sui generis* characteristics that are described in s. 227(4) and (4.1) of the *ITA*. As noted in *First Vancouver*, at para. 34, "it is open to Parliament to characterize the trust in whatever way it chooses; it is not bound by restraints imposed by ordinary principles of trust law". While *First Vancouver* considered the contrast between a statutory trust and a common law trust, the same applies to our colleague Côté J.'s reference to the *Civil Code* (*Canada (Attorney General) v. Caisse populaire d'Amos*, 2004 FCA 92, 324 N.R. 31, at para. 49). What matters here is not *the characterization* of the deemed trust that is at issue, but its *operation*. And as we explain, it *operates* to give the Crown a statutory right of access to the debtor's property to the extent of its *corpus* and a right to be paid in priority to all security interests.

[193] Further, no concerns regarding certainty of subject matter or autonomous patrimony arise here. It is of course true that, in common law Canada, for a trust to come into existence there must be certainty of intention, certainty of subject matter, and certainty of object (D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (4th ed. 2012), at p. 140; E. E. Gillese, *The Law of Trusts* (3rd ed. 2014), at p. 41). Similarly, under the Quebec civil law, "[t]hree requirements must . . . be met in order for a trust to be constituted: property must be transferred from an individual's patrimony to another patrimony by appropriation; the property must be appropriated to a particular purpose; and the trustee must accept the property" (*Bank of Nova Scotia v. Thibault*, 2004 SCC 29, [2004] 1 S.C.R. 758, at para. 31). And, again, it is also true that the subject matter of the deemed trust under s. 227(4.1) cannot be identified from the date of creation of the trust and does not constitute an autonomous patrimony to which specific property is transferred.

[194] But again, none of this remotely matters here. Statutory text, not ordinary principles of trust law, determines the nature of, and rights conferred by, deemed trusts (*First Vancouver*, at para. 34). And this Court has recognized that Parliament, through the trust deemed by s. 227(4.1) of the *ITA*, has "revitaliz[ed] the trust whose subject matter has lost all identity" (*Sparrow Electric*, at para. 31, per Gonthier J., adopted in *First Vancouver*, at para. 37). This is because the subject matter of the deemed trust is ascertained *ex post facto*, corresponding to the property of the tax debtor and property held by any secured creditor equal in value to the amount deemed to be held in trust by s. 227(4) that, but for the security interest, would be property of the tax debtor. In short,

the subject matter is whatever assets the employer then has from which to realize the original trust debt. Hence Iacobucci J.'s description in *First Vancouver* of the operation of s. 227(4.1) as "similar in principle to a floating charge" (para. 4). Parliament also circumvented the traditional requirements of the *Civil Code* for constituting a trust by requiring the amount of the unremitted source deductions to be held "separate and apart from the property of the [debtor]" and to "form no part of the estate [***patrimoine***, in the French version] or property of the [debtor]" (s. 227(4.1)).

[195] In short, the requirements of "true" trusts of civil and common law are irrelevant to ascertaining the operation of a statutorily deemed trust. Parliament did not legislate a "true" trust. Instead, it legislated a deeming provision which "artificially imports into a word or an expression an additional meaning which they would not otherwise convey beside the normal meaning which they retain where they are used" (*R. v. Verrette*, [1978] 2 S.C.R. 838, at p. 845).

[196] On this point, and contrary to the view of the majority at the Court of Appeal, Iacobucci J. *did not* hold that the deemed trust *is* a floating charge — nor that it was "of the same nature" (Côté J.'s reasons, at para. 51) — but rather that it operated *similarly*, by permitting a debtor in the interim to alienate property in the normal course of business. They are distinct legal concepts; whereas the deemed trust takes "priority over existing and future security interests", a floating charge would be overridden by a subsequent fixed charge (*Toronto-Dominion Bank v. Canada*, 2020 FCA 80, [2020] 3 F.C.R. 201, at para. 62; see also *First Vancouver*, at para. 28).

[197] Significantly, the s. 227(4.1) deemed trust does not encompass the whole of the tax debtor's interest in property, but only the amount deemed to be held in trust by s. 227(4). But this does not mean the Crown cannot have a property interest in the debtor's property. It merely limits that interest to the extent of the unremitted source deductions. This makes sense. The Crown may collect only what it is owed.

B. *The Deemed Trust Under the Fiscal Statutes Have Absolute Priority Over All Other Claims in CCAA Proceedings*

[198] The text, context, and purpose of s. 227(4.1) of the *ITA* support the conclusion that s. 227(4.1) of the *ITA* and the related deemed trust provisions under the Fiscal Statutes bear only one plausible interpretation: the Crown's deemed trust enjoys priority over all other claims, including priming charges granted under the *CCAA*. Parliament's intention when it amended and expanded s. 227(4) and (4.1) of the *ITA* was clear and unmistakable.

(1) The Deemed Trusts Apply Notwithstanding the Provisions of the *CCAA*

(a) *Text of the Fiscal Statutes*

[199] The text of s. 227(4.1) of the *ITA* is determinative: the Crown's deemed trust claim enjoys superior priority over all "security interests", including priming charges under the *CCAA*. The amount subject to the deemed trusts is deemed "to be held . . . separate and apart from the property of the person" and "to form no part of the

estate or property of the person". It is "beneficially owned by Her Majesty", and the "proceeds of such property shall be paid . . . in priority to all such security interests". The Crown's right pursuant to its deemed trust is clear: it is a right to be paid in priority to all security interests.

[200] Parliament granted this unassailable priority by employing the unequivocal language of "[n]otwithstanding any . . . enactment of Canada". This is a "blanket paramountcy clause"; it prevails over all other statutes (P. Salembier, *Legal and Legislative Drafting* (2nd ed. 2018), at p. 385). No similar "notwithstanding" provision appears in the *CCAA*, subordinating the claims under the deemed trusts of the Fiscal Statues to priming charges. Indeed, it is quite the opposite: unlike most deemed trusts which are nullified in *CCAA* proceedings by the operation of s. 37(1) of the *CCAA*, s. 37(2) *preserves* the deemed trusts of the Fiscal Statutes. This distinguishes the deemed trust at issue here from those discussed in *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, which were nullified by the operation of what is now s. 37(1). Deschamps J. repeatedly contrasted the different deemed trusts and specified that "the Crown's deemed trust and corresponding priority in source deductions remain effective both in reorganization and in bankruptcy" (para. 38). The *ITA* and *CCAA* thus operate without conflict.

(b) *Legislative Predecessor Provisions*

[201] The predecessor provisions of a statutory provision form part of the "entire context" in which it must be interpreted (*Merk v. International Association of Bridge,*

Structural, Ornamental and Reinforcing Iron Workers, Local 771, 2005 SCC 70, [2005] 3 S.C.R. 425, at para. 28). And here, it confirms that, by enacting s. 227(4.1) of the *ITA*, Parliament intended for the deemed trusts arising from the Fiscal Statutes to have absolute priority over all secured creditors, as defined in s. 224(1.3) of the *ITA*.

[202] As already noted, Parliament amended s. 227(4.1) of the *ITA* to its current form in response to this Court's decision in *Sparrow Electric*. In *Sparrow Electric*, both Royal Bank and the Minister claimed priority to the proceeds from the tax debtor's property. This Court held that the Bank had priority since the inventory was subject to the Bank's security before the deemed trust arose. In reaching this conclusion, Iacobucci J. invited Parliament to grant absolute priority to the Crown, and showed how this could be achieved:

> 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. In the absence of such clear language, judicial innovation is undesirable, both because the issue is policy charged and because a legislative mandate is apt to be clearer than a rule whose precise bounds will become fixed only as a result of expensive and lengthy litigation. [Emphasis added; para. 112.]

[203] Parliament proceeded to do just that. It amended the Fiscal Statutes to reinforce its priority. The press release accompanying the amendments stated that the objective of the amendments was to "assert the absolute priority of the Crown's claim [for] unremitted source deductions [and to] ensure that tax revenue losses are

minimised and that delinquent taxpayers and their secured creditors do not benefit from failures to remit source deductions and GST at the expense of the Crown" (Department of Finance Canada, at p. 1 (emphasis added)).

[204] The purpose of these amendments was described by Iacobucci J. for this Court in *First Vancouver*. It was, he recognized, to grant priority to the deemed trusts and ensure the Crown's claim prevails over secured creditors, irrespective of when the security interest arose (paras. 28-29). "It is evident from these changes" he added, "that Parliament has made a concerted effort to broaden and strengthen the deemed trust in order to facilitate the collection efforts of the Minister" (para. 29). Parliament's intention could not have been clearer.

[205] Indeed, our colleagues' view to the contrary leaves us wondering: if the all-encompassing scope of the notwithstanding clause of s. 227(4.1) of the *ITA* is *insufficient* to prevail over the priming charges, what language would possibly be *sufficient*? Courts must give proper effect to Parliament's plain statutory direction, and not strain to subvert it on the basis that Parliament's categorical language or "basket clause" did not itemize a particular security interest.

(2) The Priming Charges Are "Security Interests" Within the Meaning of the Fiscal Statutes

[206] The priming charge provisions in ss. 11.2(1), 11.51(1) and 11.52(1) of the *CCAA* allow the supervising court to "make an order declaring that all or part of the

company's property is subject to a security or charge" ("*charge ou sûreté*" in the French version). This does not, however, prevail over the deemed trust created by s. 227(4.1) of the *ITA*, which provides that the unpaid amounts of the deemed trust for source deductions have priority over all "security interests". That term is defined by s. 224(1.3) of the *ITA* as follows:

> ***security interest*** means any interest in, or for civil law any right in, property that secures payment or performance of an obligation and includes an interest, or for civil law a right, created by or arising out of a debenture, mortgage, hypothec, lien, pledge, charge, deemed or actual trust, assignment or encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for . . . . *(garantie)*

This makes clear that a "security interest" includes a "charge" (a "*sûreté*" in the French version). Further, ss. 11.2(1), 11.51(1) and 11.52(1) of the *CCAA* describe the priming charges as a "security or charge". There can be no doubt, therefore, that priming charges under the *CCAA* are security interests under the *ITA*.

[207] Even were this insufficient, the definition of "security interest" in s. 224(1.3) of the *ITA* is sufficiently expansive to capture *CCAA* priming charges. The word "includes", and the categorical language of "encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for" could not be any more expansive. As Professor Sullivan explains, "The purpose of a list of examples following the word 'including' is normally to emphasize the broad range of general language and to ensure that it is not inappropriately read down so as to exclude

something that is meant to be included" (*Sullivan on the Construction of Statutes* (6th ed. 2014), at para. 4.39).

[208] This Court has already recognized, in *Caisse populaire Desjardins de l'Est de Drummond v. Canada*, 2009 SCC 29, [2009] 2 S.C.R. 94, that Parliament chose "an expansive definition of 'security interest' . . . in order to enable maximum recovery by the Crown" (para. 14), such that it captures any interest in the property of the debtor that secures payment or performance of an obligation:

> In order to constitute a security interest for the purposes of s. 227(4.1) *ITA* and s. 86(2.1) *EIA*, the creditor must hold "any interest in property that secures payment or performance of an obligation". The definition of "security interest" in s. 224(1.3) *ITA* does not require that the agreement between the creditor and debtor take any particular form, nor is any particular form expressly excluded. So long as the creditor's interest in the debtor's property secures payment or performance of an obligation, there is a "security interest" within the meaning of this section. While Parliament has provided a list of "included" examples, these examples do not diminish the broad scope of the words "any interest in property" . . . . [Emphasis added; para. 15.]

In that case, Rothstein J. held for the Court that a contract providing a right to compensation (or set-off at common law) could constitute a "security interest" under s. 224(1.3) of the *ITA*, *despite that it was not enumerated in the definition* and that it is *not traditionally understood as such* (paras. 37-40).

[209] For all these reasons, the priming charges fall under the definition of "security interest", because they are "interest[s] in the debtor's property [that] secur[e] payment or performance of an obligation", i.e. the payment of the monitor, the interim

lender, and directors. Consequently, the Crown's interest under the trust deemed created by s. 227(4.1) of the *ITA* enjoys priority over the priming charges.

[210] Our colleague Côté J., however, sees the matter differently. In our respectful view, she disregards this Court's authoritative statement of the law in *Caisse populaire Desjardins de l'Est de Drummond*. Specifically, she concludes that priming charges are not "security interests" under the *ITA* because "[c]ourt-ordered charges are unlike conventional consensual and non-consensual security interests in that they are integrally connected to insolvency proceedings that operate for the benefit of the creditors as a group" (Côté J.'s reasons, at para. 62 (emphasis deleted), quoting R. J. Wood, "Irresistible Force Meets Immovable Object: *Canada v. Canada North Group Inc.*" (2020), 63 *Can. Bus. L.J.* 85, at p. 98). With respect, nothing in the definition of security interest in the *ITA* precludes the inclusion of an interest that is designed to operate to the benefit of all creditors.

[211] Further, and irrespective of the nature of *CCAA* proceedings, our colleague's conclusion is irreconcilable with this Court's holding in *Caisse populaire Desjardins de l'Est de Drummond* and with the "expansive definition" Parliament adopted to maximize recovery (*Caisse populaire Desjardins de l'Est de Drummond*, at para. 14). The fact that the instrument is court-ordered and is for the presumed benefit of all creditors is irrelevant. It does not affect *the nature* of the priming charges — to secure the payment of an obligation — which is the only relevant criterion (para. 15). As for the express inclusion of "priming charges" in the definition and their creation

by court order, we reiterate that "*sûreté*" and "*charge*" are explicitly included "however or whenever arising, created, deemed to arise or provided for" (*ITA*, s. 224(1.3)).

[212] Nor is Professor Wood's commentary, and by extension, the reasoning in *DaimlerChrysler Financial Services (Debis) Canada Inc. v. Mega Pets Ltd.*, 2002 BCCA 242, 1 B.C.L.R. (4th) 237, and *Minister of National Revenue v. Schwab Construction Ltd.*, 2002 SKCA 6, 213 Sask. R. 278, of any avail to our colleague Karakatsanis J. (para. 102; see also Wood, at p. 98, fns. 51-52). While those judgments held that finance leases and conditional sales agreements did not fall under the definition of s. 224(1.3) of the *ITA* because they were not specifically listed, that reasoning was later squarely rejected in *Caisse populaire de l'Est de Drummond*. And, were that not enough, *Mega Pets* and *Schwab*, unlike the instant case, dealt with situations where property was not transferred to the debtor, which facts were treated as determinatively supporting the conclusion that the instruments in those cases were not "security interests". For example, under a conditional sales agreement, the seller does not have an interest in the debtor's property because ownership rests with the seller until performance of the obligation (*Mega Pets*, at para. 32). By contrast, the priming charges secure payment out of property that remains the debtor's.

[213] Finally, this Court's interpretation of "security interest" in *Caisse populaire de l'Est de Drummond* is confirmed by the French version of the text. "*Sont en particulier des garanties*" is illustrative, not limitative. *Le Robert* (online) defines "*en particulier*" (in particular) as [TRANSLATION] "particularly, among others,

especially, above all" (emphasis added). Unsurprisingly, the French version of s. 224(1.3) has been described as being [TRANSLATION] "as broadly worded as possible" (R. P. Simard, "Priorités et droits spéciaux de la couronne", in *JurisClasseur Québec — Collection droit civil — Sûretés* (loose-leaf), vol. 1, by P.-C. Lafond, ed., fasc. 4, at para. 20). There is no discordance between both versions of the text. The French version conforms perfectly to the English text's use of the verb "includes", and confirms the plain reading of the English version.

[214] Respectfully, our colleagues Côté and Karakatsanis JJ. frustrate the clear will of Parliament. Clear, all-inclusive language should be treated as such, and not circumvented by straining to draw distinctions of no legal significance whatsoever or by searching for what is not specifically mentioned in order to avoid the otherwise inescapable conclusion that Parliament granted absolute priority to the deemed trusts.

(3) Conclusion

[215] It is this simple:

1. the Fiscal Statutes give absolute priority to the deemed trusts for source deductions over all security interests notwithstanding the *CCAA*;

2. the priming charges are "security interests" within the meaning of the Fiscal Statutes; and

3. the *CCAA* does not subordinate the claims under the deemed trusts of the Fiscal Statutes to the priming charges.

[216] This is sufficient to decide the appeal: the deemed trusts of the Fiscal Statutes have priority over the priming charges. However, in view of the respondents' submissions that such a finding leaves the deemed trust provisions in the Fiscal Statutes in conflict with the *CCAA*, and that recognizing the ultimate priority of the Crown's deemed trust renders certain provisions of the *CCAA* meaningless, we are compelled to explain why this is not so.

C. *The CCAA and the Fiscal Statutes Operate Harmoniously*

(1) The Broad Grant of Authority Under Section 11 of the *CCAA* Is Not Unlimited

[217] It is not disputed that s. 11 of the *CCAA* contains a grant of broad supervisory discretion and the power to "make any order that it considers appropriate in the circumstances" to give effect to that supervisory role (see J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2nd ed. 2013), at pp. 18-19). What is in dispute, however, are the limits to this broad power.

[218] A supervising judge's authority to grant priming charges was not always contained in the *CCAA*. Prior to the 2009 amendments, it was derived from the courts' inherent jurisdiction (*Temple City Housing Inc., Re*, 2007 ABQB 786, 42 C.B.R. (5th)

274, at para. 14; Q.B. reasons, at para. 105). While the amendments in some respects represented a codification of the past practice, they clarified how priming charges operated (*CCAA*, ss. 11.2, 11.51 and 11.52). Despite being "the engine driving the statutory scheme", s. 11's exercise was expressly stated by Parliament to be "subject to the restrictions set out in this Act" (see *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, at paras. 48-49, citing *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), at para. 36). Three such restrictions are significant here.

(a) *The Continued Operation of the Deemed Trusts for Unremitted Source Deductions (Section 37(2))*

[219] The first restriction on the authority to grant priming charges is found in s. 37(2) of the *CCAA*. This provides for the continued operation of the deemed trusts under the Fiscal Statutes in a *CCAA* proceeding — a point this Court *repeatedly* highlighted in *Century Services*, at paras. 78-81. At the hearing of this appeal, the respondents argued that s. 37(1) nullifies the Crown's priority in respect of all deemed trusts under the *CCAA*, and that s. 37(2) acts merely to reincorporate the deemed trusts under the Fiscal Statutes into *CCAA* proceedings without their absolute priority. This tortured interpretation misconceives the effect of s. 37(1).

[220] Section 37(1) provides that, despite any deemed trust provision in federal or provincial legislation, "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", but it is expressly made "[s]ubject to subsection (2)". Through

s. 37(2), Parliament also preserved the operation of the deemed trusts under the Fiscal Statutes within *CCAA* proceedings by providing that "[s]ubsection (1) does not apply in respect of amounts deemed to be held in trust under [the Fiscal Statutes]". In the face of Parliament's clear direction that the deemed trusts operate "notwithstanding" any other enactment, and the express preservation of the deemed trusts in the *CCAA*, there is simply no basis whatsoever for reading s. 37 as invalidating the deemed trust provisions under the Fiscal Statutes only to revive them with a conveniently lesser priority. Such an interpretation finds no support in the text, context, or purpose of the statutory schemes. Rather, all those considerations support the view that the deemed trusts under the Fiscal Statutes are preserved in *CCAA* proceedings in both form and substance, along with their absolute priority.

[221] Before turning to the second restriction, we note each of our colleagues Karakatsanis J. and Côté J. fail to give effect to Parliament's decision, expressed in clear statutory text, to "preser[ve] deemed trusts and asser[t] Crown priority only in respect of source deductions" under the *CCAA* (*Century Services*, at para. 45). For the same reason, the reliance they place on *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24, is misconceived. There, the Court held that the deemed trust created by provincial legislation was not a "true trust" so as to fall outside the debtor's property under what is now s. 67(1)(a) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). That is not this case. Unlike the deemed trust in *Henfrey*, the deemed trusts of the Fiscal Statutes receive a particular treatment in bankruptcy and insolvency proceeding because they are preserved by s. 37(2) of the *CCAA* and s. 67(3)

of the *BIA*. Further, while the Court in *Henfrey* concluded that the deemed trust was ineffective in bankruptcy because the commingling of assets rendered the money subject to the deemed trusts untraceable, this rationale has no application to s. 227(4.1). In *First Vancouver*, this Court noted that "by deeming the trust to be effective 'at any time' the debtor is in default, the amendments serve to strengthen the conclusion that the Minister is not required to trace its interest to assets which belonged to the tax debtor at the time the source deductions were made" (para. 37). Again, no conclusions regarding the nature of the deemed trusts flow from the fact that tracing is irrelevant under s. 227(4.1): the deemed trusts are statutory instruments and the question is one of operation, *not* characterization.

(b) *Priming Charges Attach Only to the Property of the Debtor Company*

[222] The second restriction on the *CCAA*'s broad authority to grant priming charges is that the *CCAA* requires priming charges to attach only to "all or part" of the property of the debtor's company (s. 11.2(1); see also ss. 11.51(1) and 11.52(1)). Here, Parliament evinces a clear intent to preserve the ultimate priority it afforded the deemed trusts under the Fiscal Statutes. This is because, by operation of s. 227(4.1) of the *ITA* and s. 37(2) of the *CCAA*, the unremitted source deductions are deemed *not* to form part of the property of the debtor's company.

[223] Parliament could not have been more explicit: the source deductions are deemed never to form part of the company's property and, if there is a default in remittances, the Crown is deemed to obtain beneficial ownership in the tax debtor's

property in the amount of the unremitted source deductions that it can collect "notwithstanding" any other enactment or security interest. Whether this is a true ownership interest is irrelevant to this appeal as the legislation *deems* the Crown to obtain beneficial ownership for these purposes. It follows that the priming charges cannot supersede the Crown's deemed trust claim because they may attach *only* to *the property of the debtor's company*, of which Parliament took great care to ensure the source deductions were deemed to form no part. As Michael J. Hanlon explains:

> While it has been held that an interim financing charge may rank ahead of the deemed trusts existing in favour of the Canada Revenue Agency with respect to amounts owing on account of unremitted source deductions, this appears to be incorrect. Property deemed to be held in trust pursuant to the provisions creating the deemed trust are deemed not to form part of the debtor's estate, and given that those deemed trusts with respect to source deductions, are preserved in a *CCAA* context, the interim financing charge would not attach to those assets. [Emphasis added; footnotes omitted.]
>
> (*Halsbury's Laws of Canada — Bankruptcy and Insolvency* (2017 Reissue), at HBI-376)

(c) *The Definition of "Secured Creditor" (Section 2)*

[224] The third restriction on the *CCAA*'s broad authority to grant priming charges is that the court "may order that the security or charge rank in priority over the claim of any secured creditor of the company" (ss. 11.2(2), 11.51(2) and 11.52(2)). Also, the definition of "secured creditor" in s. 2(1) of the *CCAA* makes it manifestly clear that the Crown is not a "secured creditor" in respect of its deemed trust claims under the Fiscal Statutes:

> ***secured creditor*** means a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company, or a holder of any bond of a debtor company secured by a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, or a trust in respect of, all or any property of the debtor company, whether the holder or beneficiary is resident or domiciled within or outside Canada, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds . . . .

This definition highlights two relevant considerations. First, the definition should be read as encompassing two classes of creditors. And second, the use of the word "trust" must be given legal significance.

[225] As to the first consideration, we accept the Crown's submission that the proper reading of the definition of secured creditor references only two classes of secured creditors: (i) holders of direct security, and (ii) holders of secured bonds. So understood, a secured creditor means either

> a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company,

or

> **a holder of any bond of a debtor company secured by** a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, or **a trust in respect of, all or any property of the debtor company** . . . .

The reference to "trust" appears only in relation to an instrument securing a bond of the debtor company. The definition must be read as "secured creditor means . . . a holder of any bond of a debtor company secured by . . . a trust in respect of, all or any property of the debtor company". Accordingly, holders of an interest under a deemed trust are not a third class of creditors (A. Prévost, "Que reste-t-il de la fiducie réputée en matière de régimes de retraite?" (2016), 75 *R. du B.* 23, at p. 58).

[226] While finding this interpretation "initially attractive", the majority of the Court of Appeal ultimately rejected this reading. It did so because, irrespective of whether the definition needs a third reference to a "holder of a trust" drafted in parallel to the first two classes of creditors, the Crown's interest could be classified as a "charge" and is therefore captured by the first class of secured creditors (C.A. reasons, at paras. 42-43). Respectfully, this is incorrect. Deemed trusts are not covered by the word "charge". To conclude that the word "charge" encompasses "deemed trusts" under the first class of secured creditors when "charge" and "trust" are listed distinctly under the second class of secured creditors (holders of secured bonds) would be incoherent and run contrary to legislative presumptions in statutory interpretation. Why would Parliament include a specific reference to *trusts* if they are already covered by *charge*? Parliament is presumed to avoid "superfluous or meaningless words, [and] phrases" (*Bristol-Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26, [2005] 1 S.C.R. 533, at para. 178). The deliberate and distinct text of "trust" and "charge" shows that it was not Parliament's intention to have holders of deemed trusts

subsumed under "charge" such that the Crown in this circumstance would become a secured creditor.

[227] In any case, if there were only one class of creditor, the Crown would not be a secured creditor with respect to the deemed trust claim under the Fiscal Statutes. While Parliament distinguished between "deemed or actual trust[s]" in s. 224(1.3) of the *ITA*, it made no such distinction in the definition of secured creditor. Parliament is presumed to legislate with intent and chose its words carefully. Our role as a court with respect to legislation is interpretation, not drafting. We must ascribe legal significance to Parliament's choice of text — that is, to the words Parliament chose and *did not* choose.

(d) *"Restrictions" Under Section 11 of the CCAA*

[228] Our colleague Karakatsanis J. agrees with our analysis of the priming charge provisions, but she does not seem to view them as "restrictions" within the meaning of s. 11 because "[t]he general language of s. 11 should not . . . be 'restricted by the availability of more specific orders'" (Karakatsanis J.'s reasons, at para. 170, citing *Century Services*, at para. 70). With respect, as a matter of law and statutory interpretation this view is simply unavailable to our colleague. Neither s. 11 nor the court's inherent jurisdiction can "empower a judge . . . to make an order negating the unambiguous expression of the legislative will" (*Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.*, [1976] 2 S.C.R. 475, at p. 480; see also *R. v. Caron*, 2011 SCC 5, [2011] 1 S.C.R. 78, at para. 32). Parliament has imposed clear

restrictions on the courts' power to give priority to priming charges. It is one thing to rely on s. 11 as a source of general authority even when other specific orders are available; it is another to misconstrue s. 11 as a source of unfettered authority to circumvent such unambiguous restrictions. While courts may use their general s. 11 power to create priming charges for purposes other than those that are specifically enumerated (see Wood, at pp. 90-91), Parliament has clearly expressed its intention to restrict any such charge in a critical way — it cannot take priority over the Crown's deemed trust.

[229] For the same reason, we respectfully find untenable our colleague Justice Moldaver's suggestion that it is unclear whether there are restrictions *internal* to the *CCAA* itself that would prevent a court from using its power under s. 11 to order a priming charge in priority to the Crown's deemed trust claim. This statement does not account for Parliament's clear intention, recorded in s. 37(2), to preserve the Crown's right to be paid in absolute priority over all secured creditors in *CCAA* proceedings. It also renders superfluous the restrictions on the court's authority to prioritize priming charges under ss. 11.2(2), 11.51(2) and 11.52(2) of the *CCAA*.

[230] Further, our colleague Moldaver J. says it is unnecessary to "define the particular nature or operation of the" deemed trust under the *ITA* (para. 255), and relies on the "notwithstanding" language of s. 227(4.1) of the *ITA* to determine whether the Crown's claim can have priority over priming charges. This interpretation effectively reads in a conflict in the statutory schemes, despite this Court's clear direction that "an

interpretation which results in conflict should be eschewed unless it is unavoidable" (*Lévis (City) v. Fraternité des policiers de Lévis Inc.*, 2007 SCC 14, [2007] 1 S.C.R. 591, at para. 47). In any event, this is not an *unavoidable* conflict: there is simply *no* conflict. Parliament *avoided* any conflict between the *CCAA* and the *ITA* by imposing restrictions upon the court's authority under s. 11 of the *CCAA*.

(e) *Structure of Crown Claims Under the CCAA*

[231] Finally, while not a "restrictio[n] set out in [the *CCAA*]", as specified in s. 11, the cogency of the statutory scheme as a whole depends on an interpretation where the Crown cannot be a secured creditor. This is so because classifying the Crown as "secured creditor" would disrupt the structure of Crown claims that the *CCAA* clearly defines at ss. 37 to 39 (Wood, at p. 98). Section 37 applies to deemed trust claims, with s. 37(1) providing that deemed trusts in favour of the Crown are ineffective under the *CCAA*, as a general rule, and s. 37(2) providing an exemption for the deemed trust for source deductions. Section 38(1) sets out the general rule that the Crown's secured claims rank as unsecured claims, with specific exemptions at s. 38(2) and (3). Finally, s. 39(1) preserves the Crown's secured creditor status if it registers before the commencement of the *CCAA* proceedings but, under s. 39(2), that security is subordinate to prior perfected security interests.

[232] This leads us to question why Parliament would expressly "preserve" the deemed trusts of the Fiscal Statutes by operation of s. 37(2), only then to rank the Crown as an unsecured creditor by the operation of s. 38(1). Unlike the interpretation

that affords the deemed trusts ultimate priority, allowing the Crown to be reduced to an unsecured creditor in respect of its deemed trust claims would render s. 37(2) almost meaningless. Further, this interpretation would require the Crown to register its claim under s. 39(1) to preserve its status because the deemed trust is not afforded the exemption under s. 38. It would be illogical for Parliament to confer greater protection on secured claims afforded an exemption under s. 38(2) or (3) than it conferred on deemed trusts for source deductions, when the clear objective was to confer "absolute priority" on the latter (*First Vancouver*, at paras. 26-28).

[233] We note that Professor Wood is not alone in recognizing that "sections 38 and 39 of the CCAA govern the conditions upon which a Crown claim can be viewed as 'secured' for the purposes of the CCAA" (F. L. Lamer, *Priority of Crown Claims in Insolvency* (loose-leaf), at §79.2). Since the deemed trusts for unremitted source deductions under the Fiscal Statutes do not meet the conditions of these sections, it follows that the Crown's claim is not "secured".

[234] In our view, a plain reading of the definition of secured creditor within the context of the broader statutory scheme results in a single inescapable conclusion. That is, there are three classes of Crown claims under the *CCAA*: (1) claims pursuant to deemed trusts continued under the *CCAA*; (2) secured claims; and (3) unsecured claims. The claims for unremitted source deductions fall under the first type: claims pursuant to deemed trusts continued under the *CCAA*.

(2) Recognizing the Ultimate Priority of the Crown's Deemed Trust Does Not Defeat the Purpose of any Provision of the *CCAA*

[235] For two further and related reasons, the majority at the Court of Appeal and the respondents resist the conclusion that the Crown's deemed trust enjoys absolute priority.

(a) *Protection of Crown Claims Under Section 6(3)*

[236] First, the majority held that granting ultimate priority to the deemed trusts would render s. 6(3) of the *CCAA* meaningless. This provision prohibits the court from sanctioning a compromise or arrangement unless it provides for payment in full to the Crown, within six months of the sanction of the plan, of all amounts due to the Crown. The majority reasoned that if the Crown is always paid first for its deemed trust claims under the Fiscal Statutes, there would be no need to protect the Crown claims under s. 6(3).

[237] Respectfully, this conclusion is erroneous. A review of the purpose and scope of s. 6(3) of the *CCAA* is clear: it operates only where there is an arrangement or compromise put to the court, and it protects the entirety of the Crown claim pursuant to s. 224(1.2) of the *ITA* and similar provisions of the Fiscal Statutes. This includes claims *not* subject to the deemed trusts under the Fiscal Statutes, such as income tax withholdings, employer contributions to employment insurance and CPP, interest and penalties. In contrast, the deemed trusts arise immediately and operate continuously

"from the time the amount was deducted or withheld" from the employee's remuneration, and apply to *only those* deductions. It follows, then, that, without s. 6(3), the Crown would be guaranteed entitlement only to unremitted source deductions when the court sanctions a compromise or arrangement, and not to its other claims under s. 224(1.2) of the *ITA*. This is because most of the Crown's claims rank as unsecured under s. 38 of the *CCAA*.

[238] It bears emphasizing that s. 6(3) does *not* apply where no arrangement is proposed or to *CCAA* proceedings which involve the liquidation of the debtor's assets. Such "liquidating CCAAs" are "now commonplace in the *CCAA* landscape" (*Callidus Capital Corp.*, at para. 42). The absolute priority of the deemed trusts under the Fiscal Statutes, continued by s. 37(2) of the *CCAA*, provides protection to the Crown's claim for unremitted source deductions in liquidating CCAAs. Each of our colleagues Côté and Karakatsanis JJ. deprive the Crown of its guaranteed entitlements in such cases, despite Parliament having unambiguously granted "absolute priority" to claims for unremitted source deductions (Department of Finance Canada).

[239] We note that our colleague Karakatsanis J. does not conclude that s. 6(3) is rendered nugatory by our interpretation; rather, she says that, since the term "beneficial ownership" as it is used in the deemed trusts does not have the same meaning at common law, we must look to the *CCAA* to ascertain the Crown's rights. This "manipulation of private law concepts, without settled meaning", she further says,

raises the question of *how* the deemed trust survives under the *CCAA* (para. 181). And the answer, she finds, is furnished by s. 6(3).

[240] This is wrong for three reasons. First, there is no question as to how the deemed trust survives. Section 37(2) operates to exempt the deemed trusts under the Fiscal Statutes from any change in form or substance under the *CCAA*; this continues the operation of s. 227(4.1), which confers absolute priority on the Crown's claim to the deemed trusts under the Fiscal Statutes. In other words, the deemed trust survives as it was under the Fiscal Statutes. It is unsurprising, therefore, that this Court did not opine on *how* the trust "survives" in *CCAA* proceedings in *Century Services*: it is, with respect, plain and obvious.

[241] Secondly, our colleague Karakatsanis J.'s suggestion that the understanding of the rights conferred on the Crown under the deemed trust must arise from reading s. 6(3) of the *CCAA* entirely bypasses the text of the *ITA* which specifically sets out those rights. After providing that the Crown has "beneficial ownership" of the value of the unremitted source deduction, the *ITA* continues: "the proceeds of such property shall be paid to the Receiver General in priority to all such security interests" (s. 227(4.1)). This is the right of the Crown under the deemed trust, and our colleague fails to give effect to this right.

[242] Finally, as we have discussed, s. 6(3) protects different interests than those captured by the deemed trusts. If s. 6(3) were to exhaust the Crown's rights under the *CCAA*, our colleague Karakatsanis J. correctly observes that "there may be some risk

to the Crown that the plan [under s. 6(3)] may fail, and the Crown may not be paid in full if the restructuring dissolves into liquidation and the estate is depleted in the interim" (para. 155 (emphasis added)). This, however, only supports our interpretation. The right "not to have to compromise" under s. 6(3) is a right independent of the Crown's right under deemed trusts (para. 155 (emphasis deleted)).

(b) *Power to Stay the Crown's Garnishment Right (Section 11.09)*

[243] Secondly, the majority at the Court of Appeal and the respondents say that giving effect to the clear statutory wording would be contrary to the purpose of s. 11.09 of the *CCAA*, which grants courts the power to stay the Crown's garnishment right under the *ITA* (C.A. reasons, at para. 54). This demonstrates, the argument goes, Parliament's intent to have the court exercise control over the Crown's interests while monitoring the restructuring proceedings. On this view, granting absolute priority to the deemed trusts under the Fiscal Statutes necessarily implies that s. 11.09 of the *CCAA* does not apply to the deemed trust claim.

[244] Again respectfully, this is not so. A court-ordered stay of garnishments under s. 11.09 of the *CCAA* *can* apply to the Crown's deemed trust claims under the Fiscal Statutes because the deemed trust provisions and s. 11.09 each serve different purposes: the deemed trusts grant a priority to the Crown, while s. 11.09 imposes conditions on when and how the Crown can enforce its garnishment rights under s. 224(1.2) of the *ITA*. In other words, s. 11.09 permits the Court to stay the Crown's ability to enforce its claims under the deemed trusts, but it does not remove its priority.

[245] The critical point is this: giving effect to Parliament's clear intent to grant absolute priority to the deemed trust does not render s. 6(3) or s. 11.09 meaningless. To the contrary, s. 6(3) and s. 11.09 respect the ultimate priority of the deemed trusts under the Fiscal Statutes by allowing for the ultimate priority of the Crown claim to persist, while not frustrating the remedial purpose of the *CCAA*.

(3) Conclusion

[246] As with our discussion of the deemed trust's absolute priority, the harmonious operation of the *CCAA* and the Fiscal Statutes can be summarized as follows:

1. the *CCAA* preserves the Crown's right to be paid in priority to all security interests for its claims for source deductions under the Fiscal Statutes;

2. under the *CCAA*, the Crown is not a "secured creditor" in respect of its deemed trust claims under the Fiscal Statutes;

3. as priming charges can attach only to the debtor's property, and as Parliament has made it clear that unremitted source deductions form no part of the debtor's property, the Crown's interest under the deemed trust is not subject to the priming charges;

4. section 6(3) of the *CCAA*, which operates only where there is an arrangement or compromise put to the court, protects the entirety of the Crown claim under s. 224(1.2) of the *ITA* and similar provisions of the Fiscal Statutes; and

5. the deemed trust's grant of priority to the Crown is unaffected by s. 11.09, which instead imposes conditions on when and how the Crown can enforce its garnishment rights under s. 224(1.2) of the *ITA*.

D. *Policy Reasons Do Not Support a Different Interpretation*

[247] The majority of the Court of Appeal and the respondents place significant weight on what they view as the potentially "absurd consequences" that would result from concluding that the deemed trusts under the Fiscal Statutes have priority over the priming charges. The same point implicitly underlies our colleague Côté J.'s reasons. Indeed, the majority at the Court of Appeal went as far as to warn that, under this interpretation, interim financing would "simply end", an assertion that "almost certainly goes too far" (C.A. reasons, at para. 50; Wood, at p. 99). It added that it would lead to more business failures and, in turn, undermine tax collection (paras. 48 and 50). We disagree.

[248] The "absurd consequences" identified by the majority at the Court of Appeal rest on faulty premises. The conclusion that interim financing would "simply end" was not supported by the record. The majority extrapolated from admittedly

incomplete and dated data about interim financing drawn from a textbook which does not indicate the presence of a deemed trust claim. This sweeping statement elides cases where there is no interim lending and cases, such as this one, where the debtor's assets are sufficient to satisfy both the interim lending and the Crown's deemed trust claim. This is an omission that cannot be readily ignored as there are usually enough funds available to satisfy both the Crown claim *and* the court-ordered priming charges (Wood, at p. 100). Equally unfounded is the majority's claim that confirming the priority of the deemed trusts of the Fiscal Statutes would "inject an unacceptable level of uncertainty into the insolvency process" (C.A. reasons, at para. 51). A company applying under the *CCAA* is required to provide its financial statements (s. 10(2)(c)), which include the source deductions owed to the Crown. Interim lenders can rely on this information to evaluate the risk of providing financing.

[249] Moreover, the majority at the Court of Appeal did not consider that Parliament can, and did, choose to prioritize the integrity of the tax system over the interests of secured creditors. Indeed, and with respect, the majority's own interpretation arguably itself produces absurd results, whereby employees' gross remuneration are conscripted as a subsidy to secure interim financing and the services of insolvency professionals.

[250] We therefore do not remotely see the consequences of our interpretation as rising to the level of absurdity. And Parliament has unambiguously struck the balance it considered appropriate in pursuit of the dual objectives of collecting unremitted

source deductions, which are not the property of the debtor, and avoiding the "devastating social and economic effects of bankruptcy" (*Century Services*, at para. 59, quoting *Elan Corp. v. Comiskey* (1990), 1 O.R. (3d) 289 (C.A.), at p. 306, per Doherty J.A., dissenting). Whether s. 227(4.1) of the *ITA* is an effective means to protect the fiscal base or whether "the Crown is biting off the hand that feeds it" are not questions that this Court has the competence or legitimacy to answer (C.A. reasons, at para. 48).

[251] In any event, even were there evidence that giving priority to the deemed trusts under the Fiscal Statutes over the priming charges produced absurd results, our conclusion would be no different. The presumption against absurdity is exactly that: a presumption. Nothing more. Illogical consequences flowing from the application of a statute do not give rein to courts to disregard clear legislative intent. As Lamer C.J. noted in *R. v. McIntosh*, [1995] 1 S.C.R. 686, at para. 41, "Parliament . . . has the right to legislate illogically (assuming that this does not raise constitutional concerns). And if Parliament is not satisfied with the judicial application of its illogical enactments, then Parliament may amend them accordingly."

[252] Here, Parliament's intention to give absolute priority to the deemed trust of the Fiscal Statutes is unequivocal. Our role is to give effect to this intention.

III. Disposition

[253] We would allow the appeal. The respondents should be entitled to costs in accordance with "Schedule B" to the regulations (*Rules of the Supreme Court of*

Canada, SOR/2002-156). There are no exceptional circumstances that would justify enhanced costs. Despite the appeal being moot, it was not improper for the Crown to seek the correct interpretation of the Fiscal Statutes.

The following are the reasons delivered by

MOLDAVER J. —

[254] I have had the benefit of reading the reasons of my colleagues, Justice Côté, Justice Karakatsanis, and Justices Brown and Rowe. While I substantially agree with the analysis and conclusions of Brown and Rowe JJ., there are two points that I wish to address.

[255] First, unlike Brown and Rowe JJ., I see no reason to define the particular nature or operation of the Crown's interest under s. 227(4.1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"), in the context of proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). While a future appeal may require this Court to determine exactly how the Crown's interest under s. 227(4.1) "survives", and whether it amounts to some form of ownership interest in the debtor's property, as Brown and Rowe JJ. maintain, some form of security interest in that property, or something else entirely (e.g., a right not to have to compromise, as Karakatsanis J. maintains), such an inquiry is not necessary in this case. Properly interpreted, the relevant provisions of the *CCAA* and *ITA* work in harmony to

direct that the Crown's interest — in whatever form it takes — must be given priority over court-ordered priming charges. This conclusion is sufficient to dispose of the appeal.

[256] In my view, to the extent that Brown and Rowe JJ. conclude that the Crown's interest under s. 227(4.1) affords the Crown beneficial ownership over the source deductions such that "the source deductions are deemed never to form part of the company's property", they have effectively decided the appeal by two paths — first, by way of the Crown's absolute priority under s. 227(4.1), and second, by way of the Crown's beneficial ownership over any unremitted source deductions (para. 223). As they note, if the Crown's interest amounts to an ownership interest and unremitted source deductions do not form part of the debtor company's property, priming charges could never attach to those source deductions, whether ordered under the specific priming charge provisions or the court's broad power under s. 11 of the *CCAA* (paras. 222-23). If this is indeed the case, it is not clear that the issue of competing priority between the Crown's interest and court-ordered priming charges ever arises, as the source deductions would be simply inaccessible to anyone other than the Crown. As I am not necessarily convinced that the Crown's interest under s. 227(4.1) amounts to an ownership interest, and as the Crown's absolute priority does not depend on this conclusion, I would leave the question of the nature of the Crown's interest to another day.

[257] Second, while I agree with Brown and Rowe JJ. that s. 37(2) of the *CCAA* can be interpreted as an internal restriction on s. 11, I hesitate to accept this conclusion, as it strikes me that in order to give proper effect to Parliament's intention for s. 11 to serve as "the engine" that drives the *CCAA* and empowers supervising judges to further its remedial objectives, any restrictions on that discretionary power should be explicit and unambiguous (*9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, at para. 48, citing *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), at para. 36). With respect, s. 37(2) does not amount to such an explicit and unambiguous restriction. Rather, s. 37(2) is a simple exception to s. 37(1), which serves to nullify the effect of any statutory provision that deems property to be held in favour of the Crown:

> **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.
>
> **(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* . . . .

[258] In effect, then, the function of s. 37(2) is merely to preserve the Crown's deemed trust under s. 227(4.1) from extinguishment under s. 37(1). In preserving the Crown's interest, however, "s. 37(2) does not explain what to do with that right for the purposes of a *CCAA* proceeding", nor does it say anything that would limit the court's power under s. 11 to order priming charges in priority to the Crown's deemed trust claim (Karakatsanis J.'s reasons, at para. 153). Indeed, as Karakatsanis J. notes, "There is no provision in the *CCAA* stipulating what the court can do with trust property and

no provision in the *CCAA* conferring more specific jurisdiction on whether a priming charge can rank ahead of the beneficiary of a deemed trust" (para. 176). Rather, it is only when one looks to s. 227(4.1) that the absolute priority of the Crown's interest — and the resulting limitations on s. 11 — become apparent. It is thus not entirely clear that interpreting s. 37(2) as an internal restriction accords with the function of s. 37(2) or the leeway that Parliament intended for the scope of powers under s. 11. In other words, the relationship between ss. 11 and 37(2) may not be as clear-cut as my colleagues seem to suggest. Accordingly, while I ultimately agree with Brown and Rowe JJ. that s. 37(2) can be interpreted as an internal restriction so as to avoid a conflict between the *CCAA* and *ITA*, I feel it important to explain that, if this interpretation is mistaken, s. 11 is nonetheless restricted by the external text of s. 227(4.1).

[259] If s. 37(2) does not amount to an internal restriction on s. 11, using s. 11 to prioritize priming charges over the Crown's deemed trust claim would put the provision in direct conflict with s. 227(4.1) which, as my colleagues Brown and Rowe JJ. have explained, requires that the Crown's claim be ranked in priority to all security interests, including priming charges. The direct conflict would trigger the "[n]otwithstanding" language in s. 227(4.1), which states that "[n]otwithstanding . . . any other enactment of Canada", the Crown's claim is to have priority. This language thus imposes an external restriction on the court's power under s. 11. Indeed, the supremacy of s. 227(4.1) is implicitly acknowledged by the text of s. 11 as, unlike s. 227(4.1), which operates despite "any other enactment of Canada", s. 11 only operates "[d]espite

anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*", but not despite anything in the *ITA*. Accordingly, while the court's discretionary authority under s. 11 could, in theory, empower a court to subordinate the Crown's interest in unremitted source deductions, that power is ultimately stopped short by the express language of s. 227(4.1).

[260] In outlining this position, I consider it important to contextualize this Court's statement in *Callidus* that "the jurisdiction granted by s. 11 is constrained only by restrictions set out in the *CCAA* itself, and the requirement that the order made be 'appropriate in the circumstances'" (para. 67). The focus in *Callidus* was on the discretionary authority of supervising *CCAA* judges within the confines of the *CCAA* itself; it was not on addressing the question of the authority of *CCAA* judges to apply s. 11 in the face of overriding federal legislation. Respectfully, where, as here, Parliament has expressly indicated the supremacy of a statute over the provisions of the *CCAA*, the court's power under s. 11 is correspondingly restricted.

[261] The Crown's deemed trust claim must thus take priority over all court-ordered priming charges, whether they arise under the specific priming charge provisions, or under the court's discretionary authority.

[262] A necessary consequence of the absolute supremacy of the Crown's deemed trust claim over court-ordered priming charges is that the Crown's interest under s. 227(4.1) cannot be given effect by s. 6(3) of the *CCAA*. Section 6(3) of the *CCAA* provides that

> [u]nless Her Majesty agrees otherwise, the court may sanction a compromise or arrangement only if the compromise or arrangement provides for the payment in full to Her Majesty in right of Canada or a province, within six months after court sanction of the compromise or arrangement, of all amounts that were outstanding at the time of the application for an order under section 11 or 11.02 and that are of a kind that could be subject to a demand under
>
> **(a)** subsection 224(1.2) of the *Income Tax Act* . . . .

[263] In my view, there are two reasons why s. 6(3) cannot represent the Crown's interest under s. 227(4.1). First, the focus of s. 6(3) is to establish a timeframe for payment to the Crown of certain outstanding debts in the event that the debtor company succeeds in staying viable as a going concern. By contrast, s. 227(4.1) is focused on ensuring the *priority* of the Crown's claim. The key point of distinction here is that, under s. 6(3), the Crown could be ranked last, so long as it is paid within six months of any arrangement. Such an outcome would be plainly inconsistent with the absolute priority of the Crown's claim, as established by the *CCAA* and *ITA*. Second, as s. 6(3) applies only where a compromise or plan of arrangement is reached, the Crown's deemed trust claim would not operate in the event that a liquidation occurred under the *CCAA*, thereby depriving the Crown of its priority over security interests in such circumstances. Again, this potential consequence would be at odds with the clear intention of the *CCAA* and *ITA*.

[264] Before concluding, I would note that it cannot be doubted that Parliament considered the potential consequences of its legislative actions, including any consequences for *CCAA* proceedings. If circumstances do arise in which the priority of

the Crown's claim threatens the viability of a particular restructuring, it clearly lies with the Crown to be flexible so as to avoid any consequences that would undermine the remedial purposes of the *CCAA*.

[265] I would, therefore, allow the appeal. The respondents are entitled to costs in this Court in accordance with Schedule B of the *Rules of the Supreme Court of Canada*, SOR/2002-156.

Appeal dismissed with costs, ABELLA, MOLDAVER, BROWN *and* ROWE JJ. *dissenting.*

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

Solicitors for the respondents Canada North Group Inc., Canada North Camps Inc., Campcorp Structures Ltd., DJ Catering Ltd., 816956 Alberta Ltd., 1371047 Alberta Ltd., 1919209 Alberta Ltd. and Ernst & Young Inc. in its capacity as monitor: Duncan Craig, Edmonton.

Solicitors for the respondent the Business Development Bank of Canada: Cassels Brock & Blackwell, Calgary.

Solicitors for the intervener the Insolvency Institute of Canada: Blake, Cassels & Graydon, Calgary.

Solicitors for the intervener the Canadian Association of Insolvency and Restructuring Professionals: Osler, Hoskin & Harcourt, Calgary.

TAB 6

Her Majesty The Queen in Right of the Province of Newfoundland and Labrador *Appellant*

v.

AbitibiBowater Inc., Abitibi-Consolidated Inc., Bowater Canadian Holdings Inc., Ad Hoc Committee of Bondholders, Ad Hoc Committee of Senior Secured Noteholders and U.S. Bank National Association (Indenture Trustee for the Senior Secured Noteholders) *Respondents*

and

Attorney General of Canada, Attorney General of Ontario, Attorney General of British Columbia, Attorney General of Alberta, Her Majesty The Queen in Right of British Columbia, Ernst & Young Inc., as Monitor, and Friends of the Earth Canada *Interveners*

Indexed as: Newfoundland and Labrador *v.* AbitibiBowater Inc.

2012 SCC 67

File No.: 33797.

2011: November 16; 2012: December 7.

Present: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Bankruptcy and Insolvency — Provable claims — Contingent claims — Corporation filing for insolvency protection — Province issuing environmental protection orders against corporation and seeking declaration that orders not "claims" under Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 ("CCAA"), and not subject to claims procedure order — Whether environmental protection orders are monetary claims that

Sa Majesté la Reine du chef de la province de Terre-Neuve-et-Labrador *Appelante*

c.

AbitibiBowater Inc., Abitibi-Consolidated Inc., Bowater Canadian Holdings Inc., comité ad hoc des créanciers obligataires, comité ad hoc des porteurs de billets garantis de premier rang et U.S. Bank National Association (fiduciaire désigné par l'acte constitutif pour les porteurs de billets garantis de premier rang) *Intimés*

et

Procureur général du Canada, procureur général de l'Ontario, procureur général de la Colombie-Britannique, procureur général de l'Alberta, Sa Majesté la Reine du chef de la Colombie-Britannique, Ernst & Young Inc., en sa qualité de contrôleur, et Les Ami(e)s de la Terre Canada *Intervenants*

Répertorié : Terre-Neuve-et-Labrador *c.* AbitibiBowater Inc.

2012 CSC 67

N° du greffe : 33797.

2011 : 16 novembre; 2012 : 7 décembre.

Présents : La juge en chef McLachlin et les juges LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver et Karakatsanis.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Faillite et insolvabilité — Réclamations prouvables — Réclamations éventuelles — Demande de protection contre l'insolvabilité par une société — Ordonnances environnementales émises par la province contre la société et demande, par la province, d'un jugement déclarant que les ordonnances ne constituent pas des « réclamations » aux termes de la Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985,

can be compromised in corporate restructuring under CCAA — Whether CCAA is ultra vires or constitutionally inapplicable by permitting court to determine whether environmental order is a monetary claim.

A was involved in industrial activity in Newfoundland and Labrador (the "Province"). In a period of general financial distress, it ended its last operation there, filed for insolvency protection in the United States and obtained a stay of proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). The Province subsequently issued five orders under the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2, requiring A to submit remediation action plans for five industrial sites it had occupied, three of which had been expropriated by the Province, and to complete the remediation actions. The Province also brought a motion for a declaration that a claims procedure order issued under the *CCAA* in relation to A's proposed reorganization did not bar the Province from enforcing the environmental protection orders. The Province argued that the environmental protection orders were not "claims" under the *CCAA* and therefore could not be stayed and subject to a claims procedure order. It further argued that Parliament lacked the constitutional competence under its power to make laws in relation to bankruptcy and insolvency to stay orders that were validly made in the exercise of a provincial power. A contested the motion, arguing that the orders were monetary in nature and hence fell within the definition of the word "claim" in the claims procedure order. The *CCAA* court dismissed the Province's motion. The Court of Appeal denied the Province leave to appeal.

Held (McLachlin C.J. and LeBel J. dissenting): The appeal should be dismissed.

Per Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.: Not all orders issued by regulatory bodies are monetary in nature and thus provable claims in an insolvency proceeding, but some may be, even if the amounts involved are not quantified

ch. C-36 (« LACC »), et qu'elles ne sont pas assujetties à l'ordonnance relative à la procédure de réclamations — Les ordonnances environnementales constituent-elles des réclamations pécuniaires pouvant faire l'objet d'une transaction dans le cadre d'une restructuration sous le régime de la LACC? — La LACC est-elle ultra vires ou constitutionnellement inapplicable en permettant au tribunal de déterminer si une ordonnance environnementale constitue une réclamation pécuniaire?

A a poursuivi des activités industrielles à Terre-Neuve-et-Labrador (la « province »). Dans une période de grandes difficultés financières, elle a mis un terme à ses activités dans la province, elle a présenté une demande de protection contre l'insolvabilité aux États-Unis et elle a obtenu une suspension des procédures en vertu de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« *LACC* »). La province a par la suite prononcé cinq ordonnances environnementales en vertu de l'*Environmental Protection Act*, S.N.L. 2002, ch. E-14.2, contraignant A à présenter des plans de restauration pour cinq sites industriels qu'elle avait occupés, dont trois avaient été expropriés par la province, et à réaliser les plans de restauration approuvés. La province a également demandé par requête un jugement déclarant qu'une ordonnance relative à la procédure de réclamations rendue aux termes de la *LACC* dans le cadre de la réorganisation proposée de A n'empêchait pas la province d'exécuter les ordonnances environnementales. La province a plaidé que les ordonnances environnementales ne constituent pas des « réclamations » au sens de la *LACC* et que leur exécution ne peut donc être suspendue ni être assujettie à une ordonnance relative à la procédure de réclamations. Elle a de plus fait valoir que le pouvoir du Parlement de légiférer en matière de faillite et d'insolvabilité ne lui confère pas la compétence constitutionnelle pour suspendre l'application des ordonnances prononcées dans l'exercice valide de pouvoirs provinciaux. A a contesté la requête et a soutenu que les ordonnances étaient de nature pécuniaire et qu'elles étaient donc visées par la définition du terme « réclamation » utilisé dans l'ordonnance relative à la procédure de réclamations. Le juge chargé d'appliquer la *LACC* a rejeté la requête de la province et la Cour d'appel a rejeté la demande d'autorisation d'appel de la province.

Arrêt (la juge en chef McLachlin et le juge LeBel sont dissidents) : Le pourvoi est rejeté.

Les juges Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver et Karakatsanis : Les ordonnances des organismes administratifs ne sont pas toutes de nature pécuniaire, et donc des réclamations prouvables dans le cadre de procédures d'insolvabilité, mais

at the outset of the proceedings. In the environmental context, the *CCAA* court must determine whether there are sufficient facts indicating the existence of an environmental duty that will ripen into a financial liability owed to the regulatory body that issued the order. In such a case, the relevant question is not simply whether the body has formally exercised its power to claim a debt. A *CCAA* court does not assess claims or orders on the basis of form alone. If the order is not framed in monetary terms, the *CCAA* court must determine, in light of the factual matrix and the applicable statutory framework, whether it is a claim that will be subject to the claims process.

There are three requirements orders must meet in order to be considered claims that may be subject to the insolvency process in a case such as the one at bar. First, there must be a debt, a liability or an obligation to a creditor. In this case, the first criterion was met because the Province had identified itself as a creditor by resorting to environmental protection enforcement mechanisms. Second, the debt, liability or obligation must be incurred as of a specific time. This requirement was also met since the environmental damage had occurred before the time of the *CCAA* proceedings. Third, it must be possible to attach a monetary value to the debt, liability or obligation. The present case turns on this third requirement, and the question is whether orders that are not expressed in monetary terms can be translated into such terms.

A claim may be asserted in insolvency proceedings even if it is contingent on an event that has not yet occurred. The criterion used by courts to determine whether a contingent claim will be included in the insolvency process is whether the event that has not yet occurred is too remote or speculative. In the context of an environmental protection order, this means that there must be sufficient indications that the regulatory body that triggered the enforcement mechanism will ultimately perform remediation work and assert a monetary claim. If there is sufficient certainty in this regard, the court will conclude that the order can be subject to the insolvency process.

certaines peuvent l'être en dépit du fait qu'elles ne sont pas quantifiées dès le début des procédures. En matière environnementale, le tribunal chargé de l'application de la *LACC* doit déterminer s'il y a suffisamment de faits indiquant qu'il existe une obligation environnementale de laquelle résultera une dette envers l'organisme administratif qui a prononcé l'ordonnance. En pareil cas, la question pertinente ne se résume pas à déterminer si l'organisme a formellement exercé son pouvoir de réclamer une dette. Le tribunal qui évalue une réclamation ou une ordonnance ne se limite pas à un examen de sa forme. Si l'ordonnance n'est pas formulée en termes pécuniaires, le tribunal doit déterminer, en fonction des faits en cause et du cadre législatif applicable, si elle constitue une réclamation qui sera assujettie au processus de réclamation.

Pour qu'elles constituent des réclamations pouvant être assujetties au processus applicable en matière d'insolvabilité dans une affaire telle celle en l'espèce, les ordonnances doivent satisfaire à trois conditions. Premièrement, il doit s'agir d'une dette, d'un engagement ou d'une obligation envers un créancier. En l'espèce, il a été satisfait à la première condition puisque la province s'est présentée comme créancière en ayant recours aux mécanismes d'application en matière de protection de l'environnement. Deuxièmement, la dette, l'engagement ou l'obligation doit avoir pris naissance à un moment précis. Il a également été satisfait à cette condition puisque les dommages environnementaux sont survenus avant que les procédures en vertu de la *LACC* ne soient entamées. Troisièmement, il doit être possible d'attribuer une valeur pécuniaire à cette dette, cet engagement ou cette obligation. La présente affaire est centrée sur cette troisième condition, et la question est de savoir si des ordonnances qui ne sont pas formulées en termes pécuniaires peuvent être formulées en de tels termes.

Il est possible de faire valoir une réclamation dans le cadre de procédures d'insolvabilité même si elle dépend d'un événement non encore survenu. Le critère retenu par les tribunaux pour décider si une réclamation éventuelle sera incluse dans le processus d'insolvabilité est celui qui consiste à déterminer si l'événement non encore survenu est trop éloigné ou conjectural. Dans le contexte d'une ordonnance environnementale, cela signifie qu'il doit y avoir des indications suffisantes permettant de conclure que l'organisme administratif qui a eu recours aux mécanismes d'application de la loi effectuera en fin de compte des travaux de décontamination et présentera une réclamation pécuniaire. Si cela est suffisamment certain, le tribunal conclura que l'ordonnance peut être assujettie au processus d'insolvabilité.

Certain indicators can guide the *CCAA* court in this assessment, including whether the activities are ongoing, whether the debtor is in control of the property, and whether the debtor has the means to comply with the order. The court may also consider the effect that requiring the debtor to comply with the order would have on the insolvency process. The analysis is grounded in the facts of each case. In this case, the *CCAA* court's assessment of the facts, particularly its finding that the orders were the first step towards performance of the remediation work by the Province, leads to no conclusion other than that it was sufficiently certain that the Province would perform remediation work and therefore fall within the definition of a creditor with a monetary claim.

Subjecting such orders to the claims process does not extinguish the debtor's environmental obligations any more than subjecting any creditor's claim to that process extinguishes the debtor's obligation to pay a debt. It merely ensures that the Province's claim will be paid in accordance with insolvency legislation. Full compliance with orders that are found to be monetary in nature would shift the costs of remediation to third party creditors and replace the polluter-pay principle with a "third-party-pay" principle. Moreover, to subject environmental protection orders to the claims process is not to invite corporations to restructure in order to rid themselves of their environmental liabilities. Reorganization made necessary by insolvency is hardly ever a deliberate choice, and when the risks corporations engage in materialize, the dire costs are borne by almost all stakeholders.

Because the provisions on the assessment of claims in insolvency matters relate directly to Parliament's jurisdiction, the ancillary powers doctrine is not relevant to this case. The interjurisdictional immunity doctrine is also inapplicable, because a finding that a claim of an environmental creditor is monetary in nature does not interfere in any way with the creditor's activities; its claim is simply subject to the insolvency process.

Per McLachlin C.J. (dissenting): Remediation orders made under a province's environmental protection

Certains indicateurs permettent de guider le tribunal dans cette analyse, notamment si les activités se poursuivent, si le débiteur exerce un contrôle sur le bien et s'il dispose des moyens de se conformer à l'ordonnance. Il est également possible pour le tribunal de prendre en compte les conséquences qu'entraînerait sur le processus d'insolvabilité le fait d'exiger du débiteur qu'il se conforme à l'ordonnance. L'analyse est fondée sur les faits propres à chaque cas. En l'espèce, l'appréciation des faits par le tribunal, plus particulièrement sa constatation que les ordonnances constituaient la première étape en vue de la décontamination des sites par la province, ne permet de tirer aucune conclusion autre que celle suivant laquelle il était suffisamment certain que la province exécuterait des travaux de décontamination et qu'elle était par conséquent visée par la définition d'un créancier ayant une réclamation pécuniaire.

Le fait d'assujettir ces ordonnances au processus de réclamations n'éteint pas les obligations environnementales qui incombent au débiteur, pas plus que le fait de soumettre à ce processus les réclamations des créanciers n'éteint l'obligation du débiteur de payer ses dettes. Le fait d'assujettir une ordonnance au processus de réclamation vise simplement à faire en sorte que le paiement au créancier sera fait conformément aux dispositions législatives applicables en matière d'insolvabilité. Le respect intégral des ordonnances dont la nature pécuniaire est reconnue transférerait le coût de la décontamination aux tiers créanciers et substituerait au principe du pollueur-payeur celui du « tiers-payeur ». En outre, l'assujettissement des ordonnances environnementales à la procédure de réclamations n'équivaut pas à convier les sociétés à se réorganiser dans le but d'échapper à leurs obligations environnementales. Une réorganisation rendue nécessaire par l'insolvabilité de la société peut difficilement être assimilée à un choix délibéré, et lorsque les risques auxquels s'exposent les sociétés se concrétisent, la quasi-totalité des personnes ayant des intérêts dans la société en supportent les terribles coûts.

L'application de la doctrine des pouvoirs accessoires n'est pas pertinente en l'espèce car les dispositions régissant l'évaluation des réclamations en matière d'insolvabilité sont directement reliées à la compétence du législateur fédéral. La doctrine de la protection des compétences exclusives ne s'applique pas non plus parce qu'une conclusion selon laquelle un créancier œuvrant dans le domaine de l'environnement détient une réclamation pécuniaire ne modifie en rien les activités de ce créancier; sa réclamation est simplement assujettie au processus d'insolvabilité.

La juge en chef McLachlin (dissidente) : Les ordonnances exigeant la décontamination émises aux termes

legislation impose ongoing regulatory obligations on the corporation required to clean up the pollution. They may only be reduced to monetary claims which can be compromised under *CCAA* proceedings in narrow circumstances where a province has done the remediation work, or where it is "sufficiently certain" that it will do the work. This last situation is regulated by the provisions of the *CCAA* for contingent or future claims. The test is whether there is a likelihood approaching certainty that the province will do the work. "Likelihood approaching certainty" recognizes that the government's decision is discretionary and may be influenced by competing political and social considerations, which are not normally subject to judicial consideration. Insofar as this determination touches on the division of powers, I am in substantial agreement with Deschamps J.

Apart from the orders related to the work done or tendered for on the Buchans property, the orders for remediation in this case are not claims that can be compromised. The *CCAA* maintains the fundamental distinction between regulatory obligations under the general law aimed at the protection of the public and monetary claims that can be compromised in *CCAA* restructuring or bankruptcy. The *CCAA* judge never asked himself the critical question of whether it was "sufficiently certain" that the Province would do the work itself. His failure to consider that question requires this Court to answer it in his stead. There is nothing on the record to support the view that the Province will move to remediate the properties. It has not been shown that the contamination poses immediate health risks which must be addressed without delay. It has not been shown that the Province has taken any steps to do any work. And it has not been shown that the Province has set aside or even contemplated setting aside money for this work. The Province retained a number of options, including leaving the sites contaminated, or calling on Abitibi to remediate following its emergence from restructuring. There is nothing in the record that makes it more probable, much less establishes "sufficient certainty", that the Province will opt to do the work itself.

d'une loi provinciale sur la protection de l'environnement imposent des exigences réglementaires continues à la personne morale requise de remédier à la pollution. Ces ordonnances ne peuvent être converties en réclamations pécuniaires pouvant faire l'objet de transactions dans le cadre de procédures engagées aux termes de la *LACC* que dans certaines circonstances particulières, lorsqu'une province a exécuté les travaux ou lorsqu'il est « suffisamment certain » qu'elle exécutera les travaux. Cette deuxième situation est prévue par les dispositions de la *LACC* relatives aux réclamations éventuelles ou futures. Le critère consiste à déterminer s'il existe une probabilité proche de la certitude que la province exécutera les travaux. Une « probabilité proche de la certitude » reconnaît que la décision du gouvernement est discrétionnaire et peut être influencée par des considérations politiques et sociales concurrentes qui sont normalement soustraites à l'examen judiciaire. Dans la mesure où cette décision touche le partage des pouvoirs, je souscris pour l'essentiel à l'opinion exprimée par la juge Deschamps.

À l'exception des ordonnances relatives aux travaux sur le site de Buchans déjà exécutés ou à l'égard desquels des appels d'offres ont été lancés, les ordonnances exigeant la décontamination en l'espèce ne constituent pas des réclamations pouvant faire l'objet de transactions dans le cadre d'une restructuration. La *LACC* établit une distinction fondamentale entre les exigences réglementaires découlant d'une loi d'application générale visant la protection du public, d'une part, et les réclamations pécuniaires pouvant faire l'objet d'une transaction dans le cadre d'une restructuration engagée sous le régime de la *LACC* ou en matière de faillite, d'autre part. Le juge de première instance ne s'est jamais posé la question cruciale de savoir s'il était « suffisamment certain » que la province exécuterait elle-même les travaux. Le fait qu'il n'ait pas examiné cette question oblige notre Cour à y répondre à sa place. Aucune preuve au dossier ne laisse croire que la province entreprendra la décontamination des sites. Il n'a pas été démontré que la contamination pose pour la santé des risques immédiats exigeant la prise de mesures dans les plus brefs délais. Il n'a pas été démontré que la province a pris quelque mesure que ce soit pour réaliser des travaux. Et il n'a pas été démontré que la province a prévu des sommes d'argent pour ces travaux ou qu'elle a même songé à en prévoir. La province a conservé un certain nombre de choix, notamment laisser les sites contaminés, ou demander à Abitibi d'exécuter les travaux lorsqu'elle aura complété sa restructuration. Rien au dossier n'indique qu'il est plus probable, et encore moins qu'il est « suffisamment certain », que la province choisira d'exécuter elle-même la décontamination.

Per LeBel J. (dissenting): The test proposed by the Chief Justice according to which the evidence must show that there is a "likelihood approaching certainty" that the Province would remediate the contamination itself is not the established test for determining where and how a contingent claim can be liquidated in bankruptcy and insolvency law. The test of "sufficient certainty" described by Deschamps J. best reflects how both the common law and the civil law view and deal with contingent claims. Applying that test, the appeal should be allowed on the basis that there is no evidence that the Province intends to perform the remedial work itself.

Cases Cited

By Deschamps J.

Distinguished: *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.* (1991), 81 Alta. L.R. (2d) 45; **referred to:** *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453; *Canada v. McLarty*, 2008 SCC 26, [2008] 2 S.C.R. 79; *Confederation Treasury Services Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75; *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, 2003 SCC 58, [2003] 2 S.C.R. 624.

By McLachlin C.J. (dissenting)

Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd. (1991), 81 Alta. L.R. (2d) 45; *Lamford Forest Products Ltd. (Re)* (1991), 86 D.L.R. (4th) 534; *Shirley (Re)* (1995), 129 D.L.R. (4th) 105; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453; *Air Canada, Re [Regulators' motions]* (2003), 28 C.B.R. (5th) 52; *General Chemical Canada Ltd., Re*, 2007 ONCA 600, 228 O.A.C. 385; *Strathcona (County) v. PriceWaterhouseCoopers Inc.*, 2005 ABQB 559, 47 Alta. L.R. (4th) 138; *Confederation Treasury Services Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75; *Anvil Range Mining Corp., Re* (2001), 25 C.B.R. (4th) 1; *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.

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Act to amend the Bankruptcy Act and to amend the Income Tax Act in consequence thereof, S.C. 1992, c. 27, s. 9.

Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act, S.C. 1997, c. 12.

Le juge LeBel (dissident) : Le critère que propose la Juge en chef, selon lequel la preuve doit démontrer une « probabilité proche de la certitude » que la province se chargerait de la décontamination, ne constitue pas le critère établi pour déterminer si, et de quelle façon, une réclamation éventuelle peut être liquidée en droit de la faillite et de l'insolvabilité. Le critère de ce qui est « suffisamment certain » qu'énonce la juge Deschamps reflète mieux la façon dont la common law et le droit civil envisagent et traitent les réclamations éventuelles. En appliquant ce critère, il y aurait lieu d'accueillir le pourvoi puisqu'aucune preuve ne confirme l'intention de la province d'exécuter elle-même les travaux de décontamination.

Jurisprudence

Citée par la juge Deschamps

Distinction d'avec l'arrêt : *Panamericana de Bienes y Servicios S.A. c. Northern Badger Oil & Gas Ltd.* (1991), 81 Alta. L.R. (2d) 45; **arrêts mentionnés :** *Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453; *Canada c. McLarty*, 2008 CSC 26, [2008] 2 R.C.S. 79; *Confederation Treasury Services Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75; *Cie pétrolière Impériale ltée c. Québec (Ministre de l'Environnement)*, 2003 CSC 58, [2003] 2 R.C.S. 624.

Citée par la juge en chef McLachlin (dissidente)

Panamericana de Bienes y Servicios S.A. c. Northern Badger Oil & Gas Ltd. (1991), 81 Alta. L.R. (2d) 45; *Lamford Forest Products Ltd. (Re)* (1991), 86 D.L.R. (4th) 534; *Shirley (Re)* (1995), 129 D.L.R. (4th) 105; *Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453; *Air Canada, Re [Regulators' motions]* (2003), 28 C.B.R. (5th) 52; *General Chemical Canada Ltd., Re*, 2007 ONCA 600, 228 O.A.C. 385; *Strathcona (County) c. PriceWaterhouseCoopers Inc.*, 2005 ABQB 559, 47 Alta. L.R. (4th) 138; *Confederation Treasury Services Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75; *Anvil Range Mining Corp., Re* (2001), 25 C.B.R. (4th) 1; *R. c. Imperial Tobacco Canada Ltée*, 2011 CSC 42, [2011] 3 R.C.S. 45; *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235.

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Abitibi-Consolidated Rights and Assets Act, S.N.L. 2008, ch. A-1.01.

Code civil du Québec, L.Q. 1991, ch. 64, art. 1497, 1508, 1513.

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Loi modifiant la Loi sur la faillite et l'insolvabilité, la Loi sur les arrangements avec les créanciers des

Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005, S.C. 2007, c. 36, s. 65.
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Civil Code of Québec, S.Q. 1991, c. 64, arts. 1497, 1508, 1513.
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 2(1) "claim", 11, 11.1, 11.8(5), (7), (8), (9), 12(1), (2).
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Treaties and Other International Instruments

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David R. Wingfield, *Paul D. Guy* and *Philip Osborne*, for the appellant.

compagnies et la Loi de l'impôt sur le revenu, L.C. 1997, ch. 12.
Loi modifiant la Loi sur la faillite et l'insolvabilité, la Loi sur les arrangements avec les créanciers des compagnies, la Loi sur le Programme de protection des salariés et le chapitre 47 des Lois du Canada (2005), L.C. 2007, ch. 36, art. 65.
Loi modifiant la Loi sur la faillite et la Loi de l'impôt sur le revenu en conséquence, L.C. 1992, ch. 27, art. 9.
Loi sur la faillite et l'insolvabilité, L.R.C. 1985, ch. B-3, art. 2 « créancier », « réclamation prouvable en matière de faillite », 14.06(8), 121(1), (2), 135(1.1).
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David R. Wingfield, *Paul D. Guy* et *Philip Osborne*, pour l'appelante.

Sean F. Dunphy, *Nicholas McHaffie*, *Joseph Reynaud* and *Marc B. Barbeau*, for the respondents.

Christopher Rupar and *Marianne Zoric*, for the intervener the Attorney General of Canada.

Josh Hunter, *Robin K. Basu*, *Leonard Marsello* and *Mario Faieta*, for the intervener the Attorney General of Ontario.

R. Richard M. Butler, for the intervener the Attorney General of British Columbia.

Roderick Wiltshire, for the intervener the Attorney General of Alberta.

Elizabeth J. Rowbotham, for the intervener Her Majesty The Queen in Right of British Columbia.

Robert I. Thornton, *John T. Porter* and *Rachelle F. Moncur*, for the intervener Ernst & Young Inc., as Monitor.

William A. Amos, *Anastasia M. Lintner*, *Hugh S. Wilkins* and *R. Graham Phoenix*, for the intervener the Friends of the Earth Canada.

The judgment of Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ. was delivered by

[1] DESCHAMPS J. — The question in this appeal is whether orders issued by a regulatory body with respect to environmental remediation work can be treated as monetary claims under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*").

[2] Regulatory bodies may become involved in reorganization proceedings when they order the debtor to comply with statutory rules. As a matter of principle, reorganization does not amount to a licence to disregard rules. Yet there are circumstances in which valid and enforceable orders will be subject to an arrangement under the *CCAA*. One such circumstance is where a regulatory body

Sean F. Dunphy, *Nicholas McHaffie*, *Joseph Reynaud* et *Marc B. Barbeau*, pour les intimés.

Christopher Rupar et *Marianne Zoric*, pour l'intervenant le procureur général du Canada.

Josh Hunter, *Robin K. Basu*, *Leonard Marsello* et *Mario Faieta*, pour l'intervenant le procureur général de l'Ontario.

R. Richard M. Butler, pour l'intervenant le procureur général de la Colombie-Britannique.

Roderick Wiltshire, pour l'intervenant le procureur général de l'Alberta.

Elizabeth J. Rowbotham, pour l'intervenante Sa Majesté la Reine du chef de la Colombie-Britannique.

Robert I. Thornton, *John T. Porter* et *Rachelle F. Moncur*, pour l'intervenante Ernst & Young Inc., en sa qualité de contrôleur.

William A. Amos, *Anastasia M. Lintner*, *Hugh S. Wilkins* et *R. Graham Phoenix*, pour l'intervenant Les Ami(e)s de la Terre Canada.

Version française du jugement des juges Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver et Karakatsanis rendu par

[1] LA JUGE DESCHAMPS — La question soulevée dans le présent pourvoi est de savoir si des ordonnances d'un organisme administratif relatives à des travaux de décontamination peuvent être traitées comme des réclamations pécuniaires aux termes de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« *LACC* »).

[2] Un organisme administratif peut être appelé à intervenir dans le cadre de procédures de réorganisation lorsqu'il prononce une ordonnance intimant au débiteur de se conformer à une règle prescrite par la loi. En principe, une réorganisation ne permet pas à une personne d'ignorer ses obligations légales. Par ailleurs, en certaines circonstances, une ordonnance valable et exécutoire sera assujettie

makes an environmental order that explicitly asserts a monetary claim.

[3] In other circumstances, it is less clear whether an order can be treated as a monetary claim. The appellant and a number of interveners posit that an order issued by an environmental body is not a claim under the *CCAA* if the order does not require the debtor to make a payment. I agree that not all orders issued by regulatory bodies are monetary in nature and thus provable claims in an insolvency proceeding, but some may be, even if the amounts involved are not quantified at the outset of the proceeding. In the environmental context, the *CCAA* court must determine whether there are sufficient facts indicating the existence of an environmental duty that will ripen into a financial liability owed to the regulatory body that issued the order. In such a case, the relevant question is not simply whether the body has formally exercised its power to claim a debt. A *CCAA* court does not assess claims — or orders — on the basis of form alone. If the order is not framed in monetary terms, the court must determine, in light of the factual matrix and the applicable statutory framework, whether it is a claim that will be subject to the claims process.

[4] The case at bar concerns contamination that occurred, prior to the *CCAA* proceedings, on property that is largely no longer under the debtor's possession and control. The *CCAA* court found on the facts of this case that the orders issued by Her Majesty the Queen in right of the Province of Newfoundland and Labrador ("Province") were simply a first step towards remediating the contaminated property and asserting a claim for the resulting costs. In the words of the *CCAA* court, "the intended, practical and realistic effect of the EPA Orders was to establish a basis for the Province to

à un arrangement conclu en vertu de la *LACC*. C'est le cas notamment lorsqu'un organisme administratif prononce une ordonnance environnementale qui est explicitement formulée en termes pécuniaires.

[3] En d'autres circonstances, il est plus difficile de savoir si une ordonnance peut être traitée comme une réclamation pécuniaire. L'appelante et certains des intervenants affirment qu'une ordonnance émise par un organisme de protection de l'environnement ne constitue pas une réclamation au sens de la *LACC* si elle n'exige pas du débiteur qu'il lui paye un montant d'argent. Je conviens que les ordonnances des organismes administratifs ne constituent pas toutes des réclamations pécuniaires, et donc des réclamations prouvables dans le cadre de procédures d'insolvabilité, mais certaines peuvent l'être en dépit du fait qu'elles ne sont pas quantifiées dès le début des procédures. En matière environnementale, le tribunal chargé de l'application de la *LACC* doit déterminer s'il y a suffisamment de faits indiquant qu'il existe une obligation environnementale de laquelle résultera une dette envers l'organisme administratif qui a prononcé l'ordonnance. En pareil cas, la question pertinente ne se résume pas à déterminer si l'organisme a formellement exercé son pouvoir de réclamer une dette. Lorsque le tribunal évalue une réclamation (ou une ordonnance) il ne se limite pas à un examen de sa forme. Si l'ordonnance n'est pas formulée en termes pécuniaires, le tribunal doit déterminer, en fonction des faits en cause et du cadre législatif applicable, si elle constitue une réclamation qui sera assujettie au processus de réclamation.

[4] Le présent pourvoi a trait à des dommages environnementaux survenus avant que les procédures sous le régime de la *LACC* ne soient engagées, des dommages causés à des terrains qui, en majeure partie, ne sont plus en la possession du débiteur ni sous son contrôle. Le tribunal de première instance a conclu, selon les faits en l'espèce, que les ordonnances émises par Sa Majesté la Reine du chef de la province de Terre-Neuve-et-Labrador (« province ») ne constituaient que la première étape en vue de restaurer les sites contaminés et de réclamer les coûts engagés. Comme l'a exprimé le juge de

recover amounts of money to be eventually used for the remediation of the properties in question" (2010 QCCS 1261, 68 C.B.R. (5th) 1, at para. 211). As a result, the *CCAA* court found that the orders were clearly monetary in nature. I see no error of law and no reason to interfere with this finding of fact. I would dismiss the appeal with costs.

I. Facts and Procedural History

[5] For over 100 years, AbitibiBowater Inc. and its affiliated or predecessor companies (together, "Abitibi") were involved in industrial activity in Newfoundland and Labrador. In 2008, Abitibi announced the closure of a mill that was its last operation in that province.

[6] Within two weeks of the announcement, the Province passed the *Abitibi-Consolidated Rights and Assets Act*, S.N.L. 2008, c. A-1.01 ("*Abitibi Act*"), which immediately transferred most of Abitibi's property in Newfoundland and Labrador to the Province and denied Abitibi any legal remedy for this expropriation.

[7] The closure of its mill in Newfoundland and Labrador was one of many decisions Abitibi made in a period of general financial distress affecting its activities both in the United States and in Canada. It filed for insolvency protection in the United States on April 16, 2009. It also sought a stay of proceedings under the *CCAA* in the Superior Court of Quebec, as its Canadian head office was located in Montréal. The *CCAA* stay was ordered on April 17, 2009.

[8] In the same month, Abitibi also filed a notice of intent to submit a claim to arbitration under NAFTA (the *North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*,

première instance, [TRADUCTION] « les ordonnances avaient pour effet attendu, pratique et réaliste d'établir le fondement d'une réclamation permettant à la province de récupérer des sommes d'argent qui seraient utilisées pour procéder aux travaux de décontamination » (2010 QCCS 1261, 68 C.B.R. (5th) 1, par. 211). Par conséquent, pour le tribunal, les ordonnances étaient clairement de nature pécuniaire. Je ne vois aucune erreur de droit ni aucune raison de modifier ces conclusions de fait. Je suis d'avis de rejeter le pourvoi avec dépens.

I. Faits et historique judiciaire

[5] Pendant plus d'une centaine d'années, AbitibiBowater Inc., et ses auteurs ou sociétés filiales (ensemble, « Abitibi ») ont poursuivi des activités industrielles à Terre-Neuve-et-Labrador. En 2008, Abitibi a annoncé la fermeture de la dernière des scieries qu'elle exploitait dans cette province.

[6] Dans les deux semaines qui ont suivi cette annonce, la province a adopté l'*Abitibi-Consolidated Rights and Assets Act*, S.N.L. 2008, ch. A-1.01 (« *Abitibi Act* »), qui transférait immédiatement à la province la plus grande partie des biens d'Abitibi situés à Terre-Neuve-et-Labrador et privait la société de tous recours judiciaires en relation avec cette expropriation.

[7] La fermeture de sa scierie à Terre-Neuve-et-Labrador est l'une des nombreuses décisions prises par Abitibi dans une période où de grandes difficultés financières touchaient ses activités au Canada et aux États-Unis. Le 16 avril 2009, elle a présenté une demande de protection contre l'insolvabilité aux États-Unis. Elle a également demandé à la Cour supérieure du Québec, à Montréal, où elle a son siège social au Canada, une suspension des procédures en vertu de la *LACC*. La suspension a été ordonnée le 17 avril 2009.

[8] Au cours du même mois, Abitibi a aussi déposé un avis d'intention de soumettre une plainte à l'arbitrage en vertu de l'ALENA (*Accord de libre-échange nord-américain entre le gouvernement du Canada, le gouvernement des États-Unis d'Amérique et le gouvernement des États-Unis du Mexique*,

Can. T.S. 1994 No. 2) for losses resulting from the *Abitibi Act*, which, according to Abitibi, exceeded $300 million.

[9] On November 12, 2009, the Province's Minister of Environment and Conservation ("Minister") issued five orders (the "*EPA* Orders") under s. 99 of the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2 ("*EPA*"). The *EPA* Orders required Abitibi to submit remediation action plans to the Minister for five industrial sites, three of which had been expropriated, and to complete the approved remediation actions. The *CCAA* judge estimated the cost of implementing these plans to be from "the mid-to-high eight figures" to "several times higher" (para. 81).

[10] On the day it issued the *EPA* Orders, the Province brought a motion for a declaration that a claims procedure order issued under the *CCAA* in relation to Abitibi's proposed reorganization did not bar the Province from enforcing the *EPA* Orders. The Province argued — and still argues — that non-monetary statutory obligations are not "claims" under the *CCAA* and hence cannot be stayed and be subject to a claims procedure order. It further submits that Parliament lacks the constitutional competence under its power to make laws in relation to bankruptcy and insolvency to stay orders that are validly made in the exercise of a provincial power.

[11] Abitibi contested the motion and sought a declaration that the *EPA* Orders were stayed and that they were subject to the claims procedure order. It argued that the *EPA* Orders were monetary in nature and hence fell within the definition of the word "claim" in the claims procedure order.

R.T. Can. 1994 n^{o} 2) relativement à des pertes découlant de l'application de l'*Abitibi Act*, lesquelles totalisaient, selon Abitibi, une somme supérieure à 300 millions de dollars.

[9] Le 12 novembre 2009, le ministre provincial de l'Environnement et de la Conservation (« ministre ») a prononcé, en vertu de l'art. 99 de l'*Environmental Protection Act*, S.N.L. 2002, ch. E-14.2 (« *EPA* »), cinq ordonnances (les « ordonnances *EPA* ») contraignant Abitibi à présenter au ministre des plans de restauration pour cinq sites industriels, dont trois avaient été expropriés, et à réaliser les plans de restauration approuvés. Le juge chargé de l'instance instituée sous le régime de la *LACC* a évalué les coûts de la mise en œuvre de ces plans à une somme se situant [TRADUCTION] « entre cinquante et cent millions de dollars », ou « plusieurs fois plus élevée » (par. 81).

[10] Le jour même où elle émettait les ordonnances *EPA*, la province a demandé par requête un jugement déclarant qu'une ordonnance relative à la procédure de réclamations rendue aux termes de la *LACC* dans le cadre de la réorganisation proposée d'Abitibi n'empêchait pas la province d'exécuter les ordonnances *EPA*. La province a soutenu — et soutient toujours — que des obligations légales de nature non pécuniaire ne constituent pas des « réclamations » au sens de la *LACC* et que leur exécution ne peut donc être suspendue ni être assujettie à une ordonnance relative à la procédure de réclamations. Elle fait de plus valoir que le pouvoir du Parlement de légiférer en matière de faillite et d'insolvabilité ne lui confère pas la compétence constitutionnelle pour suspendre l'application des ordonnances prononcées dans l'exercice valide de pouvoirs provinciaux.

[11] Abitibi a contesté la requête et a demandé un jugement déclarant que les ordonnances *EPA* avaient été suspendues et qu'elles étaient assujetties à l'ordonnance relative à la procédure de réclamations. Abitibi a soutenu que les ordonnances *EPA* étaient de nature pécuniaire et qu'elles étaient donc visées par la définition du terme « réclamation » utilisé dans l'ordonnance relative à la procédure de réclamations.

[12] Gascon J. of the Quebec Superior Court, sitting as a *CCAA* court, dismissed the Province's motion. He found that he had the authority to characterize the orders as "claims" if the underlying regulatory obligations "remain[ed], in a particular fact pattern, truly financial and monetary in nature" (para. 148). He declared that the *EPA* Orders were stayed by the initial stay order and were not subject to the exception found in that order. He also declared that the filing by the Province of any claim based on the *EPA* Orders was subject to the claims procedure order, and reserved to the Province the right to request an extension of time to assert a claim under the claims procedure order and to Abitibi the right to contest such a request.

[13] In the Court of Appeal, Chamberland J.A. denied the Province leave to appeal (2010 QCCA 965, 68 C.B.R. (5th) 57). In his view, the appeal had no reasonable chance of success, because Gascon J. had found as a fact that the *EPA* Orders were financial or monetary in nature. Chamberland J.A. also found that no constitutional issue arose, given that the Superior Court judge had merely characterized the orders in the context of the restructuring process; the judgment did not "'immunise' Abitibi from compliance with the EPA Orders" (para. 33). Finally, he noted that Gascon J. had reserved the Province's right to request an extension of time to file a claim in the *CCAA* process.

II. Positions of the Parties

[14] The Province argues that the *CCAA* court erred in interpreting the relevant *CCAA* provisions in a way that nullified the *EPA*, and that the interpretation is inconsistent with both the ancillary powers doctrine and the doctrine of interjurisdictional immunity. The Province further submits

[12] Le juge Gascon de la Cour supérieure du Québec, siégeant aux termes de la *LACC*, a rejeté la requête de la province. Il a statué qu'il avait le pouvoir de qualifier les ordonnances de « réclamations » si les obligations légales sous-jacentes [TRADUCTION] « demeur[aient], dans une situation factuelle particulière, de nature véritablement financière et pécuniaire » (par. 148). Il a déclaré que les ordonnances *EPA* avaient été suspendues en vertu de l'ordonnance de suspension initiale et qu'elles n'étaient pas visées par l'exception énoncée dans cette ordonnance. Il a également déclaré que la présentation, par la province, de toute réclamation fondée sur les ordonnances *EPA* était assujettie à l'ordonnance relative à la procédure de réclamations; il a réservé à la province le droit de demander par requête une prorogation du délai pour présenter une réclamation en vertu de la procédure de réclamations et a confirmé le droit d'Abitibi de contester une telle requête.

[13] En Cour d'appel, le juge Chamberland a rejeté la demande d'autorisation d'appel présentée par la province (2010 QCCA 965, 68 C.B.R. (5th) 57). À son avis, l'appel n'avait aucune chance raisonnable de succès parce que le juge Gascon avait conclu, comme question de faits, que les ordonnances *EPA* étaient de nature financière ou pécuniaire. Le juge Chamberland a également estimé qu'aucune question constitutionnelle ne se posait, car le juge de la Cour supérieure n'avait fait que qualifier les ordonnances dans le contexte du processus de restructuration; le jugement ne [TRADUCTION] « "soustrayait" pas Abitibi à son obligation de se conformer aux ordonnances *EPA* » (par. 33). Enfin, il a fait remarquer que le juge Gascon avait réservé à la province le droit de demander la prorogation de délai pour produire une réclamation en vertu de la *LACC*.

II. Thèses des parties

[14] La province soutient que le tribunal de première instance a commis l'erreur d'interpréter les dispositions applicables de la *LACC* de façon à invalider l'*EPA* et que cette interprétation est incompatible tant avec la doctrine des pouvoirs accessoires qu'avec celle de la protection des compétences

that, in any event, the *EPA* Orders are not "claims" within the meaning of the *CCAA*. It takes the position that "any plan of compromise and arrangement that Abitibi might submit for court approval must make provision for compliance with the *EPA* Orders" (A.F., at para. 32).

[15] Abitibi contends that the factual record does not provide a basis for applying the constitutional doctrines. It relies on the *CCAA* court's findings of fact, particularly the finding that the Province's intent was to establish the basis for a monetary claim. Abitibi submits that the true issue is whether a province that has a monetary claim against an insolvent company can obtain a preference against other unsecured creditors by exercising its regulatory power.

III. Constitutional Questions

[16] At the Province's request, the Chief Justice stated the following constitutional questions:

1. Is the definition of "claim" in s. 2(1) of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, *ultra vires* the Parliament of Canada or constitutionally inapplicable to the extent this definition includes statutory duties to which the debtor is subject pursuant to s. 99 of the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2?

2. Is s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, *ultra vires* the Parliament of Canada or constitutionally inapplicable to the extent this section gives courts jurisdiction to bar or extinguish statutory duties to which the debtor is subject pursuant to s. 99 of the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2?

3. Is s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, *ultra vires* the Parliament of Canada or constitutionally inapplicable to the extent this section gives courts jurisdiction to

exclusives. La province fait de plus valoir que, de toute façon, les ordonnances *EPA* ne constituent pas des « réclamations » au sens de la *LACC*. Elle soutient que [TRADUCTION] « tout plan de transaction et d'arrangement qu'Abitibi pourrait soumettre à l'approbation du tribunal doit prévoir qu'[Abitibi] doit se conformer aux ordonnances *EPA* » (m.a., par. 32).

[15] Abitibi soutient que l'application des doctrines constitutionnelles ne trouve aucun fondement dans les faits du dossier. Elle appuie sa position sur les conclusions de fait tirées par le tribunal de première instance, plus particulièrement celles où le tribunal conclut que l'intention de la province était d'établir le fondement d'une réclamation pécuniaire. Abitibi plaide que la véritable question est de savoir si, par l'exercice de son pouvoir de réglementation, une province ayant une réclamation pécuniaire à faire valoir contre une entreprise insolvable peut obtenir une préférence à l'encontre d'autres créanciers non garantis.

III. Questions constitutionnelles

[16] À la demande de la province, la Juge en chef a formulé les questions constitutionnelles suivantes :

1. La définition d'une « réclamation » énoncée au par. 2(1) de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36, outrepasse-t-elle les pouvoirs du Parlement du Canada ou est-elle constitutionnellement inapplicable dans la mesure où elle englobe les obligations légales auxquelles le débiteur est assujetti en application de l'art. 99 de l'*Environmental Protection Act*, S.N.L. 2002, ch. E-14.2?

2. L'article 11 de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36, outrepasse-t-il les pouvoirs du Parlement du Canada ou est-il constitutionnellement inapplicable dans la mesure où il confère aux tribunaux la compétence pour libérer le débiteur des obligations légales auxquelles il est ou pourrait être assujetti en application de l'art. 99 de l'*Environmental Protection Act*, S.N.L. 2002, ch. E-14.2?

3. L'article 11 de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36, outrepasse-t-il les pouvoirs du Parlement du Canada ou est-il constitutionnellement inapplicable dans la mesure

review the exercise of ministerial discretion under s. 99 of the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2?

[17] I note that the question whether a *CCAA* court has constitutional jurisdiction to stay a provincial order that is *not* a monetary claim does not arise here, because the stay order in this case did not affect non-monetary orders. However, the question may arise in other cases. In 2007, Parliament expressly gave *CCAA* courts the power to stay regulatory orders that are not monetary claims by amending the *CCAA* to include the current version of s. 11.1(3) (*An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, S.C. 2007, c. 36, s. 65) (the "2007 amendments"). Thus, future cases may give courts the opportunity to consider the question raised by the Province in an appropriate factual context. The only constitutional question that needs to be answered in this case concerns the jurisdiction of a *CCAA* court to determine whether an environmental order that is not framed in monetary terms is in fact a monetary claim.

[18] Processing creditors' claims against an insolvent debtor in an equitable and orderly manner is at the heart of insolvency legislation, which falls under a head of power attributed to Parliament. Rules concerning the assessment of creditors' claims, such as the determination of whether a creditor has a monetary claim, relate directly to the equitable and orderly treatment of creditors in an insolvency process. There is no need to perform a detailed analysis of the pith and substance of the provisions on the assessment of claims in insolvency matters to conclude that the federal legislation governing the characterization of an order as a monetary claim is valid. Because the provisions relate directly to Parliament's jurisdiction,

où il confère aux tribunaux la compétence pour réviser l'exercice du pouvoir discrétionnaire conféré au ministre par l'art. 99 de l'*Environmental Protection Act*, S.N.L. 2002, ch. E-14.2?

[17] Je souligne que la question de savoir si, aux termes de la *LACC*, un tribunal a compétence constitutionnelle pour suspendre l'application d'une ordonnance provinciale qui *ne* constitue *pas* une réclamation pécuniaire ne se pose pas en l'espèce parce que l'ordonnance de suspension en cause ne visait pas ces ordonnances. La question pourrait toutefois se poser dans d'autres affaires. En 2007, par l'ajout du par. 11.1(3) de la *LACC*, le législateur fédéral a explicitement conféré aux tribunaux compétents aux termes de la *LACC* le pouvoir de suspendre l'application des ordonnances d'un organisme administratif qui ne constituent pas des réclamations pécuniaires (*Loi modifiant la Loi sur la faillite et l'insolvabilité, la Loi sur les arrangements avec les créanciers des compagnies, la Loi sur le Programme de protection des salariés et le chapitre 47 des Lois du Canada (2005)*, L.C. 2007, ch. 36, art. 65) (les « modifications de 2007 »). Ainsi, les tribunaux auront l'occasion d'analyser la question soulevée par la province lorsque le contexte factuel s'y prêtera. La seule question constitutionnelle qui requiert une réponse en l'espèce a trait à la compétence d'un tribunal, aux termes de la *LACC*, de déterminer si une ordonnance environnementale qui n'est pas formulée en termes pécuniaires constitue, en fait, une réclamation pécuniaire.

[18] Le traitement équitable et ordonné des réclamations présentées par des créanciers contre un débiteur insolvable se situe au cœur même de la législation en matière d'insolvabilité, un domaine de compétence attribué au législateur fédéral. L'établissement de règles relatives à l'évaluation des réclamations des créanciers, comme celle permettant de déterminer si un créancier fait valoir une réclamation pécuniaire, concerne directement le traitement équitable et ordonné des créanciers dans le cadre d'un processus établi en matière d'insolvabilité. Il n'est pas nécessaire d'analyser en détail le caractère véritable des dispositions régissant l'évaluation des réclamations en matière d'insolvabilité pour conclure à la validité du texte législatif fédéral

the ancillary powers doctrine is not relevant to this case. I also find that the interjurisdictional immunity doctrine is not applicable. A finding that a claim of an environmental creditor is monetary in nature does not interfere in any way with the creditor's activities. Its claim is simply subjected to the insolvency process.

[19] What the Province is actually arguing is that courts should consider the form of an order rather than its substance. I see no reason why the Province's choice of order should not be scrutinized to determine whether the form chosen is consistent with the order's true purpose as revealed by the Province's own actions. If the Province's actions indicate that, in substance, it is asserting a provable claim within the meaning of federal legislation, then that claim can be subjected to the insolvency process. Environmental claims do not have a higher priority than is provided for in the *CCAA*. Considering substance over form prevents a regulatory body from artificially creating a priority higher than the one conferred on the claim by federal legislation. This Court recognized long ago that a province cannot disturb the priority scheme established by the federal insolvency legislation (*Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453). Environmental claims are given a specific, and limited, priority under the *CCAA*. To exempt orders which are in fact monetary claims from the *CCAA* proceedings would amount to conferring upon provinces a priority higher than the one provided for in the *CCAA*.

IV. Claims Under the *CCAA*

[20] Several provisions of the *CCAA* have been amended since Abitibi filed for insolvency

permettant d'établir qu'une ordonnance constitue une réclamation pécuniaire. L'application de la doctrine des pouvoirs accessoires n'est pas pertinente en l'espèce car les dispositions en cause sont directement reliées à la compétence du législateur fédéral. J'estime également que la doctrine de la protection des compétences exclusives ne s'applique pas en l'espèce. Une conclusion selon laquelle un créancier œuvrant dans le domaine de l'environnement détient une réclamation pécuniaire ne modifie en rien les activités de ce créancier. La réclamation de ce dernier est simplement assujettie au processus d'insolvabilité.

[19] Ce que soutient en fait la province, c'est que les tribunaux devraient examiner la forme des ordonnances plutôt que leur substance. Je ne vois aucune raison empêchant l'examen du choix par la province d'un type d'ordonnance donnée afin de déterminer si la forme choisie concorde avec l'objectif véritable qui se dégage des gestes qu'elle a posés. Si ces gestes indiquent qu'elle fait effectivement valoir une réclamation prouvable au sens de la législation fédérale, alors cette réclamation peut être assujettie au processus d'insolvabilité. Les réclamations en matière d'environnement ne bénéficient pas d'un rang supérieur à celui prévu par les dispositions de la *LACC*. Privilégier l'examen de la substance d'une ordonnance plutôt que de sa forme permet d'éviter qu'un organisme administratif obtienne de façon artificielle une priorité de rang supérieure à celle que la législation fédérale attribue à la réclamation. Notre Cour a depuis longtemps reconnu qu'une province ne pouvait perturber les priorités établies par le régime fédéral d'insolvabilité (*Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453). La *LACC* établit une priorité précise et limitée à l'égard des réclamations en matière environnementale. Le fait de soustraire aux procédures d'insolvabilité les ordonnances qui sont en fait des réclamations pécuniaires équivaudrait à accorder aux provinces une priorité d'un rang supérieur à celui prévu par la *LACC*.

IV. Réclamations sous le régime de la *LACC*

[20] Plusieurs dispositions de la *LACC* ont été modifiées depuis qu'Abitibi a présenté une demande

protection. Except where otherwise indicated, the provisions I refer to are those that were in force when the stay was ordered.

[21] One of the central features of the *CCAA* scheme is the single proceeding model, which ensures that most claims against a debtor are entertained in a single forum. Under this model, the court can stay the enforcement of most claims against the debtor's assets in order to maintain the *status quo* during negotiations with the creditors. When such negotiations are successful, the creditors typically accept less than the full amounts of their claims. Claims have not necessarily accrued or been liquidated at the outset of the insolvency proceeding, and they sometimes have to be assessed in order to determine the monetary value that will be subject to compromise.

[22] Section 12 of the *CCAA* establishes the basic rules for ascertaining whether an order is a claim that may be subjected to the insolvency process:

12. (1) [Definition of "claim"] For the purposes of this Act, "claim" means any indebtedness, liability or obligation of any kind that, if unsecured, would be a debt provable in bankruptcy within the meaning of the *Bankruptcy and Insolvency Act.*

(2) [Determination of amount of claim] For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor shall be determined as follows:

(*a*) the amount of an unsecured claim shall be the amount

. . .

(iii) in the case of any other company, proof of which might be made under the *Bankruptcy and Insolvency Act*, but if the amount so provable is not admitted by the company, the amount shall be determined by the court on summary application by the company or by the creditor; . . .

de protection contre l'insolvabilité. À moins d'indication contraire de ma part, les dispositions que je cite sont celles qui étaient en vigueur lorsque la suspension des procédures a été ordonnée.

[21] Une des caractéristiques principales du régime créé par la *LACC* est de traiter la presque totalité des réclamations contre un débiteur suivant une procédure unique devant un même tribunal. En vertu de ce modèle, le tribunal peut ordonner la suspension de la plupart des mesures d'exécution engagées contre les actifs du débiteur de façon à maintenir le statu quo durant la négociation avec les créanciers. Lorsque la négociation réussit, les créanciers consentent habituellement à recevoir moins que le plein montant de leurs réclamations, lesquelles ne sont pas nécessairement exigibles ou liquidées dès le début des procédures d'insolvabilité. Ces réclamations doivent parfois être évaluées afin d'établir la valeur pécuniaire qui fera l'objet du compromis.

[22] L'article 12 de la *LACC* énonce les règles de base pour déterminer si une ordonnance constitue une réclamation pouvant être assujettie au processus applicable en matière d'insolvabilité :

12. (1) [Définition de « réclamation »] Pour l'application de la présente loi, « réclamation » s'entend de toute dette, tout engagement ou toute obligation d'un genre quelconque qui, s'il n'était pas garanti, constituerait une dette prouvable en matière de faillite au sens de la *Loi sur la faillite et l'insolvabilité.*

(2) [Détermination du montant de la réclamation] Pour l'application de la présente loi, le montant représenté par une réclamation d'un créancier garanti ou chirographaire est déterminé de la façon suivante :

a) le montant d'une réclamation non garantie est le montant :

. . .

(iii) dans le cas de toute autre compagnie, dont la preuve pourrait être établie en vertu de la *Loi sur la faillite et l'insolvabilité*, mais si le montant ainsi prouvable n'est pas admis par la compagnie, ce montant est déterminé par le tribunal sur demande sommaire par la compagnie ou le créancier;

[23] Section 12 of the *CCAA* refers to the rules of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). Section 2 of the *BIA* defines a claim provable in bankruptcy:

"claim provable in bankruptcy", "provable claim" or "claim provable" includes any claim or liability provable in proceedings under this Act by a creditor;

[24] This definition is completed by s. 121(1) of the *BIA*:

121. (1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

[25] Sections 121(2) and 135(1.1) of the *BIA* offer additional guidance for the determination of whether an order is a provable claim:

121. . . .

(2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135.

135. . . .

(1.1) The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.

[26] These provisions highlight three requirements that are relevant to the case at bar. First, there must be a debt, a liability or an obligation to a *creditor*. Second, the debt, liability or obligation must be incurred *before the debtor becomes bankrupt*. Third, it must be possible to attach a *monetary value* to the debt, liability or obligation. I will examine each of these requirements in turn.

[23] L'article 12 de la *LACC* renvoie aux règles de la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* »). L'article 2 de la *LFI* définit ainsi une réclamation prouvable en matière de faillite :

« réclamation prouvable en matière de faillite » ou « réclamation prouvable » Toute réclamation ou créance pouvant être prouvée dans des procédures intentées sous l'autorité de la présente loi par un créancier.

[24] Cette définition est complétée par le par. 121(1) de la *LFI* :

121. (1) Toutes créances et tous engagements, présents ou futurs, auxquels le failli est assujetti à la date à laquelle il devient failli, ou auxquels il peut devenir assujetti avant sa libération, en raison d'une obligation contractée antérieurement à cette date, sont réputés des réclamations prouvables dans des procédures entamées en vertu de la présente loi.

[25] Les paragraphes 121(2) et 135(1.1) de la *LFI* donnent des indications additionnelles lorsqu'il s'agit de déterminer si une ordonnance constitue une réclamation prouvable :

121. . . .

(2) La question de savoir si une réclamation éventuelle ou non liquidée constitue une réclamation prouvable et, le cas échéant, son évaluation sont décidées en application de l'article 135.

135. . . .

(1.1) Le syndic décide si une réclamation éventuelle ou non liquidée est une réclamation prouvable et, le cas échéant, il l'évalue; sous réserve des autres dispositions du présent article, la réclamation est dès lors réputée prouvée pour le montant de l'évaluation.

[26] Ces dispositions font ressortir trois conditions pertinentes à la présente affaire. Premièrement, on doit être en présence d'une dette, d'un engagement ou d'une obligation envers un *créancier*. Deuxièmement, la dette, l'engagement ou l'obligation doit avoir pris naissance *avant que le débiteur ne devienne failli*. Troisièmement, il doit être possible d'attribuer une *valeur pécuniaire* à cette dette, cet engagement ou cette obligation. Je vais examiner chacune de ces conditions à tour de rôle.

[27] The *BIA*'s definition of a provable claim, which is incorporated by reference into the *CCAA*, requires the identification of a creditor. Environmental statutes generally provide for the creation of regulatory bodies that are empowered to enforce the obligations the statutes impose. Most environmental regulatory bodies can be creditors in respect of monetary or non-monetary obligations imposed by the relevant statutes. At this first stage of determining whether the regulatory body is a creditor, the question whether the obligation can be translated into monetary terms is not yet relevant. This issue will be broached later. The only determination that has to be made at this point is whether the regulatory body has exercised its enforcement power against a debtor. When it does so, it identifies itself as a creditor, and the requirement of this stage of the analysis is satisfied.

[28] The enquiry into the second requirement is based on s. 121(1) of the *BIA*, which imposes a time limit on claims. A claim must be founded on an obligation that was "incurred before the day on which the bankrupt becomes bankrupt". Because the date when environmental damage occurs is often difficult to ascertain, s. 11.8(9) of the *CCAA* provides more temporal flexibility for environmental claims:

11.8 . . .

(9) A claim against a debtor company for costs of remedying any environmental condition or environmental damage affecting real property of the company shall be a claim under this Act, whether the condition arose or the damage occurred before or after the date on which proceedings under this Act were commenced.

[29] The creditor's claim will be exempt from the single proceeding requirement if the debtor's corresponding obligation has not arisen as of the time limit for inclusion in the insolvency process. This could apply, for example, to a debtor's statutory obligations relating to polluting activities that continue after the reorganization, because in such cases,

[27] La définition de réclamation prouvable établie par la *LFI* et incorporée par renvoi à la *LACC* exige qu'une personne ait qualité de créancier. Les lois régissant l'environnement pourvoient généralement à la création d'un organisme chargé de voir au respect des obligations qui y sont prévues. La plupart des organismes administratifs peuvent agir à titre de créanciers en relation avec les obligations pécuniaires ou non pécuniaires imposées par ces lois. À cette première étape qui consiste à déterminer si un organisme administratif est un créancier, il n'est pas encore pertinent de décider si l'obligation peut être formulée en termes pécuniaires. Cette question sera abordée à un stade ultérieur. À cette étape, la seule question à trancher est de savoir si l'organisme administratif a exercé, à l'encontre d'un débiteur, son pouvoir de faire appliquer la loi. Lorsqu'il le fait, il s'identifie alors comme créancier et la condition de cette étape est espectée.

[28] L'examen de la seconde condition repose sur le par. 121(1) de la *LFI* qui impose que la réclamation ait pris naissance dans un délai donné. Celle-ci doit se fonder sur une obligation « contractée antérieurement à cette date [la date à laquelle le failli devient failli] ». Comme il est souvent difficile d'établir la date à laquelle un dommage lié à l'environnement est survenu, le par. 11.8(9) de la *LACC* prévoit une certaine flexibilité pour ce qui est des réclamations en matière d'environnement :

11.8 . . .

(9) La réclamation pour les frais de réparation du fait ou dommage lié à l'environnement et touchant un bien immeuble de la compagnie débitrice constitue une réclamation, que la date du fait ou dommage soit antérieure ou postérieure à celle où des procédures sont intentées au titre de la présente loi.

[29] La réclamation du créancier sera exemptée de l'exigence découlant de la procédure unique si l'obligation correspondante du débiteur n'a pas pris naissance dans le délai fixé pour que la réclamation soit incluse dans le processus d'insolvabilité. À titre d'exemple, cela pourrait s'appliquer aux obligations que la loi impose à un débiteur concernant

the damage continues to be sustained after the reorganization has been completed.

[30] With respect to the third requirement, that it be possible to attach a monetary value to the obligation, the question is whether orders that are not expressed in monetary terms can be translated into such terms. I note that when a regulatory body claims an amount that is owed at the relevant date, that is, when it frames its order in monetary terms, the court does not need to make this determination, because what is being claimed is an "indebtedness" and therefore clearly falls within the meaning of "claim" as defined in s. 12(1) of the *CCAA*.

[31] However, orders, which are used to address various types of environmental challenges, may come in many forms, including stop, control, preventative, and clean-up orders (D. Saxe, "Trustees' and Receivers' Environmental Liability Update" (1998), 49 C.B.R. (3d) 138, at p. 141). When considering an order that is not framed in monetary terms, courts must look at its substance and apply the rules for the assessment of claims.

[32] Parliament recognized that regulatory bodies sometimes have to perform remediation work (see House of Commons, *Evidence of the Standing Committee on Industry*, No. 16, 2nd Sess., 35th Parl., June 11, 1996). When one does so, its claim with respect to remediation costs is subject to the insolvency process, but the claim is secured by a charge on the contaminated real property and certain other related property and benefits from a priority (s. 11.8(8) *CCAA*). Thus, Parliament struck a balance between the public's interest in enforcing environmental regulations and the interest of third-party creditors in being treated equitably.

ses activités polluantes qui se poursuivent après la réorganisation, parce qu'en pareilles circonstances, des dommages sont encore causés après que la réorganisation ait été complétée.

[30] En ce qui concerne la troisième condition, soit qu'il doit être possible d'attribuer à l'obligation une valeur pécuniaire, la question est de savoir si des ordonnances qui ne sont pas formulées en termes pécuniaires peuvent être formulées en de tels termes. Je souligne que lorsqu'un organisme administratif réclame une somme qui est due à la date pertinente, il formule ainsi son ordonnance en termes pécuniaires. Le tribunal n'a alors aucune détermination à faire à cette étape car ce qui est réclamé est une « dette » et est, par conséquent, clairement visé par la définition d'une « réclamation » prévue au par. 12(1) de la *LACC*.

[31] Toutefois, parce qu'elles sont utilisées pour traiter divers enjeux environnementaux, les ordonnances peuvent se présenter sous plusieurs formes et peuvent viser notamment la cessation ou le contrôle d'une activité, la prévention et la décontamination (D. Saxe, « Trustees' and Receivers' Environnmental Liability Update » (1998), 49 C.B.R. (3d) 138, p. 141). Lorsqu'ils analysent une ordonnance qui n'est pas formulée en des termes pécuniaires, les tribunaux doivent en examiner la substance et appliquer les règles régissant l'évaluation des réclamations.

[32] Le législateur fédéral reconnaît que les organismes administratifs doivent à l'occasion exécuter des travaux de décontamination (voir Chambre des communes, *Témoignages du Comité permanent de l'industrie*, nº 16, 2e sess., 35e lég., 11 juin 1996). En pareil cas, la réclamation relative aux frais de décontamination est assujettie à la procédure de réclamations en matière d'insolvabilité mais elle est garantie par une charge réelle grevant l'immeuble contaminé et certains immeubles connexes et bénéficie d'un rang prioritaire (par. 11.8(8) *LACC*). Ainsi, le législateur a établi un équilibre entre l'intérêt du public à l'égard de l'application de la réglementation environnementale et les intérêts des tiers créanciers qui doivent être traités de façon équitable.

[33] If Parliament had intended that the debtor always satisfy all remediation costs, it would have granted the Crown a priority with respect to the totality of the debtor's assets. In light of the legislative history and the purpose of the reorganization process, the fact that the Crown's priority under s. 11.8(8) of the *CCAA* is limited to the contaminated property and certain related property leads me to conclude that to exempt environmental orders would be inconsistent with the insolvency legislation. As deferential as courts may be to regulatory bodies' actions, they must apply the general rules.

[33] Si le législateur fédéral avait eu l'intention d'obliger le débiteur à supporter dans tous les cas tous les coûts des travaux de décontamination, il aurait accordé à l'État une priorité applicable à la totalité des actifs du débiteur. Compte tenu de l'historique des dispositions législatives et des objectifs du processus de réorganisation, le fait que la priorité de l'État aux termes du par. 11.8(8) de la *LACC* soit limitée au bien contaminé et à certains biens liés m'amène à conclure qu'une exemption à l'égard des ordonnances environnementales serait incompatible avec la législation en matière d'insolvabilité. Aussi respectueux soient-ils des mesures prises par les organismes administratifs, les tribunaux sont tenus d'appliquer les règles générales.

[34] Unlike in proceedings governed by the common law or the civil law, a claim may be asserted in insolvency proceedings even if it is contingent on an event that has not yet occurred (for the common law, see *Canada v. McLarty*, 2008 SCC 26, [2008] 2 S.C.R. 79, at paras. 17-18; for the civil law, see arts. 1497, 1508 and 1513 of the *Civil Code of Québec*, S.Q. 1991, c. 64). Thus, the broad definition of "claim" in the *BIA* includes *contingent* and *future* claims that would be unenforceable at common law or in the civil law. As for unliquidated claims, a *CCAA* court has the same power to assess their amounts as would a court hearing a case in a common law or civil law context.

[34] Contrairement à l'approche qui prévaut dans le contexte des procédures régies par la common law ou le droit civil, il est possible de faire valoir une réclamation dans le cadre de procédures d'insolvabilité même si elle dépend d'un événement non encore survenu (en common law, voir *Canada c. McLarty*, 2008 CSC 26, [2008] 2 R.C.S. 79, par. 17-18; en droit civil, voir les art. 1497, 1508 et 1513 du *Code civil du Québec*, L.Q. 1991, ch. 64). Ainsi, la définition générale de « réclamation » de la *LFI* englobe des réclamations éventuelles et *futures* qui seraient inexécutoires en common law ou en droit civil. En ce qui concerne les réclamations non liquidées, le tribunal chargé de l'application de la *LACC* a le même pouvoir d'évaluer leur montant qu'un tribunal saisi d'une affaire sous le régime de la common law ou du droit civil.

[35] The reason the *BIA* and the *CCAA* include a broad range of claims is to ensure fairness between creditors and finality in the insolvency proceeding for the debtor. In a corporate liquidation process, it is more equitable to allow as many creditors as possible to participate in the process and share in the liquidation proceeds. This makes it possible to include creditors whose claims have not yet matured when the corporate debtor files for bankruptcy, and thus avert a situation in which they would be faced with an inactive debtor that cannot satisfy a judgment. The rationale is slightly different in the context of a corporate proposal or reorganization. In such cases, the broad approach serves not only to

[35] C'est pour assurer l'équité entre les créanciers ainsi que, pour le débiteur, le caractère définitif de la procédure d'insolvabilité que la *LFI* et la *LACC* englobent un large éventail de réclamations. Dans le cadre de la liquidation d'une société, il est plus équitable de permettre au plus grand nombre possible de créanciers de participer au processus et de se partager le produit de la liquidation. Cela permet d'inclure les créanciers dont les réclamations ne sont pas venues à échéance lorsque le débiteur corporatif devient failli, et ainsi éviter que, ayant cessé ses activités, le débiteur ne puisse pas satisfaire à un jugement rendu en leur faveur. L'approche est quelque peu différente dans

ensure fairness between creditors, but also to allow the debtor to make as fresh a start as possible after a proposal or an arrangement is approved.

[36] The criterion used by courts to determine whether a contingent claim will be included in the insolvency process is whether the event that has not yet occurred is too remote or speculative (*Confederation Treasury Services Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75). In the context of an environmental order, this means that there must be sufficient indications that the regulatory body that triggered the enforcement mechanism will ultimately perform remediation work and assert a monetary claim to have its costs reimbursed. If there is sufficient certainty in this regard, the court will conclude that the order can be subjected to the insolvency process.

[37] The exercise by the *CCAA* court of its jurisdiction to determine whether an order is a provable claim entails a certain scrutiny of the regulatory body's actions. This scrutiny is in some ways similar to judicial review. There is a distinction, however, and it lies in the object of the assessment that the *CCAA* court must make. The *CCAA* court does not review the regulatory body's exercise of discretion. Rather, it inquires into whether the facts indicate that the conditions for inclusion in the claims process are met. For example, if activities at issue are ongoing, the *CCAA* court may well conclude that the order cannot be included in the insolvency process because the activities and resulting damages will continue after the reorganization is completed and hence exceed the time limit for a claim. If, on the other hand, the regulatory body, having no realistic alternative but to perform the remediation work itself, simply delays framing the order as a claim in order to improve its position in relation to other creditors, the *CCAA* court may conclude

le contexte d'une proposition concordataire présentée par une société ou d'une réorganisation. Dans ces cas, l'objectif que sous-tend une interprétation large est non seulement de garantir l'équité entre créanciers, mais aussi de permettre au débiteur de prendre un nouveau départ dans les meilleures conditions possibles à la suite de l'approbation d'une proposition ou d'un arrangement.

[36] Le critère retenu par les tribunaux pour décider si une réclamation éventuelle sera incluse dans le processus d'insolvabilité est celui qui consiste à déterminer si l'événement non encore survenu est trop éloigné ou conjectural (*Confederation Treasury Service Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75). Dans le contexte d'une ordonnance environnementale, cela signifie qu'il doit y avoir des indications suffisantes permettant de conclure que l'organisme administratif qui a eu recours aux mécanismes d'application de la loi effectuera en fin de compte des travaux de décontamination et présentera une réclamation pécuniaire afin d'obtenir le remboursement de ses débours. Si cela est suffisamment certain, le tribunal conclura que l'ordonnance peut être assujettie au processus d'insolvabilité.

[37] Lorsqu'il détermine si une ordonnance constitue une réclamation prouvable, le tribunal chargé de l'application de la *LACC* doit, dans une certaine mesure, examiner les actes posés par l'organisme administratif. Cet examen se rapproche à certains égards de celui d'un contrôle judiciaire. La différence se situe, toutefois, au niveau de l'objet de l'évaluation que doit faire le tribunal. Son examen ne porte pas sur l'exercice du pouvoir discrétionnaire par l'organisme administratif. Il doit plutôt déterminer si le contexte factuel indique que les conditions requises pour que l'ordonnance soit incluse dans le processus de réclamations sont respectées. Par exemple, si le débiteur continue d'exercer les activités faisant l'objet de l'intervention de l'organisme administratif, il est fort possible que le tribunal conclue que l'ordonnance ne peut être incorporée au processus d'insolvabilité parce que ces activités et les dommages en découlant se poursuivront après la réorganisation et qu'elles excéderont donc le délai prescrit pour la production d'une

that this course of action is inconsistent with the insolvency scheme and decide that the order has to be subject to the claims process. Similarly, if the property is not under the debtor's control and the debtor does not, and realistically will not, have the means to perform the remediation work, the *CCAA* court may conclude that it is sufficiently certain that the regulatory body will have to perform the work.

[38] Certain indicators can thus be identified from the text and the context of the provisions to guide the *CCAA* court in determining whether an order is a provable claim, including whether the activities are ongoing, whether the debtor is in control of the property, and whether the debtor has the means to comply with the order. The *CCAA* court may also consider the effect that requiring the debtor to comply with the order would have on the insolvency process. Since the appropriate analysis is grounded in the facts of each case, these indicators need not all apply, and others may also be relevant.

[39] Having highlighted three requirements for finding a claim to be provable in a *CCAA* process that need to be considered in the case at bar, I must now discuss certain policy arguments raised by the Province and some of the interveners.

[40] These parties argue that treating a regulatory order as a claim in an insolvency proceeding extinguishes the debtor's environmental obligations, thereby undermining the polluter-pay principle discussed by this Court in *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, 2003 SCC 58, [2003] 2 S.C.R. 624, at para. 24. This objection

réclamation. Par contre, si l'organisme administratif, n'ayant aucune solution réaliste autre que celle d'effectuer lui-même les travaux de décontamination, ne fait que retarder la production d'une réclamation pécuniaire dans le but d'améliorer sa position par rapport à celle des autres créanciers, le tribunal pourrait conclure que cette démarche n'est pas compatible avec le régime d'insolvabilité et décider que l'ordonnance doit être traitée dans le cadre du processus de réclamations. De même, si le débiteur n'exerce aucun contrôle sur le bien et ne dispose pas, ni ne disposera, de façon réaliste, des moyens pour effectuer les travaux de décontamination, le tribunal pourrait conclure de façon suffisamment certaine que l'organisme administratif devra exécuter les travaux.

[38] Il est ainsi possible de discerner, grâce au libellé des dispositions et à leur contexte, certains indicateurs qui permettent de guider le tribunal au moment de déterminer si l'ordonnance constitue une réclamation prouvable, notamment si les activités se poursuivent, si le débiteur exerce un contrôle sur le bien et s'il dispose des moyens de se conformer à l'ordonnance. Il est également possible pour le tribunal de prendre en compte les conséquences qu'entraînerait sur le processus d'insolvabilité le fait d'exiger du débiteur qu'il se conforme à l'ordonnance. Puisque l'analyse qu'il convient de réaliser est fondée sur les faits propres à chaque cas, il n'est pas nécessaire que tous ces indicateurs soient présents, et d'autres peuvent également devenir pertinents.

[39] Après avoir souligné les trois conditions qui permettent en l'espèce de conclure qu'une ordonnance constitue une réclamation prouvable dans le cadre d'un processus régi par la *LACC*, il me faut examiner certains arguments de principe que la province et certains intervenants ont fait valoir.

[40] Ils ont plaidé que le fait d'assimiler une ordonnance d'un organisme administratif à une réclamation dans le cadre de procédure en insolvabilité éteint les obligations environnementales auxquelles le débiteur est tenu, minant par le fait même le principe du pollueur-payeur examiné par notre Cour dans l'arrêt *Cie pétrolière Impériale*

demonstrates a misunderstanding of the nature of insolvency proceedings. Subjecting an order to the claims process does not extinguish the debtor's environmental obligations any more than subjecting any creditor's claim to that process extinguishes the debtor's obligation to pay its debts. It merely ensures that the creditor's claim will be paid in accordance with insolvency legislation. Moreover, full compliance with orders that are found to be monetary in nature would shift the costs of remediation to third-party creditors, including involuntary creditors, such as those whose claims lie in tort or in the law of extra-contractual liability. In the insolvency context, the Province's position would result not only in a super-priority, but in the acceptance of a "third-party-pay" principle in place of the polluter-pay principle.

[41] Nor does subjecting the orders to the insolvency process amount to issuing a licence to pollute, since insolvency proceedings do not concern the debtor's future conduct. A debtor that is reorganized must comply with all environmental regulations going forward in the same way as any other person. To quote the colourful analogy of two American scholars, "Debtors in bankruptcy have — and should have — no greater license to pollute in violation of a statute than they have to sell cocaine in violation of a statute" (D. G. Baird and T. H. Jackson, "Comment: *Kovacs* and Toxic Wastes in Bankruptcy" (1984), 36 *Stan. L. Rev.* 1199, at p. 1200).

[42] Furthermore, corporations may engage in activities that carry risks. No matter what risks are at issue, reorganization made necessary by insolvency is hardly ever a deliberate choice. When the risks materialize, the dire costs are borne by almost all stakeholders. To subject orders to the claims process is not to invite corporations to restructure

ltée c. Québec (Ministre de l'Environnement), 2003 CSC 58, [2003] 2 R.C.S. 624, par. 24. Cet argument démontre une mauvaise compréhension de la nature des procédures en matière d'insolvabilité. Le fait d'assujettir une ordonnance au processus de réclamations n'éteint pas les obligations environnementales qui incombent au débiteur, pas plus que le fait de soumettre à ce processus les réclamations des créanciers n'éteint l'obligation du débiteur de payer ses dettes. Le fait d'assujettir une ordonnance au processus de réclamation vise simplement à faire en sorte que le paiement au créancier sera fait conformément aux dispositions législatives applicables en matière d'insolvabilité. De plus, le respect intégral des ordonnances dont la nature pécuniaire est reconnue transférerait le coût de la décontamination aux tiers créanciers, y compris aux créanciers involontaires, par exemple les créanciers en responsabilité délictuelle ou extra-contractuelle. Dans un contexte d'insolvabilité, la position de la province aurait comme résultat de lui accorder non seulement une super-priorité, mais aussi de reconnaître l'application d'un principe du « tiers-payeur » plutôt que celui du pollueur-payeur.

[41] Par ailleurs, l'assujettissement des ordonnances au processus d'insolvabilité n'autorise pas une personne à polluer, car la procédure en insolvabilité ne touche pas les actes que le débiteur posera dans le futur. Le débiteur réorganisé doit se conformer pour l'avenir à la réglementation environnementale, comme le ferait toute autre personne. Pour citer une analogie haute en couleurs de deux universitaires américains, [TRADUCTION] « [l]es débiteurs en faillite n'ont pas — et ne devraient pas avoir — une autorisation plus étendue de polluer en violation d'une loi qu'ils n'en ont de vendre de la cocaïne » (D. G. Baird et T. H. Jackson, « Comment : *Kovacs* and Toxic Wastes in Bankruptcy » (1984), 36 *Stan. L. Rev.* 1199, p. 1200).

[42] En outre, il arrive que des sociétés exercent des activités comportant des risques. Peu importe les risques en cause, une réorganisation rendue nécessaire par l'insolvabilité de la société peut difficilement être assimilée à un choix délibéré. Lorsque les risques se concrétisent, la quasi-totalité des personnes ayant des intérêts dans la société en

in order to rid themselves of their environmental liabilities.

[43] And the power to determine whether an order is a provable claim does not mean that the court will necessarily conclude that the order before it will be subject to the *CCAA* process. In fact, the *CCAA* court in the case at bar recognized that orders relating to the environment may or may not be considered provable claims. It stayed only those orders that were monetary in nature.

[44] The Province also argues that courts have in the past held that environmental orders cannot be interpreted as claims when the regulatory body has not yet exercised its power to assert a claim framed in monetary terms. The Province relies in particular on *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.* (1991), 81 Alta. L.R. (2d) 45 (C.A.), and its progeny. In *Panamericana*, the Alberta Court of Appeal held that a receiver was personally liable for work under a remediation order and that the order was not a claim in insolvency proceedings. The court found that the duty to undertake remediation work is owed to the public at large until the regulator exercises its power to assert a monetary claim.

[45] The first answer to the Province's argument is that courts have never shied away from putting substance ahead of form. They can determine whether the order is in substance monetary.

[46] The second answer is that the provisions relating to the assessment of claims, particularly those governing contingent claims, contemplate instances in which the quantum is not yet established when the claims are filed. Whether, in the

supportent les terribles coûts. L'assujettissement des ordonnances à la procédure de réclamations n'équivaut pas à convier les sociétés à se réorganiser dans le but d'échapper à leurs obligations environnementales.

[43] Et le pouvoir de déterminer si une ordonnance constitue une réclamation prouvable ne signifie pas que le tribunal jugera nécessairement que l'ordonnance sera soumise au processus de réorganisation. En fait, le tribunal en l'espèce a reconnu que les ordonnances environnementales pouvaient être ou ne pas être considérées comme des réclamations prouvables. Il n'a rendu une ordonnance de suspension qu'à l'égard des ordonnances de nature pécuniaire.

[44] La province plaide aussi que selon la jurisprudence, les ordonnances environnementales ne peuvent pas être assimilées à des réclamations lorsque l'organisme administratif n'a pas encore exercé son pouvoir de faire valoir une réclamation formulée en termes pécuniaires. La province s'appuie particulièrement sur l'arrêt *Panamericana de Bienes y Servicios S.A. c. Northern Badger Oil & Gas Ltd.* (1991), 81 Alta. L.R. (2d) 45 (C.A.), et les jugements rendus dans sa foulée. Dans l'arrêt *Panamericana*, la Cour d'appel de l'Alberta a tenu le séquestre personnellement responsable de l'exécution des travaux ordonnés et a statué que l'ordonnance ne constituait pas une réclamation visée par les procédures en insolvabilité. La cour a conclu que l'obligation d'entreprendre les travaux de décontamination est due au public en général jusqu'à ce que l'organisme administratif exerce son pouvoir de faire valoir une réclamation pécuniaire.

[45] La première réponse à cet argument de la province est que les tribunaux n'ont jamais hésité à privilégier le fond à la forme. Les tribunaux peuvent déterminer si, en substance, l'ordonnance est de nature pécuniaire.

[46] La seconde réponse est que les dispositions concernant l'évaluation des réclamations, en particulier celles régissant les réclamations éventuelles, n'exigent pas que la valeur pécuniaire soit établie au moment où elles sont produites. Un

regulatory context, an obligation always entails the existence of a correlative right has been discussed by a number of scholars. Various theories of rights have been put forward (see W. N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (new ed. 2001); D. N. MacCormick, "Rights in Legislation", in P. M. S. Hacker and J. Raz, eds., *Law, Morality, and Society: Essays in Honour of H. L. A. Hart* (1977), 189). However, because the Province issued the orders in this case, it would be recognized as a creditor in respect of a right no matter which of these theories was applied. As interesting as the discussion may be, therefore, I do not need to consider which theory should prevail. The real question is not to whom the obligation is owed, as this question is answered by the statute, which determines who can require that it be discharged. Rather, the question is whether it is sufficiently certain that the regulatory body will perform the remediation work and, as a result, have a monetary claim.

[47] The third answer to the Province's argument is that insolvency legislation has evolved considerably over the two decades since *Panamericana*. At the time of *Panamericana*, none of the provisions relating to environmental liabilities were in force. Indeed, some of those provisions were enacted very soon after, and seemingly in response to, that case. In 1992, Parliament shielded trustees from the very liability imposed on the receiver in *Panamericana* (*An Act to amend the Bankruptcy Act and to amend the Income Tax Act in consequence thereof*, S.C. 1992, c. 27, s. 9, amending s. 14 of the *BIA*). The 1997 amendments provided additional protection to trustees and monitors (*An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act*, S.C. 1997, c. 12). The 2007 amendments made it clear that a *CCAA* court has the power to determine that a regulatory order may be a claim and also provided criteria for staying regulatory orders (s. 65, amending the *CCAA* to include the current version of s. 11.1). The purpose of these amendments was to balance the creditor's

certain nombre d'auteurs ont examiné la question de savoir si, dans un contexte réglementaire, l'existence d'une obligation implique toujours en corrélation celle d'un droit. Diverses théories relatives aux droits ont été avancées (voir W. N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (nouvelle éd. 2001); D. N. MacCormick, « Rights in Legislation », dans P. M. S. Hacker et J. Raz, dir., *Law, Morality, and Society : Essays in Honour of H. L. A. Hart* (1977), 189). Toutefois, comme en l'espèce la province a prononcé les ordonnances, elle serait reconnue comme créancière d'un droit en vertu de l'une ou l'autre de ces théories. Par conséquent, malgré l'intérêt que peut susciter ce débat, il n'est pas nécessaire de déterminer la théorie qui prévaut. La véritable question n'est pas de savoir à qui est due l'obligation, puisque la loi y répond en indiquant qui peut en exiger l'exécution. La question est plutôt de savoir s'il est suffisamment certain que l'organisme administratif effectuera les travaux de décontamination et pourra ainsi faire valoir une réclamation pécuniaire.

[47] La troisième réponse à l'argument soulevé par la province est que la législation en matière d'insolvabilité a considérablement évolué au cours des deux décennies écoulées depuis l'arrêt *Panamericana*. À l'époque où l'arrêt *Panamericana* a été prononcé, aucune des dispositions concernant les obligations liées à l'environnement n'était en vigueur. Certaines des dispositions ont été adoptées très peu de temps après cette décision et, semble-t-il, en réponse à celle-ci. En 1992, le législateur a permis aux syndics d'échapper à la responsabilité même que l'arrêt *Panamericana* avait retenue contre le séquestre (*Loi modifiant la Loi sur la faillite et la Loi de l'impôt sur le revenu en conséquence*, L.C. 1992, ch. 27, art. 9, modifiant l'art. 14 de la *LFI*). Une protection additionnelle a été accordée au syndic et au contrôleur avec les modifications adoptées en 1997 (*Loi modifiant la Loi sur la faillite et l'insolvabilité, la Loi sur les arrangements avec les créanciers des compagnies et la Loi de l'impôt sur le revenu*, L.C. 1997, ch. 12). Les modifications apportées en 2007 ont précisé que le tribunal chargé d'appliquer la *LACC* a

need for fairness against the debtor's need to make a fresh start.

[48] Whether the regulatory body has a contingent claim is a determination that must be grounded in the facts of each case. Generally, a regulatory body has discretion under environmental legislation to decide how best to ensure that regulatory obligations are met. Although the court should take care to avoid interfering with that discretion, the action of a regulatory body is nevertheless subject to scrutiny in insolvency proceedings.

V. Application

[49] I now turn to the application of the principles discussed above to the case at bar. This case does not turn on whether the Province is the creditor of an obligation or whether damage had occurred as of the relevant date. Those requirements are easily satisfied, since the Province had identified itself as a creditor by resorting to *EPA* enforcement mechanisms and since the damage had occurred before the time of the *CCAA* proceedings. Rather, the issue centres on the third requirement: that the orders meet the criterion for admission as a pecuniary claim. The claim was contingent to the extent that the Province had not yet formally exercised its power to ask for the payment of money. The question is whether it was sufficiently certain that the orders would eventually result in a monetary claim. To the *CCAA* judge, there was no doubt that the answer was yes.

le pouvoir de décider qu'une ordonnance d'un organisme administratif peut constituer une réclamation; ces modifications ont de plus établi des critères applicables à la suspension de ces ordonnances (art. 65, modifiant la *LACC* par l'ajout de l'art. 11.1). Ces modifications visaient à établir un équilibre entre le besoin de traiter les créanciers de façon équitable et celui de permettre au débiteur de prendre un nouveau départ.

[48] La détermination qu'une ordonnance d'un organisme administratif constitue une réclamation éventuelle doit être fondée sur les faits de chaque affaire. La législation en matière d'environnement accorde généralement à un organisme administratif un pouvoir discrétionnaire de décider de la meilleure façon d'assurer le respect des obligations découlant de la réglementation. Quoique le tribunal doive se garder de s'ingérer dans l'exercice du pouvoir discrétionnaire de ces organismes, les mesures qu'ils prennent peuvent néanmoins faire l'objet d'un examen dans le cadre de procédures engagées sous le régime fédéral de l'insolvabilité.

V. Application

[49] J'aborde maintenant l'application des principes énoncés ci-dessus à l'affaire dont notre Cour est saisie. En l'espèce, le débat n'est pas centré sur la question de savoir si la province est créancière d'une obligation ou si des dommages étaient survenus à la date pertinente. Il est facile de répondre à ces questions étant donné que la province s'est elle-même présentée comme créancière en ayant recours aux mécanismes d'application de l'*EPA* et que les dommages sont survenus avant que les procédures en vertu de la *LACC* ne soient entamées. Le débat porte plutôt sur la troisième condition, celle qui consiste à savoir si les ordonnances satisfont au critère d'admissibilité à titre de réclamation pécuniaire. La réclamation était éventuelle dans la mesure où la province n'avait pas formellement exercé son pouvoir de demander paiement d'une somme d'argent. La question est de savoir s'il était suffisamment certain que l'ordonnance mènerait éventuellement à la production d'une réclamation pécuniaire. Pour le juge de première instance, une réponse affirmative ne faisait pas de doute.

[50] The Province's exercise of its legislative powers in enacting the *Abitibi Act* created a unique set of facts that led to the orders being issued. The seizure of Abitibi's assets by the Province, the cancellation of all outstanding water and hydroelectric contracts between Abitibi and the Province, the cancellation of pending legal proceedings by Abitibi in which it sought the reimbursement of several hundreds of thousands of dollars, and the denial of any compensation for the seized assets and of legal redress are inescapable background facts in the judge's review of the *EPA* Orders.

[51] The *CCAA* judge did not elaborate on whether it was sufficiently certain that the Minister would perform the remediation work and therefore make a monetary claim. However, most of his findings clearly rest on a positive answer to this question. For example, his finding that "[i]n all likelihood, the pith and substance of the EPA Orders is an attempt by the Province to lay the groundwork for monetary claims against Abitibi, to be used most probably as an offset in connection with Abitibi's own NAFTA claims for compensation" (para. 178), is necessarily based on the premise that the Province would most likely perform the remediation work. Indeed, since monetary claims must, both at common law and in civil law, be mutual for set-off or compensation to operate, the Province had to have incurred costs in doing the work in order to have a claim that could be set off against Abitibi's claims.

[52] That the judge relied on an implicit finding that the Province would most likely perform the work and make a claim to offset its costs is also shown by the confirmation he found in the declaration by the Premier that the Province was attempting to assess the cost of doing remediation work Abitibi had allegedly left undone and that in the Province's assessment, "at this point in

[50] En adoptant l'*Abitibi Act*, ayant ainsi recours à son pouvoir législatif, la province mettait en place un contexte factuel unique qui menait à l'émission des ordonnances. La saisie par la province des actifs d'Abitibi, l'annulation de tous les contrats d'approvisionnement en eau et d'hydroélectricité conclus entre Abitibi et la province, l'annulation des recours intentés par Abitibi pour obtenir le remboursement de plusieurs centaines de milliers de dollars et le refus de toute indemnité et de tous recours en justice à l'égard des actifs saisis tissent un contexte factuel dont le juge ne peut faire abstraction dans son examen des ordonnances *EPA*.

[51] Le juge de première instance n'a pas fait une analyse distincte du critère suivant lequel le tribunal doit être suffisamment certain que le ministre exécuterait les travaux de décontamination et ferait, par conséquent, valoir une réclamation pécuniaire. Cependant, la plupart de ses conclusions reposent manifestement sur un constat positif à cet égard. Par exemple, le constat que [TRADUCTION] « [s]elon toute vraisemblance, le caractère véritable des ordonnances *EPA* [consiste] pour la province à tenter de jeter les bases de réclamations pécuniaires contre Abitibi, dans le but de les utiliser tout probablement à titre compensatoire au regard des demandes d'indemnisation d'Abitibi fondées sur l'ALÉNA » (par. 178) repose nécessairement sur la prémisse que la province allait fort probablement exécuter les travaux de décontamination. En effet, puisque les réclamations pécuniaires, en common law comme en droit civil, doivent être réciproques pour opérer compensation, la province devait avoir engagé des dépenses en exécutant des travaux, ce qui établissait la base de la réclamation qu'elle ferait valoir pour compenser celle d'Abitibi.

[52] Un autre fait illustre que le juge de première instance a implicitement conclu que la province allait fort probablement exécuter les travaux et produire une réclamation pour compenser ses coûts est qu'il en a trouvé une confirmation dans la déclaration du premier ministre selon laquelle la province tentait d'évaluer ce qu'il en coûterait pour réaliser les travaux de décontamination qu'Abitibi n'aurait

time, there would not be a net payment to Abitibi" (para. 181).

[53] The *CCAA* judge's reasons not only rest on an implicit finding that the Province would most likely perform the work, but refer explicitly to facts that support this finding. To reach his conclusion that the *EPA* Orders were monetary in nature, the *CCAA* judge relied on the fact that Abitibi's operations were funded through debtor-in-possession financing and its access to funds was limited to ongoing operations. Given that the *EPA* Orders targeted sites that were, for the most part, no longer in Abitibi's possession, this meant that Abitibi had no means to perform the remediation work during the reorganization process.

[54] In addition, because Abitibi lacked funds and no longer controlled the properties, the timetable set by the Province in the *EPA* Orders suggested that the Province never truly intended that Abitibi was to perform the remediation work required by the orders. The timetable was also unrealistic. For example, the orders were issued on November 12, 2009 and set a deadline of January 15, 2010 to perform a particular act, but the evidence revealed that compliance with this requirement would have taken close to a year.

[55] Furthermore, the judge relied on the fact that Abitibi was not simply designated a "person responsible" under the *EPA*, but was intentionally targeted by the Province. The finding that the Province had targeted Abitibi was drawn not only from the timing of the *EPA* Orders, but also from the fact that Abitibi was the only person designated in them, whereas others also appeared to be responsible — in some cases, primarily responsible — for the contamination. For example, Abitibi was ordered to do remediation work on a site it had surrendered more than 50 years before the orders were issued; the expert report upon which the orders were based made no distinction between Abitibi's activities on the property, on which its source of power had been horse power, and subsequent activities by others who had used fuel-powered vehicles

pas exécutés, et que selon l'estimation de la province, [TRADUCTION] « à l'heure actuelle, aucun paiement net ne serait versé à Abitibi » (par. 181).

[53] Les motifs du juge de première instance reposent non seulement sur une constatation implicite que la province exécuterait fort probablement les travaux, mais ils renvoient expressément aux faits qui appuient cette constatation. Pour conclure que les ordonnances *EPA* étaient de nature pécuniaire, le juge s'est fondé sur le fait qu'Abitibi pouvait mener ses opérations grâce à un financement de débiteur-exploitant et qu'elle n'avait accès à ces fonds que pour ses activités courantes. Étant donné que les ordonnances visaient des sites que, pour la plupart, Abitibi ne possédait plus, cela signifiait qu'Abitibi ne disposait d'aucune ressource pour exécuter les travaux pendant la réorganisation.

[54] De plus, parce qu'Abitibi ne disposait pas des fonds et n'exerçait plus aucun contrôle sur les biens, l'échéancier fixé par la province dans les ordonnances *EPA* était non seulement irréaliste, mais suggérait que la province n'avait jamais vraiment eu l'intention qu'Abitibi exécute les travaux qu'elle lui ordonnait de faire. Par exemple, les ordonnances en date du 12 novembre 2009 exigeaient que certains travaux particuliers soient terminés le 15 janvier 2010 alors que la preuve démontre qu'il aurait fallu presque un an pour exécuter ces travaux.

[55] En outre, le juge s'est appuyé sur le fait qu'Abitibi n'était pas simplement désignée comme [TRADUCTION] « personne responsable » aux termes de l'*EPA*, mais qu'elle était intentionnellement visée par la province. Il a fait cette constatation non seulement en raison du choix du moment où les ordonnances ont été prononcées, mais aussi parce qu'Abitibi y était la seule personne désignée alors que d'autres semblaient également responsables — et en certains cas, principalement responsables — de la contamination. Par exemple, la province a ordonné à Abitibi d'effectuer des travaux de décontamination d'un site qu'elle avait abandonné plus de 50 ans avant le prononcé des ordonnances alors que le rapport d'expert sur lequel les ordonnances étaient fondées ne distinguait aucunement les activités d'Abitibi, qui avait utilisé des chevaux,

there. In the judge's opinion, this finding of fact went to the Province's intent to establish a basis for performing the work itself and asserting a claim against Abitibi.

et les activités subséquentes d'autres personnes qui y avaient utilisé des véhicules alimentés au mazout. Ce fait, pour le juge, illustrait l'intention de la province d'établir un fondement pour exécuter elle-même les travaux et présenter une réclamation contre Abitibi.

[56] These reasons — and others — led the *CCAA* judge to conclude that the Province had not expected Abitibi to perform the remediation work and that the "intended, practical and realistic effect of the EPA Orders was to establish a basis for the Province to recover amounts of money to be eventually used for the remediation of the properties in question" (para. 211). He found that the Province appeared to have in fact taken some steps to liquidate the claims arising out of the *EPA* Orders.

[56] Ces motifs — et d'autres — ont amené le juge de première instance à conclure que la province ne s'attendait pas à ce qu'Abitibi exécute les travaux de décontamination et que [TRADUCTION] « les ordonnances *EPA* avaient pour effet voulu, pratique et réaliste de jeter les bases qui permettraient à la province de recouvrer les sommes d'argent devant éventuellement être employées pour la décontamination des terrains en question » (par. 211). Il a conclu que la province semblait avoir en fait pris des mesures en vue de liquider les réclamations découlant des ordonnances *EPA*.

[57] In the end, the judge found that there was definitely a claim that "might" be filed, and that it was not left to "the subjective choice of the creditor to hold the claim in its pocket for tactical reasons" (para. 227). In his words, the situation did not involve a "detached regulator or public enforcer issuing [an] order for the public good" (para. 175), and it was "the hat of a creditor that best fi[t] the Province, not that of a disinterested regulator" (para. 176).

[57] En fin de compte, le juge a conclu qu'il existait véritablement une réclamation qui « pourrait » être présentée, et qu'on ne pouvait laisser au bon vouloir du créancier [TRADUCTION] « le choix subjectif de la garder en réserve pour des raisons tactiques » (par. 227). Pour reprendre ses propres mots, il ne s'agissait pas d'un cas où « un organisme de réglementation ou d'application de la loi a émis de manière objective une ordonnance dans l'intérêt public » (par. 175), mais que « la province a agi plus comme un créancier que comme un organisme administratif désintéressé » (par. 176).

[58] In sum, although the analytical framework used by Gascon J. was driven by the facts of the case, he reviewed all the legal principles and facts that needed to be considered in order to make the determination in the case at bar. He did at times rely on indicators that are unique and that do not appear in the analytical framework I propose above, but he did so because of the exceptional facts of this case. Yet, had he formulated the question in the same way as I have, his conclusion, based on his objective findings of fact, would have been the same. Earmarking money may be a strong indicator that a province will perform remediation work, and actually commencing the work is the first step towards the creation of a debt, but these are not the

[58] En somme, bien que le cadre analytique utilisé par le juge Gascon a été dicté par les faits de l'affaire, il a examiné tous les principes juridiques et les faits qu'il était tenu de prendre en compte pour statuer sur la question qui se posait. À l'occasion, il s'est appuyé sur des indicateurs singuliers qui ne figurent pas dans le cadre analytique que j'ai déjà proposé, mais cela s'explique par les faits exceptionnels en l'espèce. Or, s'il avait formulé la question comme je l'ai posée, sa conclusion, appuyée sur ses constatations de fait objectives, aurait été la même. Le fait de prévoir un budget peut constituer un indicateur clair qu'une province exécutera des travaux de décontamination, et le fait que ces travaux soient entrepris constitue la première étape de

only considerations that can lead to a finding that a creditor has a monetary claim. The *CCAA* judge's assessment of the facts, particularly his finding that the *EPA* Orders were the first step towards performance of the remediation work by the Province, leads to no conclusion other than that it was sufficiently certain that the Province would perform remediation work and therefore fall within the definition of a creditor with a monetary claim.

la constitution d'une dette, mais ces considérations ne sont pas les seules qui permettent de conclure qu'un créancier fait valoir une réclamation pécuniaire. L'appréciation des faits par le juge de première instance, plus particulièrement sa constatation que les ordonnances constituaient la première étape en vue de la décontamination des sites, ne permet de tirer aucune conclusion autre que celle suivant laquelle il était suffisamment certain que la province exécuterait des travaux de décontamination et qu'elle était par conséquent visée par la définition d'un créancier ayant une réclamation pécuniaire.

VI. Conclusion

VI. Conclusion

[59] In sum, I agree with the Chief Justice that, as a general proposition, an environmental order issued by a regulatory body can be treated as a contingent claim, and that such a claim can be included in the claims process if it is sufficiently certain that the regulatory body will make a monetary claim against the debtor. Our difference of views lies mainly in the applicable threshold for including contingent claims and in our understanding of the *CCAA* judge's findings of fact.

[59] En somme, je suis d'accord avec la Juge en chef pour dire qu'en règle générale, une ordonnance environnementale d'un organisme administratif peut être traitée comme une réclamation éventuelle et qu'une telle réclamation peut être incluse au processus de réclamation s'il est suffisamment certain que l'organisme administratif fera valoir une réclamation pécuniaire contre le débiteur. Nos divergences de vues portent principalement sur le critère applicable pour que les réclamations éventuelles soient incluses et sur la façon dont nous interprétons les constatations de fait tirées par le juge de première instance.

[60] With respect to the law, the Chief Justice would craft a standard specific to the context of environmental orders by requiring a "likelihood approaching certainty" that the regulatory body will perform the remediation work. She finds that this threshold is justified because "remediation may cost a great deal of money" (para. 86). I acknowledge that remediating pollution is often costly, but I am of the view that Parliament has borne this consideration in mind in enacting provisions specific to environmental claims. Moreover, I recall that in this case, the Premier announced that the remediation work would be performed at no net cost to the Province. It was clear to him that the *Abitibi Act* would make it possible to offset all the related costs.

[60] En ce qui concerne le droit, la Juge en chef établirait une norme propre au contexte des ordonnances environnementales qui exigerait une « probabilité proche de la certitude » que l'organisme administratif réalisera les travaux de restauration. Elle estime que ce critère s'impose parce que « les travaux de restauration peuvent être très coûteux » (par. 86). Je reconnais que les travaux de décontamination sont souvent coûteux, mais je crois que cette considération a été prise en compte par le législateur fédéral lors de l'adoption des dispositions particulières visant les réclamations en matière environnementale. De plus, je rappelle qu'en l'instance, le premier ministre a annoncé que les travaux de décontamination seraient réalisés sans coût net pour la province. Il était évident pour lui que l'adoption de l'*Abitibi Act* permettrait de compenser tous les coûts afférents.

[61] Thus, I prefer to take the approach generally taken for all contingent claims. In my view, the *CCAA* court is entitled to take all relevant facts into consideration in making the relevant determination. Under this approach, the contingency to be assessed in a case such as this is whether it is sufficiently certain that the regulatory body will perform remediation work and be in a position to assert a monetary claim.

[62] Finally, the Chief Justice would review the *CCAA* court's findings of fact. I would instead defer to them. On those findings, applying any legal standard, be it the one proposed by the Chief Justice or the one I propose, the Province's claim is monetary in nature and its motion for a declaration exempting the *EPA* Orders from the claims procedure order was properly dismissed.

[63] For these reasons, I would dismiss the appeal with costs.

The following are the reasons delivered by

THE CHIEF JUSTICE (dissenting) —

1. Overview

[64] The issue in this case is whether orders made under the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2 ("*EPA*"), by the Newfoundland and Labrador Minister of Environment and Conservation ("Minister") requiring a polluter to clean up sites (the "*EPA* Orders") are monetary claims that can be compromised in corporate restructuring under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). If they are not claims that can be compromised in restructuring, the Abitibi respondents ("Abitibi") will still have a legal obligation to clean up the sites following their emergence from restructuring. If they are such claims, Abitibi will have emerged from restructuring free of the obligation, able to recommence business without remediating the

[61] Par conséquent, je préfère retenir la méthode généralement suivie en matière de réclamations éventuelles. À mon avis, le tribunal chargé de l'application de la *LACC* peut prendre en compte l'ensemble des faits pertinents en vue de rendre la décision appropriée. Suivant cette approche, l'éventualité qu'il faut évaluer dans une affaire comme celle-ci est de savoir s'il est suffisamment certain que l'organisme administratif exécutera les travaux de décontamination et sera en mesure de faire valoir une réclamation pécuniaire.

[62] Enfin, la Juge en chef réviserait les conclusions de fait du juge de première instance. Pour ma part, je m'en remets à ces conclusions. Quelle que soit la norme juridique appliquée, soit celle proposée par la Juge en chef ou celle que je propose, au vu de ces conclusions, la réclamation de la province est de nature pécuniaire et sa requête demandant de déclarer que les ordonnances *EPA* n'étaient pas assujetties à l'ordonnance relative à la procédure de réclamations a été à juste titre rejetée.

[63] Pour ces motifs, je suis d'avis de rejeter le pourvoi avec dépens

Version française des motifs rendus par

LA JUGE EN CHEF (dissidente) —

1. Aperçu

[64] Il s'agit en l'espèce de savoir si des ordonnances du ministre de l'Environnement et de la Conservation (le « ministre ») de Terre-Neuve-et-Labrador, émises en vertu de l'*Environmental Protection Act*, S.N.L. 2002, ch. E-14.2 (« *EPA* »), obligeant un pollueur à décontaminer des sites (les « ordonnances *EPA* ») constituent des réclamations pécuniaires qui peuvent faire l'objet d'une transaction dans le cadre d'une restructuration d'entreprise engagée sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« *LACC* »). Si elles ne constituent pas des réclamations pécuniaires pouvant faire l'objet d'une transaction, les intimées du groupe Abitibi (« Abitibi ») auront encore l'obligation légale de décontaminer les sites lorsque leur

properties it polluted, the cost of which will fall on the Newfoundland and Labrador public.

restructuration sera terminée. Dans le cas contraire, Abitibi sera dégagée de cette obligation; elle pourra reprendre ses activités à l'issue de la restructuration sans avoir à décontaminer les sites qu'elle a pollués et la population de Terre-Neuve-et-Labrador devra supporter le coût de la décontamination.

[65] Remediation orders made under a province's environmental protection legislation impose ongoing regulatory obligations on the corporation required to clean up the pollution. They are not monetary claims. In narrow circumstances, specified by the *CCAA*, these ongoing regulatory obligations may be reduced to monetary claims, which can be compromised under *CCAA* proceedings. This occurs where a province has done the work, or where it is "sufficiently certain" that it will do the work. In these circumstances, the regulatory obligation would be extinguished and the province would have a monetary claim for the cost of remediation in the *CCAA* proceedings. Otherwise, the regulatory obligation survives the restructuring.

[65] Les ordonnances exigeant la décontamination émises aux termes d'une loi provinciale sur la protection de l'environnement imposent des exigences réglementaires continues à la personne morale requise de remédier à la pollution. Ces ordonnances ne constituent pas des réclamations pécuniaires. En certaines circonstances particulières prévues par la *LACC*, ces exigences réglementaires continues peuvent être converties en réclamations pécuniaires, lesquelles peuvent faire l'objet de transactions dans le cadre de procédures engagées aux termes de la *LACC*. Cette situation se produit lorsqu'une province a exécuté les travaux, ou lorsqu'il est « suffisamment certain » qu'elle exécutera les travaux. Dans ces circonstances, l'exigence réglementaire serait éteinte et la province pourrait produire, dans le cadre de procédures engagées sous le régime de la *LACC*, une réclamation pécuniaire couvrant le coût des travaux de décontamination. Autrement, l'exigence réglementaire subsiste après la restructuration.

[66] In my view, the orders for remediation in this case, with a minor exception, are not claims that can be compromised in restructuring. On one of the properties, the Minister did emergency remedial work and put other work out to tender. These costs can be claimed in the *CCAA* proceedings. However, with respect to the other properties, on the evidence before us, the Minister has neither done the clean-up work, nor is it sufficiently certain that he or she will do so. The Province of Newfoundland and Labrador ("Province") retained a number of options, including requiring Abitibi to perform the remediation if it successfully emerged from the *CCAA* restructuring.

[66] À mon avis, les ordonnances exigeant la décontamination en l'espèce, à une exception près, ne constituent pas des réclamations pouvant faire l'objet de transactions dans le cadre d'une restructuration. Dans un des sites, la ministre de l'époque a effectué d'urgence la décontamination et a lancé un appel d'offres pour d'autres travaux. Le coût de ces travaux peut faire l'objet d'une réclamation dans les procédures engagées sous le régime de la *LACC*. Toutefois, en ce qui concerne les autres sites, selon les éléments de preuve dont nous disposons, le ministre en poste n'a pas effectué les travaux de décontamination et il n'est pas suffisamment certain qu'il le fera. La province de Terre-Neuve-et-Labrador (« province ») a conservé un certain nombre de solutions, dont celle d'obliger Abitibi à décontaminer les sites si elle réussit sa restructuration engagée sous le régime de la *LACC*.

[67] I would therefore allow the appeal and grant the Province the declaration it seeks that Abitibi is still subject to its obligations under the *EPA* following its emergence from restructuring, except for work done or tendered for on the Buchans site.

2. The Proceedings Below

[68] The *CCAA* judge took the view that the Province issued the *EPA* Orders, not in order to make Abitibi remediate, but as part of a money grab. He therefore concluded that the orders were monetary and financial in nature and should be considered claims that could be compromised under the *CCAA* (2010 QCCS 1261, 68 C.B.R. (5th) 1). The Quebec Court of Appeal denied leave to appeal on the ground that this "factual" conclusion could not be disturbed (2010 QCCA 965, 68 C.B.R. (5th) 57).

[69] The *CCAA* judge's stark view that an *EPA* obligation can be considered a monetary claim capable of being compromised simply because (as he saw it) the Province's motive was money, is no longer pressed. Whether an *EPA* order is a claim under the *CCAA* depends on whether it meets the requirements for a claim under that statute. That is the only issue to be resolved. Insofar as this determination touches on the division of powers, I am in substantial agreement with my colleague Deschamps J., at paras. 18-19.

3. The Distinction Between Regulatory Obligations and Claims Under the *CCAA*

[70] Orders to clean up polluted property under provincial environmental protection legislation are regulatory orders. They remain in effect until the

[67] Je suis par conséquent d'avis d'accueillir le pourvoi et d'accorder à la province le jugement déclaratoire sollicité portant qu'Abitibi reste assujettie à ses obligations en vertu de l'*EPA* au terme de cette période de restructuration, à l'exception des travaux sur le site de Buchans déjà exécutés ou à l'égard desquels des appels d'offres ont été lancés.

2. Les décisions des juridictions inférieures

[68] Le juge de première instance a adopté le point de vue selon lequel la province avait émis les ordonnances *EPA*, non pas pour obliger Abitibi à réparer les dommages causés, mais pour lui soutirer de l'argent. Il a donc conclu que les ordonnances étaient de nature pécuniaire et financière, et qu'elles devraient être considérées comme des réclamations pouvant faire l'objet de transactions sous le régime de la *LACC* (2010 QCCS 1261, 68 C.B.R. (5th) 1). La Cour d'appel du Québec a refusé l'autorisation d'interjeter appel de cette décision au motif que rien ne permettait de modifier cette conclusion « de fait » (2010 QCCA 965, 68 C.B.R. (5th) 57).

[69] Le point de vue peu nuancé du juge de première instance, selon lequel une obligation découlant de l'*EPA* peut être considérée comme une réclamation pécuniaire susceptible de faire l'objet d'une transaction du simple fait (à son avis) que la province n'était motivée que par l'argent, n'est plus en cause. Pour répondre à la question de savoir si une ordonnance émise sous le régime de l'*EPA* constitue une réclamation au sens de la *LACC*, il faut déterminer si elle satisfait aux conditions d'existence d'une réclamation établies par cette loi. Il s'agit de la seule question à trancher. Dans la mesure où la décision sur ce point touche le partage des pouvoirs, je souscris pour l'essentiel à l'opinion exprimée par ma collègue la juge Deschamps aux par. 18-19.

3. La distinction entre une exigence réglementaire et une réclamation au titre de la *LACC*

[70] Les ordonnances exigeant la décontamination des sites pollués émises en vertu des lois provinciales sur l'environnement sont des ordonnances

property has been cleaned up or the matter otherwise resolved.

[71] It is not unusual for corporations seeking to restructure under the *CCAA* to be subject to a variety of ongoing regulatory orders arising from statutory schemes governing matters like employment, energy conservation and the environment. The corporation remains subject to these obligations as it continues to carry on business during the restructuring period, and remains subject to them when it emerges from restructuring unless they have been compromised or liquidated.

[72] The *CCAA*, like the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), draws a fundamental distinction between ongoing regulatory obligations owed to the public, which generally survive the restructuring, and monetary claims that can be compromised.

[73] This distinction is also recognized in the jurisprudence, which has held that regulatory duties owed to the public are not "claims" under the *BIA*, nor, by extension, under the *CCAA*. In *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.* (1991), 81 Alta. L.R. (2d) 45, the Alberta Court of Appeal held that a receiver in bankruptcy must comply with an order from the Energy Resources Conservation Board to comply with well abandonment requirements. Writing for the court, Laycraft C.J.A. said the question was whether the *Bankruptcy Act* "requires that the assets in the estate of an insolvent well licensee should be distributed to creditors leaving behind the duties respecting environmental safety . . . as a charge to the public" (para. 29). He answered the question in the negative:

The duty is owed as a public duty by all the citizens of the community to their fellow citizens. When the

de nature réglementaire. Elles demeurent en vigueur jusqu'à ce que le site ait été décontaminé ou que l'affaire soit réglée d'une autre façon.

[71] Il n'est pas inhabituel pour les sociétés qui cherchent à se restructurer sous le régime de la *LACC* d'être assujetties à diverses ordonnances réglementaires continues découlant de régimes législatifs régissant des domaines tels que l'emploi, la conservation de l'énergie et l'environnement. La société demeure assujettie à ces exigences alors qu'elle continue d'exercer ses activités pendant la période de restructuration, et elle y demeure assujettie au terme de cette période de restructuration, à moins que ces exigences n'aient fait l'objet d'une transaction ou qu'elles n'aient été liquidées.

[72] La *LACC*, à l'instar de la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* »), établit une distinction fondamentale entre les exigences réglementaires continues établies en faveur du public, lesquelles continuent de s'appliquer après la restructuration, et les réclamations pécuniaires qui peuvent faire l'objet d'une transaction.

[73] Cette distinction est aussi reconnue dans la jurisprudence, selon laquelle les obligations réglementaires établies en faveur du public ne sont pas des « réclamations » aux termes de la *LFI* ni, par extension, aux termes de la *LACC*. Dans l'arrêt *Panamericana de Bienes y Servicios S.A. c. Northern Badger Oil & Gas Ltd.* (1991), 81 Alta. L.R. (2d) 45, la Cour d'appel de l'Alberta a statué qu'un séquestre doit se conformer à une ordonnance de l'Energy Resources Conservation Board lui enjoignant de respecter des exigences en matière d'abandon de puits. Le juge en chef Laycraft, au nom de la cour, a affirmé que la question à trancher était de savoir si la *Loi sur la faillite* [TRADUCTION] « exige que les actifs se trouvant dans le patrimoine d'un titulaire de permis de puits soient distribués aux créanciers en laissant à la charge du public les obligations en matière de sécurité environnementale » (par. 29). Il a répondu par la négative :

[TRADUCTION] L'obligation est établie comme une obligation à caractère public qui doit être respectée par

citizen subject to the order complies, the result is not the recovery of money by the peace officer or public authority, or of a judgment for money, nor is that the object of the whole process. Rather, it is simply the enforcement of the general law. The enforcing authority does not become a "creditor" of the citizen on whom the duty is imposed. [Emphasis added; para. 33.]

l'ensemble des citoyens de la collectivité à l'égard de leurs concitoyens. Lorsque le citoyen visé par l'ordonnance s'y conforme, le résultat n'est pas perçu comme le recouvrement d'une somme d'argent par un agent de la paix ou l'autorité publique, ni comme l'exécution d'un jugement ordonnant le paiement d'une somme d'argent; d'ailleurs, cela ne constitue pas non plus l'objectif de l'ensemble du processus. Il faut plutôt y voir l'application d'une loi générale. L'organisme d'application de la loi ne devient pas un « créancier » du citoyen à qui incombe l'obligation. [Je souligne; par. 33.]

[74] The distinction between regulatory obligations under the general law aimed at the protection of the public and monetary claims that can be compromised in *CCAA* restructuring or bankruptcy is a fundamental plank of Canadian corporate law. It has been repeatedly acknowledged: *Lamford Forest Products Ltd. (Re)* (1991), 86 D.L.R. (4th) 534 (B.C.S.C.); *Shirley (Re)* (1995), 129 D.L.R. (4th) 105 (Ont. Ct. (Gen. Div.)), at p. 109; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, at para. 146, *per* Iacobucci J. (dissenting). As Farley J. succinctly put it in *Air Canada, Re [Regulators' motions]* (2003), 28 C.B.R. (5th) 52 (Ont. S.C.J.), at para. 18: "Once [the company] emerges from these CCAA proceedings (successfully one would hope), then it will have to deal with each and every then unresolved [regulatory] matter."

[74] La distinction entre les exigences réglementaires découlant d'une loi d'application générale visant la protection du public, d'une part, et les réclamations pécuniaires pouvant faire l'objet d'une transaction dans le cadre d'une restructuration engagée sous le régime de la *LACC* ou en matière de faillite, d'autre part, constitue un élément important du droit canadien des sociétés. Cette distinction a maintes fois été reconnue : *Lamford Forest Products Ltd. (Re)* (1991), 86 D.L.R. (4th) 534 (C.S.C.-B.); *Shirley (Re)* (1995), 129 D.L.R. (4th) 105 (C. Ont. (Div. gén.)), p. 109; *Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453, par. 146, le juge Iacobucci (dissident). Comme l'a dit succinctement le juge Farley dans *Air Canada, Re [Regulators' motions]* (2003), 28 C.B.R. (5th) 52 (C.S.J. Ont.), par. 18 : [TRADUCTION] « À l'issue des procédures engagées en vertu de la LACC — souhaitons qu'elles soient couronnées de succès — [la société] aura alors à régler chacun des dossiers non résolus [en matière réglementaire]. »

[75] Recent amendments to the *CCAA* confirm this distinction. Section 11.1(2) now explicitly provides that, except to the extent a regulator is enforcing a payment obligation, a general stay does not affect a regulatory body's authority in relation to a corporation going through restructuring. The *CCAA* court may only stay specific actions or suits brought by a regulatory body, and only if such action is necessary for a viable compromise to be reached and it would not be contrary to the public interest to make such an order (s. 11.1(3)).

[75] Des modifications apportées récemment à la *LACC* confirment cette distinction. Le paragraphe 11.1(2) prévoit maintenant expressément que, sauf dans la mesure où un organisme de réglementation fait respecter une obligation de paiement, une suspension générale ne porte aucunement atteinte aux pouvoirs de celui-ci à l'égard d'une société en restructuration. Le tribunal chargé d'appliquer la *LACC* ne peut ordonner une suspension qu'à l'égard de certaines actions ou poursuites intentées par un organisme administratif, et seulement si cette mesure est nécessaire à la conclusion d'une transaction viable et si une telle ordonnance ne serait pas contraire à l'intérêt public (par. 11.1(3)).

[76] Abitibi argues that another amendment to the *CCAA*, s. 11.8(9), treats ongoing regulatory duties owed to the public as claims, and erases the distinction between the two types of obligation: see *General Chemical Canada Ltd., Re*, 2007 ONCA 600, 228 O.A.C. 385, *per* Goudge J.A., relying on s. 14.06(8) of the *BIA* (the equivalent of s. 11.8(9) of the *CCAA*). With respect, this reads too much into the provision. Section 11.8(9) of the *CCAA* refers only to the situation where a government has performed remediation, and provides that the *costs of the remediation* become a claim in the restructuring process even where the environmental damage arose after *CCAA* proceedings have begun. As stated in *Strathcona (County) v. PriceWaterhouseCoopers Inc.*, 2005 ABQB 559, 47 Alta. L.R. (4th) 138, *per* Burrows J., the section "does not convert a statutorily imposed obligation owed to the public at large into a liability owed to the public body charged with enforcing it" (para. 42).

[76] Abitibi plaide qu'en vertu d'une autre modification apportée à la *LACC*, le par. 11.8(9), les exigences réglementaires continues établies en faveur du public sont considérées comme des réclamations, et que cette modification élimine la distinction entre les deux types d'obligations : voir *General Chemical Canada Ltd., Re*, 2007 ONCA 600, 228 O.A.C. 385, le juge Goudge, citant le par. 14.06(8) de la *LFI* (la disposition équivalente au par. 11.8(9) de la *LACC*). Avec égards, cette interprétation de la disposition est trop large. Le paragraphe 11.8(9) de la *LACC* vise uniquement la situation où un gouvernement a exécuté des travaux de réparation du dommage, et prévoit que les *frais de réparation* constituent une réclamation dans le cadre du processus de restructuration, même si les dommages ont été causés à l'environnement après l'introduction des procédures au titre de la *LACC*. Comme l'a déclaré le juge Burrows dans *Strathcona (County) c. PriceWaterhouseCoopers Inc.*, 2005 ABQB 559, 47 Alta. L.R. (4th) 138, la disposition [TRADUCTION] « ne convertit pas une exigence imposée par la loi et établie en faveur du public en général en une dette envers l'organisme public chargé d'appliquer la loi » (par. 42).

4. When Does a Regulatory Obligation Become a Claim Under the *CCAA*?

[77] This brings us to the heart of the question before us: When does a regulatory obligation imposed on a corporation under environmental protection legislation become a "claim" provable and compromisable under the *CCAA*?

[78] Regulatory obligations are, as a general proposition, not compromisable claims. Only financial or monetary claims provable by a "creditor" fall within the definition of "claim" under the *CCAA*. A "creditor" is defined as "a person having a claim": s. 2, *BIA*. Thus, the identification of a "creditor" hangs on the existence of a "claim". Section 12(1) of the *CCAA* defines "claim" as "any indebtedness, liability or obligation . . . that . . . would be a debt provable in bankruptcy", which is

4. Quand une exigence réglementaire devient-elle une réclamation au titre de la *LACC*?

[77] Ceci nous amène au cœur de la question dont nous sommes saisis : quand une exigence réglementaire imposée à une société en vertu d'une loi sur la protection de l'environnement devient-elle une « réclamation » prouvable et pouvant faire l'objet d'une transaction aux termes de la *LACC*?

[78] En règle générale, les exigences réglementaires ne sont pas des réclamations pouvant faire l'objet d'une transaction. Seules les réclamations financières ou pécuniaires prouvables par un « créancier » correspondent à la définition de « réclamation » au sens de la *LACC*. Un « créancier » est défini comme étant une « [p]ersonne ayant une réclamation » : art. 2, *LFI*. Ainsi, l'identification d'un « créancier » repose sur l'existence d'une « réclamation ». Le paragraphe 12(1) de la *LACC* définit une « réclamation »

accepted as confined to obligations of a financial or monetary nature.

[79] The *CCAA* does not depart from the proposition that a claim must be financial or monetary. However, it contains a scheme to deal with disputes over whether an obligation is a monetary obligation as opposed to some other kind of obligation.

[80] Such a dispute may arise with respect to environmental obligations of the corporation. The *CCAA* recognizes three situations that may arise when a corporation enters restructuring.

[81] The first situation is where the remedial work has not been done (and there is no "sufficient certainty" that the work will be done, unlike the third situation described below). In this situation, the government cannot claim the cost of remediation: see s. 102(3) of the *EPA*. The obligation of compliance falls in principle on the monitor who takes over the corporation's assets and operations. If the monitor remediates the property, he can claim the costs as costs of administration. If he does not wish to do so, he may obtain a court order staying the remediation obligation or abandon the property: s. 11.8(5) *CCAA* (in which case costs of remediation shall not rank as costs of administration: s. 11.8(7)). In this situation, the obligation cannot be compromised.

[82] The second situation is where the government that has issued the environmental protection order moves to clean up the pollution, as the legislation entitles it to do. In this situation, the government has a claim for the cost of remediation that is compromisable in the *CCAA* proceedings. This is because the government, by moving to clean up the pollution, has changed the outstanding regulatory

comme étant « toute dette, tout engagement ou toute obligation [. . .] qui [. . .] constituerait une dette prouvable en matière de faillite », une définition dont la portée reconnue se limite aux obligations de nature financière ou pécuniaire.

[79] La *LACC* ne s'écarte pas du principe selon lequel une réclamation doit être financière ou pécuniaire. Elle prévoit cependant un régime permettant de régler les différends portant sur la question de savoir si une obligation est de nature pécuniaire, par opposition à une obligation d'une autre nature.

[80] Les obligations environnementales qui incombent à une personne morale peuvent engendrer un tel différend. La *LACC* reconnaît trois situations susceptibles de se présenter lorsqu'une personne morale s'engage dans un processus de restructuration.

[81] La première situation est celle où les travaux de restauration du site n'ont pas été exécutés (et il n'est pas « suffisamment certain » que les travaux seront exécutés, contrairement à la troisième situation exposée ci-après). En pareil cas, le gouvernement ne peut réclamer le coût de la restauration : voir le par. 102(3) de l'*EPA*. En principe, l'obligation de se conformer à la loi incombe au contrôleur qui prend en charge l'actif et les activités de la société. Si le contrôleur exécute les travaux de restauration du site, il peut réclamer les frais en tant que frais d'administration. S'il ne désire pas le faire, il peut obtenir de la cour une ordonnance suspendant l'exigence de restauration ou il peut abandonner l'immeuble : par. 11.8(5) de la *LACC* (dans ce cas, les frais de restauration ne font pas partie des frais d'administration : par. 11.8(7)). En pareil cas, l'obligation ne peut faire l'objet d'une transaction.

[82] La deuxième situation est celle où le gouvernement qui a émis l'ordonnance environnementale prend des mesures de décontamination, ce que la législation l'autorise à faire. En pareil cas, le gouvernement peut produire, pour le coût de la décontamination, une réclamation qui pourra faire l'objet d'une transaction dans le cadre des procédures engagées sous le régime de la *LACC*. Il en est ainsi

obligation owed to the public into a financial or monetary obligation owed by the corporation to the government. Section 11.8(9), already discussed, makes it clear that this applies to damage after the *CCAA* proceedings commenced, which might otherwise not be claimable as a matter of timing.

parce que le gouvernement, en prenant des mesures pour décontaminer le site, a transformé l'exigence réglementaire non exécutée établie en faveur du public en une obligation financière ou pécuniaire à laquelle la société est tenue envers le gouvernement. Le paragraphe 11.8(9), examiné précédemment, prévoit clairement que cette situation s'applique aux dommages survenus après que les procédures ont été engagées au titre de la *LACC*; en l'absence d'une telle précision, ces dommages ne pourraient faire l'objet d'une réclamation compte tenu du moment choisi pour agir.

[83] A third situation may arise: the government has not yet performed the remediation at the time of restructuring, but there is "sufficient certainty" that it will do so. This situation is regulated by the provisions of the *CCAA* for contingent or future claims. Under the *CCAA*, a debt or liability that is contingent on a future event may be compromised.

[83] Une troisième situation peut se présenter : le gouvernement n'a pas encore exécuté des travaux de restauration au moment de la restructuration, mais il est « suffisamment certain » qu'il le fera. Cette situation est prévue par les dispositions de la *LACC* relatives aux réclamations éventuelles ou futures. Aux termes de la *LACC*, une dette ou un engagement qui dépend d'un événement futur peut faire l'objet d'une transaction.

[84] It is clear that a mere possibility that work will be done does not suffice to make a regulatory obligation a contingent claim under the *CCAA*. Rather, there must be "sufficient certainty" that the obligation will be converted into a financial or monetary claim to permit this. The impact of the obligation on the insolvency process is irrelevant to the analysis of contingency. The future liabilities must not be "so remote and speculative in nature that they could not properly be considered contingent claims": *Confederation Treasury Services Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75, at para. 4.

[84] Il est évident qu'une simple possibilité que les travaux soient exécutés ne suffit pas pour transformer une exigence réglementaire en une réclamation éventuelle au titre de la *LACC*. Pour en arriver à ce résultat, il faut plutôt qu'il soit « suffisamment certain » que l'exigence sera convertie en une réclamation financière ou pécuniaire. L'incidence de l'exigence sur le processus d'insolvabilité n'est pas pertinente pour l'analyse du caractère éventuel de la réclamation. Les engagements futurs ne doivent pas être [TRADUCTION] « si lointains et hypothétiques qu'ils ne puissent être considérés à bon droit comme des réclamations éventuelles » : *Confederation Treasury Services Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75, par. 4.

[85] Where environmental obligations are concerned, courts to date have relied on a high degree of probability verging on certainty that the government will in fact step in and remediate the property. In *Anvil Range Mining Corp., Re* (2001), 25 C.B.R. (4th) 1 (Ont. S.C.J.), Farley J. concluded that a contingent claim was established where the money had already been earmarked in the budget for the remediation project. He observed that

[85] Lorsque des exigences environnementales sont en cause, les tribunaux se sont jusqu'à ce jour fondés sur un haut degré de probabilité, proche de la certitude, que le gouvernement prendra réellement des mesures et exécutera les travaux de restauration. Dans *Anvil Range Mining Corp., Re* (2001), 25 C.B.R. (4th) 1 (C.S.J. Ont.), le juge Farley a conclu que la preuve d'une réclamation éventuelle était établie parce que les fonds avaient

"there appears to be every likelihood to a certainty that every dollar in the budget for the year ending March 31, 2002 earmarked for reclamation will be spent" (para. 15 (emphasis added)). Similarly, in *Shirley (Re)*, Kennedy J. relied on the fact that the Ontario Minister of the Environment had already entered the property at issue and commenced remediation activities to conclude that "[a]ny doubt about the resolve of the [Ministry's] intent to realize upon its authority ended when it began to incur expense from operations" (p. 110).

déjà été dédiés au projet de restauration dans le budget. Il a fait remarquer qu'[TRADUCTION] « il semble fortement probable et presque certain que chaque dollar dédié aux réclamations figurant au budget établi pour l'année se terminant le 31 mars 2002 sera dépensé » (par. 15 (je souligne)). De même, dans *Shirley (Re)*, le juge Kennedy s'est fondé sur le fait que les employés du ministère de l'Environnement de l'Ontario se trouvaient déjà sur le terrain en cause et avaient commencé les travaux de restauration pour conclure que [TRADUCTION] « [t]ous doutes quant à la détermination du [ministère] d'exercer son droit se sont estompés lorsque l'opération a commencé à lui occasionner des dépenses » (p. 110).

[86] There is good reason why "sufficient certainty" should be interpreted as requiring "likelihood approaching certainty" when the issue is whether ongoing environmental obligations owed to the public should be converted to contingent claims that can be expunged or compromised in the restructuring process. Courts should not overlook the obstacles governments may encounter in deciding to remediate environmental damage a corporation has caused. To begin with, the government's decision is discretionary and may be influenced by any number of competing political and social considerations. Furthermore, remediation may cost a great deal of money. For example, in this case, the *CCAA* court found that at a minimum the remediation would cost in the "mid-to-high eight figures", and could indeed cost several times that (para. 81). In concrete terms, the remediation at issue in this case may be expected to meet or exceed the entire budget of the Minister ($65 million) for 2009. Not only would this be a massive expenditure, but it would also likely require the specific approval of the legislature and thereby be subject to political uncertainties. To assess these factors and determine whether all this will occur would embroil the *CCAA* judge in social, economic and political considerations — matters which are not normally subject to judicial consideration: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 74. It is small wonder, then, that courts assessing whether it is "sufficiently certain" that a government will clean up pollution created

[86] Une bonne raison explique pourquoi il convient d'interpréter l'expression « suffisamment certain » comme exigeant une « probabilité proche de la certitude » lorsqu'il s'agit de déterminer si des exigences environnementales continues établies en faveur du public devraient être converties en réclamations éventuelles qui peuvent être rayées ou faire l'objet d'une transaction dans le cadre du processus de restructuration. Les tribunaux ne devraient pas oublier les obstacles auxquels les gouvernements peuvent se heurter lorsqu'ils décident de réparer les dommages environnementaux causés par une société. D'abord, la décision du gouvernement est discrétionnaire, et elle peut être influencée par nombre de considérations politiques et sociales concurrentes. En outre, les travaux de restauration peuvent être très coûteux. En l'espèce, par exemple, le juge de première instance a conclu que ces travaux pourraient coûter au minimum [TRADUCTION] « entre cinquante et cent millions de dollars », et même plusieurs fois cette somme (par. 81). En termes concrets, le coût des travaux en cause en l'espèce pourrait atteindre ou dépasser le budget total du ministre (65 millions de dollars) pour l'exercice 2009. Il s'agirait non seulement d'une dépense énorme, mais il faudrait probablement aussi l'approbation explicite de l'assemblée législative, avec les incertitudes politiques que cela comporte. L'évaluation de ces facteurs et l'appréciation de la possibilité que tout ce qui précède se produise entraîneraient le juge chargé d'appliquer la *LACC* dans des considérations d'ordre

by a corporation have insisted on proof of likelihood approaching certainty.

[87] In this case, as will be seen, apart from the Buchans property, the record is devoid of any evidence capable of establishing that it is "sufficiently certain" that the Province will itself remediate the properties. Even on a more relaxed standard than the one adopted in similar cases to date, the evidence in this case would fail to establish that remediation is "sufficiently certain".

5. The Result in This Case

[88] Five different sites are at issue in this case. The question in each case is whether the Minister has already remediated the property (making it to that extent an actual claim), or if not, whether it is "sufficiently certain" that he or she will remediate the property, permitting it to be considered a contingent claim.

[89] The Buchans site posed immediate risks to human health as a consequence of high levels of lead and other contaminants in the soil, groundwater, surface water and sediment. There was a risk that the wind would disperse the contamination, posing a threat to the surrounding population. Lead has been found in residential areas of Buchans and adults tested in the town had elevated levels of lead in their blood. In addition, a structurally unsound dam at the Buchans site raised the risk of contaminating silt entering the Exploits and Buchans rivers.

[90] The Minister quickly moved to address the immediate concern of the unsound dam and put

social, économique et politique — des questions normalement soustraites à l'examen judiciaire : *R. c. Imperial Tobacco Canada Ltée*, 2011 CSC 42, [2011] 3 R.C.S. 45, par. 74. Il n'est donc pas étonnant que les tribunaux, lorsqu'il s'agit d'apprécier s'il est « suffisamment certain » qu'un gouvernement procédera à la décontamination causée par une société, s'en soient tenus à la preuve d'une probabilité proche de la certitude.

[87] En l'espèce, comme nous le verrons, à l'exclusion du site de Buchans, le dossier est dénué d'éléments de preuve susceptibles d'établir qu'il est « suffisamment certain » que la province exécutera elle-même les travaux de décontamination. Même si l'on applique une norme plus souple que celle retenue jusqu'à ce jour dans des affaires semblables, la preuve en l'espèce n'établirait pas qu'il est « suffisamment certain » que les sites seront décontaminés.

5. L'issue du présent pourvoi

[88] En l'espèce, cinq sites différents sont en cause. La question dans chaque cas est de savoir si le ministre a déjà décontaminé les sites — il aurait alors une réclamation — ou, si tel n'est pas le cas, s'il est « suffisamment certain » qu'il exécutera les travaux de restauration, ce qui permettrait de considérer le coût de la décontamination comme une réclamation éventuelle.

[89] Le site de Buchans posait un risque immédiat à la santé pour les humains en raison de la forte concentration de plomb et d'autres contaminants présente dans le sol, l'eau souterraine et de surface ainsi que dans des sédiments. Il y avait un risque que le vent disperse la contamination, ce qui aurait représenté une menace pour la population environnante. On a trouvé du plomb dans des zones résidentielles de Buchans et les tests de sang ont révélé chez des adultes résidant dans la ville des concentrations élevées de plomb. De plus, un barrage en mauvais état situé sur le site de Buchans augmentait le risque de contamination du limon se déversant dans les rivières Exploits et Buchans.

[90] La ministre de l'époque a rapidement pris des mesures pour régler le problème immédiat du

out a request for tenders for other measures that required immediate action at the Buchans site. Money expended is clearly a claim under the *CCAA*. I am also of the view that the work for which the request for tenders was put out meets the "sufficiently certain" standard and constitutes a contingent claim.

[91] Beyond this, it has not been shown that it is "sufficiently certain" that the Province will do the remediation work to permit Abitibi's ongoing regulatory obligations under the *EPA* Orders to be considered contingent debts. The same applies to the other properties, on which no work has been done and no requests for tender to do the work initiated.

[92] Far from being "sufficiently certain", there is simply nothing on the record to support the view that the Province will move to remediate the remaining properties. It has not been shown that the contamination poses immediate health risks, which must be addressed without delay. It has not been shown that the Province has taken any steps to do any work. And it has not been shown that the Province has set aside or even contemplated setting aside money for this work. Abitibi relies on a statement by the then-Premier in discussing the possibility that the Province would be obliged to compensate Abitibi for expropriation of some of the properties, to the effect that "there would not be a net payment to Abitibi": R.F., at para. 12. Apart from the fact that the Premier was not purporting to state government policy, the statement simply does not say that the Province would do the remediation. The Premier may have simply been suggesting that outstanding environmental liabilities made the properties worth little or nothing, obviating any net payment to Abitibi.

[93] My colleague Deschamps J. concludes that the findings of the *CCAA* court establish that it was

barrage en mauvais état et a lancé un appel d'offres relatif aux autres mesures nécessitant une intervention immédiate sur le site de Buchans. Il est clair que les sommes d'argent dépensées constituent une réclamation au sens de la *LACC*. J'estime également que les travaux à l'égard desquels des appels d'offres ont été lancés satisfont à la norme de ce qui est « suffisamment certain » et qu'ils constituent une réclamation éventuelle.

[91] Quant au reste, on n'a pas établi qu'il soit « suffisamment certain » que la province exécutera les travaux de décontamination de façon à pouvoir considérer comme des dettes éventuelles les exigences réglementaires continues que les ordonnances *EPA* ont imposées à Abitibi. La même conclusion s'applique à l'égard des autres sites, où aucun travail n'a été réalisé et pour lesquels aucun appel d'offres n'a été lancé pour l'exécution des travaux.

[92] Il n'est pas « suffisamment certain » que la province entreprenne la décontamination des autres sites : aucune preuve au dossier ne laisse entrevoir cette possibilité. Il n'a pas été démontré que la contamination pose pour la santé des risques immédiats exigeant la prise de mesures dans les plus brefs délais. Il n'a pas été démontré que la province a pris quelque mesure que ce soit pour réaliser des travaux. Et il n'a pas été démontré que la province a prévu des sommes d'argent pour ces travaux ou qu'elle a même songé à en prévoir. Abitibi se fonde sur une déclaration du premier ministre de l'époque, qui examinait la possibilité que la province soit tenue de verser à Abitibi une indemnité pour l'expropriation de certains terrains, selon laquelle [TRADUCTION] « aucun montant net ne serait versé à Abitibi » : m.i., par. 12. Mis à part le fait que le premier ministre ne prétendait pas établir une politique gouvernementale, sa déclaration n'indique aucunement que la province exécuterait la décontamination. Le premier ministre indiquait peut-être simplement qu'en raison des exigences environnementales non respectées, les terrains ne valaient plus rien ou presque et qu'il serait inutile de verser quoi que ce soit à Abitibi.

[93] Ma collègue la juge Deschamps conclut que les constatations du juge de première instance

"sufficiently certain" that the Province would remediate the land, converting Abitibi's regulatory obligations under the *EPA* Orders to contingent claims that can be compromised under the *CCAA*. With respect, I find myself unable to agree.

[94] The *CCAA* judge never asked himself the critical question of whether it was "sufficiently certain" that the Province would do the work itself. Essentially, he proceeded on the basis that the *EPA* Orders had not been put forward in a sincere effort to obtain remediation, but were simply a money grab. The *CCAA* judge buttressed his view that the Province's regulatory orders were not sincere by opining that the orders were unenforceable (which if true would not prevent new *EPA* orders) and by suggesting that the Province did not want to assert a contingent claim, since this might attract a counterclaim by Abitibi for the expropriation of the properties (something that may be impossible due to Abitibi's decision to take the expropriation issue to NAFTA (the *North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, Can. T.S. 1994 No. 2), excluding Canadian courts). In any event, it is clear that the *CCAA* judge, on the reasoning he adopted, never considered the question of whether it was "sufficiently certain" that the Province would remediate the properties. It follows that the *CCAA* judge's conclusions cannot support the view that the outstanding obligations are contingent claims under the *CCAA*.

[95] My colleague concludes:

[The *CCAA* judge] did at times rely on indicators that are unique and that do not appear in the analytical framework I propose above, but he did so because of the exceptional facts of this case. Yet, had he formulated the

établissent qu'il est « suffisamment certain » que la province décontaminerait les terrains, transformant ainsi les exigences réglementaires que les ordonnances *EPA* imposent à Abitibi en réclamations éventuelles pouvant faire l'objet d'une transaction sous le régime de la *LACC*. Avec égards, je ne puis souscrire à cette conclusion.

[94] Le juge de première instance ne s'est jamais posé la question cruciale de savoir s'il était « suffisamment certain » que la province exécuterait elle-même les travaux. Essentiellement, il a tenu pour acquis que les ordonnances *EPA* n'avaient pas été émises avec l'intention sincère d'obtenir la décontamination des sites, mais qu'il s'agissait simplement d'une manœuvre pour soutirer de l'argent. Le juge a renforcé son point de vue selon lequel les ordonnances réglementaires émises par la province étaient dépourvues de sincérité en exprimant l'avis qu'elles n'étaient pas susceptibles d'exécution (ce qui, si cela s'avérait exact, n'empêcherait pas que de nouvelles ordonnances soient émises). Le juge a également laissé entendre que la province ne voulait pas produire une réclamation éventuelle, ce qui aurait pu provoquer le dépôt d'une demande reconventionnelle d'Abitibi pour l'expropriation des propriétés (un résultat qui peut s'avérer impossible étant donné la décision d'Abitibi de soumettre la question de l'expropriation à l'ALÉNA (*Accord de libre-échange nord-américain entre le gouvernement du Canada, le gouvernement des États-Unis d'Amérique et le gouvernement des États-Unis du Mexique*, R.T. Can. 1994 n^{o} 2), en écartant la juridiction des tribunaux canadiens). Quoi qu'il en soit, il est évident que dans son raisonnement, le juge de première instance n'a jamais examiné la question de savoir s'il était « suffisamment certain » que la province décontaminerait les sites. Il s'ensuit que les conclusions du juge ne peuvent soutenir le point de vue selon lequel les obligations non exécutées constituent des réclamations éventuelles au sens de la *LACC*.

[95] Ma collègue conclut comme suit :

À l'occasion, [le juge] s'est appuyé sur des indicateurs singuliers qui ne figurent pas dans le cadre analytique que j'ai déjà proposé, mais cela s'explique par les faits exceptionnels en l'espèce. Or, s'il avait formulé la question

question in the same way as I have, his conclusion, based on his objective findings of fact, would have been the same. . . . The *CCAA* judge's assessment of the facts . . . leads to no conclusion other than that it was sufficiently certain that the Province would perform remediation work and therefore fall within the definition of a creditor with a monetary claim. [Emphasis added; para. 58.]

[96] I must respectfully confess to a less sanguine view. First, I find myself unable to decide the case on what I think the *CCAA* judge would have done had he gotten the law right and considered the central question. In my view, his failure to consider that question requires this Court to answer it in his stead on the record before us: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 35. But more to the point, I see no objective facts that support, much less compel, the conclusion that it is "sufficiently certain" that the Province will move to itself remediate any or all of the pollution Abitibi caused. The mood of the regulator in issuing remediation orders, be it disinterested or otherwise, has no bearing on the likelihood that the Province will undertake such a massive project itself. The Province has options. It could, to be sure, opt to do the work. Or it could await the result of Abitibi's restructuring and call on it to remediate once it resumed operations. It could even choose to leave the sites contaminated. There is nothing in the record that makes the first option more probable than the others, much less establishes "sufficient certainty" that the Province will itself clean up the pollution, converting it to a debt.

[97] I would allow the appeal and issue a declaration that Abitibi's remediation obligations under the *EPA* Orders do not constitute claims compromisable under the *CCAA*, except for work done or tendered for on the Buchans site.

comme je l'ai posée, sa conclusion, appuyée sur ses constatations de fait objectives, aurait été la même. [. . .] L'appréciation des faits par le juge [. . .] ne permet de tirer aucune conclusion autre que celle suivant laquelle il était suffisamment certain que la province exécuterait des travaux de décontamination et qu'elle était par conséquent visée par la définition d'un créancier ayant une réclamation pécuniaire. [Je souligne; par. 58.]

[96] Avec égards, je dois avouer que je ne partage pas la certitude de ma collègue à ce titre. Premièrement, j'estime ne pas pouvoir trancher le pourvoi en me fondant sur ce que je crois qu'aurait fait le juge de première instance s'il avait alors saisi correctement le droit et examiné la question réellement en jeu. À mon avis, le fait qu'il n'ait pas examiné cette question oblige notre Cour à y répondre à sa place au vu du dossier : *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235, par. 35. Mais, plus précisément, je ne vois pas de faits objectifs qui appuient, et encore moins qui imposent, la conclusion selon laquelle il est « suffisamment certain » que la province entreprendra elle-même de décontaminer un site ou tous les sites pollués par Abitibi. L'humeur de l'organisme de réglementation qui ordonne la décontamination, qu'il soit ou non désintéressé, n'a aucune incidence sur la probabilité que la province entreprenne elle-même un projet d'une telle ampleur. Des choix s'offrent à la province. Elle pourrait certes choisir d'exécuter les travaux. Ou elle pourrait attendre le résultat de la restructuration d'Abitibi et lui demander d'exécuter les travaux d'assainissement une fois qu'elle aura repris ses activités. Elle pourrait même choisir de laisser les sites contaminés. Rien au dossier n'indique que le premier choix est plus susceptible d'être retenu que les autres, et encore moins qui établisse qu'il est « suffisamment certain » que la province exécutera elle-même la décontamination, convertissant ainsi l'opération en une créance.

[97] Je suis d'avis d'accueillir le pourvoi et de déclarer que les obligations de décontaminer les sites qui incombent à Abitibi aux termes des ordonnances *EPA* ne constituent pas des réclamations pouvant faire l'objet d'une transaction aux termes de la *LACC*, à l'exception des travaux exécutés sur le site de Buchans ou à l'égard desquels des appels d'offres ont été lancés.

The following are the reasons delivered by

[98] LeBel J. (dissenting) — I have read the reasons of the Chief Justice and Deschamps J. They agree that a court overseeing a proposed arrangement under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), cannot relieve debtors of their regulatory obligations. The only regulatory orders that can be subject to compromise are those which are monetary in nature. My colleagues also accept that contingent environmental claims can be liquidated and compromised if it is established that the regulatory body would remediate the environmental contamination itself, and hence turn the regulatory order into a monetary claim.

[99] At this point, my colleagues disagree on the proper evidentiary test with respect to whether the government would remediate the contamination. In the Chief Justice's opinion, the evidence must show that there is a "likelihood approaching certainty" that the province would remediate the contamination itself (para. 86). In my respectful opinion, this is not the established test for determining where and how a contingent claim can be liquidated in bankruptcy and insolvency law. The test of "sufficient certainty" described by Deschamps J., which does not look very different from the general civil standard of probability, better reflects how both the common law and the civil law view and deal with contingent claims. On the basis of the test Deschamps J. proposes, I must agree with the Chief Justice and would allow the appeal.

[100] First, no matter how I read the *CCAA* court's judgment (2010 QCCS 1261, 68 C.B.R. (5th) 1), I find no support for a conclusion that it is consistent with the principle that the *CCAA* does not apply to purely regulatory obligations, or that the court had evidence that would satisfy the test of "sufficient certainty" that the province of Newfoundland and

Version française des motifs rendus par

[98] Le juge LeBel (dissident) — J'ai pris connaissance des motifs de la Juge en chef et de la juge Deschamps. Elles s'entendent pour affirmer qu'un tribunal qui supervise un arrangement proposé aux termes de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« *LACC* »), ne peut soustraire les débiteurs aux exigences réglementaires qui leurs sont imposées. Seules peuvent faire l'objet d'une transaction les ordonnances réglementaires de nature pécuniaire. Mes collègues reconnaissent également que les réclamations environnementales éventuelles peuvent être liquidées ou faire l'objet d'une transaction s'il est établi que l'organisme administratif se chargerait de la décontamination, transformant ainsi l'ordonnance réglementaire en une réclamation pécuniaire.

[99] Sur ce, mes collègues diffèrent d'opinion quant au critère de preuve applicable pour déterminer si le gouvernement entend effectuer la décontamination. De l'avis de la Juge en chef, la preuve doit démontrer une « probabilité proche de la certitude » que la province se chargerait de la décontamination (par. 86). À mon humble avis, il ne s'agit pas du critère établi pour déterminer si, et de quelle façon, une réclamation éventuelle peut être liquidée en droit de la faillite et de l'insolvabilité. Le critère de ce qui est « suffisamment certain » qu'énonce la juge Deschamps ne semble pas différer beaucoup de la norme générale de probabilité en matière civile et reflète mieux la façon dont la common law et le droit civil envisagent et traitent les réclamations éventuelles. Cependant, en appliquant le critère que propose la juge Deschamps, je dois souscrire aux motifs de la Juge en chef et je suis d'avis d'accueillir le pourvoi.

[100] Tout d'abord, sans égard à la façon d'envisager le jugement du tribunal chargé d'appliquer la *LACC* (2010 QCCS 1261, 68 C.B.R. (5th) 1), rien à mon sens ne permet de conclure qu'il soit conforme au principe selon lequel la *LACC* ne s'applique pas aux exigences purement réglementaires, ou que la preuve faite devant le tribunal respecterait le critère

Labrador ("Province") would perform the remedial work itself.

[101] In my view, the *CCAA* court was concerned that the arrangement would fail if the Abitibi respondents ("Abitibi") were not released from their regulatory obligations in respect of pollution. The *CCAA* court wanted to eliminate the uncertainty that would have clouded the reorganized corporations' future. Moreover, its decision appears to have been driven by an opinion that the Province had acted in bad faith in its dealings with Abitibi both during and after the termination of its operations in the Province. I agree with the Chief Justice that there is no evidence that the Province intends to perform the remedial work itself. In the absence of any other evidence, an offhand comment made in the legislature by a member of the government hardly satisfies the "sufficient certainty" test. Even if the evidentiary test proposed by my colleague Deschamps J. is applied, this Court can legitimately disregard the *CCAA* court's finding as the Chief Justice proposes, since it did not rest on a sufficient factual foundation.

[102] For these reasons, I would concur with the disposition proposed by the Chief Justice.

Appeal dismissed with costs, McLachlin C.J. *and* LeBel J. *dissenting.*

Solicitors for the appellant: WeirFoulds, Toronto; Attorney General of Newfoundland and Labrador, St. John's.

Solicitors for the respondents AbitibiBowater Inc., Abitibi-Consolidated Inc. and Bowater Canadian Holdings Inc.: Stikeman Elliott, Toronto.

Solicitors for the respondent the Ad Hoc Committee of Bondholders: Goodmans, Toronto.

Solicitors for the respondents the Ad Hoc Committee of Senior Secured Noteholders and the U.S. Bank National Association (Indenture Trustee

voulant qu'il soit « suffisamment certain » que la province de Terre-Neuve-et-Labrador (« province ») exécuterait elle-même les travaux de décontamination.

[101] À mon avis, le tribunal de première instance craignait un échec de l'arrangement si les sociétés du groupe Abitibi intimées (« Abitibi ») ne pouvaient se libérer des exigences réglementaires relatives à la pollution. Le tribunal voulait écarter l'incertitude qui aurait assombri l'avenir de ces sociétés après leur réorganisation. De plus, sa décision semble motivée par l'opinion suivant laquelle la province avait traité de mauvaise foi avec Abitibi dès que cette dernière eût cessé ses activités dans cette province. Je suis d'accord avec la Juge en chef pour conclure qu'aucune preuve ne confirme l'intention de la province d'exécuter elle-même les travaux de décontamination. En l'absence de tout autre élément de preuve, une remarque faite en passant par un ministre devant l'assemblée législative peut difficilement satisfaire au critère de ce qui est « suffisamment certain ». Même si l'on applique le critère de preuve que propose ma collègue la juge Deschamps, notre Cour peut légitimement écarter les conclusions du tribunal de première instance comme le propose la Juge en chef car elles ne reposent sur aucun fondement factuel suffisant.

[102] Pour ces motifs, je suis d'avis de souscrire au dispositif que propose la Juge en chef.

Pourvoi rejeté avec dépens, la juge en chef McLachlin *et le juge* LeBel *sont dissidents.*

Procureurs de l'appelante : WeirFoulds, Toronto; procureur général de Terre-Neuve-et-Labrador, St. John's.

Procureurs des intimées AbitibiBowater Inc., Abitibi-Consolidated Inc. et Bowater Canadian Holdings Inc. : Stikeman Elliott, Toronto.

Procureurs de l'intimé le comité ad hoc des créanciers obligataires : Goodmans, Toronto.

Procureurs des intimés le comité ad hoc des porteurs de billets garantis de premier rang et U.S. Bank National Association (fiduciaire

for the Senior Secured Noteholders): Borden Ladner Gervais, Toronto.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Ottawa.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the interveners the Attorney General of British Columbia and Her Majesty The Queen in Right of British Columbia: Attorney General of British Columbia, Victoria.

Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Edmonton.

Solicitors for the intervener Ernst & Young Inc., as Monitor: Thornton Grout Finnigan, Toronto.

Solicitors for the intervener the Friends of the Earth Canada: Ecojustice, University of Ottawa, Ottawa; Fasken Martineau DuMoulin, Toronto.

désigné par l'acte constitutif pour les porteurs de billets garantis de premier rang) : Borden Ladner Gervais, Toronto.

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Procureur des intervenants le procureur général de la Colombie-Britannique et Sa Majesté la Reine du chef de la Colombie-Britannique : Procureur général de la Colombie-Britannique, Victoria.

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Procureurs de l'intervenante Les Ami(e)s de la Terre Canada : Ecojustice, Université d'Ottawa, Ottawa; Fasken Martineau DuMoulin, Toronto.