CANADA

PROVINCE OF QUÉBEC
DISTRICT OF **MONTRÉAL**

No: 500-11-042345-120

SUPERIOR COURT
(Commercial Division)
(Sitting as a court designated pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended)

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

AVEOS FLEET PERFORMANCE INC./ AVEOS PERFORMANCE AÉRONAUTIQUE INC.
and
AERO TECHNICAL US, INC.
Debtors/Respondents

and

FTI CONSULTING CANADA INC.
Monitor

and

THE ATTORNEY GENERAL OF CANADA [OSFI]
Petitioner

and

CREDIT SUISSE AG, CAYMAN ISLANDS BRANCH, as Fondé de Pouvoir
and
WELLS FARGO BANK NATIONAL ASSOCIATION, as Fondé de Pouvoir
and
AVEOS HOLDING COMPANY as Fondé de Pouvoir
Respondents

and

AON HEWITT, as administrator of the Aveos Fleet Performance Inc. pensions plans
and
The former and retired employees of Aveos Fleet Performance Inc.
Mis en cause

RESPONDENT'S (CREDIT SUISSE AG) OUTLINE OF ARGUMENT
(Against the Petitioner's *Motion for Declaratory Judgment*)

(A) OVERVIEW

1. OSFI, in its capacity as the regulator of pensions established under the *Pension Benefits Standards Act* (the "***PBSA***"), has brought this Motion for Declaratory Judgment seeking a declaration that all or part of the special payments that were accrued to or due to the pension plan (the "**Plan**") of the non-unionized employees of Aveos Fleet Performance Inc. ("**Aveos**") are subject to a statutory deemed trust, do not constitute assets of Aveos, and must be paid to the Plan.

2. Credit Suisse AG, Cayman Island Branch ("**Credit Suisse**"), in its capacity as Fondé de Pouvoir and administrative agent and collateral agent on behalf of the secured lenders (the "**Second Lien Lenders**") under a senior secured term loan agreement dated as of March 12, 2010 (as amended, restated, supplemented or modified from time to time, the "**Second Lien Credit Agreement**") with security over all of the assets of Aveos in each of the jurisdictions in which such assets were or are situate, opposes the relief sought. It is the position of Credit Suisse that:

   (a) on the authority of the Supreme Court of Canada's (the "**Supreme Court**") holding in *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 ("***Sparrow Electric***") **[Tab 1]**, the security of the Second Lien Lenders ranks in priority to any deemed trust that may have arisen in respect of the outstanding special payments owed by Aveos;

   (b) the *Companies' Creditors Arrangement Act* (the "***CCAA***") does not recognize the deemed trust established by the *PBSA*; and

   (c) the Second Lien Lenders are entitled to the proceeds of the Aveos' assets pursuant to their security in the order of the priorities established by the law.

3. As such, Credit Suisse requests that the Motion for Declaratory Judgment be dismissed with costs to Credit Suisse.

(B) SECOND LIEN LENDERS' SECURITY

4. Aveos filed for protection under the *CCAA* on March 19, 2012. As of that date, Aveos was indebted to senior secured lenders (the "**First Lien Lenders**") under a senior secured credit agreement dated as of March 12, 2010 among, *inter*

alias, Aveos, as borrower, certain other parties party thereto, the financial institutions party thereto from time to time, as lenders, Credit Suisse, as administrative agent, Wells Fargo Bank National Association, as collateral agent, Corevision Strategies, LLC, collateral monitoring agent, and the other credit parties party thereto.

5. Aveos is also indebted to the Second Lien Lenders under the Second Lien Credit Agreement.

6. The Twelfth Report of the Chief Restructuring Officer dated August 6, 2013 reported that the First Lien Lenders have been paid in full in respect of the indebtedness owing to them by Aveos, as a result of recovery by the First Lien Lenders under a guarantee of that indebtedness. As a result of such recovery, the guarantor is subrogated to the rights of the First Lien Lenders. However, the guarantor is contractually subordinated to the Second Lien Lenders.

7. As such, the Second Lien Lenders are the secured lenders currently with first priority over the assets of Aveos. The Second Lien Lenders are currently owed a balance substantially in excess of the amounts available for distribution from Aveos[1].

8. The security of the Second Lien Lenders is outlined in paragraph 36 of the Agreed Statement of Facts. The security package granted by Aveos to the Second Lien Lenders includes a deed of hypothec and issue of bonds dated March 10, 2010, governed by the laws of Quebec and registered at the Quebec Register of Personal and Movable Real Rights in March, 2010 (as amended, restated, supplemented or modified from time to time, the "**Deed of Hypothec**"), as well as a general security agreement dated March 12, 2010 (as amended, restated, supplemented or modified from time to time, the "**GSA**") governed by the laws of Ontario and registered in the various personal property security registries established under the provincial personal property and security legislation in Ontario, Alberta, British Columbia, Nova Scotia, and Manitoba in March 2010 and in the Northwest Territories in August, 2011. Similar security was granted in favour of the First Lien Lenders, which now secures the obligations to the guarantor under its subrogated claim.

9. As noted more fully below, Aveos stopped making special payments in March, 2012.

(C) The Pension Plan

10. As outlined in more detail in the Agreed Statement of Facts, the Plan at issue in this case is the Retirement Plan for Employees of Aveos, a defined benefit

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1 Twelfth Report of the Chief Restructuring Officer to the Court dated August 6, 2013.

pension plan established by Aveos effective October 16, 2007. The Plan covers all non-unionized employees of Aveos who were employed by Air Canada as of October 15, 2007, who participated in pension plans administered by Air Canada, and who became employed by Aveos effective October 16, 2007. The Plan also provides pension benefits to former non-unionized employees who were hired after October 16, 2007 and who met the eligibility criteria under the Plan terms. The Plan is governed by the *PBSA* and is registered thereunder.

11. As a result of a deficiency in the Plan as determined in a June 2011 actuarial valuation prepared as at December 31, 2010, Aveos was required to make monthly special payments to the Plan, in accordance with the *PBSA*[2]. Special payments in the amount of $254,950 monthly were made by Aveos until it filed for *CCAA* protection. The last payment made by Aveos was on March 1, 2012, for the month of January, 2012.

12. Paragraph 19 of the Initial Order granted on March 19, 2012 suspended Aveos' obligation to make further special payments to its pension plans, including the Plan.

13. OSFI terminated the Plan effective May 19, 2012[3]. Pursuant to the *PBSA*, special payments are payable for the period February 2012 to December 2012 (the end of the year in which the Plan was terminated). The outstanding special payments owing in respect of the Plan are an aggregate amount of $2,804,450[4].

(D) SUMMARY OF THE RELEVANT OBLIGATIONS UNDER THE *PBSA*

14. Section 9(4) of the Regulations under the *PBSA* provide for the following payments by an employer in respect of a pension plan:

> 9(4) A plan shall be funded in each plan year as follows:
>
> (a) by a contribution equal to the normal cost of the plan,
>
> (b) by going concern special payments;
>
> (c) if there is a solvency deficiency, by annual solvency special payments equal to the amount by which the solvency deficiency divided by 5 exceeds the amount of going concern special payments that are payable during the plan year;
>
> (d) if there is an additional solvency deficiency referred to in subsection (12), by additional annual solvency special payments payable from the effective date of the amendment and equal to the amount by which the additional solvency

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2 AON Hewitt, *Actuarial Valuation as at December 31, 2010*, June 2011, Exhibit R-2 to Agreed Statement of Facts.

3 Letter dated May 25, 2012 from OSFI to Aveos, Exhibit R-5 to Agreed Statement of Facts.

4 Actuarial Windup Report as at May 19, 2012, Exhibit R-7 to Agreed Statement of Facts.

> deficiency divided by 5 exceeds the going concern special payment in respect of the unfunded liability emerging from the amendment to the plan; and
>
> (e) by an amount required to be paid by an employer under a defined contribution provision.

15. Section 29(6) of the *PBSA* sets out the amounts that are payable into a pension plan upon the termination of that plan. These amounts include all accrued normal cost contributions, all prescribed special payments that are due and would otherwise have become due between the date of the termination and the end of the plan year in which the pension plan is terminated, and the amount, calculated periodically in accordance with the regulations, that is required to permit the plan to satisfy any obligations with respect to pension benefits as they are determined on the date of the termination:

> (6) If the whole of a pension plan is terminated, the employer shall, without delay, pay into the pension fund all amounts that would otherwise have been required to be paid to meet the prescribed tests and standards for solvency referred to in subsection 9(1) and, without limiting the generality of the foregoing, the employer shall pay into the pension fund
>
> (a) an amount equal to the normal cost that has accrued to the date of the termination;
>
> (b) the amounts of any prescribed special payments that are due on termination or would otherwise have become due between the date of the termination and the end of the plan year in which the pension plan is terminated;
>
> (c) the amounts of payments that are required to be made under a workout agreement that are due on termination or would otherwise have become due between the date of the termination and the end of the plan year in which the pension plan is terminated;
>
> (d) all of the following amounts that have not been remitted to the pension fund at the date of the termination:
>
> (i) the amounts deducted by the employer from members' remuneration, and
>
> (ii) other amounts due to the pension fund from the employer; and
>
> (e) the amounts of all of the payments that are required to be made under subsection 9.14(2).[5] [emphasis added]

16. Section 8 of the *PBSA* establishes a deemed trust for certain of these obligations as follows:

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5 *Pension Benefits Standards Act*, 1985, R.S.C. 1985, c. 32 (2nd Supp.), s. 29(6).

> 8(1) An employer shall ensure, with respect to its pension plan, that the following amounts are kept separate and apart from the employer's own moneys, and the employer is deemed to hold the amounts referred to in paragraphs (a) to (c) in trust for members of the pension plan, former members, and any other persons entitled to pension benefits under the plan:
>
> (a) the moneys in the pension fund,
>
> (b) an amount equal to the aggregate of the following payments that have accrued to date:
>
> (i) the prescribed payments, and
>
> (ii) the payments that are required to be made under a workout agreement; and
>
> (c) all of the following amounts that have not been remitted to the pension fund:
>
> (i) amounts deducted by the employer from members' remuneration, and
>
> (ii) other amounts due to the pension fund from the employer, including any amounts that are required to be paid under subsection 9.14(2) or 29(6).
>
> (2) In the event of any liquidation, assignment or bankruptcy of an employer, an amount equal to the amount that by subsection (1) is deemed to be held in trust shall be deemed to be separate from and form no part of the estate in liquidation, assignment or bankruptcy, whether or not that amount has in fact been kept separate and apart from the employer's own moneys or from the assets of the estate.[6] [emphasis added]

17. Subsections 29(6.2) and 29(6.5) exclude the deemed trust from applying to the deficiency in the pension plan[7]. As a result, any deemed trust arising under the *PBSA* is only applicable to normal cost contributions and special payments due to the Plan:

> (6.2) Subsection 8(1) does not apply in respect of the amount that the employer is required to pay into the pension fund under subsection (6.1). However, it applies in respect of any payments that are due and that have not been paid into the pension fund in accordance with the regulations made for the purposes of subsection (6.1).
>
> (6.5) Subsection 8(1) does not apply in respect of the amount that the employer is required to pay into the pension fund under subsection (6.4). However, it applies in respect of any payments that have accrued before the date of the winding-up, liquidation, assignment or bankruptcy and that

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6 *PBSA, supra,* s. 8.

7 OSFI has acknowledged that there is no deemed trust for a deficit under the *PBSA*: see paragraph 38 of Motion for Declaratory Judgment.

have not been remitted to the fund in accordance with the regulations made for the purposes of subsection (6.1).[8]

18. All normal cost contributions have been paid by Aveos to the Plan. Only special payments are outstanding[9]. At this time, Aveos remains in CCAA proceedings, and neither a receiver nor a bankruptcy trustee has been appointed in respect of Aveos.

(E) THE LAW

1.1 WHAT IS THE PRIORITY OF RANK BETWEEN A DEEMED TRUST CREATED PURSUANT TO SECTION 8 *PBSA* AND A SECURED CREDITOR?

19. The issue in this case is a priority dispute between the security held by the Second Lien Lenders, and any potential statutory deemed trust for special payments imposed by the *PBSA*. In *Priority of Crown Claims in Insolvency*, **[Tab 2]** Francis Lamer summarizes a priority dispute between a deemed trust and a secured creditor as follows:

> "In any priority dispute involving deemed statutory trusts, a court must make two essential findings. First the court must determine whether the subject matter of the deemed trust (e.g., taxes collected or withheld) remains in existence at the time realization proceedings are taken against the debtor. If the trust corpus of the deemed statutory trust has been dissipated (as is often the case in insolvency situations), the deemed statutory trust no longer remains in existence and cannot have priority over other interests unless the trust corpus can be traced into other assets either under general principles of trust law or through operation of a deemed tracing provision.
>
> Second, the court must determine whether the trust assets have been encumbered by pre-existing charges that survive the deemed creation of the trust. Most provisions creating deemed statutory trusts do not set out any priority rule that can be used to determine the ranking of competing secured creditors. There are important exceptions such as the deemed statutory trusts created under section 227(4.1) of the *Income Tax Act*, section 23(4) of the *Canada Pension Plan* and section 86(2) of the *Employment Insurance Act*, which have incorporated specific provisions that provide priority over other charges however and whenever created. Absent some specific priority rule, the nature of the interest created by deemed statutory trusts dictates that the trust will have priority over all security interests that attach to the trust corpus after the deemed statutory trust has come into existence. Priority disputes can therefore be resolved by a determination of the time at which the competing interests first charged the trust corpus unless, of course, the deemed statutory trust enjoys a statutory priority, as is the case under s. 227(4.1) of the *Income Tax Act*." [10] [emphasis added]

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8 *PBSA, supra*, ss. 29(6.2) and 29(6.5).

9 This is acknowledged by OSFI at paragraph 41 of its Motion for Declaratory Judgment.

10 Francis Lamer, *Priority of Crown Claims in Insolvency*, (Carswell: Looseleaf), at pp. 2-57-2-58.

20. While the deemed trust at issue in this case is not in favour of the Crown, it is submitted that Lamer's summary of the necessary findings is equally applicable to the *PBSA* deemed trust, and to the matters at issue in this case.

21. OSFI has asserted that the statutory deemed trust in respect of the special payments owed to the Plan has the effect of excluding the amount of such payments from the Debtor's assets, and therefore excluding the amount from the security of the Second Lien Lenders. OSFI's position is incorrect, for the following reasons:

> (a) the amounts are not held separate and apart from Aveos' assets, and therefore are not the subject matter of a true trust;
>
> (b) the deemed trust provisions of the *PBSA* do not have the effect of creating a true trust that would take the funds out of the hands of Aveos and the Second Lien Lenders; and
>
> (c) the security interests of the Second Lien Lenders arose prior to the liability of Aveos in respect of the special payments, and therefore the funds are subject to the security of the Second Lien Lenders, and any obligation pursuant to the deemed trust is subordinate to these prior secured claims.

(a) No True Trust

22. It is acknowledged by the parties in this case that no amounts were actually reserved and set aside from Aveos' own money in respect of the outstanding special payments[11]. All funds of Aveos have been commingled. There has therefore been no true trust created by Aveos in respect of the special payments at issue that would remove any funds from the assets of Aveos.

23. The criteria for a true trust are set out in Article 1260 of the *Civil Code of Québec* which reads as follows:

> **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.

24. The criteria that must be met in order to find the existence of a true trust have been summarized by Mr. Justice Mongeon in *White Birch Paper Holding Company (Arrangement relatif à)* 2012 QCCS 1679 (QCCS) (***"Re White Birch"***) **[Tab 3]** at paragraph 136:

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11 OSFI has acknowledged this fact at paragraph 39 of its Motion for Declaratory Judgment.

> "[136] De nos jours, la situation a encore évolué et la *LFI* ne reconnaît que les fiducies réelles et non les fiducies présumées, à l'exception des fiducies présumées prévues à l'article 67(3) *LFI*[12]. Il en est de même en ce qui a trait à la *LACC*[13]. Outre ces exceptions, en matière de faillite ou de restructuration, pour que les tribunaux puissent considérer une fiducie présumée comme étant une fiducie réelle au sens de la *LFI* ou de la *LACC*, elle doit satisfaire les critères du trust de la *common law*[14]. Ces critères ont d'ailleurs été résumés ainsi par le juge Guertin dans l'affaire *Chibou-vrac inc. (Syndic de)* :
>
> > [87] Ces critères d'identification d'une fiducie législative réelle au sens de l'article 67(1) a) L.F.I. sont :
> >
> > A) Concernant la validité de la création d'une fiducie:
> >
> > • la certitude que le constituant a voulu créer une fiducie (certainty of intention)
> >
> > • la certitude quant aux biens visés par la fiducie (certainty of subject matter)
> >
> > • la certitude quant aux bénéficiaires de la fiducie (certainty of objects)
> >
> > B) Concernant la survivance de la fiducie:
> >
> > • la nécessité de pouvoir identifier précisément les biens au moment où ils sont réclamés
> >
> > [88] Rappelons qu'indéniablement «[i]f any of the attributes are missing the Court will not find a trust.[15]»

25. The circumstances to satisfy these requirements do not exist in this case. As such, the Plan is not the beneficiary of a true trust.

(b) The Deemed Trust Provisions of the *PBSA* do not have the Effect of Creating a True Trust

26. The deemed trust provisions of section 8 of the *PBSA* do not have the effect of creating a true trust. Section 8 of the *PBSA* only creates a presumption in favour of the existence of a trust. However, this presumption may be rebutted if the criteria to be met in order to demonstrate the existence of a true trust are not satisfied.

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12 Denis BROCHU, *Précis de la faillite et d l'insolvabilité*, 3e éd., Brossard, Publications CCH, 2010, 665, at pp. 358-359. **[Tab 4]**

13 *CCAA* , s. 37(2).

14 *Chibou-vrac inc. (Syndic de)*, 2003 CanLII 1022 (QC CS), [2003] R.J.Q. 2809, at par. 85. **[Tab 5]**

15 *Id.*, at par. 87-88.

➢ *Re White Birch*, at paras. 138, 139, 140, 145 and 146:

"[138] Un jugement récent de la Cour d'appel du Québec dans l'affaire *Québec (Sous-ministre du Revenu) c. Service de Garantie Québec Inc. (Syndic de)*[16], se penche d'ailleurs sur la nécessité de l'existence d'une fiducie réelle pour qu'une disposition similaire à l'article 49 LRCR puisse produire ses effets.

[139] Dans cette affaire, le sous-ministre réclamait certaines sommes déposées dans le compte de *Service garantie Québec inc.* (la Débitrice) en invoquant à la fois sa créance et l'existence d'une fiducie présumée soustrayant cette même créance de l'actif de la faillite.

[140] La Cour d'appel a conclu qu'il n'existait aucune fiducie réelle en l'espèce et donc que les sommes déposées au compte bancaire faisaient partie du patrimoine de la Débitrice et devaient être dévolues au syndic. Bien qu'il y eût et une fiducie présumée créée par l'effet de la loi à l'égard du ministère du Revenu, les taxes perçues, ayant été déposées et "mélangées" avec des sommes provenant d'autres sources, il était devenu impossible de retracer lesdites sommes. Il ne pouvait donc pas y avoir fiducie réelle. La juge Dutil se prononce ainsi à cet effet :

> "En vertu de cet article, il y avait donc une présomption que les montants détenus par la Banque en date du 10 juillet 2006 l'étaient en fiducie pour l'État. Toutefois, ces montants perçus par la Débitrice avaient été déposés dans un compte où elle en détenait également d'autres provenant de différentes sources. Il ne s'agissait donc que d'une fiducie créée par l'effet de la LMR et non d'une fiducie réelle. [...]
>
> Je conclus donc que l'avis expédié en vertu de l'article 15 LMR n'a pas transformé cette fiducie présumée en fiducie réelle, ce qui aurait pu, effectivement, faire en sorte que ces biens ne soient pas compris dans le patrimoine de la Débitrice failli en vertu de l'alinéa 67(1)a) LFI.
>
> En effet, le paragraphe 67(2) LFI édicte que, sous réserve de certaines exceptions (dont entre autres les retenues à la source), un bien n'est pas considéré être détenu en fiducie aux fins de la LFI si, en l'absence d'une disposition législative, il ne l'était pas. Or, c'est exactement le cas dans la présente affaire: les montants étaient réputés être détenus en fiducie en vertu de l'article 20 LMR, mais il n'existait aucune fiducie réelle."[17]

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16 2009 QCCA 409 (CanLII), 2009 QCCA 409 **[Tab 6]**; See also *Bouloud (Syndic de)*, 2010 QCCS 4840 (CanLII), 2010 QCCS 4840, par. 63, 107 (appel principal rejeté et appel incident accueilli, C.A., 12-07-2011, 500-09-021127-105, 2011 QCCA 1813 (CanLII), 2011 QCCA 1813) **[Tab 7]**; *Chibou-vrac inc. (Syndic de)*, *supra*, note 14, at para. 44.

17 *Québec (Sous-ministre du Revenu)* c. *Service de Garantie Québec (Syndic de)*, *supra*, note 16, at par. 29, 31-32.

[145] Les fiducies présumées contenues dans plusieurs lois fédérales ou provinciales ne font que présumer l'existence d'une fiducie. Pour qu'une telle fiducie puisse réellement exister, il faut que selon le droit civil applicable, les éléments constitutifs d'une vraie fiducie doivent y avoir, en règle générale, une identification du bien. C'est ce que la Cour suprême enseigne dans *Colombie Britannique c. Henfrey Samson Bélair Ltd.*[18] La juge Dutil, dans *Service Garantie Québec (Syndic de)*

> [30] Dans l'arrêt *Colombie-Britannique c. Henfrey, Samson, Belair Ltd [Colombie-Britannique]*, la Cour suprême explique que dès que le montant de la taxe est confondu avec d'autres sommes , il n'existe plus de fiducie de *common law*:
>
> > [...] 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.[...]
>
> [31] Je conclus donc que l'avis expédié en vertu de l'article 15 *LMR* n'a pas transformé cette fiducie présumée en fiducie réelle, ce qui aurait pu, effectivement, faire en sorte que ces biens ne soient pas compris dans le patrimoine de la Débitrice faillie en vertu de l'alinéa 67(1)a) *LFI*.
>
> [32] En effet, le paragraphe 67(2) *LFI* édicte que, sous réserve de certains exceptions (dont entre autres les retenues à la source), un bien n'est pas considéré être détenu en fiducie aux fins de la *LFI* si, en l'absence d'une disposition législative, il ne le serait pas. Or, c'est exactement le cas dans la présente affaire : les montants étaient réputés être détenus en fiducie en vertu de l'article 20 *LMR*, mais il n'existait aucune fiducie réelle.

[146] Ainsi, on doit pouvoir retrouver dans les dispositions habilitantes d'un texte législatif créant une fiducie, tous les éléments créant une véritable fiducie selon le régime légal dans lequel on se trouve. Au Québec, on ne peut simplement s'arrêter au texte de l'article 49 *LRCA* et conclure que les cotisations d'équilibre font automatiquement l'objet d'une fiducie opposable à la Débitrice."

[Emphasis added]

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18 1989 CanLII 43 (CSC), (1989) 2 R.C.S. 24 **[Tab 8]**.

27. A similar conclusion was made by the Supreme Court in *Sparrow Electric*. The Supreme Court found that the deemed trust as it then existed under the *Income Tax Act (*the *"**ITA**")* did not give rise to a true trust that took the assets out of the hands of the debtor: "The trust is not in truth a real one, as the subject matter of the trust cannot be identified from the date of creation of the trust." [para. 31]

28. The foregoing conclusions[19] are applicable in this case. The deemed trust established by section 8(2) of the *PBSA* does not have the characteristics of a true trust, as the criteria that govern the establishment of a true trust have not been met. No funds were ever set aside by Aveos and as such there are no traceable funds that may be identified as the subject-matter of a trust. The statutory deeming does not have the effect of creating a true trust where no true trust exists.

(c) The Deemed Trust Provisions in the *PBSA* do not have Priority over the Second Lien Lenders

(i) *Sparrow Electric* – the Language of the Deemed Trust

29. OSFI relies on section 8(2) of the *PBSA* as its grounds for asserting that the amount of the special payments due is excluded from the assets of Aveos, and therefore is payable to the Plan in priority to the security held by certain secured lenders, including the Second Lien Lenders[20].

30. The Supreme Court has considered the identical argument in respect of the substantially similar provision in the *ITA* in the *Sparrow Electric* decision, and rejected it.

31. In *Sparrow Electric,* the Supreme Court was asked to determine a priority dispute between the federal Crown and a secured lender in respect of unpaid source deductions that had not been remitted by the debtor to the federal government. The Crown asserted and relied on the deemed trust provisions then found in subsections 227(4) and 227(5) of the *ITA* in arguing that it had priority over the proceeds of assets of the debtor that had been liquidated in a receivership.

32. The secured lender in that case, Royal Bank of Canada ("***Royal Bank***"), had been granted security by the debtor pursuant to a general security agreement governed by and perfected pursuant to the *Personal Property Security Act* (the "***PPSA***") for Alberta, and had also been granted *Bank Act* security.

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19 See also *British Columbia v. Henfrey Samson Belair Ltd, supra*, note 18.

20 See paragraph 62 of Motion for Declaratory Judgment.

33. The provisions of sections 227(4) and (5) of the *ITA* in effect in 1997 were substantially similar to the current deemed trust provisions of the *PBSA*. Sections 227(4) and (5) of the *ITA* then at issue read as follows:

> "(4) Every person who deducts or withholds any amount under this Act shall be deemed to hold the amount so deducted or withheld in trust for Her Majesty.
>
> (5) Notwithstanding any provision of the *Bankruptcy Act*, in the event of any liquidation, assignment, receivership or bankruptcy of or by a person, an amount equal to any amount
>
> (a) deemed by subsection 9(4) to be held in trust for Her Majesty, ...
>
> Shall be deemed to be separate from and form no part of the estate in liquidation, assignment, receivership or bankruptcy, whether or not that amount has in fact been kept separate and apart from the person's own moneys or from the assets of the estate."

34. Section 8 of the *PBSA* came into force in 1986. Since that time, the language of section 8(1) has not been substantively changed, and section 8(2) has remained unchanged[21]. The following is a side by side comparison of the 1997 *ITA* provisions considered in *Sparrow Electric* and the current *PBSA* provisions:

21 Section 8(1) was amended in 1998 and 2010. Section 8(1) originally appeared as "An employer shall ensure, with respect to its pension plan, that (a) the moneys in the pension fund, (b) an amount equal to the aggregate of (i) the normal actuarial cost, and (ii) any prescribed special payments, that have accrued to date; and (c) all (i) amounts deducted by the employer from members remuneration, and (ii) other amounts due to the pension fund from the employer that have not been remitted to the pension fund are kept separate and apart from the employer's own moneys, and shall be deemed to hold the amounts referred to in paragraphs (a) to (c) in trust for members of the pension plan, former members, and any other persons entitled to pension benefits or refunds under the plan."

PBSA: **8**(1) An employer shall ensure, with respect to its pension plan, that the following amounts are kept separate and apart from the employer's own moneys, and the employer is deemed to hold the amounts referred to in paragraphs (*a*) to (*c*) in trust for members of the pension plan, former members, and any other persons entitled to pension benefits under the plan: (*a*) the moneys in the pension fund, (*b*) an amount equal to the aggregate of the following payments that have accrued to date: i) the prescribed payments, and (ii) the payments that are required to be made under a workout agreement; and (*c*) all of the following amounts that have not been remitted to the pension fund: i) amounts deducted by the employer from members' remuneration, and (ii) other amounts due to the pension fund from the employer, including any amounts that are required to be paid under subsection 9.14(2) or 29(6). (2) In the event of any liquidation, assignment or bankruptcy of an employer, an amount equal to the amount that by subsection (1) is deemed to be held in trust shall be deemed to be separate from and form no part of the estate in liquidation, assignment or bankruptcy, whether or not that amount has in fact been kept separate and apart from the employer's own moneys or from the assets of the estate."	***ITA:*** **227**(4) Every person who deducts or withholds any amount under this Act shall be deemed to hold the amount so deducted or withheld in trust for Her Majesty. (5) Notwithstanding any provision of the *Bankruptcy Act*, in the event of any liquidation, assignment, receivership or bankruptcy of or by a person, an amount equal to any amount (a) deemed by subsection (4) to be held in trust for Her Majesty, ... Shall be deemed to be separate from and form no part of the estate in liquidation, assignment, receivership or bankruptcy, whether or not that amount has in fact been kept separate and apart from the person's own moneys or from the assets of the estate."

[Emphasis added]

35. In *Sparrow Electric*, the Supreme Court held that the deemed trust provisions at section 227(5) of the *ITA* were an attempt to overcome the loss of a true trust. In the event of a liquidation, assignment, or bankruptcy, these provisions purported to grant a deemed trust over amounts equivalent to the amounts that were not set aside in trust by the debtor:

> " ...s. 227(5) is a provision designed to minimize the adverse effect upon Her Majesty from the misappropriation of trust funds held by tax debtors

> on account of their employees' tax payable. The provision contemplates an intermingling of Her Majesty's property with that of a tax debtor's, such that the subject matter of the trust cannot be (or indeed never was) identifiable. To address this conceptual problem, s. 227(5) allows Her Majesty to attach its interest to any property which lawfully belongs to the debtor at the time of liquidation, assignment, receivership or bankruptcy; this property is then deemed to exist "separate" and apart from the tax debtor's estate." [para. 38]

36. Justice Gonthier refers to such provisions as a "relaxation of the equitable tracing rules" which permits the Crown to "attach its interest to any property which lawfully belongs to the debtor at the time of the liquidation..." [para. 37]

37. However, Justice Gonthier found that such a provision did not give the beneficiary of a deemed trust priority over pre-existing fixed and specific security such as that which had been granted to the Royal Bank under both the *PPSA* and the *Bank Act* in *Sparrow Electric*:

> "I would hasten to add to this, however, that this provision does not permit Her Majesty to attach Her beneficial interest to property which, at the time of the liquidation, assignment, receivership, or bankruptcy, in law belongs to a party other than the tax debtor. Sections 227(4) and (5) are manifestly directed toward the property of the tax debtor, and it would be contrary to well-established authority to stretch the interpretation of s. 227(5) to permit the expropriation of the property of third parties who are not specifically mentioned in the statute." [para. 39]

38. Justice Iacobucci in his majority decision similarly concluded that the rights created by such a deemed trust cannot affect the rights granted to a secured creditor:

> "It is open to my colleague to distinguish the fact situation in this appeal from the hypothetical priority contests I have mentioned on the ground that the Crown's interest in the inventory is unlike other charges against inventory in that it depends on the fictional device of deeming. What makes this case different, it might be said, is that the *ITA* deems to have been done what could have been done. On this understanding, it does not matter that the inventory was not actually sold and the proceeds were not actually remitted to the Receiver General, because s. 227(4) and (5) *ITA* deem these things to have been done. But in my view, this answer cannot succeed because the inventory was not an **un**encumbered asset at the moment the taxes came due. It was subject to the **re**spondent's security interest and therefore was legally the respondent's and **not** attachable by the deemed trust. As Gonthier J. himself says (at para. 39):
>
> > ... [s. 227(4)] does not permit Her Majesty to attach Her beneficial interest to property which, at the time of liquidation, assignment, receivership or bankruptcy, in law belongs to a party other than the tax debtor.

> The deeming is thus not a mechanism for undoing an existing security interest, but rather a device for going back in time and seeking out an asset that was not, at the moment the income taxes came due, subject to any competing security interest. In short, the deemed trust provision cannot be effective unless it is first determined that there is some unencumbered asset out of which the trust may be deemed. The deeming follows the answering of the chattel security question; it does not determine the answer." [paras. 98-99] [Emphasis added]

(ii) Response to Sparrow Electric

39. In 1998, as a legislative response to the *Sparrow Electric* decision, the Federal Government replaced sections 227(4) and (5) of the *ITA* with new sections 227(4) and (4.1). The history of the amendment was summarized by Justice Deschamps in *Century Services Inc. v. Canada (Attorney General),* [2010] S.C.R. 379 ("***Century Services***"), at para. 33 **[Tab 9]**:

> "In *Royal Bank of Canada v. Sparrow Electric Corp.,* [1997] 1 S.C.R. 411, this Court addressed a priority dispute between a deemed trust for sources deductions under the ITA and security interests taken under both the *Bank Act*, S.C. 1991 c. 46, and the Alberta *Personal Property Security Act*, S.A. 1988, c. P-4005 ("PPSA"). As then worded, an ITA deemed trust over the debtor's property equivalent to the amount owing in respect of income tax became effective at the time of liquidation, receivership, or assignment in bankruptcy. *Sparrow Electric* held that the ITA deemed trust could not prevail over the security interests because, being fixed charges, the latter attached as soon as the debtor acquired rights in the property such that the ITA deemed trust had no property on which to attach when it subsequently arose. Later, in *First Vancouver Finance v. M.N.R.,* 2002 SCC 49, [2002] 2 S.C.R. 720, this Court observed that Parliament had legislated to strengthen the statutory deemed trust in the ITA by deeming it to operate from the moment the deductions were not paid to the Crown as required by the ITA, and by granting the Crown priority over all security interests (para. 27-29) (the "*Sparrow Electric* amendment")"

40. The new sections 227(4) and 227(4.1) of the *ITA* provide as follows:

> 227...
>
> (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 for 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. [Emphasis added]

41. The amendments to the *ITA* deemed trust provisions made it clear that the Crown intended to take priority over security interests in respect of source deductions, no matter when such security interests arise. As noted in *Century Services*, this was confirmed by the Supreme Court in *First Vancouver Finance* v. *M.N.R.*, 2002 SCC 49 ("***First Vancouver***") [**Tab 10**]:

> "It is apparent from these changes that the intent of Parliament when drafting s. 227(4) and 227(4.1) was to grant priority to the deemed trust in respect of property that is also subject to a security interest regardless of when the security interest arose in relation to the time the source deductions were made or when the deemed trust takes effect." [para. 28]

42. While steps were taken by Parliament to amend the *ITA* in 1998, as well as similar changes at the same time to section 23 of the *Canada Pension Plan* (the "***CPP***") and s. 86 of the *Employment Insurance Act (*the *"**EIA**")*, and subsequently in 2000 to the *Excise Tax Act* (the "***ETA***")[22], Parliament did not take similar steps to amend the language of the *PBSA* to provide for priority over pre-existing security interests, notwithstanding that Parliament chose to make numerous other amendments to other provisions of the *PBSA*, including to section 8 in 1998, 2010, and 2012[23]. However, the provisions of section 8(2) are unaltered since 1986. It is submitted that Parliament had numerous occasions to make amendments similar to those made to the ITA, the CPP, the EIA, and the ETA,

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22 *Income Tax Amendments Act, 1997, Statutes of Canada*, 1998 c. 19; *Sales Tax and Excise Tax Amendment Act, 1999, Statutes of Canada*, 2000, c. 30. [**Tab 11**]

23 *Statutes of Canada*, 1998, c. 12, s. 6; 2010, c. 12, s. 1791; c. 25, s. 183; 2012, c. 16, s. 86. [**Tab 12**]

but chose not to. As a result, the reasoning of the Supreme Court in *Sparrow Electric* applies to this case.

43. This is consistent with the Quebec Superior Court's findings in *Re White Birch*. In that case, Justice Mongeon considered whether the deemed trust established under section 49 of the *Supplemental Pension Plans Act of Quebec* (the "***SPPA***") had the effect of giving priority to outstanding special payments owing by the debtor over the other obligations of the debtor, including the DIP loan.

44. Section 49 of the *SPPA* provides for a deemed trust as follows:

> 49. Until contributions and accrued interest are paid into the pension fund or to the insurer, they are deemed to be held in trust by the employer, whether or not the latter has kept them separate from his property.

45. Justice Mongeon distinguished the *SPPA* deemed trust from the current deemed trust provisions in sections 227(4) and (4.1) of the *ITA*. He found that priority language that would eliminate the need to find a true trust was absent from the *SPPA*:

> "[137] De plus, il est utile de mentionner que législateur, en y insérant l'expression "malgré toute autre garantie" dans le LIR (art. 227(4), (4.1) le *Régime des pension du Canada* (art. 23(3), (4)) et dans d'autres lois telles que la *Loi sur l'assurance-emploi* (art. 86(2), (2.1)), voulait assurer une priorité de premier rang à ces fiducies présumées. La fiducie présumée visée par ces tris lois s'applique donc de manière continue et vise tous les biens qui se retrouvent en la possession du débiteur de manière rétroactive a la retenue initiale, et ce, jusqu'à ce que le débiteur ait remédie a son défaut. Ce type de fiducie élimine donc la nécessite de retracer l'origine du bien, ce qui constitue une caractéristique importante de la fiducie réelle."

(iii) Fixed and Specific Charge

46. In *Sparrow Electric,* the Supreme Court concluded that the security granted to Royal Bank by the debtor, which pre-dated the time that the liability for source deductions arose, constituted fixed and specific charges on the property of the debtor, including after-acquired property. As such, the Royal Bank's security took priority over the deemed trust asserted by the Crown.

47. It is submitted that the reasoning of the Supreme Court in *Sparrow Electric* applies in this case. Section 8(2) of the *PBSA* does not grant the deemed trust provided for thereunder any specific priority over pre-existing security interests. Having arisen subsequent to the security interests granted to the Second Lien Lenders, it is subordinate to those interests.

48. In order to characterize the nature of the Royal Bank's security in *Sparrow Electric*, Justice Gonthier looked to the Alberta *PPSA* and the *Bank Act*, respectively. In doing so, he found that both created a fixed charge in favour of the bank.

49. After reviewing the relevant provisions of the Alberta *PPSA*, Justice Gonthier concluded that:

> "Generally speaking therefore, absent an express intention to the contrary, a security interest in all present and after-acquired personal property will attach when that agreement is executed by the parties. Once attachment has occurred, in my view, the GSA then becomes in law a fixed and specific charge over the collateral." [para. 54] [emphasis added]

50. Similarly, Justice Gonthier concluded that *Bank Act* security was a fixed and specific charge, on the basis of analysis specific to that legislation. Justice Iacobucci agreed with these conclusions.

51. In this case, the security interests in favour of the Second Lien Lenders consist of the GSA registered in each of the common law provinces in which property of Aveos was or are situate, and the Deed of Hypothec registered in Quebec.

52. The GSA provides for a grant of security interest at paragraph 2 as follows:

> "Grant of Security Interests: As general and continuing collateral security for the due payment and performance of its Obligations, each Debtor pledges, mortgages, charges and (except in the case of ULC Shares) assigns (by way of security) to the Collateral Agent (for its own benefit and for the benefit of the other Secured Parties), and grants to the Collateral Agent (for its own benefit and for the benefit of the other Secured Parties) a security interest in, and a security interest is taken in, the Collateral of such Debtor, which includes without limitation all present and after acquired personal property of such Debtor, other than Excluded Assets." [emphasis added]

53. "Collateral" is defined in the GSA as:

> "in respect of any Debtor, all of the present and future: (a) undertaking; and (b) Personal Property (including Books and Records, Contracts, Intellectual Property Permits and any Personal Property that may be described in any schedule to this Agreement or any schedules, documents or listings that such Debtor may from time to time provide to the Collateral Agent in connection with this Agreement); of such Debtor (other than Excluded Assets), including all such property in which such Debtor now or in the future has any right, title or interest whatsoever, whether owned, leased, licensed, possessed or otherwise held by such Debtor, and all Proceeds thereof, wherever located." [emphasis added]

54. "Personal Property" is defined in the GSA as:

> "personal property and includes Accounts, Chattel Paper, Documents of Title, Equipment, Goods, Instruments, Intangibles, Inventory, Investment Property, and Money."

55. The Ontario *PPSA* provides at section 11(1) that a security interest is not enforceable against a third party unless it has attached It further provides at section 11(2) that a security interest attaches to collateral when value is given, the debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party and the debtor has signed a security agreement that contains a description of the collateral sufficient to enable it to be identified.[24] The Alberta *PPSA* considered in *Sparrow Electric* contains a similar provision.[25]

56. Section 12(1) of the Ontario *PPSA* provides that "a security agreement may cover after-acquired property".[26]

57. As such, the security granted by Aveos to the Second Lien Lenders pursuant to the GSA is a fixed charge that attaches to all property of Aveos, including after-acquired property, as soon as it comes into the possession of Aveos. As a consequence it is prior in time to any deemed trust that might be said to arise, with respect to any assets covered by the GSA.

58. With respect to the Deed of Hypothec, the *Civil Code of Quebec* defines the nature of a hypothec as follows:

> 2660. A hypothec is a real right on a movable or immovable property made liable for the performance of an obligation. It confers on the creditor the right to follow the property into whosever hands it may be, to take possession of it or to take it in payment, or to sell it or cause it to be sold and, in that case, to have a preference upon the proceeds of the sale ranking as determined in this Code.
>
> 2662. A hypothec is indivisible and subsists in its entirety over all the charged properties, over each of them and over every part of them, even where the property or obligation is divisible.
>
> 2666. A hypothec is a charge on one or several specific corporeal or incorporeal properties, or on all the properties included in a universality.
>
> 2664. Hypothecation may take place only on the conditions and according to the formalities authorized by law. A hypothec may be conventional or legal.
>
> 2670. A hypothec on the property of another or on future property begins to affect it only when the grantor acquires title to the hypothecated right.27

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24 *Personal Property Security Act*, R.S.O. 1990 c. P. 10, ss. 11(1) and 11(2).
25 *Personal Property Security Act*, R.S.A. 2000 c. P-7, ss. 10 and 12(1).
26 *Personal Property Security Act*, R.S.O. 1990 c. P. 10, s. 12(1).
27 *Civil Code of Quebec*, S.Q. 1991, c. 64.

59. The Deed of Hypothec provides for a grant of hypothec at paragraph 4(1) as follows:

> "Grant of Hypothec. As collateral security for the payment and performance of all Secured Obligations, the Grantor hereby hypothecates, for the sum of One Hundred and Fifty Million Canadian Dollars (CAN$150,000,000) with interest thereon at the rate of twenty-five percent (25%) per annum from the date hereof, in favour of the Attorney, the universality of all of its movable and immovable property, corporeal and incorporeal, present and future, of any nature whatsoever and wheresoever situate, the whole including, without limitation, the following universalities of present and future property of the Grantor..." [emphasis added]

60. Under the CCQ, a floating hypothec is only created on an exceptional basis by agreement between the parties. Paragraph 12(14) of the Deed of Hypothec makes it clear that this exception is not applicable in this case:

> "The Hypothec created hereunder is not and shall not be construed as a floating hypothec within the meaning of Articles 2715 et. seq. of the Civil Code nor shall this Deed be deemed as creating a trust within the meaning of Article 1260 of the Civil Code."

61. It is common ground in this case that the Deed of Hypothec and the GSA executed by Aveos in favour of the Second Lien Lenders created fixed charges on all of the assets of Aveos, present and future.[28] There are no assets over which the deemed trust will take priority over the fixed charges granted to the Second Lien Lenders.

(iv) Conclusions with respect to Priority of the Deemed Trust

62. The security granted to the Second Lien Lenders clearly constitute fixed and specific charges over all of the assets of Aveos, which fixed and specific charges attached to the assets of Aveos long before the liability of Aveos for the outstanding special payments arose. Applying the principles established in *Sparrow Electric* by the Supreme Court, any interest acquired by the Plan pursuant to Section 8(2) *PBSA* must be subordinate to the security interests of the Second Lien Lenders.

1.2 IS THE DEEMED TRUST CREATED BY THE *PBSA* EFFECTIVE IN A PROCEEDING UNDER THE CCAA?

63. The general rule with respect to the treatment of creditors is that they shall be paid on a *pari passu* basis except under specific exceptions set out in law. The following statements are found in *Re White Birch:*

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28 Agreed Statement of Facts, para. 36.

> "[141] En droit québécois comme en droit canadien, les biens d'une société sont le gage commun de ses créanciers. Ils doivent donc être utilisés à l'avantage commun à moins que, par exception, ces biens ne soient dévolus à des créanciers spécifiques.
>
> [142] Les créanciers de ces créances spécifiques seront toujours traités dans un contexte d'exception."[29]

64. The Supreme Court, in dealing with a deemed trust created in order to facilitate the collection of goods and services tax, made the following statements in *Century Services*, statements which were cited with approval in *Re White Birch*:

> "[155] Arborant la question de la fiducie réputée touchant la TPS, par rapport à la LACC, la juge Deschamps écrira:
>
> > [44] En examinant la question dans tout son contexte, je suis amenée à conclure, pour plusieurs raisons, que ni le raisonnement ni le résultat de l'arrêt Ottawa Senators ne peuvent être adoptés. Bien qu'il puisse exister un conflit entre le libellé des textes de loi, une analyse téléologique et contextuelle visant à déterminer la véritable intention du législateur conduit à la conclusion que ce dernier ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la LACC, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a apporté à la LTA, en 2000, la modification découlant de l'arrêt Sparrow Electric.
> >
> > [45] Je rappelle d'abord que le législateur a manifesté sa volonté de mettre un terme à la priorité accordée aux créances de la Couronne dans le cadre du droit de l'insolvabilité. Selon le par. 18.3(1) de la LACC (sous réserve des exceptions prévues au par. 18.3(2)), les fiducies réputées de la Couronne n'ont aucun effet sous le régime de cette loi. Quand le législateur a voulu protéger certaines créances de la Couronne au moyen de fiducies réputées et voulu que celles-ci continuent de s'appliquer en situation d'insolvabilité, il l'a indiqué de manière explicite et minutieuse. Par exemple, le par. 18.3(2) de la LACC et le par. 67(3) de la LFI énoncent expressément que les fiducies réputées visant les retenues à la source continuent de produire leurs effets en cas d'insolvabilité. Le législateur a donc clairement établi des exceptions à la règle générale selon laquelle les fiducies réputées n'ont plus d'effet dans un contexte d'insolvabilité. La LACC et la LFI sont en harmonie : elles préservent les fiducies réputées et établissent la priorité de la Couronne seulement à l'égard des retenues à la source. En revanche, il n'existe aucune disposition législative expresse permettant de conclure que les créances relatives à la TPS bénéficient d'un traitement préférentiel sous le régime de la LACC ou de la LFI. Alors que les retenues à la source font l'objet de dispositions explicites dans ces deux lois concernant l'insolvabilité, celles-ci ne comportent pas de dispositions claires et expresses analogues établissant une exception pour les créances relatives à la TPS.

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29 *Re White Birch*, *supra*, at paras. 141-142.

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

[156] De son côté, le juge Fish sera encore plus clair sur la survie des fiducies présumées par rapport à la LACC. Il écrit:

> [95] Au cours des dernières années, le législateur fédéral a procédé à un examen approfondi du régime canadien d'insolvabilité. Il a refusé de modifier les dispositions qui sont en cause dans la présente affaire. Il ne nous appartient pas de nous interroger sur les raisons de ce choix. Nous devons plutôt considérer la décision du législateur de maintenir en vigueur les dispositions en question comme un exercice délibéré du pouvoir discrétionnaire de légiférer, pouvoir qui est exclusivement le sien. Avec égards, je rejette le point de vue suivant lequel nous devrions plutôt qualifier l'apparente contradiction entre le par. 18.3(1) (maintenant le par. 37(1)) de la LACC et l'art. 222 de la LTA d'anomalie rédactionnelle ou de lacune législative susceptible d'être corrigée par un tribunal.
>
> [96] Dans le contexte du régime canadien d'insolvabilité, on conclut à l'existence d'une fiducie réputée uniquement lorsque deux éléments complémentaires sont réunis : en premier lieu, une disposition législative qui crée la fiducie et, en second lieu, une disposition de la LACC ou de la Loi sur la faillite et l'insolvabilité, L.R.C. 1985, ch. B-3 (« LFI ») qui confirme l'existence de la fiducie ou la maintient explicitement en vigueur."
>
> (Emphasis added)

65. It is clear that the *CCAA* does not contain any provision that would confirm the validity of a deemed trust created by the *PBSA.*

66. As was the case in *Century Services,* the Court here is faced with two federal statutes. The goal is to seek out the overall intent of Parliament. *Century Services* reiterates the principal of statutory interpretation that a contextual and purposive analysis ought to be applied in order to determine Parliament's true intent[30].

67. As noted in *Century Services*, "where Parliament has sought to protect certain Crown claims through statutory deemed trust and intended that these deemed

30 *Century Services*, *supra*, at para. 44.

trusts continue in insolvency, it has legislated so explicitly and elaborately."[31] However, in respect of *PBSA* deemed trust, no such protection has been enacted in the *CCAA*. A contextual analysis leads to the conclusion that Parliament did not intend for the *PBSA* deemed trust to have any effect in a *CCAA* proceeding.

68. It is submitted that the recent amendments to the *CCAA* in 2009 confirm this position. Those amendments provide for specific protection to pension obligations at sections 6(6) and 36(7). These provisions provide, respectively, that a compromise or arrangement may only be sanctioned by a Court, and a sale of assets out of the ordinary course of business may only be approved by the Court, if provision is made to ensure payment of certain enumerated pension obligations. The obligations enumerated for such protection consist only of employee deductions, and normal cost contributions. They do not include special payments.

69. It is submitted that it is clear from these specific additions to (and corresponding omissions from) the amendments to the *CCAA* in 2009, that Parliament did not intend for the deemed trust for special payments under the *PBSA* to have any priority in a CCAA proceeding[32].

70. In discussing the pension related amendments to the *CCAA* and *Bankruptcy and Insolvency Act* (the "***BIA***") in reference to the circumstances of pension plan deficiencies, Justice Deschamps noted the deliberate choices made by Parliament in *Sun Indalex Finance LLC v. United Steelworkers,* 2013 SCC 6 **[Tab 13]**:

> "There are good reasons for giving special protection to members of pension plans in insolvency proceedings. Parliament considered doing so before enacting the most recent amendments to the CCAA, but chose not to (An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 47 of the Statutes of Canada, 2005, S.C. 2007, c. 36, in force September 18, 2009, SI/2009-68; see also Bill C-501, An Act to amend the Bankruptcy and Insolvency Act and other Acts (pension protection), 3rd Sess., 40th Parl., March 24, 2010 (subsequently amended by the Standing Committee on Industry, Science and Technology, March 1, 2011)). A report of the Standing Senate Committee on Banking, Trade and Commerce gave the following reasons for this choice:

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31 *Century Services*, *supra*, at para. 45.

32 See also recent article in the National Creditor Debtor Review: "*What about Federal Pension Claims? The Status of Pension Benefits Standards Act, 1985 and Pooled Registered Pension Plans Act Deemed Trust Claims in Insolvency*", 28 National Creditor Debtor Review, p. 25 **[Tab 14]**.

> Although the Committee recognizes the vulnerability of current pensioners, we do not believe that changes to the BIA regarding pension claims should be made at this time. Current pensioners can also access retirement benefits from the Canada/Quebec Pension Plan, and the Old Age Security and Guaranteed Income Supplement programs, and may have private savings and Registered Retirement Savings Plans that can provide income for them in retirement. The desire expressed by some of our witnesses for greater protection for pensioners and for employees currently participating in an occupational pension plan must be balanced against the interests of others. As we noted earlier, insolvency — at its essence — is characterized by insufficient assets to satisfy everyone, and choices must be made.
>
> The Committee believes that granting the pension protection sought by some of the witnesses would be sufficiently unfair to other stakeholders that we cannot recommend the changes requested. For example, we feel that super priority status could unnecessarily reduce the moneys available for distribution to creditors. In turn, credit availability and the cost of credit could be negatively affected, and all those seeking credit in Canada would be disadvantaged." Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act (2003), at p. 98; see also p. 88.)

In an insolvency process, a CCAA court must consider the employer's fiduciary obligations to plan members as their plan administrator. It must grant a remedy where appropriate. However, courts should not use equity to do what they wish Parliament had done through legislation." [paras. 81-82] [emphasis added]

71. It is submitted that the conclusions made in a recent article, *What about Federal Pension Claims? The Status of Pension Benefits Standards Act, 1985 and Pooled Registered Pension Plans Act Deemed Trust Claims in Insolvency*, that the only proper interpretation of the CCAA and the PBSA is that the deemed trust is not intended to have any priority in a CCAA proceeding, are correct:

> "The above application of the *Sparrow Electric* reasoning to the *PBSA* deemed trust yields the same results as application of common rules of statutory interpretation. Given that the pension provisions of the *BIA* and *CCAA* came into force much later than s. 8 of the *PBSA*, normal interpretation would require that the later legislation to be deemed remedial in nature. Likewise, since these provisions of the *BIA* and *CCAA* are the more specific provisions, normal interpretation would take them to have precedence over the general. Finally, the limited scope of the

protection given to pension claims in the *BIA* and *CCAA* would, by application of the doctrine of implied exclusion, suggest that Parliament did not intend there to be any additional protection. In enacting *BIA* subs. 60(1.5) and 65.13(8) and ss. 81.5 and 81.6 and *CCAA* subs. 6(6) and 36(7), while not amending subs. 8(2) of the *PBSA* by adding explicit priority language or by removing the insolvency trigger), Parliament demonstrated the intent that pension claims would have protection in insolvencies and restructurings only to the extent set out in the *BIA* and *CCAA*".[33]

72. If Parliament had intended to give the *PBSA* deemed trust priority, it has had numerous opportunities since 1997 to do so, through amendments to the *CCAA* and/or the *PBSA*. It has made a deliberate decision not to do so.

73. The parallel evolution of the relevant legislation and case law can be summarized as follows:

1986: Adoption of Section 8(2) of the *PBSA*[34];

1997: *Sparrow Electric*: The Supreme Court holds that the *ITA*[35] deemed trust cannot prevail over security interests because no express priority is provided for over pre-existing security interests;

Amendment to *CCAA:* section 18.3 of the CCAA (now section 37) is added[36] -- Deemed trusts in favour of the Crown are nullified subject to certain exemptions for source deductions claims;

1998: The "Sparrow Electric Amendment": Parliament enacts section 227(4.1) of the *ITA* which expressly provides for priority over security interests, retroactive to 1994. As well, similar amendments made to *EIA* and *CPP* at same time (and similar amendments to the *ETA* in 2000);

2002: *First Vancouver*: The Supreme Court holds based on the Sparrow Electric Amendment that a deemed trust is similar to a floating charge. The Supreme Court concludes that by the Sparrow Electric Amendment, Parliament has granted priority to the deemed trust for source deductions over security interests.

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33 *supra,* at p. 30.
34 *Pension and Benefits Standards Act*, R.S.C., 1985, c. 32 (2nd Supp.).
35 *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.).
36 Amendment to the *Companies' Creditors Arrangement Act* (S.C. 1997, c. 12, s. 125).

2010: *Century Services*: The GST deemed trust has no effect in a *CCAA* context due to the wording of section 18.3 of the *CCAA*, which does not expressly recognize the GST deemed trust. This is so notwithstanding that s. 222(3) of the *ETA* states that the deemed trust created by 222(1) of the *ETA* applies despite any other federal act (other than the *BIA*).

1.3 SUSPENSION OF SPECIAL PAYMENTS UNDER *CCAA* INITIAL ORDER

74. OSFI submits at paragraphs 63-66 of its Motion that it is contrary to the law for the suspension of special payments during the *CCAA* to result in additional proceeds being available to pay the debt owed to the secured creditor of an employer.

75. It is submitted that this position is not tenable.

76. The suspension of special payments was undertaken at the commencement of these *CCAA* proceedings in March, 2012. No challenge has been made by OSFI to this order despite the passage of over a year and a half.

77. The suspension of special payments was in keeping with the provisions of the *CCAA* and its interpretation by the courts, particularly as found in *Re Fraser Papers Inc.*[37] **[Tab 15]**.

78. The obligation to make special payments is a pre-filing obligation that arises pursuant to the provisions of the *PBSA*, and in no way arises from the provision of any services after the issuance of the Initial Order.[38] Consistent with the provisions of the *CCAA*, all creditors of Aveos, including OSFI on behalf of the Plan, have been stayed from the assertion of any rights or remedies as against Aveos in respect of such pre-filing obligations since the commencement of its *CCAA* proceedings.

79. Aveos entered these *CCAA* proceedings in crisis. The suspension of special payments, together with the suspension of payment of all other pre-filing obligations, supported the cash flow of Aveos and ensured that Aveos was able to properly stabilize its affairs in order for it to develop and implement a strategy to maximize recovery for the benefit of its stakeholders.

80. The Initial Order does not make the suspension of special payments conditional upon the submission of a plan of compromise and arrangement to Aveos' creditors, as OSFI appears to suggest ought to be the case.

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37 (2009) 55 C.B.R. (5th) 217, at para. 20.

38 See *Re Fraser Papers Inc., supra*, at para.20; *Sproule v. Nortel Networks Corporation*, 2009 ONCA 833 **[Tab 16]**; *Re White Birch*, *supra*, at paras. 88-92.

81. Contrary to the assertions of OSFI, the Second Lien Lenders have not acquired more rights than they would normally have in a liquidation – they have only the rights and priorities afforded to them in accordance with the law. It is the nature of insolvency that there will be insufficient assets available to ensure all creditors are satisfied. In such circumstances, the obligations of a debtor must be distributed in the order of priorities applicable under the law. In this case, it is clear that the secured claims of the Second Lien Lenders take priority over any liability for special payments.

82. The parties to these proceedings, particularly the Second Lien Lenders, have relied on the provisions of the Initial Order and have conducted themselves accordingly. It is the expectation of the Second Lien Lenders that priorities established by the law will be upheld.

(F) CONCLUSION

83. For all of the reasons outlined above, the Second Lien Lenders have priority to the amounts claimed by OSFI on behalf of the Plan. Credit Suisse asks therefore that the Motion for Declaratory Judgment by OSFI be dismissed with costs to Credit Suisse.

Montréal, October 10, 2013

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CANADA

PROVINCE OF QUÉBEC
DISTRICT OF **MONTRÉAL**

No: 500-11-042345-120

SUPERIOR COURT
(Commercial Division)
(Sitting as a court designated pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended)

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

AVEOS FLEET PERFORMANCE INC./
AVEOS PERFORMANCE AÉRONAUTIQUE INC.
and
AERO TECHNICAL US, INC.
Debtors/Respondents

and

FTI CONSULTING CANADA INC.
Monitor

and

THE ATTORNEY GENERAL OF CANADA [OSFI]
Petitioner

and

CREDIT SUISSE AG, CAYMAN ISLANDS BRANCH, as Fondé de Pouvoir
and
WELLS FARGO BANK NATIONAL ASSOCIATION, as Fondé de Pouvoir
and
AVEOS HOLDING COMPANY as Fondé de Pouvoir
Respondents

and

AON HEWITT, as administrator of the Aveos Fleet Performance Inc. pensions plans
and
The former and retired employees of Aveos Fleet Performance Inc.
Mis en cause

RESPONDENT'S (CREDIT SUISSE AG) AUTHORITIES

1. Royal Bank of Canada v. Sparrow Electric Corp., [1997] 1 S.C.R. 411;
2. Francis Lamer, *Priority of Crown Claims in Insolvency*, (Carswell: Looseleaf);
3. *White Birch Paper Holding Company (Arrangement relative à)* 2012 QCCS 1679 (QCCS);
4. Denis BROCHU, *Précis de la faillite et d l'insolvabilité*, 3e éd., Brossard, Publications CCH, 2010, 665, p. 358-359 ;
5. *Chibou-vrac inc. (Syndic de)*, 2003 CanLII 1022 (QC CS), [2003] R.J.Q. 2809;
6. *Québec (Sous-ministre du Revenu) c. Service de Garantie Québec Inc. (Syndic de)* 2009 QCCA 409 (CanLII), 2009 QCCA 409 ;
7. *Bouloud (Syndic de)*, 2010 QCCS 4840 (CanLII), 2010 QCCS 4840, (appel principal rejeté et appel incident accueilli, C.A., 12-07-2011, 500-09-021127-105, 2011 QCCA 1813 (CanLII), 2011 QCCA 1813) ;
8. *Colombie Britannique c. Henfrey Samson Bélair Ltd.,* 1989 CanLII 43 (CSC), (1989) 2 R.C.S. 24 ;
9. *Century Services Inc. v. Canada (Attorney General),* [2010] S.C.R. 379;
10. *First Vancouver Finance* v. *M.N.R.*, 2002 SCC 49;
11. Excerpt of *Income Tax Amendments Act, 1997, Statutes of Canada*, 1998 c. 19; *Sales Tax and Excise Tax Amendment Act, 1999, Statutes of Canada*, 2000, c. 30.
12. Excerpt of *Statutes of Canada*, 1998, c. 12, s. 6; 2010, c. 12, s. 1791; c. 25, s. 183; 2012, c. 16, s. 86;
13. *Sun Indalex Finance LLC v. United Steelworkers,* 2013 SCC 6;
14. "*What about Federal Pension Claims? The Status of Pension Benefits Standards Act, 1985 and Pooled Registered Pension Plans Act Deemed Trust Claims in Insolvency*", 28 National Creditor Debtor Review, p. 25, 30;
15. *Re Fraser Papers Inc.,* (2009) 55 C.B.R. (5th) 217;
16. *Sproule v. Nortel Networks Corporation*, 2009 ONCA.

Montréal, October 10, 2013

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