C A N A D A

PROVINCE OF QUÉBEC DISTRICT OF **MONTREAL**	**SUPERIOR COURT** Commercial Division (Sitting as a court designated pursuant to the *Companies' Creditors Arrangement Act*, R.S.C., c. 36, as amended)
N°: **500-11-048114-157**	**IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:** **BLOOM LAKE GENERAL PARTNER LIMITED** **QUINTO MINING CORPORATION** **8568391 CANADA LIMITED** **CLIFFS QUÉBEC IRON MINING ULC** **WABUSH IRON CO. LIMITED** **WABUSH RESOURCES INC.** Petitioners and- **THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP** **BLOOM LAKE RAILWAY COMPANY LIMITED** **WABUSH MINES** **ARNAUD RAILWAY COMPANY** **WABUSH LAKE RAILWAY COMPANY LIMITED** Mises-en-cause (Collectively the "**CCAA Parties**" -and- **FTI CONSULTING CANADA INC.** Monitor -and- **MOELIS & COMPANY LLC** Mise-en-cause

CCAA PARTIES' OUTLINE OF ARGUMENTS
(In support of the Motion by the Monitor for directions (docket #385))

1. INTRODUCTION[1]

1. The Monitor's Motion for Directions with respect to Pensions Claims (the "**Motion**") was notified to the Service List on September 20, 2016;

2. By way of its Motion, the Monitor seeks instructions with respect to the adjudication of pension claims arising out of the CCAA Parties' two defined benefit pensions plans (the "**Pension Claims**"). More specifically, the Monitor seeks to establish the priority rank, if any, to be afforded to said Pension Claims as a result of the application of deemed trust provisions of applicable pension legislation.

3. In an Order rendered on June 9, 2015 (the "**Comeback Order**"), the Honourable Justice Hamilton, J.S.C., granted priority to CCAA Charges ahead of all Encumbrances, including, *inter alia*, trusts and deemed trusts, as appears from paragraph 5 of said Comeback Order:

> [5] **ORDERS** that paragraph 47 of the Wabush Initial Order shall be amended as follows:
>
> > 47. **DECLARES** that each of the CCAA Charges shall rank ahead of all hypothecs, mortgages, liens, security interests, priorities, trusts, deemed trusts (statutory or otherwise), charges, encumbrances or security of whatever nature or kind (collectively, the "**Encumbrances**") […] affecting the Property of the Wabush CCAA Parties whether or not charged by such Encumbrances […], with the exception of the Crown deemed trusts for sources deductions described in Section 37(2) CCAA and the sums that could be subject to a claim under Section 38(3) CCAA. For greater certainty, the CCAA Charges only extend to assets or rights against assets over which the Wabush CCAA Parties hold or acquire title, and the Interim Lender's Charge is subject to the Permitted Priority Liens (as defined in the Interim Financing Term Sheet).

4. In so doing, Justice Hamilton reserved the rights of the Government of Newfoundland and Labrador and the Government of Canada to contest the priority of the Interim Lender Charge over statutory deemed trusts, if any, as described at paragraph 6 of the Comeback Order:

> [6] **RESERVES** the rights of Her Majesty in right of Newfoundland and Labrador, as represented by the Superintendant of Pensions, the Syndicat des Métallos, Section Locale 6254, the Syndicat des Métallos, Section 6285 and the Attorney General of Canada to contest the priority of the Interim Lender Charge over the deemed trust(s) as set out in the Notices of Objection filed by each of those parties in response to the Motion, which shall be heard and determined at the hearing scheduled on June 22, 2015.

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[1] All capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Motion.

5. On November 5, 2015, Justice Hamilton issued the Claim Procedures Order (as amended on November 16, 2015), which approved and established a procedure for the filing of creditors' claims against the CCAA Parties and their directors and officers, as appears from the Claims Procedure Order, a copy of which has been filed by the Monitor as Exhibit R-2.

2. THE FACTS

6. According to the affidavit of Mr. Terence Watt,[2] one of the Salaried Representatives, the membership breakdown of the employees (former active members) and retirees per jurisdiction is the following:

	Salaried Plan	Union Plan	Total
Newfoundland and Labrador	313	1,005	1,318
Québec	329	661	990
Other	14	66	80
Total	656	1,732	2,388

7. According to the Towers Watson report, "Plan Termination as at December 16, 2015," filed by the Petitioner as Exhibit R-26, which is currently under review by the regulators, and as summarized in paragraph 43 of the Monitor's Motion, the following amounts are due to the Salaried and Union DB Plans:

	Salaried DB Plan	Union DB Plan
Normal Cost Payments		
Pre-filing	$0	$0
Post-filing	$0	$0
Total	**$0**	**$0**
Special Payments		
Pre-filing	$3	$146,776
Post-filing	$2,185,753	$2,999,924
Total	**$2,185,756**	**$3,146,700**
Catch-up Special Payments		
Pre-filing	$0	$0
Post-filing	$0	$3,525,120

[2] Affidavit of Mr. Terence Watt, dated December 14, 2016 and filed in support of the Salaried Employees Representatives' Response to the Motion by the Monitor for directions with respect to Pension claims and the transfer of certain questions to the Supreme Court of Newfoundland and Labrador regarding the interpretation of the deemed trust priority provisions in the NPBA **(Tab 1)**.

Total	**$0**	**$3,525,120**
Estimated Wind-up Deficiency	$27,450,000	$27,486,548

3. WHICH LAW APPLIES TO THE PENSION PLANS?

8. The two plans (collectively "the **Plans**") are subject to the laws of several distinct jurisdictions. The position of the CCAA parties on this issue is outlined below.

9. As a starting point, each of the following three statutes includes provisions which define the pension plans and persons to which they apply:

Newfoundland and Labrador PBA[3]

> 5. This Act applies to all pension plans for persons employed in the province, except those pension plans to which an Act of the Parliament of Canada applies.

Québec SPPA[4]

> 1. This Act applies to pension plans provided
>
> (1) for employees who report for work at an establishment of their employer located in Québec or, if not, who receive their remuneration from such an establishment, provided, in the latter case, they do not report for work at any other establishment of their employer;
>
> (2) for employees not referred to in paragraph 1 who, while residing in Québec and being employed by an employer whose main establishment is located in Québec, work outside Québec, provided the plans are not governed by an Act of a legislative body other than the Parliament of Québec which provides for a deferred pension.

Federal PBSA[5]

> 4 (1) This Act applies in respect of pension plans.
>
> (…)
>
> (4) In this Act, included employment means employment, other than excepted employment, on or in connection with the operation of any work, undertaking or business that is within the legislative authority of the Parliament of Canada, including, without restricting the generality of the foregoing.
>
> (…)
>
> (b) any railway, canal, telegraph or other work or undertaking connecting a province with another province or extending beyond the limits of a province.

10. From the last sentence of Section 5 NPBA, one can infer that the NPBA shall not apply to the members of the Plans who formerly worked at Arnaud Railway. Section 4(4)(b) of the federal PBSA clearly indicates that it shall apply to the members who were employed by Arnaud Railway.

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3 Newfoundland *Pension Benefits Act*, 1997, SNL1996 Chapter P-4.01 ("**NPBA**").

4 Québec *Supplemental Pension Plans Act,* CQLR, c. R-15.1 ("**SPPA**").

5 *Pension Benefits Standards Act*, RSC 1985, c-32 ("**PBSA**").

11. Section 1 of the SPPA clearly provides that the Act shall apply to the members of the Plans who were formerly employed in Québec (except for those who were employed by Arnaud Railway).

12. Finally, and as further detailed below in section 9.2 of this Outline, the attempt by the Salaried Representatives to extend the application of the NPBA to all the members and beneficiaries of the Salaried DB Plan by referring to the 2016 Agreement respecting Multi-Jurisdictional Pension Plans is a patently ill-founded argument for two reasons. First, the plurality of members of the Salaried DB Plan is found in Québec (as there were more members in Québec than in Newfoundland for that plan). Second, the 2016 Agreement was never ratified by Newfoundland.

4. HAS A DEEMED TRUST BEEN VALIDLY CREATED PURSUANT TO PROVINCIAL LEGISLATION (NPBA OR SPPA) OR FEDERAL LEGISLATION (PBSA)?

13. The existence of a deemed trust protecting the Plans is a question that has been referred by way of reference to the Newfoundland Court of Appeal, despite the fact that, as stated in the January 30, 2017 judgment issued by this Court, the Superior Court of Québec has jurisdiction to adjudicate this issue. However, the real question at issue is not whether a deemed trust exists, but rather what, if anything, is protected by this or these deemed trust(s) and whether such trust(s) is (or are) effective in the present CCAA context.

14. Even if the CCAA Parties were to admit that the rules with respect to deemed trusts pursuant to the PBSA, the SPPA and the NPBA could apply to the Plan members located in the relevant jurisdiction or otherwise protected by each relevant law, they dispute that such rules are effective in an insolvency context. The CCAA parties also dispute that a deemed trust created by Newfoundland legislation, such as the one created by section 32 PBSA, if it were established in the context of CCAA proceedings, can validly charge property located in Québec.

5. IF A DEEMED TRUST EXISTS, WHAT TYPE OF PAYMENTS DOES IT PROTECT?

15. Section 49 SPPA provides for a deemed trust that extends to normal, special and catch-up payments in connection with the members who formerly worked in Québec.

16. Section 8(1) and (2) of the PBSA provides for deemed trusts that extend to normal, special and catch-up payments in connection with the members who formerly worked at Arnaud Railway.

17. Section 32 NPBA provides for various deemed trusts to secure the payment of certain amounts for the members formerly employed in Newfoundland. These amounts may include normal costs, special payments and catch-up special payments.

18. The Salaried Representatives and the USW argue that the deemed trust created pursuant to section 32(1) (c) (ii) and the obligation to hold amounts in trust created by section 32(3) extend to wind-up deficiencies. It is to be noted that the Newfoundland Superintendent of Pensions has not adopted this position in its Outline of arguments.

19. On that point, it is the position of the CCAA Parties that, in this case, the wind up deficiency is not covered for two reasons.

20. First, both sections 32(1) (c) (ii) and section 32(3) protect amounts "due." Section 61(2) states that on termination of a plan the employer shall make the payments set out in the Regulations. Section 25.1 (1) of the Regulations provides that the amount that may become payable pursuant to section 61(2) to cover the wind up deficiency shall be divided in five equal payments, while section 25.1 (3) provides that the first of these payments is due no later than 2 weeks after the filing of the report in which the deficiency will have been calculated. Thus, upon termination of a plan, the amounts related to the wind up deficiency are not due.

21. On this question, section 32(3) NPBA has to be distinguished from section 57(4) of Ontario's PBA. Section 57(4) extends to "contributions accrued to the date of the wind up but not yet due," while 32(1) (c) (ii) and section 32 protect amounts "due."

22. Second, section 32(3) NPBA shall not be applied in this matter since the two plans were not wound up prior to the filing. On that issue, the following statements made by the Court in *Indalex* are relevant:

> [46] The situation is different with respect to the Executive Plan. Unlike s. 57(3), which provides that the deemed trust protecting employer contributions exists while a plan is ongoing, s. 57(4) provides that the wind-up deemed trust comes into existence only when the plan is wound up. This is a choice made by the Ontario legislature. I would not interfere with it. Thus, the deemed trust entitlement arises only once the condition precedent of the plan being wound up has been fulfilled. This is true even if it is certain that the plan will be wound up in the future. At the time of the sale, the Executive Plan was in the process of being, but had not yet been, wound up. Consequently, the deemed trust provision does not apply to the employer's wind-up deficiency payments in respect of that plan.
>
> [58] In the instant case, the CCAA judge, in authorizing the DIP charge, did not consider the fact that the Salaried Plan's members had a claim that was protected by a deemed trust, nor did he explicitly note that ordinary creditors, such as the Executive Plan's members, had not received notice of the DIP loan motion.[6]

6. IF A DEEMED TRUST EXISTS, IS IT EFFECTIVE IN A CCAA CONTEXT?

23. Even though the legal context applicable to deemed trusts created to protect pension claims is different from the one in respect of deemed trusts created to protect Crown claims, we submit that one must firstly review the general rules applicable to deemed trusts in an insolvency context before focusing back on the treatment of deemed trusts created to protect pension claims.

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[6] *Sun Indalex Finance, LLC v. United Steelworkers*, [2013] 1 S.C.R. 271, 2013 SCC 6 **(Tab 2)** [***Sun Indalex Finance***].

6.1 Treatment of deemed trusts created to protect Crown claims in a CCAA context

6.1.1 The evolution of the legislation and of case law since *Sparrow Electric*

24. The Supreme Court has previously considered a legislative provision in the *Income Tax Act*[7] (the "**ITA**"), which was substantially similar to section 8(2) PBSA. The Court did so in the *Sparrow Electric* decision[8], where it ultimately rejected the argument that the ITA provision created a valid deemed trust.

25. 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 sections 227(4) and (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.

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

27. 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 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.

28. Section 8 of the PBSA came into force in 1986. Since that time, the language of section 8(1) has not changed substantively, and section 8(2) has remained unchanged.[9] The

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7 *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp).

8 [1997] 1 S.C.R. 411 **(Tab 3)**.

9 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."

following is a side by side comparison of the 1997 ITA provisions considered in *Sparrow Electric* and the current PBSA provisions:

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]	

29. 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:

> [38] … 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.

6.1.2 Response to Sparrow Electric

30. 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*:

> [33] In *Royal Bank of Canada v. Sparrow Electric Corp*., [1997] 1 S.C.R. 411, this Court addressed a priority dispute between a deemed trust for sources deductions under the ITA and security interests taken under both the *Bank Act*, S.C. 1991 c. 46, and the A*lberta 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").[10]

31. 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
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> > (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

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[10] *Century Services Inc. v. Canada (Attorney General),* [2010] 3 S.C.R. 379, 2010 SCC 60 **(Tab 4)** [***Century Services***].

> 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]

32. 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 arose. As noted in *Century Services*, this was confirmed by the Supreme Court in *First Vancouver Finance* v. *M.N.R.*:

> [28] 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.[11]

33. 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**"),[12] 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.[13] However, the provisions of section 8(2) have not been altered since the PBSA came into force in 1986. It is submitted that Parliament has had numerous occasions to make amendments similar to those made to the ITA, the CPP, the EIA, and the ETA, but has chosen not to do so. As a result, the reasoning of the Supreme Court in *Sparrow Electric* applies in the case at hand.

6.2 The deemed trusts created to protect amounts owed to a pension plan are ineffective in a CCAA context

6.2.1 Is the deemed trust created by the PBSA effective in a CCAA context?

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

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11 *First Vancouver Finance* v. *M.N.R.,* 2002 SCC 49 **(Tab 5)** [***First Vancouver***].

12 *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.

13 *Statutes of Canada*, 1998, c. 12, s. 6; 2010, c. 12, s. 1791; c. 25, s. 183; 2012, c. 16, s. 86.

> *[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.*[14]

35. There is consistent case law to the effect that, for a deemed trust to remain effective in an insolvency context, a specific legislative provision must exist to that effect.

36. In considering a deemed trust created to facilitate the collection of the goods and services tax, the Supreme Court 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*

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[14] *White Birch Paper Holding Company (Arrangement relatif à),* 2012 QCCS 1679 **(Tab 6)** [***White Birch***].

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

37. The statements, made by Justice Schrager in the matter of *Aveos,*[15] also highlight the need to find specific legislative provisions to maintain the effectiveness of a deemed trust in an insolvency context:

> [71] After examining the legislative history, Deschamps, J. writing for the majority, held that Parliament did not intend for the C.C.A.A. to protect the Crown's deemed trust priority for GST claims payable under the *Excise Tax Act*. Deschamps, J. stated that where Parliament's intent is to protect deemed trust

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[15] *Aveos Fleet Performance Inc./Aveos Performance aéronautique inc. (Arrangement relatif à)*, 2013 QCCS 5762 **(Tab 7)** [***Aveos***].

> claims in insolvency matters, Parliament clearly states so. Absent an express statutory basis for concluding that GST claims enjoy preferred treatment under the C.C.A.A. (or the B.I.A.), no such protection exists. Fish, J. writing minority reasons was even more explicit that the protection of a deemed trust claim in an insolvency requires a statutory provision creating the trust and a provision in the B.I.A. or C.C.A.A. explicitly preserving the effective operation of the deemed trust.
>
> [72] In the present case, while Section 8(2) P.B.S.A. creates the deemed trust, there is no provision of the C.C.A.A. that confirms or preserves it.
>
> [73] Parliament has enacted such "preserving" provisions for deductions at source in Section 37(2) C.C.A.A. (see also Section 86(2) B.I.A.). This is a *Sparrow* legacy amendment. There is no such preservation for the Section 8(2) P.B.S.A. deemed trust.
>
> [75] Whatever allure this logic may contain, the reasoning of Deschamps, J. and Fish, J. in *Century* does not appear restricted to considerations of Crown deemed trust though that is the factual background of the case. Deschamps, J. is explicit in referring to the "general rule that deemed trusts are ineffective in insolvency"
>
> […]
>
> [84] The beneficiaries of the pension plan may be vulnerable as the Superintendent and Aon submit and as such merit protection for their pension entitlements as a matter of public policy. However, the balance of competing policies is a matter for Parliament whose task is to define policy priorities and to reflect such choices in statutes. As Fish, J. stated in *Century*, legislative discretion belongs to Parliament alone and is not to be exercised by the judiciary.

38. It is clear that the CCAA does not contain any provision that would confirm the validity of a deemed trust created by the PBSA or any other provincial law to the same effect.

39. As was the case in *Century Services*, when seeking to determine what could be the priority applicable to a deemed trust created by the PBSA in a CCAA context, the Court is called to interpret two federal statutes. The goal is to seek out the overall intent of Parliament. *Century Services* reiterates the principle of statutory interpretation that a contextual and purposive analysis ought to be applied in order to determine Parliament's true intent.[16]

40. As held in *Century Services*, "where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so explicitly and elaborately."[17] No such protection has been enacted in the CCAA with respect to the PBSA deemed trust. 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.

41. It is submitted that the 2009 amendments to the *Companies' Creditors Arrangement Act* confirm this position. The amendments provide for specific protection to pension

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16 *Century Services Inc. v. Canada (Attorney General),* [2010] 3 S.C.R. 379, 2010 SCC 60, at para. 44 (**Tab 4**).

17 *Ibid*, at para. 45.

obligations at sections 6(6) and 36(7).[18] 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 or wind-up deficiencies.

42. It is submitted that these specific additions to (and corresponding omissions from) the 2009 amendments to the CCAA, make it clear that Parliament did not intend for special payments under the PBSA, or any other provincial deemed trust legislation, to have any priority in a CCAA proceeding.[19]

43. In discussing pension plan deficiencies in the context of the amendments to the CCAA and *Bankruptcy and Insolvency Act* (the "**BIA**"), Justice Deschamps, in *Sun Indalex Finance*, underscored that Parliament made a deliberate choice not to extend greater protections to pension claims:

> [81] 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 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:
>
> > 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

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[18] *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36.

[19] 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 8)**.

> 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.)
>
> [82] 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.[20] [Emphasis added]

44. 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*, the authors conclude 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. The CCAA Parties submit that this conclusion is 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. [21]

45. Had Parliament wanted to give priority to the PBSA deemed trust, or any other similar provincially created deemed trust, it has had numerous opportunities since 1997 to amend the CCAA and/or the PBSA. It has made a deliberate decision not to do so.

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

> 1986: Adoption of Section 8(2) of the PBSA;
>
> 1997: *Sparrow Electric*: The Supreme Court holds that the ITA 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 – 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);

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20 *Sun Indalex Finance, LLC v. United Steelworkers*, [2013] 1 S.C.R. 271, 2013 SCC 6 **(Tab 2).**

21 *Ibid,* at p. 30.

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.

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).

47. This issue was discussed at length in the matter of *Aveos*[22] and the Court adopted the argument to the effect that the PBSA deemed trust is not effective in a CCAA proceeding.

48. This is the position that was adopted by this Court on June 26, 2015:

> [74] It is difficult to reconcile sections 6(6) and 36(7) CCAA with a broad interpretation of section 8(2) PBSA. Why would the legislator give specific protection to the normal payments by amending the CCAA in 2009 if the deemed trust protecting not only the normal payments but also the special payments was effective in the CCAA context? Why would the legislator not protect the payment under sections 6(6) and 36(7) CCAA if they were already protected under a deemed trust? What happens to the deemed trust if there is an arrangement or an asset sale? Because both statutes were adopted by the same legislator, we must try to determine the legislator intent. […]
>
> [78] For all these reasons, the Court concludes that the Parliament's intent is that federal pension claims are protected only to the limited extent set ought in the BIA and the CCAA, notwithstanding the potentially broader language in the PBSA.[23]

6.2.2 Paramountcy of Federal legislation over Provincial legislation

6.2.2.1 General principles regarding the application of the principle of Federal paramountcy in an insolvency context

49. In the matter of *Sun Indalex Finance*,[24] the Supreme Court of Canada unanimously held (in three concurrent judgments on this point) that an interim lender charge created by the Court pursuant to the CCAA may rank ahead of a deemed trust for pension priorities created by provincial statute by operation of the constitutional doctrine of federal paramountcy, as the Court's ability to create super-priority for interim lender charges is crucial to achieving the purposes of the CCAA, even in the context of a liquidating CCAA.

50. The reasons of Justice Deschamps are most explicit on this point:

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22 *Aveos Fleet Performance Inc./Aveos Performance aéronautique inc. (Arrangement relatif à)*, 2013 QCCS 5762 **(Tab 7)**.

23 *Bloom Lake, g.p.l. (Arrangement relatif à),* (C.S. June 26, 2015), Montréal 500-11-048114-157, Hamilton J. **(Tab 9)**.

24 *Sun Indalex Finance, LLC v. United Steelworkers*, [2013] 1 S.C.R. 271, 2013 SCC 6 **(Tab 2)**.

B. *Does the Deemed Trust Supersede the DIP Charge?*

[48] The finding that the interests of the Salaried Plan's members in all the employer's wind-up contributions to the Salaried Plan are protected by a deemed trust does not mean that part of the money reserved by the Monitor from the sale proceeds must be remitted to the Salaried Plan's fund. 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 DIP charge. […]

[…]

[51] In order to avoid a race to liquidation under the BIA, courts will favour an interpretation of the CCAA that affords creditors analogous entitlements. Yet this does not mean that courts may read bankruptcy priorities into the CCAA at will. Provincial legislation defines the priorities to which creditors are entitled until that legislation is ousted by Parliament. Parliament did not expressly apply all bankruptcy priorities either to CCAA proceedings or to proposals under the BIA. Although the creditors of a corporation that is attempting to reorganize may bargain in the shadow of their bankruptcy entitlements, those entitlements remain only shadows until bankruptcy occurs. At the outset of the insolvency proceedings, Indalex opted for a process governed by the CCAA, leaving no doubt that although it wanted to protect its employees' jobs, it would not survive as their employer. This was not a case in which a failed arrangement forced a company into liquidation under the BIA. Indalex achieved the goal it was pursuing. It chose to sell its assets under the CCAA, not the BIA.

[52] The provincial deemed trust under the PBA continues to apply in CCAA proceedings, subject to the doctrine of federal paramountcy (*Crystalline Investments Ltd. v. Domgroup Ltd.*, 2004 SCC 3 (CanLII), [2004] 1 S.C.R. 60, at para. 43). The Court of Appeal therefore did not err in finding that at the end of a CCAA liquidation proceeding, priorities may be determined by the PPSA's scheme rather than the federal scheme set out in the BIA.

[…]

[56] A party relying on paramountcy must "demonstrate that the federal and provincial laws are in fact incompatible by establishing either that it is impossible to comply with both laws or that to apply the provincial law would frustrate the purpose of the federal law" (*Canadian Western Bank*, at para. 75). This Court has in fact applied the doctrine of paramountcy in the area of bankruptcy and insolvency to come to the conclusion that a provincial legislature cannot, through measures such as a deemed trust, affect priorities granted under federal legislation (*Husky Oil*).

[…]

[58] In the instant case, the CCAA judge, in authorizing the DIP charge, did not consider the fact that the Salaried Plan's members had a claim that was protected by a deemed trust, nor did he explicitly note that ordinary creditors, such as the Executive Plan's members, had not received notice of the DIP loan motion. However, he did consider factors that were relevant to the remedial objective of the CCAA and found that Indalex had in fact demonstrated that the CCAA's purpose would be frustrated without the DIP charge. It will be helpful to quote the reasons he gave on April 17, 2009 in authorizing the DIP charge ((2009), 52 C.B.R. (5th) 61):

(a) the Applicants are in need of the additional financing in order to support operations during the period of a going concern restructuring;

(b) there is a benefit to the breathing space that would be afforded by the DIP Financing that will permit the Applicants to identify a going concern solution;

(c) there is no other alternative available to the Applicants for a going concern solution;

(d) a stand-alone solution is impractical given the integrated nature of the business of Indalex Canada and Indalex U.S.;

(e) given the collateral base of Indalex U.S., the Monitor is satisfied that it is unlikely that the Post-Filing Guarantee with respect to the U.S. Additional Advances will ever be called and the Monitor is also satisfied that the benefits to stakeholders far outweighs the risk associated with this aspect of the Post-Filing Guarantee;

(f) the benefit to stakeholders and creditors of the DIP Financing outweighs any potential prejudice to unsecured creditors that may arise as a result of the granting of super-priority secured financing against the assets of the Applicants;

(g) the Pre-Filing Security has been reviewed by counsel to the Monitor and it appears that the unsecured creditors of the Canadian debtors will be in no worse position as a result of the Post-Filing Guarantee than they were otherwise, prior to the CCAA filing, as a result of the limitation of the Canadian guarantee set forth in the draft Amended and Restated Initial Order . . . ; and

(h) the balancing of the prejudice weighs in favour of the approval of the DIP Financing. [para. 9]

[59] Given that there was no alternative for a going-concern solution, it is difficult to accept the Court of Appeal's sweeping intimation that the DIP lenders would have accepted that their claim ranked below claims resulting from the deemed trust. There is no evidence in the record that gives credence to this suggestion. Not only is it contradicted by the CCAA judge's findings of fact, but 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" (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 97). The 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. The reasons given by Morawetz J. in response to the first attempt of the Executive Plan's members to reserve their rights on June 12, 2009 are instructive. He indicated that any uncertainty as to whether the lenders would withhold advances or whether they would have priority if advances were made did "not represent a positive development". He found that, in the absence of any alternative, the relief sought was "necessary and appropriate" (2009 CanLII 37906 (ON SC), 2009 CanLII 37906, at paras. 7-8).

[60] In this case, compliance with the provincial law necessarily entails defiance of the order made under federal law. On the one hand, s. 30(7) of the PPSA required a part of the proceeds from the sale related to assets described in the provincial statute to be paid to the plan's administrator before other secured creditors were paid. On the other hand, the Amended Initial Order provided that the DIP charge ranked in priority to "all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise" (para. 45). Granting priority to the DIP lenders subordinates the claims of other stakeholders, including the Plan Members. This court-ordered priority based on the CCAA has the same

> effect as a statutory priority. The federal and provincial laws are inconsistent, as they give rise to different, and conflicting, orders of priority. As a result of the application of the doctrine of federal paramountcy, the DIP charge supersedes the deemed trust.
>
> [Emphasis added]

51. The decisions rendered by Justices Cromwell and LeBel, respectively, concur with Justice Deschamps on this issue.[25]

52. The Supreme Court recently discussed the application of the paramountcy doctrine in *Alberta (Attorney General) v. Moloney*:

> [18] A conflict is said to arise in one of two situations, which form the two branches of the paramountcy test: (1) there is an operational conflict because it is impossible to comply with both laws, or (2) although it is possible to comply with both laws, the operation of the provincial law frustrates the purpose of the federal enactment.
>
> [19] What is considered to be the first branch of the test was described as follows in *Multiple Access*, the seminal decision of the Court on this issue:
>
> > 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 are being told to do inconsistent things"; compliance with one is defiance of the other.
> >
> > In *Western Bank*, Binnie and LeBel JJ. referred to this passage as "the fundamental test for determining whether there is sufficient incompatibility to trigger the application of the doctrine of federal paramountcy" (para. 71). Under that test, the question is whether there is an actual conflict in operation, that is, whether both laws "can operate side by side without conflict" (*Marine Services*, at para. 76) or whether both "laws can apply concurrently, and citizens can comply with either of them without violating the other": *Western Bank*, at para. 72; see also *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271, at para. 60; *Marine Services*, at para. 68; *British Columbia (Attorney General) v. Lafarge Canada Inc.*, 2007 SCC 23, [2007] 2 S.C.R. 86, at paras. 77 and 81-82; *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629, at para. 53; *Smith v. The Queen*, [1960] S.C.R. 776, at p. 800, per Martland J.[26]

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25 *Sun Indalex Finance, LLC v. United Steelworkers*, [2013] 1 S.C.R. 271, 2013 SCC 6 paras. 242 and 265 **(Tab 2)**.

26 *Alberta (Attorney General) v. Moloney*, 2015 SCC 51 **(Tab 10)**.

53. It is respectfully submitted that, in the present case, the application of Section 32 NPBA or 49 SPPA would create a situation where it would be impossible to comply with both laws.

6.2.2.2 Application of the principle of federal paramountcy

54. As a starting point for this section, it is to be noted that section 32(2) NPBA creates a deemed trust while section 32(4) states that the administrator of a plan has a lien and charge on the assets of the employees in an amount equal to the amount required to be held in trust.

6.2.2.2.1 Relevant provisions of the BIA and CCAA

55. The definition given to the term “secured creditor” in the CCAA is the following:

> *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;
>
> [Emphasis added]

56. Although the provisions of the BIA are not directly relevant to the present matter, some considerations must be given to the latter since it is expected that the federal legislator would have attempted to adopt a coherent interpretation between the same terms used in different acts dealing with a situation of insolvency.

57. On this point, it is to be noted that the definition of “secured creditor” given in the BIA is the following:

> *secured creditor* means a person holding a mortgage, hypothec, pledge, charge or lien on or against the property of the debtor or any part of that property as security for a debt due or accruing due to the person from the debtor, or a person whose claim is based on, or secured by, a negotiable instrument held as collateral security and on which the debtor is only indirectly or secondarily liable, and includes
>
> (a) a person who has a right of retention or a prior claim constituting a real right, within the meaning of the *Civil Code of Québec* or any other statute of the Province of Quebec, on or against the property of the debtor or any part of that property, or
>
> (b) any of
>
> (i) the vendor of any property sold to the debtor under a conditional or instalment sale,

> (ii) the purchaser of any property from the debtor subject to a right of redemption, or
>
> (iii) the trustee of a trust constituted by the debtor to secure the performance of an obligation,
>
> if the exercise of the person's rights is subject to the provisions of Book Six of the *Civil Code of Québec* entitled *Prior Claims and Hypothecs* that deal with the exercise of hypothecary rights [Emphasis added]

58. While one of the fundamental distinctions between the BIA and the CCAA is that there is no transfer of the ownership of the debtor's assets to a trustee in a CCAA context, Section 67(1)(a) of the BIA is relevant for our purpose. Said section reads as follows:

> 67 (1) The property of a bankrupt divisible among his creditors shall not comprise
>
> (a) property held by the bankrupt in trust for any other person.
>
> [Emphasis added]

59. In short, a party who benefits from a trust is entitled to be treated as a secured creditor only if it is the beneficiary of a conventional trust created to act as a security.

6.2.2.2.2 Application of the principles set out by the Supreme Court of Canada in *British Columbia v. Henfrey Samson Belair Ltd.* and in *Husky Oil Operation* v. *M.R.N.*

Even if *Indalex* shall surely be considered as providing some indices on how the issues raised in the present matter can be resolved, some other decisions issued by the Supreme Court previously shall also be considered. In an article by Sellers et al[27], the authors point to the fact that a certain ambiguity has been created by the Supreme Court's failure to reconcile Indalex with its prior case law:

> Beyond the priority ruling discussed above, the Supreme Court (by a majority of 4-3 in split decisions) affirmed the expansion of the scope of the statutory deemed trust contained in the *OPBA* in respect of a pension plan being wound-up to include the entire wind-up deficiency of the pension plan--not just unpaid amortized special payments due to be paid at the time of winding-up. In Justice Deschamps' reasons, this finding was based upon statutory interpretation, the broadening scope of the deemed trust protection in the legislative history of the *OPBA* and the remedial purpose of the *OPBA* deemed trust provisions--to protect the interests of plan beneficiaries. However, the Supreme Court did not comment on its prior decisions requiring that there be a "trust in fact" to support the enforceability of such provincial statutory deemed trusts (see, for example: *British Columbia v. Henfrey Samson Belair Ltd.*). It therefore remains to be seen how the courts will reconcile such prior decisions with the decision in *Indalex.*
>
> […]

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[27] "Aftermath-in the Wake of the Indalex Decision", Banking & Finance Law Review, November, 2013 **(Tab 11)**

> While the decision of the Supreme Court in *Indalex* provided important clarification on the priority of DIP loans and the scope and timing of a specific provincial statutory deemed trust, some uncertainty and ambiguity remains in reconciling the Supreme Court's decision in *Indalex* with prior case law, the 2009 Amendments and the dual roles of plan sponsor and plan administrator held by many employers.

60. In the matter of *British Columbia v. Henfrey Samson Belair Ltd.,*[28] the Supreme Court of Canada had to decide if the deemed trust created by Section 18 of *the Social Service Tax Act* applied in a bankruptcy context.

61. The following excerpts of this decision are relevant for our purposes:

> 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).
>
> (…)
>
> 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*.
>
> (…)
>
> 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.
>
> 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

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[28] *British Columbia v. Henfrey Samson Belair Ltd*., [1989] 2 S.C.R. 24 **(Tab 12)**

> property impressed with a trust can be identified are formidable and defy fairness and common sense.
>
> (…)
>
> 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*.

62. On the basis of the doctrine of federal paramountcy, we respectfully submit that neither the Province of Newfoundland nor the Province of Québec can, by the creation of a deemed trust pursuant to sections 32 NPBA or 49 SPPA, create a right that would allow provincially created trusts to rank above the claims of secured creditors, as they are defined in the federal CCAA.

63. It is to be noted that the findings made by the Supreme Court in *British Columbia v. Henfrey Samson Belair Ltd.* were also followed with approbation by the Supreme Court of Canada in the matter of *Husky Oil Operations Ltd. v. M.R.N.*[29] This decision stands for the principle that a province cannot attempt to "jump the queue" by defining at its will in its laws terms such as "secured creditor" or "trust."

64. More specifically, the Court expressed the following views in *Husky Oil*:

> 10. In recent years, the constitutional relationship between the scheme of distribution under the *Bankruptcy Act* and various branches of provincial law governing property has received heightened scrutiny in the so-called "quartet" of decisions of this Court. Since my interpretation of the quartet differs from Iacobucci J.'s, I hope that I will be forgiven for re-canvassing that familiar terrain in order to explain the basis of my position.
>
> 23. Finally, in *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24, at issue was whether the deemed statutory trust created by s. 18 of the British Columbia *Social Service Tax Act*, R.S.B.C. 1979, c. 388, in favour of the province for provincial sales tax collected was a valid trust within the meaning of s. 47(*a*) (now s. 67(*a*)) of the *Bankruptcy Act*. Section 47(*a*) exempted "property held by the bankrupt in trust for any other person" from "[t]he property of a bankrupt divisible among his creditors". A majority of the Court ruled that this deemed statutory trust was not a valid trust. Instead, the province's claim for the monies collected under the purported trust was really a Crown preferred claim under s. 107(1)(*j*) of the *Bankruptcy Act*, which covered "claims of the Crown ... in right of Canada or of any province".
>
> 24. Speaking for the majority, McLachlin J. noted at p. 30 that the impugned deemed statutory trust lacked the essential attributes of a trust under general principles of trust law, namely the possibility of being identified and traced. She stated at p. 33:

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[29] *Husky Oil Operations Ltd. v. M.R.N.*, [1995] 3 R.C.S. 453 **(Tab 13)**.

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.

27. McLachlin J. also addressed the province's contention that it remained sovereign over the definition of what constitutes a trust. She made the following important observations at p. 35:

The province ... 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.

32. The quartet is better stated, in my view, as standing for a number of related propositions which are themselves part of a consistent philosophy. In their lucid and thorough study of the quartet, "The Conflict Between Canadian Provincial Personal Property Security Acts and the Federal Bankruptcy Act: The War is Over" (1992), 71 Can. Bar Rev. 77, at pp. 78-79, Andrew J. Roman and M. Jasmine Sweatman state that the quartet stands for the following four propositions:

(1) provinces cannot create priorities between creditors or change the scheme of distribution on bankruptcy under s. 136(1) of the Bankruptcy Act;

(2) while provincial legislation may validly affect priorities in a non-bankruptcy situation, once bankruptcy has occurred section 136(1) of the Bankruptcy Act determines the status and priority of the claims specifically dealt with in that section;

(3) if the provinces could create their own priorities or affect priorities under the Bankruptcy Act this would invite a different scheme of distribution on bankruptcy from province to province, an unacceptable situation; and

(4) the definition of terms such as "secured creditor", if defined under the Bankruptcy Act, must be interpreted in bankruptcy cases as defined by the federal Parliament, not the provincial legislatures. Provinces cannot affect how such terms are defined for purposes of the Bankruptcy Act.

35. As a result, the "jump the queue" or "directly improve bankruptcy priorities" approach captures only part of the reasoning of the quartet. As Roman and Sweatman noted, in the *Deloitte Haskins* and *Henfrey Samson* cases, for example, the provinces were not directly or intentionally attempting to influence bankruptcy priorities. Rather, the provinces enacted laws of general application which sought to create a general priority not necessarily targeted to bankruptcy, but which had the effect of altering bankruptcy priorities. This Court nevertheless ruled that such provincial laws were inapplicable in the event of bankruptcy.

38. In this regard, I agree with Iacobucci J., at para. 147, that a bankruptcy priority is a category, and also that provincial law may result in the content of such categories being different from province to province. However, provincial law does not and cannot define the content of bankruptcy priorities or categories without limitation. Indeed, crucial limitation is imposed by the order of priorities in the *Bankruptcy Act* itself. Thus, while individual provinces can define and rank

> categories such as "secured creditor" and "trust" as they each have their own purposes, those provincial laws which enter into conflict with the provisions of the *Bankruptcy Act* are simply without application in bankruptcy. Such, indeed, was this Court's unequivocal holding in *Re Bourgault*, *Deloitte Haskins*, and *FBDB* with respect to "secured creditors" and in *Henfrey Samson* with respect to "trusts".
>
> 39. Finally, I would observe that while in agreement with the above four propositions as embodying the reasoning of the quartet, in my view the list would be more complete with the addition of a fifth and sixth, as follows:
>
> (5) in determining the relationship between provincial legislation and the Bankruptcy Act, the form of the provincial interest created must not be allowed to triumph over its substance. The provinces are not entitled to do indirectly what they are prohibited from doing directly;
>
> (6)there need not be any provincial intention to intrude into the exclusive federal sphere of bankruptcy and to conflict with the order of priorities of the *Bankruptcy Act* in order to render the provincial law inapplicable. It is sufficient that the effect of provincial legislation is to do so.
>
> 44. This last observation is also an important additional reason why I respectfully believe that it is inaccurate to interpret the quartet as only prohibiting legislation which "directly improves the priority of a claim". Such a characterization suggests that the quartet was concerned with the validity of the impugned laws. However, if the provinces had been attempting to improve the priority of their claims in bankruptcy directly, presumably this Court would simply have declared their laws to be ultra vires and invalid for being in relation to an exclusive federal matter, and no question of applicability or operability would ever have arisen.
>
> [Emphasis added]

65. The Court of Appeal of Québec has adopted the same reasoning on numerous occasions. First, in *9083-4185 Québec Inc. (Syndic de)*[30]:

> *"**2. La fongibilité ou les conditions de revendication d'une somme identifiée.***
>
> *"[57] L'argument du sous-ministre selon lequel la Couronne serait en tout temps demeurée propriétaire des taxes à percevoir par le failli n'est pas nouveau lui non plus et a déjà été rejeté par la Cour suprême du Canada.*
>
> *[58] Dans l'affaire Colombie-Britannique c. Henfrey Samson Belair, en effet, le ministère du Revenu provincial plaidait que le failli détenait en fiducie, pour le compte de la Couronne, la taxe qu'il devait percevoir et donc, que les montants concernés étaient exclus des biens de la faillite. La Cour suprême a rejeté cette prétention en ces termes :*
>
> > *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*

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30 *9083-4185 Québec Inc. (Syndic de)*, 2007 QCCA 1837 **(Tab 14)**.

> *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,…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.*
>
> *[. . .]*
>
> *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…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.*

Comme le démontre l'extrait suivant, la solution n'est pas différente en droit civil :

> *Comme chacun sait l'argent est un bien fongible. Pour en revendiquer la propriété, il faut qu'il soit clairement identifiable. Il ne suffit pas qu'il soit simplement quantifiable. Notre Cour l'a déjà dit à plus d'une reprise.*

[59] Il faut conclure dès lors qu'« à compter du moment où les fonds sont entremêlés avec tous les autres fonds dans un compte, ils ne sont plus identifiables et le mandant ne peut plus faire valoir son droit de propriété».

[60] L'on sait de plus que la TPS et la TVQ n'ont pas à être indiquées séparément sur les factures du fournisseur. Ce dernier a le droit de vendre un bien à un prix global qui inclut la TPS et la TVQ, ce qui rend difficile la conceptualisation du droit de propriété réel dans une somme d'argent spécifique dont se réclame le ministre du Revenu, la TPS et la TVQ étant au départ confondues dans la créance du détaillant.

[61] Il peut également arriver que les montants de taxe que le détaillant aura déjà remis au ministre comme la loi l'y oblige ne soient jamais perçus par lui. Il devient impossible de concevoir un droit de propriété du ministre dans une somme d'argent qui, non seulement lui a déjà été remise par le détaillant percepteur, mais ne se matérialisera jamais dans les mains de ce dernier.

[62] Les présents dossiers présentent plusieurs similitudes avec l'affaire British Columbia c. National Bank, communément appelée Red Carpet.

[63] La loi provinciale concernée, intitulée le Tobacco Tax Act, faisait de chaque détaillant un agent percepteur du ministre. En première instance, le juge, citant lui-même le juge Barr dans 423092 Ontario Ltd. v. Minister of National Revenue, avait qualifié la taxe en question de «direct tax…collected indirectly».

[64] Le juge Hollinrake, écrivant pour la Cour d'appel de Colombie-Britannique, s'exprime ainsi sur l'aspect de la fongibilité :

> *I think the trial judge was right in saying the sum of $31,017.57 the Crown seeks to recover is not the tax paid and collected from the consumer upon the tobacco products included in the four*

> *invoices, but funds which are a substitute for that tax. (soulignements ajoutés)*

[65] Plus loin, il ajoute :

> *In the case before us, in my opinion, the tracing exercise must logically commence from the time the moneys could arguably be said to be the Crown's moneys. This must be at the time the tobacco tax is collected […]. The Crown argues that when Red Carpet is paid for its invoices by SDM the amount of those invoices which can be calculated to be attributable to tobacco tax is the starting point for the tracing exercise. This calculated amount is still "tax" as defined by the Act but can it be said to be identifiable as the actual tax paid over by the consumer at the time of purchase of the tobacco product from SDM? There is a difference between calculating what one is owed over a set period of time as opposed to tracing the funds that initially represented that debt in the form of money in the hands of the debtor. (Soulignements ajoutés)*

[66] Le juge Hollingrake ajoute encore :

> *With SDM and Red Carpet having intermingled the "tax money" with all their other funds, and the time frame being as it is, I cannot see how this "tax money" could possibly be identified to permit successful tracing.*

[67] Le même raisonnement s'applique en l'instance.

[68] Le schème législatif de perception de la TPS et de la TVQ ne permet donc pas d'envisager la Couronne comme la propriétaire d'un droit réel dans les montants d'argent perçus ou percevables à ce titre.

3. L'effet de la compétence fédérale exclusive en matière de faillite.

[69] La troisième et dernière sous-question à trancher est celle du droit de la province de se conférer, en cas de faillite, une priorité qui soit différente de l'ordre de collocation prévu par la LFI.

[70] Tel que vu précédemment au cours de l'analyse de la première sous-question, l'intention claire et nette du législateur fédéral était de faire de la TPS et de la TVQ, en cas de faillite, des créances ordinaires.

[71] Lors de la faillite, la LFI a priorité sur toute autre loi incompatible. Ce sont les règles de distribution de son article 136 qui prévalent. Il est bien établi que les provinces ne peuvent «établir leur propre ordre de priorité applicable à la Loi sur la faillite», ce qui ouvrirait «la porte à l'établissement de régimes de répartition en cas de faillite différents d'une province à l'autre».

[72] Dans l'affaire Deloitte Haskins & Sells c. Workers' Compensation Board, la Cour suprême confirme qu'une loi provinciale ne peut écarter le plan de répartition prévu à la loi fédérale :

> *Avec égards, dans les arrêts Re Bourgault 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 [dans] 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, [la Loi sur la faillite] déterminait le statut et la priorité des réclamations…*

[73] Le principe a été réaffirmé dans Banque fédérale de développement c. Québec (CSST) et dans l'affaire Colombie-Britannique c. Henfrey Samson Belair Ltd., précitée, où la Cour suprême ajoutait ceci:

> *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 la Loi sur la faillite…(soulignements ajoutés)*

[74] La préoccupation de la Cour suprême, maintes fois réitérée, est d'éviter la balkanisation du régime de la faillite et de l'insolvabilité à travers les provinces et territoires du Canada :

> *…notre Cour s'est, avec raison, constamment intéressée à l'objectif du maintien d'un ordre de priorité homogène à l'échelle nationale en matière de faillite. Si ce n'était pas le cas, «le Canada [aurait] un régime de faillite balkanisé qui diminue[rait] l'importance de la compétence fédérale exclusive en matière de faillite et d'insolvabilité [. . .] Il pourrait exister un régime différent dans chaque province; l'existence de dix régimes différents en matière de faillite rendrait les activités commerciales courantes extrêmement complexes, lourdes et coûteuses, non seulement pour les Canadiens mais aussi pour nos partenaires commerciaux internationaux». (Soulignements ajoutés)*

*[75] Il en résulte que les législatures provinciales peuvent conférer une priorité à leurs taxes dans un contexte **hors faillite**, mais qu'en cas de faillite, il leur est constitutionnellement interdit de contrecarrer les dispositions de la LFI.*

> *Les lois provinciales qui entrent en conflit avec les dispositions de la Loi sur la faillite sont tout simplement inapplicables en matière de faillite."*

66. The Court of Appeal, made comments to a similar effect in *Québec (Sous-ministre du Revenu c. De Courval*[31]:

> *[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 :*

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[31] *Québec (Sous-ministre du Revenu c. De Courval*, 2009 QCCA 409 **(Tab 15)**.

> *[…] 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 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 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 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.*

67. Finally, in 2010, the Court of Appeal of Québec made the following comments in *Corporation Jetsgo (Syndic de)*[32]:

> *[54] La juge de première instance cite avec approbation la décision du juge Clément Gascon dans l'affaire Les Boutiques San Francisco Inc. c. Claudel Lingerie Inc. :*
>
> > *[…] Comme chacun sait, l'argent est un bien fongible. Pour en revendiquer la propriété, il faut qu'il soit clairement identifiable. Il ne suffit pas qu'il soit simplement quantifiable. Notre Cour l'a déjà dit à plus d'une reprise.*
>
> *[55] La Cour suprême a énoncé ce principe dès 1989 dans l'arrêt British Columbia c. Henfrey Samson Bélair Ltd. Dans cette affaire, le vendeur avait perçu la taxe provinciale de vente et avait confondu ces sommes avec ses autres revenus. Bien qu'il paraisse incontestable que ces sommes n'appartenaient pas à la faillie, la Cour suprême conclut que, les sommes ayant été confondues avec les autres avoirs de la faillie, le fisc ne pouvait en réclamer la propriété en vertu d'une fiducie de common law. La juge McLachlin, alors juge puînée, écrit :*
>
> > *[…] 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. 47a). La province a une créance garantie seulement par un privilège et l'al. 107(1)j) s'applique.*

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32 *Corporation Jetsgo (Syndic de*), 2010 QCCA 1286. **(Tab 16)**.

> *[…]*
>
> *[…] 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. […]*

[56] Récemment, cette Cour, dans l'affaire 9083-4185 Québec inc. (Syndic de), a réitéré ce principe. La juge Duval Hesler, reprenant les propos de la professeure Louise Lalonde, écrit :

> *[59] Il faut conclure dès lors qu'«à compter du moment où les fonds sont entremêlés avec tous les autres fonds dans un compte, ils ne sont plus identifiables et le mandant ne peut plus faire valoir son droit de propriété».*

[57] Toujours dans cet arrêt, la juge Duval Hesler cite l'affaire British Columbia c. National Bank, communément appelée Red Carpet. Dans cet arrêt, le juge Hollingrake de la Cour d'appel de Colombie-Britannique écrit :

> *[52] […] There is a difference between calculating what one is owed over a set period of time as opposed to tracing the funds that initially represented that debt in the form of money in the hands of the debtor.*
>
> *[…]*
>
> *[56] With SDM and Red Carpet having intermingled the "tax money" with all their other funds, and the time frame being as it is, I cannot see how this "tax money" could possibly be identified to permit successful tracing.*

[58] De nouveau, il s'agissait de la perception de taxes et on ne pouvait prétendre que la faillie était propriétaire des sommes ainsi perçues au nom du gouvernement.

[59] Dans le même sens, on peut citer la décision de la Cour d'appel d'Ontario dans l'affaire Graphicshoppe Ltd. dans laquelle les employés tentaient de recouvrer leurs contributions à leur pension que Graphicshoppe avait confondue avec ses fonds dans un seul compte de banque avant sa faillite. Comme en l'espèce, ces contributions au régime de pension étaient déduites du salaire des employés. Pour la majorité, le juge Moldaver écrit :

> *[120] Shortly thereafter however, the trust ceased to be identifiable. The employee contributions were co-mingled with Graphicshoppe's funds and prior to the date of bankruptcy, they were converted into other property and were no longer traceable. On this point, it is clear from the record that as of the date of bankruptcy, none of the employee contributions that had been deposited into Graphicshoppe's bank account remained intact. We know that with certainty because prior to the date of bankruptcy, the account went into a negative balance. We likewise know that the funds in the account on the date of bankruptcy came from Textron, the company that was factoring Graphicshoppe's receivables. Replenishment is a non-issue on the facts before us.*
>
> *[121] Against that backdrop, the central issue on appeal is whether the trustee in bankruptcy was correct in concluding that*

> *the employee contributions, did not constitute trust funds at the date of bankruptcy within the meaning of s. 67(1)(a) of the BIA. With respect, I believe that he has.*
>
> *[122] On the facts of this case, I am of the view that McLachlin J.'s majority decision in British Colombia v. Henfrey Samson Belair Ltd., 1989 CanLII 43 (CSC), [1989] 2 S.C.R. 24 (S.C.C.) ("Henfrey Samson"), vindicates the position taken by the trustee in bankruptcy. My colleague has reviewed the salient facts of the case and they need not be repeated. The passages that I consider to be apposite are found at pp. 741 and 742. They are reproduced below:*
>
> *[…]*
>
> *[123] For present purposes, I am prepared to accept that Henfrey Samson falls short of holding that co-mingling of trust and other funds is, by itself, fatal to the application of s. 67(1)(a) of the BIA. Once however, the trust funds have been converted into property that cannot be traced, that is fatal. And that is what occurred here.*
>
> *[60] L'avocat de SSQ plaide que contrairement à l'affaire Graphicshoppe Ltd, le compte de banque n'a jamais affiché un solde négatif durant la période pertinente. Cela est exact, mais ne règle pas la question de confusion des sommes déposées dans le compte de revenus."*

68. The following findings of the British Columbia Court of Appeal,[33] in what is often referred as the "Red Carpet" decision, are also relevant:

> 29 The position of the Crown generally is that its right to what it asserts are tobacco tax moneys arises from:
>
> > 1. Trust. The Crown says the three requirements of certainty of intention, subject matter and object are met. As to intention, the Crown says this comes expressly from s. 15 of the Act or alternatively it can be implied. As to subject matter the Crown says this has been established in the calculation of the figure of $31,017.57. The object of the trust is clear on its face.
> >
> > 2. The relationship between the Crown and Red Carpet under the *Tobacco Tax Act* was one of principal and agent. An agent owes fiduciary duties in equity to his principal. Equity thus being invoked, it is open to the Crown to trace the sum of $31,017.57 into the hands of the Bay and thus assert a constructive trust or equitable lien over these funds. See: P.D. Maddaugh and J.D. McCamus, *The Law of Restitution,* Canada Law Book Inc., 1990, p. 127.
> >
> > 3. The Bay has been unjustly enriched in the sum of $31,017.57 and that being so the Court should impose a constructive trust over that fund now being held in trust.

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[33] *British Columbia v. National Bank of Canada,* 1994 CarswellBC 639 **(Tab 17)**.

> 31 The starting point here is *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24. The chambers judge referred to this case at the outset of her reasons and went on to say at p. 38 (B.C.L.R.):
>
> > There, the Supreme Court of Canada held that a "deemed" trust created by statute in favour of the provincial Crown was not a "trust" for purposes of s. 67 of the *Bankruptcy Act*, R.S.C. 1985, c. B-3, and therefore did not exempt the subject-matter of the trust from the normal scheme of distribution established under the Act. Here, the question is whether, under the "administrative scheme" established by the Province of British Columbia for the collection of tax under the *Tobacco Tax Act*, a non-statutory or "ordinary" trust existed for the benefit of the Provincial Crown in respect of funds paid by tobacco retailers to the receiver of accounts of a wholesaler of tobacco products. The wholesaler is now bankrupt. If such a trust existed, or if a constructive trust is created, the funds so paid will fall outside the estate of the bankrupt in accordance with s. 67 of the *Bankruptcy Act* and may be traced or followed into the defendants' hands. If no such trust existed, and if none is constructed as a remedy for unjust enrichment, the Crown's claim against the defendants must fail and the Crown may be limited to its recourse against the bankrupt estate. I suspect that this recourse is likely to be fruitless.
>
> 33 As I read the judgment of McLachlin J. the underlying principle leading to her conclusions is that the provinces cannot legislate within their own spheres of activity such as "to create their own priorities under the *Bankruptcy Act* and to write a differential scheme of distribution on bankruptcy from province to province."
>
> 36 With respect, I do not think the Crown can rely on the statute to create the facts necessary to establish a trust under general principles of trust law. I think this would be contrary to the underlying principle in *Henfrey Samson*. That principle being that the province cannot legislate to, in effect, create its own priorities contrary to those in the *Bankruptcy Act*. If the province cannot deem a trust in order to accomplish this I cannot see how it can by legislation create facts through that legislation to accomplish the same end.

69. The qualification of the beneficiary of a trust as a secured creditor would entail a more favorable treatment in a CCAA context and bring with it several favorable consequences. Thus, it is obvious that allowing each of the provinces or territories to create its own definition of a secured creditor could only create chaos. The following provisions of the CCAA are indicative of the distinct and more favorable treatment granted to secured creditors in a CCAA context:

> 4. Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.
>
> 5. Where a compromise or an arrangement is <u>proposed between a debtor company and its secured creditors</u> or any class of them, the court may, on the

> application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.
>
> 22(1) A debtor company may divide its creditors into classes for the purpose of a meeting to be held under section 4 or 5 in respect of a compromise or arrangement relating to the company and, if it does so, it is to apply to the court for approval of the division before the meeting is held.
>
> (2) For the purpose of subsection (1), creditors may be included in the same class if their interests or rights are sufficiently similar to give them a commonality of interest, taking into account
>
> (a) the nature of the debts, liabilities or obligations giving rise to their claims;
>
> (b) the nature and rank of any security in respect of their claims;
>
> (c) the remedies available to the creditors in the absence of the compromise or arrangement being sanctioned, and the extent to which the creditors would recover their claims by exercising those remedies; and
>
> (d) any further criteria, consistent with those set out in paragraphs (a) to (c), that are prescribed.[34]
>
> [Emphasis added]

70. The significance of the qualification of the pension claims as secured or unsecured in the present matter is obvious. Either the pension claims shall be treated as unsecured creditors and they will then have to vote on a future plan with all other unsecured creditors or they shall be treated as secured creditors and they shall then, pursuant to section 5 and 22(2)b, vote in a distinct class. If the latter option was to prevail, the pension claimants would then benefit from a form of veto right on any plan. The same reasoning would apply if one was to argue that, as beneficiary of a deemed trust, an amount equal to the amount of its claim should be carved out from the monies otherwise available to fund a plan for all the other creditors.

71. In light of the above, it is clear that giving effect to section 32 NPBA and 49 SPPA would create a direct conflict with the CCAA.

72. On that point, the CCAA Parties respectfully submit that the statement made in *Timminco*[35] to the effect that the issue of federal paramountcy is not triggered by the application of the deemed trust created by section 49 SPPA does not take into account the principles set out by the Supreme Court in *Husky Oil.*

73. The sole exceptions to the non-applicability of deemed trusts in an insolvency context are the exceptions set out in sections 67(3) BIA and 37 CCAA. Section 32 NPBA and section 49 SPPA do not fall within these exceptions.

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[34] *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36.

[35] *Timminco (In the matter of the Plan of Arrangement),* 2014 QCCS 174, at paras. 163 and 171 **(Tab 18)**.

74. Although the CCAA does not include a scheme of distribution that is as elaborated as the one that can be found in the BIA, the CCAA nevertheless distinguishes between unsecured creditors, secured creditors and the beneficiaries of a trust.

75. Even if no conflict existed, and it were possible to comply with both laws at the same time, the provincial laws nevertheless frustrate the federal purpose. To allow such pension claims to outrank secured creditors would frustrate the purpose of the CCAA. As appears from the reasons of Justice Deschamps in *Sun Indalex Finance*, Parliament explicitly chose not extend greater protections to pension claims, as such protections would necessarily reduce the moneys available for distribution to creditors, which would frustrate credit availability and the cost of credit.[36] Parliament, in exercising its jurisdiction in matters of bankruptcy and insolvency, deliberately chose to favour the availability of credit. Such a decision is consistent with one of the fundamental purposes of the CCAA, that is, to allow distressed companies the opportunity to refinance and restructure. To allow provincial legislation to expand the definition of secured creditor, in a sense that Parliament explicitly chose not to, would frustrate Parliament's purpose of ensuring that there is credit available to allow for effective restructuring.

7. FOR A DEEMED TRUST TO APPLY IN A CCAA CONTEXT, MUST A LIQUIDATION HAVE OCCURRED?

76. Both sections 32(2) NPBA and 8(2) PBSA begin by the same words: "In the event of any liquidation, assignment or bankruptcy of an insolvent corporation…"

77. In its judgment of June 26, 2015, this Court issued the following statements with respect to the interpretation of the term "liquidation" as it is used in these two provisions.

> [68] The issue of the triggering event could be determinative in the present case. If the triggering event has not occurred, then there is no deemed trust and no obstacle to the Court granting the priority required by the Interim Lender.
>
> [69] It is clear that there has been no assignment or bankruptcy in the present matter. Further, there is no liquidation under Part XVIII of the Canada Business Corporations Act or equivalent provincial legislation. A CCAA proceeding does not appear to trigger the application of Section 8(2) PBSA. However, OSFI argues that these CCAA proceedings are really a liquidation, because it is very likely that the ongoing sale process will result in the sale of all of the assets of the Wabush CCAA Parties.
>
> [70] In interpreting the word "liquidation" in Section 8(2) PBSA, and in particular whether it includes a liquidation under the CCAA, the Court will consider more generally how the deemed trust under Section 8(2) PBSA is dealt with under the CCAA.
>
> [79] In the alternative, the Court could conclude that a liquidation under the CCAA does not fall within the term "liquidation" in Section 8(2) PBSA such that there has been no triggering event.

78. Two approaches can be taken to interpreting the term "liquidation." On one side, it can be interpreted by referring to its plain meaning. On the other, it could be interpreted as

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[36] *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R, para. 81 **(Tab 2)**.

having the same meaning as in other acts enacted by the same legislator. The CCAA Parties suggest that it is the second option that should prevail.

79. Laws enacted by the same legislator shall be interpreted coherently, as a whole:

> *1269. On suppose qu'il règne, entre les divers textes législatifs adoptés par une même harmonie, la même harmonie que celle que l'on trouve entre les divers éléments d'une loi : l'ensemble des lois est censé former un tout cohérent.*[37] *L'interprète doit donc favoriser l'harmonisation des lois entre elles plutôt que leur contradiction, car le sens de la loi qui produit l'harmonie avec les autres lois est réputé représenter plus fidèlement la pensée de son auteur que celui qui produit des antinomies.*
>
> *1276. En résumé donc, la présomption de cohérence entre lois connexes vaut surtout pour les lois émanant d'un même législateur. Elle s'appliquerait néanmoins entre lois issues de deux législateurs différents dans la mesure où il serait possible d'inférer des circonstances une volonté d'un des auteurs d'imiter la forme ou de tenir compte de la substance de l'autre législation.*[38]
>
> ---
>
> 8.32 It is presumed that the legislature uses language carefully and consistently so that within a statute or other legislative instrument the same words have the same meaning and different words have different meanings. Another way of understanding this presumption is to say that the legislature is presumed to avoid stylistic variation. Once a particular way of expressing a meaning has been adopted, it is used each time that meaning is intended. Given this practice, it follows that where a different form of expression is used, a different meaning is intended.
>
> 8.33 The presumption of consistent expression applies not only within statutes but across statutes as well, especially statutes or provisions dealing with the same subject matter.[39]

80. With respect to the meaning of the word "liquidation" in section 8(2) PBSA, we submit that it refers to the meaning of this term given in section XVIII of the *Canada Business Corporation Act* ("**CBCA**") while the same term used in Section 32(2) NPBA, refers to a liquidation conducted pursuant to Part XVI of the *Newfoundland Corporation Act.*[40]

81. It is to be noted that, pursuant to Section 208 CBCA, a liquidation cannot be conducted for a corporation that is insolvent or bankrupt. The same exclusion applies in Newfoundland for liquidation to be conducted pursuant to the *Newfoundland Corporation Act.*[41]

82. The existence of Section 208 CBCA and 330 *Newfoundland Corporation Act* has, in our view, inspired the drafting of sections 8(2) PBSA and 32(2) NPBA in order to cover two

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37 See Mr. Justice Bastarache's statement in *65302 British Columbia Ltd. c. Canada* [1999] 3 S.R.C. 804, para. 7 **(Tab 19)**.

38 Pierre-André Côté, *Interprétation des lois*, 4e édition, Les Éditions Thémis, 2009 **(Tab 20)**.

39 Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th edition, LexisNexis, 2014 **(Tab 21)**.

40 *Newfoundland Corporation Act*, RSNL 1990, chap. C-36.

41 Section 330, *Newfoundland Corporation Act*, RSNL 1990, chap. C-36.

mutually exclusive situations, i.e. on one side, a situation where a company would be liquidated pursuant to either the federal or the provincial Corporation Act and, on the other, a situation where a company has become the object of bankruptcy proceedings, either voluntarily or at its creditors' initiative.

8. IF A DEEMED TRUST HAS BEEN VALIDLY CREATED PURSUANT TO THE NPBA AND APPLIES IN A CCAA CONTEXT, CAN IT EXTEND TO ASSETS LOCATED IN QUEBEC?

83. The funds that are currently being held in trust by the Monitor in this matter have been generated by the sale of two main types of assets, movable and immovable.

84. The immovable property included the Bloom Lake Iron Ore Mine, the Arnaud Railway Company and the Pointe-Noire facilities.

85. With respect to movable assets, numerous pieces of equipment have been sold to third parties.

86. Both the movable equipment and immovable property were located in the province of Québec.

87. Article 3097 of the *Civil Code of Québec* sets out the conflict of law rules applicable to real rights. It reads as follows:

> 3097. Real rights and their publication are governed by the law of the place where the property concerned is situated.
>
> However, real rights on property in transit are governed by the law of the State of their place of destination.

88. Article 3102 provides the conflict of law rule with respect to movable securities:

> 3102. The validity of a movable security is governed by the law of the State in which the property charged with it is situated at the time of creation of the security.
>
> Publication and its effects are governed by the law of the State in which the property charged with the security is currently situated.

89. In the present case, both the validity and applicability of movable and immovable securities shall be governed by the law of the province of Québec, in light of the location of the assets at the moment where the security of the DB Plan's beneficiaries would have been created.

90. Article 2970 of the *Civil Code of Québec* creates the obligation to proceed to the publication of securities with respect to both movable and immovable property:

> 2970. Publication of rights concerning an immovable is made in the land register, in the land book for the registration division in which the immovable is situated.
>
> Rights concerning a movable and any other rights are published by registration in the register of personal and movable real rights; if the movable real right also pertains to an immovable, registration shall also be made in the land register in

> accordance with the standards applicable to that register and determined by this Book or by the regulations under this Book.

91. Thus, in the absence of another Québec law provision that would contradict article 2970, we believe that the deemed trusts created by Section 32(2) NPBA, which were never published, shall be considered to have no effect in Québec.

9. SPECIFIC REPLIES TO THE ARGUMENTS RAISED IN THE OUTLINE OF ARGUMENTS OF THE OTHER PARTIES

9.1 Superintendent of Financial Institution

92. At paragraph 17 of its Outline of Arguments, OSFI has summarized the amount that would be payable in respect of the Plans.

93. In its conclusion, OSFI seeks a declaration to the effect that an amount of $8,857,576 shall be subject to a deemed trust created by section 8 of the PBSA. This argument is manifestly ill-founded in fact.

94. As stated above, only 80 of the 2,388 Plan members would be subject to federal jurisdiction (i.e. 3.33% of the Plans' members).

95. This being the case, and inasmuch as the deemed trust created by section 8(2) PBSA could apply in the present circumstances, that could be secured by the federal deemed trust can only be calculated on a *pro rata* basis. We estimated the amount of the federal deemed trust to be of $294,957 which would represent 3.33% of $8,857,576.[42]

96. At paragraph 25 of its Outline of Arguments, OSFI states that since the CCAA does not contain a scheme of distribution, unlike the BIA, the CCAA does not contain a priority plan.

97. On this basis, OSFI affirms that there could not be conflict between the application of a deemed trust created pursuant to the PBSA and the CCAA.

98. We believe that this argument is manifestly ill-founded in law. Although the CCAA does not include a scheme of distribution that is as elaborated as the one that can be found in the BIA, the CCAA nevertheless distinguishes between unsecured creditors, secured creditors and the beneficiaries of a trust.

99. This being the case, it is not possible for a province to circumvent the order of collocation elaborated in the CCAA through the creation of a trust.

100. Indeed, the federal government could not do so either with respect to its own claim, in light of the wording of section 37 CCAA, which states the following:

> 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

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[42] Please note that a precise calculation to be performed by an actuary would be required to confirm the amount that could potentially be secured by a deemed trust.

> 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.

101. Even if one was to argue that, in this case, the deemed trust created by 8(2) PBSA is not in favour of the Crown, the statement made by Justice Fish in *Century Services*[43] is nevertheless instructive and applicable in this respect:

> [95] Parliament has in recent years given detailed consideration to the Canadian insolvency scheme. It has declined to amend the provisions at issue in this case. Ours is not to wonder why, but rather to treat Parliament's preservation of the relevant provisions as a deliberate exercise of the legislative discretion that is Parliament's alone. With respect, I reject any suggestion that we should instead characterize the apparent conflict between s. 18.3(1) (now s. 37(1)) of the *CCAA* and s. 222 of the *ETA* as a drafting anomaly or statutory lacuna properly subject to judicial correction or repair.
>
> [96] In the context of the Canadian insolvency regime, a deemed trust will be found to exist only where two complementary elements co-exist: first, a statutory provision creating the trust; and second, a *CCAA* or *Bankruptcy and Insolvency Ac*t, R.S.C. 1985, c. B-3 ("*BIA*") provision *confirming* — or explicitly preserving — its effective operation.

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43 *Century Services Inc. v. Canada (Attorney General),* [2010] 3 S.C.R. 379, 2010 SCC 60 (**Tab 4**).

9.2 Representatives of the Salaried/Non-Union Employees and Retirees

102. In paragraphs 64 to 79 of their Outline, the Representatives attempt to extend the application of the NPBA to all the members of the Salaried DB Plan by stating that, despite the fact that the Newfoundland government has not become a party to the 2011 Agreement Respecting Multi-Jurisdictional Pension Plans or to the 2016 Agreement Respecting Multi-Jurisdictional Pension Plans, these two agreements would be an indication of the Province of Québec's intent to accept that the jurisdiction of a Majority Authority shall extend to all the rules applicable to the funding of a terminated pension plan, including in respect of the personal rights of members located in Québec.

103. It is to be noted that this argument is contradicted by the position adopted by Retraite Québec. Moreover, it is also ill-founded in fact.

104. First, according to the affidavit filed by Mr. Terence Watt,[44] one of the Salaried Representatives, there are 329 employees who worked in Québec in the Salaried DB Plan, while 313 employees worked in Newfoundland. Thus, given that the majority of employees were located in Québec, the Majority Authority for this pension plan is Québec.

105. Also, it must be noted that deemed trusts provisions arguably confer a personal right to plan members, in that such trusts allow for an additional part of a member's benefits to be paid further to a plan wind-up.

106. On that issue, it is also relevant to refer to *Régie des Rentes du Québec v. Commission des régimes de retraite de l'Ontario.*[45] In this matter, the Régie des rentes du Québec sought judicial review of a decision by the Pension Commission of Ontario with respect to the procedure to follow in respect of the allocation of surplus amounts in a multijurisdictional pension plan. The Régie argued that, while Québec was only a "minor authority" because the majority of members were in Ontario, the termination process to be followed and allocation of surplus assets nevertheless had to be performed in accordance with the provisions of the SPPA (Québec), at least with respect to Québec members and beneficiaries. The Divisional Court granted judicial review on the grounds that the decision not to apply the SPPA to the Québec members was neither correct, nor reasonable.

107. In paragraph 80 of their Outline, the Salaried Representatives argue that the NPBA should also apply to the members that were employed at Arnaud Railway.

108. In support of their argument, the Salaried Representatives refer to the so-called theory of "reverse paramountcy." This argument is manifestly ill-founded in law as it is specifically contradicted by section 5 of the NPBA:

> 5. This Act applies to all pension plans for persons employed in the province, except those pension plans to which an Act of the Parliament of Canada applies.

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44 Affidavit of Terence Watt, sworn on December 14, 2016, at para 16 **(Tab 1)**.

45 *Régie des Rentes du Québec v. Commission des régimes de retraite de l'Ontario*, 2000 CanLII 30139, para. 61 **(Tab 22)**.

[Emphasis added]

109. In paragraphs 87 to 95 of their Outline, the Salaried Representatives argue that the word "liquidation" used in 32(2) NPBA and 8(2) PBSA should be interpreted by reference to its "plain meaning." As stated above, we do not believe that this is the proper way to interpret this word. On the contrary, we believe that the interpretation of this term shall be made by referring to similar provisions in other acts enacted by legislature of the same jurisdiction.

110. In paragraphs 151 to 159 of their Outline, the Salaried Representatives argue that the deemed trust created by section 32(2) NPBA should be applicable in Québec in light of the wording of article 1262 of the *Civil Code of Québec*.

111. While article 1262 CCQ states that it is possible to create a trust by law, it does not automatically mean that any trust created by law anywhere in the world can automatically be declared effective in the province of Québec. Section 61 of the *Interpretation Act* makes it clear that any reference to the term "law", in the *Civil Code of Québec*, refers solely to the laws in force in Québec:

> 61. In any statute, unless otherwise specially provided,
>
> […]
>
> (8) the words "Federal Parliament" mean the Parliament of Canada; the word "Legislature" or "Parliament" means the Parliament of Québec;
>
> […]
>
> (10) the words "Federal Acts" or "Federal statutes" mean the laws passed by the Parliament of Canada; the words "Act" , "statute" and "law", whenever used without qualification, mean the Acts, statutes or laws of Parliament.[46]

112. On this point, the effectiveness of a deemed trust created in another jurisdiction should then be assessed by referring to the provisions governing private international law that can be found in the *Civil Code of Québec*.

113. With respect to the application of section 3079 CCQ, a review of the case law does not permit to conclude to the applicability of this provision in the present matter.

114. Our research has not uncovered a single positive application of article 3079 CCQ. In fact, among the few reported cases on article 3079 CCQ, the Court of Appeal has refused to apply it twice.

115. In *Globe-X Management Limited (Re)*[47], Justice Clément Gascon, then of the Superior Court, applied Bahaman law to a matter of evidence. Under Bahaman law, evidence obtained by a liquidator must remain confidential. Justice Gascon applied article 3079 in finding that the examinations carried out by a liquidator could not be entered into evidence. Justice Gascon's decision was overturned by the Court of Appeal,[48] on the

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46 *Interpretation Act*, CQLR c I-16.

47 *Globe-X Management Limited (Re),* 2005 CanLII 56268 (QC CS), para. 120 and *ff*. **(Tab 23)**.

48 *Globe-X Management Ltd. (Proposition de),* 2006 QCCA 290 **(Tab 23)**.

grounds that the publicity of the court system is a matter of public concern that cannot be supplanted by Bahaman evidence law. The Court also held that:

> [44] Respondent has failed to show that there is any legitimate and manifestly preponderant interest in giving preference to the law of the Bahamas. In fact it is difficult to identify any interest based on principle. With respect, a reference to the rule of international comity, in and of itself, does not satisfy the required criteria in this case.

116. In *Banque Paribas (suisse) S.A. c. Wightman,*[49] the Court of Appeal upheld a lower court decision not to apply article 3079 CCQ in order to allow evidentiary objections based on "banking privilege" that are otherwise available under German and Swiss law.

117. In *Jovalco Group Corporation c. International Association of Bridge Structural,*[50] the question at issue was whether the Superior Court of Quebec or the Ontario Labour Relations Board had jurisdiction with respect to a grievance involving certain employees in Ontario. Again, the Court refused to apply article 3079 CCQ:

> *[67] Quant à l'article 3079 C.c.Q., il ne permet qu'exceptionnellement de donner effet à une disposition impérative de la loi d'un autre État. […]*
>
> *[68] Le Tribunal est d'avis que cette disposition ne peut trouver application en l'espèce. Selon les auteurs, il s'agit d'une disposition reconnaissant, par mesure de réciprocité en lien avec l'article 3076 C.c.Q., les dispositions des lois étrangères d'application immédiate ou nécessaire. L'article 3076 C.c.Q. prévoit en effet que les règles relatives au droit international privé s'appliquent sous réserve des règles de droit en vigueur au Québec dont l'application s'impose en raison de leur but particulier.*
>
> *[69] La notion de lois d'application nécessaire est de portée très restreinte, tel que la Cour d'appel en a fait état dans G.B. c. C.C., en la limitant aux règles qui mettent en cause l'intérêt vital de l'État ou mettent en péril l'existence même de la société et en refusant de considérer les dispositions du Code civil du Québec relatives au patrimoine familial comme étant des règles d'application nécessaire malgré qu'elles soient d'ordre public.*
>
> *[70] Les dispositions législatives ontariennes conférant une juridiction exclusive à la CRTO ne peuvent se qualifier comme dispositions d'application nécessaire compte tenu de l'interprétation donnée à cette notion et, en conséquence, l'article 3079 C.c.Q. ne permet pas de leur donner effet au Québec. Celles-ci ne peuvent donc être considérées comme excluant la compétence internationale de la Cour supérieure du Québec en l'instance.*
>
> *[71] Vu ce qui précède, si le Tribunal avait bien compétence, il lui faudrait s'en remettre aux mécanismes prévus aux articles 3135 et 3137 C.c.Q. plutôt que de retenir le moyen relatif à la juridiction exclusive de la CRTO soumis par le Syndicat.*

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49 *Banque Paribas (suisse) S.A. c. Wightman*, 1997 CanLII 10291 (QC CA) **(Tab 24)**.

50 *Jovalco Group Corporation c. International Association of Bridge Structural*, 2014 QCCS 3647 **(Tab 25)**.

118. Finally, it should be noted that Gerald Goldstein and Éthel Groffier, in *Traité de droit civil: droit international privé,*[51] expressed concern with respect to article 3079's addition to the *Civil Code*:

> *Cette innovation assez révolutionnaire est loin de faire l'unanimité. En effet, comme le souligne un auteur :*
>
> > *Un ordre juridique se montrera normalement réticent à prendre en considération une loi de police étrangère qui prétend forcer sa compétence au détriment de la loi désignée comme compétente.*
>
> *[…] Au Québec cette disposition a provoqué l'opposition du Barreau et les doutes de la Chambre des notaires, qui estimaient le recours aux conceptions étrangères de l'ordre public inutile et dangereux.*

119. In the case at hand, there exists no legitimate and manifestly preponderant interest that would justify allowing foreign law to supersede the law applicable in Québec.

120. As stated above, articles 3097 and 3102 CCQ are applicable in this situation.

9.3 Superintendent of Pensions of Newfoundland & Labrador

121. In Part I of its Outline of Arguments (paras. 8 to 41), the Superintendent of Pensions argues that the word "liquidation" should be given its "plain meaning."

122. For the reasons stated above, the CCAA Parties do not share this position.

123. In section II(iii), the Superintendent of Pensions then attempts to demonstrate that sections 36(6) and 36(7) CCAA would not "cover the field, but would rather establish minimum standards."

124. This proposed interpretation is in direct contradiction of the statement made by Justice Deschamps of the Supreme Court of Canada in *Sun Indalex Finance*:

> [81] 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 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:
>
> 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

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[51] Goldstein, Gerald et Groffier, Éthel, *Traité de droit civil: droit international privé*, *Tome I, Théorie générale*, Cowansville, Les Éditions Yvon Blais Inc., 1998, p. 101-102. **(Tab 26)**.

> 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.)
>
> [82] 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.

125. With respect to the statements made in section IV of the Outline of Arguments of the Superintendent of Pensions regarding the application of articles 1262 and 3079 CCQ to the present matter, the position of the CCAA Parties in connection with the position adopted by the Superintendent of Pensions is the same as the one stated in connection with the Salaried Representatives' position.

9.4 United Steel Workers ("USW")

126. In section D of its Outline of Arguments, the USW deals with the interaction between the various deemed trusts.

127. At paragraph 44 of its Outline, USW states that three pension-related laws are applicable to the Plans, the NPBA, the SPPA and the PBSA. It then concludes that it is the deemed trust most favorable to employees that should be applied in the case at hand.

128. This position is not shared by the CCAA Parties. According to the latter, if several acts are applicable to the two Plans, the proper application of the legislation would be to determine in relation to which group(s) of members each relevant statute applies, determine the scope of the deemed trust created by such legislation (if it applies in a CCAA context) and calculate the portion of the unfunded liabilities covered by each deemed trust.

129. Adopting the position put forward by the USW and extending for example the PBSA to members who are governed by two different provincial pension acts would clearly be inappropriate.

130. With respect to the arguments raised in section E of the USW's Outline of Arguments, the CCAA Parties reiterate that the application of the deemed trust will create a conflict with the CCAA provisions.

9.5 Retraite Québec

131. In paragraphs 19 to 22 of its Outline of arguments, Retraite Québec states that the SPPA shall apply to the members which were formerly employed in Québec. The CCAA Parties share this point of view.

THE WHOLE RESPECTFULLY SUBMITTED.

Montréal, June 14, 2017

BLAKE, CASSELS & GRAYDON LLP
Attorneys for the CCAA Parties