Court File No. CV-10-8533-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

BETWEEN:

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C., 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST PUBLISHING INC./PUBLICATIONS CANWEST INC., CANWEST BOOKS INC., AND CANWEST (CANADA) INC.

Applicants

BOOK OF AUTHORITIES
OF THE COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA, LOCAL 145
(Returnable May 16, 2011)

May 12, 2011

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TAB 1

Source: http://scc.lexum.org/en/2001/2001scc39/2001scc39.html

Noël *v.* Société d'énergie de la Baie James, [2001] 2 S.C.R. 207, 2001 SCC 39

Christian Noël *Appellant*

v.

Société d'énergie de la Baie James *Respondent*

and

United Steelworkers of America, Local 6833 (FTQ) *Mis en cause*

and

Bernard Lefebvre *Mis en cause*

Indexed as: Noël *v.* Société d'énergie de la Baie James

Neutral citation: 2001 SCC 39.

File No.: 26914.

2000: October 11; 2001: June 28.

Present: L'Heureux-Dubé, Gonthier, Major, Bastarache, Binnie, Arbour and LeBel JJ.

on appeal from the court of appeal for quebec

Judgments and orders – Res judicata – Conditions – Employee contesting legality of arbitral award – Superior Court dismissing employee's application for judicial review on ground he lacked requisite interest to bring proceeding – Employee then commencing direct action in nullity to quash arbitral award – Whether principle of res judicata prevents bringing new proceeding.

Civil procedure – Direct action in nullity – Interest – Labour relations – Employee dismissed by employer – Arbitrator dismissing grievance contesting dismissal – Union refusing to bring matter before Superior Court – Whether employee has requisite interest to bring direct action in nullity to quash arbitral award – Code of Civil Procedure, R.S.Q., c. C-25, arts. 33, 55.

Labour relations – Arbitral award – Direct action in nullity – Interest – Union's duty of representation – Employee dismissed by employer – Arbitrator dismissing grievance contesting dismissal – Union refusing to bring matter before Superior Court – Whether employee has requisite interest to bring direct action in nullity to quash arbitral award – Code of Civil Procedure, R.S.Q., c. C-25, arts. 33, 55.

After being dismissed by his employer, an employee, represented by his union, sought reinstatement, but his grievance was dismissed by an arbitrator. Under the collective agreement, the union had the exclusive authority to represent the employees for the purposes of the grievance and arbitration procedure; none of its provisions gave an employee the right to take a grievance to arbitration personally or to be a party to a proceeding before the arbitrator. Following the arbitration award, the union decided, despite the employee's demands, that it would not take the matter further. The employee then decided to act on his own and filed an application for judicial review under art. 846 *C.C.P.* The Superior Court granted the employer's motion to dismiss and found that the employee did not have the requisite interest to bring such proceedings since he was not a party within the meaning of art. 846. The employee then brought a direct action in nullity under art. 33 *C.C.P.* The Superior Court again granted the employer's motion to dismiss, on the ground that the employee did not have the requisite interest. The Court of Appeal, in a majority judgment, affirmed the judgment.

Held: The appeal should be dismissed.

(1) *Res Judicata*

The principle of *res judicata* did not prevent the employee from bringing a direct action in nullity. For a judgment to amount to *res judicata* with respect to a proceeding, it is not enough that the main legal issue be identical. It must be established that three things are identical: parties, object and cause. In this case, the parties and the object are identical. The cause of the action, which is the presumed illegality of the award, was common to the two proceedings; only the procedural route differs. However, in order for the *res judicata* principle to apply, the first Superior Court judgment would have had to deal with the substance of the case. That judgment made no determination concerning the employee's substantive right. It dealt solely with an important procedural issue: the interest required for the purposes of art. 846 *C.C.P.* Accordingly, that decision does not amount to *res judicata*, except on the question of the employee's status as a party for the purposes of art. 846 *C.C.P.*

(2) *Interest*

The existence of an interest in bringing a judicial proceeding depends on the existence of a substantive right; it is not enough to assert that a procedure exists. In applying art. 33 *C.C.P.*, we must be careful not to assess the procedural interest using only a purely literal analysis of art. 55 *C.C.P.* which applies a broad definition of the legal interest. In this case, the employee's direct action in nullity alleges that the arbitrator made a patently unreasonable decision. The employee's procedural interest, within the meaning of art. 55, must be interpreted and assessed in the context of a labour relations scheme that is based on collective bargaining and the union's monopoly on representation.

The union's duty of representation is not limited to bargaining and the arbitration process. Where a union has an exclusive representation mandate, the corresponding duty extends to everything that is done that affects the legal framework of the relationship between the employee and the employer. However, a union cannot be placed under a duty to challenge each and every arbitration award at the behest of the employee in question on the ground of unreasonableness of the decision, even in dismissal cases. The rule is that the employer and the union are entitled to the stability that results from s. 101 of the *Labour Code*, which provides that an "arbitration award is without appeal, binds the parties and, where such is the case, any employee concerned". The arbitration process represents the normal and exclusive method of resolving the conflicts that arise in the course of administering collective agreements, including disciplinary action. Judicial review cannot therefore be seen as a routine way of challenging awards or as a right of appeal. While judicial review by the superior courts is an important principle, it cannot allow employees to jeopardize this expectation of stability in labour relations in a situation where there is union representation. Allowing an employee to take action against a decision made by his

or her union, by applying for judicial review where he or she believes that the arbitration award was unreasonable, would offend the union's exclusive right of representation and the legislative intent regarding the finality of the arbitration process, and would jeopardize the effectiveness and speed of the arbitration process. Recognition of this kind of right to challenge an arbitration award would also offend the fundamental principles governing relations with the employer where there is a right of exclusive

collective representation. In a case where the arbitration process has been carried out in accordance with the collective agreement, the employer is entitled to expect that a grievance that has been disposed of by the arbitrator will, as a rule, be disposed of permanently, and that the arbitration process will not be exposed to challenges that are launched without any control being exercised by its union interlocutor.

The concept of interest for the purposes of art. 33 *C.C.P.* must therefore be analyzed in that context. An employee does not have the requisite interest if the union's decision appears to fall within the leeway it is allowed with respect to the performance of its representation mandate. The nature of the labour relations scheme established by the *Labour Code* is an impediment to recognizing that an employee has a sufficient interest to challenge an arbitration award which he or she contends is unreasonable, on the sole ground that the union refuses to institute judicial review proceedings. However, in some situations – for example, collusion between employer and union or violation of the rules of natural justice – the employee could bring an action in nullity himself or herself.

In this case, the employee does not have the requisite interest to bring a direct action in nullity. It can be concluded from his action that he personally intends to commence judicial review proceedings based on the unreasonableness of the arbitration award. This falls within the reasonable exercise of the union's discretion in the conduct of collective labour relations with the employer.

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Referred to: *Lessard v. Gare d'autobus de Sherbrooke ltée*, J.E. 94-1854; *Vachon v. Attorney General of Quebec*, [1979] 1 S.C.R. 555; *Rocois Construction Inc. v. Québec Ready Mix Inc.*, [1990] 2 S.C.R. 440; *Roberge v. Bolduc*, [1991] 1 S.C.R. 374; *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725; *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220; *Alliance des Professeurs catholiques de Montréal v. Labour Relations Board of Quebec*, [1953] 2 S.C.R. 140; *Attorney General of Quebec v. Farrah*, [1978] 2 S.C.R. 638; *Séminaire de Chicoutimi v. City of Chicoutimi*, [1973] S.C.R. 681; *Immeubles Port Louis Ltée v. Lafontaine (Village)*, [1991] 1 S.C.R. 326; *François Nolin Ltée v. Commission des relations de travail du Québec*, [1968] S.C.R. 168; *Comité d'appel du bureau provincial de médecine v. Chèvrefils*, [1974] C.A. 123; *Fraternité des Policiers de la Communauté urbaine de Montréal v. City of Montreal*, [1980] 1 S.C.R. 740; *Fortier v. Thermolec Ltée*, [1985] R.D.J. 81; *Jeunes Canadiens pour une civilisation chrétienne v. Fondation du Théâtre du Nouveau-Monde*, [1979] C.A. 491; *Canadian Merchant Service Guild v. Gagnon*, [1984] 1 S.C.R. 509; *Rayonier Canada (B.C.) Ltd. and International Woodworkers of America, Local 1-217*, [1975] 2 Can. L.R.B.R. 196; *Hémond v. Coopérative fédérée du Québec*, [1989] 2 S.C.R. 962; *McGavin Toastmaster Ltd. v. Ainscough*, [1976] 1 S.C.R. 718; *Becotte v. Syndicat canadien de la Fonction publique, local 301*, [1979] T.T. 231; *Haley and Canadian Airline Employees' Association* (1981), 41 di 311; *Centre hospitalier Régina Ltée v. Labour Court*, [1990] 1 S.C.R. 1330; *Gendron v. Municipalité de la Baie-James*, [1986] 1 S.C.R. 401; *Ajax (Town) v. CAW, Local 222*, [2000] 1 S.C.R. 538, 2000 SCC 23; *Canada Safeway Ltd. v. RWDSU, Local 454*, [1998] 1 S.C.R. 1079; *CAIMAW v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983; *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929; *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions*

professionnelles, [1993] 2 S.C.R. 756; *Hoogendoorn v. Greening Metal Products and Screening Equipment Co.*, [1968] S.C.R. 30.

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Civil Code of Québec, S.Q. 1991, c. 64, art. 2848.

Code of Civil Procedure, R.S.Q., c. C-25, arts. 33, 55, 165, 834.1, 840, 846, 847.

Code of Civil Procedure, S.Q. 1965, c. 80, art. 834.

Constitution Act, 1867, s. 96.

Labour Code, R.S.Q., c. C-27, ss. 47.2, 47.3 to 47.5, 53, 67, 68, 69, 100.5, 101.

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APPEAL from a judgment of the Quebec Court of Appeal, [1998] R.J.Q. 2270, [1998] R.J.D.T. 1064, [1998] Q.J. No. 2746 (QL), affirming a judgment of the Superior Court. Appeal dismissed.

Paule Lafontaine and *Paul Faribault*, for the appellant.

Jean Beauregard, for the respondent.

Laurent Roy and *Christiane Morrisseau*, for the *mis en cause* United Steelworkers of America, Local 6833 (FTQ).

English version of the judgment of the Court delivered by

1 LEBEL J. — After being dismissed by his employer, the Société d'énergie de la Baie James ("SEBJ"), Noël filed a grievance seeking reinstatement. When his grievance was dismissed, he applied for judicial review of the arbitration award. When he found that an application for judicial review did not lie under art. 846 of the *Code of Civil Procedure*, R.S.Q., c. C-25 ("*C.C.P.*"), he filed a direct action in nullity under art. 33 *C.C.P.* The Superior Court and the Quebec Court of Appeal, in turn, ruled against him and dismissed his action on the ground that he had no legal interest. In this Court, the appeal by Noël raises the problem of an employee's interest in obtaining judicial review of an arbitration award made under the *Labour Code*, R.S.Q., c. C-27 ("*L.C.*"), by way of a direct action in nullity. The issue directly raised by the case is the relationship between the procedural rules governing interest and the substantive law rules defining the collective bargaining scheme that applies in Quebec labour law. For reasons that differ in part from those of the majority of the Quebec Court of Appeal, I would dismiss the appeal.

I. Facts

2 This case first arose in 1992. At that time, Noël was working for the SEBJ as a flight dispatcher at the Fontanges airport on James Bay. The appellant was subject to the terms of a collective agreement between the United Steelworkers of America, Local 6833 (FTQ) (hereinafter the "union") and the respondent, negotiated under the *Labour Code*. The union had been certified to represent the members of the bargaining unit to which Noël belonged.

3 Under the collective agreement, the union had the exclusive authority to represent the employees for the purposes of the grievance and arbitration procedure. None of its provisions gave an employee the right to take a grievance to arbitration personally or to be a party to a proceeding before the arbitrator.

4 Over the preceding years, Noël had been involved in disputes with his employer. Although they were resolved, further incidents occurred. Following a train of events which there is no need to describe, the employer terminated the appellant's employment, and the appellant filed eight grievances, including one relating to his dismissal.

5 The *mis en cause*, Bernard Lefebvre, who was appointed as the arbitrator, heard these grievances. Subject to compliance with the rules and means of proof that apply to arbitration, the parties agreed to allow Noël the option of stating his case directly to the arbitrator. However, the union retained

control of the arbitration process; it had carriage of the case and covered the associated costs. Noël testified as a witness and made submissions to the arbitrator. On February 20, 1995, the arbitration award dismissed the eight grievances, and accordingly upheld Noël's dismissal.

6 Although the union had until then supported the appellant and initiated the arbitration process, it decided, following the arbitration award, despite Noël's demands, that it would not take the matter further. It refused to apply for judicial review of the arbitration award. Noël then decided to act on his own.

II. Judicial History

7 In June 1995, approximately four months after the arbitration award, Noël filed an application for judicial review under art. 846 *C.C.P.* The employer immediately filed a motion to dismiss citing various grounds, but primarily the fact that Noël did not have the requisite interest to bring such proceedings, since Noël was not a party within the meaning of art. 846 *C.C.P.* Michel Côté J. of the Superior Court accepted that argument and dismissed the action on October 25, 1995. Noël did not appeal that decision. A few weeks later, on November 16, 1995, the appellant filed a direct action in nullity in the Superior Court. That proceeding challenged the legality of the arbitration award and sought to have it quashed. The SEBJ again filed a motion to have the appellant's action dismissed, citing the principle of *res judicata*, the unreasonable delay in bringing the action and the fact that its former employee did not have the requisite interest.

8 Halperin J. of the Superior Court allowed the motion to dismiss and dismissed the appellant's action on January 26, 1996. He believed that he was bound by the decision of the Quebec Court of Appeal in *Lessard v. Gare d'autobus de Sherbrooke ltée*, J.E. 94-1854, and accordingly he held that the interest that an employee must have in order to bring a direct action in nullity against an arbitration award on the ground of excess of jurisdiction is the same as is required for filing an application for judicial review under art. 846 *C.C.P.*

9 Noël then appealed to the Quebec Court of Appeal. That court's decision on the appeal was divided: [1998] R.J.Q. 2270. Mailhot J.A., for the majority, found that a party's interest should be determined on the basis not of the title of the pleading, but of the relief sought. The legal basis for the exercise of the superintending and reforming power was the same in proceedings under both art. 33 and art. 846 *C.C.P.* The appellant sought a declaration of the nullity of the arbitration award on the ground of excess of jurisdiction because it was unreasonable, and thereby to be reinstated in his employment. *Lessard*, *supra*, therefore had to be applied. In the labour law context, where the rule is exclusive legal representation by the union, the interest required for bringing a direct action in nullity is the same as is required by art. 846 *C.C.P.* for an application for judicial review. Only a party to the case in the lower tribunal would have sufficient interest. An employee who was represented by his or her union would not

have that status. Mailhot J.A. excluded from that finding such hypothetical cases as collusion between employer and union or injustice amounting to fraud. In such situations, an employee could bring a direct action in nullity himself or herself.

10 Robert J.A., dissenting, would have allowed the appeal and recognized the appellant's interest. He accepted that apart from exceptional situations that did not exist in that case, the grievance still belongs to the union, which has carriage of it during the arbitration process, to the exclusion of the employee. However, a fundamental distinction would have to be made between an employee's interest in the arbitration case initiated for the purpose of applying and interpreting the collective agreement and the interest that would enable him or her to invoke the superintending and reforming power of the Superior Court to have the legality of the arbitrator's decision determined.

11 In the view of Robert J.A., the proceedings provided for in arts. 846 and 33 *C.C.P.* are governed by two separate procedural schemes and raise different legal policy issues. Direct actions in nullity originate in the case law. Applications for judicial review are creatures of statute. Accordingly, there are two separate procedural schemes that apply with respect to interest. A direct action in nullity would require only sufficient interest within the meaning of art. 55 *C.C.P.* Any person who believed that his or her rights had been infringed would have that interest. The requirement of status as a party in the lower tribunal would then apply only to an application for judicial review under art. 846 *C.C.P.*

12 Robert J.A. pointed out that these two procedural routes are optional and apply in the alternative since the decision of this Court in *Vachon v. Attorney General of Quebec*, [1979] 1 S.C.R. 555. A litigant therefore has the option of selecting the procedural vehicle he or she considers appropriate. Interest is a relevant factor in making this choice. Recognition of such an interest would prevail over concern for the stability of arbitration awards or over the risk of upsetting the general labour relations scheme.

13 In the view of Robert J.A., applying the test in art. 846 to art. 33 in order to determine a litigant's interest would unduly limit the superintending and reforming power vested in the Superior Court by virtue of the general common law principles. A direct action in nullity under art. 33 *C.C.P.* is the route generally taken to invoke the superintending and reforming power. The reasons for preferring to proceed by way of judicial review, or evocation as it is often called, is often one of efficiency, in terms of the procedural conduct of the two proceedings, in that the application procedure frequently seems simpler and speedier. In addition, where there is no legislative provision relating to the interest that is required in order to bring a direct action in nullity, the sufficient interest standard in art. 55 *C.C.P.* would apply. Also, any other conclusion would leave the employee with no recourse, other than an action against his or her union where it refused to apply for judicial review of the arbitration award. The specific recourse provided in ss. 47.3 to 47.5 *L.C.* does not mean that an employee can obtain a second arbitration once the arbitration has taken place and the arbitrator has rendered a decision on the merits.

14 Robert J.A. therefore found that the employee had the necessary interest to bring a direct action in nullity. Because he was adversely affected by the arbitration award, he had sufficient interest within the meaning of art. 55, even though he was not a party for the purposes of art. 846 *C.C.P.* The decision in *Lessard*, *supra*, was incompatible with an accurate understanding of the nature of an application under art. 33 and was contradicted by a strong trend in the decisions of the Superior Court; it was not binding on the Court of Appeal and should be overturned.

15 Robert J.A. considered it necessary to make a ruling on the other two arguments raised by the SEBJ in its motion to dismiss. The SEBJ had argued, first, that the judgment of Côté J. dismissing the application for judicial review was *res judicata*. Robert J.A. rejected that argument because that decision was *res judicata* only with respect to lack of interest for judicial review purposes under art. 846 *C.C.P.*, and not in relation to the merits.

16 Robert J.A. then addressed the argument that the application was brought out of time, but made no ruling on that point. He acknowledged that the delay seemed long to be reasonable, but felt that it would be difficult for the Court of Appeal to rule in that regard, there being insufficient evidence on that point. He would therefore have allowed the appeal and referred the case to the Superior Court to determine whether the delay had been reasonable and then, if it was, to dispose of the matter on the merits.

III. Relevant Legislation

17 *Code of Civil Procedure*, R.S.Q., c. C-25

> **33.** Excepting the Court of Appeal, the courts within the jurisdiction of the Parliament of Québec, and bodies politic, legal persons established in the public interest or for a private interest within Québec are subject to the superintending and reforming power of the Superior Court in such manner and form as by law provided, save in matters declared by law to be of the exclusive competency of such courts or of any one of the latter, and save in cases where the jurisdiction resulting from this article is excluded by some provision of a general or special law.

> **55.** Whoever brings an action at law, whether for the enforcement of a right which is not recognized or is jeopardized or denied, or otherwise to obtain a pronouncement upon the existence of a legal situation, must have a sufficient interest therein.

165. The defendant may ask for the dismissal of the action if:

(1) There is *lis pendens* or *res judicata*;

(2) One of the parties is incapable or has not the necessary capacity;

(3) The plaintiff has clearly no interest in the suit;

(4) The suit is unfounded in law, even if the facts alleged are true.

846. The Superior Court may, at the demand of one of the parties, evoke before judgment a case pending before a court subject to its superintending and reforming power, or revise a judgment already rendered by such court, in the following cases:

(1) when there is want or excess of jurisdiction;

(2) when the enactment upon which the proceedings have been based or the judgment rendered is null or of no effect;

(3) when the proceedings are affected by some gross irregularity, and there is reason to believe that justice has not been, or will not be done;

(4) when there has been a violation of the law or an abuse of authority amounting to fraud and of such a nature as to cause a flagrant injustice.

However, in the cases provided in paragraphs 2, 3 and 4 above, the remedy lies only if, in the particular case, the judgments of the court seized with a proceeding are not susceptible of appeal.

Labour Code, R.S.Q., c. C-27

47.2. A certified association shall not act in bad faith or in an arbitrary or discriminatory manner or show serious negligence in respect of employees comprised in a bargaining unit represented by it, whether or not they are members.

47.3. If an employee who has been the subject of dismissal or of a disciplinary sanction believes that the certified association is, in that respect, violating section 47.2, he shall, if he wishes to invoke this section, submit a written complaint to the Minister within six months. The Minister shall appoint an investigator who shall endeavour to settle the dispute to the satisfaction of the interested parties and of the certified association.

47.4. If no settlement has been reached within thirty days of the appointment of the investigator or if the association does not carry out the agreement, the employee shall, if he wishes to invoke section 47.2, apply to the Court within the fifteen ensuing days to request that his claim be referred to arbitration.

47.5. If the Court considers that the association has violated section 47.2, it may authorize the employee to submit his claim to an arbitrator appointed by the Minister for decision in the manner provided for in the collective agreement, as in the case of a grievance. Sections 100 to 101.10 apply *mutatis mutandis*. The association shall pay the employee's costs.

The Court may, in addition, make any other order it considers necessary in the circumstances.

IV. Analysis

A. *Unreasonable Delay*

18 The motion to dismiss filed by the SEBJ raised three issues: unreasonable delay, *res judicata* and lack of interest. As Robert J.A. found, it is not possible, given what is in the record, to consider the issue of unreasonable delay. In the absence of any factual basis, had this appeal been allowed, the only fair solution for both parties would have been to refer the case back to the Superior Court on this point for

the evidence that was needed to be introduced in that court.

19 Accordingly, I will not address that question. This leaves the issue of *res judicata* and the problem of interest, and I will address them in order.

B. *Res Judicata*

20 The SEBJ argues that the principle of *res judicata* applies. That principle would operate to prevent a fresh action being brought following the judgment by Côté J. of the Superior Court, who dismissed the application for judicial review filed by Noël under art. 846 *C.C.P.* Quebec civil procedure defines the concept of *res judicata* narrowly, as it does the concept of *lis pendens*, with which it is closely connected (see D. Ferland and B. Emery, *Précis de procédure civile du Québec* (3rd ed. 1997), vol. 1, at pp. 206-9; J.-C. Royer, *La preuve civile* (2nd ed. 1995), at pp. 463-64). For a judgment to amount to *res judicata* with respect to a proceeding, it is not enough that the main legal issue be identical. It must be established that three things are identical: parties, object and cause (art. 2848 of the *Civil Code of Québec*, S.Q. 1991, c. 64). (See *Rocois Construction Inc. v. Québec Ready Mix Inc.*, [1990] 2 S.C.R. 440, at p. 448; *Roberge v. Bolduc*, [1991] 1 S.C.R. 374, at pp. 404–27.) In this case, the parties are undoubtedly identical. The object, a declaration of the nullity of the arbitration award, also appears to be the same. The cause of the action, which is the presumed illegality of the award, was common to the two proceedings. Only the procedural route differs. However, in order for the *res judicata* exception to apply, the first judgment would have had to deal with the actual substance of the case. It did not. The first decision, the Superior Court judgment delivered by Côté J., made no determination concerning the appellant's substantive right. It dealt solely with an important procedural issue: the interest required for the purposes of art. 846 *C.C.P.*; it went no further than that. The Superior Court did not decide whether the application for judicial review had any merit. Accordingly, the decision of that court does not amount to *res judicata*, except on the question of Noël's status as a party for the purposes of art. 846 *C.C.P.* We must therefore now consider the main issue raised by the appellant, his interest within the meaning of art. 33 *C.C.P.*

C. *Interest -- Relationship to Substantive Law*

1. Parties' Arguments

21 The debate regarding interest raises the question of the relationship between civil procedure and substantive law, that is, in this case, the fundamental institutions of Quebec labour law. In the appellant's submission, art. 33 *C.C.P.* neither defines nor limits interest. The general rule of sufficient

interest in art. 55 *C.C.P.* then applies. Noël, who believes his rights to have been violated by the decision of the arbitrator, Lefebvre, claims to have the requisite interest and denies that the general principles of labour law can restrict that interest. Such a restriction would negate the very existence of the superintending and reforming power of the Superior Court, which is constitutional in nature and is derived not only from the *Code of Civil Procedure*, but from the fundamental general common law principles that apply in Quebec public law.

22 The appellant acknowledges the general rule of the unique nature of labour law institutions and specifically the union's exclusive representation mandate. However, he submits that this power of representation, and the legal consequences of that power, do not extend beyond the collective agreement bargaining process and measures taken to administer the agreement, such as the grievance procedure. Beyond the sphere to which that mandate applies, the principles of civil procedure governing interest again apply.

23 Noël argues that no external limitation on the provisions of the *Code of Civil Procedure* limits the power of the Superior Court in respect of the application of art. 33 *C.C.P.*, under which, he contends, all grounds for judicial review, including want of jurisdiction in the strict sense, breach of the rules of natural justice, collusion between the parties and the various types of errors subject to review by the Superior Court in accordance with the "reasonable" or "patently unreasonable" test, may be argued.

24 The SEBJ, with the union's support on this point, advocates a completely different approach, which reflects the approach taken by the Court of Appeal. It points out that it is important that there be co-ordination between labour law and civil procedure, to avoid jeopardizing the operation of the procedures for representation and for negotiating of working conditions. From this standpoint, a party's legal interest is defined in terms of the fundamental characteristics of a labour relations system, one of the most important features of which is exclusive representation of the employees by the union. This function, which is broader than the appellant suggests, would not be limited to negotiating the collective agreement and to the grievance and arbitration process. It would extend, for example, to subsequent measures to enforce or review the arbitration award. The existence of that function prevents an employee from challenging what the union has negotiated or what is decided in an arbitration in which the employee was represented by his or her union.

25 The SEBJ also points out that it is important that stability be the rule in terms of the results of bargaining and arbitrations involving the union. The union's representation mandate imposes obligations on the employer. It is therefore important that an employer which has properly performed its obligations to the union not be exposed to the possibility of untimely action taken by every one of the employees who belong to the bargaining unit seeking to challenge the solutions reached through the process of collective bargaining or of administering the labour agreement.

26 The SEBJ also submits that the nature of the proceeding that the employee chooses to institute is immaterial. The proceedings are fundamentally identical, whether they are brought under art. 846 or art. 33. The interest is therefore identical. The nature of the labour relations scheme defines and limits that interest for purposes of exercising the power of judicial review, and the interest required is therefore the interest specified in art. 846, with the exception of situations in which the employee was a party to the proceedings before the arbitrator as an individual, or extreme situations such as collusion between employer and union, as recognized by the Court of Appeal. That argument having been made, we must now consider the procedural rules governing direct action in nullity and application for judicial review, in the civil procedure and administrative law of Quebec.

2. Procedural Rules Governing Applications for Judicial Review

27 Under the constitutional arrangements that prevail in Canada, each province has a superior court whose members are appointed under s. 96 of the *Constitution Act, 1867*. That court is the cornerstone of the Canadian judicial system. It has what has been characterized as a "core" jurisdiction, which cannot be removed from it by the provincial legislatures. (See *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, at p. 740, Lamer C.J.) Among the essential powers reserved for a superior court, as a court of general jurisdiction, is the judicial review of lower tribunals and administrative bodies. While that power may be circumscribed, it cannot be totally removed from the Superior Court or transferred to another body. (See *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, at p. 235; *Alliance des Professeurs catholiques de Montréal v. Labour Relations Board of Quebec*, [1953] 2 S.C.R. 140, at p. 155; *Attorney General of Quebec v. Farrah*, [1978] 2 S.C.R. 638; *Séminaire de Chicoutimi v. City of Chicoutimi*, [1973] S.C.R. 681.)

28 Quebec civil procedure provides a structure for bringing proceedings which ask the Superior Court to exercise its superintending and reforming power. We are concerned in this case with applications for judicial review (art. 846 *C.C.P.*) and direct actions in nullity (art. 33 *C.C.P.*). These are of course separate proceedings, but the rules governing the procedure in each instance have evolved to the point that the similarities between them have become increasingly pronounced. Both allow for the same form of review. In *Immeubles Port Louis Ltée v. Lafontaine (Village)*, [1991] 1 S.C.R. 326, at p. 358, Gonthier J. pointed out the common origin and objective of these proceedings.

29 These proceedings are now two procedural methods of achieving the same result. The fact that one is available does not rule out the possibility of using the other, as this Court held in *Vachon, supra.* Direct actions in nullity and applications for judicial review derive from the same source: the jurisdiction given to the Superior Court to supervise administrative bodies or lower tribunals. Their objective is also identical. Only their procedural rules differ, although an increasingly pronounced convergence between the two may be observed.

3. Evolution of the Procedure

30 The wording of art. 33 has undergone only minor amendments since the enactment of the 1965 *Code of Civil Procedure* (S.Q. 1965, c. 80). Direct actions in nullity follow the procedure for ordinary actions in courts at first instance. They are introduced by a declaration and then, following joinder of the action, they are heard on the merits by the Superior Court. The only significant change to this procedure since 1965 was to eliminate the writ of summons in 1996, as was done in respect of all proceedings by declaration (*An Act to amend the Code of Civil Procedure, the Act respecting the Régie du logement, the Jurors Act and other legislative provisions*, S.Q. 1996, c. 5, s. 6). Furthermore, no judicial leave is required in order to institute the proceeding. The decision to bring a matter before the court lies entirely with the party.

31 The procedure for judicial review, which is governed by art. 846 *C.C.P.*, is one of the extraordinary recourses provided for in Title VI of Book II of the *Code of Civil Procedure*. A party introduces it by motion, in accordance with art. 834. In practice, this means that, unlike proceedings instituted by declaration, the case will be heard without any preliminary exchange of pleadings by the parties. As a rule, the readiness process is speedier.

32 However, the Quebec National Assembly has substantially altered the procedure that applies to these extraordinary recourses. When the 1965 *Code of Civil Procedure* was originally enacted, the procedure was different. Like the other extraordinary recourses such as *quo warranto* and *mandamus*, "evocation", as it was called at the time, necessitated a two-stage procedure. This recourse could be exercised only with the leave of a judge, under art. 834 *C.C.P.* The purpose of the initial application was to obtain leave. If it were granted, a writ of summons was issued and the case proceeded on the merits. After the first stage, the allegations made in the application became, so to speak, the allegations in the action itself.

33 In the case of recourses such as *quo warranto* and *mandamus*, the judge to whom the application for leave was made, in the first stage, did not go beyond a summary of the applicant's arguments for the purposes of granting leave. In the case of evocation, based on this Court's interpretation of art. 847 *C.C.P.* in *François Nolin Ltée v. Commission des relations de travail du Québec*, [1968] S.C.R. 168, the judge was required to satisfy himself that the facts alleged in the application, which were assumed to be proven, justified the exercise of the recourse in law. In other words, the judge ruled on the law before hearing the case on the facts, as in the case of motions to dismiss.

34 That interpretation soon caused problems with respect to the exercise of the recourse. The question arose whether the conclusions of law stated by the judge who granted leave were binding on the judge who heard the case on the merits. After considerable debate in the Quebec Court of Appeal (see,

inter alia, *Comité d'appel du bureau provincial de médecine v. Chèvrefils*, [1974] C.A. 123), this Court held that the judge who heard a case on the merits was not bound by the conclusions of law stated by the first judge. The Court held that the decision rendered in the leave application had only the weight of an interlocutory judgment, and that it was not *res judicata*. (See *Fraternité des Policiers de la Communauté urbaine de Montréal v. City of Montreal*, [1980] 1 S.C.R. 740.)

35 To solve these problems, the legislature of Quebec amended the procedure for exercising the extraordinary recourses. (See *An Act to amend the Code of Civil Procedure, the Civil Code and other legislation*, S.Q. 1983, c. 28, s. 34.) By repealing art. 847 *C.C.P.*, it eliminated the obligation to obtain leave to issue a writ of summons. The application itself became the originating pleading to introduce the case on the merits.

36 The judicial review procedure under art. 846 also permits a suspension of proceedings before the final judgment (art. 834.1 *C.C.P.*). The rules for direct actions in nullity did not expressly provide for such a procedure. However, civil procedure now recognizes the possibility of suspension as incidental to the main action (*Fortier v. Thermolec Ltée*, [1985] R.D.J. 81 (C.A.)). The procedural rules governing direct actions in nullity and applications for judicial review therefore look extremely similar, except with respect to the readiness provisions. Merger of these judicial review proceedings into a single recourse would be a logical conclusion to this evolutionary process. That reform has not yet occurred and the issue of interest therefore remains unresolved.

4. Concept of Procedural Interest

37 A rapid review of the provisions of the *Code of Civil Procedure* might suggest that a simple solution to this case can be found in art. 55, which applies a broad definition of the legal interest that must be characterized as sufficient when it amounts to a legal, direct, personal, acquired and existing interest (see Ferland and Emery, *supra*, at pp. 89 *et seq.*; see also *Jeunes Canadiens pour une civilisation chrétienne v. Fondation du Théâtre du Nouveau-Monde*, [1979] C.A. 491, at p. 493). In the appellant's submission, his rights were violated by the arbitration award. His interest in having it quashed is personal, acquired and existing. If we refer only to the wording of art. 55 *C.C.P.*, this is a recognized legal interest.

38 However, the concept of procedural interest refers to the substantive right. We must then be careful not to assess it, in applying art. 33, using only a purely literal analysis of art. 55. The existence of an interest in bringing a judicial proceeding depends on the existence of a substantive right. It is not enough to assert that a procedure exists. A right enforceable by the courts must be asserted. This understanding of the concept of interest thus calls for consideration of the substantive law on which the cause of action is based. This is the nub of the case at bar.

5. Right Asserted by the Appellant

39 The appellant's action is simply worded and alleges that the arbitrator made a patently unreasonable decision. It states that the *mis en cause* union refused to bring judicial review proceedings and seeks to have the arbitration award quashed. The motion contains no allegations, other than the unreasonableness of the arbitration award, to justify quashing the award. It does not allege improper performance of the union's representation mandate; it alleges merely that the union refused to challenge the legality of the arbitrator's decision. It does not allege collusion between employer and union or bad faith on the part of the union. The motion is narrowly framed as one for judicial review of an arbitration award on the grounds of the "unreasonableness of the decision", to use the technical language of this branch of administrative law.

40 The award that is challenged was made under the provisions of the Quebec *Labour Code* and the collective agreement that applies to the parties. It is therefore situated in the broader framework of the entire relationship between the union and the employer in respect of which it is certified and with which it has entered into collective agreements.

6. Principle of Exclusive Representation under Quebec Labour Law

41 One of the fundamental principles we find in Quebec labour law, and one which it has in common with federal law and the law of the other provinces, is the monopoly that the union is granted over representation. This principle applies in respect of a defined group of employees or bargaining unit, in relation to a specific employer or company, at the end of a procedure of certification by an administrative tribunal or agency. Once certification is granted, it imposes significant obligations on the employer, imposing on it a duty to recognize the certified union and bargain with it in good faith with the aim of concluding a collective agreement (s. 53 *L.C.*). Once the collective agreement is concluded, it is binding on both the employees and the employer (ss. 67 and 68 *L.C.*). For the purposes of administering the collective agreement, the certified association exercises all the recourses of the employees whom it represents without being required to prove that the interested party has assigned his or her claim (s. 69 *L.C.*). (With respect to these mechanisms, see, for example: F. Morin and J.-Y. Brière, *Le droit de l'emploi au Québec* (1998), at pp. 867-70; R. P. Gagnon, *Le droit du travail du Québec: pratiques et théories* (4th ed. 1999), at p. 362.)

42 The collective agreement is implemented, first and foremost, between the union and the employer. Certification, followed by the collective agreement, takes away the employer's right to negotiate directly with its employees. Because of its exclusive representation function, the presence of the union erects a screen between the employer and the employees. The employer loses the option of negotiating different conditions of employment with individual employees. In *Canadian Merchant Service Guild v. Gagnon*, [1984] 1 S.C.R. 509, at p. 519, Chouinard J., who wrote the reasons of this

Court, quoted the following passage from the decision of the British Columbia Labour Relations Board in *Rayonier Canada (B.C.) Ltd. and International Woodworkers of America, Local 1-217*, [1975] 2 Can. L.R.B.R. 196, at pp. 200-201, regarding the situation created by certification:

> Once a majority of the employees in an appropriate bargaining unit have decided they want to engage in collective bargaining and have selected a union as their representative, this union becomes the exclusive bargaining agent for all the employees in that unit, irrespective of their individual views. The union is granted the legal authority to negotiate and administer a collective agreement setting terms and conditions of employment for the unit . . . . This legal position expresses the rationale of the Labour Code as a whole that the bargaining power of each individual employee must be combined with that of all the others to provide a sufficient countervailing force to the employer so as to secure the best overall bargain for the group. [Emphasis added.]

43 Some years later, in *Hémond v. Coopérative fédérée du Québec*, [1989] 2 S.C.R. 962, at p. 975, Gonthier J. again pointed out the change in labour relations within a company brought about by certification of the union. A collective framework supersedes the traditional contractual process, which is based on individual relations between the employer and its employees. Gonthier J. then cited this passage from this Court's decision in *McGavin Toastmaster Ltd. v. Ainscough*, [1976] 1 S.C.R. 718, at p. 725:

> The common law as it applies to individual employment contracts is no longer relevant to employer–employee relations governed by a collective agreement which, as the one involved here, deals with discharge, termination of employment, severance pay and a host of other matters that have been negotiated between union and company as the principal parties thereto.

44 The impact of this system on the employer is sometimes overlooked. Although the scheme imposes obligations on the employer relating to the employees and the union, it offers employers, in return, the prospect of temporary peace in their companies. An employer can expect that the problems negotiated and resolved with the union will remain resolved and will not be reopened in an untimely manner on the initiative of a group of employees, or even a single employee. This means that, for the life of a collective agreement approved by the bargaining unit, the employer gains the right to stability and compliance with the conditions of employment in the company and to have the work performed continuously and properly. However reluctant the members of a dissenting or minority group of employees may be, they will be bound by the collective agreement and will have to abide by it.

45 In administering collective agreements, the same rule will apply to the processing and disposition of grievances. Administering the collective agreement is one of the union's essential roles, and in this it acts as the employer's mandatory interlocutor. If the representation function is performed

properly in this respect, the employer is entitled to compliance with the solutions agreed on. Collective agreements may of course recognize the right of employees to file grievances and take them to certain levels, even to arbitration, or to participate directly in grievances as parties. That is not the case here. With that exception, the rule is that the grievance and arbitration process is controlled by the union, to which that control belongs (R. Blouin and F. Morin, *Droit de l'arbitrage de grief* (5th ed. 2000), at pp. 178-81). The union's power to control the process includes the power to settle cases or bring cases to a conclusion in the course of the arbitration process, or to work out a solution with the employer, subject to compliance with the parameters of the legal duty of representation.

7. Scope of Duty of Representation

46 While the *Labour Code* gives the union exclusive power of representation, that Code, like the ordinary law of civil liability, imposes a duty on it to perform its representative function properly. As we will see, this means that the duty does not cease once the negotiation and arbitration process is over. As labour law has evolved, the scope of that duty has expanded.

47 The Quebec *Labour Code* has partially codified the duty of representation. It is defined in the following terms in s. 47.2 *L.C.*:

> **47.2.** A certified association shall not act in bad faith or in an arbitrary or discriminatory manner or show serious negligence in respect of employees comprised in a bargaining unit represented by it, whether or not they are members.

48 This duty prohibits four types of conduct: bad faith, discrimination, arbitrary conduct and serious negligence. The conduct that is demanded applies both at the collective bargaining stage and in administering the collective agreement (see Gagnon, *supra*, at p. 308). First, s. 47.2 prohibits acting in bad faith, which presumes intent to harm or malicious, fraudulent, spiteful or hostile conduct (see *Becotte v. Syndicat canadien de la Fonction publique, local 301*, [1979] T.T. 231, at p. 235; and *Rayonier*, *supra*, at p. 201). In practice, this element alone would be difficult to prove (see G. W. Adams, *Canadian Labour Law* (2nd ed. (loose-leaf)), at pp. 13–15 to 13–18; R. E. Brown "The 'Arbitrary', 'Discriminatory' and 'Bad Faith' Tests Under the Duty of Fair Representation in Ontario" (1982), 60 *Can. Bar Rev.* 412, at pp. 453-54).

49 The law also prohibits discriminatory conduct. This includes any attempt to put an individual or group at a disadvantage where this is not justified by the labour relations situation in the company. For example, an association could not refuse to process an employee's grievance, or conduct it

differently, on the ground that the employee was not a member of the association, or for any other reason unrelated to labour relations with the employer (see D. Veilleux, "Le devoir de représentation syndicale: Cadre d'analyse des obligations sous-jacentes" (1993), 48 *Relat. ind.* 661, at pp. 681-82; Adams, *supra*, at pp. 13−18 to 13−20.1).

50 The concepts of arbitrary conduct and serious negligence, which are closely related, refer to the quality of the union representation. The inclusion of arbitrary conduct means that even where there is no intent to harm, the union may not process an employee's complaint in a superficial or careless manner. It must investigate the complaint, review the relevant facts or seek whatever advice may be necessary; however, the employee is not entitled to the most thorough investigation possible. The association's resources, as well as the interests of the unit as a whole, should also be taken into account. The association thus has considerable discretion as to the type and extent of the efforts it will undertake in a specific case. (See Adams, *supra*, at pp. 13−20.1 to 13−20.6.)

51 The fourth element in s. 47.2 *L.C.* is serious negligence. A gross error in processing a grievance may be regarded as serious negligence despite the absence of intent to harm. However, mere incompetence in processing the case will not breach the duty of representation, since s. 47.2 does not impose perfection as the standard in defining the duty of diligence assumed by the union. In assessing the union's conduct, regard must be had to the resources available, the experience and training of the union representatives, who are usually not lawyers, and the priorities connected with the functioning of the bargaining unit (see Gagnon, *supra*, at pp. 310-13; Veilleux, *supra*, at pp. 683-87; Adams, *supra*, at p. 13−37).

52 Bad faith and discrimination both involve oppressive conduct on the part of the union. The analysis therefore focuses on the reasons for the union's action. In the case of the third or fourth element, what is involved is acts which, while not motivated by malicious intent, exceed the limits of discretion reasonably exercised. The implementation of each decision by the union in processing grievances and administering the collective agreement therefore calls for a flexible analysis which will take a number of factors into account.

53 The importance of the grievance to the employee is one of these factors. There is no doubt that abandoning or losing a discharge grievance will have more serious effects for the employee than a dispute over vacation dates or overtime payment arrangements. The union's duty will be more onerous in cases of that nature. For example, in *Haley and Canadian Airline Employees' Association* (1981), 41 di 311, at p. 316, the Canada Labour Relations Board pointed out that discharge grievances would call for closer scrutiny of the duty of fair representation, although employees enjoy no absolute right to have the grievance procedure initiated or carried to its conclusion in this type of case. (On this point, see *Canadian Merchant Service Guild*, *supra*, at p. 527; *Centre hospitalier Régina Ltée v. Labour Court*, [1990] 1 S.C.R. 1330, at p. 1352, *per* L'Heureux-Dubé J.)

54 In a situation of that type, the chances of the grievance succeeding will also be carefully weighed. Speedy abandonment of an apparently serious, if not valid, discharge grievance after only summary processing may suggest, *prima facie*, that there has been a breach of the duty of representation. Once again, there is still some leeway. Abandonment of some grievances that would normally be valid is sometimes necessary in the interests of the bargaining unit as a whole, as L'Heureux-Dubé J., writing for this Court, acknowledged in *Centre hospitalier Régina*, *supra*, at pp. 1349-50.

55 The concurrent interests of other employees in the bargaining unit is an important factor in assessing the union's conduct. This element reflects the collective nature of labour relations, which include the administration of the collective agreement. The interests of the unit as a whole may justify conduct on the part of the union that is otherwise detrimental to certain specific employees. A union may decide to make concessions or to develop a policy for the administration of the agreement in order not to adversely affect other employees, or to maintain good relations with the employer with a view to future negotiations. (See *Canadian Merchant Service Guild*, *supra*, at p. 527; *Rayonier*, *supra*, at p. 204.)

8. Judicial Review and Duty of Representation

56 The basic sanctions that apply where the duty of representation has been breached are set out in the *Labour Code*, in respect of certain types of decisions. Others fall under the law of civil liability. The *Labour Code* provides remedies in ss. 47.3 *et seq.* for cases in which a union fails to take a discharge grievance or disciplinary sanctions to arbitration. In a case of the nature, the Labour Court may direct arbitration in the manner provided for in the collective agreement. That process cannot be invoked here. It does not apply where there has been an arbitration as provided in the collective agreement. (See *Gendron v. Municipalité de la Baie-James*, [1986] 1 S.C.R. 401.)

57 However, the duty of representation is not limited to bargaining and the arbitration process. Where the union has an exclusive representation mandate, the corresponding duty extends to everything that is done that affects the legal framework of the relationship between the employee and the employer within the company. This Court has clearly recognized that a union could be in breach of its duty of representation by failing to bring an action in nullity against an arbitration award. As the following comments by L'Heureux-Dubé J. in *Centre hospitalier Régina*, *supra*, at p. 1347, suggest, the release of the arbitration award neither terminates nor circumscribes that duty:

> In this connection I should say at the outset that a union's duty of fair representation does not cease in relation to a grievance proceeding once the grievance has gone to arbitration. It may continue even after the arbitrator's final decision . . . subject to *Gendron v. Municipalité de la Baie-James*, *supra*, which held that in such a case the s. 47.5 L.C. procedure could not be applied.

58 After the arbitration award is made, the union still has the exclusive right to represent the employees. As a corollary, the decision to challenge the legality of an arbitration award is still governed by the principles relating to proper performance of the duty of good faith and by the same prohibitions on acting in bad faith, in a discriminatory manner or without giving the case the appropriate consideration.

59 The union may believe that at this stage, by taking the grievance to arbitration, it has applied the procedure that is routinely followed in a case of its nature. It does not have a duty to obtain a result for the employee. An unfavourable arbitration award does not create a presumption of improper performance of the duty of representation.

60 How can it be determined whether the union's failure to challenge an arbitration award is a breach of the duty of fair representation? In a case like that, the actual nature of the arguments that would be made in a judicial review application to challenge the legality of an arbitration award and asking the Superior Court to exercise its superintending power will have to be examined. This brings us back to the general principles governing judicial review. The grounds on which the validity of an arbitration award could be questioned and the power of the Superior Court to review the award invoked will vary. The inferior tribunal may have been improperly constituted, in a manner contrary to the law. It may also have acted without jurisdiction within the strict meaning of that expression, if the subject matter was not within its authority, having been assigned to another body. The arbitration board may also have committed an error that could be characterized as "patently unreasonable", and in accordance with the decisions of this Court over a period of more than 20 years, this would mean that the legality of the award could be reviewed.

61 We know that there have been significant conflicts in the case law regarding review of the reasonableness of an arbitration award. Even in the cases decided by this Court, discussion of the reasonableness of certain lower court decisions sometimes leads to analyses that are diametrically opposed. There have been significant dissenting opinions regarding the application of the standards of reasonableness to specific cases. (See, for example, *Ajax (Town) v. CAW, Local 222*, [2000] 1 S.C.R. 538, 2000 SCC 23; *Canada Safeway Ltd. v. RWDSU, Local 454*, [1998] 1 S.C.R. 1079; *CAIMAW v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983.)

62 Given the day-to-day reality of managing collective agreements, the interpretation of arbitration awards, and the abundance of litigation in this area, a union cannot be placed under a duty to challenge each and every arbitration award at the behest of the employee in question on the ground of unreasonableness of the decision, even in dismissal cases. The rule is that the employer and the union are entitled to the stability that results from s. 101 *L.C.*, which provides: "The arbitration award is without appeal, binds the parties and, where such is the case, any employee concerned. . .". Judicial review must therefore not be seen as a routine way of challenging awards or as a right of appeal. Accordingly, even in

discipline and dismissal cases, the normal process provided by the Act ends with arbitration. That process represents the normal and exclusive method of resolving the conflicts that arise in the course of administering collective agreements, including disciplinary action. In fact, this Court gave strong support for the principle of exclusivity and finality in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, at pp. 956-957 and 959, *per* McLachlin J. That approach is also intended to discourage challenges that are collateral to disputes which, as a general rule, will be definitively disposed of under the procedure for administering collective agreements. While judicial review by the superior courts is an important principle, it cannot allow employees to jeopardize this expectation of stability in labour relations in a situation where there is union representation. Allowing an employee to take action against a decision made by his or her union, by applying for judicial review where he or she believes that the arbitration award was unreasonable, would offend the union's exclusive right of representation and the legislative intent regarding the finality of the arbitration process, and would jeopardize the effectiveness and speed of the arbitration process.

63 Recognition of this kind of right to challenge an arbitration award would necessarily offend the fundamental principles governing relations with the employer where there is a right of exclusive collective representation. In a case where the arbitration process has been carried out, in accordance with the collective agreement, the employer is entitled to expect that a grievance that has been disposed of by the arbitrator will, as a rule, be disposed of permanently, and that the arbitration process will not be exposed to challenges that are launched without any control being exercised by its union interlocutor. As a general rule, the proper performance by the employer of the duty to negotiate and apply collective agreements must carry with it an assurance of stability in terms of the conditions of employment in its company.

9. Concept of Interest and Performance of Duty of Representation

64 The concept of interest for the purposes of art. 33 *C.C.P.* must be analyzed in the context described above. An employee does not have the requisite interest if the union's decision appears to fall within the leeway it is allowed with respect to the performance of its representation mandate. The nature of the labour relations scheme established by the *Labour Code* is an impediment to recognizing that an employee has a sufficient interest to challenge an arbitration award which he or she contends is unreasonable, on the sole ground that the union refuses to institute judicial review proceedings. That would negate the exclusive nature of the union's representation mandate, and would be problematic not only for the union, but also in respect of an employer that has performed its legal obligations by negotiating a collective agreement and administering that agreement in a manner that has been found by the arbitrator to be proper. It would be difficult to reconcile the principle of stability in labour relations and industrial peace that underlie the organization of the representation and collective bargaining scheme in the *Labour Code* with the procedural system proposed by the appellant. That system would allow the union's decisions in matters that are central to its function and to the reasonable leeway it is allowed under its duty of representation to be challenged by any employee who might decide to bring a direct action in nullity, asserting that his or her rights had been breached.

65 The question of unduly limiting the Superior Court's power of review does not arise in this case. While review of the legality of actions by public authorities is a central element of the Superior Court's jurisdiction, the legitimacy of defining certain limits to which that function must be subject is recognized in administrative and constitutional law. That function is not absolute. Provided they do not abolish it, legislatures may circumscribe and limit it, and may do so specifically by express legislative policy, for example by enacting privative clauses (see *Crevier*, *supra*; see also *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756, at p. 800).

66 The principle of the rule of law does not require that all decisions of a lower court or administrative tribunal necessarily be subject to microscopic judicial review. Indeed, the fact that review is often limited to jurisdictional errors provides clear confirmation that it is legitimate to limit this superintending power. Those limits may affect the interest that is required in order for a party to have standing.

67 Imposing this limit on interest is also consistent with the very nature of the power of judicial review, in one form or another, under art. 840 *C.C.P.* or art. 33 *C.C.P.*, as this Court pointed out in *Immeubles Port Louis*, *supra*. Discretion is inherent in the concept of judicial review itself. The exercise of that discretion must therefore take into account the demands of the legal policy that is apparent on examining the labour relations scheme that is in effect in Quebec. While that discretion is an invaluable tool for remedying serious injustices, it cannot generally recognize as valid a method of judicial challenge that would jeopardize the expectations of stability and finality that are an inherent result of the legal mandate of representation that is given to the union.

68 In judicial review of arbitration decisions, the need to respect the collective framework of the labour relations system, the roles of the players in that system and the employer's reasonable expectations will justify these kinds of restrictions on the concept of interest and on the interpretation of that concept and the manner in which it is applied by the Superior Court. Those limitations will not, of course, rule out any possibility of action under art. 33. The Court of Appeal referred to situations such as collusion between employer and union, fraud or bad faith. We might also think of cases in which the arbitration tribunal was not constituted in accordance with the law. As well, a case might be brought before an arbitrator that falls within the jurisdiction of another body such as a human rights tribunal or a workers' compensation board, or an arbitrator might be asked to determine a matter that the parties had decided to exclude from the collective agreement. In such cases, those legal policy issues would not come into play, and the employee could legitimately argue the fundamental nullity of the entire process that had been followed, to his or her detriment. A direct action in nullity would then provide the employee with an appropriate remedy.

69 As well, some violations of the *audi alteram partem* rule, such as situations in which the employee had been systematically prevented from presenting a point of view that might have differed from the union's, could legitimately be raised using that procedure. An employee cannot be left without a remedy. However, it should be noted, on this point, that the *Labour Code* already requires that the

arbitrator give the interested employee notice of the arbitration (s. 100.5 *L.C.*). In addition, the courts have recognized the employee's right to separate representation where the employee's interests conflict with the union's (*Hoogendoorn v. Greening Metal Products and Screening Equipment Co.*, [1968] S.C.R. 30). Ultimately, however, where the subject matter of the challenge that it is proposed to bring in the courts is the very essence of the primary function of union representation — the interpretation or application of the collective agreement — the decision is for the union to make and it cannot be challenged, regardless of the procedural method adopted, except by way of a complaint made under s. 47.3 *L.C.* or by a proceeding based on the general principle of civil liability, as discussed earlier. In this instance, the procedure followed cannot redefine the content of the substantive law and the underlying legal policy.

70 In this case, as was indicated earlier, the direct action in nullity alleges only that the decision was unreasonable. It does not contend that the fundamental rules of natural justice were violated, nor does it claim that the tribunal acted without jurisdiction and that its process was vitiated by absolute nullity. All that can be concluded from Noël's action is that he personally intends to commence judicial review proceedings based on the unreasonableness of the arbitration award. This falls within the reasonable exercise of the union's discretion in the conduct of collective labour relations with the employer. The employee's procedural interest, within the meaning of art. 55 *C.C.P.*, must therefore be interpreted and assessed in the context of a labour relations scheme that is based on collective bargaining and the union's monopoly on representation. Accordingly, the majority of the Court of Appeal did not err in finding that Noël did not have the requisite interest to bring a direct action in nullity in the circumstances.

71 For these reasons, I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Eidinger & Associés, Montréal.

Solicitors for the respondent: Lavery, de Billy, Montréal.

Solicitors for the mis en cause United Steelworkers of America, Local 6833 (FTQ): Trudel, Nadeau, Lesage, Larivière & Associés, Montréal.

TAB 2

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-11-036133-094

DATE: **NOVEMBER 9, 2009**

PRESENT: THE HONOURABLE MR. JUSTICE CLÉMENT GASCON, J.S.C.

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

ABITIBIBOWATER INC.
And
ABITIBI-CONSOLIDATED INC.
And
BOWATER CANADIAN HOLDINGS INC.
And
The other Petitioners listed on Schedules "A", "B" and "C"
Debtors

And
ERNST & YOUNG INC.
Monitor

And
HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF NEWFOUNDLAND AND LABRADOR
Petitioner

JUDGMENT ON MOTION TO ACCESS THE ELECTRONIC DATA ROOMS CREATED BY THE DEBTORS (#275)

JG1793

THE MOTION AT ISSUE

[1] Her Majesty the Queen in Right of Newfoundland and Labrador (the **"Province"**) seeks a declaratory order from this Court to access the electronic data rooms set up by the Debtors (**"Abitibi"**).

[2] Abitibi is under the protection of the *Companies' Creditors Arrangement Act*[1] (**"CCAA"**) since April 17, 2009. In the context of the restructuring process undertaken following the Initial Order, it created electronic data rooms containing non-public financial and corporate information.

[3] This was done in order to allow its stakeholders and their financial and legal advisors to better assess the ongoing condition of its business as the restructuring evolved. To have access to the electronic data rooms, permission has first to be obtained from Abitibi. Signature of confidentiality agreements is required as well.

[4] The Province requested such an access to the electronic data rooms. Abitibi denied its request.

[5] In its Motion[2], the Province contends that Abitibi's refusal is contrary to the principles underlying the *CCAA*. It argues that the denial is unfair, discriminatory and unjustifiable. It insists upon being treated in the same manner as other Abitibi's stakeholders.

[6] Abitibi strongly opposes the Motion[3].

[7] It considers that the Province is neither a creditor of Abitibi, nor a genuine stakeholder in its restructuring. It adds that the Province does not come to Court with clean hands, but rather brings the Motion for collateral purposes, unrelated to the restructuring process. In that regard, Abitibi insists upon the fact the Province owes it in excess of $300 million for the recent wrongful appropriation of its assets.

THE ELECTRONIC DATA ROOMS

[8] Based on the representations made to the Court, the electronic data rooms, subject of the debate, were created voluntarily at the initiative of Abitibi. There are no statutory requirements in the *CCAA* imposing upon a debtor company to do so.

[9] Abitibi has elected to do it in order to assist, facilitate and advance its restructuring process and to help transmitting its non-public financial and corporate information to those who required it in that context.

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

2 "Motion for a Declaration that the Petitioner is Entitled to Access the Electronic Data Rooms Created by the Debtors" dated October 16, 2009.

3 "Motion to Contest the Motion for Access to the Electronic Data Rooms Created by the Petitioners" dated October 26, 2009.

[10] Creating such data rooms for the benefit of stakeholders in a *CCAA* restructuring process is not unheard of. In large restructurings such as this one, putting in place similar data rooms is acceptable, if not common, practice. It normally enhances the chances of success of the process. Seldom does one see litigation arising from the creation of these data rooms. No precedents have indeed been found on the issue that the Court is asked to decide.

[11] Here, access to Abitibi's electronic data rooms has, apparently, not been given to every stakeholder. In fact, according to Abitibi, no individual creditor has been granted such access so far.

[12] To this day, the data rooms have rather been accessed solely by the financial and legal advisors of precise creditor groups like the Ad Hoc Committee of the Unsecured Noteholders, the Term Lenders, the Ad Hoc Committee of the Senior Secured Noteholders, and the Unsecured Creditors Committee put in place pursuant to the Chapter 11 proceedings pending in the State of Delaware.

[13] These electronic data rooms provide information that goes beyond the quite extensive financial information already circulated by the Monitor on a regular basis. To that end, no less than 20 reports are currently available on the Monitor's public website.

[14] They include, amongst others, regular four-week reporting on Abitibi's cash-flow results, receipts and disbursements with variances analysis, current liquidity and revised cash-flow forecasts, and key performance indicators review. They cover as well a timely overview of current market conditions in the forest products industry.

THE POSITIONS OF THE PARTIES

a) The Province

[15] The Province pleads that it needs to have access to the electronic data rooms to properly assess Abitibi's financial status and to make informed decisions in the restructuring. It maintains that it has a duty to inform itself of the present and future potential ability of Abitibi to cover the Province's claims against it.

[16] To that end, it states that after Abitibi was granted *CCAA* protection in April 2009, the Province made a commitment to the latter's former employees whose entitlement to severance and termination pay was stayed by the Initial Order.

[17] Thus, in June 2009, it allegedly began to implement a plan whereby Abitibi's former employees in the Province received their entitlement to severance and termination pay. In exchange, these former employees assigned their rights to make a claim in the restructuring process to an organisation created by the various unions involved and funded by the Province.

[18] Apparently, the Province has expended in excess of $24 million from the public purse to fulfil these obligations. It contends that it will be repaid for these severance and termination expenses from the claims that will be made at some point during the restructuring process.

[19] The Province also argues that Abitibi is responsible towards it for alleged environmental contamination from a former mine located in the town of Buchans. Relying on numerous media reports that it filed in the record[4], the Province claims that because of Abitibi's economic activities, the latter has exposed itself to numerous environmental obligations, the precise extent of which remains to be determined.

[20] The Province alleges that it has incurred significant costs in that regard. It adds, furthermore, that agreements have been entered into for the Province's environmental consultants to have access to the sites for the purpose of determining the full nature and extent of Abitibi's residual and environmental obligations.

[21] In addition, during oral argument, the Province's Counsel claimed that his client would also have alleged tax claims to raise against Abitibi. However, no allegation in the Motion refers to such assertion.

[22] Because of the above, the Province submits that it should be treated similarly to other Abitibi's stakeholders with respect to the electronic data rooms. The Court's discretion under the *CCAA* should, in its view, be exercised in favour of the Province so that the right of access sought may be granted without delay.

b) Abitibi

[23] Abitibi replies that the Province is simply unable to justify any status as actual or even potential creditor in this restructuring process.

[24] According to Abitibi, with regard to the funding process of Abitibi's former employees, the allegations of the Motion indicate that the Province is simply not the assignee of the claims.

[25] Abitibi states further that no evidence supports either the Province's Counsel's contentions that alleged tax claims would be owed to his client.

[26] As for the environmental obligations that Abitibi would have, it considers that the Province is the owner of the lands and mining rights on which the mining site was situated. It adds that any residual interest was surrendered to the Province as far back as in 1994, such that the Province has owned and managed the lands in question for over 15 years.

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[4] Exhibit NL-1.

[27] Abitibi also notes that it never itself operated the mine in question, while the reports that have been received so far by the Province indicate a number of other possible causes of contamination.

[28] Simply put, Abitibi is of the view that this contingent claim is, at best, highly speculative.

[29] That said, Abitibi refers to the following background elements to justify its position that the Province does not come to Court with clean hands. In fact, it submits that ulterior motives warrant the filing of the Motion.

[30] From Abitibi's standpoint, the conflict with the Province on the access to the electronic data rooms has its roots in events going back to December 2008, some four months prior to the Initial Order issued in this case.

[31] On December 4, 2008, after unsuccessful negotiations with the unions representing its workers, Abitibi announced the closure of the Grand Falls mill located in the Province. The closure was to take place in the first quarter of 2009.

[32] In the days following the announcement, Abitibi attempted in vain to negotiate with the Province an orderly winding-down of the operations.

[33] On December 16, 2008, without notice and within a single day, the Province introduced and passed into law the *Abitibi-Consolidated Rights and Assets Act*[5] (the "***Abitibi Act***").

[34] Pursuant to the *Abitibi Act*, the Province purported:

a) to seize with immediate effect substantially all of the assets, property and undertakings of Abitibi in the Province;

b) to cancel substantially all outstanding water and hydroelectric contracts and agreements between Abitibi and the Province;

c) to cancel pending legal proceedings of Abitibi against the Province seeking the return of several hundreds of thousands of dollars in unlawfully assessed payments in respect of water rights;

d) to deny Abitibi any compensation for the seized assets; and

e) to deny Abitibi access to the Province's Courts to seek redress.

[35] Abitibi voiced strong opposition to this enactment and denounced it as unconstitutional, contrary to basic principles of Canadian law and adopted in bad

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[5] S.N.L. 2008, c. A-1.01, filed as Exhibit R-2.

faith. In April 2009, one of Abitibi's U.S. subsidiaries indeed filed a Notice of Intent to Submit a Claim to Arbitration in that regard under Chapter 11 of NAFTA[6].

[36] According to Abitibi, the seized property and rights had a value in excess of $300 million. As well, the expropriated assets were generating revenues for Abitibi; some of the fixed assets could have even been sold for profit during the restructuring process[7].

[37] Because of this, Abitibi concludes that the filing of the Motion is nothing more than a reaction to the expected claims of Abitibi against the Province. Therefore, as part of its own Motion to Contest the Province's Motion, Abitibi itself seeks declaratory conclusions to the effect that the Province cannot claim any relief until it has recognized the property rights it has unlawfully seized.

[38] Abitibi even wants this Court to immediately designate a Claims Officer to hear and determine the respective claims, counter-claims, cross-claims and set-off claims of the parties against each other.

ANALYSIS AND DISCUSSION

[39] With all due respect to the position advanced by the Province, the Court considers that its Motion should be dismissed.

[40] None of the arguments it submitted are persuasive under the circumstances. In contrast, Abitibi's objections to the access sought are real; they are serious and they are many.

a) The principles underlying the *CCAA*

[41] To justify its request, the Province puts much emphasis on the principles underlying the *CCAA*. It is appropriate to briefly review them.

[42] It has often been said. No one seriously disputes it anymore. The *CCAA* is a remedial statute. Its purpose is to facilitate compromises or arrangements between an insolvent debtor company and its creditors[8].

[43] Admittedly, the restructuring process conducted under the *CCAA* is, first and foremost, that of the debtor company and its creditors who, ultimately, have the final say on the process.

[44] Still, it is now accepted that the *CCAA* is designed as well to serve a broad constituency of stakeholders, be they investors, creditors, employees or even, sometimes, local communities. It has thus been stated that Courts must have regard

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6 Exhibit R-3.
7 Testimony of Alice Minville at the hearing.
8 *Stelco Inc. (Bankruptcy), (Re),* (2005), 9 C.B.R. (5th) 135, 2005 ONCA 8671 (CanLII), at paras 32ff; *Metcalfe & Mansfield Alternative Investments II Corp., (Re),* 2008 ONCA 587 (CanLII), at paras 44-61.

not only to the interests of those that are directly affected by the restructuring process, but also to a wider public interest[9].

[45] However, if this broader public dimension goes beyond the simple direct relations between the debtor company and its creditors, it does not stand alone by itself. This wider public interest or broader public dimension must always be put in the balance together with the interest of those most directly affected by the restructuring process.

[46] Accordingly, in any application brought under the *CCAA* such as this one, it is fair to say that in giving weight to broader socio-economic or public interest considerations, the Court must keep in mind the key objectives of the Act. That is, to facilitate a restructuring so as to reach a compromise between the debtor company and its creditors and allow the business to continue as a going concern[10].

[47] As well, in exercising its jurisdiction in a broad and flexible manner to insure the *CCAA*'s effectiveness, the Court must remember that its role is one of judicial oversight. It is there to supervise the process and keep it moving towards its ultimate goal, that of an acceptable arrangement.

[48] In *Re Stelco*[11], the Ontario Court of Appeal stated that in carrying this supervisory function under the legislation, the judge in a *CCAA* restructuring process is exercising the statutory discretion provided by Section 11.

[49] That said, in a *CCAA* restructuring process, the radically different economic stakes of the various creditors in the debtor company entail that it is not realistic to constantly expect or have a level playing field[12]. There will sometimes be asymmetries, variances and distinctions. Because of the flexibility of the *CCAA*, one is not to apply its regime rigidly, in the same manner in every situation.

[50] Bearing these considerations in mind, the Court considers that this is not a case where its judicial discretion should be exercised in the manner sought by the Province. There are no reasonable or reasoned justifications that would support it.

[51] To begin with, the status of the Province as creditor is not established, while its alleged status as potential creditor stands on rather weak grounds.

[52] Apart from that, relying on a mere and general quality of stakeholder remains quite insufficient to justify the relief sought. In this regard, the reasons for Abitibi's denial

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9 *Metcalfe & Mansfield Alternative Investments II Corp., (Re),* 2008 ONCA 587 (CanLII), at paras 50-52; *Syndicat national de l'amiante d'Asbestos* v. *Mine Jeffrey inc.,* [2003] R.J.Q. 420 (C.A.), at paras 27-30.

10 *Metcalfe & Mansfield Alternative Investments II Corp., (Re),* 2008 ONCA 587 (CanLII), at paras 50-52; *Cliffs Over Maple Bay Investments Ltd.* v. *Fisgard Capital Corp.,* 2008 BCCA 327 (CanLII), at paras 27-29.

11 (2005), 75 O.R. (3d) 5 (Ont. C.A.), at paras 32-34.

12 Janis P. SARRA, *Rescue! : The Companies' Creditors Arrangement Act,* (Toronto: Thomson Carswell, 2007), at page 11.

appear legitimate and reasonable considering the objectives of the *CCAA* and the interests of those involved.

b) The creditor or potential creditor status of the Province

[53] In this case, the Province has simply failed to adduce any reliable or admissible evidence to establish that it is, actually, a creditor of Abitibi.

[54] On one hand, the Province alleges, without supporting evidence, that it has made payments to certain former employees of the Abitibi's Grand Falls mill. Yet, no evidence to establish the nature of the payments made or any lawful assignment of the related claims has been put forward.

[55] Indeed, when one reads paragraphs 7, 8 and 9 of the Motion, it appears obvious that if Abitibi's former employees in the Province claims have been assigned to anyone, it is to an organisation created by the various unions involved, not to the Province. Its role is simply to fund this organisation.

[56] In that regard, the Motion itself refers to claims that will ultimately be made in the restructuring by an "Assignee". According to the Motion, this "Assignee" is certainly not the Province.

[57] On the other hand, the Province has not provided the Court with any reasonable and convincing evidence in support of its other alleged status of potential creditor for environmental problems resulting from Abitibi's economic activities.

[58] The Motion has merely referred to several press articles in support of an alleged claim against Abitibi for the contamination arising from a closed mine in the town of Buchans.

[59] These vague and unsubstantiated allegations are, at this point in time, barely supported. This is hardly sufficient to give to the Province an alleged standing as creditor or even potential creditor of Abitibi.

[60] To conclude on this basis that the Province is a creditor of Abitibi would, in essence, substitute speculation for reason and guesswork for proof.

[61] In a *CCAA* context, a potential creditor with a contingent claim bears the onus of showing, at the very least, that its claim is neither speculative nor remote[13]. Some credible and reliable evidence must be offered in support. None exists here.

[62] Finally, even though the Province's Counsel raised, during oral argument, that the Province would have a status as creditor of Abitibi by reason of some outstanding tax claims, no allegation in the Motion, nor any evidence adduced in support thereof, substantiate that contention.

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[13] *Re Air Canada*, (2004) 2 C.B.R. (5th) 23 (Ont. S.C.J.).

c) The "stakeholder" argument

[63] The Province's other argument to the effect that it is, in any event, a "stakeholder" in Abitibi's restructuring process is no more convincing than the first one. Nor is the submission that, as alleged stakeholder in the process, the Province should be entitled to an unfettered access to the electronic data rooms.

[64] These data rooms have been set up to assist and enhance the Abitibi's restructuring process. However, there has not been an open access to the data rooms for every creditor, and certainly not for every potential stakeholder.

[65] In fact, based on the Court's understanding, access has been limited to some key undisputed creditors and their financial and legal advisors.

[66] More precisely, so far, access to the electronic data rooms has only been given to secured creditors of Abitibi whose assets are being used in the restructuring process, and to committees of unsecured creditors whose status is officially recognized in the U.S. proceedings or whose support is essential to the outcome of the restructuring because of the huge extent of the debt owed to them.

[67] No evidence suggests that mere potential or contingent creditors such as the Province have been given the kind of access the Province is seeking. To the contrary, it appears that it has not been the case. From that standpoint, the alleged discrimination claimed by the Province is simply not established.

[68] Likewise, the evidence offered does not support either the Province's claim that it is entitled to the same rights as those of other stakeholders. Again, no stakeholder with a status similar to that of the Province has been given the access sought here.

[69] Few would dispute that there are huge differences between the alleged status of the Province and that of key creditors whose claims are undisputed and whose involvement remains pivotal to the final outcome of the restructuring.

[70] In that regard, the Province's reference to the testimony of Mr. Robertson at another hearing ignores the particular context in which it was given. It hardly justifies opening the doors of the electronic data rooms to all stakeholders without distinction. True, by definition[14], stakeholders are people who have an interest in a company's or organization's affairs. However, while creditors are inevitably stakeholders, not all stakeholders are necessarily creditors.

[71] In its Memorandum of Argument, the Province goes as far as pleading that the fact that it may not be a creditor of Abitibi is not a valid reason to deny the access sought. The Court does not share that view. With respect, this is certainly a very important consideration to keep in mind on an issue like this one.

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[14] Collins COBUILD Advanced Learner's English Dictionary on CD-ROM, Lexicon, 2003, HarperCollins Publishers, <stakeholder>.

[72] In fact, in the Court's opinion, seldom would a judge allow, in a *CCAA* restructuring process, mere stakeholders who are not creditors to have access to the non-public financial and corporate information of the debtor company.

[73] In a similar fashion, access to the electronic data rooms to some creditors does not mean that similar access must necessarily be given to everyone who requests it. The fact that Abitibi should ensure transparency and openness in its restructuring proceedings and process does not entail that everyone should be treated similarly. Fair and equitable treatment does not correspond to equal and identical treatment at all costs.

[74] For instance, Abitibi could well, in some cases, deny access to its electronic data rooms to some categories of creditors for legitimate commercial reasons. The example of a creditor who is a competitor of Abitibi comes to mind. There are no doubt others.

[75] Arguably, practical reasons could also justify Abitibi limiting access to its electronic data rooms to prevent its use becoming impractical or the signing of confidentiality agreements meaningless by reason of the fact that too many persons have access to the information.

[76] This notwithstanding, the Province seems to suggest that because some creditors have had access to the electronic data rooms, all stakeholders, no matter what is their status, should be given the same opportunity. The Court disagrees.

[77] Contrary to what the Province pleads, it is not a fundamental tenet of insolvency law that similarly situated "stakeholders" be treated in the same manner. The case law does not support this premise. It rather states that in insolvency law, unsecured creditors are normally treated in the same manner in similar situation[15]. To apply the statement to "stakeholders" as well, with no consideration to their precise status, goes way beyond what the case law indicates.

[78] In a restructuring process under the *CCAA*, voting on the plan of arrangement remains, at all times, in the hands of the creditors. If the interest of stakeholders other than creditors should, sometimes, be taken into consideration in the exercise of the Court's judicial discretion or inherent jurisdiction, it does not elevate nor equate the status of stakeholders to that of creditors.

[79] In the conduct of the restructuring process, mere "stakeholders" cannot realistically pretend to a status equal to that of the creditors. The latter have a say in the ultimate plan. The former do not unless they do qualify as creditors.

[80] This being so, the Court is of the view that Abitibi can, for legitimate business reasons and through the exercise of reasonable business judgment, restrict access to

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[15] See, in this respect, *Indalex Ltd. (Re)*, (2009), 55 C.B.R. (5th) 64 (Ont. S.C.); *Woodward's Ltd. (Re)*, (1993), 17 C.B.R. (3rd) 236 (B.C. S.C.); *Pacific National Lease Holding Corp. (Re)*, (1992) 15 C.B.R. (3rd) 265 (B.C.C.A.).

its electronic data rooms when its use by mere stakeholders (or, sometimes, even creditors) would not further nor enhance its restructuring process.

[81] In this regard, lacking evidence of bad faith, the Court should be reluctant to intervene in the reasonable exercise of a debtor company's business judgment. Such exercise should not be second-guessed lightly.

[82] Here, the Province wants access to the electronic data rooms not to enhance the restructuring process, but to assess the extent of Abitibi's present and future ability to cover the Province's undetermined and potential environmental claims.

[83] The Court considers it reasonable for Abitibi to deny access to its electronic data rooms to a potential creditor or mere stakeholder with whom it has a legitimate debate and reasonable expectations of upcoming litigation. In particular where, like here, the electronic data rooms apparently contain information concerning the economic claims of Abitibi against the Province.

[84] In such a situation, the *CCAA* process should not be used to further a collateral objective that, in the end, is not in connection with the ultimate goal of the Act.

[85] The broader public dimension of the *CCAA* does not entail an unlimited and unfettered access to the non-public books, records and financial data of a debtor company for all potential or contingent claimants, be they a public or governmental body.

[86] Similarly, considerations for the wider public interest and broad public dimension do not confer to a mere stakeholder the same status as a creditor in all aspects of the restructuring process.

[87] To that end, the judgments rendered in the cases of *Fracmaster*[16] and *Calpine*[17] hardly support the Province's argument. Transparency and openness in an asset sale process for an optimal recovery to the benefit of the debtor company is hardly comparable to the kind of openness and transparency that the Province is advocating here.

[88] Lastly, the alleged legitimate public interest relied upon by the Province is not in furtherance of the purposes of the *CCAA*. It is, to the contrary, in furtherance of the Province's own interest of determining the real value of its potential claims that are yet to be established.

[89] Put otherwise, the Province wants to have access to the electronic data rooms to better evaluate whether Abitibi's pockets will, one day, be deep enough.

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[16] *Fracmaster (Re)*, (1999), 11 C.B.R. (4th) 204 (Alta Q.B.).
[17] *Calpine (Re)*, (2007), 28 C.B.R. (5th) 185 (Alta Q.B.).

[90] This does not constitute a legitimate legal interest in the restructuring process, nor a legitimate commercial interest in its success. From the allegations of its Motion, it is rather fair to say that the Province does not appear to have any genuine interest in the restructuring of Abitibi. At the present time, nothing suggests that the Province will either shape the plan of arrangement or have a say in its approval.

[91] The fact that the Province is a governmental body does not change anything. It does not have more investigative entitlement in the non-public financial or business information of a potential debtor than does any other person.

[92] One could easily add that if the Province's true goal is merely to assess Abitibi's on going financial condition, what the Monitor puts regularly on its website definitely provides the reader with what it needs in this respect.

[93] In sum, the Court accepts Abitibi's assertion that the Province's purpose here is a collateral one. It has nothing to do with the key objectives of the *CCAA*, namely to facilitate a restructuring and insure that Abitibi continues as a going concern.

[94] Abitibi's denial of the Province's request is legitimate and reasonable. It is based on proper considerations. This is not a situation where the Court should second-guess or review the exercise of Abitibi's business judgment.

[95] To paraphrase what Farley J. once wrote, justice does not dictate to grant the access sought. Nor does practicality demand that it be done here.

d) Closing remarks

[96] In closing, the Court notes that both sides have said a lot on the *Abitibi Act*.

[97] For its part, the Province considers that the *Abitibi Act* is constitutional, even though it is retrospective, targeted and confiscatory in nature[18].

[98] In contrast, Abitibi contends that the enactment is contrary to fundamental constitutional principles of the *Canadian Charter of Rights and Freedoms* and *Canadian Bill of Rights*, as well as being unconstitutional. It considers the Act to be punitive, confiscatory in nature and repugnant to public policy[19].

[99] While the Province argues that the potential claims of Abitibi against it as a result of the *Abitibi Act* are without merit, the latter maintains that if any claim is ever filed by the Province in the restructuring process, the Court will have to assess the constitutional validity of the *Abitibi Act* and the value of its cross-claims or set-off claims against the Province for the wrongful expropriation it has been subjected to.

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[18] To that end, it refers notably to *British Columbia* v. *Imperial Tobacco Canada Ltd.*, [2005] 2 S.C.R. 473, at pp. 503-504.

[19] Amongst others, it invokes *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297 and *Laane & Baltser* v. *Estonian S.S. Line*, [1949] S.C.R. 530.

[100] Be that as it may, the Court views as premature the requests contained in the conclusions of Abitibi's own Motion to Contest. It is not necessary to immediately designate a former judge as Claims Officer to hear and determine all alleged claims filed by the Province as well as any counter-claims or set-off claims to be raised by Abitibi.

[101] For the time being, the Province has filed no claim in the Claims Process established in Abitibi's *CCAA* restructuring. Consequently, it is too early to implement any kind of special process in that regard.

FOR THESE REASONS, THE COURT:

[102] **DISMISSES** the "Motion for a Declaration that the Petitioner is Entitled to Access to the Electronic Data Rooms Created by the Debtors";

[103] **DISMISSES** as well conclusions [25] and [26] of the "Motion to Contest the Motion for Access to the Electronic Data Rooms Created by the Petitioners";

[104] **WITH COSTS** against Her Majesty the Queen in Right of Newfoundland and Labrador.

CLÉMENT GASCON, J.S.C.

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Date of hearing: November 2, 2009

SCHEDULE "A"

ABITIBI PETITIONERS

1. ABITIBI-CONSOLIDATED INC.
2. ABITIBI-CONSOLIDATED COMPANY OF CANADA
3. 3224112 NOVA SCOTIA LIMITED
4. MARKETING DONOHUE INC.
5. ABITIBI-CONSOLIDATED CANADIAN OFFICE PRODUCTS HOLDINGS INC.
6. 3834328 CANADA INC.
7. 6169678 CANADA INC.
8. 4042140 CANADA INC.
9. DONOHUE RECYCLING INC.
10. 1508756 ONTARIO INC.
11. 3217925 NOVA SCOTIA COMPANY
12. LA TUQUE FOREST PRODUCTS INC.
13. ABITIBI-CONSOLIDATED NOVA SCOTIA INCORPORATED
14. SAGUENAY FOREST PRODUCTS INC.
15. TERRA NOVA EXPLORATIONS LTD.
16. THE JONQUIERE PULP COMPANY
17. THE INTERNATIONAL BRIDGE AND TERMINAL COMPANY
18. SCRAMBLE MINING LTD.
19. 9150-3383 QUÉBEC INC.

SCHEDULE "B"

BOWATER PETITIONERS

1. BOWATER CANADIAN HOLDINGS INC.
2. BOWATER CANADA FINANCE CORPORATION
3. BOWATER CANADIAN LIMITED
4. 3231378 NOVA SCOTIA COMPANY
5. ABITIBIBOWATER CANADA INC.
6. BOWATER CANADA TREASURY CORPORATION
7. BOWATER CANADIAN FOREST PRODUCTS INC.
8. BOWATER SHELBURNE CORPORATION
9. BOWATER LAHAVE CORPORATION
10. ST-MAURICE RIVER DRIVE COMPANY LIMITED
11. BOWATER TREATED WOOD INC.
12. CANEXEL HARDBOARD INC.
13. 9068-9050 QUÉBEC INC.
14. ALLIANCE FOREST PRODUCTS (2001) INC.
15. BOWATER BELLEDUNE SAWMILL INC.
16. BOWATER MARITIMES INC.
17. BOWATER MITIS INC.
18. BOWATER GUÉRETTE INC.
19. BOWATER COUTURIER INC.

SCHEDULE "C"

18.6 CCAA PETITIONERS

1. ABITIBIBOWATER INC.
2. ABITIBIBOWATER US HOLDING 1 CORP.
3. BOWATER VENTURES INC.
4. BOWATER INCORPORATED
5. BOWATER NUWAY INC.
6. BOWATER NUWAY MID-STATES INC.
7. CATAWBA PROPERTY HOLDINGS LLC
8. BOWATER FINANCE COMPANY INC.
9. BOWATER SOUTH AMERICAN HOLDINGS INCORPORATED
10. BOWATER AMERICA INC.
11. LAKE SUPERIOR FOREST PRODUCTS INC.
12. BOWATER NEWSPRINT SOUTH LLC
13. BOWATER NEWSPRINT SOUTH OPERATIONS LLC
14. BOWATER FINANCE II, LLC
15. BOWATER ALABAMA LLC
16. COOSA PINES GOLF CLUB HOLDINGS LLC

TAB 3

SUPREME COURT OF CANADA

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

DATE: 20101216
DOCKET: 33239

BETWEEN:

Century Services Inc.
Appellant
and
Attorney General of Canada on behalf of Her Majesty The Queen in Right of Canada
Respondent

CORAM: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

REASONS FOR JUDGMENT: (paras. 1 to 89)	Deschamps J. (McLachlin C.J. and Binnie, LeBel, Charron, Rothstein and Cromwell JJ. concurring)
CONCURRING REASONS: (paras. 90 to 113)	Fish J.
DISSENTING REASONS: (paras. 114 to 136)	Abella J.

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

Century Services Inc. *Appellant*

v.

Attorney General of Canada on behalf of Her Majesty The Queen in Right of Canada *Respondent*

Indexed as: Century Services Inc. *v.* Canada (Attorney General)

2010 SCC 60

File No.: 33239.

2010: May 11; 2010: December 16.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Bankruptcy and Insolvency — Priorities — Crown applying on eve of bankruptcy of debtor company to have GST monies held in trust paid to Receiver General of Canada — Whether deemed trust in favour of Crown under Excise Tax Act prevails over provisions of Companies' Creditors Arrangement Act purporting to nullify deemed trusts in favour of Crown — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 18.3(1) — Excise Tax Act, R.S.C. 1985, c. E-15, s. 222(3).

Bankruptcy and insolvency — Procedure — Whether chambers judge had authority to make order partially lifting stay of proceedings to allow debtor company to make assignment in bankruptcy and to stay Crown's right to enforce GST deemed trust — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

Trusts — Express trusts — GST collected but unremitted to Crown — Judge ordering that GST be held by Monitor in trust account — Whether segregation of Crown's GST claim in Monitor's account created an express trust in favour of Crown.

The debtor company commenced proceedings under the *Companies' Creditors Arrangement Act* ("*CCAA*"), obtaining a stay of proceedings to allow it time to reorganize its financial affairs. One of the debtor company's outstanding debts at the commencement of the reorganization was an amount of unremitted Goods and Services Tax ("GST") payable to the Crown. Section 222(3) of the *Excise Tax Act* ("*ETA*") created a deemed trust over unremitted GST, which operated despite any

other enactment of Canada except the *Bankruptcy and Insolvency Act* ("*BIA*"). However, s. 18.3(1) of the *CCAA* provided that any statutory deemed trusts in favour of the Crown did not operate under the *CCAA*, subject to certain exceptions, none of which mentioned GST.

Pursuant to an order of the *CCAA* chambers judge, a payment not exceeding $5 million was approved to the debtor company's major secured creditor, Century Services. However, the chambers judge also ordered the debtor company to hold back and segregate in the Monitor's trust account an amount equal to the unremitted GST pending the outcome of the reorganization. On concluding that reorganization was not possible, the debtor company sought leave of the court to partially lift the stay of proceedings so it could make an assignment in bankruptcy under the *BIA*. The Crown moved for immediate payment of unremitted GST to the Receiver General. The chambers judge denied the Crown's motion, and allowed the assignment in bankruptcy. The Court of Appeal allowed the appeal on two grounds. First, it reasoned that once reorganization efforts had failed, the chambers judge was bound under the priority scheme provided by the *ETA* to allow payment of unremitted GST to the Crown and had no discretion under s. 11 of the *CCAA* to continue the stay against the Crown's claim. Second, the Court of Appeal concluded that by ordering the GST funds segregated in the Monitor's trust account, the chambers judge had created an express trust in favour of the Crown.

Held (Abella J. dissenting): The appeal should be allowed.

Per McLachlin C.J. and Binnie, LeBel, Deschamps, Charron, Rothstein and Cromwell JJ.: The apparent conflict between s. 222(3) of the *ETA* and s. 18.3(1) of the *CCAA* can be resolved through an interpretation that properly recognizes the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by Parliament and the principles for interpreting the *CCAA* that have been recognized in the jurisprudence. The history of the *CCAA* distinguishes it from the *BIA* because although these statutes share the same remedial purpose of avoiding the social and economic costs of liquidating a debtor's assets, the *CCAA* offers more flexibility and greater judicial discretion than the rules-based mechanism under the *BIA*, making the former more responsive to complex reorganizations. Because the *CCAA* is silent on what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily provides the backdrop against which creditors assess their priority in the event of bankruptcy. The contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the *CCAA* and the *BIA*, and one of its important features has been a cutback in Crown priorities. Accordingly, the *CCAA* and the *BIA* both contain provisions nullifying statutory deemed trusts in favour of the Crown, and both contain explicit exceptions exempting source deductions deemed trusts from this general rule. Meanwhile, both Acts are harmonious in treating other Crown claims as unsecured. No such clear and express language exists in those Acts carving out an exception for GST claims.

When faced with the apparent conflict between s. 222(3) of the *ETA* and s. 18.3(1) of the *CCAA*, courts have been inclined to follow *Ottawa Senators Hockey Club Corp. (Re)* and resolve the conflict in favour of the *ETA*. *Ottawa Senators* should not be followed. Rather, the *CCAA* provides the rule. Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. 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 expressly and elaborately. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. The internal logic of the *CCAA* appears to subject a GST deemed trust to the waiver by Parliament of its priority. A strange asymmetry would result if differing treatments of GST deemed trusts under the *CCAA* and the *BIA* were found to exist, as this would encourage statute shopping, undermine the *CCAA*'s remedial purpose and invite the very social ills that the statute was enacted to avert. The later in time enactment of the more general s. 222(3) of the *ETA* does not require application of the doctrine of implied repeal to the earlier and more specific s. 18.3(1) of the *CCAA* in the circumstances of this case. In any event, recent amendments to the *CCAA* in 2005 resulted in s. 18.3 of the Act being renumbered and reformulated, making it the later in time provision. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*. The conflict between the *ETA* and the *CCAA* is more apparent than real.

The exercise of judicial discretion has allowed the *CCAA* to adapt and evolve to meet contemporary business and social needs. As reorganizations become increasingly complex, *CCAA* courts have been called upon to innovate. In determining their jurisdiction to sanction measures in a *CCAA* proceeding, courts should first interpret the provisions of the *CCAA* before turning to their inherent or equitable jurisdiction. Noteworthy in this regard is the expansive interpretation the language of the *CCAA* is capable of supporting. The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. The requirements of appropriateness, good faith and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. The question is whether the order will usefully further efforts to avoid the social and economic losses resulting from liquidation of an insolvent company, which extends to both the purpose of the order and the means it employs. Here, the chambers judge's order staying the Crown's GST claim was in furtherance of the *CCAA*'s objectives because it blunted the impulse of creditors to interfere in an orderly liquidation and fostered a harmonious transition from the *CCAA* to the *BIA*, meeting the objective of a single proceeding that is common to both statutes. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of *BIA* proceedings, but no gap exists between the two statutes because they operate in tandem and creditors in both cases look to the *BIA* scheme of distribution to foreshadow how they will fare if the reorganization is unsuccessful. The breadth of the court's discretion under the *CCAA*

is sufficient to construct a bridge to liquidation under the *BIA*. Hence, the chambers judge's order was authorized.

No express trust was created by the chambers judge's order in this case because there is no certainty of object inferrable from his order. Creation of an express trust requires certainty of intention, subject matter and object. At the time the chambers judge accepted the proposal to segregate the monies in the Monitor's trust account there was no certainty that the Crown would be the beneficiary, or object, of the trust because exactly who might take the money in the final result was in doubt. In any event, no dispute over the money would even arise under the interpretation of s. 18.3(1) of the *CCAA* established above, because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount.

Per Fish J.: The GST monies collected by the debtor are not subject to a deemed trust or priority in favour of the Crown. In recent years, Parliament has given detailed consideration to the Canadian insolvency scheme but has declined to amend the provisions at issue in this case, a deliberate exercise of legislative discretion. On the other hand, in upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, courts have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In the context of the Canadian insolvency regime, deemed trusts exist only where there is a statutory provision creating the trust and a *CCAA* or *BIA* provision explicitly

confirming its effective operation. The *Income Tax Act*, the *Canada Pension Plan* and the *Employment Insurance Act* all contain deemed trust provisions that are strikingly similar to that in s. 222 of the *ETA* but they are all also confirmed in s. 37 of the *CCAA* and in s. 67(3) of the *BIA* in clear and unmistakeable terms. The same is not true of the deemed trust created under the *ETA*. Although Parliament created a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it did not confirm the continued operation of the trust in either the *BIA* or the *CCAA*, reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

Per Abella J. (dissenting): Section 222(3) of the *ETA* gives priority during *CCAA* proceedings to the Crown's deemed trust in unremitted GST. This provision unequivocally defines its boundaries in the clearest possible terms and excludes only the *BIA* from its legislative grasp. The language used reflects a clear legislative intention that s. 222(3) would prevail if in conflict with any other law except the *BIA*. This is borne out by the fact that following the enactment of s. 222(3), amendments to the *CCAA* were introduced, and despite requests from various constituencies, s. 18.3(1) was not amended to make the priorities in the *CCAA* consistent with those in the *BIA*. This indicates a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA*.

The application of other principles of interpretation reinforces this conclusion. An earlier, specific provision may be overruled by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails. Section 222(3) achieves this through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" other than the *BIA*. Section 18.3(1) of the *CCAA* is thereby rendered inoperative for purposes of s. 222(3). By operation of s. 44(*f*) of the *Interpretation Act*, the transformation of s. 18.3(1) into s. 37(1) after the enactment of s. 222(3) of the *ETA* has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision. This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes other than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request for payment of the GST funds during the *CCAA* proceedings.

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By Deschamps J.

Overruled: *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737; **distinguished:** *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862; **referred to:** *Reference re Companies' Creditors Arrangement Act*, [1934] S.C.R. 659; *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny*, 2009 SCC 49, [2009] 3 S.C.R. 286; *Deputy Minister of Revenue v. Rainville*, [1980] 1 S.C.R. 35; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, 30 Alta. L.R. (4th) 192; *Komunik Corp. (Arrangement relatif à)*, 2009 QCCS 6332 (CanLII), leave to appeal granted, 2010 QCCA 183 (CanLII); *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411; *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720; *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4th) 219; *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513; *Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106; *Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282; *Chef Ready Foods Ltd. v. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134; *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9; *Air Canada, Re* (2003), 42 C.B.R. (4th) 173; *Air Canada, Re*, 2003 CanLII 49366; *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158; *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118; *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96, aff'g (1999), 12 C.B.R. (4th) 144; *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5;

Philip's Manufacturing Ltd., Re (1992), 9 C.B.R. (3d) 25; *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108.

By Fish J.

Referred to: *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737.

By Abella J. (dissenting)

Ottawa Senators Hockey Club Corp. (Re) (2005), 73 O.R. (3d) 737; *Tele-Mobile Co. v. Ontario*, 2008 SCC 12, [2008] 1 S.C.R. 305; *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862; *Attorney General of Canada v. Public Service Staff Relations Board*, [1977] 2 F.C. 663.

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APPEAL from a judgment of the British Columbia Court of Appeal (Newbury, Tysoe and Smith JJ.A.), 2009 BCCA 205, 98 B.C.L.R. (4th) 242, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, [2009] G.S.T.C. 79, [2009] B.C.J. No. 918 (QL), 2009 CarswellBC 1195, reversing a judgment of Brenner C.J.S.C., 2008 BCSC 1805, [2008] G.S.T.C. 221, [2008] B.C.J. No. 2611 (QL), 2008 CarswellBC 2895, dismissing a Crown application for payment of GST monies. Appeal allowed, Abella J. dissenting.

Mary I. A. Buttery, *Owen J. James* and *Matthew J. G. Curtis*, for the appellant.

Gordon Bourgard, *David Jacyk* and *Michael J. Lema*, for the respondent.

The judgment of McLachlin C.J. and Binnie, LeBel, Deschamps, Charron, Rothstein and Cromwell JJ. was delivered by

[1] DESCHAMPS J. — For the first time this Court is called upon to directly interpret the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). In that respect, two questions are raised. The first requires

reconciliation of provisions of the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), which lower courts have held to be in conflict with one another. The second concerns the scope of a court's discretion when supervising reorganization. The relevant statutory provisions are reproduced in the Appendix. On the first question, having considered the evolution of Crown priorities in the context of insolvency and the wording of the various statutes creating Crown priorities, I conclude that it is the *CCAA* and not the *ETA* that provides the rule. On the second question, I conclude that the broad discretionary jurisdiction conferred on the supervising judge must be interpreted having regard to the remedial nature of the *CCAA* and insolvency legislation generally. Consequently, the court had the discretion to partially lift a stay of proceedings to allow the debtor to make an assignment under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). I would allow the appeal.

1. Facts and Decisions of the Courts Below

[2] Ted LeRoy Trucking Ltd. ("LeRoy Trucking") commenced proceedings under the *CCAA* in the Supreme Court of British Columbia on December 13, 2007, obtaining a stay of proceedings with a view to reorganizing its financial affairs. LeRoy Trucking sold certain redundant assets as authorized by the order.

[3] Amongst the debts owed by LeRoy Trucking was an amount for Goods and Services Tax ("GST") collected but unremitted to the Crown. The *ETA* creates a deemed trust in favour of the Crown for amounts collected in respect of GST. The deemed trust extends to any property or proceeds held by the person collecting GST

and any property of that person held by a secured creditor, requiring that property to be paid to the Crown in priority to all security interests. The *ETA* provides that the deemed trust operates despite any other enactment of Canada except the *BIA*. However, the *CCAA* also provides that subject to certain exceptions, none of which mentions GST, deemed trusts in favour of the Crown do not operate under the *CCAA*. Accordingly, under the *CCAA* the Crown ranks as an unsecured creditor in respect of GST. Nonetheless, at the time LeRoy Trucking commenced *CCAA* proceedings the leading line of jurisprudence held that the *ETA* took precedence over the *CCAA* such that the Crown enjoyed priority for GST claims under the *CCAA*, even though it would have lost that same priority under the *BIA*. The *CCAA* underwent substantial amendments in 2005 in which some of the provisions at issue in this appeal were renumbered and reformulated (S.C. 2005, c. 47). However, these amendments only came into force on September 18, 2009. I will refer to the amended provisions only where relevant.

[4] On April 29, 2008, Brenner C.J.S.C., in the context of the *CCAA* proceedings, approved a payment not exceeding $5 million, the proceeds of redundant asset sales, to Century Services, the debtor's major secured creditor. LeRoy Trucking proposed to hold back an amount equal to the GST monies collected but unremitted to the Crown and place it in the Monitor's trust account until the outcome of the reorganization was known. In order to maintain the *status quo* while the success of the reorganization was uncertain, Brenner C.J.S.C. agreed to the

proposal and ordered that an amount of $305,202.30 be held by the Monitor in its trust account.

[5] On September 3, 2008, having concluded that reorganization was not possible, LeRoy Trucking sought leave to make an assignment in bankruptcy under the *BIA*. The Crown sought an order that the GST monies held by the Monitor be paid to the Receiver General of Canada. Brenner C.J.S.C. dismissed the latter application. Reasoning that the purpose of segregating the funds with the Monitor was "to facilitate an ultimate payment of the GST monies which were owed pre-filing, but only if a viable plan emerged", the failure of such a reorganization, followed by an assignment in bankruptcy, meant the Crown would lose priority under the *BIA* (2008 BCSC 1805, [2008] G.S.T.C. 221).

[6] The Crown's appeal was allowed by the British Columbia Court of Appeal (2009 BCCA 205, 270 B.C.A.C. 167). Tysoe J.A. for a unanimous court found two independent bases for allowing the Crown's appeal.

[7] First, the court's authority under s. 11 of the *CCAA* was held not to extend to staying the Crown's application for immediate payment of the GST funds subject to the deemed trust after it was clear that reorganization efforts had failed and that bankruptcy was inevitable. As restructuring was no longer a possibility, staying the Crown's claim to the GST funds no longer served a purpose under the *CCAA* and the court was bound under the priority scheme provided by the *ETA* to allow payment

to the Crown. In so holding, Tysoe J.A. adopted the reasoning in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), which found that the *ETA* deemed trust for GST established Crown priority over secured creditors under the *CCAA*.

[8] Second, Tysoe J.A. concluded that by ordering the GST funds segregated in the Monitor's trust account on April 29, 2008, the judge had created an express trust in favour of the Crown from which the monies in question could not be diverted for any other purposes. The Court of Appeal therefore ordered that the money held by the Monitor in trust be paid to the Receiver General.

2. Issues

[9] This appeal raises three broad issues which are addressed in turn:

(1) Did s. 222(3) of the *ETA* displace s. 18.3(1) of the *CCAA* and give priority to the Crown's *ETA* deemed trust during *CCAA* proceedings as held in *Ottawa Senators*?

(2) Did the court exceed its *CCAA* authority by lifting the stay to allow the debtor to make an assignment in bankruptcy?

(3) Did the court's order of April 29, 2008 requiring segregation of the Crown's GST claim in the Monitor's trust account create an express trust in favour of the Crown in respect of those funds?

3. Analysis

[10] The first issue concerns Crown priorities in the context of insolvency. As will be seen, the *ETA* provides for a deemed trust in favour of the Crown in respect of GST owed by a debtor "[d]espite . . . any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)" (s. 222(3)), while the *CCAA* stated at the relevant time that "notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be [so] regarded" (s. 18.3(1)). It is difficult to imagine two statutory provisions more apparently in conflict. However, as is often the case, the apparent conflict can be resolved through interpretation.

[11] In order to properly interpret the provisions, it is necessary to examine the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by Parliament, and the principles that have been recognized in the jurisprudence. It will be seen that Crown priorities in the insolvency context have been significantly pared down. The resolution of the second issue is also rooted in the context of the *CCAA*, but its purpose and the manner in which it has been interpreted in the case law are also key. After examining the first two issues in this case, I will

address Tysoe J.A.'s conclusion that an express trust in favour of the Crown was created by the court's order of April 29, 2008.

3.1 *Purpose and Scope of Insolvency Law*

[12] Insolvency is the factual situation that arises when a debtor is unable to pay creditors (see generally, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), at p. 16). Certain legal proceedings become available upon insolvency, which typically allow a debtor to obtain a court order staying its creditors' enforcement actions and attempt to obtain a binding compromise with creditors to adjust the payment conditions to something more realistic. Alternatively, the debtor's assets may be liquidated and debts paid from the proceeds according to statutory priority rules. The former is usually referred to as reorganization or restructuring while the latter is termed liquidation.

[13] Canadian commercial insolvency law is not codified in one exhaustive statute. Instead, Parliament has enacted multiple insolvency statutes, the main one being the *BIA*. The *BIA* offers a self-contained legal regime providing for both reorganization and liquidation. Although bankruptcy legislation has a long history, the *BIA* itself is a fairly recent statute — it was enacted in 1992. It is characterized by a rules-based approach to proceedings. The *BIA* is available to insolvent debtors owing $1000 or more, regardless of whether they are natural or legal persons. It contains mechanisms for debtors to make proposals to their creditors for the

adjustment of debts. If a proposal fails, the *BIA* contains a bridge to bankruptcy whereby the debtor's assets are liquidated and the proceeds paid to creditors in accordance with the statutory scheme of distribution.

[14] Access to the *CCAA* is more restrictive. A debtor must be a company with liabilities in excess of $5 million. Unlike the *BIA*, the *CCAA* contains no provisions for liquidation of a debtor's assets if reorganization fails. There are three ways of exiting *CCAA* proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership. As discussed in greater detail below, the key difference between the reorganization regimes under the *BIA* and the *CCAA* is that the latter offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations.

[15] As I will discuss at greater length below, the purpose of the *CCAA* — Canada's first reorganization statute — is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its

assets. Proposals to creditors under the *BIA* serve the same remedial purpose, though this is achieved through a rules-based mechanism that offers less flexibility. Where reorganization is impossible, the *BIA* may be employed to provide an orderly mechanism for the distribution of a debtor's assets to satisfy creditor claims according to predetermined priority rules.

[16] Prior to the enactment of the *CCAA* in 1933 (S.C. 1932-33, c. 36), practice under existing commercial insolvency legislation tended heavily towards the liquidation of a debtor company (J. Sarra, *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations* (2003), at p. 12). The battering visited upon Canadian businesses by the Great Depression and the absence of an effective mechanism for reaching a compromise between debtors and creditors to avoid liquidation required a legislative response. The *CCAA* was innovative as it allowed the insolvent debtor to attempt reorganization under judicial supervision outside the existing insolvency legislation which, once engaged, almost invariably resulted in liquidation (*Reference re Companies' Creditors Arrangement Act*, [1934] S.C.R. 659, at pp. 660-61; Sarra, *Creditor Rights*, at pp. 12-13).

[17] Parliament understood when adopting the *CCAA* that liquidation of an insolvent company was harmful for most of those it affected — notably creditors and employees — and that a workout which allowed the company to survive was optimal (Sarra, *Creditor Rights*, at pp. 13-15).

[18] Early commentary and jurisprudence also endorsed the *CCAA*'s remedial objectives. It recognized that companies retain more value as going concerns while underscoring that intangible losses, such as the evaporation of the companies' goodwill, result from liquidation (S. E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 *Can. Bar Rev.* 587, at p. 592). Reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs (*ibid.*, at p. 593). Insolvency could be so widely felt as to impact stakeholders other than creditors and employees. Variants of these views resonate today, with reorganization justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation.

[19] The *CCAA* fell into disuse during the next several decades, likely because amendments to the Act in 1953 restricted its use to companies issuing bonds (S.C. 1952-53, c. 3). During the economic downturn of the early 1980s, insolvency lawyers and courts adapting to the resulting wave of insolvencies resurrected the statute and deployed it in response to new economic challenges. Participants in insolvency proceedings grew to recognize and appreciate the statute's distinguishing feature: a grant of broad and flexible authority to the supervising court to make the orders necessary to facilitate the reorganization of the debtor and achieve the *CCAA*'s objectives. The manner in which courts have used *CCAA* jurisdiction in increasingly creative and flexible ways is explored in greater detail below.

[20] Efforts to evolve insolvency law were not restricted to the courts during this period. In 1970, a government-commissioned panel produced an extensive study recommending sweeping reform but Parliament failed to act (see *Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation* (1970)). Another panel of experts produced more limited recommendations in 1986 which eventually resulted in enactment of the *Bankruptcy and Insolvency Act* of 1992 (S.C. 1992, c. 27) (see *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)). Broader provisions for reorganizing insolvent debtors were then included in Canada's bankruptcy statute. Although the 1970 and 1986 reports made no specific recommendations with respect to the *CCAA*, the House of Commons committee studying the *BIA*'s predecessor bill, C-22, seemed to accept expert testimony that the *BIA*'s new reorganization scheme would shortly supplant the *CCAA*, which could then be repealed, with commercial insolvency and bankruptcy being governed by a single statute (*Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 15, 3rd Sess., 34th Parl., October 3, 1991, at 15:15-15:16).

[21] In retrospect, this conclusion by the House of Commons committee was out of step with reality. It overlooked the renewed vitality the *CCAA* enjoyed in contemporary practice and the advantage that a flexible judicially supervised reorganization process presented in the face of increasingly complex reorganizations, when compared to the stricter rules-based scheme contained in the *BIA*. The

"flexibility of the *CCAA* [was seen as] a great benefit, allowing for creative and effective decisions" (Industry Canada, Marketplace Framework Policy Branch, *Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2002), at p. 41). Over the past three decades, resurrection of the *CCAA* has thus been the mainspring of a process through which, one author concludes, "the legal setting for Canadian insolvency restructuring has evolved from a rather blunt instrument to one of the most sophisticated systems in the developed world" (R. B. Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 481).

[22] While insolvency proceedings may be governed by different statutory schemes, they share some commonalities. The most prominent of these is the single proceeding model. The nature and purpose of the single proceeding model are described by Professor Wood in *Bankruptcy and Insolvency Law*:

> They all provide a collective proceeding that supersedes the usual civil process available to creditors to enforce their claims. The creditors' remedies are collectivized in order to prevent the free-for-all that would otherwise prevail if creditors were permitted to exercise their remedies. In the absence of a collective process, each creditor is armed with the knowledge that if they do not strike hard and swift to seize the debtor's assets, they will be beat out by other creditors. [pp. 2-3]

The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all

possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing, rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise. With a view to achieving that purpose, both the *CCAA* and the *BIA* allow a court to order all actions against a debtor to be stayed while a compromise is sought.

[23] Another point of convergence of the *CCAA* and the *BIA* relates to priorities. Because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful. In addition, one of the important features of legislative reform of both statutes since the enactment of the *BIA* in 1992 has been a cutback in Crown priorities (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, ss. 73 and 125; S.C. 2000, c. 30, s. 148; S.C. 2005, c. 47, ss. 69 and 131; S.C. 2009, c. 33, s. 25; see also *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny*, 2009 SCC 49, [2009] 3 S.C.R. 286; *Deputy Minister of Revenue v. Rainville*, [1980] 1 S.C.R. 35; *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency*).

[24] With parallel *CCAA* and *BIA* restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory

schemes to the extent possible and encouraging reorganization over liquidation (see *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, 30 Alta. L.R. (4th) 192, at para. 19).

[25] Mindful of the historical background of the *CCAA* and *BIA*, I now turn to the first question at issue.

3.2 *GST Deemed Trust Under the CCAA*

[26] The Court of Appeal proceeded on the basis that the *ETA* precluded the court from staying the Crown's enforcement of the GST deemed trust when partially lifting the stay to allow the debtor to enter bankruptcy. In so doing, it adopted the reasoning in a line of cases culminating in *Ottawa Senators*, which held that an *ETA* deemed trust remains enforceable during *CCAA* reorganization despite language in the *CCAA* that suggests otherwise.

[27] The Crown relies heavily on the decision of the Ontario Court of Appeal in *Ottawa Senators* and argues that the later in time provision of the *ETA* creating the GST deemed trust trumps the provision of the *CCAA* purporting to nullify most statutory deemed trusts. The Court of Appeal in this case accepted this reasoning but not all provincial courts follow it (see, e.g., *Komunik Corp. (Arrangement relatif à)*,

2009 QCCS 6332 (CanLII), leave to appeal granted, 2010 QCCA 183 (CanLII)). Century Services relied, in its written submissions to this Court, on the argument that the court had authority under the *CCAA* to continue the stay against the Crown's claim for unremitted GST. In oral argument, the question of whether *Ottawa Senators* was correctly decided nonetheless arose. After the hearing, the parties were asked to make further written submissions on this point. As appears evident from the reasons of my colleague Abella J., this issue has become prominent before this Court. In those circumstances, this Court needs to determine the correctness of the reasoning in *Ottawa Senators*.

[28] The policy backdrop to this question involves the Crown's priority as a creditor in insolvency situations which, as I mentioned above, has evolved considerably. Prior to the 1990s, Crown claims largely enjoyed priority in insolvency. This was widely seen as unsatisfactory as shown by both the 1970 and 1986 insolvency reform proposals, which recommended that Crown claims receive no preferential treatment. A closely related matter was whether the *CCAA* was binding at all upon the Crown. Amendments to the *CCAA* in 1997 confirmed that it did indeed bind the Crown (see *CCAA*, s. 21, as added by S.C. 1997, c. 12, s. 126).

[29] Claims of priority by the state in insolvency situations receive different treatment across jurisdictions worldwide. For example, in Germany and Australia, the state is given no priority at all, while the state enjoys wide priority in the United States and France (see B. K. Morgan, "Should the Sovereign be Paid First? A

Comparative International Analysis of the Priority for Tax Claims in Bankruptcy" (2000), 74 *Am. Bankr. L.J.* 461, at p. 500). Canada adopted a middle course through legislative reform of Crown priority initiated in 1992. The Crown retained priority for source deductions of income tax, Employment Insurance ("EI") and Canada Pension Plan ("CPP") premiums, but ranks as an ordinary unsecured creditor for most other claims.

[30] Parliament has frequently enacted statutory mechanisms to secure Crown claims and permit their enforcement. The two most common are statutory deemed trusts and powers to garnish funds third parties owe the debtor (see F. L. Lamer, *Priority of Crown Claims in Insolvency* (loose-leaf), at §2).

[31] With respect to GST collected, Parliament has enacted a deemed trust. The *ETA* states that every person who collects an amount on account of GST is deemed to hold that amount in trust for the Crown (s. 222(1)). The deemed trust extends to other property of the person collecting the tax equal in value to the amount deemed to be in trust if that amount has not been remitted in accordance with the *ETA*. The deemed trust also extends to property held by a secured creditor that, but for the security interest, would be property of the person collecting the tax (s. 222(3)).

[32] Parliament has created similar deemed trusts using almost identical language in respect of source deductions of income tax, EI premiums and CPP premiums (see s. 227(4) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"),

ss. 86(2) and (2.1) of the *Employment Insurance Act*, S.C. 1996, c. 23, and ss. 23(3) and (4) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8). I will refer to income tax, EI and CPP deductions as "source deductions".

[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 source deductions under the *ITA* and security interests taken under both the *Bank Act*, S.C. 1991, c. 46, and the Alberta *Personal Property Security Act*, S.A. 1988, c. P-4.05 ("*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 (paras. 27-29) (the "*Sparrow Electric* amendment").

[34] The amended text of s. 227(4.1) of the *ITA* and concordant source deductions deemed trusts in the *Canada Pension Plan* and the *Employment Insurance Act* state that the deemed trust operates notwithstanding any other enactment of

Canada, except ss. 81.1 and 81.2 of the *BIA*. The *ETA* deemed trust at issue in this case is similarly worded, but it excepts the *BIA* in its entirety. The provision reads as follows:

> **222.** . . .
>
> . . .
>
> (3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed . . . .

[35] The Crown submits that the *Sparrow Electric* amendment, added by Parliament to the *ETA* in 2000, was intended to preserve the Crown's priority over collected GST under the *CCAA* while subordinating the Crown to the status of an unsecured creditor in respect of GST only under the *BIA*. This is because the *ETA* provides that the GST deemed trust is effective "despite" any other enactment except the *BIA*.

[36] The language used in the *ETA* for the GST deemed trust creates an apparent conflict with the *CCAA*, which provides that subject to certain exceptions, property deemed by statute to be held in trust for the Crown shall not be so regarded.

[37] Through a 1997 amendment to the *CCAA* (S.C. 1997, c. 12, s. 125), Parliament appears to have, subject to specific exceptions, nullified deemed trusts in favour of the Crown once reorganization proceedings are commenced under the Act. The relevant provision reads:

> **18.3** (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

This nullification of deemed trusts was continued in further amendments to the *CCAA* (S.C. 2005, c. 47), where s. 18.3(1) was renumbered and reformulated as s. 37(1):

> **37.** (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

[38] An analogous provision exists in the *BIA*, which, subject to the same specific exceptions, nullifies statutory deemed trusts and makes property of the bankrupt that would otherwise be subject to a deemed trust part of the debtor's estate and available to creditors (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, s. 73; *BIA*, s. 67(2)). It is noteworthy that in both the *CCAA* and the *BIA*, the exceptions concern source deductions (*CCAA*, s. 18.3(2); *BIA*, s. 67(3)). The relevant provision of the *CCAA* reads:

> **18.3** . . .
>
> (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* . . . .

Thus, the Crown's deemed trust and corresponding priority in source deductions remain effective both in reorganization and in bankruptcy.

[39] Meanwhile, in both s. 18.4(1) of the *CCAA* and s. 86(1) of the *BIA*, other Crown claims are treated as unsecured. These provisions, establishing the Crown's status as an unsecured creditor, explicitly exempt statutory deemed trusts in source deductions (*CCAA*, s. 18.4(3); *BIA*, s. 86(3)). The *CCAA* provision reads as follows:

> **18.4** . . .
>
> . . .
>
> (3) Subsection (1) [Crown ranking as unsecured creditor] does not affect the operation of
>
> (*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,
>
> (*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution . . . .

Therefore, not only does the *CCAA* provide that Crown claims do not enjoy priority over the claims of other creditors (s. 18.3(1)), but the exceptions to this rule (i.e., that

Crown priority is maintained for source deductions) are repeatedly stated in the statute.

[40] The apparent conflict in this case is whether the rule in the *CCAA* first enacted as s. 18.3 in 1997, which provides that subject to certain explicit exceptions, statutory deemed trusts are ineffective under the *CCAA*, is overridden by the one in the *ETA* enacted in 2000 stating that GST deemed trusts operate despite any enactment of Canada except the *BIA*. With respect for my colleague Fish J., I do not think the apparent conflict can be resolved by denying it and creating a rule requiring both a statutory provision enacting the deemed trust, and a second statutory provision confirming it. Such a rule is unknown to the law. Courts must recognize conflicts, apparent or real, and resolve them when possible.

[41] A line of jurisprudence across Canada has resolved the apparent conflict in favour of the *ETA*, thereby maintaining GST deemed trusts under the *CCAA*. *Ottawa Senators*, the leading case, decided the matter by invoking the doctrine of implied repeal to hold that the later in time provision of the *ETA* should take precedence over the *CCAA* (see also *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4th) 219 (Alta. Q.B.); *Gauntlet*).

[42] The Ontario Court of Appeal in *Ottawa Senators* rested its conclusion on two considerations. First, it was persuaded that by explicitly mentioning the *BIA* in

ETA s. 222(3), but not the *CCAA*, Parliament made a deliberate choice. In the words of MacPherson J.A.:

> The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

[43] Second, the Ontario Court of Appeal compared the conflict between the *ETA* and the *CCAA* to that before this Court in *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862, and found them to be "identical" (para. 46). It therefore considered *Doré* binding (para. 49). In *Doré*, a limitations provision in the more general and recently enacted *Civil Code of Québec*, S.Q. 1991, c. 64 ("*C.C.Q.*"), was held to have repealed a more specific provision of the earlier Quebec *Cities and Towns Act*, R.S.Q., c. C-19, with which it conflicted. By analogy, the Ontario Court of Appeal held that the later in time and more general provision, s. 222(3) of the *ETA*, impliedly repealed the more specific and earlier in time provision, s. 18.3(1) of the *CCAA* (paras. 47-49).

[44] Viewing this issue in its entire context, several considerations lead me to conclude that neither the reasoning nor the result in *Ottawa Senators* can stand. While a conflict may exist at the level of the statutes' wording, a purposive and contextual analysis to determine Parliament's true intent yields the conclusion that Parliament could not have intended to restore the Crown's deemed trust priority in

GST claims under the *CCAA* when it amended the *ETA* in 2000 with the *Sparrow Electric* amendment.

[45] I begin by recalling that Parliament has shown its willingness to move away from asserting priority for Crown claims in insolvency law. Section 18.3(1) of the *CCAA* (subject to the s. 18.3(2) exceptions) provides that the Crown's deemed trusts have no effect under the *CCAA*. 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. For example, s. 18.3(2) of the *CCAA* and s. 67(3) of the *BIA* expressly provide that deemed trusts for source deductions remain effective in insolvency. Parliament has, therefore, clearly carved out exceptions from the general rule that deemed trusts are ineffective in insolvency. The *CCAA* and *BIA* are in harmony, preserving deemed trusts and asserting Crown priority only in respect of source deductions. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. Unlike source deductions, which are clearly and expressly dealt with under both these insolvency statutes, no such clear and express language exists in those Acts carving out an exception for GST claims.

[46] The internal logic of the *CCAA* also militates against upholding the *ETA* deemed trust for GST. The *CCAA* imposes limits on a suspension by the court of the Crown's rights in respect of source deductions but does not mention the *ETA* (s. 11.4). Since source deductions deemed trusts are granted explicit protection under the

CCAA, it would be inconsistent to afford a better protection to the *ETA* deemed trust absent explicit language in the *CCAA*. Thus, the logic of the *CCAA* appears to subject the *ETA* deemed trust to the waiver by Parliament of its priority (s. 18.4).

[47] Moreover, a strange asymmetry would arise if the interpretation giving the *ETA* priority over the *CCAA* urged by the Crown is adopted here: the Crown would retain priority over GST claims during *CCAA* proceedings but not in bankruptcy. As courts have reflected, this can only encourage statute shopping by secured creditors in cases such as this one where the debtor's assets cannot satisfy both the secured creditors' and the Crown's claims (*Gauntlet*, at para. 21). If creditors' claims were better protected by liquidation under the *BIA*, creditors' incentives would lie overwhelmingly with avoiding proceedings under the *CCAA* and not risking a failed reorganization. Giving a key player in any insolvency such skewed incentives against reorganizing under the *CCAA* can only undermine that statute's remedial objectives and risk inviting the very social ills that it was enacted to avert.

[48] Arguably, the effect of *Ottawa Senators* is mitigated if restructuring is attempted under the *BIA* instead of the *CCAA*, but it is not cured. If *Ottawa Senators* were to be followed, Crown priority over GST would differ depending on whether restructuring took place under the *CCAA* or the *BIA*. The anomaly of this result is made manifest by the fact that it would deprive companies of the option to restructure

under the more flexible and responsive *CCAA* regime, which has been the statute of choice for complex reorganizations.

[49] Evidence that Parliament intended different treatments for GST claims in reorganization and bankruptcy is scant, if it exists at all. Section 222(3) of the *ETA* was enacted as part of a wide-ranging budget implementation bill in 2000. The summary accompanying that bill does not indicate that Parliament intended to elevate Crown priority over GST claims under the *CCAA* to the same or a higher level than source deductions claims. Indeed, the summary for deemed trusts states only that amendments to existing provisions are aimed at "ensuring that employment insurance premiums and Canada Pension Plan contributions that are required to be remitted by an employer are fully recoverable by the Crown in the case of the bankruptcy of the employer" (Summary to S.C. 2000, c. 30, at p. 4a). The wording of GST deemed trusts resembles that of statutory deemed trusts for source deductions and incorporates the same overriding language and reference to the *BIA*. However, as noted above, Parliament's express intent is that only source deductions deemed trusts remain operative. An exception for the *BIA* in the statutory language establishing the source deductions deemed trusts accomplishes very little, because the explicit language of the *BIA* itself (and the *CCAA*) carves out these source deductions deemed trusts and maintains their effect. It is however noteworthy that no equivalent language maintaining GST deemed trusts exists under either the *BIA* or the *CCAA*.

[50] It seems more likely that by adopting the same language for creating GST deemed trusts in the *ETA* as it did for deemed trusts for source deductions, and by overlooking the inclusion of an exception for the *CCAA* alongside the *BIA* in s. 222(3) of the *ETA*, Parliament may have inadvertently succumbed to a drafting anomaly. Because of a statutory lacuna in the *ETA*, the GST deemed trust could be seen as remaining effective in the *CCAA*, while ceasing to have any effect under the *BIA*, thus creating an apparent conflict with the wording of the *CCAA*. However, it should be seen for what it is: a facial conflict only, capable of resolution by looking at the broader approach taken to Crown priorities and by giving precedence to the statutory language of s. 18.3 of the *CCAA* in a manner that does not produce an anomalous outcome.

[51] Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. It merely creates an apparent conflict that must be resolved by statutory interpretation. Parliament's intent when it enacted *ETA* s. 222(3) was therefore far from unambiguous. Had it sought to give the Crown a priority for GST claims, it could have done so explicitly as it did for source deductions. Instead, one is left to infer from the language of *ETA* s. 222(3) that the GST deemed trust was intended to be effective under the *CCAA*.

[52] I am not persuaded that the reasoning in *Doré* requires the application of the doctrine of implied repeal in the circumstances of this case. The main issue in *Doré* concerned the impact of the adoption of the *C.C.Q.* on the administrative law

rules with respect to municipalities. While Gonthier J. concluded in that case that the limitation provision in art. 2930 *C.C.Q.* had repealed by implication a limitation provision in the *Cities and Towns Act*, he did so on the basis of more than a textual analysis. The conclusion in *Doré* was reached after thorough contextual analysis of both pieces of legislation, including an extensive review of the relevant legislative history (paras. 31-41). Consequently, the circumstances before this Court in *Doré* are far from "identical" to those in the present case, in terms of text, context and legislative history. Accordingly, *Doré* cannot be said to require the automatic application of the rule of repeal by implication.

[53] A noteworthy indicator of Parliament's overall intent is the fact that in subsequent amendments it has not displaced the rule set out in the *CCAA*. Indeed, as indicated above, the recent amendments to the *CCAA* in 2005 resulted in the rule previously found in s. 18.3 being renumbered and reformulated as s. 37. Thus, to the extent the interpretation allowing the GST deemed trust to remain effective under the *CCAA* depends on *ETA* s. 222(3) having impliedly repealed *CCAA* s. 18.3(1) because it is later in time, we have come full circle. Parliament has renumbered and reformulated the provision of the *CCAA* stating that, subject to exceptions for source deductions, deemed trusts do not survive the *CCAA* proceedings and thus the *CCAA* is now the later in time statute. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*.

[54] I do not agree with my colleague Abella J. that s. 44(*f*) of the *Interpretation Act*, R.S.C. 1985, c. I-21, can be used to interpret the 2005 amendments as having no effect. The new statute can hardly be said to be a mere re-enactment of the former statute. Indeed, the *CCAA* underwent a substantial review in 2005. Notably, acting consistently with its goal of treating both the *BIA* and the *CCAA* as sharing the same approach to insolvency, Parliament made parallel amendments to both statutes with respect to corporate proposals. In addition, new provisions were introduced regarding the treatment of contracts, collective agreements, interim financing and governance agreements. The appointment and role of the Monitor was also clarified. Noteworthy are the limits imposed by *CCAA* s. 11.09 on the court's discretion to make an order staying the Crown's source deductions deemed trusts, which were formerly found in s. 11.4. No mention whatsoever is made of GST deemed trusts (see Summary to S.C. 2005, c. 47). The review went as far as looking at the very expression used to describe the statutory override of deemed trusts. The comments cited by my colleague only emphasize the clear intent of Parliament to maintain its policy that only source deductions deemed trusts survive in *CCAA* proceedings.

[55] In the case at bar, the legislative context informs the determination of Parliament's legislative intent and supports the conclusion that *ETA* s. 222(3) was not intended to narrow the scope of the *CCAA*'s override provision. Viewed in its entire context, the conflict between the *ETA* and the *CCAA* is more apparent than real. I

would therefore not follow the reasoning in *Ottawa Senators* and affirm that *CCAA* s. 18.3 remained effective.

[56] My conclusion is reinforced by the purpose of the *CCAA* as part of Canadian remedial insolvency legislation. As this aspect is particularly relevant to the second issue, I will now discuss how courts have interpreted the scope of their discretionary powers in supervising a *CCAA* reorganization and how Parliament has largely endorsed this interpretation. Indeed, the interpretation courts have given to the *CCAA* helps in understanding how the *CCAA* grew to occupy such a prominent role in Canadian insolvency law.

3.3 *Discretionary Power of a Court Supervising a CCAA Reorganization*

[57] Courts frequently observe that "[t]he *CCAA* is skeletal in nature" and does not "contain a comprehensive code that lays out all that is permitted or barred" (*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, at para. 44, *per* Blair J.A.). Accordingly, "[t]he history of CCAA law has been an evolution of judicial interpretation" (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Ct. (Gen. Div.)), at para. 10, *per* Farley J.).

[58] *CCAA* decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly describes as "the hothouse of real-time litigation" has been the

primary method by which the *CCAA* has been adapted and has evolved to meet contemporary business and social needs (see Jones, at p. 484).

[59] Judicial discretion must of course be exercised in furtherance of the *CCAA*'s purposes. The remedial purpose I referred to in the historical overview of the Act is recognized over and over again in the jurisprudence. To cite one early example:

> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.
>
> (*Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282, at para. 57, *per* Doherty J.A., dissenting)

[60] Judicial decision making under the *CCAA* takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by staying enforcement actions by creditors to allow the debtor's business to continue, preserving the *status quo* while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed (see, e.g., *Chef Ready Foods Ltd. v. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84 (C.A.), at pp. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134, at para. 27). In doing so, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor

and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company (see, e.g., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9, at para. 144, *per* Paperny J. (as she then was); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J.), at para. 3; *Air Canada, Re*, 2003 CanLII 49366 (Ont. S.C.J.), at para. 13, *per* Farley J.; Sarra, *Creditor Rights*, at pp. 181-92 and 217-26). In addition, courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed (see, e.g., *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (Ont. S.C.J.), at para. 2, *per* Blair J. (as he then was); Sarra, *Creditor Rights*, at pp. 195-214).

[61] When large companies encounter difficulty, reorganizations become increasingly complex. *CCAA* courts have been called upon to innovate accordingly in exercising their jurisdiction beyond merely staying proceedings against the debtor to allow breathing room for reorganization. They have been asked to sanction measures for which there is no explicit authority in the *CCAA*. Without exhaustively cataloguing the various measures taken under the authority of the *CCAA*, it is useful to refer briefly to a few examples to illustrate the flexibility the statute affords supervising courts.

[62] Perhaps the most creative use of *CCAA* authority has been the increasing willingness of courts to authorize post-filing security for debtor in possession

financing or super-priority charges on the debtor's assets when necessary for the continuation of the debtor's business during the reorganization (see, e.g., *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118 (Ont. Ct. (Gen. Div.)); *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96, aff'g (1999), 12 C.B.R. (4th) 144 (S.C.); and generally, J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at pp. 93-115). The *CCAA* has also been used to release claims against third parties as part of approving a comprehensive plan of arrangement and compromise, even over the objections of some dissenting creditors (see *Metcalfe & Mansfield*). As well, the appointment of a Monitor to oversee the reorganization was originally a measure taken pursuant to the *CCAA*'s supervisory authority; Parliament responded, making the mechanism mandatory by legislative amendment.

[63] Judicial innovation during *CCAA* proceedings has not been without controversy. At least two questions it raises are directly relevant to the case at bar: (1) What are the sources of a court's authority during *CCAA* proceedings? (2) What are the limits of this authority?

[64] The first question concerns the boundary between a court's statutory authority under the *CCAA* and a court's residual authority under its inherent and equitable jurisdiction when supervising a reorganization. In authorizing measures during *CCAA* proceedings, courts have on occasion purported to rely upon their equitable jurisdiction to advance the purposes of the Act or their inherent jurisdiction to fill gaps in the statute. Recent appellate decisions have counselled against

purporting to rely on inherent jurisdiction, holding that the better view is that courts are in most cases simply construing the authority supplied by the *CCAA* itself (see, e.g., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236, at paras. 45-47, *per* Newbury J.A.; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), at paras. 31-33, *per* Blair J.A.).

[65] I agree with Justice Georgina R. Jackson and Professor Janis Sarra that the most appropriate approach is a hierarchical one in which courts rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding (see G. R. Jackson and J. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2007* (2008), 41, at p. 42). The authors conclude that when given an appropriately purposive and liberal interpretation, the *CCAA* will be sufficient in most instances to ground measures necessary to achieve its objectives (p. 94).

[66] Having examined the pertinent parts of the *CCAA* and the recent history of the legislation, I accept that in most instances the issuance of an order during *CCAA* proceedings should be considered an exercise in statutory interpretation. Particularly noteworthy in this regard is the expansive interpretation the language of the statute at issue is capable of supporting.

[67] The initial grant of authority under the *CCAA* empowered a court "where an application is made under this Act in respect of a company . . . on the application of any person interested in the matter, . . . subject to this Act, [to] make an order under this section" (*CCAA*, s. 11(1)). The plain language of the statute was very broad.

[68] In this regard, though not strictly applicable to the case at bar, I note that Parliament has in recent amendments changed the wording contained in s. 11(1), making explicit the discretionary authority of the court under the *CCAA*. Thus, in s. 11 of the *CCAA* as currently enacted, a court may, "subject to the restrictions set out in this Act, . . . make any order that it considers appropriate in the circumstances" (S.C. 2005, c. 47, s. 128). Parliament appears to have endorsed the broad reading of *CCAA* authority developed by the jurisprudence.

[69] The *CCAA* also explicitly provides for certain orders. Both an order made on an initial application and an order on subsequent applications may stay, restrain, or prohibit existing or new proceedings against the debtor. The burden is on the applicant to satisfy the court that the order is appropriate in the circumstances and that the applicant has been acting in good faith and with due diligence (*CCAA*, ss. 11(3), (4) and (6)).

[70] The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of

appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

[71] It is well established that efforts to reorganize under the *CCAA* can be terminated and the stay of proceedings against the debtor lifted if the reorganization is "doomed to failure" (see *Chef Ready*, at p. 88; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (B.C.C.A.), at paras. 6-7). However, when an order is sought that does realistically advance the *CCAA*'s purposes, the ability to make it is within the discretion of a *CCAA* court.

[72] The preceding discussion assists in determining whether the court had authority under the *CCAA* to continue the stay of proceedings against the Crown once it was apparent that reorganization would fail and bankruptcy was the inevitable next step.

[73] In the Court of Appeal, Tysoe J.A. held that no authority existed under the *CCAA* to continue staying the Crown's enforcement of the GST deemed trust once efforts at reorganization had come to an end. The appellant submits that in so holding, Tysoe J.A. failed to consider the underlying purpose of the *CCAA* and give the statute an appropriately purposive and liberal interpretation under which the order was permissible. The Crown submits that Tysoe J.A. correctly held that the mandatory language of the *ETA* gave the court no option but to permit enforcement of the GST deemed trust when lifting the *CCAA* stay to permit the debtor to make an assignment under the *BIA*. Whether the *ETA* has a mandatory effect in the context of a *CCAA* proceeding has already been discussed. I will now address the question of whether the order was authorized by the *CCAA*.

[74] It is beyond dispute that the *CCAA* imposes no explicit temporal limitations upon proceedings commenced under the Act that would prohibit ordering a continuation of the stay of the Crown's GST claims while lifting the general stay of proceedings temporarily to allow the debtor to make an assignment in bankruptcy.

[75] The question remains whether the order advanced the underlying purpose of the *CCAA*. The Court of Appeal held that it did not because the reorganization efforts had come to an end and the *CCAA* was accordingly spent. I disagree.

[76] There is no doubt that had reorganization been commenced under the *BIA* instead of the *CCAA*, the Crown's deemed trust priority for the GST funds would

have been lost. Similarly, the Crown does not dispute that under the scheme of distribution in bankruptcy under the *BIA* the deemed trust for GST ceases to have effect. Thus, after reorganization under the *CCAA* failed, creditors would have had a strong incentive to seek immediate bankruptcy and distribution of the debtor's assets under the *BIA*. In order to conclude that the discretion does not extend to partially lifting the stay in order to allow for an assignment in bankruptcy, one would have to assume a gap between the *CCAA* and the *BIA* proceedings. Brenner C.J.S.C.'s order staying Crown enforcement of the GST claim ensured that creditors would not be disadvantaged by the attempted reorganization under the *CCAA*. The effect of his order was to blunt any impulse of creditors to interfere in an orderly liquidation. His order was thus in furtherance of the *CCAA*'s objectives to the extent that it allowed a bridge between the *CCAA* and *BIA* proceedings. This interpretation of the tribunal's discretionary power is buttressed by s. 20 of the *CCAA*. That section provides that the *CCAA* "may be applied together with the provisions of any Act of Parliament . . . that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them", such as the *BIA*. Section 20 clearly indicates the intention of Parliament for the *CCAA* to operate *in tandem* with other insolvency legislation, such as the *BIA*.

[77] The *CCAA* creates conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all. Because the alternative to reorganization is often bankruptcy, participants will measure the impact of a reorganization against the position they would enjoy in

liquidation. In the case at bar, the order fostered a harmonious transition between reorganization and liquidation while meeting the objective of a single collective proceeding that is common to both statutes.

[78] Tysoe J.A. therefore erred in my view by treating the *CCAA* and the *BIA* as distinct regimes subject to a temporal gap between the two, rather than as forming part of an integrated body of insolvency law. Parliament's decision to maintain two statutory schemes for reorganization, the *BIA* and the *CCAA*, reflects the reality that reorganizations of differing complexity require different legal mechanisms. By contrast, only one statutory scheme has been found to be needed to liquidate a bankrupt debtor's estate. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of the *BIA* proceedings. However, as Laskin J.A. for the Ontario Court of Appeal noted in a similar competition between secured creditors and the Ontario Superintendent of Financial Services seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be lost in bankruptcy (*Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, at paras. 62-63).

[79] The Crown's priority in claims pursuant to source deductions deemed trusts does not undermine this conclusion. Source deductions deemed trusts survive under both the *CCAA* and the *BIA*. Accordingly, creditors' incentives to prefer one Act over another will not be affected. While a court has a broad discretion to stay

source deductions deemed trusts in the *CCAA* context, this discretion is nevertheless subject to specific limitations applicable only to source deductions deemed trusts (*CCAA*, s. 11.4). Thus, if *CCAA* reorganization fails (e.g., either the creditors or the court refuse a proposed reorganization), the Crown can immediately assert its claim in unremitted source deductions. But this should not be understood to affect a seamless transition into bankruptcy or create any "gap" between the *CCAA* and the *BIA* for the simple reason that, regardless of what statute the reorganization had been commenced under, creditors' claims in both instances would have been subject to the priority of the Crown's source deductions deemed trust.

[80] Source deductions deemed trusts aside, the comprehensive and exhaustive mechanism under the *BIA* must control the distribution of the debtor's assets once liquidation is inevitable. Indeed, an orderly transition to liquidation is mandatory under the *BIA* where a proposal is rejected by creditors. The *CCAA* is silent on the transition into liquidation but the breadth of the court's discretion under the Act is sufficient to construct a bridge to liquidation under the *BIA*. The court must do so in a manner that does not subvert the scheme of distribution under the *BIA*. Transition to liquidation requires partially lifting the *CCAA* stay to commence proceedings under the *BIA*. This necessary partial lifting of the stay should not trigger a race to the courthouse in an effort to obtain priority unavailable under the *BIA*.

[81] I therefore conclude that Brenner C.J.S.C. had the authority under the *CCAA* to lift the stay to allow entry into liquidation.

3.4 *Express Trust*

[82] The last issue in this case is whether Brenner C.J.S.C. created an express trust in favour of the Crown when he ordered on April 29, 2008, that proceeds from the sale of LeRoy Trucking's assets equal to the amount of unremitted GST be held back in the Monitor's trust account until the results of the reorganization were known. Tysoe J.A. in the Court of Appeal concluded as an alternative ground for allowing the Crown's appeal that it was the beneficiary of an express trust. I disagree.

[83] Creation of an express trust requires the presence of three certainties: intention, subject matter, and object. Express or "true trusts" arise from the acts and intentions of the settlor and are distinguishable from other trusts arising by operation of law (see D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at pp. 28-29, especially fn. 42).

[84] Here, there is no certainty to the object (i.e. the beneficiary) inferrable from the court's order of April 29, 2008 sufficient to support an express trust.

[85] At the time of the order, there was a dispute between Century Services and the Crown over part of the proceeds from the sale of the debtor's assets. The court's solution was to accept LeRoy Trucking's proposal to segregate those monies until that dispute could be resolved. Thus, there was no certainty that the Crown would actually be the beneficiary, or object, of the trust.

[86] The fact that the location chosen to segregate those monies was the Monitor's trust account has no independent effect such that it would overcome the lack of a clear beneficiary. In any event, under the interpretation of *CCAA* s. 18.3(1) established above, no such priority dispute would even arise because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount. However, Brenner C.J.S.C. may well have been proceeding on the basis that, in accordance with *Ottawa Senators*, the Crown's GST claim would remain effective if reorganization was successful, which would not be the case if transition to the liquidation process of the *BIA* was allowed. An amount equivalent to that claim would accordingly be set aside pending the outcome of reorganization.

[87] Thus, uncertainty surrounding the outcome of the *CCAA* restructuring eliminates the existence of any certainty to permanently vest in the Crown a beneficial interest in the funds. That much is clear from the oral reasons of Brenner C.J.S.C. on April 29, 2008, when he said: "Given the fact that [*CCAA* proceedings] are known to fail and filings in bankruptcy result, it seems to me that maintaining the status quo in the case at bar supports the proposal to have the monitor hold these funds in trust." Exactly who might take the money in the final result was therefore evidently in doubt. Brenner C.J.S.C.'s subsequent order of September 3, 2008 denying the Crown's application to enforce the trust once it was clear that bankruptcy was inevitable, confirms the absence of a clear beneficiary required to ground an express trust.

4. Conclusion

[88] I conclude that Brenner C.J.S.C. had the discretion under the *CCAA* to continue the stay of the Crown's claim for enforcement of the GST deemed trust while otherwise lifting it to permit LeRoy Trucking to make an assignment in bankruptcy. My conclusion that s. 18.3(1) of the *CCAA* nullified the GST deemed trust while proceedings under that Act were pending confirms that the discretionary jurisdiction under s. 11 utilized by the court was not limited by the Crown's asserted GST priority, because there is no such priority under the *CCAA*.

[89] For these reasons, I would allow the appeal and declare that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada is not subject to deemed trust or priority in favour of the Crown. Nor is this amount subject to an express trust. Costs are awarded for this appeal and the appeal in the court below.

The following are the reasons delivered by

FISH J. —

I

[90] I am in general agreement with the reasons of Justice Deschamps and would dispose of the appeal as she suggests.

[91] More particularly, I share my colleague's interpretation of the scope of the judge's discretion under s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). And I share my colleague's conclusion that Brenner C.J.S.C. did not create an express trust in favour of the Crown when he segregated GST funds into the Monitor's trust account (2008 BCSC 1805, [2008] G.S.T.C. 221).

[92] I nonetheless feel bound to add brief reasons of my own regarding the interaction between the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*").

[93] In upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), and its progeny have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In my respectful view, a clearly marked departure from that jurisprudential approach is warranted in this case.

[94] Justice Deschamps develops important historical and policy reasons in support of this position and I have nothing to add in that regard. I do wish, however, to explain why a comparative analysis of related statutory provisions adds support to our shared conclusion.

[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.

II

[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 Act*, R.S.C. 1985, c. B-3 ("*BIA*") provision *confirming* — or explicitly preserving — its effective operation.

[97] This interpretation is reflected in three federal statutes. Each contains a deemed trust provision framed in terms strikingly similar to the wording of s. 222 of the *ETA*.

[98] The first is the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"), where s. 227(4) *creates* a deemed trust:

> (4) Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act. [Here and below, the emphasis is of course my own.]

[99] In the next subsection, Parliament has taken care to make clear that this trust is unaffected by federal or provincial legislation to the contrary:

> (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 . . . equal in value to the amount so deemed to be held in trust is deemed
>
> (*a*) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, . . .
>
> . . .
>
> . . . and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

[100] The continued operation of this deemed trust is expressly *confirmed* in s. 18.3 of the *CCAA*:

> **18.3** (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as 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* . . . .

[101] The operation of the *ITA* deemed trust is also confirmed in s. 67 of the *BIA*:

> (2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.
>
> (3) Subsection (2) 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* . . . .

[102] Thus, Parliament has first *created* and then *confirmed the continued operation of* the Crown's *ITA* deemed trust under *both* the *CCAA* and the *BIA* regimes.

[103] The second federal statute for which this scheme holds true is the *Canada Pension Plan*, R.S.C. 1985, c. C-8 ("*CPP*"). At s. 23, Parliament creates a deemed trust in favour of the Crown and specifies that it exists despite all contrary provisions

in any other Canadian statute. Finally, and in almost identical terms, the *Employment Insurance Act*, S.C. 1996, c. 23 ("*EIA*"), creates a deemed trust in favour of the Crown: see ss. 86(2) and (2.1).

[104] As we have seen, the survival of the deemed trusts created under these provisions of the *ITA*, the *CPP* and the *EIA* is confirmed in s. 18.3(2) of the *CCAA* and in s. 67(3) of the *BIA*. In all three cases, Parliament's intent to enforce the Crown's deemed trust through insolvency proceedings is expressed in clear and unmistakable terms.

[105] The same is not true with regard to the deemed trust created under the *ETA*. Although Parliament creates a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it does not *confirm* the trust — or expressly provide for its continued operation — in either the *BIA* or the *CCAA*. The second of the two mandatory elements I have mentioned is thus absent reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

[106] The language of the relevant *ETA* provisions is identical in substance to that of the *ITA*, *CPP*, and *EIA* provisions:

> **222.** (1) Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all

> purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).
>
> . . .
>
> (3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed
>
> > (*a*) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, . . .
> >
> > . . .
>
> . . . and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

[107] Yet no provision of the *CCAA* provides for the continuation of this deemed trust after the *CCAA* is brought into play.

[108] In short, Parliament has imposed *two* explicit conditions, or "building blocks", for survival under the *CCAA* of deemed trusts created by the *ITA*, *CPP*, and *EIA*. Had Parliament intended to likewise preserve under the *CCAA* deemed trusts created by the *ETA*, it would have included in the *CCAA* the sort of confirmatory provision that explicitly preserves other deemed trusts.

[109] With respect, unlike Tysoe J.A., I do not find it "inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception" (2009 BCCA 205, 98 B.C.L.R. (4th) 242, at para. 37). *All* of the deemed trust provisions excerpted above make explicit reference to the *BIA*. Section 222 of the *ETA* does not break the pattern. Given the near-identical wording of the four deemed trust provisions, it would have been surprising indeed had Parliament not addressed the *BIA* at all in the *ETA*.

[110] Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings. Accordingly, s. 222 mentions the *BIA* so as to *exclude* it from its ambit — rather than to *include* it, as do the *ITA*, the *CPP*, and the *EIA*.

[111] Conversely, I note that *none* of these statutes mentions the *CCAA* expressly. Their specific reference to the *BIA* has no bearing on their interaction with the *CCAA*. Again, it is the confirmatory provisions *in the insolvency statutes* that determine whether a given deemed trust will subsist during insolvency proceedings.

[112] Finally, I believe that chambers judges should not segregate GST monies into the Monitor's trust account during *CCAA* proceedings, as was done in this case. The result of Justice Deschamps's reasoning is that GST claims become unsecured

under the *CCAA*. Parliament has deliberately chosen to nullify certain Crown super-priorities during insolvency; this is one such instance.

III

[113] For these reasons, like Justice Deschamps, I would allow the appeal with costs in this Court and in the courts below and order that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada be subject to no deemed trust or priority in favour of the Crown.

The following are the reasons delivered by

[114] ABELLA J. (dissenting) — The central issue in this appeal is whether s. 222 of the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), and specifically s. 222(3), gives priority during *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), proceedings to the Crown's deemed trust in unremitted GST. I agree with Tysoe J.A. that it does. It follows, in my respectful view, that a court's discretion under s. 11 of the *CCAA* is circumscribed accordingly.

[115] Section 11[1] of the *CCAA* stated:

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[1] Section 11 was amended, effective September 18, 2009, and now states:

> **11.** (1) Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

To decide the scope of the court's discretion under s. 11, it is necessary to first determine the priority issue. Section 222(3), the provision of the *ETA* at issue in this case, states:

> (3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, 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 collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and
>
> (*b*) to form no part of the estate or property of the person from the time the amount was collected, 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 a security interest
>
> and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

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11. Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

[116] Century Services argued that the *CCAA*'s general override provision, s. 18.3(1), prevailed, and that the deeming provisions in s. 222 of the *ETA* were, accordingly, inapplicable during *CCAA* proceedings. Section 18.3(1) states:

> **18.3** (1) . . . [N]otwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

[117] As MacPherson J.A. correctly observed in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), s. 222(3) of the *ETA* is in "clear conflict" with s. 18.3(1) of the *CCAA* (para. 31). Resolving the conflict between the two provisions is, essentially, what seems to me to be a relatively uncomplicated exercise in statutory interpretation: Does the language reflect a clear legislative intention? In my view it does. The deemed trust provision, s. 222(3) of the *ETA*, has unambiguous language stating that it operates notwithstanding any law except the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*").

[118] By expressly excluding only one statute from its legislative grasp, and by unequivocally stating that it applies despite any other law anywhere in Canada *except* the *BIA*, s. 222(3) has defined its boundaries in the clearest possible terms. I am in complete agreement with the following comments of MacPherson J.A. in *Ottawa Senators*:

> The legislative intent of s. 222(3) of the *ETA* is clear. If there is a conflict with "any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)", s. 222(3) prevails. In these words Parliament did two things: it decided that s. 222(3) should trump all other federal laws and, importantly, it addressed the topic of exceptions to its trumping decision and identified a single exception, the *Bankruptcy and Insolvency Act* . . . . The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

[119] MacPherson J.A.'s view that the failure to exempt the *CCAA* from the operation of the *ETA* is a reflection of a clear legislative intention, is borne out by how the *CCAA* was subsequently changed after s. 18.3(1) was enacted in 1997. In 2000, when s. 222(3) of the *ETA* came into force, amendments were also introduced to the *CCAA*. Section 18.3(1) was not amended.

[120] The failure to amend s. 18.3(1) is notable because its effect was to protect the legislative *status quo*, notwithstanding repeated requests from various constituencies that s. 18.3(1) be amended to make the priorities in the *CCAA* consistent with those in the *BIA*. In 2002, for example, when Industry Canada conducted a review of the *BIA* and the *CCAA*, the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals recommended that the priority regime under the *BIA* be extended to the *CCAA* (Joint Task Force on Business Insolvency Law Reform, *Report* (March 15, 2002), Sch. B, proposal 71). The same recommendations were made by the Standing Senate Committee on Banking, Trade and Commerce in its 2003 report, *Debtors and*

Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act; by the Legislative Review Task Force (Commercial) of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals in its 2005 *Report on the Commercial Provisions of Bill C-55*; and in 2007 by the Insolvency Institute of Canada in a submission to the Standing Senate Committee on Banking, Trade and Commerce commenting on reforms then under consideration.

[121] Yet the *BIA* remains the only exempted statute under s. 222(3) of the *ETA*. Even after the 2005 decision in *Ottawa Senators* which confirmed that the *ETA* took precedence over the *CCAA*, there was no responsive legislative revision. I see this lack of response as relevant in this case, as it was in *Tele-Mobile Co. v. Ontario*, 2008 SCC 12, [2008] 1 S.C.R. 305, where this Court stated:

> While it cannot be said that legislative silence is necessarily determinative of legislative intention, in this case the silence is Parliament's answer to the consistent urging of Telus and other affected businesses and organizations that there be express language in the legislation to ensure that businesses can be reimbursed for the reasonable costs of complying with evidence-gathering orders. I see the legislative history as reflecting Parliament's intention that compensation not be paid for compliance with production orders. [para. 42]

[122] All this leads to a clear inference of a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA*.

[123] Nor do I see any "policy" justification for interfering, through interpretation, with this clarity of legislative intention. I can do no better by way of explaining why I think the policy argument cannot succeed in this case, than to repeat the words of Tysoe J.A. who said:

> I do not dispute that there are valid policy reasons for encouraging insolvent companies to attempt to restructure their affairs so that their business can continue with as little disruption to employees and other stakeholders as possible. It is appropriate for the courts to take such policy considerations into account, but only if it is in connection with a matter that has not been considered by Parliament. Here, Parliament must be taken to have weighed policy considerations when it enacted the amendments to the *CCAA* and *ETA* described above. As Mr. Justice MacPherson observed at para. 43 of *Ottawa Senators*, it is inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception. I also make the observation that the 1992 set of amendments to the *BIA* enabled proposals to be binding on secured creditors and, while there is more flexibility under the *CCAA*, it is possible for an insolvent company to attempt to restructure under the auspices of the *BIA*. [para. 37]

[124] Despite my view that the clarity of the language in s. 222(3) is dispositive, it is also my view that even the application of other principles of interpretation reinforces this conclusion. In their submissions, the parties raised the following as being particularly relevant: the Crown relied on the principle that the statute which is "later in time" prevails; and Century Services based its argument on the principle that the general provision gives way to the specific (*generalia specialibus non derogant*).

[125] The "later in time" principle gives priority to a more recent statute, based on the theory that the legislature is presumed to be aware of the content of existing legislation. If a new enactment is inconsistent with a prior one, therefore, the legislature is presumed to have intended to derogate from the earlier provisions (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 346-47; Pierre-André Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 358).

[126] The exception to this presumptive displacement of pre-existing inconsistent legislation, is the *generalia specialibus non derogant* principle that "[a] more recent, general provision will not be construed as affecting an earlier, special provision" (Côté, at p. 359). Like a Russian Doll, there is also an exception within this exception, namely, that an earlier, specific provision may in fact be "overruled" by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails (*Doré v. Verdun (City)*, [1997] 2 S.C.R. 862).

[127] The primary purpose of these interpretive principles is to assist in the performance of the task of determining the intention of the legislature. This was confirmed by MacPherson J.A. in *Ottawa Senators*, at para. 42:

> . . . the overarching rule of statutory interpretation is that statutory provisions should be interpreted to give effect to the intention of the legislature in enacting the law. This primary rule takes precedence over all maxims or canons or aids relating to statutory interpretation, including

> the maxim that the specific prevails over the general (*generalia specialibus non derogant*). As expressed by Hudson J. in *Canada v. Williams*, [1944] S.C.R. 226, . . . at p. 239 . . . :
>
> > The maxim *generalia specialibus non derogant* is relied on as a rule which should dispose of the question, but the maxim is not a rule of law but a rule of construction and bows to the intention of the legislature, if such intention can reasonably be gathered from all of the relevant legislation.

(See also Côté, at p. 358, and Pierre-Andre Côté, with the collaboration of S. Beaulac and M. Devinat, *Interprétation des lois* (4th ed. 2009), at para. 1335.)

[128] I accept the Crown's argument that the "later in time" principle is conclusive in this case. Since s. 222(3) of the *ETA* was enacted in 2000 and s. 18.3(1) of the *CCAA* was introduced in 1997, s. 222(3) is, on its face, the later provision. This chronological victory can be displaced, as Century Services argues, if it is shown that the more recent provision, s. 222(3) of the *ETA*, is a general one, in which case the earlier, specific provision, s. 18.3(1), prevails (*generalia specialibus non derogant*). But, as previously explained, the prior specific provision does not take precedence if the subsequent general provision appears to "overrule" it. This, it seems to me, is precisely what s. 222(3) achieves through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" *other than the BIA*. Section 18.3(1) of the *CCAA* is thereby rendered inoperative for purposes of s. 222(3).

[129] It is true that when the *CCAA* was amended in 2005,[2] s. 18.3(1) was re-enacted as s. 37(1) (S.C. 2005, c. 47, s. 131). Deschamps J. suggests that this makes s. 37(1) the new, "later in time" provision. With respect, her observation is refuted by the operation of s. 44(*f*) of the *Interpretation Act*, R.S.C. 1985, c. I-21, which expressly deals with the (non) effect of re-enacting, without significant substantive changes, a repealed provision (see *Attorney General of Canada v. Public Service Staff Relations Board*, [1977] 2 F.C. 663, dealing with the predecessor provision to s. 44(*f*)). It directs that new enactments not be construed as "new law" unless they differ in substance from the repealed provision:

> **44.** Where an enactment, in this section called the "former enactment", is repealed and another enactment, in this section called the "new enactment", is substituted therefor,
>
> . . .
>
> (*f*) except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment, the new enactment shall not be held to operate as new law, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the former enactment;

Section 2 of the *Interpretation Act* defines an "enactment" as "an Act or regulation or any portion of an Act or regulation".

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[2] The amendments did not come into force until September 18, 2009.

[130] Section 37(1) of the current *CCAA* is almost identical to s. 18.3(1). These provisions are set out for ease of comparison, with the differences between them underlined:

> **37.** (1) Subject to subsection (2), <u>despite</u> any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as <u>being</u> held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.
>
> **18.3** (1) Subject to subsection (2), <u>notwithstanding</u> any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

[131] The application of s. 44(*f*) of the *Interpretation Act* simply confirms the government's clearly expressed intent, found in Industry Canada's clause-by-clause review of Bill C-55, where s. 37(1) was identified as "a technical amendment to re-order the provisions of this Act". During second reading, the Hon. Bill Rompkey, then the Deputy Leader of the Government in the Senate, confirmed that s. 37(1) represented only a technical change:

> On a technical note relating to the treatment of deemed trusts for taxes, the bill [*sic*] makes no changes to the underlying policy intent, despite the fact that in the case of a restructuring under the CCAA, sections of the act [*sic*] were repealed and substituted with renumbered versions due to the extensive reworking of the CCAA.
>
> (*Debates of the Senate*, vol. 142, 1st Sess., 38th Parl., November 23, 2005, at p. 2147)

[132] Had the substance of s. 18.3(1) altered in any material way when it was replaced by s. 37(1), I would share Deschamps J.'s view that it should be considered a new provision. But since s. 18.3(1) and s. 37(1) are the same in substance, the transformation of s. 18.3(1) into s. 37(1) has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision (Sullivan, at p. 347).

[133] This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. The question then is how that priority affects the discretion of a court under s. 11 of the *CCAA*.

[134] While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, R.S.C. 1985, c. W-11, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes *other* than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request for payment of the GST funds during the *CCAA* proceedings.

[135] Given this conclusion, it is unnecessary to consider whether there was an express trust.

[136] I would dismiss the appeal.

APPENDIX

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as at December 13, 2007)

11. (1) [Powers of court] Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

. . .

(3) [Initial application court orders] A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,

(*a*) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

(4) [Other than initial application court orders] A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

(*a*) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

. . .

(6) [Burden of proof on application] The court shall not make an order under subsection (3) or (4) unless

(*a*) the applicant satisfies the court that circumstances exist that make such an order appropriate; and

(*b*) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

11.4 (1) [Her Majesty affected] An order made under section 11 may provide that

(*a*) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for such period as the court considers appropriate but ending not later than

(i) the expiration of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or arrangement,

(iv) the default by the company on any term of a compromise or arrangement, or

(v) the performance of a compromise or arrangement in respect of the company; and

(*b*) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company where the company is a debtor under that legislation and the provision has a similar purpose to subsection

224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for such period as the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (*a*)(i) to (v) may apply.

(2) [When order ceases to be in effect] An order referred to in subsection (1) ceases to be in effect if

(*a*) the company defaults on payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) under any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a

comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(*b*) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) [Operation of similar legislation] An order made under section 11, other than an order referred to in subsection (1) of this section, does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(*c*) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that

it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

18.3 (1) [Deemed trusts] Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) [Exceptions] 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 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 where

(*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, notwithstanding 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.

18.4 (1) [Status of Crown claims] In relation to a proceeding under this Act, all claims, including secured claims, of Her Majesty in right of Canada or a province or any body under an enactment respecting workers' compensation, in this section and in section 18.5 called a "workers' compensation body", rank as unsecured claims.

. . .

(3) [Operation of similar legislation] Subsection (1) does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(*c*) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect

and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

20. [Act to be applied conjointly with other Acts] The provisions of this Act may be applied together with the provisions of any Act of Parliament or of the legislature of any province, that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as at September 18, 2009)

11. [General power of court] Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

11.02 (1) [Stays, etc. — initial application] A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(*a*) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(2) [Stays, etc. — other than initial application] A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(*a*) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(*a*);

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(3) [Burden of proof on application] The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

. . .

11.09 (1) [Stay — Her Majesty] An order made under section 11.02 may provide that

(*a*) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for the period that the court considers appropriate but ending not later than

(i) the expiry of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or an arrangement,

(iv) the default by the company on any term of a compromise or an arrangement, or

(v) the performance of a compromise or an arrangement in respect of the company; and

(*b*) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company if the company is a debtor under that legislation and the provision has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for the period that the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (*a*)(i) to (v) that may apply.

(2) [When order ceases to be in effect] The portions of an order made under section 11.02 that affect the exercise of rights of Her Majesty referred to in paragraph (1)(*a*) or (*b*) cease to be in effect if

(*a*) the company defaults on the payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(*b*) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) [Operation of similar legislation] An order made under section 11.02, other than the portions of that order that affect the exercise of rights of Her Majesty referred to in paragraph (1)(*a*) or (*b*), does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(*c*) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

37. (1) [Deemed trusts] Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) [Exceptions] 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.

Excise Tax Act, R.S.C. 1985, c. E-15 (as at December 13, 2007)

222. (1) [Trust for amounts collected] Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

(1.1) [Amounts collected before bankruptcy] Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the *Bankruptcy and Insolvency Act*), to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

. . .

(3) [Extension of trust] Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person

that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(*a*) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(*b*) to form no part of the estate or property of the person from the time the amount was collected, 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 a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (as at December 13, 2007)

67. (1) [Property of bankrupt] The property of a bankrupt divisible among his creditors shall not comprise

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

(*b*) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides, or

(*b*.1) such goods and services tax credit payments and prescribed payments relating to the essential needs of an individual as are made in prescribed circumstances and are not property referred to in paragraph (*a*) or (*b*),

but it shall comprise

(*c*) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and

(*d*) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

(2) [Deemed trusts] Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for

Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.

(3) [Exceptions] Subsection (2) 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 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 where

(*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, notwithstanding 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.

86. (1) [Status of Crown claims] In relation to a bankruptcy or proposal, all provable claims, including secured claims, of Her Majesty in right of Canada or a province or of any body under an Act respecting workers' compensation, in this section and in section 87 called a "workers' compensation body", rank as unsecured claims.

. . .

(3) [Exceptions] Subsection (1) does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*;

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an

employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts; or

(*c*) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

> (i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
>
> (ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

Appeal allowed with costs, ABELLA J. *dissenting.*

Solicitors for the appellant: Fraser Milner Casgrain, Vancouver.

Solicitor for the respondent: Attorney General of Canada, Vancouver.