COURT FILE NUMBER	**2401-02680**
COURT	COURT OF KING'S BENCH OF ALBERTA, IN BANKRUPTCY AND INSOLVENCY
JUDICIAL CENTRE	CALGARY

Clerk's Stamp

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

AND IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF RAZOR ENERGY CORP., RAZOR HOLDINGS GP CORP., AND BLADE ENERGY SERVICES CORP.

DOCUMENT	**BOOK OF AUTHORITIES TO THE BRIEF OF LAW AND ARGUMENT OF ARENA INVESTORS LP**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**Fasken Martineau DuMoulin LLP** Barristers and Solicitors Suite 3400, 350 7 Avenue SW Calgary Alberta T2P 3N9 Attention: Jessica Cameron/Anthony Mersich Phone: (403) 261-9468/(587) 233-4124 Email: jcameron@fasken.com/amersich@fasken.com

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BENCH BRIEF OF ARENA INVESTORS LP

APPLICATION TO BE HEARD BY THE HONOURABLE JUSTICE BURNS

April 10, 2024

LIST OF AUTHORITIES

1. *Companies' Creditors Arrangement Act*, RSC 1985, c C-36.
2. *Mines and Minerals Act*, RSA 2000, c M-17.
3. *Petroleum Marketing Act*, RSA 2000, c P-10.
4. *Petroleum Marketing Regulation*, Alta Reg 174/2006.
5. Philip Osborne, *The Law of Torts*, 6th ed (Irwin Law, Toronto: 2020).
6. *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21, 154 DLR (4th) 193.
7. *Income Tax Act*, RSC 1985, c 1 (5th Supp).
8. *British Columbia v Henfrey Samson Belair Ltd*, [1989] 2 SCR 24, 1989 CarswellBC 351.
9. Donovan WM Waters, Mark R Gillen & Lionel D Smith, *Waters' Law of Trusts in Canada*, 5th ed (Toronto: Thomson Reuters Canada, 2021).
10. *Iona Contractors Ltd v Guarantee Company of North America*, 2015 ABCA 240.
11. *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60.
12. *Canada v Canada North Group Inc*, 2021 SCC 30.
13. *Newfoundland and Labrador v AbitibiBowater Inc*, 2012 SCC 67.
14. *Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5.
15. *Eye Hill (Rural Municipality) v Saskatchewan*, 2023 SKCA 120.
16. *Re Mantle Materials Group, Ltd*, 2023 ABKB 488.
17. *Manitok Energy Inc (Re)*, 2022 ABCA 117.
18. *Orphan Well Association v Trident Exploration Corp*, 2022 ABKB 839.

TAB 1

Canada Federal Statutes
Companies' Creditors Arrangement Act

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

Currency

An Act to facilitate compromises and arrangements between companies and their creditors

R.S.C. 1985, c. C-36, as am. R.S.C. 1985, c. 27 (2nd Supp.), ss. 10 (Sched., item 3), 11; S.C. 1990, c. 17, s. 4; 1992, c. 27, s. 90(1)(f); 1993, c. 28, s. 78 (Sched. III, item 20) [Repealed 1999, c. 3, s. 12 (Sched., item 4).]; 1993, c. 34, s. 52; 1996, c. 6, s. 167(1)(d), (2); 1997, c. 12, ss. 120-127; 1998, c. 19, s. 260; 1998, c. 30, s. 14(c); 1999, c. 3, s. 22; 1999, c. 28, s. 154; 2000, c. 30, ss. 156-158; 2001, c. 9, ss. 575-577; 2001, c. 34, s. 33; 2002, c. 7, ss. 133-135; 2004, c. 25, ss. 193-195; 2005, c. 3, ss. 15, 16; 2005, c. 47, ss. 124-131 [ss. 124, 126 amended 2007, c. 36, ss. 105, 106.]; 2007, c. 29, ss. 104-109; 2007, c. 36, ss. 61(1), (2), (3) (Fr.), (4), 62 (Fr.), 63-73, 74(1), (2) (Fr.), 75-82, 112(17), (20), (23) [s. 63 repealed 2007, c. 36, s. 112(15).]; 2009, c. 33, ss. 27-29; 2012, c. 16, s. 82; 2012, c. 31, ss. 419-421; 2015, c. 3, s. 37; 2017, c. 26, s. 14; 2018, c. 10, s. 89; 2018, c. 27, s. 269; 2019, c. 29, ss. 136-140; 2023, c. 6, s. 5.

Currency
Federal English Statutes reflect amendments current to December 6, 2023
Federal English Regulations Current to Gazette Vol. 157:24 (November 22, 2023)

End of Document

Canada Federal Statutes
Companies' Creditors Arrangement Act
Short Title

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

s 1. Short title

Currency

1.Short title
This Act may be cited as the *Companies' Creditors Arrangement Act*.

Currency
Federal English Statutes reflect amendments current to December 6, 2023
Federal English Regulations Current to Gazette Vol. 157:24 (November 22, 2023)

End of Document

R.S.C. 1985, c. C-36, s. 11.02

s 11.02

Currency

11.02

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 10 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.

11.02(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.

11.02(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.

11.02(4)Restriction

Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

Amendment History

2005, c. 47, s. 128; 2019, c. 29, s. 137

Currency

Federal English Statutes reflect amendments current to December 6, 2023
Federal English Regulations Current to Gazette Vol. 157:24 (November 22, 2023)

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R.S.C. 1985, c. C-36, s. 11.1

s 11.1

Currency

11.1

11.1(1)Meaning of "regulatory body"

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

11.1(2)Regulatory bodies — order under section 11.02

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

11.1(3)Exception

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

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

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

11.1(4)Declaration — enforcement of a payment

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

Amendment History

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

Currency

Federal English Statutes reflect amendments current to December 6, 2023
Federal English Regulations Current to Gazette Vol. 157:24 (November 22, 2023)

End of Document

Canada Federal Statutes
Companies' Creditors Arrangement Act
Part III — General (ss. 18.6-43) [Heading added 2005, c. 47, s. 131.]
Her Majesty [Heading added 2005, c. 47, s. 131.]

R.S.C. 1985, c. C-36, s. 37

s 37.

Currency

37.

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.

37(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.

Amendment History

2005, c. 47, s. 131

Currency

Federal English Statutes reflect amendments current to December 6, 2023
Federal English Regulations Current to Gazette Vol. 157:24 (November 22, 2023)

End of Document

R.S.C. 1985, c. C-36, s. 38

s 38.

Currency

38.

38(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 39 called a "workers' compensation body", rank as unsecured claims.

38(2)Exceptions

Subsection (1) does not apply

(a) in respect of claims that are secured by a security or charge of a kind that can be obtained by persons other than Her Majesty or a workers' compensation body

(i) pursuant to any law, or

(ii) pursuant to provisions of federal or provincial legislation if those provisions do not have as their sole or principal purpose the establishment of a means of securing claims of Her Majesty or a workers' compensation body; and

(b) to the extent provided in subsection 39(2), to claims that are secured by a security referred to in subsection 39(1), if the security is registered in accordance with subsection 39(1).

38(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*, an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that 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 if 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.

Amendment History
2005, c. 47, s. 131; 2009, c. 33, s. 29

Currency
Federal English Statutes reflect amendments current to December 6, 2023
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End of Document

Canada Federal Statutes
Companies' Creditors Arrangement Act
Part III — General (ss. 18.6-43) [Heading added 2005, c. 47, s. 131.]
Her Majesty [Heading added 2005, c. 47, s. 131.]

R.S.C. 1985, c. C-36, s. 40

s 40. Act binding on Her Majesty

Currency

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

Amendment History
2005, c. 47, s. 131

Currency
Federal English Statutes reflect amendments current to December 6, 2023
Federal English Regulations Current to Gazette Vol. 157:24 (November 22, 2023)

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TAB 2

Alberta Statutes
Mines and Minerals Act

R.S.A. 2000, c. M-17

Currency

R.S.A. 2000, c. M-17, as am. R.S.A. 2000, c. I-3, s. 863; R.S.A. 2000, c. 19 (Supp.) [Not in force at date of publication. Repealed 2003, c. 18, s. 22.]; R.S.A. 2000, c. 24 (Supp.), s. 5 [Not in force at date of publication. Repealed 2013, c. S-19.3, s. 3.]; S.A. 2002, c. 4, s. 3 [Amended 2006, c. 24, s. 1.]; 2002, c. 12, s. 3; 2003, c. 18, ss. 6-21 [ss. 14, 19 amended 2005, c. 28, s. 5.]; 2003, c. 28; 2005, c. 28, s. 8; 2006, c. 21, s. 26(5); 2007, c. A-37.2, s. 82(16); 2008, c. 36; 2009, c. A-26.8, s. 82; 2009, c. 20, s. 5 [s. 5(3) not in force at date of publication. Repealed 2014, c. 8, s. 6(10).]; 2009, c. 53, s. 116; 2010, c. 14, s. 2; 2010, c. 20; 2012, c. R-17.3, s. 94; 2013, c. F-14.5, s. 27; 2014, c. 8, s. 6(1)-(9); 2014, c. 13, s. 34; 2016, c. 18, s. 12; 2019, c. 9; 2020, c. G-5.5, s. 31; 2020, c. 25, s. 10; 2020, c. 30, s. 30; 2021, c. 25, s. 13; Alta. Reg. 217/2022, s. 153; 2022, c. 21, s. 56; 2023, c. 9, s. 18.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Currency
Alberta Current to Gazette Vol. 119:22 (November 30, 2023)

End of Document

Alberta Statutes
Mines and Minerals Act

R.S.A. 2000, c. M-17, s. 1

s 1. Interpretation

Currency

1.Interpretation

1(1) In this Act,

(a) **"agreement"** means an instrument issued pursuant to this Act or the former Act that grants rights in respect of a mineral, subsurface reservoir, or geothermal resource, but does not include a notification, a transfer referred to in section 12, a unit agreement or a contract under section 9(a);

(a.01) **"base of groundwater protection"** means the base of groundwater protection as defined in the *Water Wells and Ground Source Heat Exchange System Directive* published by Alberta Environment and Protected Areas, as amended or replaced from time to time;

(a.1) **"captured carbon dioxide"** means a fluid substance consisting mainly of carbon dioxide captured from an emissions source;

(b) **"certificate of record"** means a certificate of record within the meaning of the regulations;

(c) **"certificate of title"** means a certificate granted pursuant to the *Land Titles Act*;

(d) **"crude bitumen"** means a naturally occurring viscous mixture, mainly of hydrocarbons heavier than pentane, that may contain sulphur compounds and that, in its naturally occurring viscous state, will not flow to a well;

(e) **"Department"** means the Department administered by the Minister;

(f) **"disposition"** means a grant, a transfer referred to in section 12 or an agreement;

(g) **"estate in a mineral"** means an estate in fee simple in a mineral or an estate for a life or lives in being in a mineral;

(h) **"fluid mineral substance"** means a fluid substance consisting of a mineral or of a product obtained from a mineral by processing or otherwise;

(i) **"former Act"** means any predecessor of this Act;

(i.1) **"geothermal resource"** means the natural heat from the earth that is below the base of groundwater protection;

(j) **"grant"** means letters patent under the Great Seal of Canada or a notification issued pursuant to *The Provincial Lands Act*, R.S.A. 1942, c. 62, the former Act or this Act;

(k) **"issue"**, with reference to a disposition, means to issue the disposition in accordance with the regulations;

(l) **"lessee"** means, except in section 82.1, the holder according to the records of the Department of an agreement;

(m) **"location"** means, except in section 82.1, the tract described in an agreement;

(n) **"mine"** means any opening or excavation in, or working of, the surface or subsurface for the purpose of working, recovering, opening up or proving any mineral or mineral-bearing substance, and includes works and machinery at or below the surface belonging to or used in connection with the mine;

(o) **"mineral claim"** means the tract described in a certificate of record;

(p) **"minerals"** means all naturally occurring minerals, and without restricting the generality of the foregoing, includes

(i) gold, silver, uranium, platinum, pitchblende, radium, precious stones, copper, iron, tin, zinc, asbestos, salts, sulphur, petroleum, oil, asphalt, bituminous sands, oil sands, natural gas, coal, anhydrite, barite, bauxite, bentonite, diatomite, dolomite, epsomite, granite, gypsum, limestone, marble, mica, mirabilite, potash, quartz rock, rock phosphate, sandstone, serpentine, shale, slate, talc, thenardite, trona, volcanic ash, sand, gravel, clay and marl, but

(ii) does not include

(A) sand and gravel that belong to the owner of the surface of land under section 58 of the *Law of Property Act*,

(B) clay and marl that belong to the owner of the surface of land under section 57 of the *Law of Property Act*, or

(C) peat on the surface of land and peat obtained by stripping off the overburden, excavating from the surface, or otherwise recovered by surface operations;

(q) **"Minister"** means the Minister determined under section 16 of the *Government Organization Act* as the Minister responsible for this Act;

(r) **"notification"** means a notification in the prescribed form;

(s) **"oil sands"** means

(i) sands and other rock materials containing crude bitumen,

(ii) the crude bitumen contained in those sands and other rock materials, and

(iii) any other mineral substances, other than natural gas, in association with that crude bitumen or the sands and other rock materials referred to in subclauses (i) and (ii),

and includes a hydrocarbon substance declared to be oil sands under section 7(2) of the *Oil Sands Conservation Act*;

(t) **"owner"** when used in connection with a mineral claim means the holder according to the records of the Department of a certificate of record;

(u) **"quarry"** means a pit or excavation in the ground for the purpose of removing, opening up or proving any mineral other than coal or oil sands, and includes works and machinery belonging to or used in connection with the quarry;

(v) **"record"** means a record as defined in the *Financial Administration Act*;

(w) **"registered"** means

(i) registered under Division 1 of Part 6, in relation to a transfer, or

(ii) registered under Division 2 of Part 6, in relation to a security notice or any other document registrable under that Division;

(x) **"Registrar"** means the Registrar within the meaning of the *Land Titles Act*;

(y) **"royalty compensation"** means money payable to the Crown in right of Alberta as compensation pursuant to regulations made under section 36(2)(i);

(y.1) **"sequestration"** means permanent disposal;

(z) **"storage rights"** means the right to inject fluid mineral substances into a subsurface reservoir for the purpose of storage;

(aa) **"subsurface cavern"** means a subsurface space created as a result of operations for the recovery of a mineral;

(bb) **"subsurface reservoir"** means the pore space within an underground formation or a subsurface cavern;

(cc) **"transfer"**, in relation to an agreement, means

(i) a transfer of the agreement, a part of the location of the agreement or a specified undivided interest in the agreement made by the lessee of the agreement or the interest, as the case may be,

(ii) a transfer of the agreement or a specified undivided interest in the agreement made by the Minister pursuant to section 23(3), or

(iii) a transfer of the agreement, a part of the location of the agreement or a specified undivided interest in the agreement made by the Minister pursuant to a judgment or order of a court;

(dd) **"Transfer Agreement"** means the agreement in the Schedule to *The Alberta Natural Resources Act*, S.A. 1930, c. 21, and all amendments to that agreement;

(ee) **"unit agreement"** means an agreement entered into by the Minister under section 102(1);

(ff) **"unit operation order"** means an order under the *Turner Valley Unit Operations Act*;

(gg) **"well"** means a well within the meaning of the *Oil and Gas Conservation Act*.

1(2) If any mineral, any product obtained from a mineral or any substance is injected into or removed from a subsurface reservoir and a question arises between the Minister and the lessee under an agreement, or any person claiming under the lessee, as to the purpose for which the mineral, mineral product or substance was injected or removed, then, for the purposes of this Act, the question is to be decided by the Minister.

1(3) A reference in this Act to a township, section, half section, quarter section and legal subdivision means a township, section, half section, quarter section and legal subdivision, respectively, within the meaning of the *Surveys Act*.

1(4) For the purposes of this Act, a reference to a township, section, half section, quarter section or legal subdivision is, in respect of land in unsurveyed territory, deemed to refer to what would be a township, section, half section, quarter section or legal subdivision if the land were surveyed in accordance with the *Surveys Act*.

1(5) The references in sections 8(1)(a), 9(a)(i), 36(2)(j) and (3.1), 50(4) and (5) and 52(1) to a product obtained from a mineral, and in section 36(2)(a) and (b) to a product obtained from a royalty share include

(a) any product obtained from a mineral or the royalty share of a mineral by processing, reprocessing or otherwise, and

(b) any product obtained directly or indirectly, and in whole or in part, in exchange for a mineral, a royalty share of a mineral or a product referred to in clause (a).

Amendment History
2003, c. 28, s. 2; 2006, c. 21, s. 26(5); 2008, c. 36, s. 2; 2010, c. 14, s. 2(2); 2020, c. G-5.5, s. 31(2); 2022, c. 21, s. 56(2)

Currency
Alberta Current to Gazette Vol. 119:22 (November 30, 2023)

End of Document

Alberta Statutes
Mines and Minerals Act
Part 1 — Administration (ss. 5-63.1)
Royalty and Other Revenues

R.S.A. 2000, c. M-17, s. 33

s 33. Royalty on mineral

Currency

33.Royalty on mineral
A royalty determined under this Act is reserved to the Crown in right of Alberta on any mineral recovered pursuant to an agreement.

Currency
Alberta Current to Gazette Vol. 119:22 (November 30, 2023)

Alberta Statutes
Mines and Minerals Act
Part 1 — Administration (ss. 5-63.1)
Royalty and Other Revenues

R.S.A. 2000, c. M-17, s. 34

s 34. Royalty to be prescribed

Currency

34.Royalty to be prescribed

34(1) Subject to section 34.1, the royalty reserved to the Crown in right of Alberta on a mineral recovered pursuant to an agreement shall be the royalty prescribed from time to time by the Lieutenant Governor in Council.

34(2) If a royalty has been reserved to the Crown in right of Canada in any letters patent that convey a mineral, there is reserved to the Crown in right of Alberta

(a) the royalty prescribed from time to time by the Lieutenant Governor in Council in accordance with the Transfer Agreement, or

(b) if no royalty is prescribed under clause (a), the royalty at the rate in effect immediately before the coming into force of the Transfer Agreement.

34(3) Except as otherwise provided by the regulations,

(a) the royalty reserved to the Crown in right of Alberta shall be deliverable in kind,

(b) the quantity of the royalty reserved to the Crown in right of Alberta shall be calculated at the place where the mineral is first measured after it is recovered, and

(c) the royalty reserved to the Crown in right of Alberta shall be delivered to the Crown at the place at which the quantity of the royalty is calculated.

Amendment History

2019, c. 9, s. 2

Currency

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Alberta Statutes
Mines and Minerals Act
Part 1 — Administration (ss. 5-63.1)
Royalty and Other Revenues

R.S.A. 2000, c. M-17, s. 35

s 35. Crown as owner

Currency

35.Crown as owner

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

35(2) If, at the place where the Crown's royalty share of a mineral is to be delivered to the Crown in right of Alberta, the Crown's royalty share of the mineral is commingled with the lessee's share of the mineral so that the Crown's royalty share cannot be identified, the Crown in right of Alberta is entitled to the quantity of the mineral of equivalent quality that is equal to the Crown's royalty share.

35(3) If under the regulations or a contract or agreement under section 9 the quantity of the royalty on a mineral is calculated on the basis of all or any of the products obtained by processing that mineral or by reprocessing the products obtained by processing that mineral, unless otherwise provided a reference to the mineral in any provision in this Act or the regulations respecting the royalty on the mineral shall be read as a reference to the product obtained by the processing or reprocessing, as the case may be.

Amendment History

2008, c. 36, s. 6

Currency

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R.S.A. 2000, c. M-17, s. 86

s 86. Marketing of Crown's share

Currency

86.Marketing of Crown's share

86(1) Every agreement to which this section applies is subject to the condition that the Crown's royalty share of a mineral to which this section applies recovered pursuant to the agreement must be delivered to the Alberta Petroleum Marketing Commission.

86(2) This section applies only to those agreements and minerals to which it is made applicable by the regulations under subsection (3).

86(3) The Lieutenant Governor in Council may make regulations specifying the agreements and minerals to which this section applies.

86(4) The Minister may, with respect to any agreement to which this section applies and in any special case when the Minister considers it warranted by circumstances to do so, waive compliance with subsection (1) for any period of time and on any conditions the Minister may prescribe.

Amendment History
2008, c. 36, s. 15

Currency
Alberta Current to Gazette Vol. 119:22 (November 30, 2023)

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TAB 3

Alberta Statutes
Petroleum Marketing Act

R.S.A. 2000, c. P-10

Currency

R.S.A. 2000, c. P-10, as am. S.A. 2007, c. A-37.2, s. 82(21); 2009, c. 20, s. 9; 2009, c. 53, s. 130; 2012, c. R-17.3, s. 100; 2013, c. 10, s. 33; 2013, c. 16, ss. 1-15; Alta. Reg. 217/2022, s. 174; 2022, c. 21, s. 64.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Currency
Alberta Current to Gazette Vol. 119:22 (November 30, 2023)

End of Document

TAB 4

Province of Alberta

PETROLEUM MARKETING ACT

MINES AND MINERALS ACT

PETROLEUM MARKETING REGULATION

Alberta Regulation 174/2006

With amendments up to and including Alberta Regulation 247/2018

Current as of December 12, 2018

Office Consolidation

Alberta King's Printer
Suite 700, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
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Note

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

(Consolidated up to 247/2018)

ALBERTA REGULATION 174/2006

Petroleum Marketing Act
Mines and Minerals Act

PETROLEUM MARKETING REGULATION

Table of Contents

Part 4
General

Definitions

1 In this Regulation,

(a) "actual deliveries", in relation to a delivery month and a battery, means the quantity of crude oil actually delivered to the Commission from the battery to a field delivery point during the delivery month, as determined by the Commission on the basis of the information in the possession of the Commission, including the final shipper's balance that related to or included that quantity;

(b) "agency contract" means a contract under which the Crown in right of Alberta and the Commission appoint a person as their agent for the purpose, among others, of marketing certain quantities of the Crown's royalty share of crude oil;

(c) "agent" or "Commission's agent" means a person appointed as an agent under an agency contract;

(d) "agreement" means an agreement as defined in the *Mines and Minerals Act*;

(e) "amendment report" means a report furnished or required to be furnished to the Commission pursuant to a notice given under section 4(5);

(f) "battery", in relation to any crude oil, means each battery at which the crude oil is measured after its recovery from a well;

(g) "Commission" means the Alberta Petroleum Marketing Commission;

(h) "Commission's field price" means

(i) with respect to royalty oil delivered to the Commission in a delivery month, the value to the Crown of the oil, in dollars per cubic metre, as

determined by the Commission at the field delivery point to which it was required to be delivered in that month;

(ii) with respect to royalty oil that should have been but was not delivered to the Commission in a delivery month, the value to the Crown of the oil, in dollars per cubic metre, as determined by the Commission at the field delivery point to which the oil should have been delivered;

(i) "delivery month" means June 2006 or any subsequent month;

(j) "field delivery point" means the place at which royalty oil is required to be delivered to the Commission by or pursuant to section 11;

(k) "final shipper's balance" means a document prepared by the operator of a crude oil pipeline in accordance with normal oil industry practice showing the actual volume of crude oil delivered into and transported by the pipeline during a particular month for the account of a particular shipper;

(l) "monthly statement" means a statement prepared and sent by the Commission to a battery operator pursuant to section 24(1);

(m) "Petrinex" means the electronic information system administered by the Department;

(n) "prescribed royalty quantity", in relation to a delivery month and a battery, means the quantity of crude oil required to be delivered to the Commission in the delivery month in payment of the royalty owing to the Crown on crude oil recovered pursuant to one or more agreements from one or more wells whose production is delivered to that battery in that delivery month;

(o) "reported royalty oil deliveries", in relation to a delivery month and a battery, means

(i) the quantity of royalty oil shown in a royalty report for the delivery month as having been delivered to the battery in that month, or

(ii) where an amendment report pertaining to the battery is furnished for the delivery month, the quantity of royalty oil shown in the amendment report as having been delivered to the battery in that month;

(p) "reporting deadline" means

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

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

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

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

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

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

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

exceeds

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

AR 174/2006 s1;140/2014

Miscellaneous interpretive rules

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

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

(3) For the purposes of this Regulation,

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

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

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

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

Petrinex

3(1) Subject to this section, where

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

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

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

(2) The Commission may

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

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

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

(4) The Commission may send to a battery operator

(a) a monthly statement, and

(b) where the monthly statement shows a net money amount owing to the Commission, the invoice for that amount referred to in section 24(3),

by electronic transmission to Petrinex in accordance with the directions of the Minister respecting the operation of Petrinex, and a monthly statement and an invoice sent in accordance with those directions is deemed for the purpose of this Regulation to be received by the battery operator when it is received by Petrinex.

AR 174/2006 s3;140/2014;197/2014

Part 1
Royalty Reporting

Monthly royalty reports

4(1) Every person who is the operator of one or more batteries in Alberta in respect of a delivery month shall, in accordance with this section and section 5, furnish to the Commission a report in respect of all of those batteries for that delivery month.

(2) Subsection (1) does not apply to an operator in respect of a delivery month if there are no prescribed royalty quantities for that delivery month in respect of any of the operator's batteries in Alberta.

(3) A royalty report furnished in respect of a delivery month must show in respect of each of the operator's batteries from which royalty oil was required to be delivered to the Commission in that delivery month,

(a) the prescribed royalty quantity for that battery for that month, and

(b) the field delivery point to which the prescribed royalty quantity was required to be delivered.

(4) If a royalty report in respect of a delivery month includes a battery but shows no prescribed royalty quantity for that battery, then, for the purposes of this Regulation, the prescribed royalty quantity for that battery for that delivery month shall be deemed to be reported as nil.

(5) If a royalty report is furnished in respect of a delivery month and the Commission is satisfied, on the basis of other records in its possession, that the reported royalty oil deliveries shown in the report for one or more of the operator's batteries is greater than the respective prescribed royalty quantities for those batteries for that month, the Commission may, by a notice to the operator, direct the operator to furnish to the Commission at or before the deadline

specified in the notice an additional report for that delivery month reflecting the amended information in respect of those batteries.

(6) The following requirements apply with respect to the furnishing of royalty reports and amendment reports in respect of a delivery month:

(a) the person furnishing the report

(i) must be the person who was the operator in respect of the batteries required to be included in the report for the delivery month, and

(ii) must be identified in the report by the operator code number assigned to that person by the Department;

(b) the report must be in a format prescribed by the Commission;

(c) each battery referred to in the report must be identified by the code number assigned to it by the Alberta Energy Regulator;

(d) each field delivery point referred to in the report must be identified by the code number assigned to it by the Alberta Energy Regulator.

(7) A royalty report and an amendment report

(a) must contain all the information required by, and

(b) must be prepared in accordance with,

any general directions posted by the Commission on Petrinex respecting the format of those reports.

(8) The Commission may by a general or special direction exempt from any provision of this section

(a) any operator or class of operators in respect of one or more delivery months, or

(b) any operator in respect of one or more of the operator's batteries for one or more delivery months.

AR 174/2006 s4;254/2007;89/2013;140/2014

Reporting deadlines

5(1) The Commission shall, in respect of each year,

(a) by order prescribe, for each delivery month in that year, the time in the next delivery month that constitutes the

deadline for furnishing a royalty report for the delivery month, and

(b) publish the reporting deadlines so prescribed in a manner that ensures that all battery operators are notified of them, including posting them on Petrinex and on the Department's website.

(2) If an operator is required to furnish a royalty report in respect of a delivery month,

(a) the royalty report shall be furnished to the Commission by the reporting deadline for the delivery month to which it relates, and

(b) any amendment report pertaining to the same delivery month shall be furnished to the Commission by the deadline specified in the notice given under section 4(5).

(3) For the purposes of this section and section 6, where the Commission prescribes a reporting deadline for a royalty report for a particular delivery month,

(a) each reporting deadline for each succeeding delivery month is a subsequent reporting deadline for that royalty report, and

(b) with respect to an amendment report for the same delivery month, each royalty report reporting deadline subsequent to the reporting deadline for the amendment report is a subsequent reporting deadline for that amendment report.

(4) For the purposes of this Part, a royalty report or an amendment report shall be considered to be furnished to the Commission

(a) when it is received by Petrinex, or

(b) if the report is required to be furnished by an alternative mode pursuant to directions under section 3(2) or (3), when it is actually received by the Commission in accordance with those directions.

(5) The Commission may by a general or special direction extend the time limited by subsection (2)(a) or (b) for the furnishing to the Commission of a royalty report or amendment report in respect of a delivery month.

AR 174/2006 s5;140/2014

Automatic penalties related to royalty reports

6(1) A battery operator is liable to pay to the Commission a penalty, calculated in accordance with subsection (3), in the following cases:

(a) where the operator is required to furnish to the Commission a royalty report in respect of a delivery month but fails to do so by the reporting deadline for that report,

(i) each of the batteries that should have been included in the report is an unreported battery for the purposes of this section, and

(ii) the operator is liable for a penalty in respect of each of those unreported batteries;

(b) where the operator is required to furnish to the Commission an amendment report in respect of a delivery month but fails to do so by the reporting deadline for the amendment report,

(i) each of the batteries that should have been included in the amendment report is an unreported battery for the purposes of this section, and

(ii) the operator is liable for a penalty in respect of each of those unreported batteries;

(c) where the operator furnishes a royalty report in respect of a delivery month by the reporting deadline for that report but the report omits one or more batteries that should have been included in the report,

(i) each of the omitted batteries is an unreported battery for the purposes of this section, and

(ii) the operator is liable for a penalty in respect of each of those unreported batteries;

(d) where the operator furnishes an amendment report in respect of a delivery month by the reporting deadline for the amendment report but the amendment report omits one or more batteries that should have been included in the amendment report,

(i) each of the omitted batteries is an unreported battery for the purposes of this section, and

(ii) the operator is liable for a penalty in respect of each of those unreported batteries.

(2) If a battery operator fails to furnish a royalty report or amendment report by a reporting deadline for the report and the failure continues beyond one or more of the subsequent reporting deadlines for the report, the operator is liable to pay to the Commission a penalty, calculated in accordance with subsection (3), for each time such a subsequent reporting deadline occurs without the royalty report or amendment report having been furnished.

(3) If a battery operator is liable for a penalty under subsection (1)(a), (b), (c) or (d) or (2), the amount of the penalty is

(a) $100 for each unreported battery not exceeding 10, and

(b) $50 for each unreported battery in excess of 10.

(4) Despite subsection (3), penalties arising under subsections (1) and (2) in respect of an operator in a month shall not exceed $5000.

(5) If a royalty report or an amendment report is furnished to the Commission by its reporting deadline or by a subsequent reporting deadline for the report, but the report as it exists when the deadline occurs is not in compliance with section 4(6)(a), (b), (c) or (d), the royalty report or amendment report, as the case may be, shall, for the purposes of this section, be deemed to have not been furnished to the Commission by the reporting deadline for the report or the subsequent reporting deadline, as the case may be.

(6) If any or all of the unreported batteries under subsection (1)(c) or (d) in relation to a royalty report or amendment report remain unreported batteries beyond one or more subsequent reporting deadlines for the royalty report or the amendment report, as the case may be, the operator is liable to pay to the Commission, for each time such a subsequent reporting deadline occurs, a penalty equal to

(a) $100 in respect of each battery remaining unreported, not exceeding 10, and

(b) $50 in respect of each battery in excess of 10 remaining unreported.

(7) Despite subsection (6), penalties arising under that subsection in respect of an operator in a month shall not exceed $5000.

(8) The person liable for a penalty under this section in relation to an unreported battery is the operator of the unreported battery for the delivery month concerned.

(9) Despite any other provision of this section, liability for a penalty in relation to an unreported battery does not arise under this section prior to the operational date.

(10) The Commission may, on application, waive all or part of a penalty imposed under this section on being satisfied

(a) that the battery operator required to furnish the royalty report or amendment report to which the penalty relates failed to furnish it by the deadline referred to in section 5(2)(a) or (b), as the case may be, by reason of

(i) circumstances beyond the operator's control, or

(ii) circumstances that the operator could not reasonably foresee,

and

(b) that, having regard to all the circumstances of the case, the operator furnished the royalty report or amendment report within a reasonable time after the reporting deadline for the report.

Penalties related to inaccurate reporting

7(1) Subject to this section, the Commission may impose penalties on a battery operator if the operator furnishes a royalty report for a delivery month and the report contains errors of any of the following kinds:

(a) the information in the report in respect of a particular battery of the operator shows either

(i) an incorrect code number for the battery,

(ii) an incorrect code number for the field delivery point,

(iii) the code number for a field delivery point other than the one prescribed under section 11 for that battery, or

(iv) an incorrect amount as the prescribed royalty quantity for that battery for that delivery month;

(b) the report includes a battery that was not one of the operator's batteries.

(2) The penalties that may be imposed on a battery operator pursuant to subsection (1) are

(a) $100 for each battery in respect of which the report contains one or more errors described in subsection (1)(a), and

(b) $100 for each error described in subsection (1)(b).

(3) Despite subsection (2), penalties arising under subsection (1) in respect of an operator in a month shall not exceed $10 000.

(4) The Commission may not impose a penalty under this section in respect of a royalty report furnished before the operational date.

(5) The Commission may, on its own motion, reduce or revoke a penalty imposed under this section on the basis of new evidence which, if it had been known to the Commission when it made its decision to impose the penalty, would have affected that decision.

Penalties for underdeliveries and overdeliveries

8(1) Subject to subsection (4), the Commission may impose on the operator of a battery in respect of a delivery month a penalty computed in accordance with subsection (2) if, according to the records of the Commission,

(a) the actual deliveries made from that battery in the delivery month

are less than or greater than

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

(2) A penalty imposed on an operator pursuant to subsection (1) in respect of a delivery month and a battery shall be an amount equal to the lesser of

(a) $500, and

(b) the product obtained by multiplying

(i) the number of cubic metres of the underdelivery balance or the excess delivered quantity, as the case may be, referred to in subsection (1)

by

(ii) 10% of the Commission's field price for that delivery month for

(A) the underdelivery balance, or

(B) the royalty oil with which the excess delivered quantity was commingled,

as the case may be.

(3) Despite subsection (2), penalties arising under subsection (1) in respect of an operator in a month shall not exceed $10 000.

(4) The Commission may not impose a penalty under this section in respect of an underdelivery balance that arises before the operational date, unless the underdelivery balance remains outstanding on or after the operational date.

(5) Where, after a penalty is imposed pursuant to subsection (1) in respect of a particular battery and delivery month, the Commission determines

(a) that the penalty was calculated or imposed in error and that the error was wholly or partly attributable to a person other than the battery operator, or

(b) that the penalty was otherwise incorrectly calculated,

the Commission may adjust the penalty accordingly and cause the adjustment to be reflected in the next monthly statement to the operator of the battery for that delivery month.

(6) If while a penalty imposed pursuant to subsection (1) remains wholly or partly unpaid the person liable under subsection (1) for the penalty is succeeded as operator of the battery, that person and each of the successors of that person as operator of the battery concerned are jointly and severally liable to the Commission for the penalty or the unpaid part of the penalty, as the case may be.

Invoicing for penalties

9(1) Where a penalty is imposed on an operator by or pursuant to this Part, the Commission must include that penalty in a monthly statement sent to the operator for the delivery month to which the penalty relates and must indicate in the statement the reason for the imposition of the penalty.

(2) If a penalty is not imposed by virtue of section 6(9), 7(4) or 8(4) that would otherwise be imposed by or pursuant to this Part in the absence of that section, the Commission may nonetheless include in the monthly statement sent to the operator for the delivery month to which the penalty would have otherwise related, a statement indicating

(a) the amount of the penalty had it been imposed,

(b) the reason for which the penalty would have been imposed, and

(c) the date when penalties of that kind can start to be imposed.

Appeals respecting penalties

10(1) Subject to this section, a person on whom a penalty is imposed by or pursuant to section 6, 7 or 8 may file with the Commission a notice of an appeal to the Minister respecting

(a) that person's liability for the penalty,

(b) the amount of the penalty, or

(c) in the case of a penalty imposed by section 6, the Commission's refusal to grant a penalty waiver pursuant to section 6(10).

(2) A notice of appeal must be filed with the Commission within

(a) 2 months after the date of the monthly statement that includes the penalty that is the subject of the notice, or

(b) one month after the date of the Commission's notice to the battery operator of the Commission's refusal to waive the penalty, in the case of an appeal under subsection (1)(c).

(3) On the filing of a notice of appeal, the Minister shall conduct a review of the penalty and the representations in or accompanying the notice.

(4) On considering an appeal under this section, the Minister may

(a) confirm the penalty,

(b) revoke the penalty on the ground that the appellant was not liable for it,

(c) reduce the amount of the penalty, or

(d) in the case of an appeal under subsection (1)(c), grant any penalty waiver pursuant to section 6(10) that the Commission could have granted,

and must inform the appellant of the Minister's decision.

(5) The Commission may establish general directions respecting the filing of and content of notices of appeal under this section and the procedures for the conduct of those appeals.

Part 2
Underdelivery and Overdelivery of Oil

Field delivery point for royalty oil

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

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

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

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

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

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

Direction to deliver royalty deficiency

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

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

(b) in a particular subsequent month, or

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

whichever is specified in the direction.

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

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

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

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

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

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

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

and

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

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

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

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

Money in lieu of royalty deficiency

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

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

Money amounts owing under section 12 or 13

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

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

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

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

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

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

(a) the person charged with the payment of the amount, and

(b) each of that person's successors as operator of the battery,

are jointly and severally liable to the Commission for the amount or the unpaid part of the amount, as the case may be.

(4) Nothing in section 12 or 13 precludes the Commission from agreeing to accept, in lieu of payment of any money amount owing to the Commission under either of those sections, the delivery to the Commission of a quantity of crude oil having a value, based on the Commission's field price, at least equal to the money amount owing.

Overdelivery of crude oil

15(1) For the purposes of this section, there is an overdelivery of crude oil to the Commission from a battery in a delivery month if, according to the records of the Commission,

(a) the actual deliveries from the battery for that delivery month

exceed

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

(2) If there is an overdelivery of crude oil from a battery in any delivery month, the Commission must, by itself or through its agent, act on behalf of the owner of the excess quantity of crude oil for the sale and delivery of that excess quantity to a purchaser.

(3) Where an excess quantity of crude oil is sold or delivered pursuant to subsection (2),

(a) the Commission or the Commission's agent, as the case may be, must negotiate the sale of the excess quantity of crude oil on the same terms and conditions that apply to the sale of the royalty oil unless the Commission or its agent is unable to do so because of market factors, and

(b) subject to subsection (5), the Commission must pay to the operator concerned, in respect of each cubic metre of the excess quantity of crude oil, an amount equal to the sale proceeds received by the Commission for the excess quantity less the amount per cubic metre prescribed by the Commission as a fee for its services in carrying out the sale and delivery of the excess quantity.

(4) If a payment of an amount is made under subsection (3)(b) to the operator of the battery,

(a) the operator is responsible for paying that amount to the former owner or owners of the excess quantity to the extent that the operator was not its owner, and

(b) the payment to the operator operates to discharge the Commission of any liability to pay that amount to the former owner or owners of the excess quantity.

(5) The Commission is not liable

(a) to any person for the payment of interest in relation to any amount received by the Commission under this section, or

(b) to pay any amount to the battery operator or any owner or former owner of the excess quantity in respect of any portion of the excess quantity lost or destroyed before delivery to the purchaser of the excess quantity.

Part 3
Penalties Related To Inaccurate Forecasting

Interpretation

16(1) In this Part,

(a) "avoidance charge" means a cost or charge reasonably incurred by a shipper for the purpose of avoiding the imposition of a non-performance penalty, or reducing the amount of a non-performance penalty, that would otherwise be imposed on the shipper;

(b) "cleaning plant" means a crude oil cleaning plant that

(i) is connected to a gathering pipeline but is not operated by the owner of that pipeline, or

(ii) is not connected to a gathering pipeline;

(c) "connected battery" means a battery that is connected directly to a gathering pipeline or feeder pipeline;

(d) "document" means a document or other memorandum of information whether in writing or in electronic form or represented or reproduced by any other means;

(e) "feeder pipeline" means a crude oil pipeline in Alberta that is connected to and transports crude oil to a trunk line;

(f) "flow-through penalty" means a penalty imposed by the Commission pursuant to section 18(1);

(g) "Form A forecast" means a document, commonly referred to in the oil industry as a Form A forecast, provided prior to a delivery month in accordance with normal oil industry practice by the operator of a connected battery, truck terminal, cleaning plant or gathering pipeline to the operator of a feeder pipeline and showing

(i) a forecast of the volume of crude oil to be delivered by the operator of that unconnected battery, truck terminal, cleaning plant or gathering pipeline in the delivery month,

(ii) the shippers for whose account the crude oil is to be delivered by those operators in the delivery month, and

(iii) the portions of that volume allocated to the accounts of those shippers;

(h) "Form C forecast" means a document, commonly referred to in the oil industry as a Form C forecast, provided prior to a delivery month in accordance with normal oil industry practice by the operator of a feeder pipeline to

(i) each operator of a connected battery, truck terminal, cleaning plant or gathering pipeline that is expected to deliver crude oil to the feeder pipeline in that delivery month, and

(ii) each shipper for whose account crude oil is to be delivered to the feeder pipeline in that delivery month,

and showing a forecast of the volume of crude oil that will be tendered for delivery to that feeder pipeline in that delivery month, the shippers for whose account the crude oil is to be delivered by those operators and the portions of those volumes allocated to the accounts of those shippers;

(i) "gathering pipeline" means a crude oil pipeline in Alberta that is connected to one or more batteries, truck terminals or cleaning plants and transports crude oil to a feeder pipeline;

(j) "non-performance penalty", in relation to a delivery month, means a penalty imposed on a shipper by the operator of a crude oil pipeline pursuant to its tariff by reason of a failure by the shipper to tender for delivery to the pipeline in that delivery month

(i) the volume of crude oil that the shipper notified the pipeline operator would be tendered for delivery to the pipeline by that shipper in that delivery month, or

(ii) the percentage specified in the tariff of that volume of crude oil;

(k) "notice of shipment" means

(i) a document, commonly referred to in the oil industry as a notice of shipment, given by a shipper to the operator of a crude oil pipeline prior to a delivery month in accordance with normal oil industry practice and showing, among other things, the volume of crude oil to be tendered for delivery by the shipper to that pipeline during the delivery month,

(ii) if the shipper prepares a corrected notice of shipment after being notified of discrepancies in the initial notice referred to in subclause (i), the corrected notice of shipment, or

(iii) if the pipeline operator informs the shipper of an apportionment among shippers of the total volume of crude oil that may be tendered for delivery to the pipeline in that delivery month, the revised notice of shipment given by the shipper to the operator reflecting the reduction of the volume of crude oil to be tendered for delivery by that shipper in that delivery month resulting from the apportionment;

(l) "oilfield facility" means a battery, a truck terminal, a cleaning plant or a gathering pipeline;

(m) "transfer forecast" means a forecast that

(i) is part of a series of transfer forecasts forming part of the reporting and forecasting system administered by the oil industry,

(ii) is prepared by an oilfield facility operator in accordance with normal oil industry practice, and

(iii) shows, among other things, the volumes of crude oil intended to be delivered by that oilfield facility

operator to another oilfield facility operator in a delivery month;

(n) "truck terminal" means a crude oil tank terminal connected to a gathering pipeline or feeder pipeline not operated by the operator of that pipeline and to which crude oil is transported by truck;

(o) "trunk line" means an extra-provincial crude oil pipeline;

(p) "unconnected battery" means a battery that is not directly connected to a gathering pipeline or feeder pipeline.

(2) If the Commission's agent, in its capacity as a shipper, is liable to the operator of a crude oil pipeline for a non-performance penalty in respect of a delivery month and the agent is entitled under the agency contract to recover all or part of the amount of the penalty from the Crown and the Commission, the amount so recoverable shall, for the purposes of this Part, be deemed to be a non-performance penalty imposed on the Commission by the operator of the pipeline.

(3) If the Commission's agent, in its capacity as a shipper, incurs an avoidance charge in respect of a delivery month and the agent is entitled under the agency contract to recover all or part of the avoidance charge from the Crown and the Commission, the amount so recoverable shall, for the purposes of this Part, be deemed to be an avoidance charge incurred by the Commission.

(4) The Commission may determine what constitutes normal oil industry practice for the purposes of this Regulation and in doing so shall have regard to the system of forecasting and reporting administered by the oil industry.

Notice to furnish information

17(1) Subject to this section, the Commission may give a notice to a person who is or was the operator of an oilfield facility or feeder pipeline for a delivery month to furnish to the Commission, by the deadline specified in the notice,

(a) a copy of a transfer forecast or a Form A forecast prepared by or on behalf of that operator in respect of that delivery month, or

(b) information relating to the preparation of the transfer forecast or the Form A forecast.

(2) The Commission may give a notice under this section only for the purpose of obtaining information for the purpose of determining

(a) the liability of an oilfield facility operator for a flow-through penalty in respect of the delivery month concerned, and

(b) the amount of the penalty.

(3) A person who is required to comply with a notice given under this section is liable to pay to the Commission

(a) a penalty of $100, if the copy of the forecast or the information referred to in the notice is not furnished to the Commission by the deadline specified in the notice, and

(b) if the failure to comply with the notice continues for one or more months following the deadline specified in the notice, a further penalty of $100 for each time any of those months expires without the notice having been complied with.

(4) If a notice given under this section is only partially complied with by reason of the omission of any copy of a forecast or of any information required to be furnished then, for the purposes of subsection (3), the notice shall be deemed not to have been complied with until the omitted copy or information is furnished to the Commission.

Flow-through penalties

18(1) The Commission may, subject to this Part, impose a penalty on one or more oilfield facility operators in respect of a delivery month in any or all of the following circumstances:

(a) if the Commission, in its capacity as a shipper of crude oil, is liable to the operator of a crude oil pipeline for a non-performance penalty in respect of that delivery month;

(b) if a non-performance penalty is deemed to be imposed on the Commission in respect of a delivery month by reason of section 16(2);

(c) if the Commission, in its capacity as a shipper, incurs an avoidance charge in respect of that delivery month;

(d) if the Commission is deemed to have incurred an avoidance charge in respect of that delivery month by reason of section 16(3).

(2) The Commission may impose flow-through penalties in respect of a delivery month only if it determines

(a) that the non-performance penalty imposed or deemed to be imposed on the Commission in respect of that month, or the avoidance charge incurred or deemed to be incurred by the Commission in respect of that month, was attributable to the fact that the notice of shipment for the month given by the Commission or its agent to the operator of the pipeline showed volumes of crude oil to be tendered for delivery that were greater than the actual volumes delivered, as shown in the Commission's or the agent's final shipper's balance for the month,

(b) that the crude oil volumes shown in the Commission's or the agent's notice of shipment as the volumes to be tendered for delivery in the month were based on crude oil volumes in Form C forecasts provided to the Commission or its agent by one or more operators of feeder pipelines that transported the crude oil, and that the volumes of crude oil actually delivered in the month were less than the volumes shown in the Form C forecasts, and

(c) that the reason for the overforecasting of crude oil deliveries in the Form C forecasts was attributable to inaccurate forecasting of deliveries in one or more of the Form A forecasts on which the Form C forecasts were wholly or partly based or in one or more transfer forecasts on which one or more Form A forecasts were wholly or partly based.

(3) The Commission may determine which oilfield facility operators are liable for flow-through penalties on the basis of

(a) the Form A forecasts and transfer forecasts provided by those battery operators who delivered, or were required to but did not deliver, royalty oil to the Commission in the delivery month concerned,

(b) one or more transfer forecasts that led to an inaccurate Form C forecast on which the Commission or its agent relied in preparing the Commission's or the agent's notice of shipment for a delivery month, where each of those transfer forecasts either

(i) contained an excessive forecast of the volume of royalty oil to be delivered by the oilfield facility operator who prepared the transfer forecast, or

(ii) changed the forecast of deliveries of royalty oil in another transfer forecast that preceded it in the series of transfer forecasts for that delivery month and that caused the other transfer forecast to become

excessive or more excessive in relation to royalty oil deliveries,

and

(c) any other information obtained by the Commission pursuant to section 17 or otherwise in the possession of the Commission and containing evidence of excessive forecasting of royalty oil deliveries.

(4) The Commission may determine the amounts of the respective flow-through penalties imposed on oilfield facility operators determined to be liable for those penalties under subsection (3), subject to the following:

(a) a penalty imposed on an operator in respect of a delivery month is subject to a minimum of $250;

(b) the aggregate amount of the flow-through penalties imposed on all oilfield facility operators in Alberta for a delivery month must not exceed the aggregate of

(i) the non-performance penalties imposed or deemed to be imposed on the Commission in respect of that delivery month,

(ii) the avoidance charge incurred or deemed to have been incurred by the Commission in respect of that delivery month, and

(iii) an amount determined by the Commission as its administration costs incurred in connection with the imposition of the flow-through penalties for that delivery month,

unless that aggregate amount is exceeded by reason of the imposition of minimum penalties under clause (a).

Waiver of penalty

19 The Commission may, on application by the oilfield facility operator concerned, waive all or part of a penalty imposed on that operator under this Part if the Commission considers the waiver warranted in the circumstances.

Invoicing for penalties

20 Where a penalty is imposed on an oilfield facility operator pursuant to this Part, the Commission must

(a) send to the oilfield facility operator an invoice for the penalty and inform the operator of the reason for its imposition and the deadline by which payment of the penalty must be received by the Commission, or

(b) in the case of a penalty imposed on a battery operator, include the penalty in a monthly statement sent to the battery operator and showing the reason for the penalty.

Appeals respecting penalties

21(1) Subject to this section, a person on whom a penalty is imposed under this Part may file with the Commission a notice of an appeal to the Minister in respect of

(a) that person's liability for the penalty,

(b) the amount of the penalty, or

(c) the Commission's refusal to waive the penalty pursuant to section 19.

(2) A notice of appeal must be filed with the Commission within

(a) 2 months after the date of the invoice for the penalty or the monthly statement that includes the penalty, as the case may be, or

(b) one month after the date of the Commission's notice to the battery operator of its refusal to waive the penalty, in the case of an appeal under subsection (1)(c).

(3) On receiving a notice of appeal, the Minister shall conduct a review of the penalty and the representations in or accompanying the notice.

(4) On concluding the review, the Minister must either

(a) confirm the penalty,

(b) revoke the penalty on the ground that the appellant was not liable for it,

(c) reduce the amount of the penalty, or

(d) grant any penalty waiver pursuant to section 19 that the Commission could have granted, in the case of an appeal under subsection (1)(c),

and must inform the appellant of the Minister's decision.

(5) The Commission may establish general directions respecting the filing of and content of notices of appeal under this section and the procedures for the conduct of those appeals.

Part 4
General

Truck transportation allowances

22(1) Subject to this section, the Crown is liable to a battery operator for an allowance based on an average of the costs incurred in the transportation of royalty oil by truck during a delivery month from that operator's battery to an unloading facility connected to a pipeline.

(2) The Crown is liable for an allowance under this section only to the extent that the Minister consents to be liable for the allowance.

(3) The payment of an allowance under this section is subject to any conditions the Minister prescribes, in addition to the following conditions:

(a) the royalty oil must have been transported in an uninterrupted manner;

(b) the royalty oil must have been delivered to the unloading facility to which it was required to be delivered during the delivery month concerned pursuant to section 11(1)(b) or (2), whichever applied;

(c) the royalty oil must have been delivered to the unloading facility for the Crown's account;

(d) the royalty oil, while being transported, met the quality specifications for the pipeline to which the royalty oil was delivered from the unloading facility.

(4) If a condition referred to in subsection (3) was breached in respect of an allowance paid under this section, the Minister may recover the allowance by action or by way of set-off under section 23.

(5) An allowance for which the Crown is liable under this section shall be paid to the operator of the battery for the delivery month in which the royalty oil was transported by truck.

(6) The Minister may not consent to the payment of an allowance under this section unless a claim is made by the operator of the battery for the delivery month concerned by the end of the 2nd year following the year in which the delivery month occurred.

Commission's right of set-off

23(1) The Commission has the right to set off

(a) any amount owing to the Commission by any person under this Regulation

against

(b) any amount owing to that person by the Commission under this Regulation.

(2) A set-off referred to in subsection (1) may be reflected in an invoice referred to in section 20(a) or in a monthly statement.

Monthly statements

24(1) The Commission shall in each delivery month prepare and send to each battery operator a statement showing, as circumstances require, the following:

(a) a reconciliation of

(i) the operator's reported royalty oil deliveries for the preceding delivery month, and

(ii) the operator's actual deliveries for the preceding delivery month;

(b) a reconciliation of

(i) the operator's actual deliveries for the preceding delivery month, and

(ii) the prescribed royalty quantities in respect of the operator's batteries for the preceding delivery month;

(c) all money amounts calculated by the Commission as owing by the operator to the Commission under this Regulation as of the date of the statement;

(d) all money amounts calculated by the Commission as owing by the Commission to the operator under this Regulation as of the date of the statement;

(e) adjustments of quantities of crude oil or money amounts shown in previous statements prepared under this section.

(2) If a monthly statement shows a net money amount owing by the Commission to the operator, the Commission shall pay that amount to the operator.

(3) If a monthly statement shows a net money amount owing by the operator to the Commission (in this section called the "net invoice amount"), the monthly statement shall be accompanied by an invoice for that net invoice amount showing the due date for payment to the Commission of the net invoice amount and containing a statement regarding the operator's liability for interest under subsection (4).

(4) If an invoice is sent to an operator under subsection (3) and the net invoice amount in the invoice is not paid in full to the Commission on or before the due date for payment specified in the invoice, interest is owing to the Commission on the balance of the net invoice amount remaining unpaid from time to time after the due date until the date on which the entire balance of the unpaid net invoice amount is received by the Commission together with any interest on that unpaid balance to that date.

(5) If interest is payable under subsection (4) in respect of any day, the rate of interest in respect of that day is the yearly rate that is 1% greater than the ATB prime rate in effect on the first day of the month in which the day occurs and interest shall, unless the Minister directs otherwise, be compounded monthly in respect of the period for which it is computed.

(6) In subsection (5), "ATB prime rate" means the yearly rate of interest established by Alberta Treasury Branches as its prime lending rate on loans payable in Canadian dollars.

Lessee's liability unaffected

25 Nothing in this Regulation operates to relieve a lessee from the lessee's liability to the Crown under an agreement for the payment of royalty.

Commission directions

26 For the purpose of enabling it to carry out its responsibilities under the *Petroleum Marketing Act*, the Commission may give such directions as it considers necessary to any lessees, battery operators, pipeline operators, agents or any other persons, and the persons to whom the directions are given shall comply with them.

AR 174/2006 s26;168/2010

Direction to transmit or store hydrocarbons

26.1(1) When the Commission wishes to arrange for the storage of a hydrocarbon substance delivered to it pursuant to section 16 of the Act, the Commission may

(a) direct the supplier of a pipeline to transmit the hydrocarbon substance by the supplier's pipeline to a

storage facility in Alberta designated by the Commission or to a point in Alberta designated by the Commission that is en route to a storage facility, or

(b) subject to subsection (2), direct the supplier of any storage facility in Alberta to accept the hydrocarbons for storage and to store it in that storage facility,

subject to the payment of compensation for it by the Commission in accordance with subsection (3).

(2) The Commission shall not make a direction under subsection (1)(b) in respect of a storage facility consisting of an underground formation unless approval has been previously obtained from the Alberta Energy Regulator pursuant to section 39(1)(d) of the *Oil and Gas Conservation Act*.

(3) When a direction is made by the Commission under subsection 1(a) and the Commission is unable to reach an agreement with the supplier of the pipeline as to the just and reasonable charges to be paid by the Commission for the transmission of the hydrocarbon substance by the pipeline, section 110 of the *Public Utilities Act* applies.

AR 235/2017 s2

27 Repealed AR 247/2018 s2.

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TAB 5

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Philip H. Osborne

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THE LAW OF TORTS

SIXTH EDITION

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a trespass subject to a privilege of reasonable and legitimate flight.[204] This approach requires a balance to be drawn between the interests of the surface owner and the use of the incumbent airspace by others. Most recreational, military, and commercial flight would be privileged but flight for the purpose of photographing private property, spraying a powerful insecticide over an urban area, testing military weapons, advertising products or services, or conducting surveillance may give rise to some difficult issues.[205] The third view, which probably represents the current Canadian position,[206] is that trespassory remedies are available only for intrusion by aircraft within the surface owner's zone of *effective possession*. Effective possession is an elusive concept but the general idea is that it extends to a height necessary to protect the plaintiff's current or future enjoyment, comfort, or use of land. The zone of effective possession will in most cases be no more than a few hundred feet above the ground. Above that, the remedy must be sought in negligence or nuisance.[207]

E. INTENTIONAL INTERFERENCE WITH CHATTELS

There are four nominate intentional torts protecting interests in chattels:[208] trespass to chattels, detinue, conversion, and the action on the case to protect an owner's reversionary interest. Each has a discrete, though overlapping, role in the protection of interests in chattels. In *practice* each tort is commonly associated with a different form of interference with chattels. The typical case of trespass to chattels is that of intentional damage to a chattel in the physical control of the plaintiff. Detinue typically applies where the defendant refuses to return the plaintiff's chattel to her. Conversion commonly applies where the defendant has taken the plaintiff's chattel. The action on the case to protect the

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204 There is some support for this view in *Atlantic Aviation Ltd v Nova Scotia Light & Power Co* (1965), 55 DLR (2d) 554 (NSSC).

205 This approach, which seeks to balance the interests of the surface possessor with those of others who seek to use the airspace, echoes the approach of Laskin CJC in *Harrison*.

206 See *Didow*, above note 199.

207 For a subterranean trespass to land, see *Austin v Rescon Construction (1984) Ltd* (1987), 45 DLR (4th) 559 (BCSC), var'd as to damages (1989), 57 DLR (4th) 591 (BCCA). See also *Star Energy Weald Basin Limited v Bocardo SA*, [2010] UKSC 35, dealing with drilling for oil under the claimant's land.

208 Chattels include all property other than land.

owner's reversionary interest applies to permanent damage to the plaintiff's chattel which occurred when the chattel was in the possession of someone else. These are, however, gross generalizations and the definition of each tort is not restricted to these typical situations. Moreover, a single fact situation may give rise to a number of causes of action. The plaintiff may choose the most advantageous remedy. These nominate torts are supplemented by replevin and the recaption of chattels, which are procedures designed to secure the timely return of chattels that have been wrongly taken or detained by another person.

1) Trespass to Chattels

Trespass to chattels is the oldest of the torts of intentional interference with chattels. It applies where the defendant directly and intentionally (or negligently[209]) interferes with a chattel in the possession of the plaintiff. Trespass to chattels protects possession rather than ownership. Indeed, a person in wrongful possession may bring an action in trespass against anyone except an owner with a right to immediate possession. This emphasis on possession reflects the fact that the main priority of the early common law was to minimize violence. The law sought to prevent violent confrontations over the possession of chattels where title lay in the hands of an owner out of possession who was not exercising his ownership rights. The solution was found in protecting the person who had physical control (possession) of the chattel. An owner out of possession such as a bailor of a chattel for a fixed term cannot, therefore, sue in trespass.[210]

Any direct interference with a chattel is actionable, including damage, destruction, taking, or movement of it. In practice, trespass is most commonly used where a chattel has been damaged or where there has been some minor unauthorized use or movement of the chattel. The destruction or taking of chattels is usually remedied by the tort of conversion or the tort of negligence. Knowledge that the interference is wrongful is not required. Mistake is no defence.

It is not clear if trespass to chattels continues to be actionable without proof of damage. One view is that the traditional rule plays a useful role in preventing people from touching valuable art and museum pieces

209 The burden of proof is on the defendant to prove an absence of intention and negligence. In practice the tort of negligence will be used to remedy damage caused by a direct negligent act.

210 This rule is, however, qualified by the concept of vicarious possession. This allows an owner to sue when his employee, agent, or bailee at will has possession of his chattel.

and in providing a remedy for the unauthorized moving or temporary use of chattels. The other view is that unless goods are taken, damage should be an essential element of liability since there is no pressing policy need to protect a dignitary interest in the inviolability of chattels.

The remedy for trespass to chattels is an award of damages. The measure of damages for a damaged chattel is the reduction in its market value or the cost of repairs where that is less. The market value of the chattel is the appropriate measure for the taking or destruction of a chattel.

Canadian courts have yet to determine how trespass to chattels applies to computer systems. A number of issues will arise, including the precise definition of chattels, the novelty of intangible interference with chattels, and whether the tort should continue to be actionable without proof of harm. Some of the issues were, however, raised in *Century 21 Canada Ltd Partnership v Rogers Communications Inc.*[211] In that case the website of the plaintiff realtor was located on the server of a third party. The plaintiff had no possessory interest in the server. The defendant electronically scraped information from the plaintiff's website and used the information on its own realty-related website. The plaintiff claimed that the defendant was liable in trespass to chattels for its taking and using of its electronic information. The court doubted that interference by electronic signals satisfies the conventional view that interference to support a trespass action must be physical. Moreover, in the court's view, trespass requires an interference with a *physical* object. Consequently, it was the third party, who owned the server, that would have had a stronger claim in trespass. That issue was, however, moot because the third party was not a party to the litigation. The action of the plaintiff was dismissed.

The American courts have also begun to grapple with these issues. An illustrative American case is *Intel Corp v Hamidi*.[212] In that case the defendant was a disgruntled former employee of the plaintiff corporation. He sent mass emails that were critical of the plaintiff to thousands of the plaintiff's employees. The plaintiff sought an injunction to put a stop to this on the grounds that the defendant's unauthorized use of its server was a trespass to chattels. An injunction was granted both on summary judgment and on appeal but the California Supreme Court reversed these decisions. It held that direct harm to the chattel was an essential element of trespass to chattels in California. In *Hamidi*, therefore, no tort was committed because there was no evidence that there was any *significant* impairment in the operation, value, or processing capacity of the plaintiff's server. The nature and degree of harm

211 2011 BCSC 1196.

212 71 P3d 296 (Ca Sup Ct 2003).

sufficient to complete the tort was not fully resolved but the Court did not favour earlier decisions where injunctions had been issued to prevent the use of the plaintiff's server for sending bulk email[213] and to prevent the accessing of information that was available to the public from the plaintiff's website[214] on the basis of minimal harm to the plaintiff's computing system and/or indirect harm to business interests. The *Hamidi* decision may be seen, therefore, as one that favours freedom of access and use of online systems and diminishes the protection of the operators of those systems unless there is a substantial degradation in their storage or processing capacity. *Hamidi* also challenges the wisdom of the view that trespass to chattels is actionable *per se*. If harm is not needed to maintain online trespass in Canada, some form of privilege of reasonable access or implied consent to the use of computer systems will need to be developed.[215]

2) Detinue

An action in detinue is available where a person with a right to the immediate possession of a chattel has requested[216] its return from a defendant who has possession of the chattel or who had possession of it but lost it as a result of a wrongful act.[217] The tort protects the plaintiff's right to the chattel and focuses on the defendant's denial of the plaintiff's rights by refusing to return it. A demand for the chattel by the plaintiff and a refusal by the defendant to return it are normally essential components of the cause of action. The demand alerts the defendant to the plaintiff's claim to the chattel and provides an opportunity for the defendant to return it to its rightful owner and, thereby, avoid liability. It is probably not necessary to make a demand if it is clear that the defendant is determined to keep the chattel, thereby making a request futile.

Unlike trespass and conversion, detinue may be remedied by an order for the return of the chattel. The most common remedy for

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213 *Compuserv Inc v Cyber Promotions Inc*, 962 F Supp 1015 (SD Ohio 1997).

214 *eBay Inc v Bidder's Edge Inc*, 100 F Supp 2d 1085 (ND Cal 2000).

215 For a very useful discussion of some of these issues see W Adams, "There Is No There There: *Intel Corp v Hamidi* and the Creation of New Common Law Property Rights Online" (2004) 40 Can Bus LJ 87.

216 The unauthorized possession of another's chattel, in itself, is not wrongful. It becomes wrongful when the defendant denies the plaintiff's right to it. Consequently, a bailee who merely continues in possession after the term of a bailment has expired is not acting wrongfully until he denies the bailor's right to it.

217 For example, a bailee who lost possession of the chattel as a consequence of an intentional or negligent act.

detinue is a judicial order that the defendant *either* give up the chattel *or* pay for its value and pay damages for its detention. Alternatively, a court may award damages for the value of the chattel and damages for its detention. Less commonly, an order may be made for the return of the chattel with damages for its detention.[218] This order is appropriate where the chattel is not easily replaceable, such as an heirloom, jewellery, or unique industrial or commercial equipment or machinery.

Since the essence of the tort is the refusal to return the chattel, an action may be defeated by the defendant returning the chattel before judgment is given. Furthermore, since the tort is a continuing one arising out of the persistent failure of the defendant to comply with the request to return the chattel, damages for the value of the chattel are assessed at the time of judgment rather than the date of the initial refusal to return it. This may be contrasted with the general rule in conversion that damages are assessed at the time of the conversion.

3) Conversion

Conversion is the most recent of the three main torts providing protection against the intentional interference with chattels. Nevertheless, it has proved to be an expansionary and flexible concept that now encompasses many situations that, at an earlier time, were the predominant preserve of trespass to chattels or detinue. There are three central elements to the tort of conversion. First, it protects persons who are in possession of chattels or who have a right to the immediate possession of chattels. Second, it is restricted to the intentional interference and dealing with chattels. Conversion is not, for example, available for the negligent damage or destruction of chattels. Third, an act of conversion is one that so seriously interferes with the plaintiff's rights to the chattel that the defendant may, in fairness, be required to pay its full value.[219] The payment of damages equivalent to the full value of the chattel is said to effect a forced judicial sale of the chattel to the defendant. This explains why orders for the return of the chattel are not made in a conversion action. The defendant is treated as if he had bought the chattel and he can keep it.

The concept of a forced sale is also the safest guide in the multitude of marginal cases where a determination must be made if the interference with a chattel is sufficiently serious to be a conversion. A good

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218 The three forms of the remedy for detinue are set out in *General & Finance Facilities Ltd v Cooks Cars (Romford) Ltd*, [1963] 1 WLR 644 (CA).

219 C Sappideen & P Vines, eds, *Fleming's Law of Torts*, 10th ed (Sydney: Law Book Co, 2011) at 66–67 [Fleming].

rule of thumb is to consider the degree of interference with the chattel and assess whether or not it is fair and reasonable that the defendant be forced to pay the full market value for it.

Chattels may be converted in a number of ways. The most frequent form of conversion is probably the taking of chattels in the course of criminal activity such as break and entry, shoplifting, and car theft. For obvious reasons, criminal taking rarely gives rise to tort litigation. The intentional *destruction* of a chattel is also clearly a conversion. The unauthorized *disposition* of another's chattel by way of sale or pledge is a conversion. The intentional disposition of chattels is made at one's peril. Mistake is no defence to conversion. Consequently, both an innocent seller of stolen goods and the innocent purchaser to whom they are transferred are both liable in conversion. There are some exceptions to this rule, the most important of which include some commercial situations where a non-owner of goods is empowered to transfer a good title to an innocent purchaser.[220] Nevertheless, the transferor remains liable in conversion. Certain ministerial dealings with goods by those who are not principals to a transaction affecting rights in the goods are also protected. For example, persons packing, storing, or carrying goods for another in ignorance of that person's lack of title and with no knowledge that they are participating in a transaction involving the unauthorized transfer of title to the goods are not liable in conversion.[221] An involuntary bailee who surrenders a chattel to a non-owner is also protected from liability in conversion if reasonable care is taken and an honest belief is held that the transferee is the true owner. A great deal of difficulty is encountered in deciding if the *temporary taking*, *movement*, or *use* of a chattel is a conversion. All the surrounding circumstances must be considered, including the duration of the interference, the kind of interference, the purpose of the interference, and the amount of damage inflicted. The most useful test is whether or not the interference is sufficiently serious to warrant a forced sale of the chattel to the defendant. The classic case on this point is *Fouldes v Willoughby*.[222] In that case, the plaintiff and two of his horses boarded the defendant's ferry. Before it departed, a dispute arose and the defendant asked the plaintiff to remove himself and his horses from the ferry. When the plaintiff refused, the defendant led the horses off

220 The most common examples are the doctrines of apparent authority and apparent ownership, sale or pledge by a mercantile agent under the Factors legislation, and the power of sellers and buyers in possession to pass good title under sale of goods legislation.

221 *Hollins v Fowler* (1875), LR 7 HL 757 (HL).

222 (1841), 8 M & W 540, 151 ER 1153 (Ex Ct).

the ferry and turned them loose. The court held that the defendant was not liable in conversion. The interference with the plaintiff's rights was not of sufficient seriousness to require the defendant to pay for the horses. At most there had been a trespass to chattels. A similar issue arises where another person's umbrella is used to run an errand in the rain, where a motor vehicle that is blocking an entrance is pushed out of the way, or where a person reads another's newspaper or uses a neighbour's tools or sports equipment. If the interference is of short duration and the chattel is returned unharmed, it is unlikely to be held to be a conversion.

Conversion may also be committed by *refusing to comply with a request to return* a chattel to its rightful owner. It is in this situation that conversion intrudes on the traditional domain of detinue. However, in conversion, unlike detinue, a single cause of action arises when the defendant refuses to return the chattel, damages are calculated at the time of the conversion, and the only remedy is an award of damages. The plaintiff may choose the more advantageous action. There are also some situations, such as where a bailee has *negligently* lost the chattel, where the owner has no claim in conversion and must sue in detinue or negligence.

There is some debate about the assessment of damages in conversion and detinue. The theory behind each tort leads to a different date of assessment of the market value of the chattel. The act of conversion obliges the defendant to pay for the chattel. Consequently, when the act of conversion occurs, the plaintiff must mitigate his loss by promptly replacing it. Damages are assessed, therefore, at the time of the conversion or, at the latest, when the plaintiff is aware of the conversion. Detinue is a continuing wrong and the cause of action may be defeated by a return of the chattel at any time before judgment. Damages are thus assessed at the date of the trial. This disparity in valuation dates has led to the guideline that detinue is the tort of choice on a rising market and conversion is preferable on a falling market. There has been some support for bridging the gap by awarding in conversion any increase in the value of the goods as consequential damages or by awarding the plaintiff the highest value of the converted goods between the time of conversion and the trial. This would lessen the evil of having remedies dependent on procedural technicalities, and it would assist plaintiffs who cannot afford to replace chattels at the time of the conversion.

In this century there has been some debate about the scope of the tort of conversion. The accepted position in Canada is that it only applies to tangible personal property such as goods. It does not apply to intangible property such as contractual rights or other choses in

action.[223] This is subject to an exception known as the "document cases." It has long been held that negotiable instruments, such as promissory notes and share certificates, both of which evidence intangible property rights, may be converted. The converted document (tangible property) is fictitiously assigned the value of the rights it represents. The conventional position was upheld by a majority of the House of Lords in its 2007 decision in *OBG Ltd v Allan*.[224] It held that a receiver of a corporation could not be held liable in conversion for the unauthorized dealing of the corporation's debts and contractual rights (intangible property). A minority of the Court rejected, as historic and anomalous, the distinction between intangibles evidenced in a written document and those that are not. This dichotomy was, in its view, unprincipled and poor policy in a computerized world of electronic records and digital information. In contrast, some American decisions reflect the minority view and have applied conversion to intangible property such as a domain name[225] and electronic records.[226] No authoritative Canadian court has addressed this issue.

4) The Action on the Case to Protect the Owner's Reversionary Interest

The emphasis in trespass to chattels, detinue, and conversion on the protection of possession or the right to immediate possession fails to address the interest of an owner without either possession or a right to immediate possession. That situation arises most frequently in respect of an unexpired bailment for a fixed term. In that situation, the bailor has neither possession nor a right to immediate possession. The action on the case to protect the owner's reversionary interest arises where the chattel has been destroyed or permanently damaged by the intentional or negligent act of the defendant. The classic authority is *Mears v London & South Western Ry Co*,[227] where the defendant negligently caused serious damage to a barge that was owned by the plaintiff but leased to a third party. The plaintiff succeeded on proof of permanent damage to the plaintiff's reversionary interest. This action is rarely used in Canada because permanent damage or destruction most commonly

223 A chose in action is a personal right, incapable of possession but enforceable through legal action, such as contractual rights, the right to money in a bank account, and tortious causes of action.

224 [2007] UKHL 21.

225 *Kemen v Cohen*, 337 F 3d 1024 (9th Cir 2003).

226 *Thyroff v Nationwide Mutual Insurance Co*, 8 NY 3d 283 (NY 2007).

227 (1862), 11 CBNS 850, 142 ER 1029 (CP).

TAB 6

1998 CarswellOnt 1
Supreme Court of Canada

Rizzo & Rizzo Shoes Ltd., Re

1998 CarswellOnt 1, 1998 CarswellOnt 2, [1998] 1 S.C.R. 27, [1998] A.C.S. No. 2, [1998] S.C.J. No. 2, 106 O.A.C. 1, 154 D.L.R. (4th) 193, 221 N.R. 241, 33 C.C.E.L. (2d) 173, 36 O.R. (3d) 418 (headnote only), 50 C.B.R. (3d) 163, 76 A.C.W.S. (3d) 894, 98 C.L.L.C. 210-006, J.E. 98-201

Philippe Adrien, Emilia Berardi, Paul Creador, Lorenzo Abel Vasquez and Lindy Wagner on their own behalf and on behalf of the other former employees of Rizzo & Rizzo Shoes Limited, Appellants v. Zittrer, Siblin & Associates, Inc., Trustees in Bankruptcy of the Estate of Rizzo & Rizzo Shoes Limited, Respondent and The Ministry of Labour for the Province of Ontario, Employment Standards Branch, Party

Gonthier, Cory, McLachlin, Iacobucci, Major JJ.

Heard: October 16, 1997
Judgment: January 22, 1998
Docket: 24711

Proceedings: reversing (1995), 30 C.B.R. (3d) 1 (C.A.); reversing (1991), 11 C.B.R. (3d) 246 (Ont. Gen. Div.)

Counsel: *Steven M. Barrett* and *Kathleen Martin*, for the appellants.
Raymond M. Slattery, for the respondent.
David Vickers, for the Ministry of Labour for the Province of Ontario, Employment Standards Branch.

Subject: Employment; Insolvency

APPEAL by employees of bankrupt employer from decision reported at (1995), 30 C.B.R. (3d) 1, 9 C.C.E.L. (2d) 264, 22 O.R. (3d) 385, *(*sub nom. *Ontario Ministry of Labour v. Rizzo & Rizzo Shoes Ltd.)* 95 C.L.L.C. 210-020, *(*sub nom. *Re Rizzo & Rizzo Shoes Ltd. (Bankrupt))* 80 O.A.C. 201 (C.A.), reversing decision reported at (1991), 11 C.B.R. (3d) 246, 6 O.R. (3d) 441, 92 C.L.L.C. 14,013 (Gen. Div.), reversing disallowance of claim by trustee in bankruptcy.

POURVOI interjeté par les employés d'un employeur failli à l'encontre d'un arrêt publié à (1995), 30 C.B.R. (3d) 1, 9 C.C.E.L. (2d) 264, 22 O.R. (3d) 385, *(*sub nom. *Ontario Ministry of Labour v. Rizzo & Rizzo Shoes Ltd.)* 95 C.L.L.C. 210-020, *(*sub nom. *Re Rizzo & Rizzo Shoes Ltd. (Bankrupt))* 80 O.A.C. 201 (C.A.), infirmant un arrêt publié à (1991), 11 C.B.R. (3d) 246, 6 O.R. (3d) 441, 92 C.L.L.C. 14,013 (Gen. Div.), infirmant le rejet par le syndic d'une preuve de réclamation dans la faillite.

The judgment of the court was delivered by *Iacobucci J.*:

1 This is an appeal by the former employees of a now bankrupt employer from an order disallowing their claims for termination pay (including vacation pay thereon) and severance pay. The case turns on an issue of statutory interpretation. Specifically, the appeal decides whether, under the relevant legislation in effect at the time of the bankruptcy, employees are entitled to claim termination and severance payments where their employment has been terminated by reason of their employer's bankruptcy.

1. Facts

2 Prior to its bankruptcy, Rizzo & Rizzo Shoes Limited ("Rizzo") owned and operated a chain of retail shoe stores across Canada. Approximately 65% of those stores were located in Ontario. On April 13, 1989, a petition in bankruptcy was filed against the chain. The following day, a receiving order was made on consent in respect of Rizzo's property. Upon the making of that order, the employment of Rizzo's employees came to an end.

3 Pursuant to the receiving order, the respondent, Zittrer, Siblin & Associates, Inc. (the "Trustee") was appointed as trustee in bankruptcy of Rizzo's estate. The Bank of Nova Scotia privately appointed Peat Marwick Limited ("PML") as receiver and manager. By the end of July, 1989, PML had liquidated Rizzo's property and assets and closed the stores. PML paid all wages, salaries, commissions and vacation pay that had been earned by Rizzo's employees up to the date on which the receiving order was made.

4 In November 1989, the Ministry of Labour for the Province of Ontario (Employment Standards Branch) (the "Ministry") audited Rizzo's records to determine if there was any outstanding termination or severance pay owing to former employees under the *Employment Standards Act*, R.S.O. 1980, c. 137, as amended (the "*ESA*"). On August 23, 1990, the Ministry delivered a proof of claim to the respondent Trustee on behalf of the former employees of Rizzo for termination pay and vacation pay thereon in the amount of approximately $2.6 million and for severance pay totalling $14,215. The Trustee disallowed the claims, issuing a Notice of Disallowance on January 28, 1991. For the purposes of this appeal, the relevant ground for disallowing the claim was the Trustee's opinion that the bankruptcy of an employer does not constitute a dismissal from employment and thus, no entitlement to severance, termination or vacation pay is created under the *ESA*.

5 The Ministry appealed the Trustee's decision to the Ontario Court (General Division) which reversed the Trustee's disallowance and allowed the claims as unsecured claims provable in bankruptcy. On appeal, the Ontario Court of Appeal overturned the trial court's ruling and restored the decision of the Trustee. The Ministry sought leave to appeal from the Court of Appeal judgment, but discontinued its application on August 30, 1993. Following the discontinuance of the appeal, the Trustee paid a dividend to Rizzo's creditors, thereby leaving significantly less funds in the estate. Subsequently, the appellants, five former employees of Rizzo, moved to set aside the discontinuance, add themselves as parties to the proceedings, and requested an order granting them leave to appeal. This Court's order granting those applications was issued on December 5, 1996.

2. Relevant Statutory Provisions

6 The relevant versions of the *Bankruptcy Act* (now the *Bankruptcy and Insolvency Act*) and the *Employment Standards Act* for the purposes of this appeal are R.S.C. 1985, c. B-3 (the "*BA*"), and R.S.O. 1980, c. 137, as amended to April 14, 1989 (the "*ESA*") respectively:

Employment Standards Act, R.S.O. 1980, c. 137, as amended:

7.--

(5) Every contract of employment shall be deemed to include the following provision:

All severance pay and termination pay become payable and shall be paid by the employer to the employee in two weekly instalments beginning with the first full week following termination of employment and shall be allocated to such weeks accordingly. This provision does not apply to severance pay if the employee has elected to maintain a right of recall as provided in subsection 40a (7) of the *Employment Standards Act*.

40.-- (1) No employer shall terminate the employment of an employee who has been employed for three months or more unless the employee gives,

(a) one weeks notice in writing to the employee if his or her period of employment is less than one year;

(b) two weeks notice in writing to the employee if his or her period of employment is one year or more but less than three years;

(c) three weeks notice in writing to the employee if his or her period of employment is three years or more but less than four years;

(d) four weeks notice in writing to the employee if his or her period of employment is four years or more but less than five years;

(e) five weeks notice in writing to the employee if his or her period of employment is five years or more but less than six years;

(f) six weeks notice in writing to the employee if his or her period of employment is six years or more but less than seven years;

(g) seven weeks notice in writing to the employee if his or her period of employment is seven years or more but less than eight years;

(h) eight weeks notice in writing to the employee if his or her period of employment is eight years or more,

and such notice has expired.

. . . . .

(7) Where the employment of an employee is terminated contrary to this section,

(a) the employer shall pay termination pay in an amount equal to the wages that the employee would have been entitled to receive at his regular rate for a regular non-overtime work week for the period of notice prescribed by subsection (1) or (2), and any wages to which he is entitled;

. . . . .

40*a* ...

(1a) Where,

(a) fifty or more employees have their employment terminated by an employer in a period of six months or less and the terminations are caused by the permanent discontinuance of all or part of the business of the employer at an establishment; or

(b) one or more employees have their employment terminated by an employer with a payroll of $2.5 million or more,

the employer shall pay severance pay to each employee whose employment has been terminated and who has been employed by the employer for five or more years.

Employment Standards Amendment Act, 1981, S.O. 1981, c. 22

2.--(1) Part XII of the said Act is amended by adding thereto the following section:

(3) Section 40*a* of the said Act does not apply to an employer who became a bankrupt or an insolvent person within the meaning of the *Bankruptcy Act* (Canada) and whose assets have been distributed among his creditors or to an employer whose proposal within the meaning of the *Bankruptcy Act* (Canada) has been accepted by his creditors in the period from and including the 1st day of January, 1981, to and including the day immediately before the day this Act receives Royal Assent.

Bankruptcy Act, R.S.C. 1985, c. B-3

121. (1) All debts and liabilities, present or future, to which the bankrupt is subject at the date of the bankruptcy or to which he may become subject before his discharge by reason of any obligation incurred before the date of the bankruptcy shall be deemed to be claims provable in proceedings under this Act.

Interpretation Act, R.S.O. 1990, c. I.11

> **10.** Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of any thing that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.
>
> . . . . .
>
> **17.** The repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law.

3. Judicial History

A. Ontario Court (General Division) (1991), 6 O.R. (3d) 441 (Ont. Gen. Div.)

7 Having disposed of several issues which do not arise on this appeal, Farley J. turned to the question of whether termination pay and severance pay are provable claims under the *BA*. Relying on *U.F.C.W., Local 617P v. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86 (Ont. S.C.), he found that it is clear that claims for termination and severance pay are provable in bankruptcy where the statutory obligation to provide such payments arose prior to the bankruptcy. Accordingly, he reasoned that the essential matter to be resolved in the case at bar was whether bankruptcy acted as a termination of employment thereby triggering the termination and severance pay provisions of the *ESA* such that liability for such payments would arise on bankruptcy as well.

8 In addressing this question, Farley J. began by noting that the object and intent of the *ESA* is to provide minimum employment standards and to benefit and protect the interests of employees. Thus, he concluded that the *ESA* is remedial legislation and as such it should be interpreted in a fair, large and liberal manner to ensure that its object is attained according to its true meaning, spirit and intent.

9 Farley J. then held that denying employees in this case the right to claim termination and severance pay would lead to the arbitrary and unfair result that an employee whose employment is terminated just prior to a bankruptcy would be entitled to termination and severance pay, whereas one whose employment is terminated by the bankruptcy itself would not have that right. This result, he stated, would defeat the intended working of the *ESA*.

10 Farley J. saw no reason why the claims of the employees in the present case would not generally be contemplated as wages or other claims under the *BA*. He emphasized that the former employees in the case at bar had not alleged that termination pay and severance pay should receive a priority in the distribution of the estate, but merely that they are provable (unsecured and unpreferred) claims in a bankruptcy. For this reason, he found it inappropriate to make reference to authorities whose focus was the interpretation of priority provisions in the *BA*.

11 Even if bankruptcy does not terminate the employment relationship so as to trigger the *ESA* termination and severance pay provisions, Farley J. was of the view that the employees in the instant case would nevertheless be entitled to such payments as these were liabilities incurred prior to the date of the bankruptcy by virtue of s. 7(5) of the *ESA*. He found that s. 7(5) deems every employment contract to include a provision to provide termination and severance pay following the termination of employment and concluded that a contingent obligation is thereby created for a bankrupt employer to make such payments from the outset of the relationship, long before the bankruptcy.

12 Farley J. also considered s. 2(3) of the *Employment Standards Amendment Act, 1981*, S.O. 1981, c. 22 (the "*ESAA*"), which is a transitional provision that exempted certain bankrupt employers from the newly introduced severance pay obligations until the amendments received royal assent. He was of the view that this provision would not have been necessary if the obligations of employers upon termination of employment had not been intended to apply to bankrupt employers under the *ESA*. Farley J. concluded that the claim by Rizzo's former employees for termination pay and severance pay could be provided as unsecured and unpreferred debts in a bankruptcy. Accordingly, he allowed the appeal from the decision of the Trustee.

B. Ontario Court of Appeal (1995), 22 O.R (3d) 385

13 Austin J.A., writing for a unanimous court, began his analysis of the principal issue in this appeal by focussing upon the language of the termination pay and severance pay provisions of the *ESA*. He noted, at p. 390, that the termination pay provisions use phrases such as "[n]o employer shall terminate the employment of an employee" (s. 40(1)), "the notice required by an employer to terminate the employment" (s. 40(2)), and "[a]n employer who has terminated or proposes to terminate the employment of employees" (s. 40(5)). Turning to severance pay, he quoted s. 40*a*(1)(*a*) (at p. 391) which includes the phrase "employees have their employment terminated by an employer". Austin J.A. concluded that this language limits the obligation to provide termination and severance pay to situations in which the employer terminates the employment. The operation of the *ESA*, he stated, is not triggered by the termination of employment resulting from an act of law such as bankruptcy.

14 In support of his conclusion, Austin J.A. reviewed the leading cases in this area of law. He cited *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725 (Ont. S.C.), wherein Houlden J. (as he then was) concluded that the *ESA* termination pay provisions were not designed to apply to a bankrupt employer. He also relied upon *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1 (Ont. S.C.), for the proposition that the bankruptcy of a company at the instance of a creditor does not constitute dismissal. He concluded as follows at p. 395:

> The plain language of ss. 40 and 40*a* does not give rise to any liability to pay termination or severance pay except where the employment is terminated by the employer. In our case, the employment was terminated, not by the employer, but by the making of a receiving order against Rizzo on April 14, 1989, following a petition by one of its creditors. No entitlement to either termination or severance pay ever arose.

15 Regarding s. 7(5) of the *ESA*, Austin J.A. rejected the trial judge's interpretation and found that the section does not create a liability. Rather, in his opinion, it merely states when a liability otherwise created is to be paid and therefore it was not considered relevant to the issue before the court. Similarly, Austin J.A. did not accept the lower court's view of s. 2(3), the transitional provision in the *ESAA*. He found that that section had no effect upon the intention of the Legislature as evidenced by the terminology used in ss. 40 and 40*a*.

16 Austin J.A. concluded that, because the employment of Rizzo's former employees was terminated by the order of bankruptcy and not by the act of the employer, no liability arose with respect to termination, severance or vacation pay. The order of the trial judge was set aside and the Trustee's disallowance of the claims was restored.

4. Issues

17 This appeal raises one issue: does the termination of employment caused by the bankruptcy of an employer give rise to a claim provable in bankruptcy for termination pay and severance pay in accordance with the provisions of the *ESA*?

5. Analysis

18 The statutory obligation upon employers to provide both termination pay and severance pay is governed by ss. 40 and 40*a* of the *ESA*, respectively. The Court of Appeal noted that the plain language of those provisions suggests that termination pay and severance pay are payable only when the employer terminates the employment. For example, the opening words of s. 40(1) are: "No employer shall terminate the employment of an employee...." Similarly, s. 40*a*(1) begins with the words, "Where...fifty or more employees have their employment terminated by an employer...." Therefore, the question on which this appeal turns is whether, when bankruptcy occurs, the employment can be said to be terminated "by the employer".

19 The Court of Appeal answered this question in the negative, holding that, where an employer is petitioned into bankruptcy by a creditor, the employment of its employees is not terminated "by the employer", but rather by operation of law. Thus, the Court of Appeal reasoned that, in the circumstances of the present case, the *ESA* termination pay and severance pay provisions were not applicable and no obligations arose. In answer, the appellants submit that the phrase "terminated by the employer" is best interpreted as reflecting a distinction between involuntary and voluntary termination of employment. It is their position that this language was intended to relieve employers of their obligation to pay termination and severance pay when employees leave their jobs voluntarily. However, the appellants maintain that where an employee's employment is involuntarily terminated by

reason of their employer's bankruptcy, this constitutes termination "by the employer" for the purpose of triggering entitlement to termination and severance pay under the *ESA*.

20 At the heart of this conflict is an issue of statutory interpretation. Consistent with the findings of the Court of Appeal, the plain meaning of the words of the provisions here in question appears to restrict the obligation to pay termination and severance pay to those employers who have actively terminated the employment of their employees. At first blush, bankruptcy does not fit comfortably into this interpretation. However, with respect, I believe this analysis is incomplete.

21 Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Recent cases which have cited the above passage with approval include: *Canada (Procureure générale) c. Hydro-Québec*, *(*sub nom. *R. v. Hydro-Québec)* [1997] 3 S.C.R. 213 (S.C.C.); *Royal Bank v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (S.C.C.); *Verdun v. Toronto Dominion Bank*, [1996] 3 S.C.R. 550 (S.C.C.); *Friesen v. R.*, [1995] 3 S.C.R. 103 (S.C.C.).

22 I also rely upon s. 10 of the *Interpretation Act*, R.S.O. 1980, c. 219, which provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit."

23 Although the Court of Appeal looked to the plain meaning of the specific provisions in question in the present case, with respect, I believe that the court did not pay sufficient attention to the scheme of the *ESA*, its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized. I now turn to a discussion of these issues.

24 In *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 (S.C.C.), at p. 1002, the majority of this Court recognized the importance that our society accords to employment and the fundamental role that it has assumed in the life of the individual. The manner in which employment can be terminated was said to be equally important (see also *Wallace v. United Grain Growers Ltd.* (1997), 219 N.R. 161 (S.C.C.). It was in this context that the majority in *Machtinger* described, at p. 1003, the object of the *ESA* as being the protection of "...the interests of employees by requiring employers to comply with certain minimum standards, including minimum periods of notice of termination." Accordingly, the majority concluded, at p. 1003, that, "...an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protection to as many employees as possible, is to be favoured over one that does not."

25 The objects of the termination and severance pay provisions themselves are also broadly premised upon the need to protect employees. Section 40 of the *ESA* requires employers to give their employees reasonable notice of termination based upon length of service. One of the primary purposes of this notice period is to provide employees with an opportunity to take preparatory measures and seek alternative employment. It follows that s. 40(7)(a), which provides for termination pay in lieu of notice when an employer has failed to give the required statutory notice, is intended to "cushion" employees against the adverse effects of economic dislocation likely to follow from the absence of an opportunity to search for alternative employment. (Innis Christie, Geoffrey England and Brent Cotter, *Employment Law in Canada* (2nd ed. 1993), at pp. 572-81.

26 Similarly, s. 40*a*, which provides for severance pay, acts to compensate long-serving employees for their years of service and investment in the employer's business and for the special losses they suffer when their employment terminates. In *R. v. TNT Canada Inc.* (1996), 27 O.R. (3d) 546 (Ont. C.A.), Robins J.A. quoted with approval at pp. 556-57 from the words of D.D. Carter in the course of an employment standards determination in *Telegram Publishing Co. v. Zwelling* (1972), 1 L.A.C. (2d) 1 (Ont. Arb. Bd.), at p. 19, wherein he described the role of severance pay as follows:

> Severance pay recognizes that an employee does make an investment in his employer's business -- the extent of this investment being directly related to the length of the employee's service. This investment is the seniority that the employee builds up during his years of service....Upon termination of the employment relationship, this investment of years of service is lost, and the employee must start to rebuild seniority at another place of work. The severance pay, based on length of service, is some compensation for this loss of investment.

27 In my opinion, the consequences or effects which result from the Court of Appeal's interpretation of ss. 40 and 40*a* of the *ESA* are incompatible with both the object of the Act and with the object of the termination and severance pay provisions themselves. It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to Côté, *supra*, an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile (Sullivan, *Construction of Statutes, supra*, at p. 88).

28 The trial judge properly noted that, if the *ESA* termination and severance pay provisions do not apply in circumstances of bankruptcy, those employees 'fortunate' enough to have been dismissed the day before a bankruptcy would be entitled to such payments, but those terminated on the day the bankruptcy becomes final would not be so entitled. In my view, the absurdity of this consequence is particularly evident in a unionized workplace where seniority is a factor in determining the order of lay-off. The more senior the employee, the larger the investment he or she has made in the employer and the greater the entitlement to termination and severance pay. However, it is the more senior personnel who are likely to be employed up until the time of the bankruptcy and who would thereby lose their entitlements to these payments.

29 If the Court of Appeal's interpretation of the termination and severance pay provisions is correct, it would be acceptable to distinguish between employees merely on the basis of the timing of their dismissal. It seems to me that such a result would arbitrarily deprive some employees of a means to cope with the economic dislocation caused by unemployment. In this way the protections of the *ESA* would be limited rather than extended, thereby defeating the intended working of the legislation. In my opinion, this is an unreasonable result.

30 In addition to the termination and severance pay provisions, both the appellants and the respondent relied upon various other sections of the *ESA* to advance their arguments regarding the intention of the legislature. In my view, although the majority of these sections offer little interpretive assistance, one transitional provision is particularly instructive. In 1981, s. 2(1) of the *Employment Standards Amendment Act, 1981*, ("*ESAA*") introduced s.40*a*, the severance pay provision, to the *ESA*. Section 2(2) deemed that provision to come into force on January 1, 1981. Section 2(3), the transitional provision in question provided as follows:

> **2.** ...
>
> (3) Section 40*a* of the said Act does not apply to an employer who became bankrupt or an insolvent person within the meaning of the *Bankruptcy Act* (Canada) and whose assets have been distributed among his creditors or to an employer whose proposal within the meaning of the *Bankruptcy Act* (Canada) has been accepted by his creditors in the period from and including the 1st day of January, 1981, to and including the day immediately before the day this Act receives Royal Assent.

31 The Court of Appeal found that it was neither necessary nor appropriate to determine the intention of the legislature in enacting this provisional subsection. Nevertheless, the court took the position that the intention of the legislature as evidenced by the introductory words of ss. 40 and 40*a* was clear, namely, that termination by reason of a bankruptcy will not trigger the severance and termination pay obligations of the *ESA*. The court held that this intention remained unchanged by the introduction of the transitional provision. With respect, I do not agree with either of these findings. Firstly, in my opinion, the use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise and one which has often been

employed by this Court (see, e.g., *R. v. Vasil*, [1981] 1 S.C.R. 469 (S.C.C.), at p. 487; *R. v. Paul*, [1982] 1 S.C.R. 621 (S.C.C.), at pp. 635, 653 and 660). Secondly, I believe that the transitional provision indicates that the Legislature intended that termination and severance pay obligations should arise upon an employers' bankruptcy.

32 In my view, by extending an exemption to employers who became bankrupt and lost control of their assets between the coming into force of the amendment and its receipt of royal assent, s. 2(3) necessarily implies that the severance pay obligation does in fact extend to bankrupt employers. It seems to me that, if this were not the case, no readily apparent purpose would be served by this transitional provision.

33 I find support for my conclusion in the decision of Saunders J. in *Royal Dressed Meats Inc.*, *supra*. Having reviewed s. 2(3) of the *ESAA*, he commented as follows:

> ...any doubt about the intention of the Ontario Legislature has been put to rest, in my opinion, by the transitional provision which introduced severance payments into the *ESA*...it seems to me an inescapable inference that the legislature intended liability for severance payments to arise on a bankruptcy. That intention would, in my opinion, extend to termination payments which are similar in character.

34 This interpretation is also consistent with statements made by the Minister of Labour at the time he introduced the 1981 amendments to the *ESA*. With regard to the new severance pay provision he stated:

> The circumstances surrounding a closure will govern the applicability of the severance pay legislation in some defined situations. For example, a bankrupt or insolvent firm will still be required to pay severance pay to employees to the extent that assets are available to satisfy their claims.
>
> . . . . .
>
> ...the proposed severance pay measures will, as I indicated earlier, be retroactive to January 1 of this year. That retroactive provision, however, will not apply in those cases of bankruptcy and insolvency where the assets have already been distributed or where an agreement on a proposal to creditors has already been reached. [Ontario, Legislative Assembly, *Debates*, No. 36, at pp. 1236-37 (June 4, 1981)]

Moreover, in the legislative debates regarding the proposed amendments the Minister stated:

> For purposes of retroactivity, severance pay will not apply to bankruptcies under the Bankruptcy Act where assets have been distributed. However, once this Act receives royal assent, employees in bankruptcy closures will be covered by the severance pay provisions. [Ontario, Legislative Assembly, *Debates*, No. 48, at p. 1699 (June 16, 1981)]

35 Although the frailties of Hansard evidence are many, this Court has recognized that it can play a limited role in the interpretation of legislation. Writing for the Court in *R. v. Morgentaler*, [1993] 3 S.C.R. 463 (S.C.C.), at p. 484, Sopinka J. stated:

> ...until recently the courts have balked at admitting evidence of legislative debates and speeches....The main criticism of such evidence has been that it cannot represent the "intent" of the legislature, an incorporeal body, but that is equally true of other forms of legislative history. Provided that the court remains mindful of the limited reliability and weight of Hansard evidence, it should be admitted as relevant to both the background and the purpose of legislation.

36 Finally, with regard to the scheme of the legislation, since the *ESA* is a mechanism for providing minimum benefits and standards to protect the interests of employees, it can be characterized as benefits-conferring legislation. As such, according to several decisions of this Court, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant (see, e.g., *Abrahams v. Canada (Attorney General)*, [1983] 1 S.C.R. 2 (S.C.C.), at p. 10; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513 (S.C.C.), at p. 537). It seems to me that, by limiting its analysis to the plain meaning of ss. 40 and 40*a* of the *ESA*, the Court of Appeal adopted an overly restrictive approach that is inconsistent with the scheme of the Act.

37 The Court of Appeal's reasons relied heavily upon the decision in *Malone Lynch*, *supra*. In *Malone Lynch*, Houlden J. held that s. 13, the group termination provision of the former *ESA*, R.S.O. 1970, c. 147, and the predecessor to s. 40 at issue in the present case, was not applicable where termination resulted from the bankruptcy of the employer. Section 13(2) of the *ESA* then in force provided that, if an employer wishes to terminate the employment of 50 or more employees, the employer must give notice of termination for the period prescribed in the regulations, "and until the expiry of such notice the terminations shall not take effect." Houlden J. reasoned that termination of employment through bankruptcy could not trigger the termination payment provision, as employees in this situation had not received the written notice required by the statute, and therefore could not be said to have been terminated in accordance with the Act.

38 Two years after *Malone Lynch* was decided, the 1970 *ESA* termination pay provisions were amended by the *Employment Standards Act, 1974*, S.O. 1974, c. 112. As amended, s. 40(7) of the 1974 *ESA* eliminated the requirement that notice be given before termination can take effect. This provision makes it clear that termination pay is owing where an employer fails to give notice of termination and that employment terminates irrespective of whether or not proper notice has been given. Therefore, in my opinion it is clear that the *Malone Lynch* decision turned on statutory provisions which are materially different from those applicable in the instant case. It seems to me that Houlden J.'s holding goes no further than to say that the provisions of the 1970 *ESA* have no application to a bankrupt employer. For this reason, I do not accept the *Malone Lynch* decision as persuasive authority for the Court of Appeal's findings. I note that the courts in *Royal Dressed Meats*, *supra*, and *British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25 (B.C. S.C.), declined to rely upon *Malone Lynch* based upon similar reasoning.

39 The Court of Appeal also relied upon *Re Kemp Products Ltd.*, *supra*, for the proposition that although the employment relationship will terminate upon an employer's bankruptcy, this does not constitute a "dismissal". I note that this case did not arise under the provisions of the *ESA*. Rather, it turned on the interpretation of the term "dismissal" in what the complainant alleged to be an employment contract. As such, I do not accept it as authoritative jurisprudence in the circumstances of this case. For the reasons discussed above, I also disagree with the Court of Appeal's reliance on *Mills-Hughes v. Raynor* (1988), 63 O.R. (2d) 343 (Ont. C.A.), which cited the decision in *Malone Lynch*, *supra* with approval.

40 As I see the matter, when the express words of ss. 40 and 40*a* of the *ESA* are examined in their entire context, there is ample support for the conclusion that the words "terminated by the employer" must be interpreted to include termination resulting from the bankruptcy of the employer. Using the broad and generous approach to interpretation appropriate for benefits-conferring legislation, I believe that these words can reasonably bear that construction (see *R. v. Z. (D.A.)*, [1992] 2 S.C.R. 1025 (S.C.C.)). I also note that the intention of the Legislature as evidenced in s. 2(3) of the *ESSA*, clearly favours this interpretation. Further, in my opinion, to deny employees the right to claim *ESA* termination and severance pay where their termination has resulted from their employer's bankruptcy, would be inconsistent with the purpose of the termination and severance pay provisions and would undermine the object of the *ESA*, namely, to protect the interests of as many employees as possible.

41 In my view, the impetus behind the termination of employment has no bearing upon the ability of the dismissed employee to cope with the sudden economic dislocation caused by unemployment. As all dismissed employees are equally in need of the protections provided by the *ESA*, any distinction between employees whose termination resulted from the bankruptcy of their employer and those who have been terminated for some other reason would be arbitrary and inequitable. Further, I believe that such an interpretation would defeat the true meaning, intent and spirit of the *ESA*. Therefore, I conclude that termination as a result of an employer's bankruptcy does give rise to an unsecured claim provable in bankruptcy pursuant to s. 121 of the *BA* for termination and severance pay in accordance with ss. 40 and 40*a* of the *ESA*. Because of this conclusion, I do not find it necessary to address the alternative finding of the trial judge as to the applicability of s. 7(5) of the *ESA*.

42 I note that subsequent to the Rizzo bankruptcy, the termination and severance pay provisions of the *ESA* underwent another amendment. Sections 74(1) and 75(1) of the *Labour Relations and Employment Statute Law Amendment Act, 1995*, S.O. 1995, c. 1, amend those provisions so that they now expressly provide that where employment is terminated by operation of law as a result of the bankruptcy of the employer, the employer will be deemed to have terminated the employment. However, s. 17 of the *Interpretation Act* directs that, "the repeal or amendment of an Act shall be deemed not to be or to involve any

declaration as to the previous state of the law." As a result, I note that the subsequent change in the legislation has played no role in determining the present appeal.

6. Disposition and Costs

43 I would allow the appeal and set aside paragraph 1 of the order of the Court of Appeal. In lieu thereof, I would substitute an order declaring that Rizzo's former employees are entitled to make claims for termination pay (including vacation pay due thereon) and severance pay as unsecured creditors. As to costs, the Ministry of Labour led no evidence regarding what effort it made in notifying or securing the consent of the Rizzo employees before it discontinued its application for leave to appeal to this Court on their behalf. In light of these circumstances, I would order that the costs in this Court be paid to the appellant by the Ministry on a party-and-party basis. I would not disturb the orders of the courts below with respect to costs.

Appeal allowed.

Pourvoi accueilli.

TAB 7

Canada Federal Statutes
Income Tax Act

R.S.C. 1985, c. 1 (5th Supp.)

Currency

An Act Respecting Income Taxes

R.S.C. 1985, c. 1 (5th Supp.), as am. S.C. 1994, c. 7; 1994, c. 8; 1994, c. 13; 1994, c. 21; 1994, c. 28; 1994, c. 29; 1994, c. 38; 1994, c. 41; 1995, c. 1; 1995, c. 3; 1995, c. 11; 1995, c. 17; 1995, c. 18; 1995, c. 21; 1995, c. 38; 1995, c. 46; 1996, c. 6; 1996, c. 11; 1996, c. 21; 1996, c. 23; 1997, c. 10; 1997, c. 12; 1997, c. 25; 1997, c. 26; 1998, c. 19; 1998, c. 21; 1998, c. 34; 1999, c. 10; 1999, c. 17; 1999, c. 22; 1999, c. 26; 1999, c. 31; 2000, c. 9; 2000, c. 12; 2000, c. 14; 2000, c. 19; 2000, c. 30; 2001, c. 16, s. 16; 2001, c. 17, ss. 2-231, 238-248, 263; 2001, c. 27, s. 254; 2001, c. 41, ss. 114-118; 2002, c. 8, ss. 148, 149, 182(1)(t), 183(1)(m), 184; 2002, c. 9, ss. 20-44; 2003, c. 15, ss. 69-89, 111-129; 2003, c. 19, ss. 73, 74; 2003, c. 28; 2004, c. 11, s. 32 ; 2004, c. 22, s. 50; 2004, c. 24, s. 24; 2004, c. 25, ss. 201, 202; 2004, c. 26, ss. 20-22; 2005, c. 19, ss. 13-55; 2005, c. 21, ss. 101-103; 2005, c. 30, ss. 2-18; 2005, c. 33, ss. 10-12; 2005, c. 34, ss. 68-71 [ss. 68, 69, 71(1) repealed 2005, c. 34, s. 83(11).]; 2005, c. 35, ss. 66(d), 67(d); 2005, c. 38, ss. 120, 138(m), 140(e); 2005, c. 47, s. 139 [Amended 2007, c. 36, s. 108.]; 2005, c. 49, ss. 5, 6; 2006, c. 4, ss. 51-88, 161-166, 173-179; 2006, c. 9, ss. 63, 64; 2006, c. 12, s. 45; 2007, c. 2, ss. 2-42, 43-54; 2007, c. 16; 2007, c. 29, ss. 2-29; 2007, c. 35, ss. 9-68, 101-124, 179-182; 2008, c. 28, ss. 2-37; 2009, c. 2, ss. 2-81; 2009, c. 31, ss. 2-15; 2010, c. 12, ss. 2-22, 2108-2109; 2010, c. 25, ss. 2-69; 2011, c. 15, ss. 2, 3; 2011, c. 24, ss. 2-75, 103 [s. 73 amended 2013, c. 34, s. 375.]; 2012, c. 19, ss. 2-15, 277, 278, 302, 692, 694(e), 695(1)(e); 2012, c. 27, ss. 26-29, 36; 2012, c. 31, ss. 2-57; 2013, c. 33, ss. 2-21, 41, 196(1)(c), 198; 2013, c. 34, ss. 2-23, 29-38, 54-77, 91-168, 169-367, 426, 427; 2013, c. 40, ss. 2-94, 231, 236(1)(e), 237(1)(j), 238(1)(i); 2014, c. 12, s. 149; 2014, c. 13, s. 115(f); 2014, c. 20, ss. 2-30, 100(1), 101(1), 458; 2014, c. 39, ss. 2-77; 2015, c. 20, s. 6; 2015, c. 36, ss. 2-19, 29-34; 2015, c. 41; 2016, c. 7, ss. 2-49; 2016, c. 11, ss. 1-10; 2016, c. 12, ss. 2-71; 2016, c. 14, ss. 66-69 [ss. 67, 69 repealed 2018, c. 12, ss. 39, 40.]; 2017, c. 12, ss. 12, 13; 2017, c. 20, ss. 2-29 [s. 6(2), (5) repealed 2018, c. 12, s. 41.]; 2017, c. 33, ss. 2-81; 2018, c. 12, ss. 2-37; 2019, c. 13, s. 124; 2019, c. 29, ss. 2-44; 2020, c. 5, ss. 2-6; 2020, c. 6, ss. 2-6; 2020, c. 11, ss. 1-3, 7; 2020, c. 12, ss. 42, 43; 2020, c. 13; 2021, c. 7, ss. 2-4; 2021, c. 21; 2021, c. 23, ss. 2-64; 2021, c. 26, ss. 1, 6, 7; 2022, c. 5, ss. 2-6, 27-29; 2022, c. 10, ss. 2-24, 158-160, 173(18)-(20), 179, 407; 2022, c. 13; 2022, c. 14, ss. 4, 5; 2022, c. 19, ss. 2-58; 2023, c. 11, ss. 3-5; 2023, c. 14, s. 5; 2023, c. 17, s. 13 [Not in force at date of publication.]; 2023, c. 26, ss. 2-79, 113(4), 660, 661 [s. 29 repealed before coming into force 2023, c. 26, s. 113(4).] [ss. 660, 661 not in force at date of publication.]; 2023, c. 29, s. 17.

Currency
Federal English Statutes reflect amendments current to December 6, 2023
Federal English Regulations Current to Gazette Vol. 157:24 (November 22, 2023)

End of Document

Canada Federal Statutes
Income Tax Act

R.S.C. 1985, c. 1 (5th Supp.), s. 1

s 1. Short title

Currency

1.Short title
This Act may be cited as the *Income Tax Act*.

Currency
Federal English Statutes reflect amendments current to December 6, 2023
Federal English Regulations Current to Gazette Vol. 157:24 (November 22, 2023)

End of Document

R.S.C. 1985, c. 1 (5th Supp.), s. 227

s 227.

Currency

227.

227(1)Withholding taxes

No action lies against any person for deducting or withholding any sum of money in compliance or intended compliance with this Act.

227(2)Return filed with person withholding

Where a person (in this subsection referred to as the "payer") is required by regulations made under subsection 153(1) to deduct or withhold from a payment to another person an amount on account of that other person's tax for the year, that other person shall, from time to time as prescribed, file a return with the payer in prescribed form.

227(3)Failure to file return

Every person who fails to file a return as required by subsection (2) is liable to have the deduction or withholding under section 153 on account of the person's tax made as though the person were a person who is neither married nor in a common-law partnership and is without dependants.

227(4)Trust for moneys deducted

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.

227(4.1)Extension of trust

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 (4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person and property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for a security interest (as defined in subsection 224(1.3)) would be property of the person, equal in value to the amount so deemed to be held in trust is deemed

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

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

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

227(4.2)Meaning of security interest
For the purposes of subsections (4) and (4.1), a security interest does not include a prescribed security interest.

227(4.3)Application to Crown
For greater certainty, subsections (4) to (4.2) apply to Her Majesty in right of Canada or a province where Her Majesty in right of Canada or a province is a secured creditor (within the meaning assigned by subsection 224(1.3)) or holds a security interest (within the meaning assigned by that subsection).

227(5)Payments by trustees, etc.
Where a specified person in relation to a particular person (in this subsection referred to as the "payer") has any direct or indirect influence over the disbursements, property, business or estate of the payer and the specified person, alone or together with another person, authorizes or otherwise causes a payment referred to in subsection 135(3), 135.1(7) or 153(1), or on or in respect of which tax is payable under Part XII.5 or XIII, to be made by or on behalf of the payer, the specified person

(a) is, for the purposes of subsections 135(3) and 153(1), section 215 and this section, deemed to be a person who made the payment;

(a.1) is, for the purposes of subsections 135.1(7) and 211.8(2), deemed to be a person who redeemed, acquired or cancelled a share and made the payment as a consequence of the redemption, acquisition or cancellation;

(b) is jointly and severally, or solidarily, liable with the payer to pay to the Receiver General

(i) all amounts payable by the payer because of any of subsections 135(3), 135.1(7), 153(1) and 211.8(2) and section 215 in respect of the payment, and

(ii) all amounts payable under this Act by the payer because of any failure to comply with any of those provisions in respect of the payment; and

(c) is entitled to deduct or withhold from any amount paid or credited by the specified person to the payer or otherwise recover from the payer any amount paid under this subsection by the specified person in respect of the payment.

227(5.1)Definition of "specified person"
In subsection (5), a "specified person" in relation to a particular person means a person who is, in relation to the particular person or the disbursements, property, business or estate of the particular person,

(a) a trustee;

(b) a liquidator;

(c) a receiver;

(d) an interim receiver;

(e) a receiver-manager;

(f) a trustee in bankruptcy or other person appointed under the *Bankruptcy and Insolvency Act*;

(g) an assignee;

(h) a secured creditor (as defined in subsection 224(1.3));

(i) an executor, a liquidator of a succession or an administrator;

(j) any person acting in a capacity similar to that of a person referred to in any of paragraphs (a) to (i);

(k) a person appointed (otherwise than as an employee of the creditor) at the request of, or on the advice of, a secured creditor in relation to the particular person to monitor, or provide advice in respect of, the disbursements, property, business or estate of the particular person under circumstances such that it is reasonable to conclude that the person is appointed to protect or advance the interests of the creditor; or

(l) an agent of a specified person referred to in any of paragraphs (a) to (k).

227(5.2)"Person" includes partnership
For the purposes of this section, references in subsections (5) and (5.1) to persons include partnerships.

227(6)Excess withheld, returned or applied
Where a person on whose behalf an amount has been paid under Part XII.5 or XIII to the Receiver General was not liable to pay tax under that Part or where the amount so paid is in excess of the amount that the person was liable to pay, the Minister shall, on written application made no later than 2 years after the end of the calendar year in which the amount was paid, pay to the person the amount so paid or such part of it as the person was not liable to pay, unless the person is or is about to become liable to make a payment to Her Majesty in right of Canada, in which case the Minister may apply the amount otherwise payable under this subsection to that liability and notify the person of that action.

227(6.1)Repayment of non-resident shareholder loan
Where, in respect of a loan from or indebtedness to a corporation or partnership, a person on whose behalf an amount was paid to the Receiver General under Part XIII because of subsection 15(2) and paragraph 214(3)(a) repays the loan or indebtedness or a portion of it and it is established by subsequent events or otherwise that the repayment was not made as part of a series of loans or other transactions and repayments, the Minister shall, on written application made no later than 2 years after the end of the calendar year in which the repayment is made, pay to the person an amount equal to the lesser of

(a) the amount so paid to the Receiver General in respect of the loan or indebtedness or portion of it, as the case may be, and

(b) the amount that would be payable to the Receiver General under Part XIII if a dividend described in paragraph 212(2)(a) equal in amount to the amount of the loan or indebtedness repaid were paid by the corporation or partnership to the person at the time of the repayment,

unless the person is or is about to become liable to make a payment to Her Majesty in right of Canada, in which case the Minister may apply the amount otherwise payable under this subsection to that liability and notify the person of that action.

227(6.2)Foreign affiliate dumping — late-filed form
If, in respect of an investment described in subsection 212.3(10), a corporation is deemed by subparagraph 212.3(7)(d)(ii) to pay a dividend and the corporation subsequently complies with the requirements of subparagraph 212.3(7)(d)(i) in respect of the investment,

(a) subject to paragraph (b), the Minister shall, on written application made on a particular day that is, or is no more than two years after, the day on which the form described in subparagraph 212.3(7)(d)(i) is filed, pay to the corporation an amount equal to the lesser of

(i) the total of all amounts, if any, paid to the Receiver General, on or prior to the particular day, on behalf of a person and in respect of the liability of the person to pay an amount under Part XIII in respect of the dividend, and

(ii) the amount that the person was liable to pay in respect of the dividend under Part XIII;

(b) where the corporation or the person is or is about to become liable to make a payment to Her Majesty in right of Canada, the Minister may apply the amount otherwise payable under paragraph (a) to that liability and notify the corporation, and, if applicable, the person, of that action; and

(c) for the purposes of this Part (other than subparagraph (a)(i)), if the amount described in subparagraph (a)(ii) exceeds the amount described in subparagraph (a)(i), the corporation is deemed to pay that excess to the Receiver General on the day on which the form described in subparagraph 212.3(7)(d)(i) is filed.

227(7)Application for assessment

Where, on application under subsection (6) by or on behalf of a person to the Minister in respect of an amount paid under Part XII.5 or XIII to the Receiver General, the Minister is not satisfied

(a) that the person was not liable to pay any tax under that Part, or

(b) that the amount paid was in excess of the tax that the person was liable to pay,

the Minister shall assess any amount payable under that Part by the person and send a notice of assessment to the person, and sections 150 to 163, subsections 164(1) and (1.4) to (7), sections 164.1 to 167 and Division J of Part I apply with any modifications that the circumstances require.

227(7.1)Application for determination

Where, on application under subsection (6.1) by or on behalf of a person to the Minister in respect of an amount paid under Part XIII to the Receiver General, the Minister is not satisfied that the person is entitled to the amount claimed, the Minister shall, at the person's request, determine, with all due dispatch, the amount, if any, payable under subsection (6.1) to the person and shall send a notice of determination to the person, and sections 150 to 163, subsections 164(1) and (1.4) to (7), sections 164.1 to 167 and Division J of Part I apply with such modifications as the circumstances require.

227(8)Penalty

Subject to subsection (9.5), every person who in a calendar year has failed to deduct or withhold any amount as required by subsection 153(1) or section 215 is liable to a penalty of

(a) 10% of the amount that should have been deducted or withheld; or

(b) where at the time of the failure a penalty under this subsection was payable by the person in respect of an amount that should have been deducted or withheld during the year and the failure was made knowingly or under circumstances amounting to gross negligence, 20% of that amount.

227(8.1)Joint and several, or solidary, liability

If a particular person has failed to deduct or withhold an amount as required under subsection 153(1) or section 215 in respect of an amount that has been paid to a non-resident person, the non-resident person is jointly and severally, or solidarily, liable with the particular person to pay any interest payable by the particular person pursuant to subsection (8.3) in respect thereof.

227(8.2)Retirement compensation arrangement deductions

Where a person has failed to deduct or withhold any amount as required under subsection 153(1) in respect of a contribution under a retirement compensation arrangement, that person is liable to pay to Her Majesty an amount equal to the amount of the contribution, and each payment on account of that amount is deemed to be, in the year in which the payment is made,

(a) for the purposes of paragraph 20(1)(r), a contribution by the person to the arrangement; and

(b) an amount on account of tax payable by the custodian under Part XI.3.

227(8.3)Interest on amounts not deducted or withheld

A person who fails to deduct or withhold any amount as required by subsection 135(3), 135.1(7), 153(1) or 211.8(2) or section 215 shall pay to the Receiver General interest on the amount at the prescribed rate, computed

(a) in the case of an amount required by subsection 153(1) to be deducted or withheld from a payment to another person, from the fifteenth day of the month immediately following the month in which the amount was required to be deducted or withheld, or from such earlier day as may be prescribed for the purposes of subsection 153(1), to,

(i) where that other person is not resident in Canada, the day of payment of the amount to the Receiver General, and

(ii) where that other person is resident in Canada, the earlier of the day of payment of the amount to the Receiver General and April 30 of the year immediately following the year in which the amount was required to be deducted or withheld;

(b) in the case of an amount required by subsection 135(3) or 135.1(7) or section 215 to be deducted or withheld, from the day on which the amount was required to be deducted or withheld to the day of payment of the amount to the Receiver General; and

(c) in the case of an amount required by subsection 211.8(2) to be withheld, from the day on or before which the amount was required to be remitted to the Receiver General to the day of the payment of the amount to the Receiver General.

227(8.4)Liability to pay amount not deducted or withheld

A person who fails to deduct or withhold any amount as required under subsection 135(3) or 135.1(7) in respect of a payment made to another person or under subsection 153(1) in respect of an amount paid to another person who is non-resident or who is resident in Canada solely because of paragraph 250(1)(a) is liable to pay as tax under this Act on behalf of the other person the whole of the amount that should have been so deducted or withheld and is entitled to deduct or withhold from any amount paid or credited by the person to the other person or otherwise to recover from the other person any amount paid by the person as tax under this Part on behalf of the other person.

227(8.5)No penalty — certain deemed payments

Subsection (8) does not apply to a corporation in respect of

(a) an amount of interest deemed by subsection 214(16) to have been paid as a dividend by the corporation unless, if the Act were read without reference to subsection 214(16), a penalty under subsection (8) would have applied in respect of the amount; and

(b) an amount deemed by subparagraph 212.3(7)(d)(ii) or subsection 247(12) to have been paid as a dividend by the corporation.

227(8.6)No penalty — qualifying non-resident employers

Subsection (8) does not apply to a "qualifying non-resident employer" (as defined in subsection 153(6)) in respect of a payment made to an employee if, after reasonable inquiry, the employer had no reason to believe at the time of the payment that the employee was not a "qualifying non-resident employee" (as defined in subsection 153(6)).

227(9)Penalty

Subject to subsection (9.5), every person who in a calendar year has failed to remit or pay as and when required by this Act or a regulation an amount deducted or withheld as required by this Act or a regulation or an amount of tax that the person is, by section 116 or by a regulation made under subsection 215(4), required to pay is liable to a penalty of

(a) subject to paragraph (b), if

(i) the Receiver General receives that amount on or before the day it was due, but that amount is not paid in the manner required, 3% of that amount,

(ii) the Receiver General receives that amount

(A) no more than three days after it was due, 3% of that amount,

(B) more than three days and no more than five days after it was due, 5% of that amount, or

(C) more than five days and no more than seven days after it was due, 7% of that amount, or

(iii) that amount is not paid or remitted on or before the seventh day after it was due, 10% of that amount; or

(b) where at the time of the failure a penalty under this subsection was payable by the person in respect of an amount that should have been remitted or paid during the year and the failure was made knowingly or under circumstances amounting to gross negligence, 20% of that amount.

227(9.1)Penalty

Notwithstanding any other provision of this Act, any other enactment of Canada, any enactment of a province or any other law, the penalty for failure to remit an amount required to be remitted by a person on or before a prescribed date under subsection 153(1), subsection 21(1) of the *Canada Pension Plan*, subsection 53(1) of the *Unemployment Insurance Act* and subsection 82(1) of the *Employment Insurance Act* shall, unless the person who is required to remit the amount has, knowingly or under circumstances amounting to gross negligence, delayed in remitting the amount or has, knowingly or under circumstances amounting to gross negligence, remitted an amount less than the amount required, apply only to the amount by which the total of all amounts so required to be remitted on or before that date exceeds $500.

227(9.2)Interest on amounts deducted or withheld but not remitted

Where a person has failed to remit as and when required by this Act or a regulation an amount deducted or withheld as required by this Act or a regulation, the person shall pay to the Receiver General interest on the amount at the prescribed rate computed from the day on which the person was so required to remit the amount to the day of remittance of the amount to the Receiver General.

227(9.3)Interest on certain tax not paid

Where a person fails to pay an amount of tax that, because of section 116, subsection 212(19) or a regulation made under subsection 215(4), the person is required to pay, as and when the person is required to pay it, the person shall pay to the Receiver General interest on the amount at the prescribed rate computed from the day on or before which the amount was required to be paid to the day of payment of the amount to the Receiver General.

227(9.4)Liability to pay amount not remitted

A person who has failed to remit as and when required by this Act or a regulation an amount deducted or withheld from a payment to another person as required by this Act or a regulation is liable to pay as tax under this Act on behalf of the other person the amount so deducted or withheld.

227(9.5)Payment from same establishment

In applying paragraphs (8)(b) and (9)(b) in respect of an amount required by paragraph 153(1)(a) to be deducted or withheld, each establishment of a person shall be deemed to be a separate person.

227(10)Assessment

The Minister may at any time assess any amount payable under

(a) subsection (8), (8.1), (8.2), (8.3) or (8.4) or 224(4) or (4.1) or section 227.1 or 235 by a person,

(b) subsection 237.1(7.4) or (7.5), 237.3(8), 237.4(12) or 237.5(5) by a person or partnership,

(c) subsection (10.2) by a person as a consequence of a failure of a non-resident person to deduct or withhold any amount, or

(d) Part XIII by a person resident in Canada,

and, where the Minister sends a notice of assessment to that person or partnership, Divisions I and J of Part I apply with any modifications that the circumstances require.

227(10.01)Part XII.5 [assessment]
The Minister may at any time assess any amount payable under Part XII.5 by a person resident in Canada and, where the Minister sends a notice of assessment to that person, Divisions I and J of Part I apply with any modifications that the circumstances require.

227(10.1)Idem
The Minister may at any time assess

(a) any amount payable under section 116 or subsection (9), (9.2), (9.3) or (9.4) by any person,

(b) any amount payable under subsection (10.2) by any person as a consequence of a failure by a non-resident person to remit any amount, and

(c) any amount payable under Part XII.5 or XIII by any non-resident person,

and, where the Minister sends a notice of assessment to the person, sections 150 to 163, subsections 164(1) and (1.4) to (7), sections 164.1 to 167 and Division J of Part I apply with such modifications as the circumstances require.

227(10.2)Joint and several, or solidary, liability re contributions to RCA
If a non-resident person fails to deduct, withhold or remit an amount as required by subsection 153(1) in respect of a contribution under a retirement compensation arrangement that is paid on behalf of the employees or former employees of an employer with whom the non-resident person does not deal at arm's length, the employer is jointly and severally, or solidarily, liable with the non-resident person to pay any amount payable under subsection (8), (8.2), (8.3), (9), (9.2) or (9.4) by the non-resident person in respect of the contribution.

227Former (10.2), (10.3)-(10.9) [Repealed]

227(11)Withholding tax
Provisions of this Act requiring a person to deduct or withhold an amount in respect of taxes from amounts payable to a taxpayer are applicable to Her Majesty in right of Canada or a province.

227(12)Agreement not to deduct void
Where this Act requires an amount to be deducted or withheld, an agreement by the person on whom that obligation is imposed not to deduct or withhold is void.

227(13)Minister's receipt discharges debtor
The receipt of the Minister for an amount deducted or withheld by any person as required by or under this Act is a good and sufficient discharge of the liability of any debtor to the debtor's creditor with respect thereto to the extent of the amount referred to in the receipt.

227(14)Application of other Parts
Parts IV, IV.1, VI and VI.1 do not apply to any corporation for any period throughout which it is exempt from tax because of section 149.

227(15)Partnership included in "person"
In this section, a reference to a "person" with respect to any amount deducted or withheld or required to be deducted or withheld is deemed to include a partnership.

227(16)Municipal or provincial corporation excepted

A corporation that at any time in a taxation year would be a corporation described in any of paragraphs 149(1)(d) to (d.6) but for a provision of an appropriation Act is deemed not to be a private corporation for the purposes of Part IV with respect to that year.

Currency

Federal English Statutes reflect amendments current to December 6, 2023
Federal English Regulations Current to Gazette Vol. 157:24 (November 22, 2023)

End of Document

TAB 8

1989 CarswellBC 351
Supreme Court of Canada

British Columbia v. Henfrey Samson Belair Ltd.

1989 CarswellBC 351, 1989 CarswellBC 711, [1989] 1 T.S.T. 2164, [1989] 2 S.C.R. 24, [1989] 5 W.W.R. 577, [1989] B.C.W.L.D. 2137, [1989] C.L.D. 1119, [1989] S.C.J. No. 78, 2 T.C.T. 4263, 34 E.T.R. 1, 38 B.C.L.R. (2d) 145, 59 D.L.R. (4th) 726, 75 C.B.R. (N.S.) 1, 97 N.R. 61, J.E. 89-1098, EYB 1989-66987

R. IN RIGHT OF BRITISH COLUMBIA v. HENFREY SAMSON BELAIR LTD. et al.

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

Heard: April 21, 1989
Judgment: July 13, 1989
Docket: No. 20515

Counsel: *W.A. Pearce* and *J.G. Pottinger*, for appellant.
W.G. Baker, Q.C., and *G.E. Parson*, for respondent.
J.M. Mabbutt, Q.C., for intervener Attorney General of Canada.
J.E. Minor and *T. Macklem*, for intervener Attorney General for Ontario.
Y. de Montigny and *M. Aubé*, for intervener Attorney General of Quebec.
R.M. Endres, for intervener Attorney General of Nova Scotia.
R. Burns, for intervener Attorney General for New Brunswick.
W.G. McFetridge and *D.D. Blevins*, for intervener Attorney General of Manitoba.
R.C. Maybank, for intervener Attorney General for Alberta.
W.G. Burke-Robertson, Q.C., for intervener Attorney General of Newfoundland.

Subject: Corporate and Commercial; Insolvency; Estates and Trusts; Provincial Tax

Annotation

The question whether a "deemed" trust created by the provincial legislature is a trust within the meaning of s. 67 of the Bankruptcy Act, R.S.C. 1985, c. B-3, or is entitled to priority only under the provisions of s. 136 of the Bankruptcy Act has been a matter of controversy between several provincial appellate courts. For instance, the courts in Nova Scotia (*Dir. of Lab. Standards (N.S.) v. Trustee in Bankruptcy* (1981), 38 C.B.R. (N.S.) 253, 126 D.L.R. (3d) 417, 47 N.S.R. (2d) 446, 90 A.P.R. 446 (C.A.)) and the appellate courts in British Columbia (*R. v. C.I.B.C.* (1983), 50 C.B.R. (N.S.) 116; *A.G. Can. v. Samson Belair Ltd.*, 55 C.B.R. (N.S.) 114, [1985] 3 W.W.R. 651, 61 B.C.L.R. 24, 17 D.L.R. (4th) 544, leave to appeal to S.C.C. refused 55 C.B.R. (N.S.) xxvii, 62 B.C.L.R. xli, 17 D.L.R. (4th) 544n, 61 N.R. 78) held that provincial "deemed" trusts fell within the provisions of s. 136 of the Bankruptcy Act, while the courts in Ontario, culminating with the case of *Re Phoenix Paper Prod. Ltd.* (1983), 44 O.R. (2d) 225, 48 C.B.R. (N.S.) 113, 1 O.A.C. 215, 3 D.L.R. (4th) 617 (C.A.), held the opposite, namely, that a "deemed" statutory trust created by the province falls within s. 67 of the Bankruptcy Act and therefore has priority over other preferred creditors such as the trustee. The judgment of the Supreme Court of Canada in the case of *R. v. Henfrey Samson Belair Ltd.* now settles this question in an authoritative manner.

The law is now quite clear: the provisions of s. 67 of the Bankruptcy Act should be confined to trusts arising under general principles of law (namely, that the res must be identifiable or traceable) while s. 136 applies to claims not established by general law but secured "by Her Majesty's personal preference" through legislation. As the court stated, this conclusion is supported by the wording of ss. 67 and 136 of the Bankruptcy Act, by the jurisprudence of the Supreme Court of Canada, and by policy considerations.

However, the court made it clear that at some stage the "deemed" trust may still meet the requirements for a trust under the principles of trust law because, at some point, the trust property may still be identifiable or traceable. But once the trust property is mingled with other funds and converted to other property, it can no longer be traced and at this point there is no longer a trust under general principles of law. In the latter case, s. 67 of the Bankruptcy Act no longer applies.

It is interesting that the court considered practical policy considerations when it stated at p. 19 as follows:

"The difficulties of extending [s. 67] to cases where no specific property impressed with a trust can be identified are formidable and defy fairness and common sense. For example, if the claim for taxes equalled or exceeded the funds in the hands of the trustee in bankruptcy, the trustee would not recover the costs incurred to realize the funds. Indeed, the trustee might be in breach of the Act by expending funds to realize the bankrupt's assets. Other difficulties would arise in the case of more than one claimant to the trust property. The spectre is raised of a person who has a valid trust claim under the general principles of trust law to a specific piece of property, finding himself in competition with the Crown claiming a statutory trust in that and all the other property. Could the Crown's general claim pre-empt the property interest of the claimant under trust law? Or would the claimant under trust law prevail? To admit of such a possibility would be to run counter to the clear intention of Parliament in enacting the Bankruptcy Act of setting up a clear and orderly scheme for the distribution of the bankrupt's assets".

C.H. Morawetz, Q.C.

Appeal from judgment of B.C.C.A., 65 C.B.R. (N.S.) 24, [1987] 4 W.W.R. 673, 13 B.C.L.R. (2d) 346, 40 D.L.R. (4th) 78, dismissing appeal from judgment of Meredith J., 61 C.B.R. (N.S.) 59, 5 B.C.L.R. (2d) 212, denying province's claimed priority over secured creditor in bankruptcy proceedings.

***Cory J.* (dissenting):**

1 I have read with great interest the compelling reasons of my colleague Justice McLachlin. Unfortunately I cannot agree that s. 47(*a*) [now s. 67(*a*)] of the Bankruptcy Act, R.S.C. 1970, c. B-3 [now R.S.C. 1985, c. B-3], does not apply in this case [appeal from 65 C.B.R. (N.S.) 24, [1987] 4 W.W.R. 673, 13 B.C.L.R. (2d) 346, 40 D.L.R. (4th) 728]. If s. 18 of the British Columbia Social Service Tax Act, R.S.B.C. 1979, c. 388, creates a valid trust, then s. 47(*a*) of the Bankruptcy Act must apply. In order to determine the effect of s. 18 it may be helpful to consider the Social Service Tax Act as a whole.

Scheme of the British Columbia Social Service Tax Act

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

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

4 Under ss. 9 and 10 of the Act every vendor is required to make returns and keep tax records in the form prescribed by the regulations and must keep a record of all purchases and sales. Division 5 of the Social Service Tax Act Regulations, B.C. Reg. 84/58, makes detailed provision for these returns and records. The regulations make clear that there is to be continuous supervision of sales tax collection. Separate monthly returns must be made for each place of business and the returns must be made no later than 15 days after the last day of each monthly period. The regulations provide in detail for the means of calculating upon each return the commission for each vendor on the collection of sales tax.

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

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

> 18. (1) Where a person collects an amount of tax under this Act
>
> (*a*) he shall be deemed to hold it in trust for Her Majesty in right of the Province for the payment over of that amount to Her Majesty in the manner and at the time required under this Act and regulations, and
>
> (*b*) the tax collected shall be deemed to be held separate from and form no part of the person's money, assets or estate, whether or not the amount of the tax has in fact been kept separate and apart from either the person's own money or the assets of the estate of the person who collected the amount of the tax under this Act.
>
> (2) The amount of taxes that, under this Act,
>
> (*a*) is collected and held in trust in accordance with subsection (1); or
>
> (*b*) is required to be collected and remitted by a vendor or lessor
>
> forms a lien and charge on the entire assets of
>
> (*c*) the estate of the trustee under paragraph (*a*);
>
> (*d*) the person required to collect or remit the tax under paragraph (*b*); or
>
> (*e*) the estate of the person required to collect or remit the tax under paragraph (*d*).

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

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

9 From the point of view of fairness, there would seem to be no objection to the provincial government creating a lien or charge on the assets of the vendor for the amount of the sales tax (the trust funds) which the vendor was responsible for collecting and remitting to the province.

Does s. 18 create a valid trust?

10 The question may be phrased more precisely by asking: If, as the chambers judge found [61 C.B.R. (N.S.) 59 at 60, 5 B.C.L.R. (2d) 212], sales tax money "was misappropriated by Tops and mingled with its assets", does that put an end to the trust? It is said that the trust, although validly existing at the moment the funds were paid by the purchaser, ceases to exist or have any validity once the funds were mingled so that they could not be traced readily. To begin with, and somewhat simplistically, there is no prohibition in the Bankruptcy Act against the province creating a deemed trust or lien against the retail vendor's property for the extent of the sales tax, nor is there a conflict between s. 18 of the Social Service Tax Act and s. 47(*a*) and s. 107 [now s. 136] of the Bankruptcy Act. This is not a statutory ruse to evade the provisions of the Bankruptcy Act. It is simply an attempt to protect trust funds which are earmarked to be used for the public benefit and public use. Rather than insist that on each sale there be a separate payment to the province, the Act created a system which was in the best interest of retail purchases, retail vendors, the business community and the province as a whole. The Act does no more than protect funds which at the moment they were paid were truly trust funds. Nor am I sure that the validity of a trust must be determined exclusively on the basis of common law. It has been held by this court that the civil law of trust is not the same as that of common law: see *Royal Trust Co. v. Tucker*, [1982] 1 S.C.R. 250 at 261, 12 E.T.R. 257, 40 N.R. 361 [Que.].

11 There are a number of provincial statutory provisions which create trusts. This type of legislation is common to a wide range of statutes that may benefit employees, purchasers of insurance, payers of health and insurance and many others who lack the organization or bargaining power to establish a trust for themselves. See for example, Pension Benefits Act, S.O. 1987, c. 35, s. 58; Insurance Act, R.S.O. 1980, c. 218, s. 359; Health Insurance Act, R.S.O. 1980, c. 197, s. 18; Builders' Lien Act, R.S.A. 1980, c. B-12, s. 16.1; Construction Lien Act, S.O. 1983, c. 6, s. 7; Business Corporations Act, S.A. 1981, c. B-15, s. 191(1); Employment Standards Act, S.A. 1988, c. E-10.2, s. 113; Insurance Act, R.S.A. 1980, c. I-5, s. 124(1); Real Estate Agents' Licensing Act, R.S.A. 1980, c. R-5, s. 14; and Health Insurance Premiums Regulation, Alta. Reg. 217/81.

12 This court has held that a province may, to further and protect a principle of social policy, create a statutory trust. In *John M.M. Troup Ltd. v. Royal Bank*, [1962] S.C.R. 487 at 494, 3 C.B.R. (N.S.) 224, 34 D.L.R. (2d) 556 [Ont.], the trust provisions of the Mechanics' Lien Act, R.S.O. 1950, c. 227 (now the Construction Lien Act), were found to be validly enacted. The statutory trusts referred to above provide needed protection for their beneficiaries and forward salutary social objectives which the provinces have jurisdiction to pursue.

13 Section 23(4) of the Canada Pension Plan, R.S.C. 1985, c. C-8, creates a statutory trust using language almost identical to s. 18 of the Social Service Tax Act. In *Re Deslauriers Const. Prod. Ltd.*, [1970] 3 O.R. 599, *(*sub nom. *A.G. Can. v. Perlmutter)* 14 C.B.R. (N.S.) 197, 13 D.L.R. (3d) 551 (C.A.), Gale C.J.O., for a unanimous court, noted that the Act deemed pension plan moneys to be kept separate and apart from the estate of the employer "whether or not that amount has in fact been kept separate and apart from the employer's own moneys or from the assets of the estate", and commented at p. 601:

> ... [these words] were inserted in the Act specifically for the purpose of taking the moneys equivalent to the deductions out of the estate of the bankrupt by the creation of a trust and making those moneys the property of the Minister.

From this he drew the following conclusion at pp. 602-603:

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

Gale C.J.O.'s judgment was cited with approval by Pigeon J. writing for the majority in this court in *Dauphin Plains Credit Union Ltd. v. Xyloid Indust. Ltd.*, [1980] 1 S.C.R. 1182 at 1198, [1980] 3 W.W.R. 513, 33 C.B.R. (N.S.) 107, [1980] C.T.C. 247, *(*sub nom. *Dauphin Plains Credit Union Ltd. v. R.)* 80 D.T.C. 6123, 108 D.L.R. (3d) 257, 3 Man. R. (2d) 283, 31 N.R. 301, who stated: "I find the reasoning in *Deslauriers* wholly persuasive."

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

> 47. The property of a bankrupt divisible among his creditors shall not comprise
>
> (*a*) property held by the bankrupt in trust for any other person.
>
> 107.(1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:
>
> (*j*) claims of the Crown not previously mentioned in this section, in right of Canada or of any province, *pari passu* notwithstanding any statutory preference to the contrary.

15 The doctrine of federal paramountcy of legislation can only apply if there is actual conflict in the operation of the provincial and federal statutes. The principle was set forth in *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161 at 191, 18 B.L.R. 138, 138 D.L.R. (3d) 1, 44 N.R. 181 [Ont.], by Dickson J., as he then was, in these words:

> In principle, there would seem to be no good reasons to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says "yes" and the other says "no"; "the same citizens are being told to do inconsistent things"; compliance with one is defiance of the other.

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

17 It is true that this court has in *Deloitte Haskins & Sells Ltd. v. W.C.B.*, [1985] 1 S.C.R. 785, 55 C.B.R. (N.S.) 241, [1985] 4 W.W.R. 481, 38 Alta. L.R. (2d) 169, 19 D.L.R. (4th) 577, 63 A.R. 321, 60 N.R. 81, recognized and emphasized that provinces cannot, by means of their own legislation, create priorities under the Bankruptcy Act. However, s. 18 has not created a priority. It did no more than give statutory recognition to a valid trust. It then eliminated the necessity of setting up a separate bank account for sales tax moneys and substituted a system of registration and record-keeping to control these funds which never at any time belonged to the vendor trustee. That latter step did not alter the existence of the valid trust of the funds collected from the purchases for payment to the province. I do not think that the decision in *Deloitte Haskins & Sells v. W.C.B.* can be taken to have altered the meaning of the words "property of the bankrupt" contained in s. 47 of the Bankruptcy Act.

18 This appears to be the opinion expressed by Anne E. Hardy, the author of Crown Priority in Insolvency (1986). She concedes that in the interest of consistency with *Deloitte Haskins & Sells v. W.C.B.*, the lien portion of the deemed trust section should probably be held to be ineffective on the bankruptcy of the trustee. Nonetheless at pp. 107-108 she sets out her position in this way:

> Thus, as a matter of interpretation, it is questionable to limit the scope of section 47(*a*) of the Bankruptcy Act to trusts which either exist in fact or do not benefit the Crown or a creditor whose claim is referred to in subsection 107(1) of the Act. Until the Act is amended to permit the courts to construe section 47 in this manner, they are probably not justified in taking this approach. The *Coopers & Lybrand* case therefore appears to be incorrectly decided. The judgments in most cases which have upheld statutory deemed trusts in bankruptcy and refused to rank the claims covered by them under subsection 107(1) of the Act are preferable.
>
> As argued above, trusts should generally be upheld on the bankruptcy of the trustee regardless of the manner in which they arise. It is possible, however, that certain types of deemed trust provisions should be held to be ineffective and that a valid trust would therefore not come into existence. Most of the trust cases decided since *Re Bourgault* have distinguished that case because it did not discuss trust provisions or the relationship between the trusts covered by section 47(*a*) and subsection 107(1) of the Bankruptcy Act. Some of these decisions dealt with trust provisions under which an amount deemed to be held in trust had been made a lien and charge on the assets of the trustee.

That view should, I think, prevail.

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

> When the courts say that there must be certainty of subject-matter, they mean that the property must either be described in the trust instrument, or there must be "a formula or method given for identifying it" ...
>
> In determining certainty, what the courts are looking for is the certainty of concept rather than whether it is too difficult to ascertain the subject-matter.

He distinguishes this question from the tracing issue:

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

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

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

22 Although there is some dispute as to whether at common law funds can be "followed" once they have been mixed with the defendant's own funds, in equity those moneys can be traced "either as a separate fund or as part of a mixed fund or as latent in property acquired by means of such a fund": *Re Diplock's Estate; Diplock v. Wintle*, [1948] Ch. 465 at 521, [1948] 2 All E.R. 318 at 347, per Lord Green M.R.; affirmed *(*sub nom. *Min. of Health v. Simpson)* [1951] A.C. 251, [1950] 2 All E.R. 1137 (H.L.). The limits to a tracing action are largely fixed by the difficulties and ultimately the prohibitive excuse of providing the necessary accounts: see D.W.M. Waters at p. 1037 ff. There is no reason why a statutorily constituted trust cannot provide an advantage over a privately constituted trust by recognizing the existence of the trust in property held by the trustee without requiring the beneficiary to undertake the often inordinately expensive action of tracing commingled funds. This advantage should not deprive the statutory trust property of its trust character or take it outside the policies articulated in *Dep. Min. of Revenue (Que.) v. Rainville*, [1980] 1 S.C.R. 35, *(*sub nom. *Re Bourgault; Dep. Min. of Revenue of Que. v. Rainville)* 33 C.B.R. (N.S.) 301, 105 D.L.R. (3d) 270, *(*sub nom. *Bourgault's Estate v. Dep. Min. of Revenue of Que.)* 30 N.R. 24; *Deloitte Haskins & Sells v. W.C.B.*, supra; and *F.B.D.B. v. Que. (Comm. de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 1061, 68 C.B.R. (N.S.) 209, 50 D.L.R. (4th) 577, 14 Q.A.C. 140, 84 N.R. 308. It would thus seem that the statutory trust complies with the requirements of a valid trust that would be recognized in equity.

23 If as stated in *Dep. Min. of Revenue (Que.) v. Rainville* mechanics' liens or construction liens may be recognized, although it would be impossible to trace the funds of the subcontractors in the commingled accounts of the general contractor, so too should the statutory trust pertaining to sales tax be recognized.

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

Disposition

25 I conclude therefore that the trust described in s. 18 of the British Columbia Social Service Tax Act is not in any sense a claim against the property of the bankrupt so as to conflict with the policy underlying s. 107(1) of the Bankruptcy Act as that policy has been expounded in *Dep. Min. v. Rainville, Deloitte Haskins & Sells v. W.C.B.*, and *F.B.D.B. v. Que. (Comm. de la santé et de la sécuritié du travail)*, for the following reasons:

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

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

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

(i) does not negate the trusts;

(ii) is largely facilitative and thus does not take the trust out of the policy enunciated in *Re Bourgault, Deloitte Haskins & Sells* and *F.B.D.B.*;

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

26 I would therefore answer the constitutional question as follows:

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

Answer: No.

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

***McLachlin J. (Lamer, Wilson, La Forest, L'Heureux-Dubé* and *Gonthier JJ.* concurring)::**

28 The issue on this appeal [from 65 C.B.R. (N.S.) 24, [1987] 4 W.W.R. 673, 13 B.C.L.R. (2d) 346, 40 D.L.R. (4th) 728] is whether the statutory trust created by s. 18 of the British Columbia Social Service Tax Act, R.S.B.C. 1979, c. 388, gives the province priority over other creditors under the Bankruptcy Act, R.S.C. 1970, c. B-3 [now R.S.C. 1985, c. B-3].

29 Tops Pontiac Buick Ltd. ("Tops") collected sales tax for the provincial government in the course of its business operations, as it was required to do by the Social Service Tax Act. Tops mingled the tax collected with its other assets. When the Canadian Imperial Bank of Commerce placed Tops in receivership pursuant to its debenture and Tops made an assignment in bankruptcy, the receiver sold the assets of Tops and applied the full proceeds in reduction of the indebtedness of the bank.

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

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

32 The section of the Social Service Tax Act which the province contends gives it priority provides:

> 18. (1) Where a person collects an amount of tax under this Act
>
> (*a*) he shall be deemed to hold it in trust for Her Majesty in right of the Province for the payment over of that amount to Her Majesty in the manner and at the time required under this Act and regulations, and
>
> (*b*) the tax collected shall be deemed to be held separate from and form no part of the person's money, assets or estate, whether or not the amount of the tax has in fact been kept separate and apart from either the person's own money or the assets of the estate of the person who collected the amount of the tax under this Act.
>
> (2) The amount of taxes that, under this Act,
>
> (*a*) is collected and held in trust in accordance with subsection (1); or
>
> (*b*) is required to be collected and remitted by a vendor or lessor
>
> forms a lien and charge on the entire assets of
>
> (*c*) the estate of the trustee under paragraph (*a*);
>
> (*d*) the person required to collect or remit the tax under paragraph (*b*); or
>
> (*e*) the estate of the person required to collect or remit the tax under paragraph (*d*).

33 The province argues that s. 18(1) creates a trust within s. 47(*a*) [now s. 67(*a*)] of the Bankruptcy Act, which provides:

> 47. The property of a bankrupt divisible among his creditors shall not comprise
>
> (*a*) property held by the bankrupt in trust for any other person.

34 The respondents, on the other hand, submit that the deemed statutory trust created by s. 18 of the Social Service Tax Act is not a trust within s. 47 of the Bankruptcy Act, in that it does not possess the attributes of a true trust. They submit that the province's claim to the tax money is in fact a debt falling under s. 107(1)(*j*) [now s. 136(1)(*j*)] of the Bankruptcy Act, the priority to which falls to be determined according to the priorities established by s. 107.

> 107.(1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:
>
> (*j*) claims of the Crown not previously mentioned in this section, in right of Canada or of any province, *pari passu* notwithstanding any statutory preference to the contrary.

Discussion

35 The issue may be characterized as follows. Section 47(*a*) of the Bankruptcy Act exempts trust property in the hands of the bankrupt from distribution to creditors, giving trust claimants absolute priority. Section 107(1) establishes priorities between

creditors on distribution; s. 107(1)(*j*) ranks Crown claims last. Section 18 of the Social Service Tax Act creates a statutory trust which lacks the essential characteristics of a trust, namely, that the property impressed with the trust be identifiable or traceable. The question is whether the statutory trust created by the provincial legislation is a trust within s. 47(*a*) of the Bankruptcy Act or a mere Crown claim under s. 107(1)(*j*).

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

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

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

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

39 Section 107(1)(*j*), on the other hand, has been held to deal not with rights conferred by general law, but with the statutorily created claims of federal and provincial tax collectors. The purpose of s. 107(1)(*j*) was discussed by this court in *Dep. Min. of Revenue (Que.) v. Rainville*, [1980] 1 S.C.R. 35, *(*sub nom. *Re Bourgault; Dep. Min. of Revenue of Que. v. Rainville)* 33 C.B.R. (N.S.) 301, 105 D.L.R. (3d) 270, *(*sub nom. *Bourgault's Estate v. Dep. Min. of Revenue of Que.)* 30 N.R. 24. Pigeon J., speaking for the majority, stated at p. 45:

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

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

41 This construction of ss. 47(*a*) and 107(1)(*j*) of the Bankruptcy Act conforms with the principle that provinces cannot create priorities under the Bankruptcy Act by their own legislation, a principle affirmed by this court in *Deloitte, Haskins & Sells Ltd. v. W.C.B.*, [1985] 1 S.C.R. 785, 55 C.B.R. (N.S.) 241, [1985] 4 W.W.R. 481, 38 Alta. L.R. (2d) 169, 19 D.L.R. (4th) 577, 63 A.R. 321, 60 N.R. 81. As Wilson J. stated at p. 806:

> ... the issue in *Re Bourgault* and *Re Black Forest Restaurant Ltd.* was not whether a proprietary interest has been created under the relevant provincial legislation. It was whether provincial legislation, even if it did create a proprietary interest, could defeat the scheme of distribution under s. 107(1) of the *Bankruptcy Act*. These cases held that it could not, that while the provincial legislation could validly secure debts on the property of the debtor in a non-bankruptcy situation, once bankruptcy occurred s. 107(1) determined the status and priority of the claims specifically dealt with in the section. It was not open to the claimant in bankruptcy to say: By virtue of the applicable provincial legislation I am a secured creditor within the meaning of the opening words of s. 107(1) of the *Bankruptcy Act* and therefore the priority accorded my claim under the relevant paragraph of s. 107(1) does not apply to me. In effect, this is the position adopted by the Court of Appeal and advanced before us by the respondent. It cannot be supported as a matter of statutory interpretation of s. 107(1) since, if the section were to be read in this way, it would have effect of permitting the provinces to determine priorities on a bankruptcy, a matter within exclusive federal jurisdiction.

While *Deloitte, Haskins & Sells Ltd. v. W.C.B.* was concerned with provincial legislation purporting to give the province the status of a secured creditor for purposes of the Bankruptcy Act, the same reasoning applies in the case at bar.

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

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

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

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

46 Applying these observations on s. 18 of the Social Service Tax Act to the construction of ss. 47(*a*) and 107(1)(*j*) of the Bankruptcy Act which I have earlier adopted, the answer to the question of whether the province's interest under s. 18 is a "trust" under s. 47(*a*) or a "claim of the Crown" under s. 107(1)(*j*) depends on the facts of the particular case. If the money collected for tax is identifiable or traceable, then the true state of affairs conforms with the ordinary meaning of "trust" and the

money is exempt from distribution to creditors by reason of 47(*a*). If, on the other hand, the money has been converted to other property and cannot be traced, there is no "property held ... in trust" under s. 47(*a*). The province has a claim secured only by a charge or lien, and s. 107(1)(*j*) applies.

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

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

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

50 The province relies on *Re Phoenix Paper Prod. Ltd.* (1983), 44 O.R. (2d) 225, 48 C.B.R. (N.S.) 113, 3 D.L.R. (4th) 617, 1 O.A.C. 215, where the Ontario Court of Appeal held that accrued vacation pay mixed with other assets of a bankrupt constituted a trust under s. 47(*a*) of the Bankruptcy Act. As the Court of Appeal in this case pointed out, the Ontario Court of Appeal in *Re Phoenix Paper Prod. Ltd.*, in considering the two divergent lines of authority presented to it, did not have the advantage of considering what was said in *Deloitte, Haskins & Sells v. W.C.B.*, and the affirmation in that case of the line of authority which the Ontario Court of Appeal rejected.

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

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

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

Conclusion

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

53 I would dismiss the appeal, with costs.

Appeal dismissed.

TAB 9

WatersTrusts 5.I

Waters' Law of Trusts in Canada, 5th Ed.

5 — The Three Certainties
Editor: Donovan W.M. Waters, Contributing Editors: Mark R. Gillen and Lionel D. Smith

5.I — INTRODUCTION

5.I — INTRODUCTION

For a trust to come into existence, it must have three essential characteristics. As Lord Langdale M.R. remarked in *Knight v. Knight*, [1] in words adopted by Barker J. in *Renehan v. Malone* [2] and considered fundamental in common law Canada, [3] (1) the language of the alleged settlor must be imperative; (2) the subject-matter or trust property must be certain; (3) the objects of the trust must be certain. This means that the alleged settlor, whether giving the property on the terms of a trust or transferring property on trust in exchange for consideration, must employ language which clearly shows his or her intention that the recipient should hold on trust. No trust exists if the recipient is to take absolutely, but he or she is merely put under a moral obligation as to what is to be done with the property. If such imperative language exists, it must, second, be shown that the settlor has so clearly described the property which is to be subject to the trust that it can be definitively ascertained. [4] Third, the objects of the trust must be equally and clearly delineated. There must be no uncertainty as to whether a person is, in fact, a beneficiary. If any one of these three certainties does not exist, the trust fails to come into existence or, to put it differently, is void. [5]

The principle of the three certainties has been fundamental at least since the days of Lord Eldon, and no one today could seek to challenge the principle; what constitutes certainty, when it is questioned, is an issue of construction for the court. [6]

Footnotes

1 *Knight v. Knight* (1840), 3 Beav. 148, 49 E.R. 58 (Eng. Ch.).

2 *Renehan v. Malone* (1897), 1 N.B. Eq. 506 (N.B. S.C. [In Equity]).

3 Numerous Canadian cases have referred to the three certainties as essential to the existence of an express trust. A few relatively recent examples include *Goodman Estate v. Geffen* (1987), (sub nom. *Goodman v. Geffen*) 52 Alta. L.R. (2d) 210 (Alta. Q.B.), reversed (1989), 68 Alta. L.R. (2d) 289 (Alta. C.A.), additional reasons at (1990), 80 Alta. L.R. (2d) 289 (Alta. C.A.), reversed (1991), 80 Alta. L.R. (2d) 293 (S.C.C.), leave to appeal allowed (1989), 101 A.R. 160 (note) (S.C.C.); *Quesnel & District Credit Union v. Smith* (1987), 19 B.C.L.R. (2d) 105 (B.C. C.A.); *Bank of Nova Scotia v. Société Générale (Canada)* (1988), 58 Alta. L.R. (2d) 193 (Alta. C.A.); *Faucher v. Tucker Estate* (1993), [1994] 2 W.W.R. 1 (Man. C.A.); *Howitt v. Howden Group Canada Ltd.* (1999), 170 D.L.R. (4th) 423, 26 E.T.R. (2d) 1 (Ont. C.A.); *Canada Trust Co. v. Price Waterhouse Ltd.* (2001), 288 A.R. 387 (Alta. Q.B.); *Arkay Casino Management & Equipment (1985) Ltd. v. Alberta (Attorney General)* (1998), 227 A.R. 280, (sub nom. *Arkay Casino Ltd. v. Alberta (Attorney General)*) 64 Alta. L.R. (3d) 368, [1999] 4 W.W.R. 334 (Alta. Q.B.); *Parsons v. Cook* (2004), 238 Nfld. & P.E.I.R. 16, 7 E.T.R. (3d) 92 (N.L. T.D.); *McMillan v. Hughes* (2004), 11 E.T.R. (3d) 290 (B.C. S.C.); *Saugestad v. Saugestad*, 2006 CarswellBC 3170, 28 E.T.R. (3d) 210 (B.C. S.C.), reversed in part on other grounds 2008 CarswellBC 123, 37 E.T.R. (3d) 19, 77 B.C.L.R. (4th) 170 (B.C. C.A.) at para. 82 [(S.C.)]; *Re Graphicshoppe Ltd.*, 2005 CarswellOnt 7008, 78 O.R. (3d) 401 (Ont. C.A.) at para. 10; *VanDenBussche v. Craig VanDenBussche Trust (Trustee of)*, 2009 CarswellMan 557, (sub nom. *VanDenBussche v. VanDenBussche Trust*) 247 Man. R. (2d) 174, 55 E.T.R. (3d) 179 (Man. Q.B.); and *Sun Life Assurance Co. of Canada v. Taylor* (2008), 2008 CarswellSask 678, 322 Sask. R. 153, [2009] 2 W.W.R. 286 (Sask. Q.B.); and *Suen v. Suen*, 2013 BCCA 313, 2013 CarswellBC

1957, 46 B.C.L.R. (5th) 248, 88 E.T.R. (3d) 179, [2013] 10 W.W.R. 311, 340 B.C.A.C. 176, 579 W.A.C. 176 (B.C. C.A.) at para. 45, followed in *Brown v. Manuch Estate*, 2015 BCSC 1966, 2015 CarswellBC 3122, 14 E.T.R. (4th) 119 (B.C. S.C.) at paras. 147-150.

4 The property interest which each beneficiary is to take must also be clearly defined. See below, Part III D.

5 In *Angus v. Port Hope (Municipality)*, 2017 ONCA 566, 2017 CarswellOnt 10123, 28 E.T.R. (4th) 169, 64 M.P.L.R. (5th) 202 (Ont. C.A.), additional reasons 2017 ONCA 637, 2017 CarswellOnt 12020, 34 E.T.R. (4th) 1 (Ont. C.A.), leave to appeal refused *Ian Angus v. Municipality of Port Hope*, 2018 CarswellOnt 7518, 2018 CarswellOnt 7519, [2017] S.C.C.A. No. 382 (S.C.C.) at para. 95 [2017 ONCA 566], the Court of Appeal underlined that the three certainties are "reflexive". That is, the evidence, or the lack of it, concerning certainty of the purported trust property or of the trust objects, may assist in establishing whether or not there is certainty of intention to create a trust.

6 For an instance where the lower court and the appeal court differed as to whether the three certainties were established, see *Angus v. Port Hope (Municipality), ibid*.

End of Document

WatersTrusts 5.III

Waters' Law of Trusts in Canada, 5th Ed.

5 — The Three Certainties
Editor: Donovan W.M. Waters, Contributing Editors: Mark R. Gillen and Lionel D. Smith

5.III — CERTAINTY OF SUBJECT-MATTER

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A question beyond the scope of this work is what constitutes property. However, whether a licence to hunt big game, issued by a public authority, and described in the terms of the licence as "non-transferrable and non-assignable", constitutes trust property was raised in *45325 Yukon Inc. v. Kiselbach*.[94] Unfortunately, it was not considered. We find it more persuasive that such a permission to act is not property, but a right attaching to the permitted party. In 45325 *Yukon Inc.* it was also argued, but not considered, that, if the settlor covenants that ascertained property will be settled upon the covenantee when it is acquired by the covenantor at a later date, the property to be acquired cannot constitute trust property. Ownership in the settlor is required at the time the covenant is entered into.[95]

For a trust to be validly created, it must also be possible to identify clearly the property that is to be subject to the trust.[96] Moreover, even if the trust property is thus clearly defined, the shares in that property which the beneficiaries are each to take must also be clearly defined. Certainty of subject-matter as a term refers to both of these required certainties.

If the language employed provides clear evidence of the intention to create a trust, no trust can yet come into existence if it is impossible to determine what the trust property is. This is so whether the settlor purports to transfer property or declares him- or herself trustee of his or her property. "The bulk of my residuary estate" is uncertain; nothing can therefore pass to the trustees or be held by the settlor as trustee.[97] But, as Cameron J.A. once put it, "this must be an elementary consideration, and scarcely requires authority to support it."[98] Trusts of such a kind are normally attempted to be grafted upon gifts already made — for example, "$50,000 to my wife, A, the bulk of which I entrust her to appoint between X, Y, and Z" — and the result is that, the trust having failed, the donee (A) takes the whole property.

Trust property must also be assignable, as for instance a right of action, or transferable, as personalty that could be subject to a restraint on alienation. It also must constitute existing property; future property, whether to be created in the future, or, being in existence, conveyed to the trustee in the future by a third party who at present has an absolute interest, exists only, if it exists at all, in the trustee's right of action to compel creation and/or transfer.[99] But, save perhaps in a sense with future property, these are not the issues that are raised with the requirement that the trust property be "certain". Certainty concerns the clarity of the identification of the trust subject-matter.

A. — Relationship Between Certainty of Intention and Certainty of Subject-matter

More difficult questions arise when the settlor's indecisiveness as to the trust property suggests that he or she did not have in mind a trust obligation at all. The settlor may have used language which, though precatory, appears *prima facie* to show trust intention, and then have left the description of the property of the alleged trust so vague that it reveals his or her true intention to have been to make an absolute gift with an attached moral obligation or, occasionally, to confer a conditional gift.[100]

Sometimes there is an obvious interaction between the language communicating the intention and the description of the trust property. [101] In *Perry v. Perry*, [102] the testator divided his property between his widow and his sons, and continued, "I wish and do want that my only daughter, Edith Florence, shall inherit from her mother a share equal to that of the boys named above, and the balance to be divided in equal shares between all our children then living." The language was precatory, but questionable as to the nature of the obligation it was intending to impose. Whatever that language meant, however, the subject-matter was "inherit from her mother a share"; did this mean a share of the mother's own property or a share of the property devised to her by the testator? And, if that was uncertain, what "balance" was to be divided? Language and property description interacted, therefore, in determining the intent of the testator. [103] The property description being uncertain, this alone would render the trust void.

B. — Residuary Estates

An undivided interest in certain property satisfies the test, [104] as does a chose in action or an interest in a chose in action. A specific share in residuary estate is also sufficiently definite. This is demonstrably so when the trust is testamentary, because the trust, like the will, takes effect from death, and, though the executors have a period thereafter during which they may wind up the estate and ultimately are able to assess the value of the residue, nevertheless the share of residue is taken to be known at the date of death. [105] What is the position, however, when the settlor creates an *inter vivos* trust, under which his or her beneficiaries are to have interests in his or her net estate? Has the trust property to be certain both when the trust is set up and when the trust terms are to begin to operate, or need it be certain only on the latter occasion? At first blush one might have said certainty when the trust terms are to begin to operate is sufficient. After all, the purpose of a rule as to certainty of trust property is presumably so that it is possible to say at the time when beneficiaries are entitled to payments what property is to act as the fund. [106] But this is not the law, nor was it Spence J.'s view in *Re Beardmore Trusts*. [107] In that case an *inter vivos* trust [108] was set up to take effect upon the settlor's death when the trustee was to hold three-fifths of the settlor's net estate [109] for the wife for life or until remarriage, remainder for the two children of the marriage. There was no question as to trust intention, and no question as to the shares each beneficiary was to take. But one reason given by the learned judge for the voidity of the trust was that "the subject-matter of the trust is not described with sufficient exactness to permit that such matter be ascertained at the time the trust was created." [110] *Mussoorie Bank v. Raynor*, [111] which the judge cited, was in fact concerned not only with certainty of trust subject-matter, but with precatory language and the contention that an absolute gift was sought to be cut down by a gift over. The old case of *Sprange v. Barnard* [112] was also concerned with the cutting down of an absolute gift. Moreover, both cases involved testamentary trusts; but — and this may have been crucial in Spence J.'s thinking — both trusts would have been *set up* by a will yet *operate* over whatever property the immediate testamentary donee did not use during the donee's lifetime. Therefore, Spence J. seems to have reasoned, in each of these precedents, between the date of the will taking effect and the date of the trust terms coming into operation the trust property was uncertain. Those cases, he thought, decided the case in hand.

In the light of the authorities there is much to be said for this conclusion. If the rule requiring certainty were a matter of convenience only and a trust would be valid provided the property was clearly defined when the trust terms operated, then gifts of "whatever is left" after A's death would not have failed, as they so often have, for uncertainty of trust property. But is there any reason why the law should not adopt a wait and see rule? Time will tell whether there is any property upon which the trust terms are to operate. What reason is there for striking down the trust before any beneficiary can claim anything from the trustee? [113] And if any beneficiary dies after the trust is set up, and before the terms operate, is the administration of his or her estate more complex than when a remainderman dies during the lifetime of the life tenant in whose favour there is a power of encroachment? The cases on testamentary trusts have been vitally concerned with trust language and the rules concerning absolute gifts, as we have seen, and *Re Beardmore Trusts* is therefore unique in that those problems were absent. [114] However, *Beardmore* exposes what can be argued to be the arbitrariness of the timing of the certainty of property rule, and on that point it may not be immune from assault. [115]

C. — Use of Formula to Determine Quantum of Subject-matter

When the courts say that there must be certainty of subject-matter, they mean that the property must either be described in the trust instrument, or there must be "a formula or method given for identifying it." [116] This latter form of certainty more often occurs with fixing the quantum of beneficiaries' interests, [117] but it can occur with the whole trust property. For example, the testator may leave all his or her property to trustees and then require them to hold "a sufficient sum of money to produce $500 per annum" for the X hospital. Such a gift would not fail for uncertainty because, though it may be difficult to determine against the background of varying interest rates from year to year what sum will produce $500 *per annum*, the size of the annuity is quite clear and the capital required "can be approximately and easily ascertained". [118]

The point is that if the court on a request by the trustees can determine the quantum of the trust property, then the trust will not fail, but the court must have objective standards by which to determine the quantum. Should the settlor say, to amend the example just given, "a sufficient sum of money so as to produce a reasonable income for A," then difficulties can arise. The trustees have not been left to decide what in their discretion is reasonable; had they been given this discretion then an adequate formula would have been required for quantifying the trust property. In the English case of *Re Golay's Will Trust*, [119] Ungoed-Thomas J. was prepared nevertheless to say that, though different trustees might hold varying notions upon what is reasonable, the word "reasonable" is sufficiently objective that, on an application being made, the court can determine what the income is to be. The courts undoubtedly lean as far as possible in favour of upholding the settlor's disposition, but it is at least arguable whether this case does not lean too far. What are the criteria for determining what is reasonable income? It does not necessarily infer need; the wealthy beneficiary is not excluded. [120] And may the trustees consider the other calls that are to be made upon the trust capital, for example, the maintenance of infants who have capital interests?

In determining certainty, what the courts are looking for is the certainty of concept rather than whether it is too difficult to ascertain the subject-matter. [121] "Reasonable income" seemed to the learned judge in *Re Golay* to satisfy that test.

Of course, certainty of the property that is to be subject to an express trust can always be obtained by the settlor or testator transferring nominal property to the trustees; for instance, he or she settles $100 "plus such other property as shall later be added." [122] The settlor, the personal representatives, or third parties may then add this further property. However, though this familiar device secures certainty, it is of no assistance if the creator of the trust has described what shall constitute that further property, and the description lacks definition or ascertainability. No one can determine what is meant by a trust of $100 plus "the bulk of my estate", for instance; the trust will remain a trust of $100. It will indeed be sufficient, on the other hand, if the creator of the trust employs a formula; for example, the creator gives his or her executors and trustees the power to transfer to the trust of $100 such other assets from his residuary estate as they shall choose.

D. — Certainty of Beneficial Shares

Even if the trust property is clearly defined or ascertainable, the trust will still be void and the trust property revert to the settlor if the beneficial shares in that property are not clearly defined. The classic example of such failure is *Boyce v. Boyce* [123] where the testator devised certain houses to his trustees on the terms that his daughter, Maria, should have one house in fee simple, "whichever she may think proper to choose or select," and the remaining houses should go to his other daughter, Charlotte, in fee simple. Maria predeceased the testator, the choosing machinery therefore broke down, and the consequence was that the trust failed and Charlotte took nothing. The property which each beneficiary was to have was uncertain. [124] Since Maria was to have one house, and Charlotte the remaining houses, it is curious that the court could not have construed the trust as a gift to Charlotte of the houses, subject to the right of Maria to choose one of them for herself. [125]

Sran v. Sands & Associates [126] provides a more recent example. In a declaration of trust the settlor clearly identified lands subject to the trust but then declared in one clause that, "I hold legal and registered title to the Lands and Gurjant Singh Sran is the beneficial owner of 50% in the Lands", and in another clause that, "I do not and will not hold any beneficial interest in the Lands whatsoever and all benefits and advantages from the Lands which are received by me, the undersigned and bare trustee, are on account and for the benefit of Gurjant Singh Sran and will be delivered to Gurjant Singh Sran forthwith upon receipt

[of a sum of money to be paid by Gurjant Singh Sran].” Smith J. found there was no trust since it was, “unclear whether the purported trust relate[d] to the entirety of the Property, or to 50% of it.”

The quantum of property allocated to each interest may be totally vague. The testator may make a gift of specific property to trustees to distribute “such part or portion thereof as they may think best and proper” among a class of persons according to need, “and the remainder thereof” to be devoted by the trustees in their discretion to certain charitable purposes. [127] It is not only uncertain what amount of property is to be available for distribution among the class, but also as a consequence the sum available for distribution among charities is uncertain. The trust is therefore void. What the testator had in mind was a distinct discretionary trust for the class, and another for the charitable purposes. The testator would have succeeded had he or she allocated definite amounts of property to each trust, for there is no objection to discretionary trusts *per se.* In such a trust, the trustees may determine what amount of property, if any, is to be received by each beneficiary. In a sense, the settlor delegates to his or her trustees the determination of the size of the beneficiaries’ interests. [128]

E. — Changes in the Nature of the Trust Property

Finally, it should be noticed that there is nothing to prevent a trustee changing the nature of the trust property through exercise of his or her power of investment. Certainty of subject-matter requires only that the trust property be initially defined or ascertainable; if it is changed in character by, for example, the sale of land and the purchase of shares, the trust property obviously retains its ascertainability. [129]

Footnotes

94 *45325 Yukon Inc. v. Kiselbach*, 2016 YKSC 46, 2016 CarswellYukon 104, 25 E.T.R. (4th) 307 (Y.T. S.C.).

95 If the promise, being a covenant, is enforceable, and the property in question is in fact acquired by the covenantor, the promisee has a personal right to sue the would-be settlor for performance.

96 This concept applies to all trusts, including alleged statutory trusts. In *Green v. Ontario* (1972), [1973] 2 O.R. 396, 34 D.L.R. (3d) 20 (Ont. H.C.), the plaintiff claimed that s. 2 of the *Provincial Parks Act*, R.S.O. 1970, c. 371, imposed a statutory trust upon the province with regard to dedicated parkland in Ontario. Apart from the fact that the learned judge could find no obligation as trustee imposed on the province, nor who could be the trust beneficiary, he drew attention to the power of the province under the Act “to increase, decrease or even put an end to or `close down’ any park” (at 31 [D.L.R.]). There was, therefore, he said, no certainty of subject-matter of the alleged trust.

It is sufficient that the property be clearly identified so, for instance, a reference to “Group Insurance coverage provided by the deceased’s employer, Moor Business Forms” was sufficient to identify the proceeds of a particular insurance policy. See *Shannon v. Shannon*, 1985 CarswellOnt 699, 19 E.T.R. 1 (Ont. H.C.); and similarly in *Schorlemer Estate v. Schorlemer*, 2006 CarswellOnt 8155, 29 E.T.R. (3d) 181 (Ont. S.C.J.) a reference to “any policies of life insurance on his life through his employer” was sufficient where the person had only one employer and only one policy of insurance.

Though it must be possible to identify the trust property, it is also essential, unless the trustee has given value, that the property is held in title by the trustee. Only then can there be a valid trust.

97 Certainty of subject-matter (or of the initial trust fund assets) is an essential element in establishing the segregation of the trust fund from other property: *Palmer v. Simmonds* (1854), 2 Drew. 221, 61 E.R. 704; *Bromley v. Tryron* (1951), [1952] A.C. 265, [1951] 2 All E.R. 1058 (U.K. H.L.). Similarly, a reference to “other property” that was to be sold and the proceeds used to form the corpus of a trust was found not to be sufficiently certain because the expression “other property” was capable of several plausible interpretations in the circumstances — see *Re Romaniuk* (1986), 48 Alta. L.R. (2d) 225, 23 E.T.R. 294 (Alta. Surr. Ct.). See also *Almecon Industries Ltd. v. Anchortek Ltd.* (2004), 48 C.B.R. (4th) 165, 246 F.T.R. 150 (F.C.).

The amount of the subject-matter need not be great for it to be certain — an amount of $10 was held to satisfy the requirement of certainty of subject-matter in *Re Kadar Estate* (1997), 17 E.T.R. (2d) 171 (B.C. S.C.). The initial trust property may be a gold coin, frequently employed in deeds of trust.

98 *Perry v. Perry* [1918] 2 W.W.R. 485, 40 D.L.R. 628 (Man. C.A.) at 639 [D.L.R.].

99 These requirements were alluded to in *45325 Yukon Inc. v. Kiselbach*, 2016 YKSC 46, 2016 CarswellYukon 104, 25 E.T.R. (4th) 307 (Y.T. S.C.).

100 In *Manufacturers Life Insurance Co. v. Senesouma*, 2016 ABQB 495, 2016 CarswellAlta 1652, 45 Alta. L.R. (6th) 43, 86 R.F.L. (7th) 223 (Alta. Q.B.), a husband was bound by a contractually binding Separation Agreement to make the proceeds of an insurance on his life available to the wife who would hold the proceeds in trust for their children. However, the Agreement failed to spell out with sufficient certainty that the disputed policy was the intended trust property, and the deceased husband later designated another as the policy beneficiary. The court held that the husband because of, and as of the time of, the contract was subject to a *Soulos v. Korkontizilas* constructive trust of the proceeds of the policy in favour of the wife and, as trust beneficiaries, the children. See further on this Supreme Court of Canada constructive trust, chapter 11, Part I D 2.

101 An often quoted case is *Mussoorie Bank v. Raynor* (1882), (1881-82) L.R. 7 App. Cas. 321 (India P.C.), where Sir Arthur Hobhouse noted that uncertainty of words has a "reflex action" upon the construction of the donor's language. There the testamentary words were, "feeling confident that she will act justly to our children in dividing the same when no longer required by her."

102 *Perry v. Perry*, [1918] 2 W.W.R. 485, 40 D.L.R. 628 (Man. C.A.).

103 This discussion of *Perry v. Perry* and the interaction between certainty of intention and certainty of subject-matter was referred to with approval in *Giles v. Westminster Savings Credit Union*, 2006 CarswellBC 183, [2006] B.C.J. No. 159 (B.C. S.C.) at para. 240.

104 *U.S. Trust Co. of New York v. C.I.R.*, 296 U.S. 481, 80 L. Ed. 340 (1936).

105 Though, of course, it may be proved that creditors of the estate have claims which prevent there being any residue. Trusts of specific property may be annihilated by abatement of the property to meet creditors' claims. Nevertheless, the law regards such trusts as having certainty of property. Why? Is it an adequate explanation that the interests of trust beneficiaries vest at death?

106 Certainty would have to exist when the trust is created, if the trustees have administrative duties to perform prior to any payment to a beneficiary as, e.g., in an accumulation trust.

107 *Re Beardmore Trusts* (1951), [1951] O.W.N. 728, [1952] 1 D.L.R. 41 (Ont. H.C.). This position was also taken, following *Re Beardmore Trusts*, in *Ernst & Young Inc. v. Central Guaranty Trust Co.* (2001), 283 A.R. 325, 36 E.T.R. (2d) 200, 12 B.L.R. (3d) 72 (Alta. Q.B.), additional reasons at (2002), 304 A.R. 1 (Alta. Q.B.) at 218-20 [B.L.R.]. In *Ernst & Young Inc. v. Central Guaranty Trust Co.*, the funds were to be held in trust to meet warranty obligations on warranties sold by car dealerships on behalf of a warranty provider. The trusts were set up with an initial $1 and further contributions were to be made based on subsequent actuarial assessments of amounts required to meet warranty obligations. At the start of the trust these amounts were uncertain. The decision in this *Ernst & Young* case was overturned on appeal on the basis that the issue of the validity of the trust was *res judicata* pursuant to an earlier bankruptcy proceeding order. The appeal decision noted that because it disposed of the appeal on the basis of *res judicata* it was not necessary for it to consider the trial judge's conclusions relating to the validity of the trusts. The Court of Appeal did, however, indicate it had reservations about the trial judge's conclusions on that issue. See *Ernst & Young Inc. v. Central Guaranty Trust Co.*, 2006 CarswellAlta 1479, 397 A.R. 225, 28 E.T.R. (3d) 174 (Alta. C.A.), leave to appeal refused 2007 CarswellAlta 517, 2007 CarswellAlta 518, [2007] S.C.C.A. No. 9 (S.C.C.). The *Ernst & Young* case was referred to in *Gouin v. Gouin*, 2005 CarswellAlta 972, 17 E.T.R. (3d) 264 (Alta. Q.B.), at para. 25 where it was noted that "a trust of an expectancy can be enforced where a contractual obligation has been undertaken to subject property expected to be acquired in the future to a trust" (see chapter 6, Part II) and the court commented that it was "not entirely clear" how this was to be reconciled with the result in *Ernst & Young*.

108 On the separation of the settlor from his wife.

109 I.e., less debts, expenses and succession duties.

110 *Supra*, note 107, at 46 [D.L.R.]. There was no means of knowing till the settlor's death how much three-fifths of the net estate would be, and indeed it might be nothing at all if the settlor died insolvent. See also *Mordo v. Nitting*, 2006 CarswellBC 2934, [2006] B.C.J. No. 3081 (B.C. S.C.) at para. 310.

111 *Supra*, note 101.

112 *Sprange v. Barnard* (1789), 2 Bro. C.C. 585, 29 E.R. 320 (Eng. Ch.).

113 There were no investment or administrative duties concerning the trust property which were to be carried out prior to the death of the settlor.

114 Divorce or separation trusts where a spouse purports to settle future property, e.g., his or her future wages, salary, or future business earnings, would be void unless consideration is given by the other spouse, as future property may only take the form of a contract to transfer. See chapter 3, Part IV A 2. Does the net residuary estate on the death of a living settlor constitute future property?

115 E.g., the testator says, "$50,000 to A, and whatever is left at his death on trust for B, C and D equally." The precedents discussed earlier, Part II A 2, show that this would be argued as a life tenancy for A, remainder to B, C and D. The opposing argument would be that the gift to A is absolute and the later derogation repugnant. Either there is a trust which both takes effect and has its terms operate from the date of the $50,000 vesting in A, or there is no trust at all. In *Beardmore*, the operation of the trust terms was delayed until some time after the trust took effect. Only if such delay is void is there no trust at all.

In *Phillips v. Spooner* (1980), [1981] 1 W.W.R. 79, 7 E.T.R. 157 (Sask. C.A.), the deceased had entered into a separation agreement, under seal, with his first wife in which he had agreed that in certain circumstances the wife could apply to the court for half of his assets at death. He covenanted that his personal representatives would consent to such an application. Unfortunately, the Court of Appeal found no need to comment on the validity of this clause, which is not infrequently found in such agreements.

116 G.G. Bogert and G.T. Bogert, *Handbook of the Law of Trusts*, 5th ed. (1973) at 72.

117 E.g., "to A, B, C and D as to income, and as to capital when D attains 25, in such shares as my trustees in their sole discretion shall choose."

118 *Crawford v. Mound Grove Cemetery Assn.*, 218 Ill. 399, 75 N.E. 998 (1905) at 1002 [N.E.] (1905, S. Ct. 111.).

119 *Re Golay's Will Trust*, [1965] 1 W.L.R. 969, [1965] 2 All E.R. 660. If a testator leaves his residuary estate to his spouse, and gives to his executors or testamentary trustees the power to determine which assets shall be the property of a "spouse trust", it is arguable that a trust is only created at that moment when the first item of property is so allocated. Subsequent allocations would then be regarded as transfers to an existing trust. (For the purposes of the *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1, s. 70(6), such allocations to a spouse trust must be completed within thirty-six months of the testator's death). In effect the testator is delegating to his executors or trustees part of the role of creating the trust.

An opposing argument is that the discretion should be seen as an adequate formula for determining the trust property, and the trust is therefore created on the moment of the testator's death, i.e., by his will. At that moment there is a conceptual certainty of trust property.

Given the trend of modern decisions, the second argument seems more likely to be upheld. The difficulty with it, however, is that, if for any reason the trustees do not allocate assets to the trust, the court may conclude that it is unable to exercise such a broad discretionary obligation in their place. On the other hand, *McPhail v. Doulton* (1970), [1971] A.C. 424, [1970] 2 All E.R. 228 (U.K. H.L.) at 457 [A.C.], at 247 [All E.R.], suggests that today the courts will go a long way towards exercising, or ensuring the exercise of, a trustee discretion in order that the trust shall not be said to fail for uncertainty. It may appoint new trustees, or require the professional preparation of a proposal for the allocation of assets to the "spouse trust".

The importance of the difference between these arguments is that s. 70(6)(b) of the *Income Tax Act* (*ibid.*), as amended, requires the spouse trust to be "created by the taxpayer's will". The problem can be avoided, however, if the testator in his or her will deputes one asset, however nominal, as spouse trust property, and then confers the above trustee discretion.

See further on the subject of discretionary powers and the doctrine of uncertainty, F.D. Baker, "Are Wills Draftsmen Misusing Discretionary Powers?" (1973-4) 1 E & T.Q. 172.

120 See R.E. Megarry (1965), 81 L.Q.R. 481.

121 *Re Gape*, [1952] Ch. 418, affirmed [1952] Ch. 743 (Eng. C.A.) (Roxburgh J.). The issue here was the certainty of a condition subsequent; "take up permanent residence in England". The certainty of concept in relation to certainty of subject-matter has been accepted in Canada in, for example, *Larochelle v. Soucie*, *supra* note 14, at para. 221. In *Larochelle* (at para. 220) the subject-matter was said to have consisted of "all rights and beneficial interest in and to all property owned by Al" and this was held to satisfy the requirement of certainty of subject-matter. See also *Grewal v. Khakh*, 2018 BCCA 357, 2018 CarswellBC 2479, 14 B.C.L.R. (6th) 18, 39 E.T.R. (4th) 200, 93 R.P.R. (5th) 7 (B.C. C.A.) where uncertainty as to the subject-matter of the trust was reconciled by reference to the circumstances in which the declaration of trust was made.

122 The same thing can be done with a declaration of trust, when the settlor declares him- or herself from henceforth to be a trustee of his or her assets for others.

123 *Boyce v. Boyce* (1849), 16 Sim. 476, 60 E.R. 959. In *Re Moore*, [1901] 1 Ch. 939, a purpose trust was to end at an uncertain and unascertainable time. In *Arkay Casino Management & Equipment (1985) Ltd. v. Alberta (Attorney General)* (1998), 227 A.R. 280, (sub nom. *Arkay Casino Ltd. v. Alberta (Attorney General)*) 64 Alta. L.R. (3d) 368, [1999] 4 W.W.R. 334 (Alta. Q.B.), the share of winners of a gambling jackpot at a casino was determined by specified amounts to be paid out of the jackpot to winners holding specified types of poker hands. See also *Ernst & Young Inc. v. Central Guaranty Trust Co.*, *supra*, note 107; *Greenwood v. Greenwood*, 2010 BCSC 1353, 2010 CarswellBC 2563, [2010] B.C.J. No. 1902 (B.C. S.C.); and *Sran v. Sands & Associates*, 2010 BCSC 937, 2010 CarswellBC 1751, 69 C.B.R. (5th) 99 (B.C. S.C.).

124 *Boyce v. Boyce* was referred to in *Ernst & Young Inc. v. Central Guaranty Trust Co.*, *supra*, note 107. There the beneficiaries of purported trust included warranty holders but the court found that no one could say either at the outset nor during the currency of the purported trust that anyone could know with any certainty what warranties were outstanding or what their terms were and thus the court concluded that it was impossible to say what each putative beneficiary's share of the funds would be.

125 It is also curious that in *Sprange v. Barnard* (1789), 2 Bro. C.C. 585, 29 E.R. 320 (Eng. Ch.), the construction was not different. £ 1300 was held for T.S. "for his sole use; and at his death the remaining part of what is left, that he does not want for his own wants and use, to be divided between" certain persons. Was T.S. absolutely entitled or had he an income interest only? Arden M.R. thought T.S. absolutely entitled as "the remaining part" failed for uncertainty. Would it not have met the testator's language more adequately to have found a life interest in T.S. and a power to draw on capital, with remainder divided equally among the enumerated persons?

In *Guild v. Mallory* (1983), 144 D.L.R. (3d) 603 (Ont. H.C.), the court was reluctant to reach the result suggested in *Boyce v. Boyce* where the effect was to frustrate the intended gift by the testator.

126 *Sran v. Sands & Associates*, 2010 BCSC 937, 2010 CarswellBC 1751, 69 C.B.R. (5th) 99 (B.C. S.C.) at para. 64. For another example of a difficulty in determining the shares of the alleged beneficiaries of the trust, see *Giles v. Westminster Savings Credit Union*, 2006 CarswellBC 183, [2006] B.C.J. No. 159 (B.C. S.C.), affirmed 2007 CarswellBC 2071, [2007] 12 W.W.R. 579 (B.C. C.A.) at para. 203 [(S.C.)].

127 *Wilce v. Van Anden*, 248 Ill. 358, 94 N.E. 42 (1911), especially at 45.

128 See further on discretionary trust chapter 12, Part II D.

129 This discussion was referred to in *Mordo v. Nitting*, *supra*, note 110, at para. 310. Initial ascertainability does not exist, so far as case law is concerned, unless specific property is earmarked as the trust property. Once this has occurred, and the trust has come into effect, the trust beneficiary can trace that property, whether it is converted into other forms, or, if money, it is mixed with other funds. See further chapter 26. If a statutory trust in favour of the Crown is imposed upon moneys withheld by the employer from the employee's wages as income tax due from the employee, but the statute also provides that the withheld moneys "shall be kept separate and apart" from the employer's own moneys, such separation is necessary before the trust can come into existence, and the withheld sums become traceable: *Dauphin Plains Credit Union Ltd. v. Xyloid Industries Ltd.*, [1980] 1 S.C.R. 1182, 108 D.L.R. (3d) 257 (S.C.C.), especially at 265-267 [D.L.R.] (see also *Neal v. Toronto Dominion Bank* (1997), 25 O.T.C. 142 (Ont. Gen. Div. [Commercial List]; and *Caisse Populaire Desjardins de l'Est de Drummond v. Canada*, 2009 CarswellNat 1568, 2009 CarswellNat 1569, [2009] 2 S.C.R. 94, 309 D.L.R. (4th) 323 (S.C.C.)). The position is different with deductions under the *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1, s. 227(4), (4.1), the *Canada Pension Plan*, R.S.C. 1985, c. C-8, s. 23(3), (4), and the *Employment Insurance*

Act, S.C. 1996, c. 23, s. 86(2), (2.1), because there withheld moneys are "deemed to be separate" from the employer's own fund, whether or not the employer actually separates them: *ibid*.

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TAB 10

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Alberta Court of Appeal

Iona Contractors Ltd. (Receiver of) v. Guarantee Co. of North America

2015 CarswellAlta 1286, 2015 ABCA 240, [2015] 9 W.W.R. 469, [2015] A.W.L.D. 2886, [2015] A.W.L.D. 2897, 19 Alta. L.R. (6th) 87, 255 A.C.W.S. (3d) 30, 26 C.B.R. (6th) 173, 387 D.L.R. (4th) 67, 44 C.L.R. (4th) 165, 602 A.R. 295, 647 W.A.C. 295

Ernst & Young Inc. in its capacities as Receiver and Manager and Trustee in the Bankruptcy of Iona Contractors Ltd., Respondent (Applicant) and The Guarantee Company of North America, Appellant (Respondent)

Marina Paperny, Frans Slatter, Keith Yamauchi JJ.A.

Heard: April 8, 2015
Judgment: July 16, 2015
Docket: Calgary Appeal 1401-0159-AC

Proceedings: reversing *Iona Contractors Ltd. (Receiver of) v. Guarantee Co. of North America* (2014), 40 C.L.R. (4th) 289, 2014 ABQB 347, 2014 CarswellAlta 940, K.M. Eidsvik J. (Alta. Q.B.)

Counsel: H.A. Gorman, Q.C., S. Jenkins (student-at-law), for Respondent
R.H. Shaban, J.W. MacLellan, for Appellant

Subject: Contracts; Corporate and Commercial; Insolvency

APPEAL by respondent surety from judgment reported at *Iona Contractors Ltd. (Receiver of) v. Guarantee Co. of North America* (2014), 2014 ABQB 347, 2014 CarswellAlta 940, 40 C.L.R. (4th) 289 (Alta. Q.B.), directing respondent to pay remaining holdback funds to trustee acting on behalf of bankrupt contractor.

***Frans Slatter J.A.*:**

1 This appeal relates to the entitlement to holdback funds that remain unpaid under a construction contract. The main players are:

- Iona Contractors, a now bankrupt contractor (represented by its bankruptcy trustee) that agreed to improve the north airfield for the Calgary Airport Authority;

- The Calgary Airport Authority which retained Iona, and owed the disputed sum of $997,716 remaining payable under the contract. Those funds are held in trust by the appellant's solicitors pending the resolution of this dispute;

- The appellant Guarantee Company of North America which issued a Labour and Material Payment Bond to the Airport Authority to ensure payment of Iona's obligations under the contract;

- A group of unpaid subcontractors, who Iona retained to perform work on the airfield, and who were subsequently paid out by Guarantee Company of North America under the Labour and Material Payment Bond;

- The Alberta Treasury Branches, Iona's secured creditor, which has a prior registered security interest against all of Iona's assets.

The chambers judge concluded that the Trustee in Bankruptcy of Iona Contractors was entitled to receive the unpaid funds from the Airport Authority, and to pay them to Alberta Treasury Branches: *Iona Contractors Ltd. (Receiver of) v. Guarantee Co. of North America*, 2014 ABQB 347 (Alta. Q.B.). The surety Guarantee Company of North America appeals.

Facts

2 In 2009 Iona and the Airport Authority entered into a contract for the construction of improvements on the airport's north airfield. Under the contract, the Airport Authority required Iona to deliver a Performance Bond, and a Labour and Material Payment Bond to guarantee that suppliers of materials and labour to the project would be paid. The appellant Guarantee Company of North America is the surety under both bonds.

3 By October 2010, work under the contract was substantially complete, but some of Iona's subcontractors remained unpaid. The Airport Authority withheld further payment. It used $182,869 ($105,000 + $77,869) of the remaining outstanding funds to complete deficiencies in the contract work, leaving $997,715.83 still in the Airport Authority's hands. Guarantee Company paid out $1.48 million under the Payment Bond to settle the outstanding accounts of Iona's subcontractors. It now claims the $997,715.83 that remains unpaid under the contract to recoup these payments.

4 In December 2010, Iona applied for protection under the *Companies' Creditors Arrangement Act*, RSC 1985, c. C-36. Iona was assigned into bankruptcy on March 18, 2011.

5 Guarantee Company argues that it is entitled to the remaining funds as the subrogee of the subcontractors because:

> (a) There is no money owed to Iona under the contract, because:
>
> (i) Iona is in breach, and
>
> (ii) the contract gives the Airport Authority the right to cure Iona's breaches by paying the unpaid subcontractors,
>
> and alternatively,
>
> (b) The remaining funds are impressed by a trust under the *Builders' Lien Act*, RSA 2000, c. B-7, s. 22.

Therefore, Guarantee Company argues, Iona's Trustee has no claim to the leftover funds.

6 The Trustee argues that:

> (a) The contract work was substantially completed, and Iona is entitled to payment of the remaining funds held back under the contract. It argues that the wording of the contract permitting the Airport Authority to cure Iona's breaches of the contract does not extend as far as paying unpaid subcontractors. In the alternative, any such payments would defeat the priority regime in the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 and are therefore impermissible, and
>
> (b) The trust provisions of the *Builders' Lien Act*, if they apply, would also offend the priority regime in the *Bankruptcy and Insolvency Act*, and they cannot assist the surety Guarantee Company in the circumstances.

The Airport Authority takes no position, and has paid the money into trust.

7 The chambers judge rejected both of Guarantee Company's arguments. On the contractual argument, she held at paras. 15-6, 26 that Iona was the only party with a contractual relationship with the subcontractors, and with a duty to pay the subcontractors. The Airport Authority had no "duty" to pay subcontractors. She held further at paras. 24-5 that the ability of the Airport Authority to hold back funds "required to have the Work completed", was not wide enough to cover the payment of unpaid subcontractors.

8 With respect to the second argument, the chambers judge held at paras. 33-4 that the statutory trust created by s. 22 of the *Builders' Lien Act* conflicted with the priority regime in the *Bankruptcy and Insolvency Act*, and so was inoperative in

these circumstances. She directed that the remaining holdback funds be paid to the Trustee, generating this appeal by Guarantee Company.

Issues and Standard of Review

9 The appellant Guarantee Company raises the same issues on appeal. The first issue is whether there are any funds owed to Iona under the contract, which depends on whether the Airport Authority had the ability to pay the unpaid subcontractors. The second issue is whether the trust provisions of the *Builders' Lien Act* conflict with the priority regime of the *Bankruptcy and Insolvency Act*.

10 The standard of review of the interpretation of contracts depends on the issue raised and the legal and factual context: *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2015 ABCA 121 (Alta. C.A.) at paras. 12-9. No parole evidence was introduced to suggest that the parties turned their mind to how these contractual provisions would operate in the circumstances that have arisen in this appeal. The main dispute over the meaning of the contract is now between non-parties to the contract. The proper interpretation of the contract turns largely on its wording. Whether the bare wording of the contract is, in any event, rendered inoperative because of conflict with the *Bankruptcy and Insolvency Act* is a question of law. Whether the trust provisions of the *Builders' Lien Act* are operative in these circumstances is also a question of law. The appropriate standard of review in this appeal is correctness.

The Contractual Argument

11 Guarantee Company argues that, under the terms of the contract, there is no money owing to Iona. It argues that the contract allows the Airport Authority to remedy breaches of the contract by Iona, which includes paying subcontractors that Iona did not pay.

12 This argument is premised on the definition of "Work" in the contract:

> 1.1.54 "Work" means the total construction and related services required by the Contract to be performed and Products to be supplied under the Contract, and includes everything that is necessary to be done, furnished or delivered by the Contractor to perform the Contract.

Clause 13.1.1 places an obligation on Iona to pay its subcontractors, and so Guarantee Company argues that this is "something that is necessary to be done" under the contract. If Iona is in breach of that part of the "Work", then the Airport Authority is entitled to cure the default under clause 6.3.3(d):

> 6.3.3 If any part of the Work is taken out of the Contractor's hands:
>
> . . .
>
> (d) the Contractor's right to any further payment that is due or accruing due (including any holdback or progress claim) for the Work taken out of the Contractor's hands is extinguished, save and except that portion (if any) which is not required by the Airport Authority to have the Work completed or to compensate it for any consequential damages or losses arising out of the taking of the Work or any part of it out of the Contractor's hands.

On this argument, if a subcontractor is not paid then the "Work" is not complete, and the Airport Authority is entitled to take paying the subcontractors "out of the Contractor's hands". If the Airport Authority pays the subcontractors directly, it can deduct the funds so used from what is otherwise owing to Iona.

13 The Trustee does not accept this line of argument, primarily because it notes that there is no contractual relationship between the Airport Authority and the subcontractors, and therefore no "obligation" on the Airport Authority to pay subcontractors. That is true, but not directly relevant at this stage of the analysis. The Airport Authority has no "obligation" to do *any* of the "Work"; it was Iona that was obliged to improve the airfield and perform all of the covenants in the contract, including paying

the subcontractors. The issue at this stage is not whether the Airport Authority has an "obligation" to pay the subcontractors (or otherwise complete the Work), but whether it has the "right" to do so under clause 6.3.3(d).

14 As the chambers judge noted at para. 21, this argument is "compelling", but it is not necessary to resolve whether, on the wording of the contract, paying the subcontractors is "something that is necessary to be done under the Contract", and therefore part of the "Work". Even if the paying of the subcontractors was authorized under clause 6.3.3(d) prior to any bankruptcy, the provisions of that clause become inoperative after bankruptcy.

15 There is nothing objectionable about a provision in a contract allowing the owner to complete work that was not performed by a bankrupt contractor, and to deduct the amount from what was otherwise owing to the contractor. Section 97(3) of the *Bankruptcy and Insolvency Act* allows such set-offs. After a bankruptcy, however, no such clause is effective to the extent that it gives a discretion to the owner to pay creditors of the bankrupt contractor otherwise than as authorized in the *Bankruptcy and Insolvency Act*: *A.N. Bail Co. v. Gingras*, [1982] 2 S.C.R. 475 (S.C.C.), at pp. 485-7. It is at this stage of the analysis that it is relevant that the owner has no "obligation" to pay the subcontractors, but only the "right" or "discretion" under clause 6.3.3(d). After bankruptcy, that discretion cannot be exercised in such a way that it disturbs the priorities in the *Bankruptcy and Insolvency Act*.

16 This point was confirmed in *Horizon Earthworks Ltd., Re*, 2013 ABCA 302, 87 Alta. L.R. (5th) 335, 556 A.R. 344 (Alta. C.A.) where the contract gave the owner municipality an explicit right to pay unpaid subcontractors:

> 1.2.35 The Contractor shall promptly pay ... any subcontractor .... In the event of failure by the Contractor at any time to do so ... the Department may retain out of any money due on any account to the Contractor from the Department such amount as the Department may deem sufficient to satisfy the same .... The Department may pay directly to any claimant such amount as the Department determines is owing, rendering to the Contractor the balance due after deducting the payments so made.

The Court noted at para. 41 that this clause gave the owner a wide discretion to pay any unpaid subcontractors. However, once a bankruptcy intervened, this discretion could no longer be exercised:

> ... once bankruptcy occurs any monies owing become the property of the Trustee, and the terms of the contract do not replace the terms of the *BIA* to prefer some of Horizon's creditors over others. Once Horizon was placed in bankruptcy, all creditors stand on an equal footing vis-à-vis Horizon, and claims must be submitted in accordance with the provisions of the *BIA* section 69.3. Further, clause 1.2.35 embodies a discretion, not a commitment, on the part of Greenview, the exercise of which would reduce what Greenview might owe to Horizon either for work already billed or work to be billed.

As this passage notes, if the owner had an obligation to pay the subcontractors, and not just a discretion, the result would be different.

17 The appellant argues that even if the Airport Authority merely had a discretion (and not an "obligation") to pay subcontractors under the contract, it does have such an obligation under the Labour and Material Payment Bond. The appellant argues that when the construction contract and the bond are read together, they disclose an obligation on the part of the Airport Authority to "mitigate" the exposure of the surety, which includes using the holdback funds to pay the subcontractors. Even if the agreements, when read together, disclose some intention to minimize the exposure of the surety, the private arrangements between the owner, the contractor, and the bonding company cannot affect the rights of third parties like the Trustee in bankruptcy and the secured creditor. Whatever rights the appellant may have were not registered at the Personal Property Registry, and cannot displace the rights of the secured party. Further, in *Greenview* the Court confirmed that the existence of a surety and a bonding arrangement did not change the outcome.

18 It follows that the appellant is unable to succeed based on its argument that no money was due to Iona under the contract.

The Trust Argument

19 In the alternative, Guarantee Company argues that it is entitled to the disputed funds by virtue of the trust created by s. 22 of the *Builders' Lien Act*. It argues that the unpaid subcontractors are the beneficiaries of that trust, and that it is subrogated to their position. The Trustee replies that the trust created is inconsistent with the priorities set by the *Bankruptcy and Insolvency Act*, and so cannot assist Guarantee Company.

The Builders' Lien Act

20 The general provisions of the *Builders' Lien Act* are well known. At common law, subcontractors have no claim against the owner of property that they improve, because there is no privity of contract between them. The *Builders' Lien Act* provides a partial remedy to that problem. It allows an unpaid subcontractor to file a lien against the owner's property, and potentially to sell the owner's property to satisfy its claim. The owner can post security in substitution for the lien, in which case the subcontractor's rights are transferred to the security. The owner can also limit its exposure by keeping statutorily mandated "holdbacks", which it can decline to pay to the contractor until it is satisfied that there are no liens. If necessary, the owner can pay the holdback into court, and allow the contractor and the subcontractors to litigate entitlement.

21 The *Builders' Lien Act* therefore creates a comprehensive, integrated system that provides some assurance to subcontractors that they will get paid for improving land. A portion of that overall regime is a statutory trust found in s. 22:

> 22(1) Where
>
> (a) a certificate of substantial performance is issued, and
>
> (b) a payment is made by the owner after a certificate of substantial performance is issued
>
> the person who receives the payment, to the extent that the person owes money to persons who provided work or furnished materials for the work or materials in respect of which the certificate was issued, holds that money in trust for the benefit of those persons.
>
> (2) When a person other than a person who received the payment referred to in subsection (1)
>
> (a) is entitled to the money held in trust under this section, and
>
> (b) receives payment pursuant to that trust,
>
> the person, to the extent that the person owes money to other persons who provided work or furnished materials for the work or materials in respect of which the payment referred to in clause (b) was made, holds that money in trust for the benefit of those other persons.
>
> (3) A person who is subject to the obligations of a trust established under this section is released from any obligations of the trust when that person pays the money to
>
> (a) the person for whom that person holds the money in trust, or
>
> (b) another person for the purposes of having it paid to the person for whom the money is held in trust.

Neither the trust provisions, nor any other portion of the *Builders' Lien* statutory regime should be read in isolation. They are all a part of one comprehensive package relating to property and civil rights in the province.

22 These trust provisions are narrow in their operation. They only apply when "a certificate of substantial performance is issued", as occurred here. That certificate is a precondition to the release of the holdback funds under s. 21, which to that point have been held by the owner to ensure that the subcontractors will be paid, and to satisfy the owner's obligation should a lien be filed. Section 22 ensures that when the remaining funds are paid out, they will end up in the hands of any unpaid subcontractors. Section 22 effectively uses the mechanism of a trust to avoid the diversion of the holdback funds, after the issue

of the certificate of substantial completion, but before the funds actually reach the unpaid subcontractors. If, in this situation, the $997,716 had been paid by the Airport Authority to Iona or the Trustee, under the statute the recipient would have held the funds in trust for the subcontractors.

23 It is obvious that the *Builders' Lien Act* could have an effect on the entitlement to payments on bankruptcy. A subcontractor which has a valid lien, or another valid claim under the *Builders' Lien Act*, might become entitled to a payment to which it would not be entitled as a mere unsecured creditor. No one has suggested that these provisions, relating as they do to property and civil rights in the province, necessarily offend the bankruptcy distribution regime.

24 An added complication in this appeal is that airport lands fall under federal jurisdiction, and so cannot be liened. This is primarily because it would be incompatible with the regulation of airports to permit any portion of the airport lands to be sold to satisfy the liens. In this case, the parties agree that the trust provisions in s. 22 can nevertheless apply, and the appeal was argued on that basis: see *Minneapolis-Honeywell Regulator Co. v. Irvine & Reeves Ltd.*, [1955] S.C.R. 694 (S.C.C.); *T. McAvity & Sons Ltd. v. Canadian Bank of Commerce*, [1959] S.C.R. 478 (S.C.C.); *Kerr Interior Systems Ltd., Re*, 2009 ABCA 240 (Alta. C.A.) at paras. 14, 17, (2009), 6 Alta. L.R. (5th) 279, 457 A.R. 274 (Alta. C.A.). The trust provisions should not, however, be interpreted as if they were a "stand alone" trust; they are still a part of the overall scheme in the *Builders' Lien Act*.

The Bankruptcy and Insolvency Act

25 The *Bankruptcy and Insolvency Act* is federal legislation, the general provisions of which are also well known. It governs the orderly distribution of the estates of bankrupt persons, and in particular specifies the priority in which competing claims will be paid. Provisions like s. 72 confirm that the *Bankruptcy and Insolvency Act* operates against the background of property and civil rights created by provincial law. In the event of an operational conflict, the federal provisions prevail.

26 The *Bankruptcy and Insolvency Act* incorporates numerous provisions that determine the priority of payments to claimants in a bankruptcy. In the most general terms, the scheme is:

> (a) Under s. 67(1), only "property of the bankrupt" is available for distribution to any class of claimants. Under s. 67(1)(a) property "held by the bankrupt in trust for any other person" is not considered to be property of the bankrupt, and so is not available to the creditors of the bankrupt.
>
> (b) Under s. 136(1), the scheme of distribution is made "subject to the rights of secured parties". Secured parties are thus entitled to enforce their security in accordance with provincial law, without regard to the scheme in the *Bankruptcy and Insolvency Act*.
>
> (c) Section 136 next lists, in order of priority between themselves, a dozen categories of claims that have priority over general unsecured claims. Priority is given to things like funeral expenses, costs of administration, some wage claims, etc.
>
> (d) Finally, s. 141 provides that all other claims will be payable rateably, subject to a few specific statutory exceptions.

The categorization of a claim for the purposes of relative priority is a matter of federal law. Thus, the provinces cannot define what is a "trust" or a "secured party" for the purposes of bankruptcy law; which claims are included in those various categories is a matter of federal law. This ensures the uniformity of bankruptcy law across Canada. But while uniformity of bankruptcy law is an important value, that does not mean that results will not vary from province to province. Since "property and civil rights" can vary depending on provincial law, a type of creditor in one province may be in a different position after bankruptcy than the same type of creditor in another province.

Interaction of the Federal and Provincial Law

27 Because federal bankruptcy legislation is enacted against the background of provincial laws respecting property and civil rights, there will be occasions when a different outcome will result depending on which law is applied. As mentioned, in

case of operational conflict federal law prevails. Obviously a deliberate attempt by a province to change the order of priority in bankruptcy will be ineffective, but an operational conflict can arise short of that.

28 There have been a number of cases in which operational conflicts have arisen:

(a) In *Rainville c. Québec (Sous-ministre du Revenu)* (1979), [1980] 1 S.C.R. 35 (S.C.C.) the provincial statute purported to create a priority for unpaid sales tax debts owed to the province, by deeming them to be a privileged debt. The relative priority for such claims was specifically dealt with in what is now s. 136(1)(j), which applied "notwithstanding any statutory preference to the contrary". This provincial attempt to create a new category of "privileged creditor" created an operational conflict with federal legislation, and was ineffective.

(b) In *Deloitte, Haskins & Sells Ltd. v. Alberta (Workers' Compensation Board)*, [1985] 1 S.C.R. 785 (S.C.C.) the provincial statute purported to create a charge on all of the property of the employer, thereby making the Board a secured creditor. The priority for Workers' Compensation Board claims was specifically dealt with in what is now s. 136(1)(h), and this attempt to create a secured claim was also ineffective.

(c) *Québec (Commission de la santé & de la sécurité du travail) c. Banque fédérale de développement*, [1988] 1 S.C.R. 1061 (S.C.C.) was another attempt to turn a workers' compensation claim into a secured claim. This provision was also held to be ineffective, even if the enforcement of the secured claim took place outside the bankruptcy regime.

(d) The provincial statute in *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24 (S.C.C.) attempted to create a priority for unpaid sales taxes. Rather than deeming the Crown's claim to be "secured", this legislation deemed a "trust" in support of the unpaid claim, in an attempt to withdraw the assets from the bankruptcy regime under s. 67(1)(a). This "trust" was held not to be a true trust for bankruptcy purposes, and the priority of the claim was governed by what is now s. 136(1)(j). While the provinces could define "trust" for purposes of provincial legislation, only the common law definition of a "trust" met the requirements for a trust under federal bankruptcy law.

(e) In *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453 (S.C.C.) the provincial statute did not purport to create either a secured claim or a trust. Rather it deemed the debtor of the bankrupt to be the surety or guarantor of the bankrupt's obligations to the Worker's Compensation Board. If the bankrupt did not pay the Board, the debtor had to pay, but it could then set off what it had paid against its debt owing to the bankrupt. The effect of the regime was to divert funds from the bankrupt's estate to pay the Board. This statutory technique was also held to create an operational conflict.

Some of these challenged provisions affected the payment priorities set out in the *Bankruptcy and Insolvency Act* more directly than the ones involved in this appeal. A feature of most of them was that they purported to create interests with priority that attached to all the assets of the bankrupt, not just to any discrete asset: see *Henfrey Samson Belair* at pp. 33-4.

29 In *Husky Oil* the Court set out certain principles for evaluating the effectiveness of provincial legislation after bankruptcy. It rejected two possible rules:

(a) First, it rejected (at para. 31) the "broader 'bottom line' approach", which postulated that any provincial law that affects the final result in bankruptcy would create an operational conflict. Such a broad rule was inconsistent with the accepted premise that property and civil rights were defined, in many fundamental ways, by provincial legislation.

(b) The Court also rejected (at para. 32) the "narrower 'jump the queue' approach", by which an operational conflict would only arise if there were a manifest intention to change priorities in bankruptcy. The scope of operational conflict was wider than this approach.

In the result, the Court endorsed a position between these extremes.

30 *Husky Oil* sets out (at paras. 33, 40) six propositions underlying the proper approach:

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

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

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

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

(5) in determining the relationship between provincial legislation and the *Bankruptcy Act*, the form of the provincial interest created must not be allowed to triumph over its substance. The provinces are not entitled to do indirectly what they are prohibited from doing directly;

(6) there need not be any provincial intention to intrude into the exclusive federal sphere of bankruptcy and to conflict with the order of priorities of the *Bankruptcy Act* in order to render the provincial law inapplicable. It is sufficient that the effect of provincial legislation is to do so.

These propositions, unfortunately, do not establish where the line is between effective and inoperative provincial legislation. Many of them merely confirm that the terms and concepts used in the *Bankruptcy and Insolvency Act* must be determined by federal law, which prevails over provincial law. The first proposition, in particular, cannot be read as endorsing the explicitly rejected "broader 'bottom line' approach". Whether any provincial scheme is in operational conflict with the bankruptcy regime must be determined by examining the purposes and effect of the provincial legislation within its statutory context.

31 Because *Husky Oil* rejected the "broader 'bottom line' approach", it is not sufficient to note that the impugned provincial legislation has some effect on priorities. It is only where provincial law interacts with federal bankruptcy law (i.e., somebody is insolvent) that the issue even arises. Obviously, if everyone is solvent, nobody cares about trusts, secured interests or priorities. If everyone is solvent, nobody cares about builders' liens either. Whether anybody has a secured or prior claim depends on provincial law over property and civil rights, so in one sense all priorities are set by provincial law. Merely noting that a provincial law has some effect on priorities is not determinative.

The Operational Validity of the Builders' Lien Act

32 On what side of the line do the trust provisions in s. 22 of the *Builders' Lien Act* stand?

33 An important consideration is that these trust provisions do not directly, intentionally, or primarily affect the order of payment in bankruptcy. They are part of a larger statutory scheme designed to create new civil rights for unpaid subcontractors. The holdback provisions and the trust provisions play a supportive role in the overall regime, and are primarily in place to prevent the unjustified erosion of the lien rights created by the statute. There is no attempt to use "form to override substance"; the trust is a legitimate part of the overall scheme. However, *Husky Oil* confirms that an intention to reorder priorities is not necessary to create an operational conflict.

34 *Henfrey Samson Belair* at pp. 34-5 confirms that the definition of "trust" encompasses, at least, all common law trusts. The common law test for a trust requires three certainties: certainty of intention, certainty of objects and certainty of subject matter. In most common law trusts, the "intention" arises because (a) the settlor forms and declares an intention to hold property in trust, or (b) property is transferred to somebody with the intention that the recipient hold the property in trust. A statutory trust is imposed by law, so it is not "intentional" in that sense; for a statutory trust to meet the common law test for a trust, the general law must be applied by analogy.

35 *Henfrey Samson Belair* at p. 34 concluded:

> In summary, I am of the view that s. 47(a) should be confined to trusts arising under general principles of law, while s. 107(1)(j) should be confined to claims such as tax claims not established by general law but secured "by her Majesty's personal preference" through legislation. (emphasis added)

Bassano Growers Ltd. v. Price Waterhouse Ltd., 1998 ABCA 198 (Alta. C.A.) at para. 12, (1998), 66 Alta. L.R. (3d) 296, 216 A.R. 328 (Alta. C.A.) interpreted *Henfrey Samson Belair* as accepting that some statutory trusts could qualify under the "general principles of law":

> This is not to say that a trust that meets the requirements of the general law, and therefore qualifies as a trust under s. 67(1)(a) of the BIA, may not have its genesis in a deemed or statutory trust. It must, however, satisfy the essential requirements of a valid trust under the general law in order to do so. Here, the purported trust fails to meet the necessity for certainty of subject-matter.
>
> (emphasis added)

The alternative interpretation of *Henfrey Samson Belair* would be that no statutory trust could ever qualify as a trust "arising under general principles of law", if only because statutory trusts are in one sense "involuntary". That alternative interpretation is, however, inconsistent with the specific findings in *Henfrey Samson Belair* at p. 34 about the statutory trust that was the subject of that decision:

> ... At the moment of collection of the tax, there is a deemed statutory trust. At that moment the trust property is identifiable and the trust meets the requirements for a trust under the principles of trust law. The difficulty in this, as in most cases, is that the trust property soon ceases to be identifiable. The tax money is mingled with other money in the hands of the merchant and converted to other property so that it cannot be traced. At this point it is no longer a trust under general principles of law. ... There is no property which can be regarded as being impressed with a trust. Because of this, s. 18(2) goes on to provide that the unpaid tax forms a lien and charge on the entire assets of the collector, an interest in the nature of a secured debt. (emphasis added)

The problem with the trust in *Henfrey Samson Belair* was that there was no certainty of subject matter, not that a statutory trust could never qualify as a "trust arising under general principles of law".

36 In most statutory trust situations, only the third certainty will be in play. Certainty of intention and certainty of objects will usually be satisfied by the terms of the statute. If the statute uses the word "trust", the intention is clear: *0409725 B.C. Ltd., Re*, 2015 BCSC 561 (B.C. S.C.) at para. 22. Usually the intended beneficiary of the trust will also be obvious. The only potential for uncertainty is over the assets that are covered by the trust.

37 The trusts created by s. 22 meet the requirements of the general principles of trust law:

> (a) There is certainty of intention. The "intention" of s. 22 is clearly to create a trust;
>
> (b) There is certainty of object. The beneficiaries of the trust are clearly the unpaid subcontractors;
>
> (c) There is certainty of subject matter. Section 22 provides that once a certificate of substantial completion is issued, any "payment by the owner" is subject to the trust. At this stage the owner's primarily obligation will be to pay out the holdback, and its obligation to do so represents a discrete chose in action. That chose in action is the subject matter of the trust. If, as the Trustee postulates, the Airport Authority had written a cheque for $997,716 to Iona, that bill of exchange and those funds would have been trust assets in Iona's hands.

It follows that the provisions of s. 22 meet the requirements of a common law trust. There is no deliberate attempt to reorder priorities in bankruptcy, and the province is not attempting to achieve indirectly what it cannot do directly. These considerations,

coupled with the fact that the trust provisions of s. 22 are merely a collateral part of a complex regime designed to create security for unpaid subcontractors, leads to the conclusion that there is no operational conflict.

38 One of the objections to the statutory scheme in *Henfrey Samson Belair* was that the trust in question did not attach to any specific funds. It purported to attach to all the assets of the bankrupt tax collector as if it were a secured claim, like a type of general floating charge. The trust in s. 22 does not suffer from this deficiency, because it only attaches to the discrete sum of money paid by the owner after the certificate of substantial completion has been issued. The other assets of the owner (the Airport Authority) and the contractor (Iona) are unaffected. There is no attempt to throw a general trust over all the assets of the bankrupt.

39 A number of decisions touch on this issue. In *John M.M. Troup Ltd. v. Royal Bank*, [1962] S.C.R. 487 (S.C.C.) the Court considered the provisions of Ontario's *Mechanics' Lien Act*. That statute purported to create a trust over "all funds received by a contractor on account of the contract price", and therefore had a wider reach than the Alberta statute involved here. The contractor had one account at the Royal Bank, into which it deposited funds it received from many projects all over the province. The Bank was sued for allegedly appropriating trust funds, but on the particular facts the Court held that the Bank could not reasonably have suspected that the funds were deposited in breach of any trust, or that there were any unpaid lien claimants. In response to an alternative argument about the validity of the trust, the Court held at p. 494: "It is suggested that the legislation is in conflict with federal legislation on banking and bankruptcy but in my opinion the conflict does not exist in either field." *Troup* supports the appellant's proposition that the trust provisions under the *Builders Lien Act* are effective even after bankruptcy. The decision is, however, inconclusive because the statement relied on is *obiter*, and must be read in the light of the subsequent decisions, discussed *supra*, paras. 28-30.

40 In *Duraco Window Industries (Sask.) Ltd. v. Factory Window & Door Ltd. (Trustee of)* (1995), 135 Sask. R. 235, 34 C.B.R. (3d) 196 (Sask. Q.B.) the bankrupt deposited all of its receipts from several projects into a single bank account. On bankruptcy, there was a balance remaining in that bank account. Since the statute in question created a trust over "all amounts owing" to a contractor or subcontractor, an unpaid supplier argued that all of these funds were impressed with a trust. The court held that there was no certainty of intention, because there was no instrument that showed an intention by the supplier and the bankrupt to create a trust. If *Duraco Window* is correct, then no statutory trust will ever meet the common law test. If the wording of the statute creating a trust is not sufficient to demonstrate an intention to create a trust, no statutory trust will ever be effective, because the trustee and beneficiary are never involved at that stage. This is inconsistent with the decision in *Henfrey Samson Belair* which implies that some statutory trusts can be effective. The real problem with the trust created in *Duraco Window* is that it lacked certainty of subject matter, because it purported to throw a general trust over all of the assets of the bankrupt. It was impossible for any third party to tell which assets of the contractor were trust assets, and which were not.

41 *Roscoe Enterprises Ltd. v. Wasscon Construction Inc.* (1998), 169 Sask. R. 240, 161 D.L.R. (4th) 725 (Sask. Q.B.) was another decision arising out of a statutory trust over "all amounts owing" to a contractor or subcontractor. The balance of the funds owing to the bankrupt contractor had been paid into court, and the dispute was between the Trustee and the unpaid subcontractors. This decision also interpreted *Henfrey Samson Belair* as invalidating all statutory trusts, and followed *Duraco Window*.

42 In *D & K Horizontal Drilling (1998) Ltd. (Trustee of) v. Alliance Pipeline Ltd.*, 2002 SKQB 86, 216 Sask. R. 199, 33 C.B.R. (4th) 217 (Sask. Q.B.) the bankrupt contractor had substantially completed its contract at the date of its bankruptcy, leaving unpaid subcontractors. The owner paid the outstanding funds into court to vacate liens on the land. The court held at para. 23 that the liens were valid interests that could be enforced after bankruptcy, and that the funds in court were merely a substitute for that security. Accordingly, the subcontractors were entitled to the funds. It was not necessary to rely on the trust provisions in the statute, but in the alternative the court at para. 37 distinguished *Duraco Window* and *Roscoe Enterprises* on the basis that the funds in question in *D&K* were paid into court to discharge the liens.

43 In *Royal Bank of Canada v. Atlas Block Co.*, 2014 ONSC 3062 (Ont. S.C.J.) at para. 36, (2014), 15 C.B.R. (6th) 272, 37 C.L.R. (4th) 286 (Ont. S.C.J.) it was held that "there is no apparent reason why a deemed trust under the [*Construction Lien Act*] should be treated differently than any other provincial statutory deemed trust for the purposes of para. 67(1)(a) of the *BIA*."

Atlas Block, like *Duraco Window* and *Roscoe Enterprises*, reads the prior Supreme Court of Canada authorities as essentially holding that no statutory trust will be effective after bankruptcy. This approach, however, appears to be inconsistent with the decision in *Husky Oil* which specifically rejected the "broader 'bottom line' approach". If the Supreme Court believed that no statutory trust was ever effective, or that all provincial statutory trusts were indistinguishable for the purposes of bankruptcy law, it would have just said so in *Henfrey Samson Belair*. In effect, the "broader 'bottom line' approach" would be the prevailing principle. On the contrary, the Court held at p. 34 that the statutory trust there did meet the first two requirements of a common law trust. By recognizing that there was room between the "broader 'bottom line' approach" and the "narrower 'jump the queue' approach", the Court essentially recognized that some provincial statutory trusts could be effective: *0409725 B.C. Ltd., Re* at para. 20. It is simply not enough to say that "all statutory trusts are the same".

44 The remaining issue is whether a trust must be in effect prior to the bankruptcy, in order to be effective after the bankruptcy. There is some passing suggestion in a few cases that a trust arising after bankruptcy is ineffective, but there is no binding authority to that effect. It is certainly true that no one can create a trust after bankruptcy in an attempt to withdraw assets from the estate and reorder priorities, but that does not mean that legitimate trusts that arise or are perfected after the bankruptcy are ineffective.

45 Section 67(1)(a) does not impose any temporal limit on when the trust arises, and only requires that the property be "held by the bankrupt in trust for any other person". Requiring that the trust exist prior to the bankruptcy might generate anomalous results. For example, had the Airport Authority written the cheque for the holdback, and mailed it to Iona, the date of receipt might be critical. If the trust must be perfected before bankruptcy, and had Iona received and deposited the cheque the day before the bankruptcy, the trust would be valid. However, if the same cheque arrived and Iona deposited it the day after the bankruptcy, the trust would not be valid. That does not appear to be a commercially sensible result. Another example would arise if the bankrupt became a testamentary trustee of an estate as a result of a death or other event that occurred after the bankruptcy. Yet another example would be of a bankrupt lawyer who came into possession of trust property after his or her bankruptcy. There is no reason in principle why such trust assets should accrue to the benefit of the unsecured creditors of the bankrupt, rather than the intended beneficiaries of the trust.

46 There is also uncertainty about the concept of the trust "existing" on the date of bankruptcy. It could mean simply that on the date of bankruptcy the trust instrument existed, or the class of beneficiaries existed, or that the trust property had come into existence and was identifiable, or some combination of those. In this case the "trust" clearly existed before Iona's bankruptcy, in the sense that the provisions of the *Builders Lien Act* were in place well before its bankruptcy. The disputed funds were "held back" in accordance with the legislation before Iona's bankruptcy. They were also "payable" before its bankruptcy. The only sense in which the trust did not "exist" on the date of bankruptcy is that the Airport Authority had not yet drawn the cheque to pay the holdback funds, nor had the deemed trustee received those funds. As noted, *supra* para. 22, the trust under the statute attaches to the holdback funds themselves when they are paid out.

47 It can be accepted that a trust cannot be created after bankruptcy if its intent or effect is to defeat the order of priorities under the *Bankruptcy and Insolvency Act*. The trusts under the *Builders' Lien Act*, however, have none of those attributes. The lien rights arise the minute the work is done, and the funds which are captured by the trust were quantified in the hands of the Airport Authority on the date of bankruptcy: *Andrea Schmidt Construction Ltd. v. Glatt* (1979), 25 O.R. (2d) 567 (Ont. H.C.) at para. 12, (1979), 104 D.L.R. (3d) 130 (Ont. H.C.) affm'd (1980), 28 O.R. (2d) 672, 112 D.L.R. (3d) 371 (Ont. C.A.). Nothing in this case about the timing of the formation of the trust or the bankruptcy would render the statutory trust invalid or inoperative.

Involvement of the Surety

48 In this case the subcontractors were not paid directly by Iona or the Airport. They were in fact paid by Guaranty Company under the Payment Bond. The intervention of the surety does not change the analysis, since the surety is subrogated to the rights of the unpaid subcontractors: *EC & M Electric Ltd. v. Medicine Hat General & Auxiliary Hospital & Nursing Home (District No. 69)* (1987), 76 A.R. 281, 50 Alta. L.R. (2d) 48 (Alta. Q.B.). Once the appellant surety paid the subcontractors, it became entitled to enforce all of their rights under the *Builders' Lien Act*. The funds in question which were held by the Airport Authority are still intact, and available to discharge the trust. Those funds should now be paid to Guarantee Company.

Conclusion

49 In conclusion, the disputed holdback funds are impressed by a trust under the *Builders Lien Act*, and are therefore not property of the bankrupt. The appeal is allowed, and the disputed funds should be paid to the appellant.

***Keith Yamauchi J.A.*:**

I concur:

***Marina Paperny J.A.* (dissenting):**

Introduction

50 I would dismiss the appeal. For the reasons that follow, I agree with the disposition of my colleagues on the first issue. However, I respectfully disagree with their conclusion on the standard of review, and with their analysis and conclusion regarding the existence of a common law trust in these circumstances.

Background

51 The Calgary Airport Authority (Airport) and Iona Contractors Ltd. (Iona) entered into a contract in 2009 for the construction of improvements on the Airport's north airfield (the Contract). By October 2010, work under the Contract was substantially complete and Iona applied to receive payment. The Airport, however, had received notice that some of Iona's subcontractors remained unpaid, and withheld further payment.

52 In December 2010, Iona applied in Ontario for protection under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36. Iona was assigned into bankruptcy on March 18, 2011, and Ernst & Young Inc. was appointed Trustee.

53 As a pre-condition to the Contract, the Airport required Iona to deliver a Performance Bond to guarantee the completion of the project, and a Labour and Material Payment Bond (Payment Bond) to guarantee that suppliers of materials and labour to the project would be paid. The appellant Guarantee Company of North America (GCNA) is surety with respect to both bonds.

54 The Airport called on GCNA, as surety under the Payment Bond, to pay the outstanding accounts of Iona's subcontractors. GCNA paid out $1.48 million to subcontractors.

55 The Airport had retained just over $1.1 million in holdback funds from Iona at the time of substantial completion. It used $105,000 to complete deficiencies remaining in the contract work, leaving $997,715.83 still in the Airport's hands (the Funds).

56 The Trustee takes the position that the Funds are owed to Iona under the Contract and therefore should be paid to it as Trustee of Iona. The Trustee proposes to forward the Funds to Alberta Treasury Branches, Iona's secured lender.

57 GCNA argues that it is entitled to the Funds as subrogee to the Airport. Its argument is twofold. First, GCNA argues that, because Iona breached the terms of the Contract, the Airport is entitled to withhold payment of the Funds. Accordingly, the Funds are not a debt payable to Iona and do not form part of Iona's estate on the bankruptcy. Instead, the Funds should be paid to GCNA, as subrogee to the Airport.

58 Alternatively, if the Funds are due to Iona, they are impressed with a trust pursuant to the trust provisions of s 22 of the Alberta *Builders' Lien Act*, RSA 2000, c B-7 (*BLA*), and therefore do not form part of the bankrupt's estate by virtue of s 67 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 *(Bankruptcy Act)*.

59 The chambers judge considered and dismissed both of these arguments. GCNA appeals.

Issues on Appeal

60 GCNA argues the same two issues on the appeal:

1. Are the Funds a debt payable to Iona?

2. If the Funds are payable to Iona, are they impressed with a trust such that they are exempted from the bankrupt's property pursuant to s 67 of the *Bankruptcy Act*?

Standard of Review

61 The Supreme Court has recently clarified that "[c]ontractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix": *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53 (S.C.C.) at para 50. Accordingly, the chambers judge's interpretation of the contractual documents at issue here is entitled to deference. I agree with my colleagues, however, that the impact of the *Bankruptcy Act* on the effect of the contract is a question of law to which the correctness standard applies.

62 Likewise, the interaction of the *Bankruptcy Act* and the *BLA* raises questions of law. The chambers judge's characterization of whether the circumstances here give rise to a "trust" for purposes of s 67 of the *Bankruptcy Act* is a matter of mixed fact and law, and also entitled to deference absent palpable and overriding error or an extricable error of law.

Analysis

1. Are the Funds a debt payable to Iona under the Contract?

63 GCNA argues that the Funds are not a debt payable to Iona and therefore do not form part of Iona's estate. The chambers judge disagreed, finding that the balance of the Funds (after deducting that portion paid by the Airport and GCNA to complete the project) is payable to Iona under the Contract. She ordered that net amount, $919,846.83, be paid to the Trustee.

64 GCNA makes several arguments based on the language of the Contract and the Payment Bond and on the general law of surety. They all lead to this: that the Airport is required to mitigate the surety's loss in making payments of some $1.48 million to subcontractors under the Payment Bond. Iona is not entitled to payment under the Contract to the extent that it has failed to meet its obligation to pay its subcontractors and suppliers. Accordingly, the remaining funds should be paid to GCNA, not to the Trustee.

65 There are several relevant provisions in the Contract between Iona and the Airport, all of which were reviewed by the chambers judge.

66 Under the Contract, the Airport has no duty to pay Iona's subcontractors and no contractual relationship with them: GC 1.4.1. Iona, as contractor, is required to enter into agreement with subcontractors and suppliers, and is further obliged to pay its subcontractors at least as often as the Airport is obliged to pay Iona: GC 3.12.1 and 13.1.1. Iona is also required to provide statutory declarations to the Airport regarding the status of any obligations or claims by subcontractors or otherwise arising under the Contract: GC 13.1.2.

67 The Contract also deals with the situation where Iona becomes insolvent or commits an act of bankruptcy. In such circumstances, the Airport may take any part of the Work [1] out of the Contractor's hands (GC 6.3.1), and may then "employ such means as it sees fit to have the Work completed at the Contractor's cost and expense" (GC 6.3.2). The obligation of the Airport to make further payments to the Contractor in this situation is set out in GC 6.3.3(d):

> 6.3.3(d) the Contractor's right to any further payment that is due or accruing due (including any holdback or progress claim) for the Work taken out of the Contractor's hands is extinguished, *save and except that portion (if any) which is not required by the Airport Authority to have the Work completed or to compensate it for any consequential damages or losses arising out of the taking of the Work or any part of it out of the Contractor's hands.*

[emphasis added]

68 GC 13.7.1 gives the Airport the right to set-off costs incurred to complete the Work against any amount payable to Iona:

> 13.7.1 In addition to any right of set-off or deduction given or implied by law or the Contract, the Airport Authority may at any time set-off against any amount payable to the Contractor any amount payable by the Contractor to the Airport Authority either under the Contract or any other contract between the Contractor and the Airport Authority under which the Contractor has an undischarged obligation to perform or supply work, labor or material or under which the Airport Authority has exercised its rights to take work out of the Contractor's hands.

69 The Contract contemplates that the Airport was entitled to complete the Work at Iona's expense. It did so, in the amount of $105,000. The chambers judge also permitted the set-off of an additional $77,869, paid by GCNA on behalf of the Airport, for work necessary to complete the project. The Airport is expressly entitled to retain those amounts from any payments due to Iona under the Contract. What the Contract does not say is that the Airport is obliged to pay Iona's subcontractors (to the contrary, the Contract expressly places that obligation solely on Iona). Nor does it say that the Airport is entitled to pay the subcontractors and retain that amount from contractual payments otherwise due to Iona. As the chambers judge pointed out, the Contract could have provided for that course of action, but it does not.

70 GCNA argues that Iona's breach of contract entitled the Airport to withhold *all* further payment. It says that Iona failed to satisfy its obligations under the Contract by failing to, *inter alia*, pay its subcontractors pursuant to GC 3.12.1 and provide the statutory declaration required pursuant to GC 13.1.2. It argues that payment of those subcontractors was part of Iona's responsibilities under GC 13.1.1, and so falls under the definition of "Work" in GC 1.1.54 because it was "necessary to be done ... by the Contractor to perform the Contract". When Iona did not pay, the Airport had the right (although not the obligation) to take that Work "out of the Contractor's hands" under GC 6.3.3(d) and pay the subcontractors. The funds so used were necessary to "have the Work completed", and so are not due to Iona.

71 The chambers judge considered and rejected that argument, stating [at para 21]:

> Although GCNA's argument is compelling that Iona should not be allowed payment for its subcontractors when the Airport knows that Iona will not be able to fulfill its obligations to pay the subcontractors with these funds, the Contract does not support that this breach on the part of Iona would allow the Airport to withhold all payment as suggested by GCNA.

72 The chambers judge concluded that GC 6.3.3(d) deals with the remedy for this breach. That provision does not say that *all* right to payment is extinguished. Rather, "that portion" of the payment that is not required by the Airport to finish the Work remains payable to Iona. She further noted that the Contract expressly allows the Airport to completely suspend payments for failure to pay certain other obligations, such as WCB and insurance: GC 9.22 and GC 10.1.7.

73 GCNA argues further that the chambers judge's interpretation of the Contract is incomplete because she failed to read the Payment Bond and the Contract together. The Payment Bond provides that the Airport is a trustee for every Claimant under the Payment Bond (the subcontractors) and states, in part:

> The Principal [Iona] and the Surety [GCNA], hereby jointly and severally agree with the Obligee [Airport], as Trustee, that every Claimant who has not been provided for under the terms of its contract with the Principal, before the expiration of a period of ninety (90) days after the date on which the last of such Claimant's work or labour was done or performed of materials were furnished by such Claimant, may as a beneficiary of the trust herein provided for, sue on this Bond, prosecute the suit to final judgment for such sum or sums as may be justly due to such Claimant under the terms of its contract with the Principal and have execution thereon ...

74 The purpose of the trust language in the Payment Bond is to give the Claimants, though they are not party to the Payment Bond, the right to sue the surety under the Bond directly for payment of monies owing to them by the principal (Iona, in this

case): see *Johns-Manville Canada Inc. v. John Carlo Ltd.*, [1983] 1 S.C.R. 513 (S.C.C.); Donovan W M Waters, ed, *Waters' Law of Trusts in Canada*, 4th ed, at 3.IV(e).

75 The right of subrogation vis-à-vis the Claimants gives the surety the right to sue Iona on the contracts between Iona and the subcontractors. GCNA argues that the relationship among the parties under the Payment Bond also obliges the Airport, as a beneficiary under the Bond, to mitigate the surety's loss when it is required to make good the obligations of Iona under the subcontracts. The Airport, according to this theory, is required to exercise its rights and remedies against Iona under the Contract to mitigate any claims under the Bonds. In other words, the Airport must exercise its set-off rights against Iona to recover the funds paid out by GCNA.

76 The difficulty with this argument is that nothing in the Contract or Payment Bond imposes an obligation on the Airport to pay the subcontractors directly. In the absence of a positive contractual obligation to pay subcontractors, Canadian authority makes clear that an owner cannot make such payments in the face of a contractor's bankruptcy, even if the contract gives it the option to do so: *A.N. Bail Co. v. Gingras*, [1982] 2 S.C.R. 475 (S.C.C.).

77 In *A.N. Bail*, a construction contract granted the following rights to the owner, the Crown:

> 21 (1) Her Majesty may, in order to discharge lawful obligations of and satisfy lawful claims against the Contractor or subcontractor arising out of the execution of the work, pay any amount which is due and payable to the Contractor ... directly to the obligees of and the claimants against the Contractor or the subcontractor.
>
> (2) A payment made pursuant to subsection (1) is to the extent of the payment a discharge of Her Majesty's liability under the contract to the Contractor.

78 The appellant contractor entered into a subcontract for masonry work with a company that subsequently became bankrupt. The subcontract incorporated the terms of Clause 21, set out above. At the insistence of the Crown department, the contractor paid a supplier of the bankrupt directly, rather than paying the amount owing to the bankrupt's trustee.

79 The question, as characterized by Chouinard J writing for the court, was "whether the contractual clause relied on can be applicable after the bankruptcy of the sub-contractor". In other words, could the owner (or the contractor), notwithstanding the intervening bankruptcy, rely on Clause 21 to make payment directly to a subcontractor or a supplier of materials, or must payment be made to the trustee of the bankrupt. The court noted that Clause 21 contains "only an option which the owner reserved in the principal contract, and appellant in its sub-contract: no obligation has been created": para 30.

80 After considering several authorities, the Supreme Court concluded that, given the intervening bankruptcy, it was not open to the owner to pay the supplier directly and in preference to the trustee. Chouinard J said, at paras 40-42:

> [40] From the date of the bankruptcy also, the debt of [the subcontractor] against appellant passed into the hands of the trustee as part of the property of the bankrupt company, and only the trustee can obtain payment of it. ...
>
> [41] **It would be to disregard the *Bankruptcy Act* and deprive it of all meaning if the debtor of a bankrupt, instead of paying the trustee, were authorized, by contract or some other means, to pay one or other of the creditors of the bankrupt as he saw fit.**
>
> [42] I adopt the conclusion of Montgomery JA, speaking for the Court of Appeal:
>
> > The above clause of the general conditions may be perfectly valid and effective where there is no question of bankruptcy. I cannot, however, agree with Appellant that it can supplant the provisions of the *Bankruptcy Act* and entitle one unsecured creditor to be paid by preference, which would almost necessarily operated to the detriment of the other unsecured creditors. I regard this as contrary to the policy of the *Bankruptcy Act*.
> >
> > [emphasis added]

81 The chambers judge here properly followed and applied the decision of the Supreme Court in *A.N. Bail*, as well as the recent decision of this Court in *Horizon Earthworks Ltd., Re*, 2013 ABCA 302 (Alta. C.A.). The facts in *Horizon Earthworks* are similar to those before us. *Horizon Earthworks* involved a priority dispute among a municipality (owner of the road construction project), a surety and a bank over funds being held back by the municipality from an insolvent contractor. Like this case, the contractual documents in *Horizon Earthworks* included a Performance Bond and a Payment Bond. At the time of the contractor's default, some $774,000.00 of the contract price remained unpaid and in the hands of the municipality. The municipality made a claim under the Performance Bond and paid $383,000.00 to complete the project. The surety paid some of the sub-contractors and suppliers under the Payment Bond, but other subcontractors remained unpaid. It was common ground that the outstanding claims vastly exceeded the disputed amount.

82 The municipality sought a direction as to whether it could pay the subcontractors directly out of the remaining funds. It argued that the bonds created a relationship between the municipality and the subcontractors to provide for payment, and also argued that the contract, bonds and an Indemnity and Security Agreement between Horizon and the surety together created a trust relationship whereby the funds are trust funds for the benefit of the subcontractors.

83 The surety generally supported the municipality's position, but further argued that it was entitled to funds owing to subcontractors who may claim under the bond, by way of set-off and subrogation.

84 This Court disagreed, concluding that the contracts did not impose a legal obligation on the municipality to pay the subcontractors directly. Accordingly, if the municipality owed money to the contractor at the time of bankruptcy, that account receivable became the property of the Trustee. In this respect, the Court relied on the reasoning of the Supreme Court in *A.N. Bail*.

85 As noted above, the contractual relationships in *Horizon Earthworks* included a Payment Bond, not present in *A.N. Bail*. This Court rejected the argument that the existence of the Bond should lead to a different result, saying at para 43:

> In our view, the contractual arrangements here do not establish a relationship sufficient to distinguish *Bail*. Although there is language in the contracts between Horizon and Western Surety relating to unpaid funds being earmarked with a trust, Greenview [the municipality] is not a party to the Bonds or the ISA, and has no legal obligations under any of those agreements to pay unpaid creditors. While the Labour and Material Payment Bond says that Greenview, as Obligee under the Bonds, can bring claims on behalf of unpaid creditors, it does not require Greenview to do so. Nothing in any document places an obligation on Greenview to pay the unpaid creditors. Thus if Greenview owes money to Horizon at bankruptcy pursuant to the Harper Creek Contract, that account receivable becomes the property of the Trustee.

86 The reasoning in *Horizon Earthworks* applies here. The Funds held by the Airport are payable to Iona, and therefore to the Trustee, and not to the subcontractors. The Airport has no obligation to pay the subcontractors and no legal relationship with them.

87 GCNA relies on American jurisprudence which, it says, stands for the proposition that a surety is subrogated to and acquires the rights of the contractor whose obligation it discharged, the subcontractors whose claims it paid, and the owner who holds the balances and retention. The surety, GCNA argues, has a right to payment due the contractor when the surety completes the defaulted contractor's obligations. In particular, GCNA relies upon the following description of the right of subrogation in *Pearlman v. Reliance Insurance Co.*, 371 U.S. 132 (U.S. Sup. Ct.), pp 7-8: "... that the Government has a right to use the retained fund to pay the laborers and materialmen; that the laborers and materialmen had a right to be paid out of the fund; that the contractor, had he completed his job and paid the laborers and materialmen, would have become entitled to the fund; and the surety, having paid the laborers and materialmen, is entitled to the benefit of all these rights to the extent necessary to reimburse it".

88 Those authorities are not persuasive given that existing Canadian authority deals with the issue. The equitable doctrine of subrogation described by the British Columbia Court of Appeal in *Canadian Indemnity Co. v. British Columbia Hydro & Power Authority*, 1976 CarswellBC 1227 (B.C. C.A.) at para 15; [1976] B.C.J. No. 815 (B.C. C.A.) (also relied upon by GCNA) is said to entitle a surety, who carries out its obligations to pay or perform what a contractor has failed to pay or perform, to the

rights of the person to whom the surety was obligated. In this case, those rights would include the right to use retained funds to complete the project, as was done. The chambers judge relied on the reasoning in *Canadian Indemnity* to include in that amount the cost of paying an electrical subcontractor to return to finish its work, and I would not interfere with that conclusion. It is clear from this Court's decision in *Horizon Earthworks*, however, that the surety's subrogated rights would not include repayment for fulfilling the contractor's obligation to pay the subcontractors. The Airport has no corresponding obligation to make those payments under the Contract and importantly, under the law as set out in *Horizon Earthworks* and *A.N. Bail*, the Airport had no ability to use the Funds to make voluntary payments to subcontractors in priority to other creditors, in the face of Iona's bankruptcy. I also note the decision of *St. Paul v. Genereux Workshop (Bonnyville) Ltd.* (1984), 12 D.L.R. (4th) 238 (Alta. C.A.), where this Court declined to follow the American authorities relied upon by GCNA.

89 The remaining Funds are a debt owing to Iona under the Contract as found by the chambers judge and are, therefore, payable to the Trustee. This ground of appeal must fail.

2. Are the Funds impressed with a trust and therefore exempt from the bankrupt's estate under the Bankruptcy Act?

90 As an alternative argument, GCNA submits that, if the Funds are payable to Iona under the Contract, they are impressed with a trust by virtue of s 22 of the *BLA* such that they are excluded from the property of Iona pursuant to s 67(1)(a) of the *Bankruptcy Act*.

91 Section 67 of the *Bankruptcy Act* exempts certain property held by a bankrupt from being divided among the bankrupt's creditors. One such exemption applies to "property held by the bankrupt in trust for any other person": s 67(1)(a). The Supreme Court of Canada described the intention behind this provision [then s 47(a)] in *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24 (S.C.C.) at para 38:

> Taking the words in their ordinary sense, they connote a situation where there is property which can be identified as being held in trust. That property is to be removed from other assets in the hands of the bankrupt before distribution under the *Bankruptcy Act* because, in equity, it belongs to another person. The intention of Parliament in enacting s 47(a), then, was to permit removal of property which can be specifically identified as not belonging to the bankrupt under general principles of trust law from the distribution scheme established by the *Bankruptcy Act*.

92 Like other Canadian lien legislation, the *BLA* includes provisions that require contractors who receive monies in payment for a project subject to the *BLA* to hold those monies in trust for their subcontractors or suppliers. Section 22 of the *BLA* provides:

> 22(1) Where
>
> (a) a certificate of substantial performance is issued, and
>
> (b) a payment is made by the owner after a certificate of substantial performance is issued
>
> the person who receives the payment, to the extent that the person owes money to persons who provided work or furnished materials for the work or materials in respect of which the certificate issued, holds that money in trust for the benefit of those persons.

93 GCNA argues that, by operation of this provision, monies paid to Iona are impressed with a trust within the meaning of s 67(1)(a) of the *Bankruptcy Act*, such that they are exempt from distribution in the bankruptcy proceedings.

94 Given that the project in this case is an airport, a federal undertaking, a preliminary issue arises with respect to the applicability of the provincial *BLA*. The airport property cannot be subject to a builders' lien: *Construction Builders' and Mechanics' Liens in Canada*, Bristow et al, 7th ed (Toronto: Carswell, 2010) at 2.12.1-2; *Greater Toronto Airports Authority v. Mississauga (City)* (2000), 50 O.R. (3d) 641 (Ont. C.A.); *Vancouver International Airport v. Lafarge Canada Inc.* (2009), 82 C.L.R. (3d) 285 (B.C. S.C.). However, the parties here agree that the trust provisions in s 22 can apply to a project even where the lien provisions of the *BLA* do not apply, citing *T. McAvity & Sons Ltd. v. Canadian Bank of Commerce*, [1959] S.C.R. 478,

17 D.L.R. (2d) 529 (S.C.C.). For purposes of this appeal, I am prepared to assume that s 22 of the *BLA* applies to payments made to Iona with respect to construction of the project, and to Iona's relationship with its subcontractors. I will therefore proceed to consider whether s 22 creates a trust within the meaning of the *Bankruptcy Act*.

95 Statutory trusts are, as the name implies, creatures of statute enacted with a view to protecting the interests of the Crown or private interests that otherwise would have little protection. The Supreme Court of Canada has had occasion to consider whether deemed statutory trusts constitute valid trusts for the purpose of the *Bankruptcy Act.* In *Henfrey Samson Belair*, a majority of the Supreme Court held that a "deemed trust" created by provincial legislation is not, without more, a trust within the meaning of s 67 of the *Bankruptcy Act*, nor is it entitled to priority under that *Act*. The provisions of s 67 are confined to trusts arising under general principles of law. McLachlin J, writing for the majority, interpreted the relevant provision of the *Bankruptcy Act* as follows (at para 42):

> To interpret s 47(a) [now s 67(a)] as applying not only to trusts as defined by the general law, but to statutory trusts created by provinces lacking the common law attributes of trusts, would be to permit the provinces to create their own priorities under the *Bankruptcy Act* and to invite a differential scheme of distribution on bankruptcy from province to province.

96 McLachlin J went on to state that, depending on the facts of the case, monies collected under a statutory trust might meet the requirements for a trust under the general principles of trust law [at para 46]:

> If the money collected for tax is identifiable or traceable, then the true state of affairs conforms with the ordinary meaning of "trust" and the money is exempt from distribution to creditors by reason of [the current s 67(a)]. If, on the other hand, the money has been converted to other property and cannot be traced, there is no 'property held ... in trust' under [s 67(a)].

97 In *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, 128 D.L.R. (4th) 1 (S.C.C.), the Supreme Court undertook a broad review of the effect of provincial legislation that may intrude into the federal sphere of bankruptcy. The majority set out a number of propositions that emerge from the court's quartet of decisions in this area, including *Henfrey Samson Belair* [at paras 33 and 40]:

> 1. Provinces cannot create priorities between creditors or change the scheme of distribution on bankruptcy under s 136(1) of the *Bankruptcy Act;*
>
> 2. While provincial legislation may validly affect priorities in a non-bankruptcy situation, once bankruptcy has occurred section 136(1) of the *Bankruptcy Act* determines the status and priority of the claims specifically dealt with in that section;
>
> 3. If the provinces could create their own priorities or affect priorities under the *Bankruptcy Act* this would invite a different scheme of distribution on bankruptcy from province to province, an unacceptable situation;
>
> 4. The definition of terms such as "secured creditor", if defined under the *Bankruptcy Act*, must be interpreted in bankruptcy cases as defined by the federal Parliament, not the provincial legislatures. Provinces cannot affect how such terms are defined for purposes of the *Bankruptcy Act*;
>
> 5. In determining the relationship between provincial legislation and the *Bankruptcy Act*, the form of the provincial interest created must not be allowed to triumph over its substance. The provinces are not entitled to do indirectly what they are prohibited from doing directly;
>
> 6. There need not be any provincial intention to intrude into the exclusive federal sphere of bankruptcy and to conflict with the order of priorities of the *Bankruptcy Act* in order to render the provincial law inapplicable. It is sufficient that the *effect* of the provincial legislation is to do so.

98 The goal, wrote Gonthier J, is to maintain a "nationally homogeneous system of bankruptcy priorities". Provincial laws can use the concept of "trust" for their own purposes, but they cannot affect bankruptcy priorities when doing so. *Henfrey Samson Belair* and *Husky Oil* provided that provincially created statutory trusts can only affect bankruptcy priorities when they

also have all the attributes of trusts under the general principles of trust law, thus bringing them within the ambit of s 67(a) of the *Bankruptcy Act*. To conclude otherwise would be to permit provinces to create their own bankruptcy priorities outside the scheme, and to risk a situation of differing priorities in different jurisdictions.

99 GCNA says that the governing authority with respect to trusts created under provincial builders' or mechanics' lien legislation is an earlier decision of the Supreme Court, *John M.M. Troup Ltd. v. Royal Bank*, [1962] S.C.R. 487, 34 D.L.R. (2d) 556 (S.C.C.). In particular, GCNA relies on the following statement by the majority in *Troup* at para 11:

> As to bankruptcy, the creation of the trust by s. 3(1) [of the Ontario *Mechanics' Lien Act*] does affect the amount of property divisible among the creditors but so does any other trust validly created.

100 There is a line of authority that has cited *Troup* for the proposition that lien legislation and the *Bankruptcy Act* are not operationally in conflict and therefore a lien act's trust provisions create a trust that falls within the exemption in s. 67(1)(a). These cases take the view that *Troup* and *Henfrey Samson Belair* are not in conflict: see, for example, *D & K Horizontal Drilling (1998) Ltd. (Trustee of) v. Alliance Pipeline Ltd.*, 2002 SKQB 86, [2002] 6 W.W.R. 497 (Sask. Q.B.); *0409725 B.C. Ltd., Re*, 2015 BCSC 561 (B.C. S.C.).

101 In my view, the statement from *Troup* set out above cannot sit comfortably with the later reasoning of McLachlin J in *Henfrey Samson Belair*. The dissent in *Henfrey Samson Belair* relied on *Troup*, but the majority did not. Although *Troup* was not expressly overruled by the majority, McLachlin J clearly rejected the proposition that deemed statutory trusts could be valid trusts under bankruptcy legislation if they did not otherwise meet the requirements of general trust law. To the extent that *Troup* says that trusts created by lien legislation, without more, are valid trusts under the *Bankruptcy Act*, it has been overruled by *Henfrey Samson Belair*.

102 Even if this aspect of *Troup* has not been overruled, the brief statement in that case regarding trusts created by lien legislation is at best *obiter*. It is important to consider what was actually at issue in *Troup*. A contractor had received monies for work done on a county project and deposited the cheque into its current account. The contractor had previously given its bank a general assignment of book debts. The bank used the deposited funds to pay down some of the contractor's indebtedness. It was alleged that the monies which were taken by the bank under the assignment were trust monies under the *Mechanics' Lien Act*, and accordingly the bank must account to the appellant lien holders who had claims under that *Act*. A majority of the Supreme Court held that the payment received by the bank was in the ordinary course of business and a bank that received monies, not through the assignment but through the ordinary course of business, can retain such funds unless it has notice not only that they are trust monies but also that the payment to the bank constitutes a breach of trust.

103 One argument advanced by the bank was that the *Mechanics' Lien Act* was unconstitutional as being in conflict with federal legislation on banking and bankruptcy. The majority rejected this argument, stating that there was no conflict in either field. Importantly, there was no intervening bankruptcy on the part of the contractor, so the issue of whether there was an operational conflict between the lien legislation and the *Bankruptcy Act* was not directly before the court. The statement relied on by GCNA was made in that context and was, in my view, *obiter*.

104 The correct approach to the question of whether a builders' lien trust is valid under the *Bankruptcy Act* is to assess the putative trust through the lens of general principles of trust law and, in particular, consider whether the three certainties (of intention, object, and subject matter) have been established. This approach is in keeping with the Supreme Court's direction in *Henfrey Samson Belair* and *Husky Oil*. The issue is whether there exists a trust that survives the bankruptcy of the statutorily mandated trustee, pursuant to s 67(1)(a) of the *Bankruptcy Act*. There is no such valid trust unless it possesses all the elements of a trust under general law.

105 This was the approach taken by this Court in *Bassano Growers Ltd. v. Price Waterhouse Ltd.*, 1998 ABCA 198 (Alta. C.A.). In that case, a chambers judge concluded that a deemed statutory trust in favour of potato growers who sold produce to a now bankrupt purchaser, without more, was not a "trust" within the meaning of s 67(1)(a). On the evidence, the chambers

judge concluded that the existence of a trust under the general law could not be found for a lack of certainty of subject matter. In upholding that decision, this Court set out the relevant principles as follows at paras 8 - 10:

> [8] The chambers judge held that the trusts contemplated by s 67(1)(a) are only those that qualify as trusts under the general law, that is, only those that meet the conditions necessary for the creation of a valid trust under the general law. Because the funds in question were commingled and cannot be identified there is no certainty of subject matter, one of the essential requirements for a common law trust. ...
>
> [9] The circumstances of this case fall squarely within the rationale of the majority judgment of the Supreme Court of Canada in ... *Henfrey Samson* .... The *ratio* of *Henfrey Samson* has been applied in a number of subsequent judgments involving statutory trusts of various kinds created pursuant to provincial legislation [citations omitted].
>
> [10] The underlying principle of *Henfrey Samson* was concisely stated by the British Columbia Court of Appeal in *British Columbia v National Bank of Canada* ... at 232:
>
> > That principle being that the province cannot legislate to, in effect, create its own priorities contrary to those in the *Bankruptcy Act*. If the province cannot deem a trust in order to accomplish this I cannot see how it can by legislation create facts through that legislation to accomplish that same end.

106 Having concluded that a valid trust had not been created in the circumstances before it, the Court went on to note that a trust that has its genesis in a deemed or statutory trust may qualify under s 67(1)(a) in the right circumstances. However, to so qualify it must "satisfy the essential requirements of a valid trust under the general law". I agree.

107 Neither *Henfrey Samson Belair* nor *Bassano* dealt with statutory trusts created under lien legislation. The deemed statutory trust in *Henfrey Samson Belair* was created under the *Social Service Tax Act*, RSBC C-431, and was intended to benefit the Crown. Later decisions have concluded that the principles set out in *Henfrey Samson Belair* apply to other statutory trusts, regardless of the nature of the deemed beneficiary: see *Edmonton Pipe Industry Pension Plan Trust Fund (Trustee of) v. 350914 Alberta Ltd.*, 2000 ABCA 146, 187 D.L.R. (4th) 23 (Alta. C.A.) at para 41; *Bassano*; *British Columbia v. National Bank of Canada* (1994), 30 C.B.R. (3d) 215 (B.C. C.A.), at 232; *Points of Call Holidays Ltd., Re* (1991), 54 B.C.L.R. (2d) 384 (B.C. S.C.), at 389.

108 I see no principled reason why the approach should be different with respect to lien legislation from that taken with respect to other deemed statutory trusts, particularly those intended to benefit private parties such as was the case in this Court's decisions in *Bassano* and *Edmonton Pipe*. Moreover, courts in several jurisdictions have used this same approach in assessing whether trusts created under lien legislation are valid for purposes of the *Bankruptcy Act*: see *0409725 B.C. Ltd., Re*, 2015 BCSC 561 (B.C. S.C.); *Royal Bank of Canada v. Atlas Block Co.*, 2014 ONSC 3062, 15 C.B.R. (6th) 272 (Ont. S.C.J.); *Roscoe Enterprises Ltd. v. Wasscon Construction Inc.* (1998), 161 D.L.R. (4th) 725, 169 Sask. R. 240 (Sask. Q.B.); *Duraco Window Industries (Sask.) Ltd. v. Factory Window & Door Ltd. (Trustee of)*, [1995] 9 W.W.R. 498, 135 Sask. R. 235 (Sask. Q.B.). In all those cases, courts have examined the facts to assess whether the three certainties required to establish a valid trust under the general law are present.

109 Most courts dealing with deemed statutory trusts seem to assume that certainty of intention has been established, perhaps implied by virtue of the statutory language that creates the trust [2] . That appears to have been the case in *Henfrey Samson Belair*, where McLachlin J does not discuss the intention to create the trust. An exception is *Duraco Window*, where Geatros J of the Saskatchewan Court of Queen's Bench expressed doubt that the parties intended to create a trust relationship with respect to the funds in the bankrupt contractor's bank account. Although the issue seems not to be entirely settled, for purposes of this appeal I have accepted that the creation of the statutory trust in s 22 of the *BLA* is sufficient to establish certainty of intention.

110 The establishment of certainty of object is also generally straightforward; in trusts created under lien legislation, the object is the subcontractors sought to be protected by the legislation.

111 Establishing sufficient certainty of subject matter has consistently been the main stumbling block to establishing a builders' lien trust as a valid trust under the *Bankruptcy Act.* That was the problem identified by the courts in, for example, *Henfrey Samson Belair*, *Bassano*, and in this case in the court below. In *0409725 BC Ltd.*, a recent case from the British Columbia Supreme Court, Grauer J noted that the issue of certainty of subject matter is an evidentiary one. That is the case; in *Henfrey Samson Belair*, McLachlin J stated that whether there exists a "trust" under the *Bankruptcy Act* "depends on the facts of the particular case": para 46. Whether certainty of subject matter exists is dependent on the facts and is, to some extent, a function of the statutory language and a question of timing.

112 A review of cases where certainty of subject matter has been found shows that the court was able to point to a specific, identifiable *res* that formed the subject matter of the trust, thereby satisfying the requirements of *Henfrey Samson Belair*. For example, in *D&K*, a registered lien had been vacated and replaced by a payment into court prior to the bankruptcy.

113 Similarly, in *Kerr Interior Systems Ltd., Re*, 2009 ABCA 240, [2009] 8 W.W.R. 1 (Alta. C.A.), an owner paid money into court in order to vacate builders' liens filed by two subcontractors of the bankrupt. The Saskatchewan *Builders' Lien Act* was at issue in that case, which was decided by this Court. The majority found that, on the facts, both claimants were able to establish claims to amounts that were "readily ascertainable and identifiable" as at the relevant date. The dissenting judge held that in order to constitute a "trust" for purposes of the CCAA, the claim had to be sufficiently specific as at the relevant date in order to reach the position of a trust at law. One of the claimants had filed a lien under the Saskatchewan *BLA*, thereby making its claim sufficiently ascertainable. The other had not, and that trust claim was not sufficiently specific as of the relevant date.

114 It is also worth noting that the Saskatchewan *Builders' Lien Act* is structured differently from the Alberta *BLA*. The owner, as well as the contractor, is made a trustee over all amounts in the owner's hands that are payable to the contractor. Under s 22 of the Alberta *BLA*, no trust comes into existence until payment is made to the contractor, who is the sole trustee. In this case, the funds were in the hands of the Airport at the time of the bankruptcy (and are still), so no *BLA* trust had come into existence.

115 In cases where the requisite certainty of subject matter has been absent, it is often because funds from all sources flow into the putative trustee's account, resulting in commingling and an inability to trace the funds that are subject to the trust. In *Atlas Block*, Penny J noted that the bankrupt contractor was under no obligation under the provisions of the relevant lien legislation to keep the putative trust funds separate and apart from other funds received. Because the funds were commingled with funds from other sources, there could be no certainty of subject matter as described in *Henfrey Samson Belair*: paras 43 - 45. Similar reasoning was applied by the courts in *0409725 BC Ltd*, *Roscoe Enterprises*, and *Duraco Window*.

116 This is one of the latter cases. The chambers judge reviewed the evidence and submissions of counsel and concluded that, once the funds in the hands of the Airport were paid to Iona they would be immediately commingled with funds from other sources and any certainty of subject matter lost. That conclusion is supported by the language of s 22 of the *BLA*, which does not obligate a contractor who receives payment to segregate the funds. The same type of commingling was found to be fatal to the existence of a valid trust in *Bassano* and in *Henfrey Samson Belair*, both cases that were binding on the chambers judge. There is no basis to interfere with her conclusion on the point.

117 For these reasons, I would dismiss the second ground of appeal.

Conclusion

118 For all the foregoing reasons, I would dismiss the appeal.

Appeal allowed.

Footnotes

1 "Work" is defined as "the total construction and related services required by the Contract to be performed and Products to be supplied under the Contract, and includes everything that is necessary to be done, furnished or delivered by the Contractor to perform the Contract."

2 For a discussion of certainty of intention in this context, see Aline Grenon, "Common law and statutory trusts: In search of missing links" (1995) 15:2 Est & Tr J.

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TAB 11

2010 SCC 60, 2010 CSC 60
Supreme Court of Canada

Ted Leroy Trucking [Century Services] Ltd., Re

2010 CarswellBC 3419, 2010 CarswellBC 3420, 2010 SCC 60, 2010 CSC 60, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, [2010] S.C.J. No. 60, [2011] 2 W.W.R. 383, [2011] B.C.W.L.D. 533, [2011] B.C.W.L.D. 534, 12 B.C.L.R. (5th) 1, 196 A.C.W.S. (3d) 27, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), 296 B.C.A.C. 1, 326 D.L.R. (4th) 577, 409 N.R. 201, 503 W.A.C. 1, 72 C.B.R. (5th) 170, J.E. 2011-5

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

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

Heard: May 11, 2010
Judgment: December 16, 2010
Docket: 33239

Proceedings: reversing *Ted Leroy Trucking Ltd., Re* (2009), 2009 CarswellBC 1195, 2009 G.T.C. 2020 (Eng.), 2009 BCCA 205, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, 98 B.C.L.R. (4th) 242, [2009] G.S.T.C. 79 (B.C. C.A.); reversing *Ted Leroy Trucking Ltd., Re* (2008), 2008 CarswellBC 2895, 2008 BCSC 1805, [2008] G.S.T.C. 221, 2009 G.T.C. 2011 (Eng.) (B.C. S.C. [In Chambers])

Counsel: Mary I.A. Buttery, Owen J. James, Matthew J.G. Curtis for Appellant
Gordon Bourgard, David Jacyk, Michael J. Lema for Respondent

Subject: Estates and Trusts; Goods and Services Tax (GST); Tax — Miscellaneous; Insolvency

APPEAL by creditor from judgment reported at 2009 CarswellBC 1195, 2009 BCCA 205, [2009] G.S.T.C. 79, 98 B.C.L.R. (4th) 242, [2009] 12 W.W.R. 684, 270 B.C.A.C. 167, 454 W.A.C. 167, 2009 G.T.C. 2020 (Eng.) (B.C. C.A.), allowing Crown's appeal from dismissal of application for immediate payment of tax debt.

***Deschamps J.*:**

1 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 (B.C. S.C. [In Chambers])).

6 The Crown's appeal was allowed by the British Columbia Court of Appeal (2009 BCCA 205, [2009] G.S.T.C. 79, 270 B.C.A.C. 167 (B.C. C.A.)). 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] G.S.T.C. 1, 73 O.R. (3d) 737 (Ont. 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 (Canada)*, [1934] S.C.R. 659 (S.C.C.), 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, October 3, 1991, at pp. 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, ss. 25 and 29; see also *Alternative granite & marbre inc., Re*, 2009 SCC 49, [2009] 3 S.C.R. 286, [2009] G.S.T.C. 154 (S.C.C.); *Quebec (Deputy Minister of Revenue) c. Rainville* (1979), [1980] 1 S.C.R. 35 (S.C.C.); *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)).

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, [2003] G.S.T.C. 193, 30 Alta. L.R. (4th) 192 (Alta. Q.B.), 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., Re*, 2009 QCCS 6332 (C.S. Que.), leave to appeal granted, 2010 QCCA 183 (C.A. Que.)). 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 am. 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. Bank. 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 v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (S.C.C.), 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. Minister of National Revenue*, 2002 SCC 49, [2002] G.S.T.C. 23, [2002] 2 S.C.R. 720 (S.C.C.), 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, [2003] G.S.T.C. 21 (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 c. Verdun (Municipalité)*, [1997] 2 S.C.R. 862 (S.C.C.), 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" (*ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, 92 O.R. (3d) 513 (Ont. C.A.), 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. Gen. Div. [Commercial List])), 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.
>
> (*Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 41 O.A.C. 282 (Ont. C.A.), 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., *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 51 B.C.L.R. (2d) 84 (B.C. C.A.), at pp. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134 (B.C. C.A. [In Chambers]), 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 (Alta. Q.B.), at para. 144, *per* Paperny J. (as she then was); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J. [Commercial List]), at para. 3; *Air Canada, Re* [2003 CarswellOnt 4967 (Ont. S.C.J. [Commercial List])], 2003 CanLII 49366, 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. Gen. Div. [Commercial List]); *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96 (B.C. C.A.), aff'g (1999), 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers]); 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 (B.C. C.A.), at paras. 45-47, *per* Newbury J.A.; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (Ont. C.A.), 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 (Ont. C.A.), 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.

***Fish J. (concurring)*:**

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 (B.C. S.C. [In Chambers])).

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, [2005] G.S.T.C. 1 (Ont. 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:

> **227 (4) Trust for moneys deducted** — 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) Extension of trust** — 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
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> > (a) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for 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 being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*....

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

67 (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) the *CCAA* and in s. 67(3) 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) [Deemed] 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).

...

> **(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
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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, ...
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> > ...
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> ... 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, [2009] G.S.T.C. 79 (B.C. C.A.), 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.

***Abella J. (dissenting)*:**

114 The central issue in this appeal is whether s. 222 of the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*EIA*"), 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:

> **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:

> **222 (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
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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
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> (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.

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, [2005] G.S.T.C. 1 (Ont. 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, at pp. 37-38). 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 *R. v. Tele-Mobile Co.*, 2008 SCC 12, [2008] 1 S.C.R. 305 (S.C.C.), 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 derogani*).

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 c. Verdun (Municipalité)*, [1997] 2 S.C.R. 862 (S.C.C.)).

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:

> [T]he 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 *Canada (Attorney General) v. Canada (Public Service Staff Relations Board)*, [1977] 2 F.C. 663 (Fed. C.A.), 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*".

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), 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.
>
> **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.

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 reorder 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.

Appeal allowed.

Pourvoi accueilli.

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 (i);

(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) [Deemed] 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.

Footnotes

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

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.

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

End of Document

TAB 12

2021 SCC 30, 2021 CSC 30
Supreme Court of Canada

Canada v. Canada North Group Inc.

2021 CarswellAlta 1780, 2021 CarswellAlta 1781, 2021 SCC 30, 2021 CSC 30, [2021] 10 W.W.R. 1, [2021] 5 C.T.C. 111, [2021] A.W.L.D. 3408, [2021] A.W.L.D. 3521, [2021] S.C.J. No. 30, 19 B.L.R. (6th) 1, 2021 D.T.C. 5080, 2021 D.T.C. 5081, 28 Alta. L.R. (7th) 1, 333 A.C.W.S. (3d) 23, 460 D.L.R. (4th) 309, 91 C.B.R. (6th) 1, EYB 2021-397318

Her Majesty The Queen in Right of Canada (Appellant) and Canada North Group Inc., Canada North Camps Inc., Campcorp Structures Ltd., DJ Catering Ltd., 816956 Alberta Ltd., 1371047 Alberta Ltd., 1919209 Alberta Ltd., Ernst & Young Inc. in its capacity as monitor and Business Development Bank of Canada (Respondents) and Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals (Interveners)

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

Heard: December 1, 2020
Judgment: July 28, 2021
Docket: 38871

Proceedings: affirming *Canada v. Canada North Group Inc.* (2019), *(*sub nom. *The Queen v. Canada North Group Inc.)* 2019 D.T.C. 5111, 11 P.P.S.A.C. (4th) 157, [2019] 12 W.W.R. 635, 93 Alta. L.R. (6th) 29, 437 D.L.R. (4th) 122, 72 C.B.R. (6th) 161, 2019 ABCA 314, 2019 CarswellAlta 1815, 95 B.L.R. (5th) 222, Frederica Schutz J.A., Patricia Rowbotham J.A., Thomas W. Wakeling J.A. (Alta. C.A.); affirming *Canada North Group Inc (Companies' Creditors Arrangement Act)* (2017), 2017 ABQB 550, 2017 CarswellAlta 1631, [2018] 2 W.W.R. 731, 60 Alta. L.R. (6th) 103, 52 C.B.R. (6th) 308, J.E. Topolniski J. (Alta. Q.B.)

Counsel: Michael Taylor, Louis L'Heureux, for Appellant
Darren R. Bieganek, Q.C., Brad Angove, for Respondents, Canada North Group Inc., Canada North Camps Inc., Campcorp Structures Ltd., DJ Catering Ltd., 816956 Alberta Ltd., 1371047 Alberta Ltd., 1919209 Alberta Ltd. and Ernst & Young Inc. in its capacity as Monitor
Jeffrey Oliver, Mary I. A. Buttery, Q.C., for Respondent, Business Development Bank of Canada
Kelly J. Bourassa, for Intervener, Insolvency Institute of Canada
Randal Van de Mosselaer, for Intervener, Canadian Association of Insolvency and Restructuring Professionals

Subject: Civil Practice and Procedure; Estates and Trusts; Income Tax (Federal); Insolvency; Tax — Miscellaneous

APPEAL by Crown from judgment reported at *Canada v. Canada North Group Inc.* (2019), 2019 ABCA 314, 2019 CarswellAlta 1815, 72 C.B.R. (6th) 161, 437 D.L.R. (4th) 122, 93 Alta. L.R. (6th) 29, 95 B.L.R. (5th) 222, [2019] 12 W.W.R. 635, 11 P.P.S.A.C. (4th) 157, 2019 D.T.C. 5111 (Alta. C.A.), dismissing its appeal from ruling that court could rank super-priority charges ahead of statutory deemed trusts for unremitted source deductions.

POURVOI formé par la Couronne à l'encontre d'un jugement publié à *Canada v. Canada North Group Inc.* (2019), 2019 ABCA 314, 2019 CarswellAlta 1815, 72 C.B.R. (6th) 161, 437 D.L.R. (4th) 122, 93 Alta. L.R. (6th) 29, 95 B.L.R. (5th) 222, [2019] 12 W.W.R. 635, 11 P.P.S.A.C. (4th) 157, 2019 D.T.C. 5111 (Alta. C.A.), ayant rejeté l'appel que cette dernière a interjeté à l'encontre d'une décision selon laquelle un tribunal avait le pouvoir de faire passer les charges super prioritaires devant les fiducies réputées créées par la loi pour les retenues à la source non versées.

***Côté J.* (Wagner C.J.C., Kasirer J. concurring):**

I. Overview

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

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

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

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

II. Background

5 Canada North Group and six related corporations ("Debtors") initiated restructuring proceedings under s. 50.4(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (“BIA”), but soon changed course and sought to restructure under the *CCAA*. In their initial *CCAA* application, they requested a package of relief standard to *CCAA* proceedings, including a thirty-day stay on all proceedings against them, the appointment of a monitor and the creation of three super-priority charges. The first charge they requested was an administration charge of up to $1,000,000 in favour of counsel, a monitor and a chief restructuring officer for the fees they incurred. The second was a $1,000,000 financing charge in favour of an interim lender. The third was a $150,000 directors' charge protecting their directors and officers against liabilities incurred after the commencement of the proceedings. The Debtors included in their initial motion an affidavit from one of their directors attesting to a $1,140,000 debt to Her Majesty The Queen for source deductions and Goods and Services Tax ("GST").

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

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

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

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

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

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

III. Judgments Below

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

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

10 Justice Topolniski relied upon *Temple City Housing Inc., Re*, 2007 ABQB 786, 42 C.B.R. (5th) 274, and *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720, to conclude that the deemed trust created by s. 227(4.1) of the ITA is not a proprietary interest. Rather, the *ITA* creates something similar to a floating charge over all the debtor's assets, which permits the debtor to alienate property subject to the deemed trust. These characteristics are inconsistent with a proprietary interest, and thus s. 227(4.1) does not create such an interest.

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

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

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

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

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

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

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

IV. Issue

16 The central issue in this appeal is whether the *CCAA* authorizes courts to grant super-priority charges with priority over a deemed trust created by s. 227(4.1) of the ITA. In order to answer this question, I proceed in three stages. First, I assess the nature of the *CCAA* regime and the power of supervising courts to order such charges. Given that supervising courts generally have the authority to order super-priority charges with priority over all other claims, I then turn to s. 227(4.1) of the ITA to determine whether it gives Her Majesty an interest that cannot be subordinated to super-priority charges. Here I assess the Crown's two arguments as to why s. 227(4.1) provides for an exception to the general rule, namely that Her Majesty has a proprietary or ownership interest in the insolvent company's assets and that, even if Her Majesty does not have such an interest, s. 227(4.1) provides Her with a security interest that has absolute priority over all claims. I conclude by assessing how courts should exercise their authority to order super-priority charges where Her Majesty has a claim against an insolvent company protected by a s. 227(4.1) deemed trust.

V. Analysis

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

A. CCAA Regime

18 The *CCAA* is part of Canada's system of insolvency law, which also includes the BIA and the Winding-up and Restructuring Act, R.S.C. 1985, c. W-11, s. 6(1), for banks and other specified institutions. Although both the *CCAA* and the *BIA* create reorganization regimes, what distinguishes the *CCAA* regime is that it is restricted to companies with liabilities of more than $5,000,000 and "offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations" (Century Services Inc. v. Canada (Attorney General), 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 14).

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

20 The view underlying the entire *CCAA* regime is thus that debtor companies retain more value as going concerns than in liquidation scenarios (*Century Services*, at para. 18). The survival of a going-concern business is ordinarily the result with the greatest net benefit. It often enables creditors to maximize returns while simultaneously benefiting shareholders, employees, and other firms that do business with the debtor company (para. 60). Thus, this Court recently held that the *CCAA* embraces "the simultaneous objectives of maximizing creditor recovery, preservation of going-concern value where possible, preservation of jobs and communities affected by the firm's financial distress ... and enhancement of the credit system generally" (9354-9186 Québec inc. v. Callidus Capital Corp., 2020 SCC 10, at para. 42, quoting J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2nd ed. 2013), at p. 14).

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

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

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

24 As this Court held in Century Services, at para. 70, the general language of s. 11 is not restricted by the availability of these more specific orders. In fact, courts regularly grant super-priority charges in favour of persons not specifically referred to in the aforementioned provisions, including through orders that have priority over orders made under the specific provisions. These include, for example, key employee retention plan charges (Grant Forest Products Inc., Re (2009), 57 C.B.R. (5th) 128 (Ont. S.C.J.); *Timminco Ltd., Re*, 2012 ONSC 506, 85 C.B.R. (5th) 169), and bid protection charges (*In the Matter of a Plan of Compromise or Arrangement of Green Growth Brands Inc.*, 2020 ONSC 3565, 84 C.B.R. (6th) 146).

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

26 Justice Deschamps first assessed the supervising judge's order to determine whether it had truly been necessary to give the financing charge priority over the deemed trust. Even though the supervising judge had not specifically considered the deemed trust in the order authorizing a super-priority charge, he had found that there was no alternative but to make the order. Financing secured by a super priority was necessary if the company was to remain a going concern (para. 59). Justice Deschamps rejected the suggestion "that the DIP lenders would have accepted that their claim ranked below claims resulting from the deemed trust", because "[t]he harsh reality is that lending is governed by the commercial imperatives of the lenders, not by the interests of the plan members or the policy considerations that lead provincial governments to legislate in favour of pension fund beneficiaries" (para. 59).

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

28 There are also practical considerations that explain why supervising judges must have the discretion to order other charges with priority over deemed trusts. Restructuring under the *CCAA* often requires the assistance of many professionals. As Wagner C.J. and Moldaver J. recently recognized for a unanimous Court, the role the monitor plays in a *CCAA* proceeding is critical: "The monitor is an independent and impartial expert, acting as 'the eyes and the ears of the court' throughout the proceedings .... The core of the monitor's role includes providing an advisory opinion to the court as to the fairness of any proposed plan of arrangement and on orders sought by parties, including the sale of assets and requests for interim financing" (*Callidus Capital*, at para. 52, quoting Ernst & Young Inc. v. Essar Global Fund Ltd., 2017 ONCA 1014, 139 O.R. (3d) 1, at para. 109). In the words of Morawetz J. (as he then was), "[i]t is not reasonable to expect that professionals will take the risk of not being paid for their services, and that directors and officers will remain if placed in a compromised position" (*Timminco*, at para. 66).

29 This Court has similarly found that financing is critical as "case after case has shown that 'the priming of the DIP facility is a key aspect of the debtor's ability to attempt a workout'" (*Indalex*, at para. 59, quoting J. P. Sarra, *Rescue! The* Companies' Creditors Arrangement Act (2007), at p. 97). As lower courts have affirmed, "Professional services are provided, and DIP funding is advanced, in reliance on super-priorities contained in initial orders. To ensure the integrity, predictability and fairness

of the *CCAA* process, certainty must accompany the granting of such super-priority charges" (First Leaside Wealth Management Inc. (Re), 2012 ONSC 1299, at para. 51 (CanLII)).

30 Super-priority charges in favour of the monitor, financiers and other professionals are required to derive the most value for the stakeholders. They are beneficial to all creditors, including those whose claims are protected by a deemed trust. The fact that they require super priority is just a part of "[t]he harsh reality ... that lending is governed by the commercial imperatives of the lenders" (*Indalex*, at para. 59). It does not make commercial sense to act when there is a high level of risk involved. For a monitor and financiers to put themselves at risk to restructure and develop assets, only to later discover that a deemed trust supersedes all claims, smacks of unfairness. As McLachlin J. (as she then was) said, granting a deemed trust absolute priority where it does not amount to a trust under general principles of law would "defy fairness and common sense" (*British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24, at p. 33).

31 It is therefore clear that, in general, courts supervising a *CCAA* reorganization have the authority to order super-priority charges to facilitate the restructuring process. Similarly, courts have ensured that the *CCAA* is given a liberal construction to fulfill its broad purpose and to prevent this purpose from being neutralized by other statutes: [TRANSLATION] "As the courts have ruled time and again, the purpose of the *CCAA* and orders made under it cannot be affected or neutralized by another [Act], whether of public order or not" (Triton Électronique inc. (Arrangement relatif à), 2009 QCCS 1202, at para. 35 (CanLII)). "This case is not so much about the rights of employees as creditors, but the right of the court under the [*CCAA*] to serve not the special interests of the directors and officers of the company but the broader constituency referred to in Chef Ready Foods Ltd. [v. Hongkong Bank of Can. (1990), 51 B.C.L.R. (2d) 84 (C.A.)] ... Such a decision may inevitably conflict with provincial legislation, but the broad purposes of the [*CCAA*] must be served" (*Pacific National Lease Holding*, at para. 28). Courts have been particularly cautious when interpreting security interests so as to ensure that the *CCAA*'s important purpose can be fulfilled. For instance, in *Chef Ready Foods*, Gibbs J.A. observed that if a bank's rights under the Bank Act, S.C. 1991, c. 46, were to be interpreted as being immune from the provisions of the *CCAA*, then the benefits of *CCAA* proceedings would be "largely illusory" (p. 92). "There will be two classes of debtor companies: those for whom there are prospects for recovery under the [*CCAA*]; and those for whom the [*CCAA*] may be irrelevant dependent upon the whim of the [creditor]" (p. 92). It is important to keep in mind that *CCAA* proceedings operate for the benefit of the creditors as a group and not for the benefit of a single creditor. Without clear and direct instruction from Parliament, we cannot countenance the possibility that it intended to create a security interest that would limit or eliminate the prospect of reorganization and recovery under the *CCAA* for some companies. To do so would turn the *CCAA* into a dead letter. With this in mind, I turn to the specific provision at issue in this appeal.

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

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

33 Section 153(1) of the ITA requires employers to withhold income tax from employees' gross pay and forward the amounts withheld to the CRA. When an employer withholds income tax from its employees in accordance with the *ITA*, it assumes its employees' liability for those amounts (s. 227(9.4)). As a result, Her Majesty cannot have recourse to the employees if the employer fails to remit the withheld amounts. Instead, Her Majesty's interest is protected by a deemed trust. Section 227(4) of the ITA provides that amounts withheld are deemed to be held separate and apart from the employer's assets and in trust for Her Majesty. If an employer fails to remit the amounts withheld in the manner provided by the ITA, s. 227(4.1) extends the trust to all of the employer's assets. In this case, the Debtors failed to remit the amounts withheld to the CRA, bringing s. 227(4.1) into operation.

34 When a company seeks protection under the *CCAA*, s. 37(1) of the CCAA provides that most of Her Majesty's deemed trusts are nullified (unless the property in question would be regarded as held in trust in the absence of the statutory provision creating the deemed trust). However, s. 37(2) of the CCAA exempts the deemed trusts created by s. 227(4) and (4.1) of the ITA from the nullification provided for in s. 37(1). These deemed trusts continue to operate throughout the *CCAA* process (*Century*

Services, at para. 45). In my view, this preservation by the *CCAA* of the deemed trusts created by the *ITA* does not modify the characteristics of these trusts. They continue to operate as they would have if the insolvent company had not sought *CCAA* protection. Therefore, the Crown's arguments must be assessed by reviewing the nature of the interest created by s. 227(4.1) of the ITA.

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

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

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

37 Section 227(4.1) provides:

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

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

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

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

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

> **8.1** Both the common law and the civil law are equally authoritative and recognized sources of the law of property and civil rights in Canada and, unless otherwise provided by law, if in interpreting an enactment it is necessary to refer to a province's rules, principles or concepts forming part of the law of property and civil rights, reference must be made to the rules, principles and concepts in force in the province at the time the enactment is being applied.
>
> **8.2** Unless otherwise provided by law, when an enactment contains both civil law and common law terminology, or terminology that has a different meaning in the civil law and the common law, the civil law terminology or meaning is to be adopted in the Province of Quebec and the common law terminology or meaning is to be adopted in the other provinces.

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

41 In this case, Parliament has expressly chosen to dissociate itself from provincial private law. Section 227(4.1) says that it operates "*[n]otwithstanding any other provision of this Act*, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), *any other enactment of Canada, any enactment of a province or any other law*". In *Caisse populaire Desjardins de l'Est de Drummond v. Canada*, 2009 SCC 29, [2009] 2 S.C.R. 94, the majority found that, through these words, Parliament has created a standalone scheme of uniform application across all provinces (paras. 11-13). The nature of the deemed trust created by s. 227(4.1) must thus be understood on its own terms.

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

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

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

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

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

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

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

46 In the common law, a trust arises when legal ownership and beneficial ownership of a particular property are separated (see Valard Construction Ltd. v. Bird Construction Co., 2018 SCC 8, [2018] 1 S.C.R. 224, at para. 18). "Because a trust divides legal and beneficial title to property between a trustee and a beneficiary, respectively, the 'hallmark' characteristic of a trust is the fiduciary relationship existing between the trustee and the beneficiary, by which the trustee is to hold the trust property solely for the beneficiary's enjoyment" (para. 17 (footnote omitted)). As Rothstein J. wrote, because of this fiduciary relationship, "[t]he beneficial owner of property has been described as 'the real owner of property even though it is in someone else's name'" (Pecore v. Pecore, 2007 SCC 17, [2007] 1 S.C.R. 795, at para. 4, quoting *Csak v. Aumon*, (1990), 69 D.L.R. (4th) 567 (Ont. H.C.J.), at p. 570).

47 While the precise rights given to a beneficial owner may vary according to the terms of the trust and the principles of equity, I agree with the Crown that, where this type of interest exists, it will generally be inappropriate for the supervising judge to order a super-priority charge over the property subject to the interest, although the broad power conferred on the court by s. 11 of the CCAA would enable it to do so. Property held in trust cannot be said to belong to the trustee because "in equity, it

belongs to another person" (*Henfrey*, at p. 31). However, a close examination of the nature of the interest created by s. 227(4.1) of the ITA reveals that it does not create this type of interest because "[t]he employer is not actually required to hold the money separate and apart, the usual fiduciary obligations of a trustee are absent, and the trust exists without a *res*. The law of tracing is similarly corrupted" (R. J. Wood and R. T. G. Reeson, "The Continuing Saga of the Statutory Deemed Trust: Royal Bank v. Tuxedo Transportation Ltd." (2000), 15 B.F.L.R. 515, at p. 532). In other words, the key attributes that allow the common law to refer to beneficial ownership as being a proprietary interest are missing.

48 According to the common law understanding of a trust, the legal owner or trustee owes a fiduciary duty to the equitable owner or beneficiary. The fiduciary relationship impresses the office of trustee with three fundamental duties: the trustee must act honestly and with reasonable skill and prudence, the trustee cannot delegate the office, and the trustee cannot personally profit from its dealings with the trust property or its beneficiaries (see Valard, at para. 17). This severely restricts what the trustee may do with trust property and creates a relationship significantly different from the one between a debtor and a creditor. For instance, while a debtor may attempt to reduce its debt or reach a compromise, a trustee cannot, since it must always act in the best interest of the beneficiary and cannot consider its own interests. Similarly, while a debtor is liable to a creditor until the debt is repaid, a trustee is not liable to a beneficial owner where property is lost, unless it was lost through a breach of the standard of care owed (see E. E. Gillese, *The Law of Trusts* (3rd ed. 2014), at p. 14). In the case of the deemed trust, however, Parliament did not create such a fiduciary relationship. Parliament expressly contemplated a potential compromise between Her Majesty and the debtor in s. 6(3) of the CCAA. In addition, the terms of the *ITA* do not require that the debtor actually keep the property subject to the deemed trust separate and use it solely for the benefit of Her Majesty. In fact, Her Majesty does not enjoy the benefit of Her interest in the property while the property is held by the debtor. Instead, Parliament contemplated that the debtor would continue to use and dispose of the property subject to the trust for its own business purposes (see *First Vancouver*, at paras. 42-46).

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

50 In *First Vancouver*, this Court examined the nature of the interest created by s. 227(4.1) of the ITA. Writing for the Court, Iacobucci J. held that this provision creates a charge which "is in principle similar to a floating charge over all the assets of the tax debtor in the amount of the default" (para. 40). He concluded that Parliament specifically intended to create a charge with fluidity, a charge that could readily float over all of the debtor's assets rather than attach to a particular one (para. 33). Parliament's intention was to capture any property that comes into the possession of the tax debtor whilst simultaneously allowing any asset to be alienated and the proceeds of disposition to be captured (para. 5).

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

52 Parliament's decision to avoid certainty of subject matter was an intentional modification to the deemed trust following this Court's decision in *Dauphin Plains Credit Union Ltd. v. Xyloid Industries Ltd.*, [1980] 1 S.C.R. 1182. In *Dauphin Plains*, the

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

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

54 This interpretation is supported by the existence of s. 227(4.2) of the ITA, which specifically anticipates other interests taking priority over the deemed trust (something that would be impossible if there were an ownership interest). It states that "[f]or the purposes of subsections 227(4) and 227(4.1), a security interest does not include a prescribed security interest". In the Income Tax Regulations, C.R.C., c. 945, s. 2201(1), the Governor in Council has defined "prescribed security interest" as a registered mortgage "that encumbers land or a building, where the mortgage is registered ... before the time the amount is deemed to be held in trust by the person". Therefore, in certain situations, mortgage holders take priority over Her Majesty.

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

56 Other scholars agree that s. 227(4.1) "merely secures payment or performance of an obligation" (R. J. Wood, “Irresistible Force Meets Immovable Object: Canada v. Canada North Group Inc.” (2020), 63 Can. Bus. L.J. 85, at p. 95; see also A. Duggan and J. Ziegel, "Justice Iacobucci and the Canadian Law of Deemed Trusts and Chattel Security” (2007), 57 U.T.L.J. 227, at pp. 245-46). Wood and Reeson reach the particularly damning conclusion that "[t]he concept of a trust is used in the legislation, but in virtually every respect the characteristics of a trust are lacking" and thus "the use of inappropriate legal concepts" has led to the creation of a "statutory provision [that] is deeply flawed" (pp. 531-32). They "suspec[t] that the intention of the drafters was that Revenue Canada should obtain a charge on all the assets of the debtor", and they state that "the statutory deemed trust is nothing more than a legislative mechanism that is intended to create a non-consensual security interest in the assets of the employer" (p. 533).

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

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

58 The Crown also refers to the part of s. 227(4.1) which states that the Receiver General shall be paid the proceeds of a debtor's property "in priority to all such security interests", as defined in s. 224(1.3). In the Crown's view, court-ordered super-

priority charges under s. 11 of the CCAA or any of the sections that follow it are security interests within the meaning of s. 224(1.3) and therefore Her Majesty's interest has priority over them.

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

60 With respect, I disagree with this reasoning. *Sparrow Electric* dealt with a type of interest very different from the one before us now. In *Sparrow Electric*, this Court held that a fixed and specific charge over the tax debtor's inventory had priority over Her Majesty's deemed trust created by the *ITA*. Thus the purpose of the amendments was to "clarify that the deemed trusts for unremitted source deductions and GST apply whether or not other security interests have been granted in respect of the inventory or trade receivables of a business" (Department of Finance Canada, *Unremitted Source Deductions and Unpaid GST* (April 7, 1997), at p. 2). If Parliament had intended that the deemed trust have absolute priority, it would not have enacted s. 227(4.2) at the same time. As noted above, s. 227(4.2) provides that "a security interest does not include a prescribed security interest", and thus specifically envisions that the deemed trust will not have absolute priority. In my view, by using the words "in priority to all such security interests" in s. 227(4.1), Parliament intended that the priority be absolute not over all possible interests, but only over security interests as defined in s. 224(1.3). What must therefore be determined is whether a court-ordered super-priority charge under the *CCAA* falls within that definition.

61 Section 224(1.3) reads as follows:

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

62 This definition is expansive. However, the list of illustrative security interests makes it clear that a super-priority charge created under the *CCAA* cannot fall within its meaning. Court-ordered super-priority charges are utterly different from any of the interests listed. These super-priority charges are granted, not for the sole benefit of the holder of the charge, but to facilitate restructuring in furtherance of the interests of all stakeholders. In this way, they benefit the creditors as a group. The fact that Parliament chose to provide a list of examples whose nature is so unlike that of a court-ordered super-priority charge demonstrates that it must have had a very different type of interest in mind when drafting s. 224(1.3). I could not agree more with Professor Wood about the limited class of interests that Parliament had in mind:

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

63 My colleagues Brown and Rowe JJ. allege that this interpretation of s. 224(1.3) is contrary to our Court's decision in *Caisse populaire Desjardins de l'Est de Drummond*, where Rothstein J. wrote that the provided examples "do not diminish the broad scope of the words 'any interest in property' (para. 15; see also para. 14). With respect, I disagree with my colleagues. As Justice Rothstein explained at para. 40, his comments were made in response to the argument that the list of examples of security interests was exhaustive. I agree with him that the list of examples provided is not exhaustive. However, the examples

remain illustrative of the types of interests that Parliament had in mind and are clearly united by a common theme or class because Parliament employed a compound "means ... and includes" structure to establish its definition: "*security interest means* any interest in, or for civil law any right in, property that secures payment or performance of an obligation *and includes* ...". In my view, this structure evidences Parliament's intent that the list have limiting effect, such that only the instruments enumerated and instruments that are similar in nature fall within the definition. The critical difference between the listed security interests and super-priority charges ordered under s. 11 of the CCAA or any of the sections that follow it explains both why the latter are excluded from the list of specific instruments and why there can be no suggestion that they may be included in the broader term "encumbrance" at the end of that list. The *ejusdem generis* principle supports this position by limiting the generality of the final words on the basis of the narrow enumeration that precedes them (*National Bank of Greece (Canada) v. Katsikonouris*, [1990] 2 S.C.R. 1029, at p. 1040). All of the other instruments arise by agreement or by operation of law. Therefore, court-ordered super-priority charges under s. 11 or any of the sections that follow it are different in kind from anything on the list.

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

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

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

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

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

67 Finally, if Parliament had wanted to include court-ordered super-priority charges in the definition of "security interest", it would have said so specifically. Parliament must be taken to have legislated with the operation of the *CCAA* in mind. In the words of Professor Sullivan, "The legislature is presumed to know its own statute book and to draft each new provision with regard to the structures, conventions, and habits of expression as well as the substantive law embodied in existing legislation" (Sullivan (2014), at p. 422 (footnote omitted)). Given that, in *Indalex*, this Court has already found that granting super-priority charges is critical as "a key aspect of the debtor's ability to attempt a workout", one would expect Parliament to use clearer language

where such a definition could jeopardize the operation of another one of its Acts. I am therefore in total disagreement with my colleagues Justices Brown and Rowe that "nothing in the definition of security interest in the *ITA* precludes the inclusion of an interest that is designed to operate to the benefit of all creditors" (para. 210). To the contrary, everything hints at priming charges being excluded from the definition of security interest.

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

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

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

70 As discussed above, a supervising court's authority to order super-priority charges is grounded in its broad discretionary power under s. 11 of the CCAA and also in the more specific grants of authority under ss. 11.2, 11.4, 11.51 and 11.52. Those provisions authorize the court to grant certain priming charges that rank ahead of the claims of "any secured creditor". While I have already concluded that Her Majesty does not have a proprietary interest as a result of Her deemed trust, it is less certain whether Her Majesty is a "secured creditor" under the *CCAA*. Professor Wood is of the view that Her Majesty is not a "secured creditor" under the *CCAA* by virtue of Her deemed trust interest; rather, ss. 37 to 39 of the CCAA create "two distinct approaches — one that applies to a deemed trust, the other that applies when a statute gives the Crown the status of a secured creditor" (p. 96). Therefore, the ranking of a priming charge ahead of the deemed trust would fall outside the scope of the express priming charge provisions. I do not need to definitively determine if Her Majesty falls within the definition of "secured creditor" under the *CCAA* by virtue of Her trust. Instead, I would ground the supervising court's power in s. 11, which "permits courts to create priming charges that are not specifically provided for in the *CCAA*" (p. 98). I respectfully disagree with the suggestion of my colleagues Brown and Rowe JJ. that Professor Wood or any other author has suggested that s. 11 is limited by the specific provisions that follow it (para. 228). To the contrary, this Court said in *Century Services*, at paras. 68-70, that s. 11 provides a very broad jurisdiction that is not restricted by the availability of more specific orders.

71 My colleagues Brown and Rowe JJ. also argue that "priming charges cannot supersede the Crown's deemed trust claim because they may attach *only* to *the property of the debtor's company*" (para. 223 (emphasis in original)). With respect, this argument cannot stand because, although ss. 11.2, 11.51 and 11.52 of the CCAA contain this restriction, there is no such restriction in s. 11. As Lalonde J. recognized, [TRANSLATION] "In exercising the authority conferred by the *CCAA*, including inherent powers, the courts have not hesitated to use this jurisdiction to intervene in contractual relationships between a debtor and its creditors, even to make orders affecting the rights of third parties" (*Triton Électronique*, at para. 31). There may be circumstances where it is appropriate for a court to attach charges to property that does not belong to the debtor — if, for instance, this deemed trust were to be equivalent to a proprietary interest. However, that circumstance does not arise in this case because the property subject to Her Majesty's deemed trust remains the property of the debtor, as the deemed trust does not create a proprietary interest. My colleagues' reliance on s. 37(2) of the CCAA is similarly ill-founded. As I said earlier, s. 37(2) simply preserves the status quo. It does not alter Her Majesty's interest. It merely continues that interest and excludes it from the operation of s. 37(1), which would otherwise downgrade it to the interest of an ordinary creditor.

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

Initial Order, it is clear that she would have found that the super-priority charges deserved priority over Her Majesty's interest (paras. 100-104). However, I wish to say a few words on when it may be necessary for a supervising judge to subordinate Her Majesty's interest to super-priority charges.

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

VI. Disposition

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

Karakatsanis J. **(Martin J. concurring):**

I. Overview

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

76 In this case, the *CCAA* judge ordered priming charges over the estates of Canada North Group and six related companies (Debtor Companies) in favour of an interim lender, the monitor, and directors. Property of two of the Debtor Companies, however, was also subject to a deemed trust in favour of the Crown, under the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.) (ITA), for unremitted source deductions consisting of employees' income tax, Canada Pension Plan contributions, and employment insurance premiums. While this appeal is moot because there are sufficient assets to satisfy both the Crown's deemed trust claim and the priming charges, this Court is asked to determine which has priority in the restructuring: the priming charges under the *CCAA* or the deemed trust under the *ITA*.

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

78 The appellant, the Crown, argues that s. 227(4.1) of the ITA creates a proprietary right in the Crown because, through the mechanism of a deemed trust, it gives the Crown beneficial ownership of the amount of the unremitted source deductions. In other words, that *amount* is the Crown's property and a *CCAA* judge cannot, therefore, order a charge over it; it should be taken out of the estate and can play no role in the restructuring process.

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

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

II. Facts

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

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

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

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

84 At the time of the Initial Order, two of the Debtor Companies had failed to remit source deductions and owed the Crown $685,542.93. The Crown applied to vary the Priming Charges in the Initial Order on the basis that paras. 44 and 46(d) failed to recognize the Crown's legislated interest in unremitted source deductions. The Crown argued that s. 227(4.1) of the ITA, s. 23(4) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (*CPP*), and s. 86(2.1) of the Employment Insurance Act, S.C. 1996, c. 23 (EIA), require the Crown's claims for unremitted source deductions to have priority over the claims of all other creditors of a debtor, notwithstanding any other federal statute, including the *CCAA*. In these reasons, I will only refer to s. 227(4.1) of the ITA as the relevant *ITA*, *CPP* and *EIA* provisions are identical and the latter two statutes cross-reference the *ITA*.

III. Decisions Below

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

85 The application judge held that court-ordered priming charges under ss. 11.2, 11.51 and 11.52 of the CCAA have priority over the Crown's deemed trust for unremitted source deductions. First, she concluded that the Crown's deemed trust under s. 227(4.1) of the ITA creates a security interest rather than a proprietary interest because the definition of "security interest" in the *ITA* includes an interest created by a deemed or actual trust, and it would be inconsistent to interpret the Crown's interest

under s. 227(4.1) contrary to its enabling statute. She also reasoned that the deemed trust is a security interest because it lacks certainty of subject matter and is therefore not a true trust.

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

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

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

88 Wakeling J.A. disagreed. He concluded that s. 227(4.1) of the ITA makes two unequivocal statements: first, that the Crown is the beneficial owner of the debtor's property to the extent of the unremitted source deductions; and second, that this amount must be paid to the Crown notwithstanding the security interests of any other secured creditors, including, in his opinion, the holders of a priming charge. As a result, it was unnecessary to reconcile policy objectives. In his view, the notwithstanding clause in s. 227(4.1) was conclusive because the relevant *CCAA* provisions lacked the same language. As a result, there was "no need to look beyond the four corners of s. 227(4.1) to determine the scope of the unassailable priority it creates" (para. 135). Finally, Wakeling J.A. noted that there is perfect correlation between the purpose of the *ITA* and the plain meaning of s. 227(4.1).

IV. Parties' Submissions

A. The Appellant the Crown

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

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

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

B. The Respondent Business Development Bank of Canada

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

that Act contemplates that a priming charge can rank ahead of the Crown's deemed trust. Thus, ss. 11.2, 11.51 and 11.52 of the CCAA contemplate that a priming charge can rank ahead of the Crown's deemed trust.

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

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

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

V. Issue

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

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

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

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

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

VI. Analysis

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

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

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

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

> **(4.1)** Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner

> and at the time provided under this Act, property of the person and property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for a security interest (as defined in subsection 224(1.3)) would be property of the person, equal in value to the amount so deemed to be held in trust is deemed
>
> > (a) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, and
> >
> > (b) to form no part of the estate or property of the person from the time the amount was so deducted or withheld, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to such a security interest
>
> and is property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

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

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

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

100 Iacobucci J., writing for a majority of the Court, held in favour of the bank. At that time, the deemed trust was worded differently, triggering only upon an event of "liquidation, assignment, receivership or bankruptcy", and the amount of the unremitted source deductions was only deemed to be held "separate from and form no part of the estate *in liquidation, assignment, receivership or bankruptcy*" (para. 13 (emphasis added)). The majority therefore concluded that the deemed trust did not attach to the debtor's property because, at the relevant time, that property was already "legally the [bank's]" (para. 98). Because the bank had a fixed and specific charge over all of the debtor's property, there was nothing left for the trust to attach to. The trust could not be effective unless there was some unencumbered asset in the bankruptcy out of which the trust could be deemed (para. 99).

101 After *Sparrow Electric*, Parliament amended the deemed trust to ensure that, in a case like *Sparrow Electric*, the deemed trust attached notwithstanding any security interest held in the debtor's property (*First Vancouver*, at para. 27). As Iacobucci J. explained in *First Vancouver*, Parliament intended "to grant priority to the deemed trust in respect of property that is also subject to a security interest regardless of when the security interest arose in relation to the time the source deductions were made or when the deemed trust takes effect" (para. 28). [1]

102 In this appeal, the Crown argues that a court-ordered priming charge under the *CCAA* is a security interest for the purposes of the Crown's deemed trust. I agree that the definition of "security interest" in s. 224(1.3) of the ITA is broad, capturing "any interest in ... property that secures payment or performance of an obligation and includes an interest ... created by or arising out of a ... charge ..., *however or whenever arising, created, deemed to arise or otherwise provided for*". However, Wood makes the observation that court-ordered charges are fundamentally different in nature from the security interests that arise by consensual

agreement or by operation of law enumerated in s. 224(1.3) because "they are integrally connected to insolvency proceedings that operate for the benefit of the creditors as a group" (Wood (2020), at p. 98). As a result, he reasons that "it would be reasonable to expect that they would be specifically mentioned in the ITA definition of security interest if they were to be included" (p. 98).

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

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

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

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

106 This Court has noted that property is often understood as a "bundle of rights" and obligations (Saulnier v. Royal Bank of Canada, 2008 SCC 58, [2008] 3 S.C.R. 166, at para. 43). Depending on which rights someone holds, their "bundle of rights" can be viewed as a weak or robust proprietary interest. For this reason, the holder of a security interest has been described as having a proprietary right in its security. In *Sparrow Electric*, for example, both Iacobucci J., writing for the majority, and Gonthier J., writing for the dissent, explained the secured creditor in that case as having a proprietary right in, and effectively owning, the debtor's property that secured its debt (paras. 42 and 98).

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

108 This Court explained in *Saulnier* that, when analyzing the definition of property under a statute, there is little use in considering property in the abstract or even under the common law because "Parliament can and does create its own lexicon" for particular purposes (para. 16; see also Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny, 2009 SCC 49, [2009] 3 S.C.R. 286, at paras. 11-12). Indeed, "interests unknown to the common law may be created by statute" (*Wotherspoon v. Canadian Pacific Ltd.*, [1987] 1 S.C.R. 952, at p. 999, citing Ross J. in *Town of Lunenburg v. Municipality of Lunenburg*, [1932] 1 D.L.R. 386 (N.S.S.C.), at p. 390). As a result, caution is required before importing definitions from other contexts,

relying on statements or description from cases out of context, and employing general concepts like "proprietary right" and "security interest". It is crucial in this appeal to stay within the bounds of the statutory provisions being interpreted.

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

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

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

(i) No Settled Doctrinal Meaning

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

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

114 The term itself is also contentious within the academy, giving rise to a heated debate about whether a trust beneficiary should be thought of as an *owner* at all (see, e.g., D. W. M. Waters, “The Nature of the Trust Beneficiary's Interest” (1967), 45 Can. Bar Rev. 219; L. D. Smith, "Trust and Patrimony" (2008), 38 *R.G.D.* 379; B. McFarlane and R. Stevens, "The nature of equitable property" (2010), 4 J. Eq. 1; J. E. Penner, "The (True) Nature of a Beneficiary's Equitable Proprietary Interest under a Trust” (2014), 27 Can. J.L. & Jur. 473; Brender, at p. 316). The conventional view is that a trust beneficiary only has a right *in personam* against the trustee to enforce the terms of the trust, which is not a proprietary right in the trust property. A different view is that a trust beneficiary has equitable ownership of trust property, despite the existence of an intermediary with legal title (Brown, at pp. 413-14). Some suggest that there is a midway approach in Canada: depending on the context, a beneficiary's right is either a personal right against the trustee or a proprietary right in trust property (Brender, at p. 316).

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

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

117 In my view, the works cited above belie the notion that s. 227(4.1) of the ITA, and its use of the concept of beneficial ownership, is unequivocal in meaning. Not only is there no settled definition of beneficial ownership under the common law, there also appears to be no consistent meaning of the term in the *ITA*. And the concept does not exist in Quebec civil law. The meaning of beneficial ownership when used in a statute must always be construed within the context of the particular provision in which it occurs. What is necessary is careful scrutiny of s. 227(4.1), and specifically, the right of beneficial ownership it gives the Crown, particularly in the context of a statutory deemed trust with no specific subject matter.

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

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

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

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

121 This departure from a standard requirement of trust formation — certainty of subject matter — results in at least two features of s. 227(4.1) that are at odds with the operation of ordinary trusts. First, through equitable tracing, the beneficiary of a trust can claim appreciation in trust value, but this advantage is impossible without identifiable trust property (*Rawluk v. Rawluk*, [1990] 1 S.C.R. 70, at pp. 79 and 92-93; *Foskett v. McKeown*, [2001] 1 A.C. 102 (H.L.), at pp. 129-31; L. D. Smith, *The Law of Tracing* (1997), at pp. 347-48). The tracing mechanism in s. 227(4.1) provides that the value of any unremitted source deductions continues to survive in the assets remaining in the tax debtor's hands. Section 227(4.1) traces the *value* of the unremitted source deductions, necessarily capping the Crown's right at that value. In *Sparrow Electric*, Gonthier J. explained that such a tracing mechanism is "antithetical to tracing in the traditional sense, to the extent that it requires no link at all between the subject matter of the trust and the fund or asset which the subject matter is being traced into" (para. 37; see also Wood and Reeson, at p. 518; Smith (1997), at pp. 310-20 and 347-48; R. J. Wood, "The Floating Charge in Canada" (1989), 27 Alta. L. Rev. 191, at p. 221).

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

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

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

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

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

127 The Court's limited analogy to a floating charge in *First Vancouver* helps explain why "beneficial ownership" in s. 227(4.1) again means something narrower than it does outside of that statutory context. The Crown's right of beneficial ownership does not prevent the trustee from disposing of trust property until the Canada Revenue Agency (CRA) enforces the deemed trust (Canada Revenue Agency, *Tax collections policies* (online); see also ITA, ss. 222, 223(1) to (3), (5) and (6) and 224(1)). Freely disposing of trust property, including for one's own business purposes, is obviously not something a trustee can do under the common law.

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

129 To conclude, beneficial ownership under s. 227(4.1) is a manipulation of the concept of beneficial ownership under ordinary principles of trust law. The logical incoherence of s. 227(4.1) has prompted some scholars to criticize the provision as using inappropriate legal concepts. For example, Wood and Reeson state:

> ... we believe that the design of [s. 227(4.1) of the *ITA*] is deeply flawed.... In large measure, the difficulties have as their source the use of inappropriate legal concepts. The concept of a trust is used in the legislation, but in virtually every respect

> the characteristics of a trust are lacking. The employer is not actually required to hold the money separate and apart, the usual fiduciary obligations of a trustee are absent, and the trust exists without a *res*. The law of tracing is similarly corrupted. The tracing exercise does not seek to identify a chain of substitutions, and a proprietary claim is available without the need for a proprietary base.
>
> . . . . .
>
> The misuse of the trust concept and the perversion of conventional tracing principles empty these concepts of meaning and will pose a threat to the rationality of the law. [Footnote omitted; pp. 531-33.]

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

131 Similarly, in *Caisse populaire Desjardins de Montmagny*, this Court rejected the Crown's argument that s. 222(3) of the Excise Tax Act, R.S.C. 1985, c. E-15 (ETA), which is nearly identical to s. 227(4.1) of the ITA, created a proprietary right in the Crown (paras. 20-27). In that case, the debtor companies owed goods and services tax (GST) at the time of their respective bankruptcies. As the Crown's GST claims are unsecured in bankruptcy, the tax authorities took the position that amounts owing up to the date of the bankruptcy were the Crown's property. This Court unanimously disagreed with that position, concluding that the manner and mechanism of collecting GST was not consistent with a proprietary right (paras. 21-23).

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

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

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

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

(1) Parliament's Insolvency Regime

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

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

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

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

138 Due to its remedial nature, the *CCAA* is famously skeletal in nature (*Century Services*, at paras. 57-62). It does not "contain a comprehensive code that lays out all that is permitted or barred" (para. 57, quoting Metcalfe & Mansfield Alternative Investments II Corp. (Re), 2008 ONCA 587, 92 O.R. (3d) 513, at para. 44, per Blair J.A.). Under s. 11, for example, the court may make any order that it considers appropriate in the circumstances, subject to the restrictions set out in the Act. Section 11 has been described as "the engine that drives this broad and flexible statutory scheme" (*Stelco Inc. (Re)*, (2005), 75 O.R. (3d) 5 (C.A.), at para. 36; see also *9354-9186 Québec inc.*, at para. 48). Deschamps J. observed in *Century Services* that these discretionary grants of jurisdiction to the courts have been key in allowing the *CCAA* to adapt and evolve to meet contemporary business and social needs. Although judicial discretion must always be exercised in furtherance of the *CCAA*'s remedial purpose, it takes many forms and has proven to be flexible, innovative, and necessary (paras. 58-61; U.S. Steel Canada Inc., Re, 2016 ONCA 662, 402 D.L.R. (4th) 450, at para. 102).

139 This is in contrast to the liquidation regime in the *BIA*, which has slightly different purposes. In *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, Gonthier J. explained that bankruptcy serves two goals: it "ensure[s] the equitable distribution of a bankrupt debtor's assets among the estate's creditors *inter se* [and it ensures] the financial rehabilitation of insolvent individuals" (para. 7; see also *9354-9186 Québec inc.*, at para. 46). Similarly, Sarra and Houlden and Morawetz JJ. describe the purposes of the *BIA* as permitting both "an honest debtor, who has been unfortunate, to secure a discharge so that he or she can make a fresh start and resume his or her place in the business community" and "the orderly and fair distribution of the property of a bankrupt among his or her creditors on a *pari passu* basis" (The 2020-2021 Annotated Bankruptcy And Insolvency Act (2020), at p. 2).

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

141 Importantly, the specific goals of restructuring in the *CCAA*, in contrast to liquidation, result in the introduction of a key player: the interim lender. Interim financing, previously referred to as debtor-in-possession financing, is a judicially-supervised mechanism whereby an insolvent company is loaned funds for use during and for the purposes of the restructuring process. Before the 2009 amendments, there were no statutory provisions on interim financing in the *CCAA*, but the institution was well-established in the jurisprudence (L. W. Houlden, G. B. Morawetz and J. Sarra, *Bankruptcy and Insolvency Law of Canada* (4th ed. rev. (loose-leaf)), vol. 4, at N§93; see also Century Services, at para. 62). The 2009 amendments codified much of the existing jurisprudence, and I discuss the statutory provisions in detail below.

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

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

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

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

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

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

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

> 37 **(1)** Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.
>
> **(2)** Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision"), nor does it apply in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province if

> (a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or
>
> (b) the province is a province providing a comprehensive pension plan as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a provincial pension plan as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,
>
> and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

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

149 In my view, the Crown's submission overextends the analysis in *Century Services*. The issue in that case was whether the deemed trust under s. 222(3) of the ETA for unremitted GST was effective in the *CCAA*. As mentioned, s. 222(3) is almost identical in wording to s. 227(4.1) of the ITA, providing that the deemed trust extends to property of the tax debtor equal in value to the amount of the unremitted GST and extends to property otherwise held by a secured creditor pursuant to a security interest. Section 222(3) of the ETA also provides that the deemed trust operates despite any other enactment of Canada, except the *BIA*. Thus, under the *BIA*, the Crown priority for unremitted GST is lost. However, under the CCAA, s. 37(1) provides that statutory deemed trusts in favour of the Crown should not be regarded as trusts unless they would qualify as trusts absent the deeming language. The Court in *Century Services* grappled with the apparent conflict between s. 222(3) of the ETA and s. 37(1) (then s. 18.3(1)) of the *CCAA*.

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

151 Thus, while the Court emphasized that the deemed trust in s. 227(4.1) "survives" in the *CCAA*, it did not comment on *how* it survives. This Court has never considered the scope of the deemed trust under the *CCAA*, especially in light of the purposes of the *CCAA* and the equivocal nature of the beneficial ownership conferred through the deeming provision. For this appeal, it is necessary to probe into ss. 37(2) and 6(3) to determine *how* the *CCAA* construes the Crown's right to unremitted source deductions.

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

153 The result is that s. 37(2) provides that the Crown continues to beneficially own the debtor's property equal in value to the unremitted source deductions; the unremitted source deductions "shall ... be regarded as being held in trust for Her Majesty". However, although this signals that, unlike deemed trusts captured by s. 37(1), the Crown's deemed trust continues and confers

a stronger right, s. 37(2) does not explain what to do with that right for the purposes of a *CCAA* proceeding. It does not, for example, provide that trust property should be put aside, as it would be in the *BIA* context. In keeping with the *CCAA*'s flexibility, s. 37(2) says little about what the Crown's unique right of beneficial ownership under s. 227(4.1) of the ITA requires. But as I shall explain, s. 11 gives the court broad discretion to consider and give effect to the Crown's interest recognized in s. 37(2).

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

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

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

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

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

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

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

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

> **11.2 (1)** On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security

> or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.
>
> **(2)** The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

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

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

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

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

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

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

165 I also agree with the Crown that the definition of "secured creditor" in the *CCAA* does not specifically list the holder of a deemed or actual trust. In addition, the Crown's interest cannot simply be called a "charge". As explained above, although the Crown's deemed trust has some parallels with a floating charge, the provision also employs some aspects of beneficial ownership. I would also hesitate to draw analogies with any of the other terms listed in the *CCAA* definition. The holders of several of these instruments are often described as having proprietary rights in their security. It was a legislative choice to define them as secured creditors for the purposes of the *CCAA*. It is difficult to shoehorn the Crown's deemed trust into the definition of "secured creditor" in the *CCAA*, particularly as the *CCAA* specifically refers to the deemed trust in s. 37(2).

166 Moreover, I agree with the Crown that ss. 37 to 39 of the CCAA treat the Crown's deemed trust and the Crown's secured claims as distinct interests. After s. 37 of the CCAA, dealing with deemed trusts, s. 38(1) provides a general rule that secured claims of the Crown rank as unsecured claims. Section 38(2) contains an exemption from s. 38(1) for consensual security interests that are granted to the Crown. Section 38(3) contains an exemption for the CRA's enhanced requirement to pay. Finally,

s. 39(1) preserves the Crown's secured creditor status if it registers before the commencement of a *CCAA* proceeding, and s. 39(2) subordinates a Crown security or charge to prior perfected security interests.

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

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

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

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

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

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

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

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

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

174 In addition, depending on the circumstances, such an order may further the remedial objectives of the *CCAA*. For example, interim financing is often crucial to the restructuring process. If there is evidence that interim lending cannot be obtained without ranking the interim loan ahead of the Crown's deemed trust, such an order could, again depending on the circumstances, further the remedial objectives of the *CCAA*. In general, the court should have flexibility to order super-priority charges in favour of parties whose function is to facilitate the proposal of a plan of compromise that, in any event, will be required to pay the Crown in full.

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

176 While I agree that s. 11 is restricted by the provisions set out in the *CCAA* and cannot be used to violate specific provisions in the Act, s. 11 is not "restricted by the availability of more specific orders". The fact that specific provisions of the *CCAA* allow the court to rank priming charges ahead of a secured creditor does not mean that the court can *only* rank priming charges ahead of a secured creditor. Such an interpretation would amount to reading words into ss. 11.2, 11.51 and 11.52 that do not exist. An order that ranks a priming charge ahead of the beneficiary of the deemed trust is different in kind than the orders contemplated by ss. 11.2, 11.51 and 11.52, which contemplate the subordination of secured creditors. There is no provision in the *CCAA* stipulating what the court can do with trust property and no provision in the *CCAA* conferring more specific jurisdiction on whether a priming charge can rank ahead of the beneficiary of a deemed trust. So long as the order does not conflict with other provisions in the Act, namely ss. 37(2) and 6(3), and so long as it fulfills the "baseline considerations" of appropriateness, good faith, and due diligence, an order ranking a priming charge ahead of the Crown's deemed trust would fall under the jurisdiction conferred by s. 11 (*Century Services*, at para. 70; *9354-9186 Québec inc.*, at para. 49). As explained above, there would be no conflict with ss. 37(2) and 6(3) of the CCAA.

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

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

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

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

• whether the interim lender has indicated, in good faith, that it will not lend to the debtor without ranking ahead of the Crown's deemed trust;

• the relative amounts of the interim loan and the unremitted source deductions (if the amount of the unremitted source deductions is a small fraction of the amount of the interim loan, the interim lender may not be significantly prejudiced without super-priority);

• whether, and for how long, the Crown allowed source deductions to go unremitted without taking action (see, e.g., Hanlon, Tickle and Csiszar); and

• finally, the prospects of success of a restructuring; and whether the *CCAA* is likely to be used to sell the debtor's assets.

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

VII. Conclusion

181 I would dismiss the appeal and clarify that the authority to rank priming charges ahead of the Crown's deemed trust for unremitted source deductions is derived from s. 11 of the CCAA rather than ss. 11.2, 11.51 and 11.52. The Crown's interest under s. 227(4.1) of the ITA is a deemed trust interest, but beneficial ownership of deemed trust property is a manipulation of private law concepts, without settled meaning. Accordingly, the specific nature of beneficial ownership of deemed trust property must be determined in the relevant context in which it is asserted. Here, the Crown's right to unremitted source deductions in a *CCAA* restructuring is protected by both ss. 37(2) and 6(3). The former is flexible, requiring the Crown's deemed trust property to be considered when appropriate under the Act; the latter specifically requires that a plan of compromise provide for payment in full of the Crown's deemed trust claims within six months of the plan's approval. The Crown's right differs under the *BIA*, in keeping with the different goals and schemes of liquidation and restructuring. Given the content of the Crown's right to unremitted source deductions in a *CCAA* restructuring, there is no conflict between s. 227(4.1) of the ITA and s. 11 of the CCAA. The schemes of both federal Acts can be harmonized and the objectives of both statutes furthered.

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

***Brown, Rowe JJ.* (dissenting) (Abella J. concurring):**

I. Overview

183 At issue in this appeal is whether the Crown's deemed trust claim for unremitted source deductions under s. 227(4) and (4.1) of the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.) (“ITA”), s. 23(3) and (4) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8 ("*CPP*"), and ss. 23(4) and 86(2) and (2.1) of the Employment Insurance Act, S.C. 1996, c. 23 (“EIA”) (collectively, the "Fiscal Statutes"), have priority over court-ordered priming charges under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (“CCAA”).

184 The present iteration of the deemed trust provision, s. 227(4.1) of the ITA, was the result of a 1997 amendment enacted by Parliament directly in response to this Court's interpretation of the provision's predecessor in *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (Department of Finance Canada, *Unremitted Source Deductions and Unpaid GST* (April 7, 1997)). That provision was itself the result of several amendments, beginning in 1942, with the amendment introducing the deemed trust in s. 92(6) and (7) of the Income War Tax Act, R.S.C. 1927, c. 97 (previously S.C. 1917, c. 28) (*An Act to amend the* Income War Tax Act, S.C. 1942-43, c. 28, s. 31). The provision and the historical amendments demonstrate Parliament's intention to safeguard its ability to collect employee source deductions under the relevant statutes, in priority to all other claims against a debtor's property.

185 The Crown appeals from the decision of the Court of Appeal of Alberta which, like the chambers judge, held that the *CCAA* court could subordinate the deemed trust claims under the Fiscal Statutes to the priming charges (2019 ABCA 314, 93 Alta. L.R. 29, aff'g 2017 ABQB 550, 60 Alta. L.R. (6th) 103). Having examined the pertinent provisions of the Fiscal Statutes, and for the reasons that follow, we find ourselves in respectful disagreement with that conclusion, and prefer the view of the dissenting judge, Wakeling J.A. The Crown's deemed trust claims under the Fiscal Statutes have ultimate priority and cannot be subordinated by priming charges.

186 In our view, the text of the impugned provisions in the Fiscal Statutes is clear: the Crown's deemed trust operates "[n]otwithstanding ... any other enactment of Canada" (ITA, s. 227(4.1)). [2] Parliament used unequivocal language — indeed, *the very language suggested by this Court* in *Sparrow Electric* — to give ultimate priority to the Crown's claim. Further, and again in clear and unequivocal text, Parliament imposed limits on the broad grant of authority by which a court can prioritize priming charges, thereby making plain the superiority of deemed trust claims. Finally, no provision of the *CCAA* is rendered meaningless by this interpretation. Unlike in other contexts such as the legislative scheme governing the GST/HST, Parliament has left no room for subordinating the deemed trusts under the Fiscal Statutes in pursuit of other legislative objectives. We would, therefore, allow the appeal.

II. Analysis

A. General Comments on the Nature of the Deemed Trusts Under the Fiscal Statutes

187 The deemed trust created by the *ITA* is an essential instrument to collect source deductions (First Vancouver Finance v. M.N.R., 2002 SCC 49, [2002] 2 S.C.R. 720, at para. 22). The *ITA* grants special priority to the Crown to collect unremitted source deductions, reflecting its status as an "involuntary creditor" (*First Vancouver*, at para. 23).

188 Section 227(4) and (4.1) of the ITA reads:

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

189 These sections describe two relevant events. First, at the time of the deduction, a trust is deemed in favour of the Crown, binding every person (the "tax debtor") who collects source deductions in the amount withheld until the person remits the source deductions (ITA, s. 227(4)). Section 227(4) deems the tax debtor to hold the source deductions "separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person".

190 The second event occurs where the tax debtor has failed to remit the source deductions in accordance with the manner and time provided by the ITA. Section 227(4.1) extends the deemed trust to all "property of the person and property held by any secured creditor ... equal in value to the amount so deemed to be held in trust". This is achieved by deeming the source deductions to be held "in trust for Her Majesty" from the moment the amount was "deducted or withheld by the person, separate and apart from the property of the person". Parliament further provided that the unremitted source deductions under the Fiscal Statutes "form no part of the estate or property of the person" from the time of deduction or withholding, and is "property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests".

191 This Court has held that the deemed trust is a "creatur[e] of statute" and "is not in truth a real [trust], as the subject matter of the trust cannot be identified from the date of creation of the trust" (*Sparrow Electric*, at para. 31, per Gonthier J., citing D. W. M. Waters, *Law of Trusts in Canada* (2nd ed. 1984), at p. 117, and adopted in First Vancouver, at para. 37). This statement fuelled a debate in this appeal about whether the deemed trust is a security interest or a proprietary interest, with the respondents arguing that the Crown cannot hold a proprietary interest in the debtor's property because there is a lack of certainty in the subject matter.

192 We agree with each of our colleagues Justices Karakatsanis and Côté that the deemed trust is not a "true" trust and that it does not confer an ownership interest or the rights of a beneficiary on the Crown as they are understood at common law or within the meaning of the *Civil Code of Québec* (Karakatsanis J.'s reasons, at paras. 119-20; Côté J.'s reasons, at paras. 43 and 49). Respectfully, however, our colleagues miss the point of the *deemed* quality of the trust. The matters of a property interest, certainty of subject matter and autonomous patrimony that arise from attempts to describe the operation of the deemed trust are entirely irrelevant and do not assist in deciding this appeal, nor in understanding Parliament's intent. The deemed trust is a legal fiction, with *sui generis* characteristics that are described in s. 227(4) and (4.1) of the ITA. As noted in First Vancouver, at para. 34, "it is open to Parliament to characterize the trust in whatever way it chooses; it is not bound by restraints imposed by ordinary principles of trust law". While *First Vancouver* considered the contrast between a statutory trust and a common law trust, the same applies to our colleague Côté J.'s reference to the Civil Code(Canada (Attorney General) v. Caisse populaire d'Amos, 2004 FCA 92, 324 N.R. 31, at para. 49). What matters here is not *the characterization* of the deemed trust that is at issue, but its *operation*. And as we explain, it *operates* to give the Crown a statutory right of access to the debtor's property to the extent of its *corpus* and a right to be paid in priority to all security interests.

193 Further, no concerns regarding certainty of subject matter or autonomous patrimony arise here. It is of course true that, in common law Canada, for a trust to come into existence there must be certainty of intention, certainty of subject matter, and certainty of object (D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (4th ed. 2012), at p. 140; E. E. Gillese, *The Law of Trusts* (3rd ed. 2014), at p. 41). Similarly, under the Quebec civil law, "[t]hree requirements must ... be met in order for a trust to be constituted: property must be transferred from an individual's patrimony to another patrimony by appropriation; the property must be appropriated to a particular purpose; and the trustee must accept the property" (*Bank of Nova* Scotia v. Thibault, 2004 SCC 29, [2004] 1 S.C.R. 758, at para. 31). And, again, it is also true that the subject matter of the deemed trust under s. 227(4.1) cannot be identified from the date of creation of the trust and does not constitute an autonomous patrimony to which specific property is transferred.

194 But again, none of this remotely matters here. Statutory text, not ordinary principles of trust law, determines the nature of, and rights conferred by, deemed trusts (*First Vancouver*, at para. 34). And this Court has recognized that Parliament, through the trust deemed by s. 227(4.1) of the ITA, has "revitaliz[ed] the trust whose subject matter has lost all identity" (*Sparrow Electric*, at para. 31, per Gonthier J., adopted in First Vancouver, at para. 37). This is because the subject matter of the deemed trust is ascertained *ex post facto*, corresponding to the property of the tax debtor and property held by any secured creditor equal

in value to the amount deemed to be held in trust by s. 227(4) that, but for the security interest, would be property of the tax debtor. In short, the subject matter is whatever assets the employer then has from which to realize the original trust debt. Hence Iacobucci J.'s description in *First Vancouver* of the operation of s. 227(4.1) as "similar in principle to a floating charge" (para. 4). Parliament also circumvented the traditional requirements of the *Civil Code* for constituting a trust by requiring the amount of the unremitted source deductions to be held "separate and apart from the property of the [debtor]" and to "form no part of the estate [*patrimoine*, in the French version] or property of the [debtor]" (s. 227(4.1)).

195 In short, the requirements of "true" trusts of civil and common law are irrelevant to ascertaining the operation of a statutorily deemed trust. Parliament did not legislate a "true" trust. Instead, it legislated a deeming provision which "artificially imports into a word or an expression an additional meaning which they would not otherwise convey beside the normal meaning which they retain where they are used" (*R. v. Verrette*, [1978] 2 S.C.R. 838, at p. 845).

196 On this point, and contrary to the view of the majority at the Court of Appeal, Iacobucci J. *did not* hold that the deemed trust *is* a floating charge — nor that it was "of the same nature" (Côté J.'s reasons, at para. 51) — but rather that it operated *similarly*, by permitting a debtor in the interim to alienate property in the normal course of business. They are distinct legal concepts; whereas the deemed trust takes "priority over existing and future security interests", a floating charge would be overridden by a subsequent fixed charge (Toronto-Dominion Bank v. Canada, 2020 FCA 80, [2020] 3 F.C.R. 201, at para. 62; see also First Vancouver, at para. 28).

197 Significantly, the s. 227(4.1) deemed trust does not encompass the whole of the tax debtor's interest in property, but only the amount deemed to be held in trust by s. 227(4). But this does not mean the Crown cannot have a property interest in the debtor's property. It merely limits that interest to the extent of the unremitted source deductions. This makes sense. The Crown may collect only what it is owed.

B. The Deemed Trust Under the Fiscal Statutes Have Absolute Priority Over All Other Claims in CCAA Proceedings

198 The text, context, and purpose of s. 227(4.1) of the ITA support the conclusion that s. 227(4.1) of the ITA and the related deemed trust provisions under the Fiscal Statutes bear only one plausible interpretation: the Crown's deemed trust enjoys priority over all other claims, including priming charges granted under the *CCAA*. Parliament's intention when it amended and expanded s. 227(4) and (4.1) of the ITA was clear and unmistakable.

(1) The Deemed Trusts Apply Notwithstanding the Provisions of the CCAA

(a) Text of the Fiscal Statutes

199 The text of s. 227(4.1) of the ITA is determinative: the Crown's deemed trust claim enjoys superior priority over all "security interests", including priming charges under the *CCAA*. The amount subject to the deemed trusts is deemed "to be held ... separate and apart from the property of the person" and "to form no part of the estate or property of the person". It is "beneficially owned by Her Majesty", and the "proceeds of such property shall be paid ... in priority to all such security interests". The Crown's right pursuant to its deemed trust is clear: it is a right to be paid in priority to all security interests.

200 Parliament granted this unassailable priority by employing the unequivocal language of "[n]otwithstanding any ... enactment of Canada". This is a "blanket paramountcy clause"; it prevails over all other statutes (P. Salembier, *Legal and Legislative Drafting* (2nd ed. 2018), at p. 385). No similar "notwithstanding" provision appears in the *CCAA*, subordinating the claims under the deemed trusts of the Fiscal Statues to priming charges. Indeed, it is quite the opposite: unlike most deemed trusts which are nullified in *CCAA* proceedings by the operation of s. 37(1) of the CCAA, s. 37(2) *preserves* the deemed trusts of the Fiscal Statutes. This distinguishes the deemed trust at issue here from those discussed in *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, which were nullified by the operation of what is now s. 37(1). Deschamps J. repeatedly contrasted the different deemed trusts and specified that "the Crown's deemed trust and corresponding priority in source deductions remain effective both in reorganization and in bankruptcy" (para. 38). The *ITA* and *CCAA* thus operate without conflict.

(b) Legislative Predecessor Provisions

201 The predecessor provisions of a statutory provision form part of the "entire context" in which it must be interpreted (Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771, 2005 SCC 70, [2005] 3 S.C.R. 425, at para. 28). And here, it confirms that, by enacting s. 227(4.1) of the ITA, Parliament intended for the deemed trusts arising from the Fiscal Statutes to have absolute priority over all secured creditors, as defined in s. 224(1.3) of the ITA.

202 As already noted, Parliament amended s. 227(4.1) of the ITA to its current form in response to this Court's decision in *Sparrow Electric*. In *Sparrow Electric*, both Royal Bank and the Minister claimed priority to the proceeds from the tax debtor's property. This Court held that the Bank had priority since the inventory was subject to the Bank's security before the deemed trust arose. In reaching this conclusion, Iacobucci J. invited Parliament to grant absolute priority to the Crown, and showed how this could be achieved:

> I wish to emphasize that it is open to Parliament to step in and assign absolute priority to the deemed trust. A clear illustration of how this might be done is afforded by s. 224(1.2) *ITA*, which vests certain moneys in the Crown "notwithstanding any security interest in those moneys" and provides that they "shall be paid to the Receiver General in priority to any such security interest". All that is needed to effect the desired result is clear language of that kind. In the absence of such clear language, judicial innovation is undesirable, both because the issue is policy charged and because a legislative mandate is apt to be clearer than a rule whose precise bounds will become fixed only as a result of expensive and lengthy litigation.
>
> [Emphasis added; para. 112.]

203 Parliament proceeded to do just that. It amended the Fiscal Statutes to reinforce its priority. The press release accompanying the amendments stated that the objective of the amendments was to "assert the *absolute priority* of the Crown's claim [for] unremitted source deductions [and to] ensure that tax revenue losses are minimised and that delinquent taxpayers and their secured creditors do not benefit from failures to remit source deductions and GST at the expense of the Crown" (Department of Finance Canada, at p. 1 (emphasis added)).

204 The purpose of these amendments was described by Iacobucci J. for this Court in *First Vancouver*. It was, he recognized, to grant priority to the deemed trusts and ensure the Crown's claim prevails over secured creditors, irrespective of when the security interest arose (paras. 28-29). "It is evident from these changes" he added, "that Parliament has made a concerted effort to broaden and strengthen the deemed trust in order to facilitate the collection efforts of the Minister" (para. 29). Parliament's intention could not have been clearer.

205 Indeed, our colleagues' view to the contrary leaves us wondering: if the all-encompassing scope of the notwithstanding clause of s. 227(4.1) of the ITA is *insufficient* to prevail over the priming charges, what language would possibly be *sufficient*? Courts must give proper effect to Parliament's plain statutory direction, and not strain to subvert it on the basis that Parliament's categorical language or "basket clause" did not itemize a particular security interest.

(2) The Priming Charges Are "Security Interests" Within the Meaning of the Fiscal Statutes

206 The priming charge provisions in ss. 11.2(1), 11.51(1) and 11.52(1) of the CCAA allow the supervising court to "make an order declaring that all or part of the company's property is subject to a security or charge" ("*charge ou sûreté*" in the French version). This does not, however, prevail over the deemed trust created by s. 227(4.1) of the ITA, which provides that the unpaid amounts of the deemed trust for source deductions have priority over all "security interests". That term is defined by s. 224(1.3) of the ITA as follows:

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

This makes clear that a "security interest" includes a "charge" (a "*sûreté*" in the French version). Further, ss. 11.2(1), 11.51(1) and 11.52(1) of the CCAA describe the priming charges as a "security or charge". There can be no doubt, therefore, that priming charges under the *CCAA* are security interests under the *ITA*.

207 Even were this insufficient, the definition of "security interest" in s. 224(1.3) of the ITA is sufficiently expansive to capture *CCAA* priming charges. The word "includes", and the categorical language of "encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for" could not be any more expansive. As Professor Sullivan explains, "The purpose of a list of examples following the word 'including' is normally to emphasize the broad range of general language and to ensure that it is not inappropriately read down so as to exclude something that is meant to be included" (*Sullivan on the Construction of Statutes* (6th ed. 2014), at para. 4.39).

208 This Court has already recognized, in *Caisse populaire Desjardins de l'Est de Drummond v. Canada*, 2009 SCC 29, [2009] 2 S.C.R. 94, that Parliament chose "an expansive definition of 'security interest' ... in order to enable maximum recovery by the Crown" (para. 14), such that it captures any interest in the property of the debtor that secures payment or performance of an obligation:

> In order to constitute a security interest for the purposes of s. 227(4.1) *ITA* and s. 86(2.1) *EIA*, the creditor must hold "any interest in property that secures payment or performance of an obligation". The definition of "security interest" in s. 224(1.3) *ITA* does not require that the agreement between the creditor and debtor take any particular form, nor is any particular form expressly excluded. So long as the creditor's interest in the debtor's property secures payment or performance of an obligation, there is a "security interest" within the meaning of this section. While Parliament has provided a list of "included" examples, these examples do not diminish the broad scope of the words "any interest in property" ....
>
> [Emphasis added; para. 15.]

In that case, Rothstein J. held for the Court that a contract providing a right to compensation (or set-off at common law) could constitute a "security interest" under s. 224(1.3) of the ITA, *despite that it was not enumerated in the definition* and that it is *not traditionally understood as such* (paras. 37-40).

209 For all these reasons, the priming charges fall under the definition of "security interest", because they are "interest[s] in the debtor's property [that] secur[e] payment or performance of an obligation", i.e. the payment of the monitor, the interim lender, and directors. Consequently, the Crown's interest under the trust deemed created by s. 227(4.1) of the ITA enjoys priority over the priming charges.

210 Our colleague Côté J., however, sees the matter differently. In our respectful view, she disregards this Court's authoritative statement of the law in *Caisse populaire Desjardins de l'Est de Drummond*. Specifically, she concludes that priming charges are not "security interests" under the *ITA* because "[c]ourt-ordered charges are unlike conventional consensual and non-consensual security interests in that they are integrally connected to insolvency proceedings that operate for the benefit of the creditors as a group" (Côté J.'s reasons, at para. 62 (emphasis deleted), quoting R. J. Wood, “Irresistible Force Meets Immovable Object: Canada v. Canada North Group Inc.” (2020), 63 Can. Bus. L.J. 85, at p. 98). With respect, nothing in the definition of security interest in the *ITA* precludes the inclusion of an interest that is designed to operate to the benefit of all creditors.

211 Further, and irrespective of the nature of *CCAA* proceedings, our colleague's conclusion is irreconcilable with this Court's holding in *Caisse populaire Desjardins de l'Est de Drummond* and with the "expansive definition" Parliament adopted to maximize recovery (*Caisse populaire Desjardins de l'Est de Drummond*, at para. 14). The fact that the instrument is court-ordered and is for the presumed benefit of all creditors is irrelevant. It does not affect *the nature* of the priming charges — to secure the payment of an obligation — which is the only relevant criterion (para. 15). As for the express inclusion of "priming charges" in the definition and their creation by court order, we reiterate that "*sûreté*" and "*charge*" are explicitly included "*however* or whenever arising, *created*, deemed to arise or provided for" (ITA, s. 224(1.3)).

212 Nor is Professor Wood's commentary, and by extension, the reasoning in *DaimlerChrysler Financial Services (Debis) Canada Inc. v. Mega Pets Ltd.*, 2002 BCCA 242, 1 B.C.L.R. (4th) 237, and *Minister of National Revenue v. Schwab Construction Ltd.*, 2002 SKCA 6, 213 Sask. R. 278, of any avail to our colleague Karakatsanis J. (para. 102; see also Wood, at p. 98, fns. 51-52). While those judgments held that finance leases and conditional sales agreements did not fall under the definition of s. 224(1.3) of the ITA because they were not specifically listed, that reasoning was later squarely rejected in *Caisse populaire de l'Est de Drummond*. And, were that not enough, *Mega Pets* and *Schwab*, unlike the instant case, dealt with situations where property was not transferred to the debtor, which facts were treated as determinatively supporting the conclusion that the instruments in those cases were not "security interests". For example, under a conditional sales agreement, the seller does not have an interest in the debtor's property because ownership rests with the seller until performance of the obligation (*Mega Pets*, at para. 32). By contrast, the priming charges secure payment out of property that remains the debtor's.

213 Finally, this Court's interpretation of "security interest" in *Caisse populaire de l'Est de Drummond* is confirmed by the French version of the text. "*Sont en particulier des garanties*" is illustrative, not limitative. *Le Robert* (online) defines "*en particulier*" (in particular) as [TRANSLATION] "*particularly, among others*, especially, above all" (emphasis added). Unsurprisingly, the French version of s. 224(1.3) has been described as being [TRANSLATION] "as broadly worded as possible" (R. P. Simard, "Priorités et droits spéciaux de la couronne", in *JurisClasseur Québec — Collection droit civil — Sûretés* (loose-leaf), vol. 1, by P.-C. Lafond, ed., fasc. 4, at para. 20). There is no discordance between both versions of the text. The French version conforms perfectly to the English text's use of the verb "includes", and confirms the plain reading of the English version.

214 Respectfully, our colleagues Côté and Karakatsanis JJ. frustrate the clear will of Parliament. Clear, all-inclusive language should be treated as such, and not circumvented by straining to draw distinctions of no legal significance whatsoever or by searching for what is not specifically mentioned in order to avoid the otherwise inescapable conclusion that Parliament granted absolute priority to the deemed trusts.

(3) Conclusion

215 It is this simple:

1. the Fiscal Statutes give absolute priority to the deemed trusts for source deductions over all security interests notwithstanding the *CCAA*;

2. the priming charges are "security interests" within the meaning of the Fiscal Statutes; and

3. the *CCAA* does not subordinate the claims under the deemed trusts of the Fiscal Statutes to the priming charges.

216 This is sufficient to decide the appeal: the deemed trusts of the Fiscal Statutes have priority over the priming charges. However, in view of the respondents' submissions that such a finding leaves the deemed trust provisions in the Fiscal Statutes in conflict with the *CCAA*, and that recognizing the ultimate priority of the Crown's deemed trust renders certain provisions of the *CCAA* meaningless, we are compelled to explain why this is not so.

C. The CCAA and the Fiscal Statutes Operate Harmoniously

(1) The Broad Grant of Authority Under Section 11 of the CCAA Is Not Unlimited

217 It is not disputed that s. 11 of the CCAA contains a grant of broad supervisory discretion and the power to "make any order that it considers appropriate in the circumstances" to give effect to that supervisory role (see J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2nd ed. 2013), at pp. 18-19). What is in dispute, however, are the limits to this broad power.

218 A supervising judge's authority to grant priming charges was not always contained in the *CCAA*. Prior to the 2009 amendments, it was derived from the courts' inherent jurisdiction (Temple City Housing Inc., Re, 2007 ABQB 786, 42 C.B.R. (5th) 274, at para. 14; Q.B. reasons, at para. 105). While the amendments in some respects represented a codification of the past

practice, they clarified how priming charges operated (CCAA, ss. 11.2, 11.51 and 11.52). Despite being "the engine driving the statutory scheme", s. 11's exercise was expressly stated by Parliament to be "*subject to the restrictions set out in this Act*" (see 9354-9186 Québec inc. v. Callidus Capital Corp., 2020 SCC 10, at paras. 48-49, citing *Stelco Inc. (Re)*, (2005), 75 O.R. (3d) 5 (C.A.), at para. 36). Three such restrictions are significant here.

(a) The Continued Operation of the Deemed Trusts for Unremitted Source Deductions (Section 37(2))

219 The first restriction on the authority to grant priming charges is found in s. 37(2) of the CCAA. This provides for the continued operation of the deemed trusts under the Fiscal Statutes in a *CCAA* proceeding — a point this Court *repeatedly* highlighted in *Century Services*, at paras. 78-81. At the hearing of this appeal, the respondents argued that s. 37(1) nullifies the Crown's priority in respect of all deemed trusts under the *CCAA*, and that s. 37(2) acts merely to reincorporate the deemed trusts under the Fiscal Statutes into *CCAA* proceedings without their absolute priority. This tortured interpretation misconceives the effect of s. 37(1).

220 Section 37(1) provides that, despite any deemed trust provision in federal or provincial legislation, "property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision", but it is expressly made "[s]ubject to subsection (2)". Through s. 37(2), Parliament also preserved the operation of the deemed trusts under the Fiscal Statutes within *CCAA* proceedings by providing that "[s]ubsection (1) does not apply in respect of amounts deemed to be held in trust under [the Fiscal Statutes]". In the face of Parliament's clear direction that the deemed trusts operate "notwithstanding" any other enactment, and the express preservation of the deemed trusts in the *CCAA*, there is simply no basis whatsoever for reading s. 37 as invalidating the deemed trust provisions under the Fiscal Statutes only to revive them with a conveniently lesser priority. Such an interpretation finds no support in the text, context, or purpose of the statutory schemes. Rather, all those considerations support the view that the deemed trusts under the Fiscal Statutes are preserved in *CCAA* proceedings in both form and substance, along with their absolute priority.

221 Before turning to the second restriction, we note each of our colleagues Karakatsanis J. and Côté J. fail to give effect to Parliament's decision, expressed in clear statutory text, to "preser[ve] deemed trusts and asser[t] Crown priority only in respect of source deductions" under the *CCAA* (*Century Services*, at para. 45). For the same reason, the reliance they place on *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24, is misconceived. There, the Court held that the deemed trust created by provincial legislation was not a "true trust" so as to fall outside the debtor's property under what is now s. 67(1)(a) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 ("BIA"). That is not this case. Unlike the deemed trust in *Henfrey*, the deemed trusts of the Fiscal Statutes receive a particular treatment in bankruptcy and insolvency proceeding because they are preserved by s. 37(2) of the CCAA and s. 67(3) of the BIA. Further, while the Court in *Henfrey* concluded that the deemed trust was ineffective in bankruptcy because the commingling of assets rendered the money subject to the deemed trusts untraceable, this rationale has no application to s. 227(4.1). In *First Vancouver*, this Court noted that "by deeming the trust to be effective 'at any time' the debtor is in default, the amendments serve to strengthen the conclusion that the Minister is not required to trace its interest to assets which belonged to the tax debtor at the time the source deductions were made" (para. 37). Again, no conclusions regarding the nature of the deemed trusts flow from the fact that tracing is irrelevant under s. 227(4.1): the deemed trusts are statutory instruments and the question is one of operation, *not* characterization.

(b) Priming Charges Attach Only to the Property of the Debtor Company

222 The second restriction on the *CCAA*'s broad authority to grant priming charges is that the *CCAA* requires priming charges to attach only to "all or part" of the property of the debtor's company (s. 11.2(1); see also ss. 11.51(1) and 11.52(1)). Here, Parliament evinces a clear intent to preserve the ultimate priority it afforded the deemed trusts under the Fiscal Statutes. This is because, by operation of s. 227(4.1) of the ITA and s. 37(2) of the CCAA, the unremitted source deductions are deemed *not* to form part of the property of the debtor's company.

223 Parliament could not have been more explicit: the source deductions are deemed never to form part of the company's property and, if there is a default in remittances, the Crown is deemed to obtain beneficial ownership in the tax debtor's property in the amount of the unremitted source deductions that it can collect "notwithstanding" any other enactment or security interest.

Whether this is a true ownership interest is irrelevant to this appeal as the legislation *deems* the Crown to obtain beneficial ownership for these purposes. It follows that the priming charges cannot supersede the Crown's deemed trust claim because they may attach *only* to *the property of the debtor's company*, of which Parliament took great care to ensure the source deductions were deemed to form no part. As Michael J. Hanlon explains:

> While it has been held that an interim financing charge may rank ahead of the deemed trusts existing in favour of the Canada Revenue Agency with respect to amounts owing on account of unremitted source deductions, this appears to be incorrect. Property deemed to be held in trust pursuant to the provisions creating the deemed trust are deemed not to form part of the debtor's estate, and given that those deemed trusts with respect to source deductions, are preserved in a *CCAA* context, the interim financing charge would not attach to those assets.
>
> [Emphasis added; footnotes omitted.]
>
> (*Halsbury's Laws of Canada — Bankruptcy and Insolvency* (2017 Reissue), at HBI-376)

(c) The Definition of "Secured Creditor" (Section 2)

224 The third restriction on the *CCAA*'s broad authority to grant priming charges is that the court "may order that the security or charge rank in priority over the claim of *any secured creditor* of the company" (ss. 11.2(2), 11.51(2) and 11.52(2)). Also, the definition of "secured creditor" in s. 2(1) of the CCAA makes it manifestly clear that the Crown is not a "secured creditor" in respect of its deemed trust claims under the Fiscal Statutes:

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

This definition highlights two relevant considerations. First, the definition should be read as encompassing two classes of creditors. And second, the use of the word "trust" must be given legal significance.

225 As to the first consideration, we accept the Crown's submission that the proper reading of the definition of secured creditor references only two classes of secured creditors: (i) holders of direct security, and (ii) holders of secured bonds. So understood, a secured creditor means either

> a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company,

or

> **a holder of any bond of a debtor company secured by** a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, or **a trust in respect of, all or any property of the debtor company** ....

The reference to "trust" appears only in relation to an instrument securing a bond of the debtor company. The definition must be read as "secured creditor means ... a holder of any bond of a debtor company secured by ... a trust in respect of, all or any property of the debtor company". Accordingly, holders of an interest under a deemed trust are not a third class of creditors (A. Prévost, "Que reste-t-il de la fiducie réputée en matière de régimes de retraite?" (2016), 75 *R. du B.* 23, at p. 58).

226 While finding this interpretation "initially attractive", the majority of the Court of Appeal ultimately rejected this reading. It did so because, irrespective of whether the definition needs a third reference to a "holder of a trust" drafted in parallel to the first two classes of creditors, the Crown's interest could be classified as a "charge" and is therefore captured by the first

class of secured creditors (C.A. reasons, at paras. 42-43). Respectfully, this is incorrect. Deemed trusts are not covered by the word "charge". To conclude that the word "charge" encompasses "deemed trusts" under the first class of secured creditors when "charge" and "trust" are listed distinctly under the second class of secured creditors (holders of secured bonds) would be incoherent and run contrary to legislative presumptions in statutory interpretation. Why would Parliament include a specific reference to *trusts* if they are already covered by *charge*? Parliament is presumed to avoid "superfluous or meaningless words, [and] phrases" (Bristol-Myers Squibb Co. v. Canada (Attorney General), 2005 SCC 26, [2005] 1 S.C.R. 533, at para. 178). The deliberate and distinct text of "trust" and "charge" shows that it was not Parliament's intention to have holders of deemed trusts subsumed under "charge" such that the Crown in this circumstance would become a secured creditor.

227 In any case, if there were only one class of creditor, the Crown would not be a secured creditor with respect to the deemed trust claim under the Fiscal Statutes. While Parliament distinguished between "deemed or actual trust[s]" in s. 224(1.3) of the ITA, it made no such distinction in the definition of secured creditor. Parliament is presumed to legislate with intent and chose its words carefully. Our role as a court with respect to legislation is interpretation, not drafting. We must ascribe legal significance to Parliament's choice of text — that is, to the words Parliament chose and *did not* choose.

(d) "Restrictions" Under Section 11 of the CCAA

228 Our colleague Karakatsanis J. agrees with our analysis of the priming charge provisions, but she does not seem to view them as "restrictions" within the meaning of s. 11 because "[t]he general language of s. 11 should not ... be 'restricted by the availability of more specific orders'" (Karakatsanis J.'s reasons, at para. 170, citing Century Services, at para. 70). With respect, as a matter of law and statutory interpretation this view is simply unavailable to our colleague. Neither s. 11 nor the court's inherent jurisdiction can "empower a judge ... to make an order negating the unambiguous expression of the legislative will" (*Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.*, [1976] 2 S.C.R. 475, at p. 480; see also R. v. Caron, 2011 SCC 5, [2011] 1 S.C.R. 78, at para. 32). Parliament has imposed clear restrictions on the courts' power to give priority to priming charges. It is one thing to rely on s. 11 as a source of general authority even when other specific orders are available; it is another to misconstrue s. 11 as a source of unfettered authority to circumvent such unambiguous restrictions. While courts may use their general s. 11 power to create priming charges for purposes other than those that are specifically enumerated (see Wood, at pp. 90-91), Parliament has clearly expressed its intention to restrict any such charge in a critical way — it cannot take priority over the Crown's deemed trust.

229 For the same reason, we respectfully find untenable our colleague Justice Moldaver's suggestion that it is unclear whether there are restrictions *internal* to the *CCAA* itself that would prevent a court from using its power under s. 11 to order a priming charge in priority to the Crown's deemed trust claim. This statement does not account for Parliament's clear intention, recorded in s. 37(2), to preserve the Crown's right to be paid in absolute priority over all secured creditors in *CCAA* proceedings. It also renders superfluous the restrictions on the court's authority to prioritize priming charges under ss. 11.2(2), 11.51(2) and 11.52(2) of the CCAA.

230 Further, our colleague Moldaver J. says it is unnecessary to "define the particular nature or operation of the" deemed trust under the *ITA* (para. 255), and relies on the "notwithstanding" language of s. 227(4.1) of the ITA to determine whether the Crown's claim can have priority over priming charges. This interpretation effectively reads in a conflict in the statutory schemes, despite this Court's clear direction that "an interpretation which results in conflict should be eschewed unless it is unavoidable" (*Lévis (City) v. Fraternité des policiers de Lévis Inc.*, 2007 SCC 14, [2007] 1 S.C.R. 591, at para. 47). In any event, this is not an *unavoidable* conflict: there is simply *no* conflict. Parliament *avoided* any conflict between the *CCAA* and the *ITA* by imposing restrictions upon the court's authority under s. 11 of the CCAA.

(e) Structure of Crown Claims Under the CCAA

231 Finally, while not a "restrictio[n] set out in [the *CCAA*]", as specified in s. 11, the cogency of the statutory scheme as a whole depends on an interpretation where the Crown cannot be a secured creditor. This is so because classifying the Crown as "secured creditor" would disrupt the structure of Crown claims that the *CCAA* clearly defines at ss. 37 to 39 (Wood, at p. 98). Section 37 applies to deemed trust claims, with s. 37(1) providing that deemed trusts in favour of the Crown are ineffective

under the *CCAA*, as a general rule, and s. 37(2) providing an exemption for the deemed trust for source deductions. Section 38(1) sets out the general rule that the Crown's secured claims rank as unsecured claims, with specific exemptions at s. 38(2) and (3). Finally, s. 39(1) preserves the Crown's secured creditor status if it registers before the commencement of the *CCAA* proceedings but, under s. 39(2), that security is subordinate to prior perfected security interests.

232 This leads us to question why Parliament would expressly "preserve" the deemed trusts of the Fiscal Statutes by operation of s. 37(2), only then to rank the Crown as an unsecured creditor by the operation of s. 38(1). Unlike the interpretation that affords the deemed trusts ultimate priority, allowing the Crown to be reduced to an unsecured creditor in respect of its deemed trust claims would render s. 37(2) almost meaningless. Further, this interpretation would require the Crown to register its claim under s. 39(1) to preserve its status because the deemed trust is not afforded the exemption under s. 38. It would be illogical for Parliament to confer greater protection on secured claims afforded an exemption under s. 38(2) or (3) than it conferred on deemed trusts for source deductions, when the clear objective was to confer "absolute priority" on the latter (*First Vancouver*, at paras. 26-28).

233 We note that Professor Wood is not alone in recognizing that "sections 38 and 39 of the CCAA govern the conditions upon which a Crown claim can be viewed as 'secured' for the purposes of the CCAA" (F. L. Lamer, *Priority of Crown Claims in Insolvency* (loose-leaf), at §79.2). Since the deemed trusts for unremitted source deductions under the Fiscal Statutes do not meet the conditions of these sections, it follows that the Crown's claim is not "secured".

234 In our view, a plain reading of the definition of secured creditor within the context of the broader statutory scheme results in a single inescapable conclusion. That is, there are three classes of Crown claims under the *CCAA*: (1) claims pursuant to deemed trusts continued under the *CCAA*; (2) secured claims; and (3) unsecured claims. The claims for unremitted source deductions fall under the first type: claims pursuant to deemed trusts continued under the *CCAA*.

(2) Recognizing the Ultimate Priority of the Crown's Deemed Trust Does Not Defeat the Purpose of any Provision of the CCAA

235 For two further and related reasons, the majority at the Court of Appeal and the respondents resist the conclusion that the Crown's deemed trust enjoys absolute priority.

(a) Protection of Crown Claims Under Section 6(3)

236 First, the majority held that granting ultimate priority to the deemed trusts would render s. 6(3) of the CCAA meaningless. This provision prohibits the court from sanctioning a compromise or arrangement unless it provides for payment in full to the Crown, within six months of the sanction of the plan, of all amounts due to the Crown. The majority reasoned that if the Crown is always paid first for its deemed trust claims under the Fiscal Statutes, there would be no need to protect the Crown claims under s. 6(3).

237 Respectfully, this conclusion is erroneous. A review of the purpose and scope of s. 6(3) of the CCAA is clear: it operates only where there is an arrangement or compromise put to the court, and it protects the entirety of the Crown claim pursuant to s. 224(1.2) of the ITA and similar provisions of the Fiscal Statutes. This includes claims *not* subject to the deemed trusts under the Fiscal Statutes, such as income tax withholdings, employer contributions to employment insurance and CPP, interest and penalties. In contrast, the deemed trusts arise immediately and operate continuously "from the time the amount was deducted or withheld" from the employee's remuneration, and apply to *only those* deductions. It follows, then, that, without s. 6(3), the Crown would be guaranteed entitlement only to unremitted source deductions when the court sanctions a compromise or arrangement, and not to its other claims under s. 224(1.2) of the ITA. This is because most of the Crown's claims rank as unsecured under s. 38 of the CCAA.

238 It bears emphasizing that s. 6(3) does *not* apply where no arrangement is proposed or to *CCAA* proceedings which involve the liquidation of the debtor's assets. Such "liquidating CCAAs" are "now commonplace in the *CCAA* landscape" (*Callidus Capital Corp.*, at para. 42). The absolute priority of the deemed trusts under the Fiscal Statutes, continued by s. 37(2) of the CCAA, provides protection to the Crown's claim for unremitted source deductions in liquidating CCAAs. Each of our

colleagues Côté and Karakatsanis JJ. deprive the Crown of its guaranteed entitlements in such cases, despite Parliament having unambiguously granted "absolute priority" to claims for unremitted source deductions (Department of Finance Canada).

239 We note that our colleague Karakatsanis J. does not conclude that s. 6(3) is rendered nugatory by our interpretation; rather, she says that, since the term "beneficial ownership" as it is used in the deemed trusts does not have the same meaning at common law, we must look to the *CCAA* to ascertain the Crown's rights. This "manipulation of private law concepts, without settled meaning", she further says, raises the question of *how* the deemed trust survives under the *CCAA* (para. 181). And the answer, she finds, is furnished by s. 6(3).

240 This is wrong for three reasons. First, there is no question as to how the deemed trust survives. Section 37(2) operates to exempt the deemed trusts under the Fiscal Statutes from any change in form or substance under the *CCAA*; this continues the operation of s. 227(4.1), which confers absolute priority on the Crown's claim to the deemed trusts under the Fiscal Statutes. In other words, the deemed trust survives as it was under the Fiscal Statutes. It is unsurprising, therefore, that this Court did not opine on *how* the trust "survives" in *CCAA* proceedings in *Century Services*: it is, with respect, plain and obvious.

241 Secondly, our colleague Karakatsanis J.'s suggestion that the understanding of the rights conferred on the Crown under the deemed trust must arise from reading s. 6(3) of the CCAA entirely bypasses the text of the *ITA* which specifically sets out those rights. After providing that the Crown has "beneficial ownership" of the value of the unremitted source deduction, the *ITA* continues: "the proceeds of such property shall be paid to the Receiver General in priority to all such security interests" (s. 227(4.1)). This is the right of the Crown under the deemed trust, and our colleague fails to give effect to this right.

242 Finally, as we have discussed, s. 6(3) protects different interests than those captured by the deemed trusts. If s. 6(3) were to exhaust the Crown's rights under the *CCAA*, our colleague Karakatsanis J. correctly observes that "there may be some risk to the Crown that the plan [under s. 6(3)] may fail, and the Crown *may not be paid in full* if the restructuring dissolves into liquidation and the estate is depleted in the interim" (para. 155 (emphasis added)). This, however, only supports our interpretation. The right "not to have to compromise" under s. 6(3) is a right independent of the Crown's right under deemed trusts (para. 155 (emphasis deleted)).

(b) Power to Stay the Crown's Garnishment Right (Section 11.09)

243 Secondly, the majority at the Court of Appeal and the respondents say that giving effect to the clear statutory wording would be contrary to the purpose of s. 11.09 of the CCAA, which grants courts the power to stay the Crown's garnishment right under the *ITA* (C.A. reasons, at para. 54). This demonstrates, the argument goes, Parliament's intent to have the court exercise control over the Crown's interests while monitoring the restructuring proceedings. On this view, granting absolute priority to the deemed trusts under the Fiscal Statutes necessarily implies that s. 11.09 of the CCAA does not apply to the deemed trust claim.

244 Again respectfully, this is not so. A court-ordered stay of garnishments under s. 11.09 of the CCAA *can* apply to the Crown's deemed trust claims under the Fiscal Statutes because the deemed trust provisions and s. 11.09 each serve different purposes: the deemed trusts grant a priority to the Crown, while s. 11.09 imposes conditions on when and how the Crown can enforce its garnishment rights under s. 224(1.2) of the ITA. In other words, s. 11.09 permits the Court to stay the Crown's ability to enforce its claims under the deemed trusts, but it does not remove its priority.

245 The critical point is this: giving effect to Parliament's clear intent to grant absolute priority to the deemed trust does not render s. 6(3) or s. 11.09 meaningless. To the contrary, s. 6(3) and s. 11.09 respect the ultimate priority of the deemed trusts under the Fiscal Statutes by allowing for the ultimate priority of the Crown claim to persist, while not frustrating the remedial purpose of the *CCAA*.

(3) Conclusion

246 As with our discussion of the deemed trust's absolute priority, the harmonious operation of the *CCAA* and the Fiscal Statutes can be summarized as follows:

1. the *CCAA* preserves the Crown's right to be paid in priority to all security interests for its claims for source deductions under the Fiscal Statutes;

2. under the *CCAA*, the Crown is not a "secured creditor" in respect of its deemed trust claims under the Fiscal Statutes;

3. as priming charges can attach only to the debtor's property, and as Parliament has made it clear that unremitted source deductions form no part of the debtor's property, the Crown's interest under the deemed trust is not subject to the priming charges;

4. section 6(3) of the CCAA, which operates only where there is an arrangement or compromise put to the court, protects the entirety of the Crown claim under s. 224(1.2) of the ITA and similar provisions of the Fiscal Statutes; and

5. the deemed trust's grant of priority to the Crown is unaffected by s. 11.09, which instead imposes conditions on when and how the Crown can enforce its garnishment rights under s. 224(1.2) of the ITA.

D. Policy Reasons Do Not Support a Different Interpretation

247 The majority of the Court of Appeal and the respondents place significant weight on what they view as the potentially "absurd consequences" that would result from concluding that the deemed trusts under the Fiscal Statutes have priority over the priming charges. The same point implicitly underlies our colleague Côté J.'s reasons. Indeed, the majority at the Court of Appeal went as far as to warn that, under this interpretation, interim financing would "simply end", an assertion that "almost certainly goes too far" (C.A. reasons, at para. 50; Wood, at p. 99). It added that it would lead to more business failures and, in turn, undermine tax collection (paras. 48 and 50). We disagree.

248 The "absurd consequences" identified by the majority at the Court of Appeal rest on faulty premises. The conclusion that interim financing would "simply end" was not supported by the record. The majority extrapolated from admittedly incomplete and dated data about interim financing drawn from a textbook which does not indicate the presence of a deemed trust claim. This sweeping statement elides cases where there is no interim lending and cases, such as this one, where the debtor's assets are sufficient to satisfy both the interim lending and the Crown's deemed trust claim. This is an omission that cannot be readily ignored as there are usually enough funds available to satisfy both the Crown claim *and* the court-ordered priming charges (Wood, at p. 100). Equally unfounded is the majority's claim that confirming the priority of the deemed trusts of the Fiscal Statutes would "inject an unacceptable level of uncertainty into the insolvency process" (C.A. reasons, at para. 51). A company applying under the *CCAA* is required to provide its financial statements (s. 10(2)(c)), which include the source deductions owed to the Crown. Interim lenders can rely on this information to evaluate the risk of providing financing.

249 Moreover, the majority at the Court of Appeal did not consider that Parliament can, and did, choose to prioritize the integrity of the tax system over the interests of secured creditors. Indeed, and with respect, the majority's own interpretation arguably itself produces absurd results, whereby employees' gross remuneration are conscripted as a subsidy to secure interim financing and the services of insolvency professionals.

250 We therefore do not remotely see the consequences of our interpretation as rising to the level of absurdity. And Parliament has unambiguously struck the balance it considered appropriate in pursuit of the dual objectives of collecting unremitted source deductions, which are not the property of the debtor, and avoiding the "devastating social and economic effects of bankruptcy" (*Century Services*, at para. 59, quoting *Elan Corp. v. Comiskey*, (1990), 1 O.R. (3d) 289 (C.A.), at p. 306, per Doherty J.A., dissenting). Whether s. 227(4.1) of the ITA is an effective means to protect the fiscal base or whether "the Crown is biting off the hand that feeds it" are not questions that this Court has the competence or legitimacy to answer (C.A. reasons, at para. 48).

251 In any event, even were there evidence that giving priority to the deemed trusts under the Fiscal Statutes over the priming charges produced absurd results, our conclusion would be no different. The presumption against absurdity is exactly that: a presumption. Nothing more. Illogical consequences flowing from the application of a statute do not give rein to courts

to disregard clear legislative intent. As Lamer C.J. noted in R. v. McIntosh, [1995] 1 S.C.R. 686, at para. 41, "Parliament ... has the right to legislate illogically (assuming that this does not raise constitutional concerns). And if Parliament is not satisfied with the judicial application of its illogical enactments, then Parliament may amend them accordingly."

252 Here, Parliament's intention to give absolute priority to the deemed trust of the Fiscal Statutes is unequivocal. Our role is to give effect to this intention.

III. Disposition

253 We would allow the appeal. The respondents should be entitled to costs in accordance with "Schedule B" to the regulations (Rules of the Supreme Court of Canada, SOR/2002-156). There are no exceptional circumstances that would justify enhanced costs. Despite the appeal being moot, it was not improper for the Crown to seek the correct interpretation of the Fiscal Statutes.

Moldaver J. **(dissenting):**

254 I have had the benefit of reading the reasons of my colleagues, Justice Côté, Justice Karakatsanis, and Justices Brown and Rowe. While I substantially agree with the analysis and conclusions of Brown and Rowe JJ., there are two points that I wish to address.

255 First, unlike Brown and Rowe JJ., I see no reason to define the particular nature or operation of the Crown's interest under s. 227(4.1) of the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.) ("ITA"), in the context of proceedings under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 ("CCAA"). While a future appeal may require this Court to determine exactly how the Crown's interest under s. 227(4.1) "survives", and whether it amounts to some form of ownership interest in the debtor's property, as Brown and Rowe JJ. maintain, some form of security interest in that property, or something else entirely (e.g., a right not to have to compromise, as Karakatsanis J. maintains), such an inquiry is not necessary in this case. Properly interpreted, the relevant provisions of the *CCAA* and *ITA* work in harmony to direct that the Crown's interest — in whatever form it takes — must be given priority over court-ordered priming charges. This conclusion is sufficient to dispose of the appeal.

256 In my view, to the extent that Brown and Rowe JJ. conclude that the Crown's interest under s. 227(4.1) affords the Crown beneficial ownership over the source deductions such that "the source deductions are deemed never to form part of the company's property", they have effectively decided the appeal by two paths — first, by way of the Crown's absolute priority under s. 227(4.1), and second, by way of the Crown's beneficial ownership over any unremitted source deductions (para. 223). As they note, if the Crown's interest amounts to an ownership interest and unremitted source deductions do not form part of the debtor company's property, priming charges could never attach to those source deductions, whether ordered under the specific priming charge provisions or the court's broad power under s. 11 of the CCAA (paras. 222-23). If this is indeed the case, it is not clear that the issue of competing priority between the Crown's interest and court-ordered priming charges ever arises, as the source deductions would be simply inaccessible to anyone other than the Crown. As I am not necessarily convinced that the Crown's interest under s. 227(4.1) amounts to an ownership interest, and as the Crown's absolute priority does not depend on this conclusion, I would leave the question of the nature of the Crown's interest to another day.

257 Second, while I agree with Brown and Rowe JJ. that s. 37(2) of the CCAA can be interpreted as an internal restriction on s. 11, I hesitate to accept this conclusion, as it strikes me that in order to give proper effect to Parliament's intention for s. 11 to serve as "the engine" that drives the *CCAA* and empowers supervising judges to further its remedial objectives, any restrictions on that discretionary power should be explicit and unambiguous (9354-9186 Québec inc. v. Callidus Capital Corp., 2020 SCC 10, at para. 48, citing *Stelco Inc. (Re)*, (2005), 75 O.R. (3d) 5 (C.A.), at para. 36). With respect, s. 37(2) does not amount to such an explicit and unambiguous restriction. Rather, s. 37(2) is a simple exception to s. 37(1), which serves to nullify the effect of any statutory provision that deems property to be held in favour of the Crown:

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

> **(2)** Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act* ....

258 In effect, then, the function of s. 37(2) is merely to preserve the Crown's deemed trust under s. 227(4.1) from extinguishment under s. 37(1). In preserving the Crown's interest, however, "s. 37(2) does not explain what to do with that right for the purposes of a *CCAA* proceeding", nor does it say anything that would limit the court's power under s. 11 to order priming charges in priority to the Crown's deemed trust claim (Karakatsanis J.'s reasons, at para. 153). Indeed, as Karakatsanis J. notes, "There is no provision in the *CCAA* stipulating what the court can do with trust property and no provision in the *CCAA* conferring more specific jurisdiction on whether a priming charge can rank ahead of the beneficiary of a deemed trust" (para. 176). Rather, it is only when one looks to s. 227(4.1) that the absolute priority of the Crown's interest — and the resulting limitations on s. 11 — become apparent. It is thus not entirely clear that interpreting s. 37(2) as an internal restriction accords with the function of s. 37(2) or the leeway that Parliament intended for the scope of powers under s. 11. In other words, the relationship between ss. 11 and 37(2) may not be as clear-cut as my colleagues seem to suggest. Accordingly, while I ultimately agree with Brown and Rowe JJ. that s. 37(2) can be interpreted as an internal restriction so as to avoid a conflict between the *CCAA* and *ITA*, I feel it important to explain that, if this interpretation is mistaken, s. 11 is nonetheless restricted by the external text of s. 227(4.1).

259 If s. 37(2) does not amount to an internal restriction on s. 11, using s. 11 to prioritize priming charges over the Crown's deemed trust claim would put the provision in direct conflict with s. 227(4.1) which, as my colleagues Brown and Rowe JJ. have explained, requires that the Crown's claim be ranked in priority to all security interests, including priming charges. The direct conflict would trigger the "[n]otwithstanding" language in s. 227(4.1), which states that "[n]otwithstanding ... any other enactment of Canada", the Crown's claim is to have priority. This language thus imposes an external restriction on the court's power under s. 11. Indeed, the supremacy of s. 227(4.1) is implicitly acknowledged by the text of s. 11 as, unlike s. 227(4.1), which operates despite "any other enactment of Canada", s. 11 only operates "[d]espite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*", but not despite anything in the *ITA*. Accordingly, while the court's discretionary authority under s. 11 could, in theory, empower a court to subordinate the Crown's interest in unremitted source deductions, that power is ultimately stopped short by the express language of s. 227(4.1).

260 In outlining this position, I consider it important to contextualize this Court's statement in *Callidus* that "the jurisdiction granted by s. 11 is constrained only by restrictions set out in the *CCAA* itself, and the requirement that the order made be 'appropriate in the circumstances'" (para. 67). The focus in *Callidus* was on the discretionary authority of supervising *CCAA* judges within the confines of the *CCAA* itself; it was not on addressing the question of the authority of *CCAA* judges to apply s. 11 in the face of overriding federal legislation. Respectfully, where, as here, Parliament has expressly indicated the supremacy of a statute over the provisions of the *CCAA*, the court's power under s. 11 is correspondingly restricted.

261 The Crown's deemed trust claim must thus take priority over all court-ordered priming charges, whether they arise under the specific priming charge provisions, or under the court's discretionary authority.

262 A necessary consequence of the absolute supremacy of the Crown's deemed trust claim over court-ordered priming charges is that the Crown's interest under s. 227(4.1) cannot be given effect by s. 6(3) of the CCAA. Section 6(3) of the CCAA provides that

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

263 In my view, there are two reasons why s. 6(3) cannot represent the Crown's interest under s. 227(4.1). First, the focus of s. 6(3) is to establish a timeframe for payment to the Crown of certain outstanding debts in the event that the debtor company succeeds in staying viable as a going concern. By contrast, s. 227(4.1) is focused on ensuring the *priority* of the Crown's claim.

The key point of distinction here is that, under s. 6(3), the Crown could be ranked last, so long as it is paid within six months of any arrangement. Such an outcome would be plainly inconsistent with the absolute priority of the Crown's claim, as established by the *CCAA* and *ITA*. Second, as s. 6(3) applies only where a compromise or plan of arrangement is reached, the Crown's deemed trust claim would not operate in the event that a liquidation occurred under the *CCAA*, thereby depriving the Crown of its priority over security interests in such circumstances. Again, this potential consequence would be at odds with the clear intention of the *CCAA* and *ITA*.

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

265 I would, therefore, allow the appeal. The respondents are entitled to costs in this Court in accordance with Schedule B of the Rules of the Supreme Court of Canada, SOR/2002-156.

Appeal dismissed.

Pourvoi rejeté.

Footnotes

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

2 The wording of the deemed trust provisions in the relevant provisions of the Fiscal Statutes is materially identical. This decision focuses on the deemed trusts in s. 227(4) and (4.1) of the ITA. The reasoning herein, however, applies with equal force to each of the other statutes.

TAB 13

2012 SCC 67
Supreme Court of Canada

AbitibiBowater Inc., Re

2012 CarswellQue 12490, 2012 CarswellQue 12491, 2012 SCC 67, [2012] 3 S.C.R. 443, [2012] A.C.S. No. 67, [2012] S.C.J. No. 67, 221 A.C.W.S. (3d) 264, 352 D.L.R. (4th) 399, 438 N.R. 134, 71 C.E.L.R. (3d) 1, 95 C.B.R. (5th) 200, J.E. 2012-2270

Her Majesty the Queen in Right of the Province of Newfoundland and Labrador, Appellant and AbitibiBowater Inc., Abitibi-Consolidated Inc., Bowater Canadian Holdings Inc., Ad Hoc Committee of Bondholders, Ad Hoc Committee of Senior Secured Noteholders and U.S. Bank National Association (Indenture Trustee for the Senior Secured Noteholders), Respondents and Attorney General of Canada, Attorney General of Ontario, Attorney General of British Columbia, Attorney General of Alberta, Her Majesty the Queen in Right of British Columbia, Ernst & Young Inc., as Monitor, and Friends of the Earth Canada, Interveners

McLachlin C.J.C., LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis JJ.

Heard: November 16, 2011
Judgment: December 7, 2012
Docket: 33797

Proceedings: affirmed *AbitibiBowater Inc., Re* (2010), 68 C.B.R. (5th) 57, 52 C.E.L.R. (3d) 1, 2010 CarswellQue 4782, 2010 QCCA 965, Chamberland J.A. (C.A. Que.); refused leave to appealdemande d'autorisation d'en appeler refusée *AbitibiBowater Inc., Re* (2010), 68 C.B.R. (5th) 1, 52 C.E.L.R. (3d) 17, 2010 QCCS 1261, 2010 CarswellQue 2812, Clément Gascon J.C.S (C.S. Que.)

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Roderick Wiltshire, for Intervener, Attorney General of Alberta
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Robert I. Thornton, John T. Porter, Rachelle F. Moncur, for Intervener, Ernst & Young Inc., as Monitor
William A. Amos, Anastasia M. Lintner, Hugh S. Wilkins, R. Graham Phoenix, for Intervener, Friends of the Earth Canada

Subject: Insolvency; Environmental

APPEAL by province from decision reported at *AbitibiBowater Inc., Re* (2010), 68 C.B.R. (5th) 57, 52 C.E.L.R. (3d) 1, 2010 CarswellQue 4782, 2010 QCCA 965 (C.A. Que.), denying leave to appeal decision dismissing its motion for declaration that claims procedure order issued under *Environmental Protection Act* (Nfld.) did not bar province from enforcing orders requiring debtor to perform remedial work.

POURVOI formé par la province à l'encontre d'une décision publiée à *AbitibiBowater Inc., Re* (2010), 68 C.B.R. (5th) 57, 52 C.E.L.R. (3d) 1, 2010 CarswellQue 4782, 2010 QCCA 965 (C.A. Que.), ayant refusé d'accorder la permission d'interjeter appel à l'encontre d'une décision ayant rejeté sa requête visant à faire déclarer que l'ordonnance relative à la procédure de réclamations émise en vertu de l'*Environmental Protection Act* n'empêchait pas la province d'exécuter les ordonnances enjoignant la débitrice d'exécuter des travaux de décontamination.

***Deschamps J.*:**

1 The question in this appeal is whether orders issued by a regulatory body with respect to environmental remediation work can be treated as monetary claims under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*").

2 Regulatory bodies may become involved in reorganization proceedings when they order the debtor to comply with statutory rules. As a matter of principle, reorganization does not amount to a licence to disregard rules. Yet there are circumstances in which valid and enforceable orders will be subject to an arrangement under the *CCAA*. One such circumstance is where a regulatory body makes an environmental order that explicitly asserts a monetary claim.

3 In other circumstances, it is less clear whether an order can be treated as a monetary claim. The appellant and a number of interveners posit that an order issued by an environmental body is not a claim under the *CCAA* if the order does not require the debtor to make a payment. I agree that not all orders issued by regulatory bodies are monetary in nature and thus provable claims in an insolvency proceeding, but some may be, even if the amounts involved are not quantified at the outset of the proceeding. In the environmental context, the *CCAA* court must determine whether there are sufficient facts indicating the existence of an environmental duty that will ripen into a financial liability owed to the regulatory body that issued the order. In such a case, the relevant question is not simply whether the body has formally exercised its power to claim a debt. A *CCAA* court does not assess claims — or orders — on the basis of form alone. If the order is not framed in monetary terms, the court must determine, in light of the factual matrix and the applicable statutory framework, whether it is a claim that will be subject to the claims process.

4 The case at bar concerns contamination that occurred, prior to the *CCAA* proceedings, on property that is largely no longer under the debtor's possession and control. The *CCAA* court found on the facts of this case that the orders issued by Her Majesty the Queen in right of the Province of Newfoundland and Labrador ("Province") were simply a first step towards remediating the contaminated property and asserting a claim for the resulting costs. In the words of the *CCAA* court, "the intended, practical and realistic effect of the *EPA* Orders was to establish a basis for the Province to recover amounts of money to be eventually used for the remediation of the properties in question" (2010 QCCS 1261, 68 C.B.R. (5th) 1 (C.S. Que.), at para. 211). As a result, the *CCAA* court found that the orders were clearly monetary in nature. I see no error of law and no reason to interfere with this finding of fact. I would dismiss the appeal with costs.

I. Facts and Procedural History

5 For over 100 years, AbitibiBowater Inc. and its affiliated or predecessor companies (together, "Abitibi") were involved in industrial activity in Newfoundland and Labrador. In 2008, Abitibi announced the closure of a mill that was its last operation in that province.

6 Within two weeks of the announcement, the Province passed the *Abitibi-Consolidated Rights and Assets Act*, S.N.L. 2008, c. A-1.01 ("*Abitibi Act*"), which immediately transferred most of Abitibi's property in Newfoundland and Labrador to the Province and denied Abitibi any legal remedy for this expropriation.

7 The closure of its mill in Newfoundland and Labrador was one of many decisions Abitibi made in a period of general financial distress affecting its activities both in the United States and in Canada. It filed for insolvency protection in the United States on April 16, 2009. It also sought a stay of proceedings under the *CCAA* in the Superior Court of Quebec, as its Canadian head office was located in Montreal. The *CCAA* stay was ordered on April 17, 2009.

8 In the same month, Abitibi also filed a notice of intent to submit a claim to arbitration under NAFTA (the *North American Free Trade Agreement Between the Government of the United Mexican States and the Government of the United States of America*, Can. T.S. 1994 No. 2) for losses resulting from the *Abitibi Act*, which, according to Abitibi, exceeded $300 million.

9 On November 12, 2009, the Province's Minister of Environment and Conservation ("Minister") issued five orders ("*EPA* Orders") under s. 99 of the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2 ("*EPA*"). The *EPA* Orders required Abitibi to submit remediation action plans to the Minister for five industrial sites, three of which had been expropriated, and to complete the approved remediation actions. The *CCAA* judge estimated the cost of implementing these plans to be from "the mid-to-high eight figures" to "several times higher" (para. 81).

10 On the day it issued the *EPA* Orders, the Province brought a motion for a declaration that a claims procedure order issued under the *CCAA* in relation to Abitibi's proposed reorganization did not bar the Province from enforcing the *EPA* Orders. The Province argued — and still argues — that non-monetary statutory obligations are not "claims" under the *CCAA* and hence cannot be stayed and be subject to a claims procedure order. It further submits that Parliament lacks the constitutional competence under its power to make laws in relation to bankruptcy and insolvency to stay orders that are validly made in the exercise of a provincial power.

11 Abitibi contested the motion and sought a declaration that the *EPA* Orders were stayed and that they were subject to the claims procedure order. It argued that the *EPA* Orders were monetary in nature and hence fell within the definition of the word "claim" in the claims procedure order.

12 Gascon J. of the Quebec Superior Court, sitting as a *CCAA* court, dismissed the Province's motion. He found that he had the authority to characterize the orders as "claims" if the underlying regulatory obligations "remain[ed], in a particular fact pattern, truly financial and monetary in nature" (para. 148). He declared that the *EPA* Orders were stayed by the initial stay order and were not subject to the exception found in that order. He also declared that the filing by the Province of any claim based on the *EPA* Orders was subject to the claims procedure order, and reserved to the Province the right to request an extension of time to assert a claim under the claims procedure order and to Abitibi the right to contest such a request.

13 In the Court of Appeal, Chamberland J.A. denied the Province leave to appeal (2010 QCCA 965, 68 C.B.R. (5th) 57 (C.A. Que.)). In his view, the appeal had no reasonable chance of success, because Gascon J. had found as a fact that the *EPA* Orders were financial or monetary in nature. Chamberland J.A. also found that no constitutional issue arose, given that the Superior Court judge had merely characterized the orders in the context of the restructuring process; the judgment did not "'immunise' Abitibi from compliance with the EPA Orders" (para. 33). Finally, he noted that Gascon J. had reserved the Province's right to request an extension of time to file a claim in the *CCAA* process.

II. Positions of the Parties

14 The Province argues that the *CCAA* court erred in interpreting the relevant *CCAA* provisions in a way that nullified the *EPA*, and that the interpretation is inconsistent with both the ancillary powers doctrine and the doctrine of interjurisdictional immunity. The Province further submits that, in any event, the *EPA* Orders are not "claims" within the meaning of the *CCAA*. It takes the position that "any plan of compromise and arrangement that Abitibi might submit for court approval must make provision for compliance with the EPA Orders" (A.F., at para. 32).

15 Abitibi contends that the factual record does not provide a basis for applying the constitutional doctrines. It relies on the *CCAA* court's findings of fact, particularly the finding that the Province's intent was to establish the basis for a monetary claim. Abitibi submits that the true issue is whether a province that has a monetary claim against an insolvent company can obtain a preference against other unsecured creditors by exercising its regulatory power.

III. Constitutional Questions

16 At the Province's request, the Chief Justice stated the following constitutional questions:

> 1. Is the definition of "claim" in s. 2(1) of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, *ultra vires* the Parliament of Canada or constitutionally inapplicable to the extent this definition includes statutory duties to which the debtor is subject pursuant to s. 99 of the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2?
>
> 2. Is s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, *ultra vires* the Parliament of Canada or constitutionally inapplicable to the extent this section gives courts jurisdiction to bar or extinguish statutory duties to which the debtor is subject pursuant to s. 99 of the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2?

3. Is s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, *ultra vires* the Parliament of Canada or constitutionally inapplicable to the extent this section gives courts jurisdiction to review the exercise of ministerial discretion under s. 99 of the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2?

17 I note that the question whether a *CCAA* court has constitutional jurisdiction to stay a provincial order that is *not* a monetary claim does not arise here, because the stay order in this case did not affect non-monetary orders. However, the question may arise in other cases. In 2007, Parliament expressly gave *CCAA* courts the power to stay regulatory orders that are not monetary claims by amending the *CCAA* to include the current version of s. 11.1(3) (*An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, S.C. 2007, c. 36, s. 65) ("2007 amendments"). Thus, future cases may give courts the opportunity to consider the question raised by the Province in an appropriate factual context. The only constitutional question that needs to be answered in this case concerns the jurisdiction of a *CCAA* court to determine whether an environmental order that is not framed in monetary terms is in fact a monetary claim.

18 Processing creditors' claims against an insolvent debtor in an equitable and orderly manner is at the heart of insolvency legislation, which falls under a head of power attributed to Parliament. Rules concerning the assessment of creditors' claims, such as the determination of whether a creditor has a monetary claim, relate directly to the equitable and orderly treatment of creditors in an insolvency process. There is no need to perform a detailed analysis of the pith and substance of the provisions on the assessment of claims in insolvency matters to conclude that the federal legislation governing the characterization of an order as a monetary claim is valid. Because the provisions relate directly to Parliament's jurisdiction, the ancillary powers doctrine is not relevant to this case. I also find that the interjurisdictional immunity doctrine is not applicable. A finding that a claim of an environmental creditor is monetary in nature does not interfere in any way with the creditor's activities. Its claim is simply subjected to the insolvency process.

19 What the Province is actually arguing is that courts should consider the form of an order rather than its substance. I see no reason why the Province's choice of order should not be scrutinized to determine whether the form chosen is consistent with the order's true purpose as revealed by the Province's own actions. If the Province's actions indicate that, in substance, it is asserting a provable claim within the meaning of federal legislation, then that claim can be subjected to the insolvency process. Environmental claims do not have a higher priority than is provided for in the *CCAA*. Considering substance over form prevents a regulatory body from artificially creating a priority higher than the one conferred on the claim by federal legislation. This Court recognized long ago that a province cannot disturb the priority scheme established by the federal insolvency legislation: *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453 (S.C.C.). Environmental claims are given a specific, and limited, priority under the *CCAA*. To exempt orders which are in fact monetary claims from the *CCAA* proceedings would amount to conferring upon provinces a priority higher than the one provided for in the *CCAA*.

IV. Claims under the CCAA

20 Several provisions of the *CCAA* have been amended since Abitibi filed for insolvency protection. Except where otherwise indicated, the provisions I refer to are those that were in force when the stay was ordered.

21 One of the central features of the *CCAA* scheme is the single proceeding model, which ensures that most claims against a debtor are entertained in a single forum. Under this model, the court can stay the enforcement of most claims against the debtor's assets in order to maintain the *status quo* during negotiations with the creditors. When such negotiations are successful, the creditors typically accept less than the full amounts of their claims. Claims have not necessarily accrued or been liquidated at the outset of the insolvency proceeding, and they sometimes have to be assessed in order to determine the monetary value that will be subject to compromise.

22 Section 12 of the *CCAA* establishes the basic rules for ascertaining whether an order is a claim that may be subjected to the insolvency process:

[Definition of "claim"]

> **12.** (1) For the purposes of this Act, "claim" means any indebtedness, liability or obligation of any kind that, if unsecured, would be a debt provable in bankruptcy within the meaning of the *Bankruptcy and Insolvency Act*.
>
> [Determination of amount of claim]
>
> (2) For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor shall be determined as follows:
>
> (*a*) the amount of an unsecured claim shall be the amount
>
> . . .
>
> (iii) in the case of any other company, proof of which might be made under the *Bankruptcy and Insolvency Act*, but if the amount so provable is not admitted by the company, the amount shall be determined by the court on summary application by the company or by the creditor; and ...

23 Section 12 of the *CCAA* refers to the rules of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). Section 2 of the *BIA* defines a claim provable in bankruptcy:

> "claim provable in bankruptcy", "provable claim" or "claim provable" includes any claim or liability provable in proceedings under this Act by a creditor.

24 This definition is completed by s. 121 of the *BIA*:

> **121.** (1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

25 *Sections* 121(2) and 135(1.1) of the *BIA* offer additional guidance for the determination of whether an order is a provable claim:

> **121.** . . .
>
> (2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135.
>
> **135.** . . .
>
> (1.1) The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.

26 These provisions highlight three requirements that are relevant to the case at bar. First, there must be a debt, a liability or an obligation to a *creditor*. Second, the debt, liability or obligation must be incurred *before the debtor becomes bankrupt*. Third, it must be possible to attach a *monetary value* to the debt, liability or obligation. I will examine each of these requirements in turn.

27 The *BIA*'s definition of a provable claim, which is incorporated by reference into the *CCAA*, requires the identification of a creditor. Environmental statutes generally provide for the creation of regulatory bodies that are empowered to enforce the obligations the statutes impose. Most environmental regulatory bodies can be creditors in respect of monetary or non-monetary obligations imposed by the relevant statutes. At this first stage of determining whether the regulatory body is a creditor, the question whether the obligation can be translated into monetary terms is not yet relevant. This issue will be broached later. The

only determination that has to be made at this point is whether the regulatory body has exercised its enforcement power against a debtor. When it does so, it identifies itself as a creditor, and the requirement of this stage of the analysis is satisfied.

28 The enquiry into the second requirement is based on s. 121(1) of the *BIA*, which imposes a time limit on claims. A claim must be founded on an obligation that was "incurred before the day on which the bankrupt becomes bankrupt". Because the date when environmental damage occurs is often difficult to ascertain, s. 11.8(9) of the *CCAA* provides more temporal flexibility for environmental claims:

> **11.8**. . . .
>
> (9) A claim against a debtor company for costs of remedying any environmental condition or environmental damage affecting real property of the company shall be a claim under this Act, whether the condition arose or the damage occurred before or after the date on which proceedings under this Act were commenced.

29 The creditor's claim will be exempt from the single proceeding requirement if the debtor's corresponding obligation has not arisen as of the time limit for inclusion in the insolvency process. This could apply, for example, to a debtor's statutory obligations relating to polluting activities that continue after the reorganization, because in such cases, the damage continues to be sustained after the reorganization has been completed.

30 With respect to the third requirement, that it be possible to attach a monetary value to the obligation, the question is whether orders that are not expressed in monetary terms can be translated into such terms. I note that when a regulatory body claims an amount that is owed at the relevant date, that is, when it frames its order in monetary terms, the court does not need to make this determination, because what is being claimed is an "indebtedness" and therefore clearly falls within the meaning of "claim" as defined in s. 12(1) of the *CCAA*.

31 However, orders, which are used to address various types of environmental challenges, may come in many forms, including stop, control, preventative, and clean-up orders (D. Saxe, "Trustees' and Receivers' Environmental Liability Update", 49 C.B.R. (3d) 138, at p. 141). When considering an order that is not framed in monetary terms, courts must look at its substance and apply the rules for the assessment of claims.

32 Parliament recognized that regulatory bodies sometimes have to perform remediation work (see House of Commons, *Standing Committee on Industry*, No. 16, 2nd Sess., 35th Parl., June 11, 1996). When one does so, its claim with respect to remediation costs is subject to the insolvency process, but the claim is secured by a charge on the contaminated real property and certain other related property and benefits from a priority (s. 11.8(8) *CCAA*). Thus, Parliament struck a balance between the public's interest in enforcing environmental regulations and the interest of third-party creditors in being treated equitably.

33 If Parliament had intended that the debtor always satisfy all remediation costs, it would have granted the Crown a priority with respect to the totality of the debtor's assets. In light of the legislative history and the purpose of the reorganization process, the fact that the Crown's priority under s. 11.8(8) *CCAA* is limited to the contaminated property and certain related property leads me to conclude that to exempt environmental orders would be inconsistent with the insolvency legislation. As deferential as courts may be to regulatory bodies' actions, they must apply the general rules.

34 Unlike in proceedings governed by the common law or the civil law, a claim may be asserted in insolvency proceedings even if it is contingent on an event that has not yet occurred (for the common law, see *McLarty v. R.*, 2008 SCC 26, [2008] 2 S.C.R. 79 (S.C.C.), at paras. 17-18; for the civil law, see arts. 1497, 1508 and 1513 of the *Civil Code of Québec*, S.Q. 1991, c. 64). Thus, the broad definition of "claim" in the *BIA* includes *contingent* and *future* claims that would be unenforceable at common law or in the civil law. As for unliquidated claims, a *CCAA* court has the same power to assess their amounts as would a court hearing a case in a common law or civil law context.

35 The reason the *BIA* and the *CCAA* include a broad range of claims is to ensure fairness between creditors and finality in the insolvency proceeding for the debtor. In a corporate liquidation process, it is more equitable to allow as many creditors as possible to participate in the process and share in the liquidation proceeds. This makes it possible to include creditors whose

claims have not yet matured when the corporate debtor files for bankruptcy, and thus avert a situation in which they would be faced with an inactive debtor that cannot satisfy a judgment. The rationale is slightly different in the context of a corporate proposal or reorganization. In such cases, the broad approach serves not only to ensure fairness between creditors, but also to allow the debtor to make as fresh a start as possible after a proposal or an arrangement is approved.

36 The criterion used by courts to determine whether a contingent claim will be included in the insolvency process is whether the event that has not yet occurred is too remote or speculative: *Confederation Treasury Services Ltd., Re* (1997), 96 O.A.C. 75 (Ont. C.A.). In the context of an environmental order, this means that there must be sufficient indications that the regulatory body that triggered the enforcement mechanism will ultimately perform remediation work and assert a monetary claim to have its costs reimbursed. If there is sufficient certainty in this regard, the court will conclude that the order can be subjected to the insolvency process.

37 The exercise by the *CCAA* court of its jurisdiction to determine whether an order is a provable claim entails a certain scrutiny of the regulatory body's actions. This scrutiny is in some ways similar to judicial review. There is a distinction, however, and it lies in the object of the assessment that the *CCAA* court must make. The *CCAA* court does not review the regulatory body's exercise of discretion. Rather, it inquires into whether the facts indicate that the conditions for inclusion in the claims process are met. For example, if activities at issue are ongoing, the *CCAA* court may well conclude that the order cannot be included in the insolvency process because the activities and resulting damages will continue after the reorganization is completed and hence exceed the time limit for a claim. If, on the other hand, the regulatory body, having no realistic alternative but to perform the remediation work itself, simply delays framing the order as a claim in order to improve its position in relation to other creditors, the *CCAA* court may conclude that this course of action is inconsistent with the insolvency scheme and decide that the order has to be subject to the claims process. Similarly, if the property is not under the debtor's control and the debtor does not, and realistically will not, have the means to perform the remediation work, the *CCAA* court may conclude that it is sufficiently certain that the regulatory body will have to perform the work.

38 Certain indicators can thus be identified from the text and the context of the provisions to guide the *CCAA* court in determining whether an order is a provable claim, including whether the activities are ongoing, whether the debtor is in control of the property, and whether the debtor has the means to comply with the order. The *CCAA* court may also consider the effect that requiring the debtor to comply with the order would have on the insolvency process. Since the appropriate analysis is grounded in the facts of each case, these indicators need not all apply, and others may also be relevant.

39 Having highlighted three requirements for finding a claim to be provable in a *CCAA* process that need to be considered in the case at bar, I must now discuss certain policy arguments raised by the Province and some of the interveners.

40 These parties argue that treating a regulatory order as a claim in an insolvency proceeding extinguishes the debtor's environmental obligations, thereby undermining the polluter-pay principle discussed by this Court in *Cie pétrolière Impériale c. Québec (Tribunal administratif)*, 2003 SCC 58, [2003] 2 S.C.R. 624 (S.C.C.) (para. 24). This objection demonstrates a misunderstanding of the nature of insolvency proceedings. Subjecting an order to the claims process does not extinguish the debtor's environmental obligations any more than subjecting any creditor's claim to that process extinguishes the debtor's obligation to pay its debts. It merely ensures that the creditor's claim will be paid in accordance with insolvency legislation. Moreover, full compliance with orders that are found to be monetary in nature would shift the costs of remediation to third-party creditors, including involuntary creditors, such as those whose claims lie in tort or in the law of extra-contractual liability. In the insolvency context, the Province's position would result not only in a super-priority, but in the acceptance of a "third party-pay" principle in place of the polluter-pay principle.

41 Nor does subjecting the orders to the insolvency process amount to issuing a licence to pollute, since insolvency proceedings do not concern the debtor's future conduct. A debtor that is reorganized must comply with all environmental regulations going forward in the same way as any other person. To quote the colourful analogy of two American scholars, "Debtors in bankruptcy have — and should have — no greater license to pollute in violation of a statute than they have to sell cocaine in violation of a statute" (D. G. Baird and T. H. Jackson, "Comment: *Kovacs* and Toxic Wastes in Bankruptcy" (1984), 36 *Stan. L. Rev.* 1199, at p. 1200).

42 Furthermore, corporations may engage in activities that carry risks. No matter what risks are at issue, reorganization made necessary by insolvency is hardly ever a deliberate choice. When the risks materialize, the dire costs are borne by almost all stakeholders. To subject orders to the claims process is not to invite corporations to restructure in order to rid themselves of their environmental liabilities.

43 And the power to determine whether an order is a provable claim does not mean that the court will necessarily conclude that the order before it will be subject to the *CCAA* process. In fact, the *CCAA* court in the case at bar recognized that orders relating to the environment may or may not be considered provable claims. It stayed only those orders that were monetary in nature.

44 The Province also argues that courts have in the past held that environmental orders cannot be interpreted as claims when the regulatory body has not yet exercised its power to assert a claim framed in monetary terms. The Province relies in particular on *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.* (1991), 81 Alta. L.R. (2d) 45 (Alta. C.A.), and its progeny. In *Panamericana*, the Alberta Court of Appeal held that a receiver was personally liable for work under a remediation order and that the order was not a claim in insolvency proceedings. The court found that the duty to undertake remediation work is owed to the public at large until the regulator exercises its power to assert a monetary claim.

45 The first answer to the Province's argument is that courts have never shied away from putting substance ahead of form. They can determine whether the order is in substance monetary.

46 The second answer is that the provisions relating to the assessment of claims, particularly those governing contingent claims, contemplate instances in which the quantum is not yet established when the claims are filed. Whether, in the regulatory context, an obligation always entails the existence of a correlative right has been discussed by a number of scholars. Various theories of rights have been put forward (see W. N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (new ed. 2001); D. N. MacCormick, "Rights in Legislation", in P. M. S. Hacker and J. Raz, eds., *Law, Morality, and Society: Essays in Honour of H. L. A. Hart* (1977), 189). However, because the Province issued the orders in this case, it would be recognized as a creditor in respect of a right no matter which of these theories was applied. As interesting as the discussion may be, therefore, I do not need to consider which theory should prevail. The real question is not to whom the obligation is owed, as this question is answered by the statute, which determines who can require that it be discharged. Rather, the question is whether it is sufficiently certain that the regulatory body will perform the remediation work and, as a result, have a monetary claim.

47 The third answer to the Province's argument is that insolvency legislation has evolved considerably over the two decades since *Panamericana*. At the time of *Panamericana*, none of the provisions relating to environmental liabilities were in force. Indeed, some of those provisions were enacted very soon after, and seemingly in response to, that case. In 1992, Parliament shielded trustees from the very liability imposed on the receiver in *Panamericana* (*An Act to amend the Bankruptcy Act and to amend the Income Tax Act in consequence thereof*, S.C. 1992, c. 27, s. 9, amending s. 14 of the *BIA*). The 1997 amendments provided additional protection to trustees and monitors (S.C. 1997, c. 12). The 2007 amendments made it clear that a *CCAA* court has the power to determine that a regulatory order may be a claim and also provided criteria for staying regulatory orders (s. 65, amending the *CCAA* to include the current version of s. 11.1). The purpose of these amendments was to balance the creditor's need for fairness against the debtor's need to make a fresh start.

48 Whether the regulatory body has a contingent claim is a determination that must be grounded in the facts of each case. Generally, a regulatory body has discretion under environmental legislation to decide how best to ensure that regulatory obligations are met. Although the court should take care to avoid interfering with that discretion, the action of a regulatory body is nevertheless subject to scrutiny in insolvency proceedings.

V. Application

49 I now turn to the application of the principles discussed above to the case at bar. This case does not turn on whether the Province is the creditor of an obligation or whether damage had occurred as of the relevant date. Those requirements are easily satisfied, since the Province had identified itself as a creditor by resorting to *EPA* enforcement mechanisms and since the damage had occurred before the time of the *CCAA* proceedings. Rather, the issue centres on the third requirement: that the

orders meet the criterion for admission as a pecuniary claim. The claim was contingent to the extent that the Province had not yet formally exercised its power to ask for the payment of money. The question is whether it was sufficiently certain that the orders would eventually result in a monetary claim. To the *CCAA* judge, there was no doubt that the answer was yes.

50 The Province's exercise of its legislative powers in enacting the *Abitibi Act* created a unique set of facts that led to the orders being issued. The seizure of Abitibi's assets by the Province, the cancellation of all outstanding water and hydroelectric contracts between Abitibi and the Province, the cancellation of pending legal proceedings by Abitibi in which it sought the reimbursement of several hundreds of thousands of dollars, and the denial of any compensation for the seized assets and of legal redress are inescapable background facts in the judge's review of the *EPA* Orders.

51 The *CCAA* judge did not elaborate on whether it was sufficiently certain that the Minister would perform the remediation work and therefore make a monetary claim. However, most of his findings clearly rest on a positive answer to this question. For example, his finding that "[i]n all likelihood, the pith and substance of the EPA Orders is an attempt by the Province to lay the groundwork for monetary claims against Abitibi, to be used most probably as an offset in connection with Abitibi's own NAFTA claims for compensation" (para. 178), is necessarily based on the premise that the Province would most likely perform the remediation work. Indeed, since monetary claims must, both at common law and in civil law, be mutual for set-off or compensation to operate, the Province had to have incurred costs in doing the work in order to have a claim that could be set off against Abitibi's claims.

52 That the judge relied on an implicit finding that the Province would most likely perform the work and make a claim to offset its costs is also shown by the confirmation he found in the declaration by the Minister that the Province was attempting to assess the cost of doing remediation work Abitibi had allegedly left undone and that in the Province's assessment, "at this point in time, there would not be a net payment to Abitibi" (para. 181).

53 The *CCAA* judge's reasons not only rest on an implicit finding that the Province would most likely perform the work, but refer explicitly to facts that support this finding. To reach his conclusion that the *EPA* Orders were monetary in nature, the *CCAA* judge relied on the fact that Abitibi's operations were funded through debtor-in-possession financing and its access to funds was limited to ongoing operations. Given that the *EPA* Orders targeted sites that were, for the most part, no longer in Abitibi's possession, this meant that Abitibi had no means to perform the remediation work during the reorganization process.

54 In addition, because Abitibi lacked funds and no longer controlled the properties, the timetable set by the Province in the *EPA* Orders suggested that the Province never truly intended that Abitibi was to perform the remediation work required by the orders. The timetable was also unrealistic. For example, the orders were issued on November 12, 2009 and set a deadline of January 15, 2010 to perform a particular act, but the evidence revealed that compliance with this requirement would have taken close to a year.

55 Furthermore, the judge relied on the fact that Abitibi was not simply designated a "person responsible" under the *EPA*, but was intentionally targeted by the Province. The finding that the Province had targeted Abitibi was drawn not only from the timing of the *EPA* Orders, but also from the fact that Abitibi was the only person designated in them, whereas others also appeared to be responsible — in some cases, primarily responsible — for the contamination. For example, Abitibi was ordered to do remediation work on a site it had surrendered more than 50 years before the orders were issued; the expert report upon which the orders were based made no distinction between Abitibi's activities on the property, on which its source of power had been horse power, and subsequent activities by others who had used fuelpowered vehicles there. In the judge's opinion, this finding of fact went to the Province's intent to establish a basis for performing the work itself and asserting a claim against Abitibi.

56 These reasons — and others — led the *CCAA* judge to conclude that the Province had not expected Abitibi to perform the remediation work and that the "intended, practical and realistic effect of the EPA Orders was to establish a basis for the Province to recover amounts of money to be eventually used for the remediation of the properties in question" (para. 211). He found that the Province appeared to have in fact taken some steps to liquidate the claims arising out of the *EPA* Orders.

57 In the end, the judge found that there was definitely a claim that "might" be filed, and that it was not left to "the subjective choice of the creditor to hold the claim in its pocket for tactical reasons" (para. 227). In his words, the situation did not involve a "detached regulator or public enforcer issuing [an] order for the public good" (at para. 175), and it was "the hat of a creditor that best [fit] the Province, not that of a disinterested regulator" (para. 176).

58 In sum, although the analytical framework used by Gascon J. was driven by the facts of the case, he reviewed all the legal principles and facts that needed to be considered in order to make the determination in the case at bar. He did at times rely on indicators that are unique and that do not appear in the analytical framework I propose above, but he did so because of the exceptional facts of this case. Yet, had he formulated the question in the same way as I have, his conclusion, based on his objective findings of fact, would have been the same. Earmarking money may be a strong indicator that a province will perform remediation work, and actually commencing the work is the first step towards the creation of a debt, but these are not the only considerations that can lead to a finding that a creditor has a monetary claim. The *CCAA* judge's assessment of the facts, particularly his finding that the *EPA* Orders were the first step towards performance of the remediation work by the Province, leads to no conclusion other than that it was sufficiently certain that the Province would perform remediation work and therefore fall within the definition of a creditor with a monetary claim.

VI. Conclusion

59 In sum, I agree with the Chief Justice that, as a general proposition, an environmental order issued by a regulatory body can be treated as a contingent claim, and that such a claim can be included in the claims process if it is sufficiently certain that the regulatory body will make a monetary claim against the debtor. Our difference of views lies mainly in the applicable threshold for including contingent claims and in our understanding of the *CCAA* judge's findings of fact.

60 With respect to the law, the Chief Justice would craft a standard specific to the context of environmental orders by requiring a "likelihood approaching certainty" that the regulatory body will perform the remediation work. She finds that this threshold is justified because "remediation may cost a great deal of money" (para. 22). I acknowledge that remediating pollution is often costly, but I am of the view that Parliament has borne this consideration in mind in enacting provisions specific to environmental claims. Moreover, I recall that in this case, the Premier announced that the remediation work would be performed at no net cost to the Province. It was clear to him that the *Abitibi Act* would make it possible to offset all the related costs.

61 Thus, I prefer to take the approach generally taken for all contingent claims. In my view, the *CCAA* court is entitled to take all relevant facts into consideration in making the relevant determination. Under this approach, the contingency to be assessed in a case such as this is whether it is sufficiently certain that the regulatory body will perform remediation work and be in a position to assert a monetary claim.

62 Finally, the Chief Justice would review the *CCAA* court's findings of fact. I would instead defer to them. On those findings, applying any legal standard, be it the one proposed by the Chief Justice or the one I propose, the Province's claim is monetary in nature and its motion for a declaration exempting the *EPA* Orders from the claims procedure order was properly dismissed.

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

***McLachlin C.J.C.* (dissenting):**

1. Overview

64 The issue in this case is whether orders made under the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2 ("*EPA*") by the Newfoundland and Labrador Minister of Environment and Conservation (the "Minister") requiring a polluter to clean up sites (the "*EPA* Orders") are monetary claims that can be compromised in corporate restructuring under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). If they are not claims that can be compromised in restructuring, the Abitibi respondents ("Abitibi") will still have a legal obligation to clean up the sites following their emergence from restructuring. If

they are such claims, Abitibi will have emerged from restructuring free of the obligation, able to recommence business without remediating the properties it polluted, the cost of which will fall on the Newfoundland and Labrador public.

65 Remediation orders made under a province's environmental protection legislation impose ongoing regulatory obligations on the corporation required to clean up the pollution. They are not monetary claims. In narrow circumstances, specified by the *CCAA*, these ongoing regulatory obligations may be reduced to monetary claims, which can be compromised under *CCAA* proceedings. This occurs where a province has done the work, or where it is "sufficiently certain" that it will do the work. In these circumstances, the regulatory obligation would be extinguished and the province would have a monetary claim for the cost of remediation in the *CCAA* proceedings. Otherwise, the regulatory obligation survives the restructuring.

66 In my view, the orders for remediation in this case, with a minor exception, are not claims that can be compromised in restructuring. On one of the properties, the Minister did emergency remedial work and put other work out to tender. These costs can be claimed in the *CCAA* proceedings. However, with respect to the other properties, on the evidence before us, the Minister has neither done the clean-up work, nor is it sufficiently certain that he or she will do so. The Province of Newfoundland and Labrador (the "Province") retained a number of options, including requiring Abitibi to perform the remediation if it successfully emerged from the *CCAA* restructuring.

67 I would therefore allow the appeal and grant the Province the declaration it seeks that Abitibi is still subject to its obligations under the *EPA* following its emergence from restructuring, except for work done or tendered for on the Buchans site.

2. The Proceedings Below

68 The *CCAA* judge took the view that the Province issued the *EPA* Orders, not in order to make Abitibi remediate, but as part of a money grab. He therefore concluded that the orders were monetary and financial in nature and should be considered claims that could be compromised under the *CCAA* (2010 QCCS 1261, 68 C.B.R. (5th) 1 (C.S. Que.)). The Quebec Court of Appeal denied leave to appeal on the ground that this "factual" conclusion could not be disturbed (2010 QCCA 965, 68 C.B.R. (5th) 57 (C.A. Que.)).

69 The *CCAA* judge's stark view that an *EPA* obligation can be considered a monetary claim capable of being compromised simply because (as he saw it) the Province's motive was money, is no longer pressed. Whether an *EPA* order is a claim under the *CCAA* depends on whether it meets the requirements for a claim under that statute. That is the only issue to be resolved. Insofar as this determination touches on the division of powers, I am in substantial agreement with my colleague Deschamps J., at paras. 18-19.

3. The Distinction Between Regulatory Obligations and Claims under the CCAA

70 Orders to clean up polluted property under provincial environmental protection legislation are regulatory orders. They remain in effect until the property has been cleaned up or the matter otherwise resolved.

71 It is not unusual for corporations seeking to restructure under the *CCAA* to be subject to a variety of ongoing regulatory orders arising from statutory schemes governing matters like employment, energy conservation and the environment. The corporation remains subject to these obligations as it continues to carry on business during the restructuring period, and remains subject to them when it emerges from restructuring unless they have been compromised or liquidated.

72 The *CCAA*, like the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") draws a fundamental distinction between ongoing regulatory obligations owed to the public, which generally survive the restructuring, and monetary claims that can be compromised.

73 This distinction is also recognized in the jurisprudence, which has held that regulatory duties owed to the public are not "claims" under the *BIA*, nor, by extension, under the *CCAA*. In *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.* (1991), 81 Alta. L.R. (2d) 45 (Alta. C.A.), the Alberta Court of Appeal held that a receiver in bankruptcy must comply with an order from the Energy Resources Conservation Board to comply with well abandonment requirements. Writing

for the court, Laycraft C.J.A. said the question was whether the *Bankruptcy Act* "requires that the assets in the estate of an insolvent well licensee should be distributed to creditors leaving behind the duties respecting environmental safety ... as a charge to the public" (para. 29). He answered the question in the negative:

> The duty is owed as a public duty by all the citizens of the community to their fellow citizens. When the citizen subject to the order complies, the result is not the recovery of money by the peace officer or public authority, or of a judgement for money, nor is that the object of the whole process. Rather, it is simply the enforcement of the general law. The enforcing authority does not become a "creditor" of the citizen on whom the duty is imposed.
>
> [Emphasis added, para. 33]

74 The distinction between regulatory obligations under the general law aimed at the protection of the public and monetary claims that can be compromised in *CCAA* restructuring or bankruptcy is a fundamental plank of Canadian corporate law. It has been repeatedly acknowledged: *Lamford Forest Products Ltd. (Re)* (1991), 86 D.L.R. (4th) 534 (B.C. S.C.); *Shirley, Re* (1995), 129 D.L.R. (4th) 105 (Ont. Bktcy.)), at p. 109; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453 (S.C.C.), at para. 146, *per* Iacobucci J. (dissenting). As Farley J. succinctly put it in *Air Canada Re [Regulators' motions]*, (2003), 28 C.B.R. (5th) 52 (Ont. S.C.J. [Commercial List]), at para. 18: "Once [the company] emerges from these CCAA proceedings (successfully one would hope), then it will have to deal with each and every then unresolved [regulatory] matter."

75 Recent amendments to the *CCAA* confirm this distinction. Section 11.1(2) now explicitly provides that, except to the extent a regulator is enforcing a payment obligation, a general stay does not affect a regulatory body's authority in relation to a corporation going through restructuring. The *CCAA* court may only stay specific actions or suits brought by a regulatory body, and only if such action is necessary for a viable compromise to be reached and it would not be contrary to the public interest to make such an order (s. 11.1(3)).

76 Abitibi argues that another amendment to the *CCAA*, s. 11.8(9), treats ongoing regulatory duties owed to the public as claims, and erases the distinction between the two types of obligation: see *General Chemical Canada Ltd., Re*, 2007 ONCA 600, 228 O.A.C. 385 (Ont. C.A.), *per* Goudge J.A., relying on s. 14.06(8) of the *BIA* (the equivalent of s. 11.8(9) of the *CCAA*). With respect, this reads too much into the provision. Section 11.8(9) of the *CCAA* refers only to the situation where a government has performed remediation, and provides that the *costs of the remediation* become a claim in the restructuring process even where the environmental damage arose after *CCAA* proceedings have begun. As stated in *Strathcona (County) v. Fantasy Construction Ltd. Estate (Trustee of)*, 2005 ABQB 559, 47 Alta. L.R. (4th) 138 (Alta. Q.B.), *per* Burrows J., the section "does not convert a statutorily imposed obligation owed to the public at large into a liability owed to the public body charged with enforcing it" (para. 42).

4. When Does a Regulatory Obligation Become a Claim Under the CCAA?

77 This brings us to the heart of the question before us: when does a regulatory obligation imposed on a corporation under environmental protection legislation become a "claim" provable and compromisable under the *CCAA*?

78 Regulatory obligations are, as a general proposition, not compromisable claims. Only financial or monetary claims provable by a "creditor" fall within the definition of "claim" under the *CCAA*. "Creditor" is defined as "a person having a claim ..." (*BIA* s. 2). Thus, the identification of a "creditor" hangs on the existence of a "claim". Section 12(1) of the *CCAA* defines "claim" as "any indebtedness, liability or obligation ... that ... would be a debt provable in bankruptcy", which is accepted as confined to obligations of a financial or monetary nature.

79 The *CCAA* does not depart from the proposition that a claim must be financial or monetary. However, it contains a scheme to deal with disputes over whether an obligation is a monetary obligation as opposed to some other kind of obligation.

80 Such a dispute may arise with respect to environmental obligations of the corporation. The *CCAA* recognizes three situations that may arise when a corporation enters restructuring.

81 The first situation is where the remedial work has not been done (and there is no "sufficient certainty" that the work will be done, unlike the third situation described below). In this situation, the government cannot claim the cost of remediation: see s. 102(3) of the *EPA*. The obligation of compliance falls in principle on the monitor who takes over the corporation's assets and operations. If the monitor remediates the property, he can claim the costs as costs of administration. If he does not wish to do so, he may obtain a court order staying the remediation obligation or abandon the property: s. 11.8(5) *CCAA* (in which case costs of remediation shall not rank as costs of administration: s. 11.8(7)). In this situation, the obligation cannot be compromised.

82 The second situation is where the government that has issued the environmental protection order moves to clean up the pollution, as the legislation entitles it to do. In this situation, the government has a claim for the cost of remediation that is compromisable in the *CCAA* proceedings. This is because the government, by moving to clean up the pollution, has changed the outstanding regulatory obligation owed to the public into a financial or monetary obligation owed by the corporation to the government. Section 11.8(9), already discussed, makes it clear that this applies to damage after the *CCAA* proceedings commenced, which might otherwise not be claimable as a matter of timing.

83 A third situation may arise: the government has not yet performed the remediation at the time of restructuring, but there is "sufficient certainty" that it will do so. This situation is regulated by the provisions of the *CCAA* for contingent or future claims. Under the *CCAA*, a debt or liability that is contingent on a future event may be compromised.

84 It is clear that a mere possibility that work will be done does not suffice to make a regulatory obligation a contingent claim under the *CCAA*. Rather, there must be "sufficient certainty" that the obligation will be converted into a financial or monetary claim to permit this. The impact of the obligation on the insolvency process is irrelevant to the analysis of contingency. The future liabilities must not be "so remote and speculative in nature that they could not properly be considered contingent claims": *Confederation Treasury Services Ltd. (Bankrupt) Re* (1997), 96 O.A.C. 75 (Ont. C.A.) (para. 4).

85 Where environmental obligations are concerned, courts to date have relied on a high degree of probability verging on certainty that the government will in fact step in and remediate the property. In *Anvil Range Mining Corp., Re* (2001), 25 C.B.R. (4th) 1 (Ont. S.C.J. [Commercial List]), Farley J. concluded that a contingent claim was established where the money had already been earmarked in the budget for the remediation project. He observed that "there appears to be *every likelihood to a certainty* that every dollar in the budget for the year ending March 31, 2002 earmarked for reclamation will be spent" (para. 15 (emphasis added)). Similarly, in *Shirley, Re*, Kennedy J. relied on the fact that the Ontario Minister of Environment had already entered the property at issue and commenced remediation activities to conclude that "[a]ny doubt about the resolve of the MOE's intent to realize upon its authority ended when it began to incur expense from operations" (p. 110).

86 There is good reason why "sufficient certainty" should be interpreted as requiring "likelihood approaching certainty" when the issue is whether ongoing environmental obligations owed to the public should be converted to contingent claims that can be expunged or compromised in the restructuring process. Courts should not overlook the obstacles governments may encounter in deciding to remediate environmental damage a corporation has caused. To begin with, the government's decision is discretionary and may be influenced by any number of competing political and social considerations. Furthermore, remediation may cost a great deal of money. For example, in this case, the *CCAA* court found that at a minimum the remediation would cost in the "mid-to-high eight figures" (at para. 81), and could indeed cost several times that. In concrete terms, the remediation at issue in this case may be expected to meet or exceed the entire budget of the Minister ($65 million) for 2009. Not only would this be a massive expenditure, but it would also likely require the specific approval of the Legislature and thereby be subject to political uncertainties. To assess these factors and determine whether all this will occur would embroil the *CCAA* judge in social, economic and political considerations — matters which are not normally subject to judicial consideration: *Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45 (S.C.C.), at para. 74. It is small wonder, then, that courts assessing whether it is "sufficiently certain" that a government will clean up pollution created by a corporation have insisted on proof of likelihood approaching certainty.

87 In this case, as will be seen, apart from the Buchans property, the record is devoid of any evidence capable of establishing that it is "sufficiently certain" that the Province will itself remediate the properties. Even on a more relaxed standard than the one adopted in similar cases to date, the evidence in this case would fail to establish that remediation is "sufficiently certain".

5. The Result in this Case

88 Five different sites are at issue in this case. The question in each case is whether the Minister has already remediated the property (making it to that extent an actual claim), or if not, whether it is "sufficiently certain" that he or she will remediate the property, permitting it to be considered a contingent claim.

89 The Buchans site posed immediate risks to human health as a consequence of high levels of lead and other contaminants in the soil, groundwater, surface water and sediment. There was a risk that the wind would disperse the contamination, posing a threat to the surrounding population. Lead has been found in residential areas of Buchans and adults tested in the town had elevated levels of lead in their blood. In addition, a structurally unsound dam at the Buchans site raised the risk of contaminating silt entering the Exploits and Buchans rivers.

90 The Minister quickly moved to address the immediate concern of the unsound dam and put out a request for tenders for other measures that required immediate action at the Buchans site. Money expended is clearly a claim under the *CCAA*. I am also of the view that the work for which the request for tenders was put out meets the "sufficiently certain" standard and constitutes a contingent claim.

91 Beyond this, it has not been shown that it is "sufficiently certain" that the Province will do the remediation work to permit Abitibi's ongoing regulatory obligations under the *EPA* Orders to be considered contingent debts. The same applies to the other properties, on which no work has been done and no requests for tender to do the work initiated.

92 Far from being "sufficiently certain", there is simply nothing on the record to support the view that the Province will move to remediate the remaining properties. It has not been shown that the contamination poses immediate health risks, which must be addressed without delay. It has not been shown that the Province has taken any steps to do any work. And it has not been shown that the Province has set aside or even contemplated setting aside money for this work. Abitibi relies on a statement by the then-Premier in discussing the possibility that the Province would be obliged to compensate Abitibi for expropriation of some of the properties, to the effect that "there would not be a net payment to Abitibi" (R.F. at para. 12). Apart from the fact that the Premier was not purporting to state government policy, the statement simply does not say that the Province would do the remediation. The Premier may have simply been suggesting that outstanding environmental liabilities made the properties worth little or nothing, obviating any net payment to Abitibi.

93 My colleague Deschamps J. concludes that the findings of the *CCAA* court establish that it was "sufficiently certain" that the Province would remediate the land, converting Abitibi's regulatory obligations under the *EPA* Orders to contingent claims that can be compromised under the *CCAA*. With respect, I find myself unable to agree.

94 The *CCAA* judge never asked himself the critical question of whether it was "sufficiently certain" that the Province would do the work itself. Essentially, he proceeded on the basis that the *EPA* Orders had not been put forward in a sincere effort to obtain remediation, but were simply a money grab. The *CCAA* judge buttressed his view that the Province's regulatory orders were not sincere by opining that the orders were unenforceable (which if true would not prevent new *EPA* orders) and by suggesting that the Province did not want to assert a contingent claim, since this might attract a counterclaim by Abitibi for the expropriation of the properties (something that may be impossible due to Abitibi's decision to take the expropriation issue to NAFTA (the *North American Free Trade Agreement Between the Government of the United Mexican States and the Government of the United States of America*, Can.T.S. 1994 No. 2), excluding Canadian courts.) In any event, it is clear that the *CCAA* judge, on the reasoning he adopted, never considered the question of whether it was "sufficiently certain" that the Province would remediate the properties. It follows that the *CCAA* judge's conclusions cannot support the view that the outstanding obligations are contingent claims under the *CCAA*.

95 My colleague concludes:

> [The *CCAA* judge] did at times rely on indicators that are unique and that do not appear in the analytical framework I propose above, but he did so because of the exceptional facts of this case. Yet, had he formulated the question in the same way as I have, his conclusion, based on his objective findings of fact would have been same. ... The *CCAA* judge's assessment of the facts ... leads to no conclusion other than that it was sufficiently certain that the Province would perform remediation work and therefore fall within the definition of a creditor with a monetary claim.
>
> [Emphasis added, para. 58].

96 I must respectfully confess to a less sanguine view. First, I find myself unable to decide the case on what I think the *CCAA* judge would have done had he gotten the law right and considered the central question. In my view, his failure to consider that question requires this Court to answer it in his stead on the record before us: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.), at para. 35. But more to the point, I see no objective facts that support, much less compel, the conclusion that it is "sufficiently certain" that the Province will move to itself remediate any or all of the pollution Abitibi caused. The mood of the regulator in issuing remediation orders, be it disinterested or otherwise, has no bearing on the likelihood that the Province will undertake such a massive project itself. The Province has options. It could, to be sure, opt to do the work. Or it could await the result of Abitibi's restructuring and call on it to remediate once it resumed operations. It could even choose to leave the site contaminated. There is nothing in the record that makes the first option more probable than the others, much less establishes "sufficient certainty" that the Province will itself clean up the pollution, converting it to a debt.

97 I would allow the appeal and issue a declaration that Abitibi's remediation obligations under the *EPA* Orders do not constitute claims compromisable under the *CCAA*, except for work done or tendered for on the Buchans site.

LeBel J. **(dissenting):**

98 I have read the reasons of the Chief Justice and Deschamps J. They agree that a court overseeing a proposed arrangement under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), cannot relieve debtors of their regulatory obligations. The only regulatory orders that can be subject to compromise are those which are monetary in nature. My colleagues also accept that contingent environmental claims can be liquidated and compromised if it is established that the regulatory body would remediate the environmental contamination itself, and hence turn the regulatory order into a monetary claim.

99 At this point, my colleagues disagree on the proper evidentiary test with respect to whether the government would remediate the contamination. In the Chief Justice's opinion, the evidence must show that there is a "likelihood approaching certainty" that the province would remediate the contamination itself (para. 22). In my respectful opinion, this is not the established test for determining where and how a contingent claim can be liquidated in bankruptcy and insolvency law. The test of "sufficient certainty" described by Deschamps J., which does not look very different from the general civil standard of probability, better reflects how both the common law and the civil law view and deal with contingent claims. On the basis of the test Deschamps J. proposes, I must agree with the Chief Justice and would allow the appeal.

100 First, no matter how I read the *CCAA* court's judgment (2010 QCCS 1261, 68 C.B.R. (5th) 1 (C.S. Que.)), I find no support for a conclusion that it is consistent with the principle that the *CCAA* does not apply to purely regulatory obligations, or that the court had evidence that would satisfy the test of "sufficient certainty" that the province of Newfoundland and Labrador (the "Province") would perform the remedial work itself.

101 In my view, the *CCAA* court was concerned that the arrangement would fail if the Abitibi respondents ("Abitibi") were not released from their regulatory obligations in respect of pollution. The *CCAA* court wanted to eliminate the uncertainty that would have clouded the reorganized corporations' future. Moreover, its decision appears to have been driven by an opinion that the Province had acted in bad faith in its dealings with Abitibi both during and after the termination of its operations in the Province. I agree with the Chief Justice that there is no evidence that the Province intends to perform the remedial work itself. In the absence of any other evidence, an off-hand comment made in the legislature by a member of the government

hardly satisfies the "sufficient certainty" test. Even if the evidentiary test proposed by my colleague Deschamps J. is applied, this Court can legitimately disregard the *CCAA* court's finding as the Chief Justice proposes, since it did not rest on a sufficient factual foundation.

102 For these reasons, I would concur with the disposition proposed by the Chief Justice.

Appeal dismissed.

Pourvoi rejeté.

TAB 14

2019 SCC 5, 2019 CSC 5
Supreme Court of Canada

Orphan Well Association v. Grant Thornton Ltd.

2019 CarswellAlta 141, 2019 CarswellAlta 142, 2019 SCC 5, 2019 CSC 5, [2019] 1 S.C.R. 150, [2019] 1 R.C.S. 150, [2019] 3 W.W.R. 1, [2019] A.W.L.D. 879, [2019] A.W.L.D. 880, [2019] A.W.L.D. 881, [2019] A.W.L.D. 941, [2019] A.W.L.D. 942, [2019] S.C.J. No. 5, 22 C.E.L.R. (4th) 121, 301 A.C.W.S. (3d) 183, 430 D.L.R. (4th) 1, 66 C.B.R. (6th) 1, 81 Alta. L.R. (6th) 1, 9 P.P.S.A.C. (4th) 293

Orphan Well Association and Alberta Energy Regulator (Appellants) and Grant Thornton Limited and ATB Financial (formerly known as AlbertaTreasury Branches) (Respondents) and Attorney General of Ontario, Attorney General of British Columbia, Attorney General of Saskatchewan, Attorney General of Alberta, Ecojustice Canada Society, Canadian Association of Petroleum Producers, Greenpeace Canada, Action Surface Rights Association, Canadian Association of Insolvency and Restructuring Professionals and Canadian Bankers' Association (Interveners)

Wagner C.J.C., Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown JJ.

Heard: February 15, 2018
Judgment: January 31, 2019
Docket: 37627

Proceedings: reversing *Orphan Well Assn. v. Grant Thornton Ltd.* (2017), 8 C.E.L.R. (4th) 1, [2017] 6 W.W.R. 301, 50 Alta. L.R. (6th) 1, 47 C.B.R. (6th) 171, 2017 CarswellAlta 695, 2017 ABCA 124, Frans Slatter J.A., Frederica Schutz J.A., Sheilah Martin J.A. (Alta. C.A.); affirming *Grant Thornton Ltd. v. Alberta Energy Regulator* (2016), 33 Alta. L.R. (6th) 221, 37 C.B.R. (6th) 88, [2016] 11 W.W.R. 716, 2016 CarswellAlta 994, 2016 ABQB 278, Neil Wittmann C.J.Q.B. (Alta. Q.B.)

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Howard A. Gorman, Q.C., D. Aaron Stephenson, for Intervener, Canadian Bankers' Association

Subject: Civil Practice and Procedure; Environmental; Estates and Trusts; Insolvency; Natural Resources

APPEAL from judgment reported at *Orphan Well Assn. v. Grant Thornton Ltd.* (2017), 2017 ABCA 124, 2017 CarswellAlta 695, 8 C.E.L.R. (4th) 1, [2017] 6 W.W.R. 301, 50 Alta. L.R. (6th) 1, 47 C.B.R. (6th) 171 (Alta. C.A.), dismissing appeal from judgment dismissing application for declaration that trustee-in-bankruptcy's disclaimer of licensed wells was void and granting cross-application for approval of sales process that excluded renounced wells.

POURVOI formé à l'encontre d'une décision publiée à *Orphan Well Assn. v. Grant Thornton Ltd.* (2017), 2017 ABCA 124, 2017 CarswellAlta 695, 8 C.E.L.R. (4th) 1, [2017] 6 W.W.R. 301, 50 Alta. L.R. (6th) 1, 47 C.B.R. (6th) 171 (Alta. C.A.), ayant rejeté un appel interjeté à l'encontre d'un jugement ayant rejeté une demande visant à faire déclarer que la renonciation du syndic de faillite à des puits autorisés était nulle et ayant accueilli une demande reconventionnelle visant à obtenir l'approbation d'un processus de vente qui excluait les puits ayant fait l'objet d'une renonciation.

Wagner C.J.C. **(Abella, Karakatsanis, Gascon, Brown JJ. concurring):**

I. Introduction

1 The oil and gas industry is a lucrative and important component of Alberta's and Canada's economy. The industry also carries with it certain unavoidable environmental costs and consequences. To address them, Alberta has established a comprehensive cradle-to-grave licensing regime that is binding on companies active in the industry. A company will not be granted the licences that it needs to extract, process or transport oil and gas in Alberta unless it assumes end-of-life responsibilities for plugging and capping oil wells to prevent leaks, dismantling surface structures and restoring the surface to its previous condition. These obligations are known as "reclamation" and "abandonment" (Environmental Protection and Enhancement Act, R.S.A. 2000, c. E-12 (“EPEA”), s. 1(ddd), and Oil and Gas Conservation Act, R.S.A. 2000, c. O-6 (“OGCA”), s. 1(1)(a)).

2 The question in this appeal is what happens to these obligations when a company is bankrupt and a trustee in bankruptcy is charged with distributing its assets among various creditors according to the rules in the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (“BIA”). Redwater Energy Corporation ("Redwater") is the bankrupt company at the centre of this appeal. Its principal assets are 127 oil and gas assets — wells, pipelines and facilities — and their corresponding licences. A few of Redwater's licensed wells are still producing and profitable. The majority of the wells are spent and burdened with abandonment and reclamation liabilities that exceed their value.

3 The Alberta Energy Regulator ("Regulator") and the Orphan Well Association ("OWA") are the appellants in this Court. (For simplicity, I will refer to the Regulator when discussing the appellants' position, unless otherwise noted.) The Regulator administers Alberta's licensing regime and enforces the abandonment and reclamation obligations of licensees. The Regulator has delegated to the OWA, an independent non-profit entity, the authority to abandon and reclaim "orphans", which are oil and gas assets and their sites left behind in an improperly abandoned or unreclaimed state by defunct companies at the close of their insolvency proceedings. The Regulator says that, one way or another, the remaining value of the Redwater estate must be applied to meet the abandonment and reclamation obligations associated with its licensed assets.

4 Redwater's trustee in bankruptcy, Grant Thornton Limited ("GTL"), and Redwater's primary secured creditor, Alberta Treasury Branches ("ATB"), oppose the appeal. (For simplicity, I will refer to GTL when discussing the respondents' position, unless otherwise noted.) GTL argues that, since it has disclaimed Redwater's unproductive oil and gas assets, s. 14.06(4) of the BIA empowers it to walk away from those assets and the environmental liabilities associated with them and to deal solely with Redwater's producing oil and gas assets. Alternatively, GTL argues that, under the priority scheme in the *BIA*, the claims of Redwater's secured creditors must be satisfied ahead of Redwater's environmental liabilities. Relying on the doctrine of paramountcy, GTL says that Alberta's environmental legislation regulating the oil and gas industry is constitutionally inoperative to the extent that it authorizes the Regulator to interfere with this arrangement.

5 The chambers judge (2016 ABQB 278, 37 C.B.R. (6th) 88 (Alta. Q.B.)) and a majority of the Court of Appeal (2017 ABCA 124, 47 C.B.R. (6th) 171 (Alta. C.A.)) agreed with GTL. The Regulator's proposed use of its statutory powers to enforce Redwater's compliance with abandonment and reclamation obligations during bankruptcy was held to conflict with the *BIA* in two ways: (1) it imposed on GTL the obligations of a licensee in relation to the Redwater assets disclaimed by GTL, contrary to s. 14.06(4) of the BIA; and (2) it upended the priority scheme for the distribution of a bankrupt's assets established by the *BIA* by requiring that the "provable claims" of the Regulator, an unsecured creditor, be paid ahead of the claims of Redwater's secured creditors.

6 Martin J.A., as she then was, dissented. She would have allowed the Regulator's appeal on the basis that there was no conflict between Alberta's environmental legislation and the *BIA*. Martin J.A. was of the view that: (1) s. 14.06 of the BIA did not operate to relieve GTL of Redwater's obligations with respect to its licensed assets; and (2) the Regulator was not asserting any provable claims, so the priority scheme in the *BIA* was not upended.

7 For the reasons that follow, I would allow the appeal. Although my analysis differs from hers in some respects, I agree with Martin J.A. that the Regulator's use of its statutory powers does not create a conflict with the *BIA* so as to trigger the doctrine of federal paramountcy. Section 14.06(4) is concerned with the personal liability of trustees, and does not empower a trustee to walk away from the environmental liabilities of the estate it is administering. The Regulator is not asserting any claims provable in the bankruptcy, and the priority scheme in the *BIA* is not upended. Thus, no conflict is caused by GTL's status as a licensee under Alberta legislation. Alberta's regulatory regime can coexist with and apply alongside the *BIA*.

II. Background

A. Alberta's Regulatory Regime

8 The resolution of the constitutional questions and the ultimate outcome of this appeal depend on a proper understanding of the complex regulatory regime which governs Alberta's oil and gas industry. I will therefore describe that regime in considerable detail.

9 In order to exploit oil and gas resources in Alberta, a company needs three things: a property interest in the oil or gas, surface rights and a licence issued by the Regulator. In Alberta, mineral rights are typically reserved from ownership rights in land. About 90 percent of Alberta's mineral rights are held by the Crown on behalf of the public.

10 A company's property interest in the oil or gas it seeks to exploit typically takes the form of a mineral lease with the Crown (but occasionally with a private owner). The company also needs surface rights so it can access and occupy the physical land located above the oil and gas and place the equipment needed to pump, store and haul away the oil and gas. Surface rights may be obtained through a lease with the landowner, who is often a farmer or rancher (but is occasionally the Crown). Where a landowner does not voluntarily grant surface rights, Alberta law authorizes the Surface Rights Board to issue a right of entry order in favour of an "operator", that is, the person having the right to a mineral or the right to work it (Surface Rights Act, R.S.A. 2000, c. S-24, ss. 1(h) and 15).

11 Canadian courts characterize a mineral lease that allows a company to exploit oil and gas resources as a *profit à prendre*. It is not disputed that a *profit à prendre* is a form of real property interest held by the company (*Berkheiser v. Berkheiser*, [1957] S.C.R. 387 (S.C.C.)). A *profit à prendre* is fully assignable and has been defined as "a non-possessory interest in land, like an easement, which can be passed on from generation to generation, and remains with the land, regardless of changes in ownership" (F. L. Stewart, "How to Deal with a Fickle Friend? Alberta's Troubles with the Doctrine of Federal Paramountcy", in J. P. Sarra and B. Romaine, eds., *Annual Review of Insolvency Law 2017* (2018), 163 ("Stewart"), at p. 193). Solvent and insolvent companies alike will often hold *profits à prendre* in both producing and unproductive or spent wells. There are a variety of potential "working interest" arrangements whereby several parties can share an interest in oil and gas resources.

12 The third thing a company needs in order to access and exploit Alberta's oil and gas resources, and the one most germane to this appeal, is a licence issued by the Regulator. The *OGCA* prohibits any person without a licence from commencing to drill a well or undertaking any operations preparatory or incidental to the drilling of a well, and from commencing to construct or operate a facility (ss. 11(1) and 12(1)). The Pipeline Act, R.S.A. 2000, c. P-15, similarly prohibits the construction of pipelines without a licence (s. 6(1)). The *profit à prendre* in an oil and gas deposit may be bought and sold without regulatory approval. However, it is of little practical use on its own, as, without the licence associated with a well, the purchaser cannot "continue any drilling operations, any producing operations or any injecting operations" (OGCA, s. 11(1)), and, without the licence associated with a facility, the purchaser cannot "continue any construction or operation" (OGCA, s. 12(1)).

13 The three relevant licensed assets in the Alberta oil and gas industry are wells, facilities and pipelines. A "well" is defined, *inter alia*, as "an orifice in the ground completed or being drilled ... for the production of oil or gas" (OGCA, s. 1(1)(eee)). A "facility" is broadly defined and includes any building, structure, installation or equipment that is connected to or associated with the recovery, development, production, handling, processing, treatment or disposal of oil and gas resources (OGCA, s. 1(1)(w)). A "pipeline" is defined as "a pipe used to convey a substance or combination of substances", including associated installations (Pipeline Act, s. 1(1)(t)).

14 The licences a company needs to recover, process and transport oil and gas are issued by the Regulator. The Regulator is not an agent of the Crown. It is established as a corporation by s. 3(1) of the Responsible Energy Development Act, S.A. 2012, c. R-17.3 ("REDA"). It exercises a wide range of powers under the *OGCA* and the *Pipeline* Act. It also acts as the regulator in respect of energy resource activities under the *EPEA*, Alberta's more general environmental protection legislation (REDA, s. 2(2)(h)). The Regulator's mandate is set out in the *REDA* and includes "the efficient, safe, orderly and environmentally responsible development of energy resources in Alberta" (s. 2(1)(a)). The Regulator is funded almost entirely by the industry it regulates, and it collects its budget through an administration fee (Stewart, at p. 219; REDA, ss. 28 and 29; Alberta Energy Regulator Administration Fees Rules, Alta. Reg. 98/2013).

15 The Regulator has a wide discretion when it comes to granting licences to operate wells, facilities and pipelines. On receiving an application for a licence, the Regulator may grant the licence subject to any conditions, restrictions and stipulations, or it may refuse the licence (OGCA, s. 18(1); Pipeline Act, s. 9(1)). Licences to operate a well, facility or pipeline are granted subject to obligations that will one day arise to abandon the underlying asset and reclaim the land on which it is situated.

16 "Abandonment" refers to "the permanent dismantlement of a well or facility in the manner prescribed by the regulations or rules" made by the Regulator (OGCA, s. 1(1)(a)). Specifically, the abandonment of a well has been defined as "the process of sealing a hole which has been drilled for oil or gas, at the end of its useful life, to render it environmentally safe" (*Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.*, 1991 ABCA 181, 81 Alta. L.R. (2d) 45 ("*Northern Badger*"), at para. 2). The abandonment of a pipeline refers to its "permanent deactivation ... in the manner prescribed by the rules" (Pipeline Act, s. 1(1)(a)). "Reclamation" includes "the removal of equipment or buildings", "the decontamination of buildings ... land or water", and the "stabilization, contouring, maintenance, conditioning or reconstruction of the surface of the land" (EPEA, s. 1(ddd)). A further duty binding on those active in the Alberta oil and gas industry is remediation, which arises where a harmful or potentially harmful substance has been released into the environment (EPEA, ss. 112 to 122). As the extent of any remediation obligations that may be associated with Redwater assets is unclear, I will not refer to remediation separately from reclamation, unless otherwise noted. As has been done throughout this litigation, I will refer to abandonment and reclamation jointly as end-of-life obligations.

17 A licensee must abandon a well or facility when ordered to do so by the Regulator or when required by the rules or regulations. The Regulator may order abandonment when "the Regulator considers that it is necessary to do so in order to protect the public or the environment" (OGCA, s. 27(3)). Under the rules, a licensee is required to abandon a well or facility, *inter alia*, on the termination of the mineral lease, surface lease or right of entry, where the Regulator cancels or suspends the licence, or where the Regulator notifies the licensee that the well or facility may constitute an environmental or safety hazard (Oil and Gas Conservation Rules, Alta. Reg. 151/71, s. 3.012). Section 23 of the *Pipeline Act* requires licensees to abandon pipelines in similar situations. The duty to reclaim is established by s. 137 of the EPEA. This duty is binding on an "operator", a broader term which encompasses the holder of a licence issued by the Regulator (EPEA, s. 134(b)). Reclamation is governed by the procedural requirements set out in regulations (Conservation and Reclamation Regulation, Alta. Reg. 115/93).

18 The Licensee Liability Rating Program, which was, at the time of Redwater's insolvency, set out in *Directive 006: Licensee Liability Rating (LLR) Program and License Transfer Process* (March 12, 2013) ("Directive 006") is one means by which the Regulator seeks to ensure that end-of-life obligations will be satisfied by licensees rather than being offloaded onto the Alberta public. As part of this program, the Regulator assigns each company a Liability Management Rating ("LMR"), which is the ratio between the aggregate value attributed by the Regulator to a company's licensed assets and the aggregate liability attributed by the Regulator to the eventual cost of abandoning and reclaiming those assets. For the purpose of calculating the LMR, all the

licences held by a given company are treated as a package, without any segregation or parcelling of assets. A licensee's LMR is calculated on a monthly basis and, where it dips below the prescribed ratio (1.0 at the time of Redwater's insolvency), the licensee is required to pay a security deposit. The security deposit is added to the licensee's "deemed assets" and must bring its LMR back up to the ratio prescribed by the Regulator. If the required security deposit is not paid, the Regulator may cancel or suspend the company's licences (OGCA, s. 25). As an alternative to posting security, the licensee can perform end-of-life obligations or transfer licences (with approval) in order to bring its LMR back up to the prescribed level.

19 Licences can be transferred only with the Regulator's approval. The Regulator uses the Licensee Liability Rating Program to ensure that end-of-life obligations will not be negatively affected by licence transfers. Upon receipt of an application to transfer one or more licences, the Regulator assesses how the transfer, if approved, would affect the LMR of both the transferor and the transferee. At the time of Redwater's insolvency, if both the transferor and the transferee would have a post-transfer LMR equal to or exceeding 1.0, the Regulator would approve the transfer, absent other concerns. Following the chambers judge's decision in this case, the Regulator implemented changes to its policies, including the requirement that transferees have an LMR of 2.0 or higher immediately following any licence transfer: Alberta Energy Regulator, *Licensee Eligibility — Alberta Energy Regulator Measures to Limit Environmental Impacts Pending Regulatory Changes to Address the Redwater Decision*, June 20, 2016 (online). For the purposes of this appeal, I will be referring to the regulatory regime as it existed at the time of Redwater's insolvency.

20 As discussed in greater detail below, if either the transferor or the transferee would have a post-transfer LMR below 1.0, the Regulator would refuse to approve the licence transfer. In such a situation, the Regulator would insist on certain remedial steps being taken to ensure that neither LMR would drop below 1.0. Although Directive 006, as it was in the 2013 version, required both the transferee and transferor to have a post transfer LMR of at least 1.0, during this litigation, the Regulator stated that, when licensees are in receivership or bankruptcy, its working rule is to approve transfers as long as they do not cause a deterioration in the transferor's LMR, even where its LMR will remain below 1.0 following the transfer. The explanation for this working rule is that it helps to facilitate purchases. The Regulator's position is that the Licensee Liability Rating Program continues to apply to the transfer of licences as part of insolvency proceedings.

21 The *OGCA*, the *Pipeline Act* and the *EPEA* all contemplate that a licensee's regulatory obligations will continue to be fulfilled when it is subject to insolvency proceedings. The *EPEA* achieves this by including the trustee of a licensee in the definition of "operator" for the purposes of the duty to reclaim (s. 134(b)(vi)). The *EPEA* also specifically provides that an order to perform reclamation work (known as an "environmental protection order") may be issued to a trustee (ss. 140 and 142(1)(a)(ii)). The *EPEA* imposes responsibility for carrying out the terms of an environmental protection order on the person to whom the order is directed (ss. 240 and 245). However, absent gross negligence or wilful misconduct, a trustee's liability in relation to such an order is expressly limited to the value of the assets in the bankrupt estate (s. 240(3)). The *OGCA* and the *Pipeline Act* take a more generic approach to applying the various obligations of licensees to trustees in the insolvency context: they simply include trustees in the definition of "licensee" (OGCA, s. 1(1)(cc); Pipeline Act, s. 1(1)(n)). As a result, every power which these Acts give the Regulator against a licensee can theoretically also be exercised against a trustee.

22 Despite this, Alberta's regulatory regime does contemplate the possibility that some of a licensee's end-of-life obligations will remain unfulfilled when the insolvency process has run its course. The Regulator may designate wells, facilities, and their sites as "orphans" (OGCA, s. 70(2)(a)). A pipeline is defined as a "facility" for the purposes of the orphan regime (OGCA, s. 68(d)). Directive 006 stated that "a well, facility, or pipeline in the LLR program is eligible to be declared an orphan where the licensee of that licence becomes insolvent or defunct" (s. 7.1). An "orphan fund" has been established for the purpose of paying for, *inter alia*, the abandonment and reclamation of orphans (OGCA, s. 70(1)). The orphan fund is financed by an annual industry-wide levy paid by licensees of wells, facilities and unreclaimed sites (s. 73(1)). The amount of the levy is prescribed by the Regulator based on the estimated cost of abandoning and reclaiming orphans in a given fiscal year (s. 73(2)).

23 The Regulator has delegated its statutory authority to abandon and reclaim orphans to the OWA (Orphan Fund Delegated Administration Regulation, Alta. Reg. 45/2001), a non-profit organization overseen by an independent board of directors. It is funded almost entirely through the industry-wide levy described above, 100 percent of which is remitted to it by the Regulator. The OWA has no power to seek reimbursement of its costs. However, once it has completed its environmental work, it may be

reimbursed up to the value of any security deposit held by the Regulator to the credit of the licensee of the orphans. In recent years, the number of orphans in Alberta has increased rapidly. For example, the number of new orphan wells increased from 80 in the 2013-14 years to 591 in the 2014-15 years.

24 At issue in this appeal is the applicability during bankruptcy of two powers conferred on the Regulator by the provincial legislation. Both are designed to ensure that licensees satisfy their end-of-life obligations.

25 The first power at issue in this appeal is the Regulator's power to order a licensee to abandon licensed assets, which is accompanied by statutory powers for the enforcement of such orders. Where a well or facility has not been abandoned in accordance with a direction of the Regulator or the rules or regulations, the Regulator may authorize any person to abandon the well or facility or may do so itself (OGCA, s. 28). Where the Regulator or the person it has designated performs the abandonment, the costs of doing so constitute a debt payable to the Regulator. An order of the Regulator showing these costs may be filed with and entered as a judgment of the Alberta Court of Queen's Bench and then enforced according to the ordinary procedure for enforcement of judgments of that court (OGCA, s. 30(6)). A similar scheme applies with respect to pipelines (Pipeline Act, ss. 23 to 26).

26 A licensee that contravenes or fails to comply with an order of the Regulator, or that has an outstanding debt to the Regulator in respect of abandonment or reclamation costs, is subject to a number of potential enforcement measures. The Regulator may suspend operations, refuse to consider licence applications or licence transfer applications (OGCA, s. 106(3)(a), (b) and (c)), or require the payment of security deposits, generally or as a condition of granting any further licences, approvals or transfers (OGCA, s. 106(3)(d) and (e)). Where a licensee contravenes the Act, regulations or rules, any order or direction of the Regulator, or any condition of a licence, the Regulator may prosecute the licensee for a regulatory offence and a fine may be imposed as a penalty, although the licensee can raise a due diligence defence (OGCA, ss. 108 and 110). A similar scheme applies with respect to pipelines (Pipeline Act, ss. 51 to 54) and the *EPEA* contains similar debt-creating provisions with respect to environmental protection orders. The *EPEA* also provides for the prosecution of regulatory offences in cases of non-compliance, with an available due diligence defence. However, as noted, a trustee's liability in relation to environmental protection orders is capped at estate assets, unless the trustee is guilty of gross negligence or wilful misconduct (EPEA, ss. 227 to 230, 240 and 245).

27 The second power at issue in this appeal is the Regulator's power to impose conditions on a licensee's transfer of its licence(s). As when it initially grants a licence, the Regulator has broad powers to consent to the transfer of a licence subject to any conditions, restrictions and stipulations or to reject the transfer (OGCA, s. 24(2)). Under Directive 006 and its 2016 replacement, the Regulator can reject a transfer even where both parties would have the required LMR after the transfer or where a security deposit is available to be posted in compliance with LMR requirements. In particular, the Regulator may determine that it is not in the public interest to approve the licence transfer based on the compliance history of one or both parties or their directors, officers or security holders, or based on the risk posed by the transfer to the orphan fund.

28 Where a proposed transaction would cause the transferor's LMR to deteriorate below 1.0 (or simply to deteriorate, in the case of an insolvent transferor), the Regulator insists that one of the following conditions be met before it will approve the transaction: (i) that the transferor perform abandonment, reclamation, or both, thus reducing its deemed liabilities, or (ii) that the transferor post a security deposit, thus increasing its deemed assets. Alternatively, the transaction may be structured to avoid any deterioration of the transferor's LMR by "bundling" the licences for spent wells with the licences for producing wells. A transaction in which the licenses for spent wells are retained while the licences for producing wells are transferred will almost always cause a considerable deterioration in a company's LMR.

29 During this appeal, there was significant discussion of other regulatory regimes which Alberta *could* have adopted to prevent environmental costs associated with the oil and gas industry from being offloaded onto the public. What Alberta *has* chosen is a licensing regime which makes such costs an inherent part of the value of the licensed assets. This regime has the advantage of aligning with the polluter-pays principle, a well-recognized tenet of Canadian environmental law. This principle assigns polluters the responsibility for remedying environmental damage for which they are responsible, thereby incentivizing companies to pay attention to the environment in the course of their economic activities (*Imperial Oil Ltd. v. v. Quebec (Minister of the Environment)*, 2003 SCC 58, [2003] 2 S.C.R. 624 (S.C.C.) , at para. 24). The Licensee Liability Rating Program essentially

requires licensees to apply the value derived from oil and gas assets during the productive portions of the life cycle of the assets to the inevitable cost of abandoning those assets and reclaiming their sites at the end of those life cycles.

30 Ultimately, it is not the role of this Court to decide the best regulatory approach to the oil and gas industry. What is not in dispute is that, in adopting its current regulatory regime, Alberta has acted within its constitutional authority over property and civil rights in the province and over the "development, conservation and management of non-renewable natural resources ... in the province" (Constitution Act, 1867, ss. 92(13) and 92A(1)(c)). Alberta has devised a complex regulatory apparatus to address important policy questions concerning when, by whom and in what manner the inevitable environmental costs associated with oil and gas extraction are to be paid. Its solution is a licensing regime that depresses the value of key industry assets to reflect environmental costs, backstopped by a levy on industry in the form of the orphan fund. Alberta intended that apparatus to continue to operate when an oil and gas company is subject to insolvency proceedings.

31 However, the insolvency of an oil and gas company licensed to operate in Alberta also engages the *BIA*. The *BIA* is federal legislation that governs the administration of a bankrupt's estate and the orderly and equitable distribution of property among its creditors. It is validly enacted pursuant to Parliament's constitutional authority over bankruptcy and insolvency (Constitution Act, 1867, s. 91(21)). Just as Alberta's regulatory regime reflects its considered choice about how to address the important policy questions raised by the environmental risks of oil and gas extraction, the *BIA* reflects Parliament's considered choice about how to balance important policy objectives when a bankrupt's assets are, by definition, insufficient to meet all of its various obligations. To the extent that there is an operational conflict between the Alberta regulatory regime and the *BIA*, or that the Alberta regulatory regime frustrates the purpose of the *BIA*, the doctrine of paramountcy dictates that the *BIA* must prevail.

B. The Relevant Provisions of the BIA

32 Here, I simply wish to note the sections of the *BIA* at issue in this appeal. These sections will determine whether the doctrine of paramountcy applies. I will discuss the purposes of the *BIA* and the various issues raised by s. 14.06 in greater detail below.

33 The central concept of the *BIA* is that of a "claim provable in bankruptcy". Several provisions of the *BIA* form the basis for delineating the scope of provable claims. The first is the definition provided in s. 2:

> ***claim provable in bankruptcy, provable claim*** or ***claim provable*** includes any claim or liability provable in proceedings under this Act by a creditor...

34 "Creditor" is defined in s. 2 as "a person having a claim provable as a claim under this Act".

35 The definition of "claim provable" is completed by s. 121(1):

> All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

36 A claim may be provable in a bankruptcy proceeding even if it is a contingent claim. A "contingent claim is 'a claim which may or may not ever ripen into a debt, according as some future event does or does not happen'" (*Peters v. Remington*, 2004 ABCA 5, 49 C.B.R. (4th) 273 (Alta. C.A.), at para. 23, quoting *Gardner v. Newton* (1916), 29 D.L.R. 276 (Man. K.B.) , at p. 281). Sections 121(2) and 135(1.1) provide guidance on when a contingent claim will be a provable claim:

> **121 (2)** The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135.
>
> . . . . .
>
> **135 (1.1)** The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.

37 In *AbitibiBowater Inc., Re*, 2012 SCC 67, [2012] 3 S.C.R. 443 (S.C.C.) ("*Abitibi*"), at para. 26, this Court interpreted the foregoing provisions of the *BIA* and articulated a three-part test for determining when an environmental obligation imposed by a regulator will be a provable claim for the purposes of the BIA and the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 ("CCAA"):

> First, there must be a debt, a liability or an obligation to a *creditor*. Second, the debt, liability or obligation must be incurred *before the debtor becomes bankrupt*. Third, it must be possible to attach a *monetary value* to the debt, liability or obligation. [Emphasis in original.]

38 I will address the *Abitibi* test in greater detail below.

39 Once bankruptcy has been declared, creditors of the bankrupt must participate in one collective bankruptcy proceeding if they wish to enforce their provable claims. Section 69.3(1) of the BIA thus provides for an automatic stay of enforcement of provable claims outside the bankruptcy proceeding, effective as of the first day of bankruptcy.

40 The *BIA* establishes a comprehensive priority scheme for the satisfaction of the provable claims asserted against the bankrupt in the collective proceeding. Section 141 sets out the general rule, which is that all creditors rank equally and share rateably in the bankrupt's assets. However, the rule set out in s. 141 applies "[s]ubject to [the *BIA*]". Section 136(1) lists the claims of preferred creditors and the order of priority for their payment. It also states that this order of priority is "[s]ubject to the rights of secured creditors". Under s. 69.3(2), the stay of proceedings does not prevent secured creditors from realizing their security interest. The *BIA* therefore sets out a priority scheme for paying claims provable in bankruptcy, with secured creditors being paid first, preferred creditors second and unsecured creditors last (see *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327 (S.C.C.) , at paras. 32-35).

41 Essential to this appeal is s. 14.06 of the BIA, which deals with various environmental matters in the bankruptcy context. I will now reproduce s. 14.06(2) and s. 14.06(4), the two portions of the s. 14.06 scheme that are directly implicated in this appeal. The balance of s. 14.06 can be found in the appendix at the conclusion of these reasons.

42 Section 14.06(2) reads as follows:

> **(2)** Notwithstanding anything in any federal or provincial law, a trustee is not personally liable in that position for any environmental condition that arose or environmental damage that occurred
>
> (a) before the trustee's appointment; or
>
> (b) after the trustee's appointment unless it is established that the condition arose or the damage occurred as a result of the trustee's gross negligence or wilful misconduct or, in the Province of Quebec, the trustee's gross or intentional fault.

43 Section 14.06(4) reads as follows:

> **(4)** Notwithstanding anything in any federal or provincial law but subject to subsection (2), where an order is made which has the effect of requiring a trustee to remedy any environmental condition or environmental damage affecting property involved in a bankruptcy, proposal or receivership, the trustee is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,
>
> (a) if, within such time as is specified in the order, within ten days after the order is made if no time is so specified, within ten days after the appointment of the trustee, if the order is in effect when the trustee is appointed, or during the period of the stay referred to in paragraph (b), the trustee
>
> (i) complies with the order, or

(ii) on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property, or any right in any immovable, affected by the condition or damage;

(b) during the period of a stay of the order granted, on application made within the time specified in the order referred to in paragraph (a), within ten days after the order is made or within ten days after the appointment of the trustee, if the order is in effect when the trustee is appointed, by

(i) the court or body having jurisdiction under the law pursuant to which the order was made to enable the trustee to contest the order, or

(ii) the court having jurisdiction in bankruptcy for the purposes of assessing the economic viability of complying with the order; or

(c) if the trustee had, before the order was made, abandoned or renounced or been divested of any interest in any real property, or any right in any immovable, affected by the condition or damage.

44 As I will discuss, a main point of contention between the parties is the very different interpretations they ascribe to s. 14.06(4) of the BIA. I note that s. 14.06(4)(a)(ii), which is relied upon by GTL, refers to a trustee who "abandons, disposes of or otherwise releases any interest in any real property". The word "disclaim" is used in these reasons, as it has been throughout this litigation, as a shorthand for these terms.

45 I turn now to a brief discussion of the events of the Redwater bankruptcy.

C. The Events of the Redwater Bankruptcy

46 Redwater was a publicly traded oil and gas company. It was first granted licences by the Regulator in 2009. On January 31 and August 19, 2013, ATB advanced funds to Redwater and, in return, was granted a security interest in Redwater's present and after-acquired property. ATB lent funds to Redwater with full knowledge of the end-of-life obligations associated with its assets. In mid-2014, Redwater began to experience financial difficulties. Upon application by ATB, GTL was appointed receiver for Redwater on May 12, 2015. At that time, Redwater owed ATB approximately $5.1 million.

47 Upon being advised of the receivership, the Regulator sent GTL a letter dated May 14, 2015, setting out its position. The Regulator noted that the *OGCA* and the *Pipeline* Act included both receivers and trustees in the definition of "licensee". The Regulator stated that it was not a creditor of Redwater and that it was not asserting a "provable claim in the receivership". Accordingly, notwithstanding the receivership, Redwater remained obligated to comply with all regulatory requirements, including abandonment obligations for all licensed assets. The Regulator stated that GTL was legally obligated to fulfill these obligations prior to distributing any funds or finalizing any proposal to creditors. It warned that it would not approve the transfer of any of Redwater's licences unless it was satisfied that both the transferee and the transferor would be in a position to fulfill all regulatory obligations. It requested confirmation that GTL had taken possession of Redwater's licensed properties and that it was taking steps to comply with all of Redwater's regulatory obligations.

48 At the time it ran into financial difficulties, Redwater was licensed by the Regulator for 84 wells, 7 facilities and 36 pipelines, all in central Alberta. The vast majority of its assets were these oil and gas assets. At the time GTL was appointed receiver, 19 of the wells and facilities were producing and the remaining 72 were inactive or spent. There were working interest participants in several of the wells and facilities. Redwater's LMR did not drop below 1.0 until after it went into receivership, so it never paid any security deposits to the Regulator.

49 By September 2015, Redwater's LMR had dropped to 0.93. The net value of its deemed assets and its deemed liabilities was negative $553,000. The 19 producing wells and facilities for which Redwater was the licensee would have had an LMR of 2.85 and a deemed net value of $4.152 million. The remaining 72 wells and facilities for which Redwater was the licensee would have had an LMR of 0.30 and a deemed net value of negative $4.705 million. Given that Redwater was in receivership, the

Regulator's position was that it would approve the transfer of Redwater's licences only if the transfer did not cause a deterioration in its LMR.

50 In its Second Report to the Alberta Court of Queen's Bench dated October 3, 2015, GTL explained why it had concluded that it could not meet the Regulator's requirements. GTL had concluded that the cost of the end-of-life obligations for the spent wells would likely exceed the sale proceeds for the productive wells. It viewed a sale of the non-producing wells — even if bundled with producing wells — as unlikely. If such a sale were possible, the purchase price would be reduced by the end-of-life obligations, negating the benefit to the estate. Based on this assessment, by letter dated July 3, 2015, GTL informed the Regulator that it was taking possession and control only of Redwater's 17 most productive wells (including a leaking well that was subsequently abandoned), 3 associated facilities and 12 associated pipelines ("Retained Assets"), and that, pursuant to para. 3(a) of the Receivership Order, it was not taking possession or control of any of Redwater's other licensed assets ("Renounced Assets"). GTL's position was that it had no obligation to fulfill any regulatory requirements associated with the Renounced Assets.

51 In response, on July 15, 2015, the Regulator issued orders under the *OGCA* and the *Pipeline* Act requiring Redwater to suspend and abandon the Renounced Assets ("Abandonment Orders"). The orders required abandonment to be carried out immediately where there were no other working interest participants and, by September 18, 2015, where there were other working interest participants. The Regulator stated that it considered the Renounced Assets an environmental and safety hazard and that s. 3.012(d) of the Oil and Gas Conservation Rules required a licensee to abandon wells or facilities so considered. In issuing the Abandonment Orders, the Regulator also relied on ss. 27 to 30 of the OGCA and ss. 23 to 26 of the Pipeline Act. If the Abandonment Orders were not complied with, the Regulator threatened to abandon the assets itself and to sanction Redwater through the use of s. 106 of the OGCA. The Regulator further stated that, once abandonment had taken place, the surface would need to be reclaimed and reclamation certificates obtained in accordance with s. 137 of the EPEA.

52 On September 22, 2015, the Regulator and the OWA filed an application for a declaration that GTL's renunciation of the Renounced Assets was void, an order requiring GTL to comply with the Abandonment Orders, and an order requiring GTL to "fulfill the statutory obligations as licensee in relation to the abandonment, reclamation and remediation" of all of Redwater's licensed properties (A.R., vol. II, at p. 41). The Regulator did not seek to hold GTL liable for these obligations beyond the assets remaining in the Redwater estate. GTL brought a cross-application on October 5, 2015, seeking approval to pursue a sales process excluding the Renounced Assets. GTL sought a court order directing that the Regulator could not prevent the transfer of the licences associated with the Retained Assets on the basis of, *inter alia*, the LMR requirements, failure to comply with the Abandonment Orders, refusal to take possession of the Renounced Assets or any outstanding debts owed by Redwater to the Regulator. GTL did not seek to foreclose the possibility that the Regulator might have some other valid reason to reject a proposed transfer.

53 A bankruptcy order was issued for Redwater on October 28, 2015, and GTL was appointed as trustee. GTL sent another letter to the Regulator on November 2, 2015, this time invoking s. 14.06(4)(a)(ii) of the BIA in relation to the Renounced Assets. The Abandonment Orders remain outstanding.

D. Judicial History

(1) Court of Queen's Bench of Alberta

54 The chambers judge concluded that s. 14.06 of the BIA was designed to permit trustees to disclaim property where this was a rational economic decision in light of the environmental condition affecting the property. Personal liability of the trustee was not a condition precedent to the power to disclaim. The chambers judge accordingly found an operational conflict between s. 14.06 of the BIA and the definition of "licensee" in the *OGCA* and the *Pipeline* Act. Under s. 14.06 of the *BIA*, GTL could renounce assets and not be responsible for the associated environmental obligations. However, under the *OGCA* and the *Pipeline* Act, GTL could not renounce licensed assets because the definition of "licensee" included receivers and trustees, so GTL remained liable for environmental obligations.

55 Applying the test from *Abitibi*, the chambers judge concluded that, although in a "technical sense" it was not sufficiently certain that the Regulator or the OWA would carry out the Abandonment Orders and assert a monetary claim to have its costs reimbursed, the situation met what was intended by the Court in *Abitibi* because the Abandonment Orders were "intrinsically financial" (para. 173). Forcing GTL, as a "licensee", to comply with the Abandonment Orders would therefore frustrate the *BIA*'s overall purpose of equitable distribution of the bankrupt's assets, as the Regulator's claim would be given a super priority to which it was not entitled, ahead of the claims of secured creditors. It would also frustrate the purpose of s. 14.06, by which Parliament had legislated as to environmental claims in bankruptcy and had specifically chosen not to give them a super priority. The conditions imposed by the Regulator on transfers of the licences for the Retained Assets further frustrated s. 14.06 by including the Renounced Assets in the calculation for determining the approval of a sale.

56 The chambers judge approved the sale procedure proposed by GTL. He declared that the *OGCA* and the *Pipeline* Act were inoperative to the extent that they conflicted with the *BIA* by deeming GTL to be the "licensee" of the Renounced Assets; that GTL was entitled to disclaim the Renounced Assets pursuant to s. 14.06(4)(a)(ii) and (c), and was not subject to any obligations in relation to those assets; that the Abandonment Orders were inoperative to the extent that they required GTL to comply or to provide security deposits; and that Directive 006 was inoperative to the extent it conflicted with s. 14.06 of the BIA. Lastly, he declared that the Regulator, in exercising its discretion to approve a transfer of the licences for the Retained Assets, could not consider the Renounced Assets for the purpose of calculating Redwater's LMR before or after the transfer, nor could it consider any other issue involving the Renounced Assets.

(2) Court of Appeal of Alberta

(a) Majority Reasons

57 Slatter J.A., for the majority, dismissed the appeals. He stated that the constitutional issues in the appeals were complementary to the primary issue, which was the interpretation of the BIA. Section 14.06 did not exempt environmental claims from the general bankruptcy regime, other than the super priority in s. 14.06(7), which would rarely, if ever, have any application to oil and gas wells. Section 14.06(4) did not "limit the power of the trustee to renounce ... properties to those circumstances where it might be exposed to personal liability" (para. 68). Additionally, the word "order" in s. 14.06(4) had to be given a wide meaning.

58 Slatter J.A. identified the essential issue as "whether the environmental obligations of Redwater meet the test for a provable claim" (para. 73). He agreed with the chambers judge that the third branch of the *Abitibi* test was met, but concluded that that test had been met "in both a technical and substantive way" (para. 76). The Regulator's policies essentially stripped away from the bankrupt estate enough value to meet environmental obligations. Requiring the depositing of security, or diverting value from the bankrupt estate, clearly met the standard of "certainty". The Regulator's policies required that the full value of the bankrupt's assets be applied first to environmental liabilities, creating a super priority for environmental claims. Slatter J.A. concluded that, "[n]otwithstanding their intended effect as conditions of licensing, the Regulator's policies [had] a direct effect on property, priorities, and the Trustee's right to renounce assets, all of which [were] governed by the *BIA*" (para. 86).

59 In terms of constitutional analysis, Slatter J.A. concluded that the role of GTL as a "licensee" under the *OGCA* and the *Pipeline* Act was "in operational conflict with the provisions of the *BIA*" that exempted trustees from personal liability, allowed them to disclaim assets and established the priority of environmental claims (para. 89). It also frustrated the *BIA*'s purpose of "managing the winding up of insolvent corporations and settling the priority of claims against them" (para. 89). As such, the Regulator could not "insist that the Trustee devote substantial parts of the bankrupt estate in satisfaction of the environmental claims in priority to the claims of the secured creditor" (para. 91).

(b) Dissenting Reasons

60 Martin J.A. dissented. In contrast to the majority, she stressed the constitutional dimensions of the case, in particular the need for co-operative federalism in the area of the environment, and noted that the doctrine of paramountcy should be applied with restraint. She concluded that the Regulator was not asserting a provable claim within the meaning of the *Abitibi* test. It was

not enough for a regulatory order to be "intrinsically financial" for it to be a claim provable in bankruptcy (para. 185, quoting the chambers judge's reasons, at para. 173). There was not sufficient certainty that the ordered abandonment work would be done, either by the Regulator or by the OWA, and there was "no certainty at all that a claim for reimbursement would be made" (para. 184). Martin J.A. was also of the view that the Regulator was not a creditor of Redwater — or, if it was a creditor in issuing the Abandonment Orders, it was at least not one in enforcing the conditions for the transfer of licences. The Regulator had to be able to maintain control over the transfer of licences during a bankruptcy, and there was no reason why such regulatory requirements could not coexist with the distribution of the bankrupt's estate.

61 With regard to s. 14.06, Martin J.A. accepted the Regulator's argument that s. 14.06(4) allowed a trustee to renounce real property in order to avoid personal liability but did not prevent the assets of the bankrupt estate from being used to comply with environmental obligations. However, she went beyond this. In her view, s. 14.06(4) to (8) were enacted together as a statutory compromise. Martin J.A. concluded that a trustee's power to disclaim assets under s. 14.06 simply had no applicability to Alberta's regulatory regime. The ability to renounce under s. 14.06(4) had to be read in conjunction with the other half of the compromise — the Crown's super priority over the debtor's real property established by s. 14.06(7). Licence conditions were not the sort of "order" contemplated by s. 14.06(4), nor were licences the kind of "real property" contemplated by that provision. The balance struck by s. 14.06 was not effective when there was no "real property of the debtor" in which the Crown could take a super priority (para. 210).

62 As there was no entitlement under the *BIA* to renounce the end-of-life obligations imposed by Alberta's regulatory regime, there was no operational conflict in enforcing those obligations under provincial law. Nor was there any frustration of purpose. The Regulator was not asserting any claims provable in bankruptcy: "The continued application of [Alberta's] regulatory regime following bankruptcy did not determine or reorder priorities among creditors, but rather value[d] accurately the assets available for distribution" (para. 240).

III. Analysis

A. The Doctrine of Paramountcy

63 As I have explained, Alberta legislation grants the Regulator wide-ranging powers to ensure that companies that have been granted licences to operate in the Alberta oil and gas industry will safely and properly abandon oil wells, facilities and pipelines at the end of their productive lives and will reclaim their sites. GTL seeks to avoid being subject to two of those powers: the power to order Redwater to abandon the Renounced Assets and the power to refuse to allow a transfer of the licences for the Retained Assets due to unmet LMR requirements. There is no doubt that these are valid regulatory powers granted to the Regulator by valid Alberta legislation. GTL seeks to avoid their application during bankruptcy by virtue of the doctrine of federal paramountcy, which dictates that the Alberta legislation empowering the Regulator to use the powers in dispute in this appeal will be inoperative to the extent that its use of these powers during bankruptcy conflicts with the *BIA*.

64 The issues in this appeal arise from what has been termed the "untidy intersection" of provincial environmental legislation and federal insolvency legislation (*Nortel Networks Corp., Re*, 2012 ONSC 1213, 88 C.B.R. (5th) 111 (Ont. S.C.J. [Commercial List]), at para. 8). Paramountcy issues frequently arise in the insolvency context. Given the procedural nature of the *BIA*, the bankruptcy regime relies heavily on the continued operation of provincial laws. However, s. 72(1) of the BIA confirms that, where there is a genuine conflict between provincial laws concerning property and civil rights and federal bankruptcy legislation, the *BIA* prevails (see Moloney, at para. 40). In other words, bankruptcy is carved out from property and civil rights but remains conceptually part of it. Valid provincial legislation of general application continues to apply in bankruptcy until Parliament legislates pursuant to its exclusive jurisdiction in relation to bankruptcy and insolvency. At that point, the provincial law becomes inoperative to the extent of the conflict (see *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453 (S.C.C.) , at para. 3).

65 Over time, two distinct forms of conflict have been recognized. The first is *operational conflict*, which arises where compliance with both a valid federal law and a valid provincial law is impossible. Operational conflict arises "where one enactment says 'yes' and the other says 'no', such that 'compliance with one is defiance of the other'" (*Saskatchewan (Attorney*

General) v. Lemare Lake Logging Ltd., 2015 SCC 53, [2015] 3 S.C.R. 419 (S.C.C.), at para. 18, quoting *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161 (S.C.C.) , at p. 191). The second is *frustration of purpose*, which occurs where the operation of a valid provincial law is incompatible with a federal legislative purpose. The effect of a provincial law may frustrate the purpose of the federal law, even though it does "not entail a direct violation of the federal law's provisions" (*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3(S.C.C.) , at para. 73). The party relying on frustration of purpose "must first establish the purpose of the relevant federal statute, and then prove that the provincial legislation is incompatible with this purpose" (*Lemare*, at para. 26, quoting *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 S.C.R. 536 (S.C.C.) , at para. 66).

66 Under both branches of paramountcy, the burden of proof rests on the party alleging the conflict. This burden is not an easy one to satisfy, as the doctrine of paramountcy is to be applied with restraint. Conflict must be defined narrowly so that each level of government may act as freely as possible within its respective sphere of constitutional authority. "[H]armonious interpretations of federal and provincial legislation should be favoured over an interpretation that results in incompatibility ... [i]n the absence of 'very clear' statutory language to the contrary" (*Lemare*, at paras. 21 and 27). "It is presumed that Parliament intends its laws to co-exist with provincial laws" (*Moloney*, at para. 27). As this Court found in *Lemare*, at paras. 22-23, the application of the doctrine of paramountcy should also give due weight to the principle of co-operative federalism. This principle allows for interplay and overlap between federal and provincial legislation. While co-operative federalism does not impose limits on the otherwise valid exercise of legislative power, it does mean that courts should avoid an expansive interpretation of the purpose of federal legislation which will bring it into conflict with provincial legislation.

67 The case law has established that the *BIA* as a whole is intended to further "two purposes: the equitable distribution of the bankrupt's assets among his or her creditors and the bankrupt's financial rehabilitation" (*Moloney*, at para. 32, citing Husky Oil, at para. 7). Here, the bankrupt is a corporation that will never emerge from bankruptcy. Accordingly, only the former purpose is relevant. As I will discuss below, the chambers judge also spoke of the purposes of s. 14.06 as distinct from the broader purposes of the *BIA*. This Court has discussed the purpose of specific provisions of the *BIA* in previous cases — see, for example, Lemare, at para. 45.

68 GTL has proposed two conflicts between the Alberta legislation establishing the disputed powers of the Regulator during bankruptcy and the *BIA*, either of which, it says, would have provided a sufficient basis for the order granted by the chambers judge.

69 The first conflict proposed by GTL results from the inclusion of trustees in the definition of "licensee" in the *OGCA* and the *Pipeline Act*. GTL says that s. 14.06(4) releases it from all environmental liability associated with the Renounced Assets after a valid "disclaimer" is made. But as a "licensee", it can be required by the Regulator to satisfy all of Redwater's statutory obligations and liabilities, which disregards the "disclaimer" of the Renounced Assets. GTL further notes the possibility that it may be held personally liable as a "licensee". In response, the Regulator says that s. 14.06(4) is concerned primarily with protecting trustees from personal liability in relation to environmental orders, and does not affect the ongoing responsibilities of the bankrupt estate. Thus, as long as a trustee is protected from personal liability, no conflict arises from its status as a "licensee" or from the fact that the bankrupt estate remains responsible under provincial law for the ongoing environmental obligations associated with "disclaimed" assets.

70 The second conflict proposed by GTL is that, even if s. 14.06(4) is only concerned with a trustee's personal liability, the Regulator's use of its statutory powers effectively reorders the priorities in bankruptcy established by the *BIA*. Such reordering is said to be caused by the fact that the Regulator requires the expenditure of estate assets to comply with the Abandonment Orders and to discharge or secure the environmental liabilities associated with the Renounced Assets before it will approve a transfer of the licences for the Retained Assets (in keeping with the LMR requirements). These end-of-life obligations are said by GTL to be unsecured claims held by the Regulator, which cannot, under the *BIA*, be satisfied in preference over the claims of Redwater's secured creditors. In response, the Regulator says that, on the proper application of the *Abitibi* test, these environmental regulatory obligations are not provable claims in bankruptcy. Accordingly, says the Regulator, the provincial laws requiring the Redwater estate to satisfy these obligations prior to the distribution of its assets to secured creditors do not conflict with the priority scheme in the *BIA*.

71 I will consider each alleged conflict in turn.

B. Is There a Conflict Between the Alberta Regulatory Scheme and Section 14.06 of the BIA?

72 As a statutory scheme, s. 14.06 of the BIA raises numerous interpretive issues. As noted by Martin J.A., the only matter concerning s. 14.06 on which all the parties to this litigation can agree is that it "is not a model of clarity" (C.A. reasons, at para. 201). Given the confusion caused by attempts to interpret s. 14.06 as a coherent scheme during this litigation, Parliament may very well wish to re-examine s. 14.06 during its next review of the *BIA*.

73 At its core, this appeal raises the issue of whether there is a conflict between specific Alberta legislation and the *BIA*. GTL submits that there is such a conflict. It argues that, because it "disclaimed" the Renounced Assets under s. 14.06(4) of the BIA, it should cease to have any responsibilities, obligations or liability with respect to them. And yet, it notes, as a "licensee" under the *OGCA* and the *Pipeline* Act, it remains responsible for abandoning the Renounced Assets. Furthermore, those assets continue to be included in the calculation of Redwater's LMR. GTL suggests an additional conflict with s. 14.06(2) of the BIA based on its possible exposure, as a "licensee", to personal liability for the costs of abandoning the Renounced Assets.

74 I have concluded that there is no conflict. Various arguments were advanced during this appeal concerning the disparate elements of the s. 14.06 scheme. However, the provision upon which GTL in fact relies in arguing that it is entitled to avoid its responsibilities as a "licensee" under the Alberta legislation is s. 14.06(4). As I have noted, GTL and the Regulator propose very different interpretations of s. 14.06(4). However, s. 14.06(4) is clear and unambiguous when read on its own: where it is invoked by a trustee, the result is that "the trustee is not personally liable" for failure to comply with certain environmental orders or for the costs incurred by any person in carrying out the terms of such orders. The provision says nothing about the liability of the "bankrupt" or the "estate" — distinct concepts referenced many times throughout the BIA. Section 14.06(4), on its own wording, does not support the interpretation urged upon this Court by GTL.

75 In my view, s. 14.06(4) sets out the result of a trustee's "disclaimer" of real property when there is an order to remedy any environmental condition or damage affecting that property. Regardless of whether "disclaimer" is understood as a common law power or as a power deriving from some other statutory source, the result of a trustee's "disclaimer" of real property where an environmental order has been made in relation to that property is that the trustee is protected from personal liability, while the ongoing liability of the bankrupt estate is unaffected. The interpretation of s. 14.06(4) as being concerned with the personal liability of the trustee and not with the liability of the bankrupt estate is supported not only by the plain language of the section, but also by the Hansard evidence, a previous decision of this Court and the French version of the section. Furthermore, not only is the plain meaning of the words "personally liable" clear, but the same concept is also found in both s. 14.06(1.2) and s. 14.06(2), which specifically state that the trustee is not personally liable. In particular, in my view, it is impossible to coherently read s. 14.06(2) as referring to personal liability and yet read s. 14.06(4) as somehow referring to the liability of the bankrupt estate.

76 Given that s. 14.06(4) dictates that "disclaimer" only protects trustees from personal liability, then, even assuming that GTL successfully "disclaimed" in this case, no operational conflict or frustration of purpose results from the fact that the Regulator requires GTL, as a "licensee", to expend estate assets on abandoning the Renounced Assets. Furthermore, no conflict is caused by continuing to include the Renounced Assets in the calculation of Redwater's LMR. Finally, given the restraint with which the doctrine of paramountcy must be applied, and given that the Regulator has not attempted to hold GTL personally liable as a "licensee" for the costs of abandonment, no conflict with s. 14.06(2) or s. 14.06(4) is caused by the mere theoretical possibility of personal liability under the OGCA or the Pipeline Act.

77 In what follows, I will begin by interpreting s. 14.06(4) and explaining why, based on its plain wording and other relevant considerations, the provision is concerned solely with the personal liability of the trustee, and not with the liability of the bankrupt estate. I will then explain how, despite their superficial similarity, s. 14.06(4) and s. 14.06(2) have different rationales, and I will demonstrate that, on a proper understanding of the scheme crafted by Parliament, s. 14.06(4) does not affect the liability of the bankrupt estate. To conclude, I will demonstrate that there is no operational conflict or frustration of

purpose between the Alberta legislation and s. 14.06 of the BIA in this case, with particular reference to the question of GTL's protection from personal liability.

(1) The Correct Interpretation of Section 14.06(4)

(a) Section 14.06(4) Is Concerned With the Personal Liability of Trustees

78 I have concluded that s. 14.06(4) is concerned with the personal liability of trustees, and not with the liability of the bankrupt estate. I emphasize here the well-established principle that, "[w]hen a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes" (*Canadian Western Bank*, at para. 75, quoting *Canada (Attorney General) v. Law Society (British Columbia)*, [1982] 2 S.C.R. 307 (S.C.C.), at p. 356).

79 Section 14.06(4) says nothing about the "bankrupt estate" avoiding the applicability of valid provincial law. In drafting s. 14.06(4), Parliament could easily have referred to the liability of the bankrupt estate. Parliament chose instead to refer simply to the personal liability of a trustee. Notably, s. 14.06(7) and s. 14.06(8) both refer to a "debtor in a bankruptcy". Parliament's choice in this regard cannot be ignored. I agree with Martin J.A. that there is no basis on which to read the words "the trustee is not personally liable" in s. 14.06(4) as encompassing the liability of the bankrupt estate. As noted by Martin J.A., it is apparent from the express language chosen by Parliament that s. 14.06(4) was motivated by and aimed at concerns about the protection of trustees, not the protection of the full value of the estate for creditors. Nothing in the wording of s. 14.06(4) suggests that it was intended to extend to estate liability.

80 The Hansard evidence leads to the same conclusion. Jacques Hains, Director, Corporate Law Policy Directorate, Department of Industry Canada, noted the following during the 1996 debates preceding the enactment of s. 14.06(4) in 1997:

> The aim is to provide a better definition of the liability of insolvency professionals and practitioners in order to encourage them to accept mandates where there may be problems related to the environment. It is hoped that this will reduce the number of abandoned sites both for the benefit of the environment and the safeguard of businesses and jobs.
>
> (Standing Committee on Industry, *Evidence*, No. 16, 2nd Sess., 35th Parl., June 11, 1996, at 15:49-15:55, as cited in C.A. reasons, at para. 197.)

Several months later, Mr. Hains stated:

> What Parliament tried to do in 1992 was to provide a relief to insolvency practitioners ... because they were at risk when they accepted a mandate to liquidate an insolvent business. Under environmental laws, therefore, they could have been subject to personal liability to clean up the environment. I am speaking of personal liability here, meaning "out of their own pockets."
>
> (*Proceedings of the Standing Committee on Banking, Trade and Commerce*, No. 13, 2nd Sess., 35th Parl., November 4, 1996, at p. 15)

Mr. Hains proceeded to explain how the 1997 amendments were intended to improve on the 1992 reforms to the *BIA* that had included the original version of s. 14.06(2) (as discussed further below), but he gave no indication that the focus had somehow shifted away from a trustee's "personal liability".

81 Prior to the enactment of the 1997 amendments, G. Marantz, Legal Advisor to the Department of Industry Canada, noted that they were intended to "provide the trustee with protection from being chased with deep-pocket liability" (Standing Committee on Industry, *Evidence*, No. 21, 2nd Sess., 35th Parl., September 25, 1996, at 17:15, as cited in C.A. reasons, at para. 198). I agree with the Regulator that the legislative debates give no hint of any intention by Parliament to immunize bankrupt estates from environmental liabilities. The notion that s. 14.06(4) was aimed at encouraging trustees in bankruptcy to accept mandates, and not at limiting estate liability, is further supported by the fact that the provision was inserted under the general heading "Appointment and Substitution of Trustees".

82 Furthermore, in drafting s. 14.06(4), Parliament chose to use exactly the same concept it had used earlier in s. 14.06(2): by their express wording, where either provision applies, a trustee is not "personally liable". This cannot have been an oversight given that s. 14.06(4) was added to the *BIA* some five years after the enactment of s. 14.06(2). Since both provisions deal expressly with the protection of trustees from being "personally liable", it is very difficult to accept that they could be concerned with different kinds of liability. By their wording, s. 14.06(2) and s. 14.06(4) are clearly both concerned with the same concept. Indeed, if one interprets s. 14.06(4) as extending to estate liability, then there is no principled reason not to interpret s. 14.06(2) in the same way. However, it is undisputed that this was not Parliament's intention in enacting s. 14.06(2).

83 Similarly, Parliament has also chosen to use the same concept found in both s. 14.06(4) and s. 14.06(2) in a third part of the 14.06 scheme, namely s. 14.06(1.2). This provision states that a trustee carrying on the business of a debtor or continuing the employment of a debtor's employees is not "personally liable" in respect of certain enumerated liabilities, including as a successor employer. Although this provision is not directly raised in this litigation, by its own terms, it clearly does not and cannot refer to the liability of the bankrupt estate. Again, it is difficult to conceive of how Parliament could have specified that a trustee is not "personally liable", using the ordinary, grammatical sense of that phrase, in both s. 14.06(1.2) and s. 14.06(2), but then intended the phrase to be read in a completely different and illogical manner in s. 14.06(4). All three provisions refer to the personal liability of a trustee, and all three must be interpreted consistently. Indeed, I note that the concept of a trustee being "not personally liable" is also used consistently in other parts of the *BIA* unrelated to the s. 14.06 scheme — see, for example, s. 80 and s. 197(3).

84 This interpretation of s. 14.06(4) is also bolstered by the French wording of s. 14.06. The French versions of both s. 14.06(2) and s. 14.06(4) refer to a trustee's protection from personal liability "*ès qualités*". This French expression is defined by *Le Grand Robert de la langue française* (2nd ed. 2001) dictionary as referring to someone acting "à cause d'un titre, d'une fonction particulière", which, in English, would mean acting by virtue of a title or specific role. The *Robert & Collins* dictionary (online) translates "*ès qualités*" as in "one's official capacity". In using this expression in s. 14.06(4), Parliament is therefore stating that, where "disclaimer" properly occurs, a trustee, is not personally liable, in its capacity as trustee, for orders to remedy any environmental condition or damage affecting the "disclaimed" property. These provisions are clearly not concerned with the concept of estate liability. The French versions of s. 14.06(2) and s. 14.06(4) thus utilize identical language to describe the limitation of liability they offer trustees. It is almost impossible to conceive of Parliament using identical language in two such closely related provisions and yet intending different meanings. Accordingly, a trustee is not personally liable in its official capacity as representative of the bankrupt estate where it invokes s. 14.06(4).

85 Prior to this litigation, the case law on s. 14.06 was somewhat scarce. However, this Court has considered the s. 14.06 scheme once before, in *GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.*, 2006 SCC 35, [2006] 2 S.C.R. 123(S.C.C.) . In that case, comments made by both the majority and the dissenting judge support my conclusion that s. 14.06(4) is concerned only with the personal liability of trustees. Abella J., writing for the majority, explained that "where Parliament has intended to confer immunity on trustees or receivers from certain claims, it has done so explicitly" (para. 67). As examples of this principle, she referred to 14.06(1.2) and, most notably for our purposes, to s. 14.06(4), which she described as follows: "trustee immune in certain circumstances from environmental liabilities" (para. 67). In her dissent, Deschamps J. explained that a "trustee is not personally bound by the bankrupt's obligations" (para. 91). She noted that trustees are protected by the provisions that confer immunity upon them, including s. 14.06 (1.2), (2) and (4).

86 Although the dissenting reasons focus on the source of the "disclaimer" power in s. 14.06(4), nothing in this case turns on either the source of the "disclaimer" power or on whether GTL successfully "disclaimed" the Renounced Assets. I would note that, while the dissenting reasons rely on a purported common law power of "disclaimer", the Court has been referred to no cases — and the dissenting reasons have cited none — demonstrating the existence of a common law power allowing trustees to "disclaim" *real property*. In any case, regardless of the source of the "disclaimer" power, nothing in s. 14.06(4) suggests that, where a trustee does "disclaim" real property, the result is that it is simply free to walk away from the environmental orders applicable to it. Quite the contrary — the provision is clear that, where an environmental order has been made, the result of an act of "disclaimer" is the cessation of personal liability. No effect of "disclaimer" on the liability of the bankrupt estate is

specified. Had Parliament intended to empower trustees to walk away entirely from assets subject to environmental liabilities, it could easily have said so.

87 Additionally, as I have mentioned, s. 14.06(4)'s scope is not narrowed to a "disclaimer" in its formal sense. Under s. 14.06(4)(a)(ii), a trustee is not personally liable for an environmental order where the trustee "abandons, disposes of or otherwise releases any interest in any real property". This appeal does not, however, require us to decide what constitutes abandoning, disposing of or otherwise releasing real property for the purpose of s. 14.06(4), and I therefore leave the resolution of this question for another day. Nor does this appeal require us to decide the effects of a successful divestiture under s. 20 of the BIA. Section 20 of the BIA was not raised or relied upon by GTL as providing it with the authority to walk away from all responsibility, obligation or liability regarding the Renounced Assets.

88 The dissenting reasons argue that certain other parts of the s. 14.06 scheme make the most sense if s. 14.06(4) limits estate liability. Other than s. 14.06(2), none of these provisions is in issue in this litigation, and none of them was relied on by GTL. Regardless, in view of the clear and unambiguous wording of s. 14.06(4), less weight should be given to its statutory context. This is particularly so given that the proposed alternative interpretation would require the Court to read words such as "personally" out of the subsection. As has been noted, when the words of a provision are precise and unequivocal, their ordinary meaning plays a dominant role in the interpretive process (*Canada Trustco Mortgage Co. v. R.*, 2005 SCC 54, [2005] 2 S.C.R. 601 (S.C.C.) , at para. 10). Ultimately, the consequences of a trustee's "disclaimer" are clear — protection from personal liability, not from estate liability. There is no ambiguity on the face of s. 14.06(4). This Court has no option other than to accede to the clear intention of Parliament.

89 I turn now to the relationship between s. 14.06(2) and (4).

(b) How Section 14.06(4) Is Distinguishable From Section 14.06(2)

90 In this case, GTL relied solely on s. 14.06(4) in purporting to "disclaim" the Renounced Assets. However, as I will explain, GTL is fully protected from personal liability for the environmental liabilities associated with those assets whether it is understood as having "disclaimed" the Renounced Assets or not. However, it cannot simply "walk away" from the Renounced Assets in either case.

91 Regardless of whether GTL can access s. 14.06(4) (in other words, regardless of whether it has "disclaimed"), it is already fully protected from personal liability in respect of environmental matters by s. 14.06(2). Section 14.06(2) protects trustees from personal liability for "any environmental condition that arose or environmental damage that occurred", unless it is established that the condition arose or the damage occurred after the trustee's appointment and as a result of their gross negligence or wilful misconduct. In this case, it is not disputed that the environmental condition or damage leading to the Abandonment Orders arose or occurred prior to GTL's appointment. Section 14.06(2) provides trustees with protection from personal liability as broad as that provided by s. 14.06(4). Although, on the face of the provisions, there are two ways in which s. 14.06(4) may appear to offer broader protection, neither of them withstands closer examination.

92 First, the Regulator submits that the protection offered by s. 14.06(4) should be distinguished from that offered by s. 14.06(2) on the basis that the former is concerned with orders while the latter is concerned with environmental obligations generally. I agree with the dissenting reasons that a persuasive distinction cannot be drawn between liability for an environmental condition or environmental damage (purportedly covered by s. 14.06(2)) and liability for failure to comply with an order to remedy such a condition or such damage (purportedly covered by s. 14.06(4)). As the dissenting reasons note, "[t]his distinction is entirely artificial" (para. 212). The underlying liability addressed through environmental orders is the liability provided for in s. 14.06(2): an "environmental condition that arose or environmental damage that occurred". Second, on the face of s. 14.06(4), no exceptions are carved out for gross negligence or wilful misconduct post-appointment, unlike in s. 14.06(2). However, s. 14.06(4) is expressly made "subject to subsection (2)". I agree with the dissenting reasons that the only possible interpretation of this proviso is that, where the trustee has caused an environmental condition or environmental damage through its wilful misconduct or gross negligence, the trustee will still be personally liable, regardless of its reliance on s. 14.06(4).

93 It follows that s. 14.06(4) does not provide trustees with protection from personal liability any broader than the protection provided by s. 14.06(2). Despite this, in my view, Parliament had good reasons for enacting s. 14.06(4) in 1997. The first was to make it clear to trustees that they had complete protection from personal liability in respect of environmental conditions and damage (absent wilful misconduct or gross negligence), especially in situations where they have "disclaimed". The Hansard evidence shows that one of the impetuses for the 1997 reforms was the desire of trustees for further certainty. The second was to clarify the effect of a trustee's "disclaimer", on the liability of the *bankrupt estate* for orders to remedy an environmental condition or damage. In other words, s. 14.06(4) makes it clear not just that a trustee who "disclaims" real property is exempt from personal liability under environmental orders applicable to that property, but also that the liability of the bankrupt estate is unaffected by such "disclaimer".

94 In 1992, Parliament turned its attention to the potential liability of trustees in the environmental context and enacted s. 14.06(2). The provision originally stated that trustees were protected from personal liability for any environmental condition that arose or any environmental damage that occurred "(a) before [their] appointment ... or (b) after their appointment except where the condition arose or the damage occurred as a result of their failure to exercise due diligence". The Hansard evidence demonstrates that trustees were unhappy with the original language of s. 14.06(2). As Mr. Hains explained, they complained that the due diligence standard was "too vague. No one knows what it does and it may vary from one case to another. With the vagueness of the standard and what may be required to satisfy it, and with the risk of personal liability, the trustees were not even interested in investigating how they might exercise due diligence" (*Proceedings of the Standing Senate Committee on Banking, Trade and Commerce*, No. 13, 2nd Sess., 35th Parl., November 4, 1996, at pp. 15-16).

95 As a result, Parliament made reforms to the *BIA* in 1997. These reforms not only changed the standard of protection offered to trustees by s. 14.06(2) by adopting the current language, but also introduced s. 14.06(4). As is evident from their shared language, the provisions were intended to work together to clarify a trustee's protection from personal liability for any environmental condition or damage. Section 14.06(4) provided the certainty that trustees had been seeking in the years prior to 1997. For the first time, it explicitly linked the concept of "disclaimer" to the scheme protecting trustees from environmental liability. Whether it is understood as a common law power or as a reference to other statutory provisions, the concept of "disclaimer" predates s. 14.06(4) itself, as well as the 1992 version of s. 14.06(2). "Disclaimer" is also applicable in other contexts, such as in relation to executory contracts, as discussed in *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.*, 2005 BCCA 154, 251 D.L.R. (4th) 328 (B.C. C.A.).

96 Prior to 1997, the effects of a "disclaimer" of real property on environmental liability was unclear. In particular, it was unclear what effect "disclaimer" might have on the liability of the bankrupt estate, given that environmental legislation imposed liability based on the achievement of the status of owner, party in control or licensee (see J. Klimek, *Insolvency and Environment Liability* (1994), at p. 4-19). By enacting s. 14.06(4), Parliament clarified that the effect of the "disclaimer" of real property was to limit the personal liability of the trustee for orders to remedy any environmental condition or damage, but not to limit the liability of the bankrupt estate. Parliament could have merely updated the language of s. 14.06(2) in 1997, but this would have left the question of "disclaimer" and estate liability unaddressed. Knowledge of the impact of "disclaimer" could be important to a trustee who is deciding whether to accept a mandate. Section 14.06(4) thus went a considerable way towards resolving the vagueness of which trustees had complained prior to 1997.

97 A notable aspect of the scheme crafted by Parliament is that s. 14.06(4) applies "[n]otwithstanding anything in any federal or provincial law". In enacting s. 14.06(4), Parliament specified the effect of the "disclaimer" of real property solely in the context of *environmental orders*. The effect of "disclaimer" on liability in other contexts was not addressed. Parliament was concerned with orders to remedy any environmental condition or damage, where, liability frequently attaches based on the status of owner, party in control, or licensee. Parliament did not want trustees to think that they could avoid the estate's environmental liability through the act of "disclaiming". Accordingly, it used specific language indicating that the effect of the "disclaimer" of real property on orders to remedy an environmental condition or damage is merely that the trustee is not personally liable. It is possible that the effect of "disclaimer" on the liability of the bankrupt estate might be different in other contexts.

98 Section 14.06(4) thus makes it clear that "disclaimer" by the trustee has no effect on the bankrupt estate's continuing liability for orders to remedy any environmental condition or damage. The liability of the bankrupt estate is, of course, an issue with which s. 14.06(2) is absolutely unconcerned. Thus, it can be seen that s. 14.06(4) and s. 14.06(2) are not in fact the same — they may provide trustees with the same protection from personal liability, but only the former has any relevance to the question of estate liability. Section 14.06(2) protects trustees without having to be invoked by them — it does not speak to the results of a trustee's "disclaimer".

99 Where a trustee has "disclaimed" real property, it is not personally liable under an environmental order applicable to that property, but the bankrupt estate itself remains liable. Of course, the fact that the bankrupt estate remains liable even where a trustee invokes s. 14.06(4) does not necessarily mean that the trustee must comply with environmental obligations in priority to all other claims. The priority of an environmental claim depends on the proper application of the *Abitibi* test, as I will discuss below.

100 Accordingly, regardless of whether GTL is properly understood as having "disclaimed", the result is the same. Given that the environmental condition or damage arose or occurred prior to GTL's appointment, it is fully protected from personal liability by s. 14.06(2). However, "disclaimer" does not empower a trustee to simply walk away from the "disclaimed" assets when the bankrupt estate has been ordered to remedy any environmental condition or damage. The environmental liability of the bankrupt estate remains unaffected.

101 I offer the following brief comment on the balance of the s. 14.06 scheme, although, as mentioned, none of those provision is actually in issue before this Court. The dissenting reasons argue that interpreting s. 14.06(4) as being concerned solely with the personal liability of trustees creates interpretive issues with the balance of the s. 14.06 scheme. In my view, this is not a reason to ignore the plain meaning of s. 14.06(4). No principle of statutory interpretation requires that the plain meaning of a provision be contorted to make its scheme more coherent. This Court has been tasked with interpreting s. 14.06(4), and, in my view, the wording of s. 14.06(4) admits of only one interpretation.

(2) There Is No Operational Conflict or Frustration of Purpose Between Section 14.06(2) and Section 14.06(4) of the BIA and the Alberta Regulatory Scheme

102 The operational conflicts between the *BIA* and the Alberta legislation alleged by GTL arise from its status as a "licensee" under the *OGCA* and the *Pipeline Act*. As I have just demonstrated, s. 14.06(4) does not empower a trustee to walk away from all responsibilities, obligations and liabilities with respect to "disclaimed" assets. Rather, it clarifies a trustee's protection from environmental personal liability and makes it clear that a trustee's "disclaimer" does not affect the environmental liability of the bankrupt estate. Regardless of whether GTL effectively "disclaimed" the Renounced Assets, it cannot walk away from them. In light of the proper interpretation of s. 14.06(4), no operational conflict is caused by the fact that, under Alberta law, GTL, as a "licensee", remains responsible for abandoning the Renounced Assets utilizing the remaining assets of the Redwater estate. Likewise, no operational conflict is caused by the fact that the end-of-life liabilities associated with the Renounced Assets continue to be included in the calculation of Redwater's LMR.

103 Thus, regardless of whether it has effectively "disclaimed", s. 14.06(2) fully protects GTL from personal liability in respect of environmental matters affecting the Redwater estate. GTL notes that, on the face of the *OGCA* and the *Pipeline* Act, there is nothing specifically preventing the Regulator from holding it personally liable as a "licensee" for the costs of carrying out the Abandonment Orders. GTL submits that the mere possibility that it may be held personally liable for abandonment under the Alberta legislation creates an operational conflict with the protection from personal liability provided by s. 14.06(2) of the BIA.

104 There is no possibility of trustees facing personal liability for reclamation or remediation — they are specifically protected from such liability by the *EPEA*, absent wilful misconduct or gross negligence. GTL is correct that its potential personal liability for abandonment as a "licensee" is not similarly capped at estate assets under the *OGCA* and the *Pipeline* Act. The Regulator submits that "[w]hile the definition of a licensee does not explicitly provide that the receiver's liability is limited to assets in the insolvency estate, such federal requirements are obviously read in to the provision and [are] explicitly included in other

legislation administered by the [Regulator], namely the [*EPEA*]" (A.F., at para. 104 (footnote omitted)). For its part, GTL says that it is no answer that the Regulator's practice is to impose liability only up to the value of the estate because, as ATB argues, without a specific statutory provision, "[p]ractices can change without notice" (ATB's factum, at para. 106).

105 I reject the proposition that the inclusion of trustees in the definition of "licensee" in the *OGCA* and the *Pipeline* Act should be rendered inoperative by the mere theoretical possibility of a conflict with s. 14.06(2). Such an outcome would be inconsistent with the principle of restraint which underlies paramountcy, as well as with the principles of cooperative federalism. The inclusion of trustees in the definition of "licensee" is an important part of the Alberta regulatory regime. It confers on them the privilege of operating the licensed assets of bankrupts while also ensuring that insolvency professionals are regulated during the lengthy periods of time when they manage oil and gas assets.

106 Importantly, the situation in this case is completely different from the one before the Court in *Moloney* . In that case, Gascon J. rejected the argument that there was no operational conflict because the bankrupt could voluntarily pay a provincial debt post discharge or could choose not to drive. He noted that "the test for operational conflict cannot be limited to asking whether the respondent can comply with both laws by renouncing the protection afforded to him or her under the federal law or the privilege he or she is otherwise entitled to under the provincial law" (para. 60). In the instant case, GTL retains both the protection afforded to it under the federal law (no personal liability) and the privilege to which it is entitled under the provincial law (ability to operate the bankrupt's assets in a regulated industry). GTL is not being asked to forego doing anything or to voluntarily pay anything. Nor is it urged that the Regulator could avoid conflict by declining to apply the impugned law during bankruptcy, as in Moloney , at para. 69. This is not a situation in which the Regulator might decline to apply the provincial law, but a situation in which the provincial law can be — and has been — applied during bankruptcy without conflict.

107 According to the evidence in this case, the *OGCA* and the *Pipeline* Act have included trustees in the definition of "licensee" for 20 years now, and, in that time, the Regulator has never attempted to hold a trustee personally liable. The Regulator does not look beyond the assets remaining in the bankrupt estate in seeking compliance with the bankrupt's environmental obligations. If the Regulator were to attempt to hold GTL personally liable under the Abandonment Orders, this would create an operational conflict between the *OGCA* and the *Pipeline* Act, and s. 14.06(2) of the *BIA*, rendering the former two Acts inoperative to the extent of the conflict. As it stands, however, GTL can both be protected from personal liability by s. 14.06(2) and comply with the Alberta regime in administering the Redwater estate as a "licensee".

108 The suggestion, in the dissenting reasons, that the Regulator is seeking to hold GTL personally liable is untrue. No one disputes that significant value remains in the Redwater estate. Although the Regulator's entitlement is, of course, dependent on the priorities established by the *BIA*, the history of this regulatory system demonstrates that there are ways for the Regulator to access that value without holding GTL personally liable. It is not this Court's role to mandate a particular mechanism for the Regulator to achieve that end. Even if this was not the case, the fact that Redwater's assets have already been sold and are currently being held in trust means that personal liability is no longer a concern. There is no operational conflict.

109 I turn now to frustration of purpose. The chambers judge identified a number of purposes of s. 14.06 in his reasons. GTL relies on three of them, namely: "limit[ing] the liability of insolvency professionals, so that they will accept mandates despite environmental issues"; "reduc[ing] the number of abandoned sites in the country"; and "permit[ing] receivers and trustees to make rational economic assessments of the costs of remedying environmental conditions, and giv[ing] receivers and trustees the discretion to determine whether to comply with orders to remediate property affected by these conditions" (chambers judge's reasons, at paras. 128-29).

110 The burden is on GTL to establish the specific purposes of s. 14.06(2) and s. 14.06(4) if it wishes to demonstrate a conflict. This has been described as a "high" burden, requiring "[c]lear proof of purpose" (*Lemare*, at para. 26). In my view, based on the plain wording of s. 14.06(2) and s. 14.06(4) (a "trustee is not personally liable") and the Hansard evidence, it is evident that the purpose of these provisions is to protect trustees from personal liability in respect of environmental matters affecting the estates they are administering.

111 This purpose is not frustrated by the inclusion of trustees in the definition of "licensee" in the *OGCA* and the *Pipeline Act*. The Regulator's position is that it would never attempt to hold a trustee personally liable. Trustees have been considered licensees under these Acts for over 20 years, and they have yet to face the scourge of personal liability. To find an essential part of Alberta's regulatory regime inoperative based on the theoretical possibility of frustration of purpose would be inconsistent with the principles of paramountcy and cooperative federalism. To date, Alberta's regulatory regime has functioned as intended without frustrating the purpose of s. 14.06(2) or s. 14.06(4) of the BIA.

112 In arguing that s. 14.06 has the broader goals of reducing the number of abandoned sites (in the non-technical sense of "abandoned") and encouraging trustees to accept mandates, GTL relies on what it calls "the available extrinsic evidence and the actual words and structure of that section" (GTL's factum, at para. 91). In my view, the arguments it advances are insufficient for GTL to meet its high burden and demonstrate that the purpose of s. 14.06(2) and s. 14.06(4) should be defined as including these broader objectives. Reducing the number of unaddressed sites and encouraging trustees to accept mandates may be positive side effects of s. 14.06(2) and s. 14.06(4), but it is a stretch to see them as the purpose of the provisions. Like the provision at issue in *Lemare*, it is more plausible that they serve a "simple and narrow purpose" (para. 45).

113 Regardless, even if it is assumed that such broader goals are part of the purpose of s. 14.06(2) and s. 14.06(4), the evidence does not show that they are frustrated by the inclusion of trustees in the statutory definition of "licensee". Relying on statements made by GTL in the Second Report, ATB asserts that, if trustees continue to be considered licensees and if environmental claims continue to be binding on estates, then, in situations akin to that of the Redwater insolvency, trustees will refuse to accept appointments. The fact that, prior to this litigation, it had been settled in Alberta since at least *Northern Badger* that certain ongoing environmental obligations in the oil and gas industry continue to be binding on bankrupt estates must be weighed against this bald allegation. It was also well established that the Regulator would never attempt to hold insolvency professionals personally liable for such obligations. As noted by the Canadian Association of Petroleum Producers, there is nothing to suggest that this well-established state of affairs has led insolvency professionals to refuse to accept appointments or has increased the number of orphaned sites. There is no reason why the Regulator and trustees cannot continue to work together collaboratively, as they have for many years, to ensure that end-of-life obligations are satisfied, while at same time maximizing recovery for creditors.

(3) Conclusion on Section 14.06 of the BIA

114 There is no conflict between the Alberta legislation and s. 14.06 of the BIA that makes the definition of "licensee" in the former inapplicable insofar as it includes GTL. GTL continues to have the responsibilities and duties of a "licensee" to the extent that assets remain in the Redwater estate. Nonetheless, GTL submits that, even if it cannot walk away from the Renounced Assets by invoking s. 14.06(4), the environmental obligations associated with those assets are unsecured claims of the Regulator for the purposes of the *BIA*. GTL says that the order of priorities in the *BIA* requires it to satisfy the claims of Redwater's secured creditors before the Regulator's claims, which rank equally with the claims of other unsecured creditors. According to GTL, the Regulator's attempts to use its statutory powers to prioritize its environmental claims conflict with the *BIA*. I will now consider this alleged conflict, which turns on the *Abitibi* test.

C. The Abitibi Test: Is the Regulator Asserting Claims Provable in Bankruptcy?

115 The equitable distribution of the bankrupt's assets is one of the purposes of the *BIA*. It is achieved through the collective proceeding model. Creditors of the bankrupt wishing to enforce a claim provable in bankruptcy must participate in the collective proceeding. Their claims will ultimately have the priority assigned to them by the *BIA*. This ensures that the bankrupt's assets are distributed fairly. This model avoids inefficiency and chaos, thus maximizing global recovery for all creditors. For the collective proceeding model to be viable, creditors with provable claims must not be allowed to enforce them outside the collective proceeding.

116 It is well established that a provincial law will be rendered inoperative in the context of bankruptcy where the effect of the law is to conflict with, reorder or alter the priorities established by the *BIA*. Both Martin J.A. and the chambers judge

dealt with the altering of bankruptcy priorities under the frustration of purpose branch of paramountcy. In my view, it could also be plausibly advanced that a provincial law that has the effect of reordering bankruptcy priorities is in operational conflict with the *BIA* — such was the conclusion in Husky Oil , at para. 87. For the purposes of this appeal, there is no need to decide which would be the appropriate branch of the paramountcy analysis. Under either branch, the Alberta legislation authorizing the Regulator's use of its disputed powers will be inoperative to the extent that the use of these powers during bankruptcy alters or reorders the priorities established by the *BIA*.

117 GTL says that this is precisely the effect of the obligations imposed on the Redwater estate by the Regulator through the use of its statutory powers, even if it cannot walk away from the Renounced Assets by invoking s. 14.06(4). Parliament has assigned a particular rank to environmental claims that are provable in bankruptcy. It is accepted that the limited super priority for environmental claims created by s. 14.06(7) of the BIA does not apply here, and accordingly, says GTL, the Regulator is an ordinary creditor as regards its environmental claims — in other words, neither a secured nor a preferred creditor. The Regulator's environmental claims are thus to be paid rateably with those of Redwater's other ordinary creditors under s. 141 of the BIA. GTL argues that, to comply with the Abandonment Orders or LMR requirements, the Redwater estate will have to expend funds prior to distributing its assets to the secured creditors, and that this amounts to the Regulator using its statutory powers to create for itself a priority in bankruptcy to which it is not entitled.

118 However, only claims provable in bankruptcy must be asserted within the single proceeding. Other claims are not stayed upon bankruptcy and continue to be binding on the estate. In *Abitibi*, this Court clearly stated that not all environmental obligations enforced by a regulator will be claims provable in bankruptcy. As a matter of principle, bankruptcy does not amount to a licence to disregard rules. The Regulator says that it is not asserting any claims provable in the bankruptcy, so the Redwater estate must comply with its environmental obligations, to the extent that assets are available to do so.

119 The resolution of this issue turns on the proper application of the *Abitibi* test for determining whether a particular regulatory obligation amounts to a claim provable in bankruptcy. To reiterate:

> First, there must be a debt, a liability or an obligation to a *creditor*. Second, the debt, liability or obligation must be incurred *before the debtor becomes bankrupt*. Third, it must be possible to attach a *monetary value* to the debt, liability or obligation. [Emphasis in original; para. 26.]

120 There is no dispute that in this appeal, the second part of the test is met. Accordingly, I will discuss only the first and the third parts of the test.

121 In this Court, the Regulator, supported by various interveners, raised two concerns about how the *Abitibi* test has been applied, both by the courts below and in general. The first concern is that the "creditor" step of the *Abitibi* test has been interpreted too broadly in cases such as the instant appeal and *Nortel Networks Corp., Re*, 2013 ONCA 599, 368 D.L.R. (4th) 122 (Ont. C.A.) ("*Nortel* CA"), and that, in effect, this step of the test has become so pro forma as to be practically meaningless. The second concern has to do with the application of the "monetary value" step of the *Abitibi* test by the chambers judge and Slatter J.A. This step is generally called the "sufficient certainty" step, based on the guidance provided in *Abitibi*. The argument here is that the courts below went beyond the test established in *Abitibi* by focusing on whether Redwater's regulatory obligations were "intrinsically financial". Under *Abitibi*, the sufficient certainty analysis should have focused on whether the Regulator would ultimately perform the environmental work and assert a monetary claim for reimbursement.

122 In my view, both concerns raised by the Regulator have merit. As I will demonstrate, *Abitibi* should not be taken as standing for the proposition that a regulator is always a creditor when it exercises its statutory enforcement powers against a debtor. On a proper understanding of the "creditor" step, it is clear that the Regulator acted in the public interest and for the public good in issuing the Abandonment Orders and enforcing the LMR requirements and that it is, therefore, not a creditor of Redwater. It is the public, not the Regulator or the General Revenue Fund, that is the beneficiary of those environmental obligations; the province does not stand to gain financially from them. Although this conclusion is sufficient to resolve this aspect of the appeal, for the sake of completeness, I will also demonstrate that the chambers judge erred in finding that, on these facts, there is sufficient certainty that the Regulator will ultimately perform the environmental work and assert a claim

for reimbursement. To conclude, I will briefly comment on why the *effects* of the end-of-life obligations do not conflict with the priority scheme in the *BIA*.

(1) The Regulator Is Not a Creditor of Redwater

123 The Regulator and the supporting interveners are not the first to raise issues with the "creditor" step of the *Abitibi* test. In the six years since *Abitibi* was decided, concerns about the "creditor" step and the fact that, as it is commonly understood, it will seemingly be satisfied in all — or nearly all — cases have also been expressed by academic commentators, such as A. J. Lund, "Lousy Dentists, Bad Drivers, and Abandoned Oil Wells: A New Approach to Reconciling Provincial Regulatory Regimes with Federal Insolvency Law" (2017) 80 Sask. L. Rev. 157, at p. 178, and Stewart. This Court has not had an opportunity to comment on *Abitibi* since it was decided. However, the interpretation of the "creditor" step adopted by lower courts, including the majority of the Court of Appeal in this case, has focused on certain comments found at para. 27 of *Abitibi*, and the "creditor" step has accordingly been found to be satisfied whenever a regulator exercises its enforcement powers against a debtor (see, for example, C.A. reasons, at para. 60; *Nortel* CA, at para. 16).

124 GTL submits that these lower courts have correctly interpreted and applied the "creditor" step. It further submits that, because of *Abitibi*, the 1991 Alberta Court of Appeal decision in *Northern Badger* is of no assistance in analyzing the creditor issue. Conversely, the Regulator forcefully argues that *Abitibi* must be understood in the context of its own unique facts and that it did not overrule *Northern Badger*. Relying on *Northern Badger*, the Regulator argues that a regulator exercising a power to enforce a public duty is not a creditor of the individual or corporation subject to that duty. Like Martin J.A., I agree with the Regulator on this point. If, as GTL urges and the majority of the Court of Appeal concluded, the "creditor" step is satisfied whenever a regulator exercises its enforcement powers against a debtor, then it is hard to imagine a situation in which the "creditor" step would not be satisfied by the actions of an environmental regulator. Stewart was correct to suppose that "[s]urely, the Court did not intend this result" (p. 189). For the "creditor" step to have meaning, "there must be situations where the other two steps could be met... but the order [or obligation] is still not a provable claim because the regulator is not a creditor of the bankrupt" (Attorney General of Ontario's factum, at para. 39).

125 Before further explaining my conclusion on this point, I must address a preliminary issue: the fact that the Regulator conceded in the courts below that it was a creditor. It is well established that concessions of law are not binding on this Court: see *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control & Licensing Branch)*, 2001 SCC 52, [2001] 2 S.C.R. 781(S.C.C.) , at para. 44; *M. v. H.*, [1999] 2 S.C.R. 3 (S.C.C.) , at para. 45; *R. v. Sappier*, 2006 SCC 54, [2006] 2 S.C.R. 686 (S.C.C.) , at para. 62. As noted by L'Heureux-Dubé J., in dissent, but not on this point, in *R. v. Elshaw*, [1991] 3 S.C.R. 24 (S.C.C.) , at p. 48, "the fact that an issue is conceded below means nothing in and of itself". Although concessions by the parties are often relied upon, it is ultimately for this Court to determine points of law. For several reasons, no fairness concerns are raised by disregarding the Regulator's concession in this case.

126 First, in a letter to GTL dated May 14, 2015, the Regulator advanced the position that it was "not a creditor of [Redwater]", but, rather, had a "statutory mandate to regulate the oil and gas industry in Alberta" (GTL's Record, vol. 1, at p. 78). I note that this was the initial communication between the Regulator and GTL, only two days after the latter's appointment as receiver of Redwater's property. Second, the issue of whether the Regulator is a creditor was discussed in the parties' factums. Third, during oral arguments before this Court, the Regulator was questioned about its concession. Counsel made the undisputed point that higher courts are not bound by such concessions and took the position that, on the correct interpretation of *Abitibi*, the Regulator was not a creditor. Fourth, when the Regulator's status as a creditor was raised as an issue before this Court, opposing counsel did not argue that they would have adduced further evidence on the issue had it been raised in the courts below. Finally, a proper understanding of the "creditor" step of the *Abitibi* test is of fundamental importance to the proper functioning of the national bankruptcy scheme and of provincial environmental schemes throughout Canada. I conclude that this case is one in which it is appropriate to disregard the Regulator's concession in the courts below.

127 Returning to the analysis, I note that the unique factual matrix of*Abitibi* must be kept in mind. In that case, Newfoundland and Labrador expropriated most of AbitibiBowater's property in the province without compensation. Subsequently, AbitibiBowater was granted a stay under the *CCAA*. It then filed a notice of intent to submit a claim to arbitration

under the *North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, Can. T.S. 1994 No. 2 ("NAFTA"), for losses resulting from the expropriation. In response, Newfoundland's Minister of Environment and Conservation ordered AbitibiBowater to remediate five sites pursuant to the Environmental Protection Act, S.N.L. 2002, c. E-14.2 ("EPA"). Three of the five sites had been expropriated by Newfoundland and Labrador. The evidence led to the conclusion that "the Province never truly intended that Abitibi was to perform the remediation work", but instead sought a claim that could be used as an offset in connection with AbitibiBowater's NAFTA claim (*Abitibi*, at para. 54). In other words, the Province sought a financial benefit from the remediation orders.

128 In this appeal, it is not disputed that, in seeking to enforce Redwater's end-of-life obligations, the Regulator is acting in a *bona fide* regulatory capacity and does not stand to benefit financially. The Regulator's ultimate goal is to have the environmental work actually performed, for the benefit of third-party landowners and the public at large. There is no colourable attempt by the Regulator to recover a debt, nor is there an ulterior motive on its part, as there was in*Abitibi*. The distinction between the facts of this appeal and those of*Abitibi* becomes even clearer when one examines the comprehensive reasons of the chambers judge in *Abitibi*. The crux of the findings of Gascon J. (as he then was) is found at paras. 173-76:

> ... the Province stands as the direct beneficiary, from a monetary standpoint, of Abitibi's compliance with the EPA Orders. In other words, the execution in nature of the EPA Orders would result in a definite credit to the Province's own "balance sheet". Abitibi's liability in that regard is an asset for the Province itself.
>
> With all due respect, this is not regulatory in nature; it is rather purely financial in reality. This is, in fact, closer to a debtor-creditor relationship than anything else.
>
> This is quite far from the situation of the detached regulator or public enforcer issuing order for the public good. Here, the Province itself derives the direct pecuniary benefit from the required compliance of Abitibi to the EPA Orders. The Province stands to directly gain in the outcome. None of the cases submitted by the Province bear any similarity to the fact pattern in the present proceedings.
>
> From this perspective, it is the hat of a creditor that best fits the Province, not that of a disinterested regulator.
>
> (*AbitibiBowater inc., Re*, 2010 QCCS 1261, 68 C.B.R. (5th) 1(C.S. Que.))

129 This Court recognized in *Abitibi* that the Province "easily satisfied" the creditor requirement (para 49). It was therefore not necessary to consider at any length how the "creditor" step should be understood or how it would apply in other factual situations. However, even at para. 27 of *Abitibi*, the paragraph relied on by the majority of the Court of Appeal, Deschamps J. made a point of noting that "[m]ost environmental regulatory bodies *can be* creditors in respect of monetary or non-monetary obligations imposed by the relevant statutes" (emphasis added). The interpretation of the "creditor" step adopted by the majority of the Court of Appeal and urged upon this Court by GTL leaves no room for a regulator that enforces obligations not to be a creditor, though this possibility was clearly contemplated by para. 27 of*Abitibi*. As noted above, GTL's interpretation leaves the "creditor" step with no independent work to perform.

130 *Northern Badger* established that a regulator enforcing a public duty by way of non-monetary order is not a creditor. I reject the claim in the dissenting reasons that*Northern Badger* should be interpreted differently. First, I note that whether the Regulator has a contingent claim is relevant to the sufficient certainty test, which presupposes that the Regulator is a creditor. I cannot accept the proposition in the dissenting reasons that *Northern Badger* was concerned with what would become the third prong of the *Abitibi* test. In *Northern Badger*, Laycraft C.J.A. accepted that abandonment was a liability and identified the issue as "whether that liability is to the board so that it is the board which is the creditor" (para. 32). Second, the underlying scenario here with regards to Redwater's end-of-life obligations is exactly the same as in *Northern Badger* — a regulator is ordering an entity to comply with its legal obligations in furtherance of the public good. This reasoning from *Northern Badger* was subsequently adopted in cases such as *Strathcona (County) v. Fantasy Construction Ltd. Estate (Trustee of)*, 2005 ABQB 794, 261 D.L.R. (4th) 221 (Alta. Q.B.), at paras. 23-25, and *Lamford Forest Products Ltd., Re* (1991), 86 D.L.R. (4th) 534 (B.C. S.C.).

131 I cannot agree with the suggestion by the majority of the Court of Appeal in this case that *Northern Badger* "is of limited assistance" in the application of the *Abitibi* test (para. 63). Rather, I agree with Martin J.A. that *Abitibi* did not overturn the reasoning in *Northern Badger*, but instead "emphasized the need to consider the substance of provincial regulation in assessing whether it creates a claim provable in bankruptcy" (para. 164). As Martin J.A. noted, even following *Abitibi*, the law continues to be that "public obligations are not provable claims that can be counted or compromised in the bankruptcy" (para. 174).*Abitibi* clarified the scope of *Northern Badger* by confirming that a regulator's environmental claims will be provable claims under certain circumstances. It does not stand for the proposition that a regulator exercising its enforcement powers is always a creditor. The reasoning in *Northern Badger* was simply not applicable on the facts of *Abitibi*, given the actions of the Province as outlined above.

132 In *Abitibi*, Deschamps J. noted that insolvency legislation had evolved in the years since *Northern Badger*. That legislative evolution did not, however, change the meaning to be ascribed to the term "creditor". In this regard, I agree with the conclusion in Strathcona (County) v. Fantasy Construction Ltd. Estate (Trustee of)2005 ABQB 559256 D.L.R. (4th) 536Alta. Q.B., that the amendments to the *BIA* dealing with environmental matters in the years following *Northern Badger* cannot be interpreted as having overturned the reasoning in that case. As should be clear from the earlier discussion of s. 14.06, the amendments to the *BIA* do not speak to when a regulator enforcing an environmental claim is a creditor.

133 The conclusion that the reasoning in *Northern Badger* continues to be relevant since *Abitibi* and the amendments to insolvency legislation also finds support in the writings of academic commentators. Stewart's position is that, while*Abitibi* discussed*Northern Badger*, it did not overturn it. He urges this Court to clarify that there remains "a distinction between a regulatory body that is a creditor because it is enforcing a debt, and a regulatory body that is not a creditor because it is enforcing the law" (p. 221). Similarly, Lund argues that a court should "consider the importance of the public interests protected by the regulatory obligation when deciding whether the debtor owes a debt, liability or obligation to a creditor" (p. 178).

134 For the foregoing reasons, *Abitibi* cannot be understood as having changed the law as summarized by Laycraft C.J.A. I adopt his comments at para. 33 of *Northern Badger*:

> The statutory provisions requiring the abandonment of oil and gas wells are part of the general law of Alberta, binding every citizen of the province. All who become licensees of oil and gas wells are bound by them. Similar statutory obligations bind citizens in many other areas of modern life ... But the obligation of the citizen is not to the peace officer, or public authority which enforces the law. The duty is owed as a public duty by all the citizens of the community to their fellow citizens. When the citizen subject to the order complies, the result is not the recovery of money by the peace officer or public authority, or of a judgment for money, nor is that the object of the whole process. Rather, it is simply the enforcement of the general law. The enforcing authority does not become a "creditor" of the citizen on whom the duty is imposed.

135 Based on the analysis in *Northern Badger*, it is clear that the Regulator is not a creditor of the Redwater estate. The end-of-life obligations the Regulator seeks to enforce against Redwater are public duties. Neither the Regulator nor the Government of Alberta stands to benefit financially from the enforcement of these obligations. These public duties are owed, not to a creditor, but, rather, to fellow citizens, and are therefore outside the scope of "provable claims". I do not intend to suggest, however, that a regulator will be a creditor only where it acts exactly as the province did in*Abitibi*. There may very well be situations in which a regulator's actions fall somewhere between those in *Abitibi* and those in the instant case. Notably, unlike some previous cases, the Regulator has performed no environmental work itself. I leave such situations to be addressed in future cases in which there are full factual records. Here, it is clear that the Regulator is seeking to enforce Redwater's public duties, whether by issuing the Abandonment Orders or by maintaining the LMR requirements. The Regulator is not a creditor within the meaning of the *Abitibi* test.

136 I reject the suggestion that the foregoing analysis somehow overrules the first prong of the *Abitibi* test. The facts in *Abitibi* were not comparable to the facts of this appeal. Although this Court discussed*Northern Badger* in *Abitibi*, it merely referenced the subsequent amendments to the *BIA*, and did not overturn the earlier decision. The Court was clear that the ultimate outcome "must be grounded in the facts of each case" (para. 48). The dissenting reasons claim that, given the foregoing analysis, it will

be nearly impossible to find that regulators are ever creditors. *Abitibi* itself shows this not to be the case. Furthermore, as I have said, there may well be cases that fall between *Abitibi* and the present case. However, if *Abitibi* is read as requiring only a determination of whether the regulator has exercised an enforcement power, it will in fact be impossible for a regulator *not* to be a creditor. The dissenting reasons do not seriously deny this, merely suggesting that regulators can publish guidelines or issue licences. The Regulator does both, yet, under the approach taken in the dissenting reasons, it is powerless to take any practical steps in the public interest regarding its guidelines or licences without qualifying as a creditor. As I have explained,*Abitibi* clearly contemplates a place for regulators who are not creditors.

137 Strictly speaking, this is sufficient to dispose of this aspect of the appeal. However, additional guidance on the sufficient certainty analysis may prove helpful in future cases. Accordingly, I turn now to a discussion of the "sufficient certainty" step and of the reasons why the Abandonment Orders and the LMR conditions both fail on this step of the *Abitibi* test.

(2) There Is No Sufficient Certainty That the Regulator Will Perform the Environmental Work and Advance a Claim for Reimbursement

138 The "sufficient certainty" test articulated in paras. 30 and 36 in*Abitibi* essentially does no more than reorganize and restate the requirements of the relevant provisions of the BIA. Section 121(2) provides that contingent claims may be provable claims. In other words, contingent debts or liabilities owed by a bankrupt to a creditor may be, but are not necessarily, provable claims. Section 135(1.1) provides for the valuation of such a claim. A contingent claim must be capable of valuation under s. 135(1.1) — it cannot be too remote or speculative — in order to be a provable claim under s. 121(2).

139 Before the third step of the *Abitibi* test can even be reached, a regulator must already have been shown to be a creditor. I have concluded that, on the facts of this case, the Regulator is not a creditor of Redwater. However, for the purpose of explaining how I differ from the chambers judge on the "sufficient certainty" analysis, I will proceed as if the Regulator were, in fact, a creditor of Redwater in respect of the Abandonment Orders and LMR requirements. These end-of-life obligations do not directly require Redwater to make a payment to the Regulator. Rather, they are obligations requiring Redwater to *do something*. As discussed in *Abitibi*, if the Regulator were in fact a creditor, end-of-life obligations would be its contingent claims.

140 What a court must determine is whether there are sufficient facts indicating the existence of an environmental duty that will ripen into a financial liability owed to a regulator. In determining whether a non-monetary regulatory obligation of a bankrupt is too remote or too speculative to be included in the bankruptcy proceeding, the court must apply the general rules that apply to future or contingent claims. It must be sufficiently certain that the contingency will come to pass — in other words, that the regulator will enforce the obligation by performing the environmental work and seeking reimbursement.

141 I will now discuss the Abandonment Orders and the LMR requirements in turn and demonstrate how they fail to satisfy the "sufficient certainty" step of the *Abitibi* test.

(a) The Abandonment Orders

142 The Regulator has issued orders under the *OGCA* and the *Pipeline* Act requiring Redwater to abandon the Renounced Assets. Even if the Regulator were a creditor of Redwater, the Abandonment Orders would still have to be capable of valuation in order to be included in the bankruptcy process. In my view, it is not established either by the chambers judge's factual findings or by the evidence that it is sufficiently certain that the Regulator will perform the abandonments and advance a claim for reimbursement. The claim is too remote and speculative to be included in the bankruptcy process.

143 The chambers judge acknowledged that it was "unclear" whether the Regulator would perform the abandonments itself or would deem the wells subject to the Abandonment Orders to be orphans (para. 173). He stated that, in the latter case, the OWA would probably carry out the abandonments, although it was not clear when they would be completed. Indeed, the chambers judge acknowledged that, given the OWA's resources, it could take as long as 10 years for it to get around to performing the required environmental work on the Redwater property. He nonetheless concluded that — even though the "sufficient certainty" step was not satisfied in a "technical sense" — the situation met what had been intended in*Abitibi*. That conclusion was at least partly based on his finding that the Abandonment Orders were "intrinsically financial" (para. 173).

144 In my view, the chambers judge did not make a finding of fact that the Regulator would carry out the abandonments *itself*. As noted, he acknowledged that it was "unclear" whether the Regulator would perform the abandonments. This can hardly be deemed a finding of fact deserving of deference. In my view, considered as a whole, the evidence in this case leads to the conclusion that the Regulator will not abandon the Renounced Assets itself.

145 The Regulator is not in the business of performing abandonments. It has no statutory duty to do so. Abandonment is instead an obligation of the licensee. The evidence of the Regulator's affiant was that the Regulator very rarely abandons properties on behalf of licensees and virtually never does so where the licensee is in receivership or bankruptcy. The affiant stated that the Regulator had no intention of abandoning Redwater's licensed assets. As noted by the chambers judge, it is true that, in its letter to GTL dated July 15, 2015, the Regulator threatened to perform the abandonments itself, but the Regulator subsequently took no steps to follow up on that threat. Even if this letter should be accorded any weight, the contradiction between it and the Regulator's subsequent affidavits at the very least makes it difficult to say with anything approaching sufficient certainty that the Regulator intends to carry out the abandonments. These facts distinguish this case from *Abitibi*, in which the restructuring judge's findings were based on the premise that the province would most likely perform the remediation work itself.

146 Below, I will explain why the OWA's involvement is insufficient to satisfy the "sufficient certainty" test. First, I note that any reliance the chambers judge placed on the intrinsically financial nature of the Abandonment Orders was an error. In this regard, I am in complete agreement with Martin J.A. Considering whether an order is intrinsically financial is an erroneous interpretation of the third step of the *Abitibi* test. It is too broad and would result in a provable claim being found even where the existence of a monetary claim in bankruptcy is merely speculative. Thus, in *Nortel* CA, Juriansz J.A. rightly rejected the argument that the *Abitibi* test did not require a determination that the regulator would perform the environmental work and claim reimbursement, and that it was sufficient for there to be an environmental order requiring an expenditure of funds by the bankrupt estate. He held the following, at paras. 31-32:

> As I read it, the Supreme Court's decision is clear: ongoing environmental remediation obligations may be reduced to monetary claims that can be compromised in CCAA proceedings only where the province has performed the remediation work and advances a claim for reimbursement, or where the obligation may be considered a contingent or future claim because it is "sufficiently certain" that the province will do the work and then seek reimbursement.
>
> The respondents' approach is not only inconsistent with *AbitibiBowater Inc., Re*, it is too broad. It would result in virtually all regulatory environmental orders being found to be provable claims. As Deschamps J. observed, a company may engage in activities that carry risks. When those risks materialize, the costs are borne by those who hold a stake in the company. A risk that results in an environmental obligation becomes subject to the insolvency process only when it is in substance monetary and is in substance a provable claim.

147 As the chambers judge correctly acknowledged, the fact that the Regulator would not conduct the abandonments itself does not mean that it would wash its hands of the Renounced Assets. Rather, if necessary, it would designate them as orphans pursuant to the *OGCA* and leave them for the OWA. I am not suggesting that a regulator can strategically avoid the "sufficient certainty" test simply by delegating environmental work to an arm's length organization. I would not decide, as the Regulator urges, that the *Abitibi* test *always* requires that the environmental work be performed by the regulator itself. However, the OWA's true nature must be emphasized. There are strong grounds to conclude that, given the particular features of this regulatory context, the OWA is not the regulator.

148 The creation of the OWA was not an attempt by the Regulator to avoid the *BIA* order of priorities in bankruptcy. It is a non-profit organization with its own mandate and independent board of directors, and it operates as a financially independent entity pursuant to legally delegated authority. Although the OWA's board includes a representative of the Regulator and a representative of Alberta Environment and Parks, its independence is not in question. The OWA's 2014-2015 annual report indicates that five out of six voting directors represent industry. The OWA uses a risk assessment tool to prioritize when and how it will perform environmental work on the many hundreds of orphans in Alberta. There is no suggestion that the Regulator has any say in the order in which the OWA chooses to perform environmental work. The 2014-2015 annual report also states

that, since 1992, 87 percent of the money collected and invested to fund OWA activities has been provided by industry via the orphan levy. The Regulator, at para. 99 of its factum, hints obliquely that additional provincial or federal funding may be forthcoming in the future, but even if it materializes, it will be almost entirely in the form of loans. I cannot accept the suggestion in the dissenting reasons that the Regulator and the OWA are "inextricably intertwined" (para. 273).

149 Even assuming that the OWA's abandonment of Redwater's licensed assets could satisfy the "sufficient certainty" test, I agree with Martin J.A. that it is difficult to conclude that there is sufficient certainty that the OWA will in fact perform the abandonments. I also agree with her view that there is no certainty that a claim for reimbursement will be advanced should the OWA ultimately abandon the assets.

150 The dissenting reasons suggest that the facts of this appeal are more akin to those of *Northstar Aerospace Inc., Re*, 2013 ONCA 600, 8 C.B.R. (6th) 154 (Ont. C.A.), than to those of *Nortel* CA, arguing that the "sufficient certainty" test is satisfied because, as in *Northstar*, there is no purchaser to take on Redwater's assets and the debtor itself is insolvent, so only the OWA can perform the work. In my view, *Northstar* is easily distinguishable. In that case, the bankrupt had been voluntarily carrying out remediation prior to its bankruptcy. After it made its assignment into bankruptcy, the Ministry of the Environment ("MOE") took over the remediation activities itself, purporting to do so on a without prejudice basis. Jurianz J.A. found that the fact that the MOE had already undertaken remediation activities made it sufficiently certain that it would do so. As I will now demonstrate, the facts here are very different.

151 At the beginning of this litigation, the OWA estimated that it would take 10 to 12 years to get through the backlog of orphans. By 2015, that backlog was increasing rapidly, and it may well have continued to increase at the same or an even greater speed in the intervening years, as submitted by the Regulator. If anything, this suggests the possibility of an even larger backlog. There is no indication that the Renounced Assets would have a particularly high priority in the backlog. Even if the potential additional funding materializes, the Regulator submits that it will be a generation or more before the OWA can address its existing inventory of orphans.

152 The dissenting reasons rely on the chambers judge's conclusion that the OWA would "probably" perform the abandonments eventually, while downplaying the fact that he also concluded that this would not "necessarily [occur] within a definite timeframe" (paras. 261 and 278, citing the chambers judge's reasons, at para. 173). Given the most conservative timeline — the 10 years discussed by the chambers judge — it is difficult to predict anything occurring with sufficient certainty. Much could change within the next decade, both in terms of government policy and in terms of the willingness of those in the Alberta oil and gas industry to discharge environmental liabilities. This is not at all the same situation as in *Northstar*, in which the MOE had already commenced environmental work.

153 Perhaps more to the point, this lengthy timeline means that, should it ultimately perform the work, the OWA will not advance a claim for reimbursement. Advancement of a claim is an element of the test that is just as essential as performance of the work. The OWA itself has no ability to seek reimbursement of its costs from licensees and, although the costs of abandonment carried out by a person authorized by the Regulator constitute a debt payable to the Regulator under s. 30(5) of the OGCA, no evidence has been adduced that the Regulator has exercised its power to recover such costs in comparable cases. There is a good reason for this: the reality is that, by the time the OWA got around to abandoning any of Redwater's wells, the estate would be finalized and GTL long since discharged. In sum, the chambers judge erred in failing to consider whether the OWA can be treated as the regulator and in failing to appreciate that, even if it can, it is not sufficiently certain that the OWA will in fact perform the abandonments and advance a claim for reimbursement.

154 Accordingly, even if the Regulator had acted as a creditor in issuing the Abandonment Orders, it cannot be said with sufficient certainty that it would perform the abandonments and advance a claim for reimbursement.

(b) The Conditions for the Transfer of Licenses

155 I will deal briefly with the LMR conditions for the transfer of licences. Much of the foregoing analysis with regard to the Abandonment Orders also applies to these conditions. As noted by Martin J.A., the requirement of regulatory approval for

licence transfers is difficult to compare directly with the remediation orders at issue in *Abitibi*. However, this Court confirmed that the *Abitibi* test applies to a class of regulatory obligations that is broader than "orders" in *Moloney* , at paras. 54-55. The LMR conditions are a "non-monetary obligation" for the Redwater estate, since they must be satisfied before the Regulator will approve the transfer of any of Redwater's licences. However, it is notable that, even apart from the LMR conditions, licences are far from freely transferrable. The Regulator will not approve the transfer of licences where the transferee is not a licensee under the *OGCA*, the *Pipeline Act*, or both. The Regulator also reserves the right to reject a proposed transfer where it determines that the transfer is not in the public interest, such as where the transferee has outstanding compliance issues.

156 In a sense, the factors suggesting an absence of sufficient certainty are even stronger for the LMR requirements than for the Abandonment Orders. There is a debt enforcement scheme under the *OGCA* and the *Pipeline Act* in respect of abandonment, but there is no such scheme for the LMR requirements. The Regulator's refusal to approve licence transfers unless and until the LMR requirements have been satisfied does not give it a monetary claim against Redwater. It is true that compliance with the LMR requirements results in a reduction in the value of the bankrupt estate. However, as discussed earlier, not every obligation that diminishes the value of the bankrupt estate, and therefore the amount available to secured creditors, satisfies the "sufficient certainty" step. The question is not whether an obligation is intrinsically financial.

157 Compliance with the LMR conditions prior to the transfer of licences reflects the inherent value of the assets held by the bankrupt estate. Without licences, Redwater's *profits à prendre* are of limited value at best. All licences held by Redwater were received by it subject to the end-of-life obligations that would one day arise. These end-of-life obligations form a fundamental part of the value of the licensed assets, the same as if the associated costs had been paid up front. Having received the benefit of the Renounced Assets during the productive period of their life cycles, Redwater cannot now avoid the associated liabilities. This understanding is consistent with *Daishowa-Marubeni International Ltd. v. R.*, 2013 SCC 29, [2013] 2 S.C.R. 336 (S.C.C.) , which dealt with the statutory reforestation obligations of holders of forest tenures in Alberta. This Court unanimously held that the reforestation obligations were "a future cost embedded in the forest tenure that serves to depress the tenure's value at the time of sale" (para. 29).

158 The fact that regulatory requirements may cost money does not transform them into debt collection schemes. As noted by Martin J.A., licensing requirements predate bankruptcy and apply to all licensees regardless of solvency. GTL does not dispute the fact that Redwater's licences can be transferred only to other licensees nor that the Regulator retains the authority in appropriate situations to reject proposed transfers due to safety or compliance concerns. There is no difference between such conditions and the condition that the Regulator will not approve transfers where they would leave the requirement to satisfy end-of-life obligations unaddressed. All these regulatory conditions depress the value of the licensed assets. None of them creates a monetary claim in the Regulator's favour. Licensing requirements continue to exist during bankruptcy, and there is no reason why GTL cannot comply with them.

(3) Conclusion on the Abitibi test

159 Accordingly, the end-of-life obligations binding on GTL are not claims provable in the Redwater bankruptcy, so they do not conflict with the general priority scheme in the *BIA*. This is not a mere matter of form, but of substance. Requiring Redwater to pay for abandonment before distributing value to creditors does not disrupt the priority scheme of the *BIA*. In crafting the priority scheme set out in the *BIA*, Parliament intended to permit regulators to place a first charge on real property of a bankrupt affected by an environmental condition or damage in order to fund remediation (see s. 14.06(7)). Thus, the *BIA* explicitly contemplates that environmental regulators will extract value from the bankrupt's real property if that property is affected by an environmental condition or damage. Although the nature of property ownership in the Alberta oil and gas industry meant that s. 14.06(7) was unavailable to the Regulator, the Abandonment Orders and the LMR replicate s. 14.06(7)'s effect in this case. Furthermore, it is important to note that Redwater's only substantial assets were affected by an environmental condition or damage. Accordingly, the Abandonment Orders and LMR requirements did not seek to force Redwater to fulfill end-of-life obligations with assets unrelated to the environmental condition or damage. In other words, recognizing that the Abandonment Orders and LMR requirements are not provable claims in this case does not interfere with the aims of the *BIA* — rather, it facilitates them.

160 Bankruptcy is not a licence to ignore rules, and insolvency professionals are bound by and must comply with valid provincial laws during bankruptcy. They must, for example, comply with non-monetary obligations that are binding on the bankrupt estate, that cannot be reduced to provable claims, and the effects of which do not conflict with the *BIA*, notwithstanding the consequences this may have for the bankrupt's secured creditors. The Abandonment Orders and the LMR requirements are based on valid provincial laws of general application — exactly the kind of valid provincial laws upon which the *BIA* is built. As noted in *Moloney* , the *BIA* is clear that "[t]he ownership of certain assets and the existence of particular liabilities depend upon provincial law" (para. 40). End-of-life obligations are imposed by valid provincial laws which define the contours of the bankrupt estate available for distribution.

161 Finally, as noted earlier, the *BIA*'s general purpose of facilitating financial rehabilitation is not relevant for a corporation such as Redwater. Corporations with insufficient assets to satisfy their creditors will never be discharged from bankruptcy because they cannot satisfy all their creditors' claims in full (BIA, s. 169(4)). Thus, no conflict with this purpose is caused by the conclusion that the end-of-life obligations binding Redwater are not provable claims.

IV. Conclusion

162 There is no conflict between Alberta's regulatory regime and the *BIA* requiring portions of the former to be rendered inoperative in the context of bankruptcy. Although GTL remains fully protected from personal liability by federal law, it cannot walk away from the environmental liabilities of the bankrupt estate by invoking s. 14.06(4). On a proper application of the *Abitibi* test, the Redwater estate must comply with ongoing environmental obligations that are not claims provable in bankruptcy.

163 Accordingly, the appeal is allowed. In *Alberta Energy Regulator v. Grant Thornton Limited*, 2017 ABCA 278, 57 Alta. L.R. (6th) 37 (Alta. C.A.), Wakeling J.A. declined to stay the precedential effect of the Court of Appeal's decision. As he noted, the interests of the Regulator itself were already protected. Pursuant to earlier orders of the Alberta courts, GTL had already sold or renounced all of Redwater's assets, and the sale proceeds were being held in trust. Accordingly, the Regulator's request for an order that the proceeds from the sale of Redwater's assets be used to address Redwater's end-of-life obligations is granted. Additionally, the chambers judge's declarations in paras. 3 and 5-16 of his order are set aside.

164 As the successful party in the appeal, the Regulator would normally be entitled to its costs. However, the Regulator specifically did not seek costs. Accordingly, there will be no order made as to costs.

***Côté J.* (dissenting) (Moldaver J. concurring):**

I. Introduction

165 Redwater Energy Corporation ("Redwater") is a bankrupt oil and gas company. Its estate principally consists of two types of properties or assets: valuable, producing oil wells and facilities that are still capable of generating revenue; and value-negative, non-producing assets, including depleted wells that are subject to onerous environmental liabilities. Redwater's receiver and trustee in bankruptcy, Grant Thornton Limited ("GTL"), purports to have disclaimed ownership of the non-producing assets. It did so in order to sell the valuable, producing wells separately — unencumbered by the liabilities attached to the disclaimed properties — and to distribute the proceeds of that sale to the estate's creditors.

166 However, Alberta law does not recognize GTL's disclaimers as enforceable. Shortly after GTL's appointment as receiver, the Alberta Energy Regulator ("AER") issued "Abandonment Orders" for the disclaimed assets, directing Redwater and its working interest participants to carry out environmental work on those properties. Specifically, the AER sought to have GTL "abandon" the non-producing properties, which meant to render the wells environmentally safe according to the AER's directives. It later notified GTL that it would refuse to approve any sale of Redwater's valuable assets unless GTL did one of three things: sell the disclaimed properties in a single package with the producing wells and facilities; complete the abandonment and reclamation work itself; or post security to cover the environmental liabilities associated with the disclaimed properties.

167 The evidence reveals that none of these options is economically viable. The net value of Redwater's 127 licensed properties is negative, so no rational purchaser would ever agree to buy them as a package. This is precisely why GTL opted to disclaim the burdensome properties in the first place. As to the remaining options, GTL cannot undertake or guarantee the abandonment and reclamation work because the environmental liabilities attached to the disclaimed assets exceed the estate's realizable value — and in any event, GTL could not access the funds necessary to satisfy these commitments until after a sale of the estate's valuable assets was completed. The effect of the AER's position, then, is to hamper GTL in its administration of the estate, preventing it from realizing *any* value for *any* of Redwater's creditors, including the AER. And the AER's position effectively leaves the valuable and producing wells in limbo, creating a real risk that they, too, will become "orphans" — assets that are unable to be sold to another company and are left entirely unrealized.

168 According to Wagner C.J., GTL is without recourse because federal law enables it only to protect itself from personal liability and because the AER was entitled to assert its environmental liability claims outside of the bankruptcy process. I disagree on both points. In my view, two aspects of Alberta's regulatory regime conflict with the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (“BIA”). This result flows from a proper and accurate understanding of fundamental principles of constitutional and insolvency law.

169 First, Alberta's statutes regulating the oil and gas industry define the term "licensee" as including receivers and trustees in bankruptcy. The effect of this definition is that insolvency professionals are subject to the same obligations and liabilities as Redwater itself — including the obligation to comply with the AER's Abandonment Orders and the risk of personal liability for failing to do so. The *BIA*, however, permits a trustee in bankruptcy to disclaim assets encumbered by environmental liabilities. This power was available to GTL in the circumstances of this case, and GTL validly disclaimed the non-productive assets. The result is that it is no longer subject to the environmental liabilities associated with those assets. Because Alberta's statutory regime does not recognize these disclaimers as lawful (by virtue of the fact that receivers and trustees are regulated as licensees, who cannot disclaim assets), there is an unavoidable operational conflict between federal and provincial law. Alberta's legislation governing the oil and gas sector should therefore be held inoperative to the extent that it does not recognize the legal effect of GTL's disclaimers.

170 Second, the AER has required that GTL satisfy Redwater's environmental liabilities ahead of the estate's other debts, which contravenes the *BIA*'s priority scheme. Because the Abandonment Orders are "claims provable in bankruptcy" under the three-part test outlined by this Court in *AbitibiBowater Inc., Re*, 2012 SCC 67, [2012] 3 S.C.R. 443 (S.C.C.) — from which this Court should not depart either explicitly or implicitly — the AER cannot assert those claims outside the bankruptcy process. To do so would frustrate an essential purpose of the *BIA*: distributing the estate's value in accordance with the statutory priority scheme. Nor can the AER achieve the same result indirectly by imposing conditions on the sale of Redwater's valuable assets. The province's licensing scheme effectively operates as a debt collection mechanism in relation to a bankrupt company: it prevents GTL from discharging its duties as trustee unless the AER's environmental claims are satisfied. As such, it should be held inoperative as applied to Redwater under the second prong of the paramountcy test, frustration of purpose.

II. Background

171 Redwater was a publicly traded oil and gas company that operated wells, pipelines and other facilities in central Alberta. In mid-2014, it suffered a number of financial setbacks following a series of acquisitions and unsuccessful drilling initiatives. As a result, it became unable to meet its obligations to its largest secured creditor, ATB Financial, which commenced enforcement proceedings.

172 GTL was appointed as Redwater's receiver on May 12, 2015. Upon its appointment, but before taking possession of any AER-licensed properties, GTL carried out an analysis of the economic viability and marketability of Redwater's assets. It determined that only a portion of the company's properties was actually saleable and that it would not be in Redwater's best interests — or in the interests of its creditors — for GTL, as receiver, to take possession of the non-producing properties. It therefore informed the AER on July 3, 2015, that it would take possession of only 20 of Redwater's 127 licensed wells

and facilities. On November 2, 2015, shortly after its appointment as trustee, GTL again disclaimed the same non-producing properties it had previously renounced in its capacity as receiver.

173 According to GTL's assessment, Redwater's valuable assets were worth $4.152 million and would generate significant value for the estate's creditors if they were sold at auction. On the other hand, the net value of the non-producing properties was -$4.705 million, reflecting the extensive abandonment and reclamation liabilities owed to the AER. The net value of the estate as a whole was -$0.553 million. This was why, in GTL's business judgment, a sale of all the estate's assets together was simply not realistic.

174 The AER responded to GTL's first disclaimer notice by issuing the Abandonment Orders which required Redwater to carry out environmental work on the non-producing properties that GTL had disclaimed. But the AER's enforcement efforts were not limited to the debtor's estate itself. In its initial application that spurred this litigation, the AER filed suit against GTL seeking three principal remedies: (1) a declaration that GTL's disclaimers were void and unenforceable; (2) an order compelling GTL, in its capacity as receiver, to comply with the Abandonment Orders issued in relation to a portion of Redwater's assets; and (3) an order compelling GTL to fulfill its obligations as licensee under Alberta's legislation, specifically in relation to the abandonment, reclamation and remediation of Redwater's licensed properties.

175 The genesis of this litigation, then, was a clear and forceful effort by the AER to require GTL to satisfy Redwater's environmental obligations. To understand why the AER took that approach, it is important to note that it had provincial law on its side. Under the Oil and Gas Conservation Act, R.S.A. 2000, c. O-6 (“OGCA”) and the Pipeline Act, R.S.A. 2000, c. P-15 (“PLA”), the term "licensee" is defined to include receivers and trustees in bankruptcy (OGCA, s. 1(1)(cc); PLA, s. 1(1)(n)). As a result, insolvency professionals become subject to the same regulatory obligations as the insolvent debtor itself by effectively stepping into its shoes. They can therefore be compelled to carry out abandonment and reclamation work on the direction of the AER (OGCA, s. 27; PLA, s. 23; Oil and Gas Conservation Rules, Alta. Reg. 151/71 ("*OGCA Rules*"), s. 3.012); to reimburse anyone else who does abandonment work (OGCA, ss. 29 and 30; PLA, s. 25); to pay the orphan fund levy for any of the debtor's assets (OGCA, s. 74); to provide a security deposit, under certain circumstances, at the AER's request (*OGCA Rules*, s. 1.100(2)); and to pay a fine for failing to comply with an order made by the AER (OGCA, ss. 108 and 110(1); PLA, ss. 52(2) and 54(1)). These liabilities are all personal in nature. Other comparable legislation expressly limits the liability of insolvency professionals. For example, the Environmental Protection and Enhancement Act, R.S.A. 2000, c. E-12, states that the liability of a receiver or trustee under an environmental protection order "is limited to the value of the assets that the person is administering", absent "gross negligence or wilful misconduct" (s. 240(3)). Alberta's oil and gas statutory regime, however, does not include such a clause protecting receivers and trustees. And as the AER's initial application makes clear, the AER itself viewed these obligations as personal. This was why it sued GTL to compel it, among other things, to comply with its obligations as a licensee under provincial law.

176 The AER also exercised its enforcement power in another capacity. In addition to issuing the Abandonment Orders, the AER imposed restrictions and conditions on the sale of Redwater's assets — conditions that effectively required GTL to satisfy those same obligations before a sale could be approved. Thus, even if GTL defied the AER's request to abandon the non-producing properties, it would still be unable to discharge its duties as receiver and trustee.

177 Both the chambers judge and the majority of the Court of Appeal found in favour of GTL on each prong of the paramountcy test, concluding that there is an operational conflict and a frustration of purpose (2016 ABQB 278, 33 Alta. L.R. (6th) 221 (Alta. Q.B.); 2017 ABCA 124, 50 Alta. L.R. (6th) 1 (Alta. C.A.)). They agreed with GTL and ATB Financial that the provisions of Alberta's statutory regime permitting the AER to enforce compliance with Redwater's environmental abandonment and reclamation obligations were constitutionally inoperative during bankruptcy. The AER and the Orphan Well Association ("OWA") then appealed to this Court.

III. Analysis

178 The *Constitution Act, 1867*, grants the federal government exclusive jurisdiction to regulate matters relating to bankruptcy and insolvency (s. 91(21)). In the exercise of that jurisdiction, Parliament enacted the *BIA*, "a complete code governing

bankruptcy" (*Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327 (S.C.C.) , at para. 40; see also *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453 (S.C.C.) , at para. 85). The *BIA* outlines, among other things, the powers, duties and functions of receivers and trustees responsible for administering bankrupt or insolvent estates and the scope of claims that fall within the bankruptcy process (see BIA, ss. 16 to 38 and 121 to 154).

179 Although the operation of the *BIA* "depends upon the survival of various provincial rights" (*Moloney* , at para. 40), this is true only to the extent that "substantive provisions of any [provincial] law or statute relating to property ... are not in conflict with [the *BIA*]" (BIA, s. 72(1)). When a conflict arises, the *BIA* necessarily prevails (*Moloney* , at paras. 16 and 29; *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419 (S.C.C.) , at para. 16). This reflects the constitutional principle that federal laws are paramount (*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3 (S.C.C.) , at para. 32).

180 The respondents in this appeal — GTL and ATB Financial — posit two distinct conflicts between the federal and provincial legislation. First, they argue that the *BIA* grants receivers and trustees the power to disclaim any interest in any real property, even where they are not at risk of personal liability by virtue of their possession of the property. This disclaimer power enables trustees to renounce valueless and liability-laden property of a bankrupt in pursuit of their primary goal, which is to maximize global recovery for all creditors. The respondents argue that GTL validly disclaimed the non-producing assets and therefore cannot be held responsible for carrying out the Abandonment Orders; nor can the AER make any sale of Redwater's assets conditional on the fulfillment of obligations with respect to the disclaimed properties.

181 Second, they argue that the AER's Abandonment Orders constitute "claims provable in bankruptcy". In their view, it would undermine the *BIA*'s priority scheme if the AER could assert those claims outside the bankruptcy process — and ahead of the estate's secured creditors — whether by compelling GTL to carry out those orders or by making the sale of Redwater's valuable assets conditional on the fulfillment of those obligations.

182 In my view, GTL and ATB Financial have satisfied their burden of demonstrating a genuine inconsistency between federal and provincial law under both branches of the paramountcy test. In what follows, I first discuss the operational conflict that arises between Alberta's regulatory regime and s. 14.06(4) of the BIA. I then turn to the second branch of the paramountcy analysis, frustration of purpose.

A. Operational Conflict

183 The first branch of the paramountcy test is operational conflict. An operational conflict arises where "it is impossible to comply with both laws" (*Moloney* , at para. 18) — "where one enactment says 'yes' and the other says 'no'", or where "the same citizens are being told to do inconsistent things" (*Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161 (S.C.C.) , at p. 191; see also Lemare Lake, at para. 18).

184 In essence, an operational conflict analysis is an exercise in statutory interpretation: the Court must ascertain the meaning of each competing enactment in order to determine whether dual compliance is possible. Although this interpretation exercise takes place within the guiding confines of cooperative federalism, a concept that allows for some interplay and overlap between federal and provincial legislation, this Court recently set out the limits to this concept:

> [C]ooperative federalism may be used neither to "override nor [to] modify the division of powers itself" (*Rogers Communications Inc. v. Châteauguay (City)*, [2016 SCC 23, [2016] 1 S.C.R. 467] at para. 39), nor to impose "limits on the otherwise valid exercise of legislative competence" (*Quebec (Attorney General) v. Canada (Attorney General)*, [2015 SCC 14, [2015] 1 S.C.R. 693] at para. 19; *Reference re Securities Act*, [2011 SCC 66, [2011] 3 S.C.R. 837] at paras. 61-62). It cannot, therefore, be used to make *ultra vires* legislation *intra vires*. By fostering cooperation between Parliament and the legislatures within the existing constitutional boundaries, however, cooperative federalism works to support, rather than supplant, the division of legislative powers (see: *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 22).
>
> (*Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, [2018] 3 S.C.R. 189(S.C.C.), at para. 18)

185 Properly understood, cooperative federalism operates as a straightforward interpretive presumption — one that supports, rather than supplants, the modern approach to statutory interpretation. This Court recognized as much in *Moloney* , where Gascon J. wrote that courts should "favour an interpretation of the federal legislation that allows the concurrent operation of both laws" on the basis of a presumption "that Parliament intends its laws to co-exist with provincial laws" (*Moloney* (para. 27). But where "the proper meaning of the provision" — one that is not limited to "a mere literal reading of the provisions at issue" — cannot support a harmonious interpretation, it is beyond this Court's power to create harmony where Parliament did not intend it (*Moloney* (para. 23; see also *Pan-Canadian Securities Regulation*, at para. 18; *Lemare Lake*, at paras. 78-79, per Côté J., dissenting, but not on this point).

186 In my view, my colleague places undue reliance on the principle of cooperative federalism to narrow the scope of federal law and find a harmonious interpretation where no plausible one exists. Courts must be especially careful about using cooperative federalism to interpret legislative provisions narrowly in a case like this where Parliament expressly envisioned that the disclaimer right could come into conflict with provincial law. This is evident from the very first line of s. 14.06(4), which states that the disclaimer power applies "[n]otwithstanding *anything* in *any* federal or *provincial law*". The notion that judicial restraint should compel a different interpretation is therefore belied by the fact that Parliament considered, acknowledged and *accepted* the potential for conflict. To rely on judicial restraint, then, to avoid a conflict between federal and provincial law is to disregard Parliament's express instruction. Simply put, this is not a case where a drastic power is to be assumed from the statute; it is one where such a power is clearly provided for. In my view, reliance on cooperative federalism must never result in an interpretation of s. 14.06(4) that is inconsonant with its language, context and purpose.

187 It is undisputed in this appeal that Alberta law does not recognize GTL's disclaimers of assets licensed by the AER as enforceable to the extent that they relieve GTL of the obligation to satisfy the environmental liabilities associated with the assets. As receiver and trustee, GTL steps into Redwater's shoes as a "licensee" under provincial law; and, GTL submits, it can therefore, without the disclaimers, be held liable for the debtor's abandonment and reclamation obligations in the same manner as Redwater itself. The question, then, is whether the *BIA* permits GTL to disclaim these properties and what legal effect results from such disclaimer.

188 Section 14.06 of the BIA, reproduced in full in the appendix, outlines a trustee's powers and duties with respect to environmental liabilities and the disclaimer of property. Specifically, s. 14.06(4) states that the trustee is "not personally liable for failure to comply" with an order requiring it to "remedy any environmental condition or environmental damage affecting property involved in a bankruptcy", provided that the trustee "abandons, disposes of or otherwise releases any interest in any real property... affected by the condition or damage" within the statutory timeframes. The timing of GTL's disclaimers is not at issue here.

189 My colleague concludes that, regardless of whether GTL could have properly invoked the disclaimer power in this case, the effect of any such disclaimer would simply be to protect it from personal liability. He states that, in any event, the exercise of the disclaimer power was unnecessary in this case because GTL was already fully protected from personal liability through the operation of s. 14.06(2). Further, he argues, because the AER has not sought to hold GTL personally liable, there is no conflict between federal and provincial law on the facts of this case. With respect, I disagree with this approach to the language of the *BIA*, which does not properly account for fundamental principles of constitutional and insolvency law. I will begin by addressing the proper scope of the disclaimer power provided to trustees, explaining that the actual existence of a risk of personal liability is not a necessary condition for the exercise of this power and that, while protection from personal liability is one effect of a valid disclaimer, it is not the only one. In my view, this interpretation makes s. 14.06(4) consistent with the remainder of the section and is therefore to be preferred. With respect, I do not accept that Parliament intended s. 14.06(4) simply to protect trustees from the exact same liability that it had already addressed through s. 14.06(2). Subsection (4) must have a meaningful role to play within Parliament's bankruptcy and insolvency regime; I reject the suggestion that Parliament crafted a superfluous provision. I will also deal briefly with the AER's argument that the disclaimer power is not available at all in the context of Alberta's oil and gas statutory regime. In my view, it is available in this context.

(1) The Power to Disclaim Under Section 14.06(4)

190 The "natural meaning which appears when the provision is simply read through" (*Canadian Pacific Air Lines Ltd. v. C.A.L.P.A.*, [1993] 3 S.C.R. 724 (S.C.C.) , at p. 735) is that s. 14.06(4) assumes and incorporates a pre-existing common law right to disclaim property in the context of bankruptcy and insolvency (see L. Silverstein, "Rejection of Executory Contracts in Bankruptcy and Reorganization" (1964), 31 U. Chi. L. Rev. 467, at pp. 468-72; *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.*, 2005 BCCA 154, 251 D.L.R. (4th) 328(B.C. C.A.), at paras. 24-31; *Thomson Knitting Co., Re*, [1925] 2 D.L.R. 1007(Ont. C.A.), at p. 1008). This right is in keeping with the fundamental objective of court officers in insolvencies: the maximization of recovery for creditors as a whole by realizing the estate's valuable assets. By allowing trustees to disclaim assets with substantial liabilities, this power enables them to administer the estate in the most efficient manner and to avoid significant costs of administration that would reduce creditor recovery. Section 14.06(4) recognizes and supports this foundational principle of insolvency law.

191 This reading offers the clearest and most obvious explanation for the manner in which the provision is drafted, in that it plainly describes a result or legal effect of disclaimer: a trustee "is not personally liable for failure to comply" with an environmental order "*if* ... the trustee ... abandons, disposes of or otherwise releases any interest in any real property" (s. 14.06(4)). We should interpret s. 14.06(4) as authorizing the act of disclaimer in light of the principle that "[t]he legislator does not speak in vain" (*Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559(S.C.C.) , at para. 37, citing *Québec (Procureur général) c. Carrières Ste-Thérèse ltée*, [1985] 1 S.C.R. 831 (S.C.C.) , at p. 838). If a trustee did not have the power to disclaim property, and if that power were not recognized and provided for in the statute, a provision describing the effect of such a disclaimer would serve no purpose.

192 The AER submits that property may be disclaimed only where it is necessary for a trustee to avoid personal liability with respect to an environmental order. This interpretation entirely inverts the language of the provision, turning a stated *effect* of disclaimer into a necessary condition that circumscribes the exercise of the power. The operative clauses are neither written nor ordered in this manner. Rather, s. 14.06(4) expresses the disclaimer right in unqualified terms and emphasizes that a trustee may not be held liable whenever that right is exercised. If Parliament truly intended to condition the right to disclaim property on the actual existence of a risk of personal liability, "it is hard to conceive of a more convoluted and sibylline way of stating something that could be so easily expressed in clear and direct terms" (*Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85(S.C.C.) , at p. 124).

193 My colleague adopts a slightly different approach. Rather than accepting the argument that the risk of personal liability is a necessary condition to the exercise of the disclaimer power in s. 14.06(4), he concludes that protection from personal liability for non-compliance with environmental orders is the only consequence of a valid disclaimer. Therefore, he says, the bankrupt's estate is not relieved of its obligations under the environmental orders and the trustee can be compelled to expend the entirety of the estate's assets on compliance. With respect, this also cannot be the correct reading of the subsection. Nor do I believe that the brief references to s. 14.06(4) in *GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.*, 2006 SCC 35, [2006] 2 S.C.R. 123(S.C.C.) — a case in which this subsection was not directly in issue and this Court was not tasked with interpreting it in any meaningful way — provide much assistance in this case.

194 I accept that the opening words of s. 14.06(4) refer to the personal liability of the trustee. However, when the words of the subsection are read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament", as the courts are required to do (see *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.) ; *Bell ExpressVu* , at para. 26, quoting E. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87), their meaning becomes apparent.

195 Section 14.06(4) both assumes and relies on the common law power of trustees to disclaim assets, a power that the majority of the Court of Appeal described as "commonplace" (para. 47). Even my colleague appears to accept that this disclaimer power "predates" s. 14.06(4) itself (at para. 95). Indeed, the majority of the Court of Appeal recognized that "[s]ection 14.06 does not appear to create a right in a trustee to abandon properties without value, but rather assumes that one exists upon bankruptcy" (para. 63). This is the only rational explanation for why Parliament made the effects of s. 14.06(4) available when the trustee "abandons, disposes of or otherwise releases any interest in any real property". While avoiding personal liability is

one effect of the appropriate exercise of this power, it is not the only effect. Disclaimer operates to "determine, as from the date of the disclaimer, the rights, interests and liabilities" in the disclaimed property (R. Goode, *Principles of Corporate Insolvency Law* (4th ed. 2011), at p. 202). By properly disclaiming certain assets, the trustee is relieved of any liabilities associated with the disclaimed property and loses the ability to sell the property for the benefit of the estate. The author Frank Bennett, writing about the administration of the bankrupt's real property, explains that "[w]here the trustee disclaims its interest, the disclaimer releases and disclaims any and all right, title and interest to the property" (*Bennett on Creditors' and Debtors' Rights and Remedies* (5th ed. 2006), at p. 482 (footnote omitted)).

196 The majority asserts that s. 14.06(4) does not allow a trustee to "walk away" from assets and the environmental liabilities associated with them (paras. 86, 100 and 102). However, *disclaiming* property does have precisely this effect. It permits the trustee not to realize assets that would provide no value to the estate's creditors and whose realization would therefore undermine the trustee's fundamental objective. A recognized purpose of the disclaimer power is to "avoid the continuance of liabilities in respect of onerous property which would be payable as expenses of the liquidation, to the detriment of unsecured creditors" (Goode, at p. 200 (footnote omitted)). These principles are no less valid in relation to valueless real property than they are in relation to unprofitable and burdensome executory contracts. Indeed, there has been no suggestion in this appeal, including from the AER and the OWA, that trustees can never disclaim onerous real property.

197 This explanation of the disclaimer power is borne out by GTL's actions in the instant case. After assessing the economic viability and marketability of Redwater's assets, GTL determined that it would be most beneficial to Redwater's creditors as a whole if it disclaimed the non-producing, liability-laden assets.

198 Parliament's recognition of this common law disclaimer power in s. 14.06(4) is not new. The power is also referred to in another section, albeit in a broader context. Section 20(1) of the BIA, provides trustees with the ability to "divest" themselves of "any real property or immovable of the bankrupt" generally. However, the disclaimer power itself does not derive from this section. Nor is a trustee required to invoke s. 20(1) in order to exercise the disclaimer power described in s. 14.06(4), which incorporates that power and spells out the particular effects of its exercise in the specific context of environmental remediation orders. In any event, this Court is not required in this appeal to comment on the full effects of s. 20(1).

199 Under my colleague's interpretation, it is unclear why Parliament chose to enact the disclaimer mechanism. It is surely true that Parliament could have achieved the same outcome through the use of simpler language. Had it merely intended to protect trustees from personal liability for failure to comply with environmental orders, it could have easily done so directly — in fact, it had already done so in s. 14.06(2). There is no reason why Parliament would have attempted to achieve this relatively straightforward result through the convoluted mechanism of requiring trustees to disclaim property while at the same time not intending such disclaimer to have its "commonplace" common law effects. There is a reason why Parliament has referred to the power to disclaim in s. 14.06(4); we must give effect to this choice and to the words that Parliament has used.

200 It follows, then, that I respectfully disagree that s. 14.06(4) only protects trustees from specific types of personal liability. But it does not follow that the *estate* is relieved of its liabilities once a trustee exercises the disclaimer power — a misconception that is pervasive in the AER's submissions and the majority's analysis. The disclaimed property ultimately reverts to the estate at the conclusion of the bankruptcy proceedings, as is the case with unrealized assets (see BIA, s. 40; see also Bennett, at p. 528). The estate remains liable for the remediation obligations attached to the land. Whether the estate has sufficient assets capable of satisfying those liabilities at that point in time is a separate question that is unrelated to the underlying fact of ongoing liability. In any case, the regulatory scheme continues to apply with respect to the retained assets. In referring repeatedly to the idea that disclaimer does not "immunize bankrupt estates from environmental liabilities" (para. 81), the majority misunderstands the impact and purpose of the disclaimer power. The estate itself is not relieved of environmental obligations. As I have noted, the trustee does not take possession of the bankrupt's assets in order to continue the life of the bankrupt indefinitely. The trustee's function is to realize on the estate's valuable assets and maximize global recovery for all creditors. Allowing the trustee to deal only with the value-positive assets to achieve this goal does not relieve the *estate* of its environmental obligations. As a result, the disclaimer power, and its incorporation into s. 14.06(4), is entirely consistent with the foundational principles of insolvency law.

201 In s. 14.06(4), Parliament has expressly referred to this disclaimer power and spelled out the particular effects flowing from its proper exercise. By doing so, it has purposefully incorporated the disclaimer power into its statutory scheme to achieve its desired purposes.

202 My interpretation of s. 14.06(4) finds ample support in the Hansard evidence. In the debates preceding the enactment of s. 14.06(4) in 1997, Jacques Hains, a director in the Department of Industry Canada who had been involved in drafting the amendments to the *BIA*, discussed the new options being provided to trustees when faced with an environmental remediation order:

> First, he could decide to carry out the order and remedy the environmental damage, the costs to be charged as costs of administration from the bankrupt's assets.
>
> The second option would be to challenge this order to remedy before the appropriate courts; these two options are already to be found in environmental legislation.
>
> The third option would be for the monitor to apply to the appropriate court for a period of stay to assess the economic viability of complying with the order, whether it is worth the trouble and whether the assets are sufficient to cover the clean up costs.
>
> As a fourth option, if he considers that this course has absolutely no economic viability, he may give notification that he has renounced the real property to which the order applies. [Emphasis added.]
>
> (Standing Committee on Industry, *Evidence*, No. 16, 2nd Sess., 35th Parl., June 11, 1996, at 15:45 to 15:50)

The above passage makes no reference to the personal liability of a trustee who is considering whether to invoke the "fourth option" and disclaim the property. Mr. Hains was clear that the decision to disclaim is based on the "economic viability" of complying with the remediation orders, specifically "whether the assets are sufficient to cover the clean up costs". This makes sense only in the context of the trustee's obligation to maximize economic recovery for creditors.

203 Several months later, Mr. Hains reiterated this fourth option, explaining that, after assessing the economic viability of complying with the order and "knowing that the bill will be too expensive and will not be economically viable, *the trustees are then out of it and can abandon that piece of property* subject to the order" (*Proceedings of the Standing Senate Committee on Banking, Trade and Commerce*, No. 13, 2nd Sess., 35th Parl., November 4, 1996, at p. 13:68 (emphasis added)). This description plainly reflects the function of the disclaimer power, which does indeed allow trustees to "walk away" from liability-laden assets that will not contribute to maximizing creditor recovery.

204 Mr. Hains' answers to questions from the House of Commons Standing Committee further confirms this interpretation of the disclaimer power. The following exchange is very telling:

> **Mr. Lebel [Member of Parliament for Chambly]**: When a trustee decides to give up the land and realize[s] assets elsewhere, for example by making a profit from the sale of assets, having released himself from the obligation to clean up the land, he would be sharing a dividend realized from other profitable assets and telling the creditors to manage as best they can with the real property. If the creditors are not willing to touch it, he will then tell the government to clean it up. In such a case, each of the bankruptcy creditors would also ... stand to earn a small dividend, as it is referred to in Bankruptcy Law.
>
> Do you not think that your bill should require the trustee to carry out a clean-up from the assets of the bankruptcy before the dividends are distributed?
>
> **Mr. Hains**: It's an excellent question that was put to me only three weeks ago by colleagues from the Department of the Environment of Quebec, whom I was meeting to discuss this subject. There were a number of matters of interest to them, particularly the one raised by Mr. Lebel. [Emphasis added.]

(Standing Committee on Industry, June 11, 1996, at 16:55)

Mr. Hains went on to reference various other features of the scheme to assuage Mr. Lebel's concerns and noted that provincial environmental agencies would be responsible for performing the remediation work. Significantly, at no point did Mr. Hains contradict Mr. Lebel's understanding of the bill's provisions. Nor did he take issue with the premise underlying the question: that the new legislation does not "require the trustee to carry out a clean-up from the assets of the bankruptcy" before they are distributed to creditors. Mr. Hains did not claim that provincial regulators might still enforce such a requirement.

205 This exchange between Mr. Lebel and Mr. Hains clearly demonstrates the collective understanding of all parties that the proposed amendments, containing what would become s. 14.06(4), specifically *did not* require the trustee to expend the estate's assets to comply with environmental remediation orders. The drafters of s. 14.06(4) thus turned their minds directly to this issue, and their understanding of the provision's effects was contrary to that proposed by the majority.

206 Based on these references to Hansard, I cannot agree with the majority's statement that the legislative debates provide "no hint" of a parliamentary intention to relieve trustees of the obligation to expend estate assets on environmental remediation (para. 81). This intention was clearly expressed on multiple occasions.

207 As courts must read statutory provisions in their entire context, and as Parliament is presumed to craft sections and subsections of legislation as parts of a coherent whole, it is important to carefully examine the other subsections of s. 14.06. This is true regardless of whether a party to litigation seeks to apply them or to put them directly in issue (majority reasons, at paras. 88 and 101). Significantly, the immediate statutory context surrounding s. 14.06(4) confirms that a trustee's right to disclaim property is not limited in the manner suggested by the AER or my colleague. Four provisions adjacent to s. 14.06(4) support this conclusion.

208 First, s. 14.06(5) provides that a court may stay an environmental order "for the purpose of enabling the trustee to assess the economic viability of complying with the order". Assessing "economic viability" is, on its face, broader than assessing the risk of personal liability. This provision indicates that a trustee is entitled to disclaim assets based on a rational economic analysis geared toward maximizing the value of the estate, and not merely in order to protect itself from personal liability. Otherwise, there would be no reason for Parliament to permit a court to grant a stay for the purpose of assessing economic viability. This understanding is consistent with the fundamental principles of insolvency law and with the Hansard evidence, as noted above, as well as with one of the recognized justifications for the disclaimer power more generally: to allow a trustee "to complete the administration of the liquidation without being held up by continuing obligations on the company under ... continued ownership and possession of assets which are of no value to the estate" (Goode, at p. 200).

209 Second, s. 14.06(7) grants the government a super priority for environmental claims in cases where it has already taken action to remedy the condition or damage. This provision would serve little purpose if a government regulator could assert a super priority for *all* environmental claims, as the AER effectively purports to do here by refusing to recognize GTL's disclaimers as lawful. It also suggests that Parliament specifically envisioned that the government could obtain a super priority and leapfrog other creditors, but *only* where the government itself has already remediated the environmental damage. An analogous argument was central to the reasoning in *Abitibi*, where this Court observed that the existence of a Crown priority limited to the contaminated property and certain related property under s. 11.8(8) of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, undercut the argument that Parliament "intended that the debtor always satisfy all remediation costs" in circumstances where that express priority was inapplicable and where the Crown had no further priority with respect to the totality of the estate's assets (para. 33).

210 Third, s. 14.06(6) provides that claims for costs of remedying an environmental condition or environmental damage cannot rank as costs of administration if the trustee has disclaimed the property in question. Again, if the AER could effectively assert a super priority by compelling GTL to use all of Redwater's assets to satisfy its outstanding environmental liabilities, this provision would be unnecessary, because the costs of environmental remediation would rank *ahead* of administrative costs in the priority structure. Moreover, s. 14.06(6) highlights the potential for a direct conflict between federal and provincial law. A

trustee cannot comply with the AER's instruction to pay environmental costs as part of its administration of the estate while simultaneously complying with the *BIA*'s requirement that such costs *not* be included in the trustee's administrative costs. This further raises the spectre of bankruptcy professionals being forced to expend their own funds under Alberta's regulatory regime — a notion that Parliament clearly rejected by amending the *BIA* in response to *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.*, 1991 ABCA 181, 81 D.L.R. (4th) 280 (see C.A. reasons, at para. 63). This is a risk that is not adequately addressed under my colleague's interpretation.

211 Fourth, s. 14.06(2) already deals with the circumstances in which a trustee can be held personally liable for a bankrupt's environmental liabilities. Under this provision, personal liability can arise only where environmental damage occurs as a result of the trustee's gross negligence or wilful misconduct. If a risk of personal liability is, in fact, a necessary condition to disclaim under s. 14.06(4), or if protection from personal liability is the only effect of disclaimer, this would mean that the disclaimer power is available or useful only in cases where the underlying environmental condition arises after the trustee's appointment and the trustee is responsible for gross negligence or wilful misconduct.

212 This obvious absurdity cannot be sidestepped by trying to distinguish between liability for environmental *damage* (purportedly covered by s. 14.06(2)) and liability for *a failure to comply with an order* to remedy such damage (purportedly covered by s. 14.06(4)). This distinction is entirely artificial. If the AER issues an abandonment order in relation to a licensed property, it effectively creates liability for the underlying condition itself — liability that would still be encompassed by s. 14.06(2). This is evident from the marginal note for s. 14.06(2), "[l]iability in respect of environmental *matters*", which is capacious enough to include liability that flows from a failure to comply with an environmental order. In any event, it is difficult to imagine why Parliament would intend to immunize a trustee from personal liability for an environmental *condition*, but still hold the trustee liable for a failure to comply with an *order* to remedy that exact same condition — and then further, permit the trustee to avoid that very liability by disclaiming the property, but either not permit the trustee to disclaim that property in any other circumstance or make it pointless to do so. This convoluted reasoning not only misreads s. 14.06(4), but also rewrites s. 14.06(2) in the process. It effectively creates a sector specific exemption from bankruptcy law that would prohibit many receivers and trustees that operate in the oil and gas industry from disclaiming assets (see N. Bankes, *Majority of the Court of Appeal Confirms Chief Justice Wittmann's Redwater Decision*, May 3, 2017 (online)).

213 I also cannot accept that Parliament enacted s. 14.06(4) simply to protect trustees from personal liability in the narrow subset of circumstances not already covered by s. 14.06(2) — namely where an environmental condition or environmental damage arises after a trustee's appointment and as a result of the trustee's gross negligence or wilful misconduct — for two main reasons. Firstly, the terms of the provision itself belie this theory. The opening lines of s. 14.06(4) expressly make the limitation of liability "subject to subsection (2)". This indicates that Parliament deliberately intended subs. (2) to supersede subs. (4) in the determination of liability. Thus, where a trustee has caused an environmental condition or environmental damage through its wilful misconduct or gross negligence, the trustee *will still be personally liable*, despite any valid disclaimer under subs. (4). Secondly, there is no evidence, or indeed any rationale, to explain why Parliament would have drafted s. 14.06(4) to protect trustees in such narrow circumstances, through the method of disclaiming property, and to shield them from liability where they cause environmental issues through their own wrongdoing.

214 The majority of this Court accepts that, on its interpretation, no meaningful distinction can be drawn between the protection from personal liability provided by subs. (2) and that provided by subs. (4). Indeed, the majority appears to believe that such a distinction is not even necessary, accepting that "s. 14.06(4) does not provide trustees with protection from personal liability any broader than the protection provided by s. 14.06(2)" (para. 93). However, the effect of this interpretation is to render subs. (4) entirely meaningless and redundant. Trustees would have no reason to exercise their power to disclaim assets, as the only effect of doing so would be to protect them from personal liability from which they are already fully shielded by subs. (2). Section 14.06(4) would therefore serve no purpose whatsoever within Parliament's bankruptcy regime. I cannot understand the logic of Parliament explicitly referring to, and incorporating, the ability of trustees to disclaim assets — and specifically outlining one consequence of that power — simply to mandate that such an action has no meaningful effect. We must presume that Parliament does not speak in vain and did not craft a pointless provision (*J.T.I. MacDonald Corp. c. Canada (Procureure*

générale), 2007 SCC 30, [2007] 2 S.C.R. 610 (S.C.C.) , at para. 87). It is a trite principle of statutory interpretation that every provision of a statute should be given meaning:

> It is presumed that every feature of a legislative text has been deliberately chosen and has a particular role to play in the legislative design. The legislature does not include unnecessary or meaningless language in its statutes; ... it does not make the same point twice.
>
> (R. Sullivan, *Statutory Interpretation* (3rd ed. 2016), at p. 43)

215 This evident absurdity cannot be avoided by suggesting that s. 14.06(4) was created to clarify to trustees that they may be required to expend the entire value of a bankrupt estate to comply with environmental orders, despite valid disclaimers. If Parliament's intent was truly to undermine the disclaimer power in this way, it is difficult to conceive of a more convoluted, tortuous and unclear method to achieve this result than s. 14.06(4). Had Parliament simply sought to make clear to trustees that disclaimer would not allow them to relieve themselves from satisfying environmental liabilities, it could easily have done so directly rather than enacting a provision that describes protection from personal liability they do not actually face.

216 Section 14.06, when read as a whole, indicates that subs. (4) does more than merely protect trustees from personal liability. My colleague has declined to even consider the remaining subsections of s. 14.06 that I have discussed, other than subs. (2). Nonetheless, he says that the plain meaning of a provision cannot be "contorted to make its scheme more coherent" (para. 101). The conclusion that would result from such an approach would be that Parliament simply intended to craft a largely incoherent framework. I disagree that we should reach this conclusion here. As Dickson J. (as he then was) stated in *R. v. Morgentaler* (1975), [1976] 1 S.C.R. 616 (S.C.C.) , at p. 676: "We should pay Parliament the respect of not assuming readily that it has enacted legislative inconsistencies or absurdities." A determination that Parliament designed s. 14.06 as an incoherent whole is inconsistent with the role of the courts in statutory interpretation, which is to read the words of a statute in their entire context, harmoniously with the scheme of the statute. As Ruth Sullivan has noted:

> It is presumed that the provisions of legislation are meant to work together, both logically and teleologically, as parts of a functioning whole. The parts are presumed to fit together logically to form a rational, internally consistent framework; and because the framework has a purpose, the parts are also presumed to work together dynamically, each contributing something toward accomplishing the intended goal.
>
> The presumption of coherence is also expressed as a presumption against internal conflict. It is presumed that the body of legislation enacted by a legislature does not contain contradictions or inconsistencies, that each provision is capable of operating without coming into conflict with any other. [Footnote omitted.]
>
> (*Sullivan on the Construction of Statutes* (6th ed. 2014), at p. 337; see also *R. v. H. (L.)*, 2008 SCC 49, [2008] 2 S.C.R. 739(S.C.C.), at para. 47.)

217 Where it is possible to read the provisions of a statute — especially the various subsections of a single section — in a consistent manner, that interpretation is to be preferred over one that results in internal inconsistency. In my view, as I have set out above, it is possible to read s. 14.06(4) coherently with the remainder of the section. This is the interpretation that Parliament is presumed to have intended. In this case, I see no compelling reason to depart from this presumption.

218 My colleague's analysis is reminiscent of the strictly textual or literal approach to statutory interpretation — the "plain meaning rule" — that this Court squarely rejected in *Rizzo*. This is apparent from the fact that he relies strictly on what he alleges to be the "clear and unambiguous" wording of s. 14.06(4), while discounting the context of the provision. With respect, I am of the view that the Court should rely on the predominant and well-established modern approach to statutory interpretation: the words of an Act must be "'read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament'" (*Rizzo*, at para. 21; *Bell ExpressVu* , at para. 26, both quoting Driedger, at p. 87).

219 In *Rizzo*, Iaccobucci J. explained that "statutory interpretation cannot be founded on the wording of the legislation alone" (para. 21). The Court of Appeal in *Rizzo*, which had adopted the plain meaning interpretation, "did not pay sufficient attention to the scheme of the [Act], its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized" (para. 23).

220 In interpreting s. 14.06(4) of the BIA, the majority similarly relies on the supposed plain meaning of the words of the provision but does not pay sufficient attention to the scheme of s. 14.06 as a whole; nor does it appropriately recognize the context of the words.

221 Even if we were to leave aside the wording of the provision itself and its immediate statutory context, a purposive interpretation would lead to the same result. Consider the consequences of the analysis of the AER or the analysis of my colleague in other cases like this, where an oil company's environmental liabilities exceed the value of its realizable assets. Insolvency professionals, knowing in advance that they can be compelled to funnel all of the estate's remaining assets toward those environmental liabilities (either because they cannot disclaim value-negative assets absent a risk of personal liability or because their disclaimer will be ineffective to prevent this), will never accept mandates in the first place. This is sensible business practice: if the estate's entire realizable value must go toward its environmental liabilities, leaving nothing behind to cover administrative costs, insolvency professionals will have nothing to gain — and much to lose — by stepping in to serve as receivers and trustees, irrespective of whether they are protected from personal liability. Debtors and creditors alike, knowing that this is the case, will have no reason to even petition for bankruptcy. The result is that *none* of a bankrupt estate's assets will be sold — not even an oil company's valuable wells — and the number of orphaned properties will increase. This is a far cry from the objectives of the 1997 amendments to the *BIA* as discussed in Parliament, which were to "encourage [insolvency professionals] to accept mandates" and to "reduce the number of abandoned sites" (Standing Committee on Industry, June 11, 1996, at 15:49). It is difficult to imagine that Parliament would have intended a construction of s. 14.06(4) that explicitly undermines its stated purposes.

222 The majority appears to accept that the purposes of s. 14.06(4) of the BIA included encouraging insolvency professionals to accept mandates in cases where there may be environmental liabilities (paras. 80-81). However, merely protecting trustees from personal liability in such cases will fail to achieve Parliament's desired result. As I have explained, even where prospective trustees face no risk of personal liability, they will be reluctant to accept mandates if provincial entities can require the entire value of a bankrupt's realizable estate to be applied to satisfy environmental obligations.

223 Since I have explained that s. 14.06(4) provides trustees with the power to disclaim assets even where there is no risk of personal liability, it is now necessary to briefly consider whether this power was available to GTL on the facts of this case. Here, the statutory conditions to the exercise of this power were met. The Abandonment Orders clearly relate to the remediation of an "environmental condition" (or "tout fait ... lié à l'environnement" in the French version of the *BIA*, which can be translated literally as "any fact ... related to the environment"). Indeed, even the AER and the OWA have never contested this point. In response to such orders, GTL was therefore entitled to exercise the disclaimer power provided for in s. 14.06(4).

(2) Section 14.06(4) Applies to Alberta's Oil and Gas Industry

224 The AER raised an additional argument that the right of disclaimer is entirely inapplicable in the context of the statutory regime governing the oil and gas industry due to the role played by third-party surface landowners and the nature of the property interests involved which rendered the Crown's super priority under s. 14.06(7) impractical. Martin J.A. (as she then was), writing in dissent at the Alberta Court of Appeal, reached the same conclusion. With respect, I cannot agree. Parliament did not make the disclaimer power in s. 14.06(4) conditional on the availability of the Crown's super priority.

225 In delineating what interests may be disclaimed by a trustee under s. 14.06(4), Parliament used exceptionally broad language. The trustee is permitted to disclaim "any interest" in "any real property". While Redwater's AER-issued licences may not be real property, all of the parties accept that *profits à prendre* and surface leases can be characterized as real property interests. In the context of this case, it is these interests that GTL truly sought to disclaim. The AER argued that s. 14.06(4)

permits the disclaimer only of "true real property", meaning land currently or previously owned by the bankrupt, without any third-party landowners. This interpretation is not consistent with the actual language used by Parliament. Had Parliament intended to restrict the disclaimer power solely to fee simple interests, it could have stated this, rather than referring to "any interest in any real property".

226 Further, the Alberta oil and gas industry is far from the only natural resource sector in which companies traditionally operate on the land of third parties, whether the Crown or private landowners. The potential liability of trustees would explode if the mere presence of these third-party landowners rendered the disclaimer power in s. 14.06(4) entirely inapplicable. The language of the section is clearly broad enough to capture the statutory regime governing Alberta's oil and gas sector.

(3) Conclusion on Operational Conflict

227 In light of this interpretation of s. 14.06(4), I agree with both courts below that there is an operational conflict to the extent that Alberta's statutory regime holds receivers and trustees liable as "licensees" in relation to the disclaimed assets (see chambers judge reasons, at para. 181; C.A. reasons, at para. 57). This conflict is far from hypothetical. Under federal law, GTL is entitled to disclaim the bankrupt's assets affected by the Abandonment Orders. Under the BIA, GTL cannot be compelled to take action with respect to properties it has validly disclaimed, since the act of disclaimer relieves it of any rights, interests and liabilities in respect of the disclaimed properties. But under provincial law, the AER can order GTL to abandon the disclaimed assets, among other things (see para. 11). This is exactly what happened here. Not only did the AER order GTL to complete the work, but it also made the sale of Redwater's valuable assets conditional on GTL either abandoning the non-producing properties itself or packaging those properties with the estate's valuable assets for the purposes of any sale. In doing so, the AER impermissibly disregarded the effect of GTL's disclaimers. This remains the case, irrespective of whether GTL could (or would) ever be held personally liable for the costs of abandoning the properties above and beyond the entire value of the estate.

228 My colleague claims that the AER "has never attempted to hold a trustee personally liable" (para. 107). What is clear is that, on the facts of this case, the AER directly sought to require GTL to perform or pay for the abandonment work itself, whether this is referred to as personal liability or not. It is critical to observe that this litigation began when the AER filed an application seeking to compel GTL to comply with its obligations as a licensee, including the obligation to abandon the non-producing properties. Practically speaking, this amounted to an effort to hold GTL personally liable. Where else would the money required to abandon the disclaimed properties have come from? The value of the estate as a whole was negative, and the AER refused to permit GTL to sell the valuable properties on their own. No purchaser would have agreed to buy all of the assets together. Therefore, GTL had no way to recoup any value from the estate, as Redwater was bankrupt and no longer generating income. The *only* source of funds, in this scenario, was GTL itself. This is why the AER filed suit to compel GTL to carry out Redwater's abandonment obligations. As this makes clear, I cannot agree with the suggestion that the provincial regime has never been utilized to hold trustees personally liable in contravention of federal law. That is precisely what happened in this very case.

229 This conclusion cannot be avoided by referring to the fact that, pursuant to orders of the Alberta courts, GTL has already sold the valuable Redwater assets and the proceeds are being held in trust pending the outcome of this appeal (see majority reasons, at para. 108). This is precisely the result the AER sought to prevent by precluding GTL from selling only the valuable properties, without the disclaimed ones. GTL was able to do so only as a direct result of this litigation.

230 My colleague states that, if the AER "were to attempt to hold GTL personally liable under the Abandonment Orders, this would create an operational conflict between the *OGCA* and the *Pipeline Act*, and s. 14.06(2) of the BIA, rendering the former two Acts inoperative to the extent of the conflict" (para. 107). Thus, even on my colleague's interpretation of s. 14.06 — which I do not accept — an operational conflict does exist on the facts of this case, specifically as a result of the AER's application to the Alberta Court of Queen's Bench seeking to have GTL personally satisfy the environmental obligations associated with the disclaimed assets.

231 All of that being said, creditors with provable claims can still seek payment in accordance with the *BIA*'s priority scheme (*Abitibi*, at para. 98). As I discuss below, the AER's environmental claims remain valid as against the Redwater estate, and it may pursue those claims through the normal bankruptcy process. Thus, even if s. 14.06(4) does not permit GTL to disclaim the

non-producing wells and relieve itself of the environmental obligations associated with them, it is nevertheless the case that the AER cannot compel GTL to satisfy its claims ahead of those of Redwater's secured creditors.

B. Frustration of Purpose

232 The second branch of the paramountcy test is frustration of purpose. Even where dual compliance with both federal and provincial law is, strictly speaking, possible, provincial legislation or provisions will nevertheless be rendered inoperative to the extent that they have the effect of frustrating a valid federal legislative purpose (*Moloney* , at para. 25; *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121 (S.C.C.) , at pp. 154-55; *Canadian Western Bank* , at para. 73). The focus of the analysis is on the effect of the provincial legislation or provisions, not its purpose (*Moloney* , at para. 28; *Husky Oil* , at para. 39).

233 This Court has repeatedly recognized that one of the purposes of the *BIA* is "the equitable distribution of the bankrupt's assets among his or her creditors" (*Moloney* , at para. 32; *Husky Oil* , at para. 7). It achieves this goal through a collective proceeding model — one that maximizes creditors' total recovery and promotes order and efficiency by distributing the estate's assets in accordance with a designated priority scheme (*Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379(S.C.C.) , at para. 22). All claims that are "provable in bankruptcy" are subject to this priority scheme. Exercises of provincial power that have the effect of altering bankruptcy priorities are therefore inoperative because they frustrate Parliament's purpose of equitably distributing the estate's assets in accordance with the federal statutory regime (*Abitibi*, at para. 19; *Husky Oil* , at para. 32).

234 The question here is whether the environmental claims asserted by the AER (i.e., the Abandonment Orders) are provable in bankruptcy. If they are, then the AER is not permitted to assert those claims outside of the bankruptcy process and ahead of Redwater's secured creditors because this would frustrate the purpose of the federal priority scheme. Rather, it must abide by the *BIA* and seek recovery from the estate through the normal bankruptcy procedures (*Abitibi*, at para. 40).

235 In *Abitibi*, this Court established a three-part test, rooted in the language of the *BIA*, to determine whether a claim is provable in bankruptcy: "First, there must be a debt, a liability or an obligation to a *creditor*. Second, the debt, liability or obligation must be incurred *before the debtor becomes bankrupt*. Third, it must be possible to attach a *monetary value* to the debt, liability or obligation" (para. 26 (emphasis in original)). Since there is no dispute that Redwater's environmental obligations arose before it became bankrupt, I limit my analysis below to the first and third prongs of the *Abitibi* test: whether the liability is owed to a creditor, and whether it is possible to attach a monetary value to that liability.

236 The first prong of the *Abitibi* test asks whether the debt, liability or obligation at issue is owed by a bankrupt entity to a creditor. Deschamps J., writing for a majority of the Court, suggested that this is not an exacting requirement: "The *only determination* that has to be made at this point is whether the regulatory body has exercised its enforcement power against a debtor. When it does so, it identifies itself as a creditor, and the requirement of this stage of the analysis is satisfied" (para. 27 (emphasis added)). Though I would not go so far as to suggest that the analysis under the first prong is merely perfunctory or pro forma, and circumstances may well exist where it is not satisfied, Deschamps J. made clear in *Abitibi* that "*[m]ost* environmental regulatory bodies can be creditors", again stressing that government entities cannot systematically evade the priority requirements of federal bankruptcy legislation under the guise of enforcing public duties (para. 27 (emphasis added)). Even Martin J.A., writing in dissent at the Court of Appeal in this case, acknowledged that "*Abitibi* cast[s] the creditor net widely" (para. 186). The language of *Abitibi* admits of no ambiguity, uncertainty or doubt in this regard.

237 The majority suggests that applying *Abitibi* on its own terms will make it "impossible for a regulator *not* to be a creditor" (para. 136 (emphasis in original)). Without seeking to speculate on all possible scenarios, I would simply note that there will be many obvious circumstances in which regulators are not even exercising enforcement powers against particular debtors and the analysis from*Abitibi* can be concluded at a very early stage. Provincial regulators do many things that do not qualify as enforcement mechanisms against specific parties. For example, a regulatory agency may publish guidelines for the benefit of all actors in a certain industry or it may issue a license or permit to an individual. In such cases, any discussion of frustrating federal purposes will not go far. However, as Deschamps J. expressly acknowledged, the first prong of the test will have very broad application. This Court should not feel compelled to limit its scope when*Abitibi* employed clear language in full recognition of its wide-ranging effects.

238 Here, there is no doubt that the AER exercised its enforcement power against a debtor when it issued orders requiring Redwater to perform the environmental work on the non-producing properties. The reasoning is simple: Redwater owes a debt to the AER, and the AER has attempted to enforce that debt by issuing the Abandonment Orders, which require Redwater to make good on its obligation. If Redwater (or GTL, as the receiver and trustee) does not abide by those orders — to the detriment of the estate's other creditors — it can be held liable under provincial law. This is, by any definition, an exercise of enforcement power, which is precisely what *Abitibi* describes. In fact, the AER itself conceded this point *twice* — first before the Court of Queen's Bench, and again at the Court of Appeal (chambers judge reasons, at para. 164; C.A. reasons, at para. 73).

239 The conclusion that I reach with respect to the AER's status as a creditor follows from a straightforward application of *Abitibi*. My colleague, however, seeks to reformulate this prong of the test. He suggests that a regulator is acting as a creditor only where it is not acting in the public interest and where the regulator itself, or the general revenue fund, is the beneficiary of the environmental obligation. He endorses the holding allegedly made in *Northern Badger* that "a regulator enforcing a public duty by way of non-monetary order is not a creditor" (para. 130).

240 In my view, it is neither appropriate nor necessary in this case to attempt to redefine this prong of *Abitibi* and narrow the broad definition of "creditor" provided by Deschamps J. This Court should leave her clear description of the provable claim standard to stand on its own terms. Respectfully, I disagree with the manner in which the majority is attempting to reformulate the "creditor" analysis, for a number of reasons.

241 Firstly, I do not believe that this case represents an appropriate opportunity to revisit the "creditor" stage of the *Abitibi* test. The AER conceded in both of the courts below that it was in fact a creditor of GTL. As a direct result of these concessions, neither the Alberta Court of Queen's Bench nor the majority of the Court of Appeal directly addressed this issue; instead, they merely provided cursory comments. This issue appears to have been raised for the first time by Martin J.A. in her dissenting judgment. However, even her analysis is relatively brief, comprising only three paragraphs and consisting mainly of the statement that the costs of abandonment are "not owed to the Regulator, or to the province" (para. 185). While it is true that the parties briefly addressed this issue in their written and oral submissions to this Court, it was clearly not a substantial focus of their arguments. Without the benefit of considered reasons from the lower courts or thorough submissions on the continued application of the first prong of the test formulated in *Abitibi*, this Court should not attempt to significantly alter it.

242 Secondly, the majority states that no fairness concerns are raised by disregarding the AER's concessions below. It makes this point predominantly because the issue was raised and argued before this Court and because of the AER's unilateral assertion in its letter to GTL in May 2015. However, it is important to note that the effect of the AER's concessions was that GTL and ATB Financial were no longer required to adduce any evidence on this issue (S. N. Lederman, A. W. Bryant and M. K. Fuerst, *The Law of Evidence in Canada* (5th ed. 2018), at p. 1387). This point is important given that the majority's reformulation of the "creditor" requirement under the first prong of the test is highly fact-specific and dependent on the circumstances of the particular case. As a direct result of the AER's concession in the Alberta Court of Queen's Bench, we cannot know what evidence GTL or ATB Financial could have adduced on this issue. Therefore, there may indeed be real prejudice occasioned to these parties by disregarding the AER's concession at this point in time.

243 Thirdly, my colleague relies on the fact that the chambers judge in*Abitibi* found that the Province had already expropriated three of the five sites for which it issued remediation orders and was likely using the orders as a means to offset AbitibiBowater's NAFTA claims. While the chambers judge did in fact make these findings, they were inconsequential to Deschamps J.'s analysis on the "creditor" prong of the test. When applying the test to the facts of*Abitibi*, she explained that the first prong was "easily satisfied" because "the Province had identified itself as a creditor by resorting to [Environmental Protection Act, S.N.L. 2002, c. E-14.2] enforcement mechanisms" (*Abitibi*, at para. 49). She placed no reliance on the fact that the Province might itself derive a financial benefit from its actions and was not enforcing a purely public duty. Her analysis was in no way based on a finding that the Province's actions were a "colourable attempt" to recover a debt or that they demonstrated an "ulterior motive" (majority reasons, at para. 128).

244 Fourthly, in my view, it is incorrect to rely on *Northern Badger* in this case. That decision does not support my colleague's position in the manner he alleges. The issue in *Northern Badger* was also whether environmental remediation orders could be considered claims provable in bankruptcy. However, the crux of the dispute was whether "enforcing the requirement for the proper abandonment of oil and gas wells" (p. 57) gave rise to a provable claim because it would require the receiver to expend funds. Laycraft C.J.A. never addressed the question of whether the regulator could be said to have a contingent claim because it would complete the abandonment work itself and assert a claim for reimbursement. It was in the context of the regulator requiring the receiver to fulfill the abandonment obligations *itself* that the Alberta Court of Appeal discussed the enforcement of a public duty. It is important to carefully examine what the Court of Appeal actually said in this regard:

> The statutory provisions requiring the abandonment of oil and gas wells are part of the general law of Alberta, binding every citizen of the province. All who become licensees of oil and gas wells are bound by them. Similar statutory obligations bind citizens in many other areas of modern life. Rules relating to health, or the prevention of fires, or the clearing of ice and snow, or the demolition of unsafe structures are examples which come to mind. But the obligation of the citizen is not to the peace officer, or public authority which enforces the law. The duty is owed as a public duty by all the citizens of the community to their fellow citizens. When the citizen subject to the order complies, the result is not the recovery of money by the peace officer or public authority, or of a judgment for money, nor is that the object of the whole process. Rather, it is simply the enforcement of the general law. The enforcing authority does not become a "creditor" of the citizen on whom the duty is imposed.
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> It is true that this board has the power by statute to create in its own favour a statutory debt if it chooses to do so. It may, under Sections 91(1) and (2) of the *Oil and Gas Conservation Act* (discussed above) do the work of abandonment itself and become a creditor for the sums expended. But the Board has not done so in this case. Rather it is simply in the course of enforcing observance of a part of the general law of Alberta. [Emphasis added; paras. 33-34.]

245 As is evident from para. 34 of *Northern Badger*, quoted above, the Court of Appeal never stated in that case that a regulator is not — or cannot be — a creditor when it is acting to enforce a public duty. In *Abitibi*, when referring to *Northern Badger*, Deschamps J. explained that the Alberta Court of Appeal "found that the duty to undertake remediation work is owed to the public at large *until the regulator exercises its power to assert a monetary claim*" (*Abitibi*, at para. 44 (emphasis added)). Laycraft C.J.A. accepted that when the regulator fulfills an environmental obligation itself and asserts a claim for reimbursement, it does indeed "become a creditor for the sums expended". Even in this situation, the public is still the ultimate beneficiary of the remediation work. This is largely consistent with Deschamps J.'s formulation of the test for a provable claim. In fact, this Court simply extended this principle in *Abitibi*, concluding that a regulator may also be a creditor with a provable contingent claim when it is sufficiently certain that the regulator will perform the remediation work and advance a claim for reimbursement. This is precisely the situation with the AER and the OWA here, as I will explain in more detail below. The Alberta Court of Appeal did not frame the issue in terms of the three-part test that would later be developed in *Abitibi*; it did not divide its analysis of whether a provable claim existed. However, viewed properly, Deschamps J. dealt with the concerns raised in *Northern Badger* under the third prong of the *Abitibi* test. It is not appropriate to duplicate these principles under the first prong as well, as the majority proposes. For this reason, it is misguided to rely on *Northern Badger* in this appeal to conclude that the AER is not a creditor.

246 However, even if the majority were correct about the reasoning in *Northern Badger* with respect to whether regulators enforcing public duties can be creditors — which I do not concede — I do not accept its conclusion that*Abitibi* did not overturn that reasoning. The Court was well aware of the decision in *Northern Badger* and cited it directly. Despite this, Deschamps J., when formulating the first prong of the test, made no distinction between regulators acting in the public interest and regulators acting for their own benefit. Instead, she stated that "the only determination that has to be made" (para. 27) is whether the regulator is exercising its enforcement powers against a debtor. In referring to *Northern Badger*, she expressly noted that "*[t]he real question is not to whom the obligation is owed*, as this question is answered by the statute, which determines who can require that it be discharged" (paras. 27 and 46 (emphasis added)).

247 Finally, and perhaps most importantly, suggesting that a regulator is not acting as a creditor where its environmental enforcement activities are aimed at the public good and are for the benefit of the public effectively overrules the first prong of

the *Abitibi* test. Under my colleague's approach, it is no longer the case that the *only* determination that has to be made at the creditor stage of the analysis is "whether the regulatory body has exercised its enforcement power against a debtor" (*Abitibi*, at para. 27). Instead, the court must consider whether the regulatory body is enforcing a public duty and whether it stands to benefit financially from the fulfillment of the obligation in question.

248 Provincial regulators, in exercising their statutory environmental powers, will, in some sense, virtually always be acting in some public interest or for the benefit of some segment of the public. Under my colleague's reformulation of the first prong of the *Abitibi* test, it will be nearly impossible to find that regulators acting to protect environmental interests are ever creditors, outside the facts of*Abitibi* itself. As a result, provincial entities will be able to completely disregard the *BIA*'s priority scheme as long as they can plausibly point to some public interest that is furthered by their actions. Such a result strips*Abitibi* of its central holding and entitles provincial regulators to easily upend Parliament's purpose of providing an equitable recovery scheme in bankruptcy for all creditors.

249 In my view, it is insufficient to simply note that the facts of *Abitibi*differ from those of the present appeal (majority reasons, at para. 136). Deschamps J.'s broad articulation of the first prong of the test was in no way made dependent upon the particular facts of *Abitibi*. She sought to provide a clear general framework for determining when a regulator will be classified as a creditor — a framework that the majority's reasons effectively rewrite.

250 Further, it is worth noting that this Court in *Moloney* followed *Abitibi* in applying the broad definition of "creditor". In *Moloney* , this Court concluded that the Province of Alberta was acting as a creditor even though the debt it was collecting was reimbursement for compensating a third party who had been injured by the debtor in a car accident (para. 55). I fail to see how any meaningful distinction can be drawn between that situation and a situation in which a regulator seeks reimbursement for the costs incurred to remedy environmental damage caused to the land of third parties by the debtor.

251 "[G]reat care should be taken" before this Court overturns or overrules one of its prior decisions (*Teva Canada Ltd. v. TD Canada Trust*, 2017 SCC 51, [2017] 2 S.C.R. 317 (S.C.C.) , at para. 65). It is "a step not to be lightly undertaken" (*Craig v. R.*, 2012 SCC 43, [2012] 2 S.C.R. 489 (S.C.C.) , at para. 24). In order to do so, "the Court must be satisfied based on compelling reasons that the precedent was wrongly decided and should be overruled" (*Craig* , at para. 25; see also Teva , at para. 65). The reasons for exercising such caution are clear and sound, namely to ensure "certainty, consistency and institutional legitimacy" and to recognize that "the public relies on our disciplined ability to respect precedent" (*Teva* , at para. 65). When this Court decides that it is necessary to depart from one of its past decision, it should be clear about what it is doing and why.

252 Despite these clear admonitions against this Court too easily overturning its own precedents, that is precisely what the majority proposes to do in this case. Its approach effectively overrules the unequivocal definition of "creditor" provided in*Abitibi* — a considered decision rendered by a majority of this Court a mere six years ago. Not only does the majority fail to provide compelling reasons why Deschamps J.'s clear definition is wrong, but it also does not acknowledge that it is overturning a recent decision of this Court, rejecting the suggestion that this is the impact of its reasoning (para. 136). Further, this is being done without complete and robust submissions on the issue. Such an approach to our own precedents does not serve the goals of certainty, consistency or institutional legitimacy.

253 This Court should continue to apply the "creditor" prong of the test as it was clearly articulated in *Abitibi*. Deschamps J.'s definition ensures that provincial regulators are not able to easily appropriate for themselves a higher priority in bankruptcy and undermine Parliament's priority scheme. It advances the goals of orderliness and fairness in insolvency proceedings. Under that broad standard, the AER plainly acted as a creditor with respect to the Redwater estate. That is likely why it conceded this point in both of the courts below.

254 Since there is no dispute that the second prong of the *Abitibi* test is satisfied, I turn next to the third prong, which asks whether it is sufficiently certain that the regulator will perform the work and make a claim for reimbursement. As explained in *Abitibi* in the context of an environmental order:

> With respect to the third requirement, that it be possible to attach a monetary value to the obligation, the question is whether orders that are not expressed in monetary terms can be translated into such terms. I note that when a regulatory body claims an amount that is owed at the relevant date, that is, when it frames its order in monetary terms, the court does not need to make this determination, because what is being claimed is an "indebtedness" and therefore clearly falls within the meaning of "claim" as defined in s. 12(1) of the *CCAA*.
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> . . . . .
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> The criterion used by courts to determine whether a contingent claim will be included in the insolvency process is whether the event that has not yet occurred is too remote or speculative (*Confederation Treasury Services Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75). In the context of an environmental order, this means that there must be sufficient indications that the regulatory body that triggered the enforcement mechanism will ultimately perform remediation work and assert a monetary claim to have its costs reimbursed. If there is sufficient certainty in this regard, the court will conclude that the order can be subjected to the insolvency process. [Emphasis added; paras. 30 and 36.]

255 In my view, it is sufficiently certain that either the AER or the OWA will ultimately perform the abandonment and reclamation work and assert a monetary claim for reimbursement. Therefore, the final prong of the *Abitibi* test is satisfied. The chambers judge made three critical findings of fact — each of which is entitled to deference on appeal (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.) , at para. 10) — that easily support this conclusion.

256 First, Wittmann C.J. found that GTL was not in possession of the disclaimed properties and, in any event, "has no ability to perform any kind of work on these assets" because the environmental liabilities exceeded the value of the estate itself (para. 170; see also *Abitibi*, at para. 53 where the Court stated that: "Abitibi had no means to perform the remediation work"). He discounted the possibility that any of Redwater's working interest participants would step in to perform the work, even for the small number of Redwater's licensed assets for which such partners existed (chambers judge reasons, at para. 171). In sum, he concluded that "there is no other party who could be compelled to carry out the abandonment work" (para. 172).

257 Two decisions of the Ontario Court of Appeal highlight why this is important. In *Nortel Networks Corp., Re*, 2013 ONCA 599, 6 C.B.R. (6th) 159 (Ont. C.A.), Juriansz J.A. found that the "sufficient certainty" standard was *not* satisfied in respect of certain sites because those sites had already been sold so the purchasers could be compelled to carry out the work on the basis that they were jointly and severally liable for the remediation obligations (paras. 39-40). But in *Northstar Aerospace Inc., Re*, 2013 ONCA 600, 8 C.B.R. (6th) 154 (Ont. C.A.), Juriansz J.A. found that the "sufficient certainty" standard *was* satisfied because there was no purchaser that could be compelled by the regulator to complete the work. While it is true that fresh evidence on appeal revealed that the Ministry of the Environment had commenced the remediation work, Juriansz J.A. found that the fact that there were no subsequent purchasers had grounded the application judge's implicit conclusion regarding sufficient certainty (paras. 16-17). The present case is like *Northstar*, which is perfectly applicable to the facts of this case: there is no purchaser to take on Redwater's assets, and the debtor itself is insolvent. The chambers judge in this case concluded that there was no other party who could be compelled to carry out the work.

258 Second, in light of the fact that neither GTL nor Redwater's working interest participants would (or could) undertake this work, Wittmann C.J. found as a fact that "the AER will ultimately be responsible for [the abandonment] costs" (para. 171). He concluded that "the AER has the power [to seek recovery of abandonment costs] and has actually performed the work on occasion" (para. 168). In fact, in this very case, "the AER has expressly stated an intention to seek reimbursement for the costs of abandoning the renounced assets" (para. 172). This conclusion finds ample support in the record. In a cover letter sent with the Abandonment Orders on July 15, 2015, the AER unambiguously stated that if Redwater failed to abandon the disclaimed properties in accordance with its instructions, "the AER *will, without further notice, use its process to have the properties abandoned*" (GTL's Record, vol. I, at p. 102 (emphasis added)). The letter further stated that "[t]he AER *will exercise all remedies available to it to recover the costs from the liable parties*" (p. 102 (emphasis added)). The chambers judge did not err in relying on these unequivocal statements from the AER itself — to the effect that it *will* have the abandonment work performed and seek reimbursement — to conclude that sufficient certainty existed in this case.

259 Although there is some contrary evidence in the record — principally, the remarks of an AER affiant, who stated that the AER would not abandon the properties — Wittmann C.J. did not commit any palpable and overriding error by giving more weight to the letter that the AER sent contemporaneously with the Abandonment Orders. Likewise, to the extent that the AER sent other correspondence stating that it was not a creditor and that it was not asserting a provable claim, Wittmann C.J. did not err in discounting these self-serving statements as insufficiently probative on the ultimate legal questions. There is therefore no basis to disturb these factual findings or to reweigh this evidence on appeal.

260 Even if the AER's admission that it would abandon the properties itself is not sufficient on its own, Wittmann C.J. made a third critical finding of fact: the AER's only "realistic alternativ[e] to performing the remediation work itself" was to deem the renounced assets to be orphan wells (para. 172). In this circumstance, he found that "the legislation and evidence shows that if the AER deems a well an orphan, *then the OWA will perform the work*" (para. 166 (emphasis added)).

261 In light of these factual determinations, Wittmann C.J. rightly concluded that the "sufficient certainty" standard of *Abitibi* was satisfied. He elaborated on the legal basis for that conclusion as follows:

> Does this situation meet the sufficient certainty criterion as described in *AbitibiBowater*? The answer is no in a narrow and technical sense, since it is unclear whether the AER will perform the work itself or if it will deem the properties subject to the orders, orphans. If so, the OWA will probably perform the work, although not necessarily within a definite timeframe. However, the situation does meet, in my opinion, what was intended by the majority of the Court in *AbitibiBowater*. ... In the result, I find that although not expressed in monetary terms, the AER orders are in this case intrinsically financial. [para. 173]

262 My colleague does not specify the standard of review he applies in overturning Wittmann C.J.'s application of the third prong of the *Abitibi* test to this case. Nevertheless, he disagrees with the chambers judge and holds that the "sufficient certainty" standard is not satisfied. He offers two reasons for overruling Wittmann C.J.'s finding; but in doing so, he does not identify any palpable and overriding error (or, even under the non-deferential standard of correctness, *any* true error) in the chambers judge's ultimate conclusion.

263 The first reason — the purported legal error of determining that the Abandonment Orders are "intrinsically financial" — is little more than a distraction. Even if this is an erroneous application of *Abitibi*, it is evident that Wittmann C.J. was of the view, *at a minimum*, that either the AER or the OWA would complete the abandonment work. And as I describe below, this alone is enough to satisfy the "sufficient certainty" standard. My colleague overemphasizes the import of this stray comment in the context of a thorough set of reasons that otherwise faithfully applies the correct standard. Any legal error on this basis, to the extent that one exists, does not displace the result that the chambers judge reached.

264 The second reason is more substantial. According to Wagner C.J., whether the AER will perform the abandonment work itself or delegate that task to the OWA is dispositive, since it was the Province itself that undertook the reclamation work in*Abitibi*. Here, he suggests, "the OWA is not the regulator" (para. 147) and thus the involvement of the OWA "is insufficient to satisfy the 'sufficient certainty' test" (para. 146).

265 Accepting, for a moment, the potential relevance of this distinction, I am of the view that any uncertainty as to whether the AER *would* delegate the reclamation work to the OWA is questionable. My colleague's emphasis on the self-serving remarks of an AER affiant and the fact that the AER took no immediate steps to perform the abandonment work itself amounts to little more than *post hoc* appellate fact finding, especially in light of the AER's own statement. Although Wittmann C.J. suggested that it was "unclear" whether the AER would complete this work itself, his other findings of fact and law — that the AER has the statutory power to perform the work, that it has actually done so in the past, and that it expressly stated its intention to seek reimbursement here — suggest otherwise. Regardless, Wittmann C.J.'s remark that the "sufficient certainty" standard was not satisfied "in a narrow and technical sense" must be read in this context: he was simply suggesting that there was some uncertainty as to "whether the AER will perform the work itself" as opposed to delegating the work to the OWA (para. 173).

He was *not* implying — let alone concluding as a matter of law — that GTL had failed to prove the third prong of the *Abitibi* test. That reading would vastly overstate, and completely decontextualize, the meaning of a few isolated words in his reasons.

266 The more important problem, though, is that any distinction between the performance of the abandonment work by the AER and its performance by the OWA is meaningless. Form is elevated over substance if it is concluded that the "sufficient certainty" standard is not satisfied when a regulatory body's delegate, as opposed to the regulatory body itself, performs the work. And despite my colleague's suggestion that a regulatory body cannot act strategically to evade*Abitibi*, that is precisely what his analysis permits.

267 We are told that the "OWA's true nature" (majority reasons, at para. 147) — and therefore what purports to distinguish this case from impermissible examples of strategic delegation — rests on four factors: (1) the OWA is a non-profit organization; (2) it has an independent board of directors; (3) it has its own mandate and determines "when and how it will perform environmental work" (para. 148); and (4) it is "financially independent" (para. 148) as it is funded "almost entirely" by a tax on the oil and gas industry (para. 23).

268 The first point is true, but irrelevant. Why does an organization's non-profit status have any bearing on whether it is being used as a vehicle to avoid the "sufficient certainty" standard under *Abitibi*?

269 The second point is not accurate. The AER appoints members of the OWA's board of directors, as does another provincial body, Alberta Environment and Parks — underscoring the extent to which the provincial government can influence the OWA's activities.

270 The third point overstates the OWA's level of independence. The Orphan Fund Delegated Administration Regulation, Alta. Reg. 45/2001, gives the AER substantial power to influence the OWA's decision making. Section 3(2)(b) of the regulation expressly states that, in fulfilling its delegated powers, duties and functions, the OWA must act in accordance with "applicable requirements, guidelines, directions and orders of the [AER]". The regulation also mandates that the OWA provide information to the AER on request and regularly submit reports indicating or containing its budget, "goals, strategies and performance measures", activities for the previous year and financial statements (s. 6). The AER appears to be able to exercise substantial control and oversight over the OWA if it so chooses, including over the manner in which the OWA carries out its environmental work.

271 The fourth point is also inaccurate and would probably be irrelevant even if it were accurate. The Province has provided funding to the OWA in the past, including a $30 million contribution in 2009 and an additional $50,000 in 2012, and it has announced that it will loan the OWA an additional $230 million (see A.F., at para. 99 (alluding to this loan); recall *Abitibi*, at para. 58 where the Court stated that: "Earmarking money may be a strong indicator that a province will perform remediation work").

272 In any event, it is important to note the more salient features of the OWA and its relationship with the AER (and, more generally, with the provincial government). The OWA operates under legal authority delegated to it by the AER and in accordance with a Memorandum of Understanding it has signed with both the AER and Alberta Environment and Parks. The orphan fund itself is administered by the AER, which prescribes and collects industry contributions and remits the funds to the OWA. The OWA cannot increase the industry levy without first obtaining approval from the Alberta Treasury Board. In addition, the *OGCA* makes clear that abandonment costs incurred by any person authorized by the AER — which would include the OWA — constitute a debt payable to the AER (OGCA, s. 30(5)). The record shows that the AER has remitted abandonment costs to the OWA in the past, in the form of security deposits and amounts recovered through successful enforcement action against licensees.

273 The AER and the OWA are therefore inextricably intertwined. We should see this arrangement for what it is: when the AER exercises its statutory powers to declare a property an "orphan" under s. 70(2) of the OGCA, it effectively delegates the abandonment work to the OWA. Treating the OWA's work as meaningfully different from abandonment activities carried out by the AER turns a blind eye to this reality and does nothing to further the underlying principles of paramountcy. To the contrary, it provides provincial regulators with an easy way to evade the test of *Abitibi* through strategic behaviour, thereby

undermining the legitimate federal interest in enforcing the *BIA*'s priority scheme. It should not matter which body carries out the work (see C.A. reasons, at para. 78; OGCA, s. 70(1)(a)(ii)).

274 The majority faults the chambers judge for "failing to consider whether the OWA can be treated as the regulator" (para. 153). However, the chambers judge cannot have erred by failing to appreciate a level of independence that simply does not exist.

275 The majority also offers an alternative conclusion: it is not sufficiently certain that even the OWA will perform the abandonment work (para. 149). Whether the chambers judge's conclusion to the contrary amounts to a palpable and overriding error, or something else, we are not told.

276 Again, such an approach would permit the AER to benefit from strategic gamesmanship by manipulating the timing of its intervention in order to escape the insolvency regime and strip Redwater of its assets. This arbitrary line-drawing exercise, in which a period of 10 years before the wells are abandoned is too long (but presumably some shorter time line would not be), has no basis in law. As Slatter J.A. convincingly observed in his reasons, the AER

> cannot insist that security be posted to cover environmental costs, but at the same time argue that it may be a long time before the Orphan Well Association actually does the remediation. If the Regulator takes security for remediating Redwater's orphan wells, those funds cannot be used for any other purpose. If security is taken, it is no answer that the security might be held for an indefinite period of time; the consequences to the insolvency proceedings and distribution of funds to the creditors are immediate and certain. Further, if security is taken, the environmental obligation has clearly been reduced to monetary terms. [Emphasis added; para. 79.]

277 Moreover, the OWA's estimate of 10 to 12 years was put forward at the start of this litigation more than 3 years ago. Whether that estimate remains accurate after the province's proposed infusion of nearly a quarter of a billion dollars into the orphan fund (A.F., at para. 99) [1] — money that will undoubtedly speed up the OWA's abandonment efforts — is an open question. In any case, the changing factual context highlights the essential problem with the majority's approach: pinning the constitutional analysis on the timing of the OWA's intervention is arbitrary and irrational, as it causes the result to shift based on decisions made by the very actor that stands to benefit from a finding that the "sufficient certainty" standard is not satisfied.

278 All that aside, the chambers judge's recognition that the OWA will "probably" abandon the properties should be enough (chambers judge reasons, at para. 173). Concluding otherwise is not justified, since it would mean applying a stricter certainty requirement than is called for by *Abitibi* itself. Deschamps J. expressly rejected an alternative standard — a "likelihood approaching certainty" — adopted by McLachlin C.J. in dissent (*Abitibi*, at para. 60). But here, dismissing as insufficient the chambers judge's conclusion that the OWA would "probably" complete the work essentially means requiring a "likelihood approaching certainty". Since *Abitibi*does not require absolute certainty, or even a likelihood approaching certainty, Wittmann C.J. did not err in concluding that the third prong was satisfied (see the *Oxford English Dictionary* (online), which defines "probably" as "with likelihood (though not with certainty)"; "almost certainly; as far as one knows or can tell; in all probability; most likely" (online)).

279 After concluding that it is not sufficiently certain that the AER will abandon the sites, the majority goes on to find that the AER's licence transfer restrictions similarly do not satisfy the *Abitibi* test. This is so, it says, because the AER's refusal to approve a licence transfer does not give it a monetary claim against Redwater and because compliance with the Licensee Management Ratio ("LMR") conditions "reflects the inherent value of the assets held by the bankrupt estate" (para. 157). At the outset, I wish to make clear that I have already concluded that, since GTL lawfully disclaimed the non-producing properties under s. 14.06(4) of the BIA, an operational conflict arises to the extent that the AER included those disclaimed properties in calculating Redwater's LMR for the purpose of imposing conditions on the sale of Redwater's assets. In the analysis that follows, I reach that same conclusion under the frustration of purpose aspect of the paramountcy test as well.

280 I take issue with the majority's conclusion regarding the LMR conditions for two reasons. First, this approach elevates form over substance, disregarding Gascon J.'s admonition in *Moloney* that "[t]he province cannot do indirectly what it is precluded from doing directly" (para. 28; see also Husky Oil , at para. 41). Refusing to approve a sale of Redwater's assets

unless GTL satisfies Redwater's environmental liabilities is no different, in substance, from directly ordering Redwater or GTL to undertake that work. This is because the AER achieves the exact same thing — the fulfillment of Redwater's environmental obligations — by making any sale conditional on GTL completing the work itself, posting security or packaging the non-producing assets into the sale, which reduces the sale price by the exact amount of those liabilities and ensures that the purchaser can be compelled, as the subsequent "licensee" under provincial law, to comply with the Abandonment Orders.

281 The only difference between these two exercises of provincial power is the means by which the AER has opted to enforce the underlying obligations. The Abandonment Orders carry a threat of liability for non-compliance; imposing conditions on the sale of Redwater's assets, on the other hand, does not create a liability in a formal sense, but it does preclude any sale from occurring unless and until those obligations are satisfied. Since the trustee must sell the assets in order to carry out its mandate, the *effect* of imposing conditions on the sale of Redwater's assets is the same as that of issuing abandonment orders — and, as my colleague acknowledges, it is the effect of provincial action, not its intent or its form, that is central to the paramountcy analysis (para. 116; see also Husky Oil , at para. 40). In either case, then, the effect of the AER's action is to create a debt enforcement scheme — one that requires the environmental obligations owed to the AER to be discharged ahead of the bankrupt's other debts.

282 Second, it is irrelevant to this analysis that the licensing requirements predate Redwater's bankruptcy and apply to all licensees. This is no different from*Abitibi*, where the obligation to close down and remediate the properties predated AbitibiBowater's bankruptcy and could also have been said to constitute an "inherent" limitation on the value of the regulatory licence. Yet the obligations at issue there were provable claims. So too here. Alberta is, of course, free to affect the priority of claims in non-bankruptcy contexts. For example, it can leverage its licensing power to condition the sale of assets by *solvent* corporations on the payment of outstanding debts to the province. But "once bankruptcy has occurred [the *BIA*] determines the status and priority of the claims" (*Husky Oil* , at para. 32, quoting A. J. Roman and M. J. Sweatman, "The Conflict between Canadian Provincial Personal Property Security Acts and The Federal Bankruptcy Act: The War is Over" (1992), 71 Can. B. Rev. 77, at p. 79).

283 In this case, imposing conditions on the sale of Redwater's valuable assets *does* result in a monetary debt in the AER's favour, whether in the form of: (1) the posting of security; (2) actual completion of the environmental work; or (3) the sale of the non-producing properties to another entity that is then regulated as a "licensee" and, as such, can be compelled under provincial law to complete the work. In each case, the result is the same: the AER is conditioning any sale of Redwater's assets on its ability to recover a pre-existing debt owed to it by the bankrupt.

284 An approach which artificially separates the Abandonment Orders and the transfer requirements in order to treat them as analytically distinct under the *Abitibi* test would cause the paramountcy analysis to turn on irrelevant subtleties in the manner or form in which the province has chosen to exercise its power. The two measures must be seen in tandem as the AER's means of enforcing a debt against the Redwater estate. As I have described, there is no meaningful difference in the bankruptcy context between a formal abandonment order directing a trustee to engage in remediation work and a rigid licensing system that imposes the exact same obligations as a condition of sale — a sale that, if the trustee is to carry out its mandate, *must* occur. The only effect of the majority's analysis is to encourage regulators to collect on their debts in more creative ways. None of this serves the purposes of paramountcy; and, more critically, nothing in that analysis offers insolvency professionals (or regulators, for that matter) clear guidance as to the types of obligations that will or will not satisfy the *Abitibi* test.

285 Since it is sufficiently certain that the AER (or the OWA, as its delegate) will complete the abandonment and reclamation work, all three prongs of the *Abitibi* test are satisfied. The Abandonment Orders are provable claims, and therefore the AER may not compel Redwater or its trustee to fulfill the obligations in question outside of the *BIA*'s priority scheme. Likewise, the AER may not condition the sale of Redwater's valuable assets on the performance of those same obligations.

286 Towards the end of its analysis, the majority makes the point that the AER's enforcement actions in this case facilitate, rather than frustrate, Parliament's intentions behind the *BIA* priority scheme due to the super priority for environmental remediation costs set out in s. 14.06(7) (para. 159). Respectfully, I completely reject this contention. No party attempted to argue that the super priority in subs. (7) was applicable on the facts of this case. Indeed, it is clear that it is not, as the majority itself acknowledges. I cannot accept that where Parliament has set out a particular super priority for the Crown for environmental

remediation costs, secured against specific real property assets of the bankrupt, and where certain conditions are met, it somehow "facilitates" Parliament's priority scheme to, in effect, impose that super priority over other assets, in the absence of those statutory conditions being satisfied. It is wrong to rely on s. 14.06(7) to recognize an effective super priority for the AER in circumstances where the terms of that subsection are inapplicable. Doing so clearly undermines the detailed and comprehensive priority scheme that Parliament set out in the *BIA* to achieve its purposes. Had Parliament wished to extend a Crown super priority for environmental remediation costs beyond the circumstances in s. 14.06(7), it could have done so.

287 As a final note, GTL and ATB Financial advance alternative arguments that some aspects of Alberta's statutory regime, including the definition of "licensee", frustrate the purposes of the 1997 amendments to the *BIA* — purposes that, they say, include protecting insolvency professionals from liability and reducing the number of orphaned sites.

288 It is not strictly necessary for me to address these arguments, since I have already found that there is an operational conflict (the Alberta regime's failure to recognize the lawfulness of GTL's disclaimers) as well as a frustration of purpose on other grounds (interference with the *BIA*'s priority scheme). I would note, however, that GTL has stated that it would immediately seek a discharge if it were required to carry out the abandonment work, which would result in the remaining Redwater assets being surrendered to the OWA. The result in this circumstance, which does not appear to be acknowledged, or which appears to be ignored, in my colleague's reasons, would be *more* orphaned oil wells. To the extent, then, that the 1997 amendments were intended to reduce the number of orphaned properties, that purpose is also frustrated by preventing a receiver or trustee from disclaiming value-negative assets.

IV. Conclusion

289 There is much to be said in the context of this appeal about which outcome will optimally balance environmental protection and economic development. On the one hand, enforcing the AER's remediation orders would effectively wipe out the estate's remaining value and leave all of its creditors (except the AER) without any recovery. It would also likely discourage insolvency professionals from accepting mandates in cases such as this one — potentially resulting in more orphaned properties across the province. On the other hand, permitting GTL to disclaim the non-producing wells and preventing the AER from enforcing environmental obligations before the estate's value is depleted would leave open the question of who, exactly, should foot the bill for remediating the affected land.

290 Whatever the merits of these competing positions, in matters of statutory interpretation this Court is one of law, not of policy. As the majority recognizes, at para. 30, "it is not the role of this Court to decide the best regulatory approach to the oil and gas industry"; decisions on these matters are made — indeed, they *have been made* — by legislators, not judges. And the law in this case supports only one outcome. But this does not mean that the AER is without options to protect the public from bearing the costs of abandoning oil wells. It could adjust its LMR requirements to prevent other oil companies from reaching the point of bankruptcy with unfunded abandonment obligations (as it has already done since this litigation began). It could adopt strategies used in other jurisdictions, such as requiring the posting of security up-front so that abandonment costs are not borne entirely at the end of an oil well's life cycle. One of the interveners, the Canadian Bankers' Association, noted that such systems of up-front bonding are prevalent in American jurisdictions. The AER could work with industry to increase levies so that the orphan fund has sufficient resources to respond to the recent increase in the number of orphaned properties. It could seek judicial intervention in cases where it suspects that a company is strategically using insolvency as a voluntary step to avoid its environmental liabilities (*Sydco Energy Inc (Re)*, 2018 ABQB 75, 64 Alta. L.R. (6th) 156(Alta. Q.B.), at para. 84). And, as I have noted, it can continue to apply the province's statutory regime to all assets of an insolvent or bankrupt debtor that are retained by a receiver or trustee, including wells and facilities that the receiver or trustee seeks to operate rather than sell.

291 The AER may not, however, disregard federal bankruptcy law in the pursuit of otherwise valid statutory objectives. Yet that is precisely what it has done here by effectively displacing the "polluter-pays" principle enacted by Parliament in favour of a "lender-pays" regime, in which responsibility for the bankrupt's environmental liabilities is transferred to the estate's creditors. Our paramountcy jurisprudence does not permit that result.

292 For the foregoing reasons, I would dismiss the appeal and affirm the orders made by the chambers judge.

Appeal allowed.

Pourvoi accueilli.

Appendix

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 14.06 (1) No trustee is bound to assume the duties of trustee in matters relating to assignments, bankruptcy orders or proposals, but having accepted an appointment in relation to those matters the trustee shall, until discharged or another trustee is appointed in the trustee's stead, perform the duties required of a trustee under this Act.

(1.1) In subsections (1.2) to (6), a reference to a trustee means a trustee in a bankruptcy or proposal and includes

(a) an interim receiver;

(b) a receiver within the meaning of subsection 243(2); and

(c) any other person who has been lawfully appointed to take, or has lawfully taken, possession or control of any property of an insolvent person or a bankrupt that was acquired for, or is used in relation to, a business carried on by the insolvent person or bankrupt.

. . . . .

(2) Notwithstanding anything in any federal or provincial law, a trustee is not personally liable in that position for any environmental condition that arose or environmental damage that occurred

(a) before the trustee's appointment; or

(b) after the trustee's appointment unless it is established that the condition arose or the damage occurred as a result of the trustee's gross negligence or wilful misconduct or, in the Province of Quebec, the trustee's gross or intentional fault.

(3) Nothing in subsection (2) exempts a trustee from any duty to report or make disclosure imposed by a law referred to in that subsection.

(4) Notwithstanding anything in any federal or provincial law but subject to subsection (2), where an order is made which has the effect of requiring a trustee to remedy any environmental condition or environmental damage affecting property involved in a bankruptcy, proposal or receivership, the trustee is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,

(a) if, within such time as is specified in the order, within ten days after the order is made if no time is so specified, within ten days after the appointment of the trustee, if the order is in effect when the trustee is appointed, or during the period of the stay referred to in paragraph (b), the trustee

(i) complies with the order, or

(ii) on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property, or any right in any immovable, affected by the condition or damage;

(b) during the period of a stay of the order granted, on application made within the time specified in the order referred to in paragraph (a), within ten days after the order is made or within ten days after the appointment of the trustee, if the order is in effect when the trustee is appointed, by

(i) the court or body having jurisdiction under the law pursuant to which the order was made to enable the trustee to contest the order, or

(ii) the court having jurisdiction in bankruptcy for the purposes of assessing the economic viability of complying with the order; or

(c) if the trustee had, before the order was made, abandoned or renounced or been divested of any interest in any real property, or any right in any immovable, affected by the condition or damage.

(5) The court may grant a stay of the order referred to in subsection (4) on such notice and for such period as the court deems necessary for the purpose of enabling the trustee to assess the economic viability of complying with the order.

(6) If the trustee has abandoned or renounced any interest in any real property, or any right in any immovable, affected by the environmental condition or environmental damage, claims for costs of remedying the condition or damage shall not rank as costs of administration.

(7) Any claim by Her Majesty in right of Canada or a province against the debtor in a bankruptcy, proposal or receivership for costs of remedying any environmental condition or environmental damage affecting real property or an immovable of the debtor is secured by security on the real property or immovable affected by the environmental condition or environmental damage and on any other real property or immovable of the debtor that is contiguous with that real property or immovable and that is related to the activity that caused the environmental condition or environmental damage, and the security

(a) is enforceable in accordance with the law of the jurisdiction in which the real property or immovable is located, in the same way as a mortgage, hypothec or other security on real property or immovables; and

(b) ranks above any other claim, right, charge or security against the property, despite any other provision of this Act or anything in any other federal or provincial law.

(8) Despite subsection 121(1), a claim against a debtor in a bankruptcy or proposal for the costs of remedying any environmental condition or environmental damage affecting real property or an immovable of the debtor shall be a provable claim, whether the condition arose or the damage occurred before or after the date of the filing of the proposal or the date of the bankruptcy.

Footnotes

1 I am assuming that the AER's factum is accurate in referring to the existence and amount of this loan (which no other party contested).

End of Document

TAB 15

2023 SKCA 120
Saskatchewan Court of Appeal

Eye Hill (Rural Municipality) v. Saskatchewan

2023 CarswellSask 548, 2023 SKCA 120, 2023 A.C.W.S. 5464, 487 D.L.R. (4th) 565, 9 C.B.R. (7th) 228

Rural Municipality of Eye Hill No. 382 (Appellant / Applicant) And His Majesty the King, Saskatchewan (as represented by the Minister of Energy and Resources) and BDO Canada Limited in its capacity as Receiver of Bow River Energy Ltd. (Respondents / Respondents)

Leurer C.J.S., Jackson, Caldwell JJ.A.

Heard: October 4, 2023
Judgment: November 1, 2023
Docket: CACV4169

Proceedings: affirming *Eye Hill (Rural Municipality) v. Saskatchewan (Minister of Energy)* (2023), 6 C.B.R. (7th) 259, 2023 SKKB 52, 2023 CarswellSask 141, M.R. McCreary J.A., ex officio (Sask. K.B.)

Counsel: Russell Gregory, for Appellant
James Rose, Shawna Sparrow, for His Majesty the King, Saskatchewan (as Represented by the Minister of Energy and Resources)
Keely Cameron, Adam Williams, for BDO Canada Limited in its capacity as receiver of Bow River Energy Ltd.

Subject: Insolvency

APPEAL by municipality from judgment reported at *Eye Hill (Rural Municipality) v. Saskatchewan (Minister of Energy)* (2023), 2023 SKKB 52, 2023 CarswellSask 141, 6 C.B.R. (7th) 259 (Sask. K.B.), finding that Ministry of Energy and Resources had priority over undistributed proceeds realized by receiver during company's receivership over municipality's claim for unpaid property taxes.

***Caldwell J.A.*:**

1 This appeal involves a dispute between the rural municipality of Eye Hill No. 382 [RM] and the Ministry of Energy and Resources [Ministry] over certain undistributed proceeds realised by BDO Canada Limited [Receiver] during the receivership of Bow River Energy Ltd. [Bow River]. A Court of King's Bench Chambers judge (ex officio) held that the Ministry has priority to these funds: Rural Municipality of Eye Hill v Saskatchewan, 2023 SKKB 52 (Sask. K.B.) , 6 CBR (7th) 259 [Decision]. I would dismiss the RM's appeal against the *Decision* for the reasons that follow.

2 The RM's claim to the receivership proceeds relates to unpaid property taxes owing by Bow River pursuant to *The* Municipalities Act, SS 2005, c M-36.1. The Ministry's claim arises under licences to extract oil and gas, which it had granted to Bow River on the condition that Bow River assume the end-of-life obligations to abandon its wells by securing them against leakage, removing surface infrastructure and remedying contamination.

3 In the *Decision*, the Chambers judge ruled that the receivership proceeds were payable to the Ministry in priority to property taxes owing to the RM. The Chambers judge gave several reasons for this result, but the principal or controlling reasons were that: (a) orders made in failed proceedings involving Bow River under the Companies' Creditors Arrangement Act, RSC 1985, c C-36 [CCAA], did not affect the subsequent receivership proceedings; and (b) the Ministry did not have a claim provable in bankruptcy because it was not a creditor under the analysis set out in Newfoundland and Labrador v AbitibiBowater Inc. 2012 SCC 67, [2012] 3 SCR 443 [Abitibi], and Orphan Well Association v Grant Thornton Ltd. 2019 SCC 5, [2019] 1 SCR

150 [Redwater]. Although the RM challenges other aspects of the *Decision*, it is only necessary to address these two reasons for the Chambers judge's decision.

4 Dealing first with the *CCAA* orders, as part of her reasoning the Chambers judge held that the *CCAA* orders "are not applicable to these [receivership] proceedings" and, in any event, "no amounts were required to be paid during the *CCAA* proceedings under the *CCAA* orders relied on [by the RM]" (*Decision* at para 26). Importantly, the Alberta Court of King's Bench, where the *CCAA* matters were initiated and heard, had terminated those proceedings prior to the appointment of the Receiver in Saskatchewan. The termination of the *CCAA* proceedings meant that the orders made within those proceedings had lapsed — i.e., they were, as the Chambers judge remarked, "not applicable". As part of her analysis of the *CCAA* issue, the Chambers judge agreed with the Receiver that "a creditor should not be permitted to lie in the weeds" by not advancing its claim during the currency of *CCAA* proceedings (at para 35). The RM attacks all parts of the Chambers judge's reasoning on this issue.

5 In addressing the RM's arguments on the *CCAA* orders, I agree that the orders did not establish a priority regime. I also respectfully conclude that the record does not support the conclusion that the RM may be criticized for not advancing its claim earlier than it did. Nonetheless, these disagreements do not undermine the Chambers judge's principal findings regarding the *CCAA* orders, where she correctly held that they: (a) did not impose a payment obligation on Bow River beyond the statutory requirements of *The Municipalities Act*; and (b) had not established a trust in favour of the RM. In short, there is no error of law in the Chambers judge's overall conclusion that the *CCAA* orders had no bearing on the RM's claim under the receivership.

6 I turn next to the Chambers judge's analysis under *Abitibi* and *Redwater*. In brief terms, the reasoning in those two cases is used to determine when environmental obligations constitute a claim provable in bankruptcy. Here, the RM first argues that *Redwater*, which interpreted an Alberta regulatory scheme, does not translate to Saskatchewan as easily as the Chambers judge thought. This is a long-bow argument that does not reach its target. While there are minor differences, the Ministry is responsible for a regulatory scheme established under *The* Oil and Gas Conservation Act, RSS 1978, c O-2, that is the equivalent of the Alberta regime considered in *Redwater*. At salient points, the two regimes are nearly identical — e.g., the regulator has the power to enforce a licensee's environmental obligations as against its receiver or trustee in bankruptcy. Therefore, the reasoning in *Redwater* is, in my view, readily applicable in Saskatchewan, just as the Chambers judge concluded.

7 In terms of the application of *Abitibi* and *Redwater* to the facts of this matter, I find that the Chambers judge correctly interpreted *Redwater* as applying in the circumstances of the receivership; its ratio as being: "for an environmental obligation to be considered a claim provable in bankruptcy, the three requirements set out in [*Abitibi*] must be met" (*Decision* at para 45). In simple terms, the *Abitibi* requirements are these:

> (a) there must be a debt, a liability or an obligation to a creditor;
>
> (b) the debt, liability or obligation must have been incurred before the time of bankruptcy; and
>
> (c) it must be possible to attach a monetary value to the debt, liability or obligation.

8 Relevant to this appeal, the majority of the Supreme Court in *Redwater* found that the first part of the *Abitibi* test — a debt, liability or obligation owing to a creditor — was not met in the context of an Alberta regulator's claim for unfulfilled end-of-life environmental obligations owing by an oil-and-gas-well licensee that was subject to bankruptcy proceedings:

> [122] In my view, both concerns raised by the Regulator have merit. As I will demonstrate, *Abitibi* should not be taken as standing for the proposition that a regulator is always a creditor when it exercises its statutory enforcement powers against a debtor. On a proper understanding of the "creditor" step, it is clear that the Regulator acted in the public interest and for the public good in issuing the Abandonment Orders and enforcing the [Liability Management Rating] requirements and that it is, therefore, not a creditor of Redwater. It is the public, not the Regulator or the General Revenue Fund, that is the beneficiary of those environmental obligations; the province does not stand to gain financially from them. Although this conclusion is sufficient to resolve this aspect of the appeal, for the sake of completeness, I will also demonstrate that the chambers judge erred in finding that, on these facts, there is sufficient certainty that the Regulator will ultimately perform

> the environmental work and assert a claim for reimbursement. To conclude, I will briefly comment on why the *effects* of the end-of-life obligations do not conflict with the priority scheme in the [*Bankruptcy and Insolvency Act*, RSC 1985, c B-3].
>
> (Emphasis in original)

9 This analysis translates directly into the facts of this case. On this basis, there is no error in the Chambers judge's conclusion that the Ministry is not a creditor of Bow River. As in *Redwater*, the Ministry is acting in a regulatory capacity and exercising its powers in the public interest to enforce the fulfillment of the public duties Bow River assumed when it obtained oil and gas well licences from the Ministry. The Court in *Redwater* held that a regulator exercising a power to enforce a public duty is not a creditor of the person who is subject to that duty. Similarly, while it may receive funds through its enforcement efforts, the Ministry, like the regulator in *Redwater*, does not stand to gain financially from enforcing *The Oil and Gas Conservation Act* and regulations thereunder. As the Chambers judge concluded, the Ministry is not a "creditor" within the meaning of the first part of the *Abitibi* test.

10 Since the Ministry is not a creditor, its claim is not provable in bankruptcy. This means there is no basis to set aside the *Decision*. As occurred in *Redwater*, the conclusion under the first part of the *Abitibi* test is sufficient to resolve the RM's appeal. In short, the Chambers judge's determinations that the Ministry's claim is not provable in bankruptcy and that the Ministry therefore ranked in priority to the RM withstand appellate scrutiny.

11 In the result, I would dismiss the appeal largely for the reasons of the Chambers judge on the issues of the nature and scope of the *CCAA* orders and under the first part of the *Abitibi* test. There is no need to examine the RM's criticism of other parts of the *Decision*. I would make no order as to costs.

***Leurer C.J.S.*:**

I concur.

***Jackson J.A.*:**

I concur.

Appeal dismissed.

TAB 16

2023 ABKB 488
Alberta Court of King's Bench

Re Mantle Materials Group, Ltd

2023 CarswellAlta 2276, 2023 ABKB 488, [2023] 10 W.W.R. 453,
2023 A.C.W.S. 4298, 61 Alta. L.R. (7th) 406, 9 C.B.R. (7th) 86

In the Matter of the Bankruptcy and Insolvency Act, RSC 1985, c B-3, as Amended

And In the Matter of the Notice of Intention to Make a Proposal of Mantle Materials Group, Ltd

Colin C.J. Feasby J.

Heard: August 15, 2023
Judgment: August 28, 2023
Docket: Calgary 2301-10358

Counsel: Tom Cumming, Stephen Kroeger, for Mantle Materials Group, Ltd.
Alexis Teasdale, Joel Schachter, for Travelers Capital Corp
Pantelis Kyriakakis, for Proposal Trustee, FTI Consulting Canada Inc.
Doug Nishimura, for Alberta Environment and Protected Areas
Darren Bieganek, for 945441 Alberta Ltd

Subject: Civil Practice and Procedure; Environmental; Insolvency

DETERMINATION of creditor's rank in debtor's proposal.

***Colin C.J. Feasby J.*:**

Introduction

1 Mantle Materials Group, Ltd. applied for an extension of time to make a proposal pursuant to the Bankruptcy and Insolvency Act, RSC 1985, c B3 s 50.4(8), approval of various charges on the bankrupt estate ("Restructuring Charges") including the priority of those charges, and approval of the payment of certain prefiling debts to creditors whose support is required to perform environmental reclamation work that will be integral to the pending proposal. The application was granted with a temporary proviso with respect to the priority of the Restructuring Charges over certain equipment to ensure that Travelers Capital Corp, a secured lender, was not prejudiced prior to the release of these Reasons.

2 Mantle advises that the proposal that it intends to make will not allow payment to any creditors before Mantle has satisfied its end of life obligations stemming from Environmental Protection Orders issued by Alberta Environment and Protected Areas ("AEPA" formerly Alberta Environment and Parks) with respect to several gravel producing properties. Mantle submits that this is what is required by Orphan Well Association v Grant Thornton Ltd 2019 SCC 5 (“Redwater”) because the environmental remediation obligation is an obligation of the company that must be satisfied prior to distributions to creditors. AEPA supports Mantle's position.

3 Travelers asserts that it has priority with respect to security in certain equipment and Travelers' ability to realize on its security should not be postponed until after the remediation work has been completed to AEPA's satisfaction and subordinated to the Restructuring Charges. Travelers offers a different interpretation of *Redwater*. Travelers contends that *Redwater* held that an end of life environmental obligation need only be satisfied using assets encumbered by or related to the end of life obligation. Travelers submits the Court should find that a creditor with security over assets unrelated to assets burdened with the environmental remediation obligation may realize on such security without delay.

Background

4 Mantle operates 14 gravel pits on public land pursuant to surface material leases issued by AEPA. Mantle also operates 10 gravel pits on private land pursuant to royalty agreements with the landowners.

5 Mantle acquired its gravel producing assets in 2021 in the *Companies' Creditors Arrangement Act* proceedings for JMB Crushing Systems Inc. and associated companies. [1] Financial liabilities of JMB were compromised and undesired assets were transferred to a residual company pursuant to a Reverse Vesting Order. The desired assets remained in JMB and its subsidiary 2161889 Alberta Ltd, both of which then amalgamated with Mantle on May 1, 2021.

6 Following the commencement of the JMB CCAA proceedings, AEPA issued Environmental Protection Orders ("EPOs") to JMB and 216 in respect of some of the gravel producing properties.

7 EPOs are issued pursuant to AEPA's authority under the Environmental Protection and Enhancement Act, RSA 2000, c E 12 s 140. An AEPA inspector is permitted to "issue an environmental protection order regarding conservation and reclamation to an operator directing the performance of any work or the suspension of any work if in the inspector's opinion the performance or suspension of the work is necessary in order to conserve and reclaim the land."

8 An EPO issued by AEPA in respect of end of life reclamation is similar in nature to an Abandonment and Reclamation Order ("ARO") issued by the Alberta Energy Regulator ("AER"). Indeed, all the parties in the present case proceeded on the basis that an EPO issued by AEPA had the same legal effect and should be subject to like treatment in insolvency proceedings as an ARO issued by the AER.

9 The EPOs issued by AEPA to JMB address end of life reclamation steps to be taken at various gravel producing or formerly gravel producing assets operated by JMB on both public and private land.

10 The original Reverse Vesting Order presented to the Court in the JMB CCAA proceedings sought to absolve the directors of JMB and 216 of responsibility for the EPOs and sought to usurp AEPA's regulatory role by putting the Court in a supervisory role with respect to the performance of reclamation work by Mantle and compliance with the EPOs. AEPA objected to the original proposed Reverse Vesting Order.

11 As a result of AEPA's objections, the Court approved a revised Reverse Vesting Order that provided that the order did not affect the liability of JMB, 216, or the directors of those companies for "Compliance Issues" or performing "Reclamation Obligations" in respect of the various gravel producing properties. Mantle accordingly remained liable for the EPOs issued with respect to both the properties acquired in the amalgamation with JMB and 216 and the properties now possessed by the residual company. Mantle negotiated a plan with AEPA for the reclamation work to be done to satisfy the EPOs.

12 Following completion of the JMB CCAA proceedings, Mantle entered a loan transaction with Travelers. Travelers loaned Mantle $1,7000,000 for the acquisition of equipment for use in its operations. Mantle granted Travelers a purchase money security interest (PMSI) over the equipment. The security interest was registered in the Alberta Personal Property Registry. Pursuant to an agreement between Travelers, Mantle, and Fiera Private Debt Fund V LP, which holds a general security interest in all of Mantle's present and after acquired property, Travelers' security interest in the equipment was designated to have first priority. As of July 21, 2023, Mantle owed Travelers just short of $1.1 million.

13 Mantle experienced operational problems and was burdened with excessive debt inherited from the JMB CCAA proceedings and incurred in the period following the acquisition of the gravel producing properties. Mantle's difficulties were compounded by the significant reclamation obligations it was required to complete to satisfy the EPOs. On July 14, 2023, Mantle filed a notice of intention to make a proposal under s 50.4 of the BIA.

14 On August 15, 2023, I granted an extension of the BIA stay period and the time period to permit Mantle to make its proposal. I further approved the creation and priority ranking of various Restructuring Charges, including an Administration

Charge, a Directors & Officers Charge, and an Interim Lending Facility Charge. I was satisfied that the participation of lawyers, insolvency professionals, and directors and officers was required for the proposal to succeed. I was further satisfied that the Interim Lending Facility, which is to be primarily used to fund reclamation work, is necessary for the success of the proposal.

15 Travelers' argued that the Restructuring Charges should not have priority over Travelers' security interest in the equipment and that Travelers should be able to be paid out or realize on its security without delay. Mantle, supported by AEPA, submitted that the Restructuring Charges were necessary to put the proposal into effect and that the main plank of the proposal was the completion of the reclamation work to satisfy the EPOs. Mantle is of the view that the value of the gravel pits that are still active exceeds the amount of the reclamation obligations. Mantle has also posted more than $1 million as security with AEPA which will be returned upon completion of the reclamation obligations to AEPA's satisfaction. Mantle submits that Travelers should not be permitted to realize on its security prior to the completion of the reclamation work because if it were allowed to do so, that would jeopardize Mantle's ability to complete the reclamation work and thereby jeopardize its ability to make a proposal to its creditors.

16 I granted an Order to allow work on the pending proposal, including reclamation work, to get underway while preserving Travelers' position pending these Reasons. The Order provided, in part, as follows:

> The Charges shall constitute a security and charge on the Property and, with the exception of the security interests in favour of Travelers registered in the Alberta Property Registry as base registration number 21100725361 (the "**Travelers' Security Interests**"), such Charges shall rank in priority to all other security interests, trusts, liens, charges, deemed trusts, encumbrances and claims of secured creditors, statutory or otherwise in favour of any person, including liens and trusts created by federal and provincial legislation (collectively, the "**Encumbrances**"), provided, however, that the relative priority of Charges and the Travelers' Security Interests is subject to further order of the Court . . .

Redwater, Manitok, Trident, and Stare Decisis

17 Mantle and AEPA submit that three decisions dictate the outcome of this case: *Redwater; Manitok Energy Inc (Re)*, 2022 ABCA 117; and *Orphan Well Association v Trident Exploration Corp*, 2022 ABKB 839. These decisions, they say, stand for the principle that end of life environmental obligations must be satisfied before any creditors may recover and that the whole estate of the insolvent entity is to be used to satisfy such end of life environmental obligations. This rule leaves no room for those with security in assets unrelated to the environmental condition or damage to realize on that security until end of life obligations have been satisfied using, if necessary, the unrelated assets in which they have security.

18 Travelers submits that Mantle and AEPA are wrong that *Redwater* and *Manitok* are controlling and that instead the present case is one of "first instance." *Redwater* and *Manitok* indicate that there is an exception to the rule posited by Mantle and AEPA for assets unrelated to the environmental condition or damage and that it is for this Court to give that exception shape. Travelers, citing *R v Comeau*, 2018 SCC 15 and *R v Sullivan*, 2022 SCC 19, further asserts that *Trident* at para 66 67 is inconsistent with *Redwater* and *Manitok* and "violates the doctrine of vertical *stare decisis* . . . " *Trident*, Travelers argues, should not be followed because of its conflict with *Redwater* and *Manitok*.

19 Rather than discussing a basic concept like *stare decisis* in Reasons, I normally just ask what the relevant cases and statutes say the law is and then apply the law to the facts of the case before me. Travelers, however, has raised the issue of *stare decisis* and provided me with some authorities, making it clear that they attach some importance to it.

20 As a judge of a court of first instance, the principle of vertical *stare decisis* provides that I am bound to follow the *ratio decidendi* of decisions of higher courts. The inimitable Master Funduk explained: "The judicial pecking order does not permit little peckers to overrule big peckers. It is the other way around": South Side Woodwork v R.C. Contracting, 1989 CanLII 3384 (AB KB) at para 53.

21 The Court held in *Comeau* at para 26 "[s]ubject to extraordinary exceptions, a lower court must apply the decisions of higher courts to the facts before it." None of the exceptions apply in the present case. The issue, as will be come clear later in

these Reasons, is whether there is a decision that is on point that must be followed or whether the reasons of the Supreme Court of Canada and the Court of Appeal left the question open.

22 The principle of horizontal *stare decisis* requires that judges of the same Court pay heed to each others' decisions. This is particularly important in the commercial arena where parties plan their affairs and make significant investment decisions based on the law that emerges from this Court.

23 Kasirer J, writing for the Court, observed in *Sullivan* at para 65 "Horizontal *stare decisis* applies to courts of coordinate jurisdiction within a province . . . While not strictly binding in the same way as vertical *stare decisis*, decisions of the same court should be followed as a matter of judicial comity, as well as for the reasons supporting *stare decisis* generally."

24 Kasirer J explained in *Sullivan* at para 75 that a Court should only depart from horizontal *stare decisis* if:

1. The rationale of an earlier decision has been undermined by subsequent appellate decisions;

2. The earlier decision was reached per incuriam ("through carelessness" or "by inadvertence"); or

3. The earlier decision was not fully considered, e.g. taken in exigent circumstances.

25 Vertical *stare decisis* requires me to determine the *ratio decidendi* of *Redwater* and *Manitok* while horizontal *stare decisis* demands that I determine the *ratio decidendi* of *Trident* with respect to the question before me - whether the whole of a debtor's estate, including unrelated assets, must be used to satisfy end of life environmental obligations prior to any distribution to creditors.

26 Justices Côté, Brown, and Rowe writing for themselves and Wagner CJC in dissent in R v Kirkpatrick, 2022 SCC 33 at para 127 explained what the *ratio decidendi* of a decision is:

> The *ratio decidendi* of a decision is a statement of law, not facts, and "[q]uestions of law forming part of the *ratio* . . . of a decision are binding . . . as a matter of *stare decisis*." A question of law cannot, therefore, be confused with the various factual matrices from which that question of law might arise [citations omitted].

27 The *ratio decidendi* of a case can be difficult to separate from *obiter dictum*, which is an expression of opinion that is not essential to a decision. Binnie J explained in R v Henry, 2005 SCC 76 at para 52: "the submissions of the attorneys general presuppose a strict and tidy demarcation between the narrow *ratio decidendi* of a case, which is binding, and *obiter*, which they say may safely be ignored. I believe that this supposed dichotomy is an oversimplification of how the common law develops."

28 The discussion that follows shows that the issue in the present case is not one of distinguishing between *ratio decidendi* and *obiter dictum*; rather, it is to what extent the Court is bound by what *Redwater* and *Manitok* imply or, perhaps more accurately, what the parties infer from those decisions. With *Trident*, the question is whether the *ratio decidendi*, which is clear, applies on the facts of the present case.

29 What does *Redwater* say about environmental obligations and unrelated assets? Wagner CJC, writing for the majority, pointed out that Redwater's environmental liabilities were not required to be satisfied with unrelated assets. He held at para 159:

> it is important to note that Redwater's only substantial assets were affected by an environmental condition or damage. Accordingly, the Abandonment Orders and LMR requirements did not seek to force Redwater to fulfill end of life obligations with assets unrelated to the environmental condition or damage. In other words, recognizing that the Abandonment Orders and LMR requirements are not provable claims in this case does not interfere with the aims of the *BIA* — rather, it facilitates them [emphasis added].

30 Travelers submits that Wagner CJC chose his words carefully and that the only plausible inference from those words is that unrelated assets cannot be conscripted to satisfy end of life environmental obligations. Though he may have chosen his words carefully in the sense that he did not want to foreclose a scenario where assets were so unrelated to an environmental

obligation that they should not be called upon to satisfy the environmental obligation, he did not provide any guidance as to what he meant by "assets unrelated" or how unrelated the assets must be to escape the reach of the regulator.

31 The Court of Appeal in *Manitok* addressed the question of whether a debtor's oil and gas assets could be divided into two pools, one consisting of valuable assets and the other consisting of assets burdened by environmental obligations. The Court viewed the situation in *Manitok* to be the same as in *Redwater* where the proceeds of the sale of valuable oil and gas assets "had to be used by Redwater's trustee to satisfy abandonment and reclamation obligations before any distribution to secured creditors" (para 31). The Court went on at para 31 to explain how it interpreted *Redwater*:

> The point is that the outcome of ***Redwater*** demonstrates that the Supreme Court of Canada did not treat Redwater's assets as falling into different pools. All of the oil and gas assets were treated collectively as being contaminated, and they all had to answer for the abandonment and reclamation obligations attached to the disclaimed assets. None of the other oil and gas assets were 'assets unrelated' to the other oil and gas assets. Manitok is in exactly the same position. The 'substantial assets' of Manitok are the same as the 'substantial assets' of Redwater.

32 Though the Court of Appeal adverted in *Manitok* to the question of whether in theory unrelated assets could not be called upon to satisfy environmental obligations it deferred the question because it did not have to be decided given the Court's conclusion that all of Manitok's substantial assets were related to the environmental obligations. The Court held at para 36:

> ***Redwater*** confirms that the proceeds of the sale of those assets must be applied first towards the satisfaction of abandonment and reclamation obligations. To the extent that there is any issue about it, the status of assets completely unrelated to the oil and gas business can be left for another day [emphasis added].

33 Mantle and AEPA argue that Wagner CJC's words in para 159 must be viewed in the context of the whole ruling in *Redwater*. Wagner CJC held that environmental obligations are a corporate or estate obligation that must be satisfied before any creditor claims (para 98; see also, *Manitok* at para 17, 30, & 35). According to Mantle and AEPA, the logic of this ruling leaves no room for the exception for assets unrelated to the environmental condition or damage asserted by Travelers.

34 The reference to "assets unrelated" in *Redwater* unaccompanied by any explanation followed by the Court of Appeal's statement in *Manitok* that it was leaving the issue for "another day" indicates that there is no *ratio decidendi* in those cases that binds me in the present case. As I will explain below, the facts of the present case do not require me to decide whether Travelers is correct that some category of assets unrelated to the environmental condition or damage in issue may not be used to satisfy environmental regulatory obligations or Mantle and AEPA are correct that all the assets that comprise the estate of a debtor must be used to address environmental regulatory obligations before creditor claims are paid.

35 That Redwater and Manitok's substantial assets were all oil and gas assets was not surprising. Many oil and gas companies do not own much in the way of assets other than oil and gas rights and the equipment required to produce oil and gas from those interests in land such as compressors, pumpjacks, and tanks. And even this kind of equipment may be leased instead of owned. Jack R Maslen & Tiffany Bennett, "Going Green? New Interpretations of Redwater from Canada's Natural Resource Sectors" in in Jill Corrani Nadeau & D. Blair Nixon, eds., *Annual Review of Insolvency Law*, (Toronto: Thomson Reuters, 2022) 105 concluded at 119, "based on *Manitok*, assets or proceeds that relate in any way to the debtor's oil and gas business will be used to satisfy non monetary end of life obligations. For most oil and gas producers, this likely means all of their property." A question to be considered later in these Reasons is whether Mantle, a gravel company, is any different than oil and gas companies like Redwater and Manitok.

36 Whether assets of an oil and gas company other than oil and gas rights are unrelated assets was tested in *Trident*. Justice Neufeld in *Trident* was required to consider whether a receiver was required to allocate proceeds of the sale of assets, including "non licensed assets such as real estate and equipment" (para 80) to satisfy environmental obligations in priority to municipal tax claims. Neufeld J took a pragmatic approach, refusing to get engaged in a debate over how to draw a line between related and unrelated assets of an oil and gas company. He concluded that because Trident had one business, oil and gas exploration and production, that all assets were related to the environmental obligation. He wrote at para 67:

> I also find that the assets subject to the AER super priority are not limited to licenced oil and gas wells, pipelines and production facilities. Trident had certain real estate assets that were used for office or equipment storage and the like. However, Trident had only one business: exploration and production of oil and gas. It makes no sense to differentiate real estate assets from other assets used in that business, just as it made no sense in ***Manitok*** to carve out economic licensed assets from uneconomic ones. In either case, the result would be to undermine the policy purposes upon which the super priority principle is based.

37 Neufeld J's statement of the law in *Trident* is consistent with *Redwater* and *Manitok* though his application of the law breaks new ground. Whereas in *Redwater* and *Manitok*, it was held that all oil and gas assets should be treated as related to environmental obligations that attached only to some of the oil and gas assets, *Trident* extended this principle to other assets used in an oil and gas business even if they were not directly involved in oil and gas production (e.g. the real estate used to store equipment).

38 None of the exceptions to the principle of horizontal *stare decisis* apply to *Trident*. The decision was fully considered, carefully reasoned, and has not been undermined by appellate authority. That means that the question in the present case is whether Mantle's equipment subject to the Travelers security interest is analogous to the equipment and real estate in *Trident*.

39 Warren Miller, Vice President of Structured Finance and Capital Markets at Travelers, deposed that it was his understanding that Mantle sought financing from Travelers so that it could "purchas[e] the equipment necessary to operate its business (instead of renting it)." Mr. Miller's Affidavit attached as part of an exhibit a Notice of Intention to Enforce Security which listed all Mantle's equipment that Travelers had financed. The descriptions include the following: Jaw Crushing Plant, Cone Crushing Plant, Screen Plant, Aggregate Feeder, Aggregate Surge Bin, Material Washer, Conveyor, Truck Scale, Articulated Dump Truck, Tracked Excavator, and the like. The equipment in which Travelers has a security interest appears to be part to Mantle's gravel production business.

40 In my view, no sensible distinction can be made between the equipment and real estate in *Trident* and the equipment in the present case. The equipment over which Travelers has a security interest is as much a part of Mantle's gravel business as the equipment and real estate in *Trident* was a part of Trident's oil and gas business. Based on this factual finding, I am bound by the principle of horizontal *stare decisis* to follow *Trident*. In finding that the equipment in the present case is part of Mantle's gravel business, I make no comment on how in theory a line should be drawn between related and unrelated assets or even if a line should be drawn. As the Court of Appeal said in *Manitok*, that "can be left for another day."

41 Travelers advanced policy arguments as to why it should not have to wait to realize upon its security until after Mantle completes the reclamation work required by the EPOs. Mantle and AEPA responded with policy arguments supporting the deferral of realization of all secured creditors, including Travelers, until after the satisfactory completion of the reclamation work. Given my conclusion that the equipment subject to the Travelers security interest is related to the assets to which Mantle's environmental obligations pertain in the sense that the equipment is used in gravel production, it is not necessary to explore these policy arguments.

42 Though I decline to debate the wisdom of the policy of effectively subordinating secured creditors to environmental obligations in these Reasons, it is noteworthy that the evidential record shows that Travelers conducted due diligence prior to entering the financing arrangement with Mantle. Among the materials available to Travelers as part of that due diligence process were documents indicating the existence of Mantle's environmental reclamation obligations and the security posted by Mantle with AEPA. Prior to entering the financing arrangement, Travelers had the opportunity to assess the risk of doing business with Mantle, make an informed decision whether to do business with Mantle, and to negotiate a cost of borrowing that reflected the risk inherent in Mantle's business.

Conclusion

43 The Travelers security interest in the equipment must be subordinated to the Restructuring Charges because the Restructuring Charges are necessary to the completion of the environmental remediation work that is an important part of the

pending proposal. Travelers cannot realize on its security until the environmental reclamation work is completed to AEPA's satisfaction and the only way that such work can be done is with the support of the officers and directors of Mantle, lawyers and insolvency professionals, and the interim lender who are all protected by the Restructuring Charges.

44 Paragraph 10 of the Order dated August 15, 2023 shall be amended to provide that the Restructuring Charges have priority over the Travelers security interest in the equipment identified in the Travelers security registration.

Order accordingly.

Footnotes

1 For a discussion of the restructuring of JMB and the use of a reverse vesting order in that case, see Candace Formosa, "Dampening the Effect of Redwater Through a Reverse Vesting Order," in Jill Corrani & D. Blair Nixon, eds., *Annual Review of Insolvency Law*, (Toronto: Thomson Reuters, 2021) 697.

End of Document

TAB 17

2022 ABCA 117
Alberta Court of Appeal

Manitok Energy Inc (Re)

2022 CarswellAlta 806, 2022 ABCA 117, [2022] 6 W.W.R. 1, [2022] A.W.L.D. 1734, 2022 A.C.W.S. 680, 468 D.L.R. (4th) 434, 98 C.B.R. (6th) 1

Alvarez & Marsal Canada Inc. in its capacity as the Court-appointed receiver and manager of Manitok Energy Inc. (Appellant) and Prentice Creek Contracting Ltd., Riverside Fuels Ltd. and Alberta Energy Regulator (Respondents) and Stettler County, Woodlands County and Orphan Well Association (Intervenors)

Frans Slatter, Ritu Khullar, Jolaine Antonio JJ.A.

Heard: March 10, 2022
Judgment: March 30, 2022
Docket: Calgary Appeal 2101-0085AC

Proceedings: reversing *Manitok Energy Inc (Re)* (2021), 25 Alta. L.R. (7th) 412, 87 C.B.R. (6th) 255, 2021 ABQB 227, [2021] 7 W.W.R. 557, 2021 CarswellAlta 698, B.E. Romaine J. (Alta. Q.B.)

Counsel: H.A.Gorman, Q.C., M Parker, D.A. Stephenson, for Appellant
G.L. Walters, for Respondent, Prentice Creek Contracting Ltd.
G.S.E. Hamilton, for Respondent, Riverside Fuels Ltd.
M.E. Lavelle, for Respondent, Alberta Energy Regulator
G.G. Plester, for Intervenors, Stettler County and Woodlands County
R. Gurofsky, G.J. Finegan, for Intervenor, Orphan Well Association

Subject: Insolvency

APPEAL by receiver from judgment reported at *Manitok Energy Inc (Re)* (2021), 2021 ABQB 227, 2021 CarswellAlta 698, 87 C.B.R. (6th) 255, [2021] 7 W.W.R. 557, 25 Alta. L.R. (7th) 412 (Alta. Q.B.), finding that builders' lien claimants were entitled to be paid by receiver from estate in preference to end-of-life obligations associated with abandonment and reclamation obligations for oil and gas property.

***Per curiam*:**

1 The issue underlying this appeal, as stated by consent under R. 7.1(2), is:

> Whether end of life obligations associated with the abandonment and reclamation of unsold oil and gas properties must be satisfied by the Receiver from Manitok's estate in preference to satisfying what may otherwise be first-ranking builders' lien claims based on services provided by the lien claimants before the receivership date.

This issue engages the reach of the Supreme Court of Canada's ***Redwater*** decision: ***Orphan Well Association v Grant Thornton Ltd.***, 2019 SCC 5, [2019] 1 SCR 150.

Facts

2 Manitok Energy Inc. was an oil and gas company that became insolvent. This appeal deals with the priority in which the Receiver must allocate the remaining funds in the estate.

3 The specific issue relates to two builders' liens filed against property of Manitok. The respondent Prentice Creek Contracting provided equipment and services to Manitok related to the reclamation and cleanup of certain oil and gas well sites. The respondent Riverside Fuels provided fuel and lubricants to Manitok. When they were unpaid, both filed builders' liens prior to Manitok's bankruptcy on February 20, 2018.

4 The essential priority issue in this appeal is between the two builders' liens and Manitok's "abandonment and reclamation" obligations. After an oil and gas well has been fully exploited, the licensee operating it must "abandon" the well, by sealing it off in an environmentally safe way. It must then "reclaim" the surface of the land: *Redwater* at para. 16. These "end of life" obligations, which are mandated by regulation, are inherent in oil and gas properties, and can be very financially onerous and beyond the means of insolvent corporations.

5 Like many insolvent oil and gas companies, Manitok had some assets that had remaining value, but it also had a number of assets that had no remaining net value because they were burdened with inherent and inchoate abandonment and reclamation obligations. The Receiver identified some of the valuable assets and arranged their sale. Four sales were approved by the court and closed. The Receiver then negotiated a sale of a bundle of assets to Persist Oil & Gas, under which Persist was to assume the abandonment and reclamation obligations with respect to the assets it was purchasing. While the Alberta Energy Regulator has subsequently issued abandonment orders to the Receiver, none of those orders relate to the assets that were sold to Persist.

6 The Persist sale was approved by the court. The Sale and Vesting Order provided that the net proceeds would be held "in an interest bearing trust account" by the Receiver, and those sale proceeds would "stand in the place and stead of the Purchased Assets", without affecting in any way the priorities or interests of the various claimants in those assets. The Sale and Vesting Order stipulated particular holdbacks to cover the amounts of the two builders' liens and certain unpaid property taxes. However, before the Persist sale could close, the Supreme Court rendered its *Redwater* decision on January 31, 2019. Because of the *Redwater* decision, the parties amended the Persist sale agreement, but the holdback provisions were not changed. The Persist sale then closed, and the Receiver received the proceeds.

7 After the various sales negotiated by the Receiver, the Manitok estate still owned a number of oil and gas assets with aggregate assumed abandonment and reclamation obligations of about $44.5 million, far in excess of the assets in the estate. The Receiver intended to "disclaim" those assets, that is, it intended to "abandon, dispose of or otherwise release" the bankrupt estate's interest in these properties: *Redwater* at para. 44. As a result, any reclamation obligations would likely fall on the Orphan Well Association.

The Reasons of the Chambers Judge

8 When a dispute arose as to whether the *Redwater* decision was applicable to the facts of the Manitok bankruptcy, the parties stated an issue for the court as set out *supra*, para. 1. The chambers judge concluded that *Redwater* was distinguishable, and that the builders' lien claimants were entitled to be paid out of the proceeds of the Persist sale: Manitok Energy Inc (Re), 2021 ABQB 227 (Alta. Q.B.) , 25 Alta LR (7th) 412.

9 The chambers judge acknowledged the ruling in *Redwater* that end of life obligations are not provable in bankruptcy, and that trustees in bankruptcy are required to respect valid provincial laws of general application. Generally speaking, trustees are not personally liable for environmental obligations, but the bankrupt estate remains liable: reasons at paras. 33-37. The chambers judge, however, distinguished *Redwater* based on comments made in para. 159 of that decision:

> 159 Accordingly, the end-of-life obligations binding on [the Receiver] GTL are not claims provable in the Redwater bankruptcy, so they do not conflict with the general priority scheme in the BIA. This is not a mere matter of form, but of substance. Requiring Redwater to pay for abandonment before distributing value to creditors does not disrupt the priority scheme of the BIA. In crafting the priority scheme set out in the BIA, Parliament intended to permit regulators to place a first charge on real property of a bankrupt affected by an environmental condition or damage in order to fund remediation (see s. 14.06(7)). Thus, the BIA explicitly contemplates that environmental regulators will extract value from the bankrupt's real property if that property is affected by an environmental condition or damage. Although the nature of property ownership

> in the Alberta oil and gas industry meant that s. 14.06(7) was unavailable to the Regulator, the Abandonment Orders and the LMR [Liability Management Rating] replicate s. 14.06(7)'s effect in this case. Furthermore, it is important to note that Redwater's only substantial assets were affected by an environmental condition or damage. Accordingly, the Abandonment Orders and LMR requirements did not seek to force Redwater to fulfill end-of-life obligations with assets unrelated to the environmental condition or damage. In other words, recognizing that the Abandonment Orders and LMR requirements are not provable claims in this case does not interfere with the aims of the BIA - rather, it facilitates them. (Emphasis added by the chambers judge)

The chambers judge particularly relied on the reference to "assets unrelated to the environmental condition or damage".

10 The chambers judge's analysis was:

> 39 It is here [in the emphasized passage in para. 159] that the distinction between the facts of Redwater and the facts in this case becomes apparent. In this case, the AER is seeking to require Manitok to fulfill end-of-life obligations with assets unrelated to the environmental condition or damage represented by the abandonment orders it has issued, assets over which Manitok no longer has ownership or control. This change in ownership occurred prior to any action by the AER, so that the orders a) do not apply to property over which the respondents claim a lien, and b) do not apply to contiguously owned property at the time.

The proper interpretation of para. 159 of ***Redwater*** is discussed *infra*, paras. 20-31.

11 The chambers judge held that the key distinguishing features were:

> (a) *Redwater* only extends environmental obligations to contaminated property, or property contiguous to it: reasons at paras. 39, 40.
>
> (b) The Persist assets had been sold, before the Alberta Energy Regulator issued any enforcement orders, and Persist had assumed the abandonment and reclamation obligations with respect to them. The Alberta Energy Regulator was no longer at risk with respect to the Persist assets: reasons at paras. 39, 41-42.
>
> (c) The proceeds of sale being held in trust arose from the Persist assets, which were no longer a part of the Manitok estate. *Redwater* did not extend to assets of which the bankrupt company was no longer an owner or licensee: reasons at paras. 39, 41-42.
>
> (d) The builders' liens were on property sold to Persist which was "unrelated" to the contaminated property, so the proceeds of that sale were not subject to the *Redwater* ruling: reasons at paras. 39, 44.
>
> (e) The sale proceeds were being held in trust by court order which preserved the rights of the builders' lien holders. Those funds were no longer a part of the estate and so the trustee did not have to use them to discharge abandonment and reclamation obligations: reasons at para. 43.

Having thus distinguished ***Redwater***, the chambers judge held that the builders' liens were entitled to be paid from the funds held in trust.

12 On appeal, the Receiver and the Alberta Energy Regulator argue that there are reviewable errors in the chambers decision:

> (a) it misinterprets the scope of the *Redwater* decision.
>
> (b) it concludes that *Redwater* only requires that the proceeds of sale of valuable assets be applied to the reclamation and abandonment obligations of "related" assets.
>
> (c) it incorrectly relied on the timing of the enforcement orders issued by the Alberta Energy Regulator.

(d) it concluded that the court had created a "trust" over the sale proceeds of the Persist assets, which enhanced the claim of the builders' lien holders.

The Orphan Well Association intervened in support of the appellant. The respondent builders' lien holders support the chambers decision, as do the intervenor municipalities.

The Redwater decision

13 The central issue in this appeal is therefore the application of the *Redwater* decision to the facts underlying the Manitok Energy bankruptcy.

14 *Redwater*, like this appeal, involved a priority battle. In *Redwater* the prime secured creditor, Alberta Treasury Branches, asserted its right as a secured creditor to be paid in priority to the other claims against the bankrupt estate. The trustee in bankruptcy argued that the abandonment and reclamation obligations were claims provable in bankruptcy and would be extinguished by the bankruptcy process like all other unsecured claims. The Alberta Energy Regulator and the Orphan Well Association argued that any net proceeds in the estate had to be set aside and applied first to the satisfaction of abandonment and reclamation obligations. The Alberta Energy Regulator issued Abandonment Orders and advised that it would not issue licences to any purchaser of the valuable assets unless it was satisfied the abandonment and reclamation obligations would be discharged.

15 *Redwater* noted that abandonment and reclamation obligations are an inherent component of the value of oil and gas assets: *Redwater* at para. 157. The Alberta regulatory regime adopts a "polluter-pays principle":

> . . . The Licensee Liability Rating Program essentially requires licensees to apply the value derived from oil and gas assets during the productive portions of the lifecycle of the assets to the inevitable cost of abandoning those assets and reclaiming their sites at the end of those lifecycles" . . .
>
> . . . [Alberta's] solution is a licensing regime that depresses the value of key industry assets to reflect environmental costs, backstopped by a levy on industry in the form of the orphan fund. Alberta intended that apparatus to continue to operate when an oil and gas company is subject to insolvency proceedings: ***Redwater*** at paras. 29-30.

The Alberta regime was not in constitutional conflict with the federal bankruptcy regime. The *Bankruptcy and Insolvency Act* sections engaged were primarily directed at the personal liability of trustees, not the liability of the bankrupt estate.

16 The *Redwater* decision confirmed at paras. 119, 122 that the reclamation and abandonment obligations were not "claims provable in bankruptcy", because they were not associated with any "creditor". Environmental duties are owed to the public: *Redwater* at paras. 134-35. Further, there was insufficient certainty in the quantum of those obligations to make them provable in bankruptcy: *Redwater* at paras. 145, 149, 154.

17 Since claims that were not "provable in bankruptcy" were not extinguished by the bankruptcy process, the abandonment and reclamation obligations remained binding on the bankrupt estate:

> 160 Bankruptcy is not a licence to ignore rules, and insolvency professionals are bound by and must comply with valid provincial laws during bankruptcy. They must, for example, comply with non-monetary obligations that are binding on the bankrupt estate, that cannot be reduced to provable claims, and the effects of which do not conflict with the *BIA*, notwithstanding the consequences this may have for the bankrupt's secured creditors . . .

Even if the trustee disclaimed the worthless assets, the abandonment and reclamation obligations remained an obligation of the bankrupt estate: ***Redwater*** at paras. 93, 98. Accordingly, the proceeds of the sale of Redwater's assets had to be used to address its "end-of-life" obligations before any distributions were made to creditors: ***Redwater*** at paras. 160-63.

The Application of Redwater to the Manitok Bankruptcy

18 In 2015 Redwater Energy Corporation was in much the same position as Manitok Energy finds itself today. Both were insolvent oil and gas companies. Both had some producing assets that had value, but both also had a number of assets in which the abandonment and reclamation obligations far exceeded any market value. In both, the trustee or receiver had disclaimed the worthless assets and sold off the valuable assets, with the sale proceeds being held pending the court's directions on distribution. In *Redwater*, the Supreme Court of Canada concluded that the receiver was obliged to satisfy the abandonment and reclamation obligations before making any distribution to the secured creditor, Alberta Treasury Branches.

19 In the present appeal, the prime secured creditor of Manitok Energy (the National Bank) has come to an agreement with the Receiver. Here the two builders' lien holders claim to have a secured position that must be satisfied in priority to other claims. As in *Redwater*, the Alberta Energy Regulator and the Orphan Well Association argue that abandonment and reclamation obligations must be satisfied first. They argue that the proceeds of the Persist sale presently held by the Receiver must be applied first to the satisfaction of those obligations before there can be any distribution to the builders' lien claimants or any other creditors.

"Assets Unrelated"

20 The parties engaged the comments in *Redwater* about s. 14.06(7) of the Bankruptcy and Insolvency Act, RSC 1985, c. B–3:

> 14.06(7) Any claim by Her Majesty in right of Canada or a province against the debtor in a bankruptcy, proposal or receivership for costs of remedying any environmental condition or environmental damage affecting real property or an immovable of the debtor is secured by security on the real property or immovable affected by the environmental condition or environmental damage and on any other real property or immovable of the debtor that is contiguous with that real property or immovable and that is related to the activity that caused the environmental condition or environmental damage, and the security
>
> > (a) is enforceable in accordance with the law of the jurisdiction in which the real property or immovable is located, in the same way as a mortgage, hypothec or other security on real property or immovables; and
> >
> > (b) ranks above any other claim, right, charge or security against the property, despite any other provision of this Act or anything in any other federal or provincial law.

Redwater holds at para. 159 that this provision does not apply to abandonment and reclamation obligations in the oil and gas industry, but ***Redwater***, it is argued, applied it by analogy: " . . . the Abandonment Orders and the LMR [Liability Management Rating] replicate s. 14.06(7)'s effect in this case" (emphasis added).

21 All the parties to this appeal referred to para. 159 of *Redwater*, which is reproduced here again for convenience.

> 159 Accordingly, the end-of-life obligations binding on [the Receiver] GTL are not claims provable in the Redwater bankruptcy, so they do not conflict with the general priority scheme in the BIA. This is not a mere matter of form, but of substance. Requiring Redwater to pay for abandonment before distributing value to creditors does not disrupt the priority scheme of the BIA. In crafting the priority scheme set out in the BIA, Parliament intended to permit regulators to place a first charge on real property of a bankrupt affected by an environmental condition or damage in order to fund remediation (see s. 14.06(7)). Thus, the BIA explicitly contemplates that environmental regulators will extract value from the bankrupt's real property if that property is affected by an environmental condition or damage. Although the nature of property ownership in the Alberta oil and gas industry meant that s. 14.06(7) was unavailable to the Regulator, the Abandonment Orders and the LMR [Liability Management Rating] replicate s. 14.06(7)'s effect in this case. Furthermore, it is important to note that Redwater's only substantial assets were affected by an environmental condition or damage. Accordingly, the Abandonment Orders and LMR requirements did not seek to force Redwater to fulfill end-of-life obligations with assets unrelated to the environmental condition or damage. In other words, recognizing that the Abandonment Orders and LMR requirements are not provable claims in this case does not interfere with the aims of the BIA - rather, it facilitates them. (Emphasis added)

This paragraph is found under the heading "Conclusion on the *Abitibi* Test", a reference to the previous leading case of ***Newfoundland and Labrador v AbitibiBowater Inc***, 2012 SCC 67, [2012] 3 SCR 443.

22 The wording in para. 159 of *Redwater* does present interpretative challenges. It notes that s. 14.06(7) cannot apply to oil and gas assets, because of the inherent nature of those assets. It then appears to recognize a non-statutory analogous concept, "replicated" by the Alberta Energy Regulator's enforcement actions. This analogous concept however is said not to extend to "assets unrelated to the environmental condition or damage". The meaning of this proviso creates the issue in this appeal.

23 The chambers judge relied on parts of para. 159 to distinguish *Redwater*.

> (a) Parliament intended to permit regulators to place a charge on property if it was affected by an environmental condition;
>
> (b) The activities of the Alberta Energy Regulator in *Redwater* "replicated" the effect of s. 14.06(7) of the Bankruptcy and Insolvency Act;
>
> (c) Redwater's only "substantial assets" were affected by an environmental condition, so the Alberta Energy Regulator orders did not extend to "assets unrelated to the environmental conditions".

The chambers judge also noted that ***Redwater*** confirmed at para. 114 that the trustee only has a duty to remediate "to the extent that assets remain in the . . . estate".

24 The chambers judge essentially concluded that because the Persist assets, along with their abandonment and reclamation obligations, had been sold to Persist, they were "assets unrelated" to the rest of the oil and gas properties owned by Manitok. Those were the assets the Receiver had disclaimed and which were likely to become orphaned.

25 Section 14.06(7) creates a super-priority for reclamation expenses which *Redwater* stated at para. 159 was unavailable to the Regulator due to " . . . the nature of property ownership in the Alberta oil and gas industry". This may be a reference to the fact that oil and gas rights are a *profit à prendre*, although security interests can exist in them. Further, as a matter of fact, the super-priority created by the section assumes that there will be some residual value in an asset after it has been remediated. Take the example of a service station site which has been contaminated because its fuel tanks leaked over a long period of time. After the property is remediated, the site would have some continuing value against which the super-priority security interest could attach. That is not the case with orphaned oil and gas properties, which by their nature have little or no value even if they are properly abandoned and reclaimed.

26 The Receiver argues that para. 159 merely addresses an argument (emphatically endorsed by the dissent at para. 286) that using estate assets for remediation would be inconsistent with the *Bankruptcy and Insolvency Act*. The Receiver argues that para. 159 must be read as follows:

> 159 Accordingly, the end-of-life obligations binding on [the Receiver] GTL are not claims provable in the Redwater bankruptcy, so they do not conflict with the general priority scheme in the *BIA* . . .
>
> Thus, the *BIA* explicitly contemplates that environmental regulators will extract value from the bankrupt's real property if that property is affected by an environmental condition or damage . . .
>
> In other words, recognizing that the Abandonment Orders and LMR requirements are not provable claims in this case does not interfere with the aims of the *BIA* - rather, it facilitates them.

The intervening discussion in the paragraph (including the reference to "replicate" and "assets unrelated") is only intended to illustrate this consistency with the *Bankruptcy and Insolvency Act*, not to create a separate class of "unrelated" assets.

27 The Alberta Energy Regulator agrees, arguing that para. 159 is part of the discussion on constitutional paramountcy. That paragraph is not intended to override or qualify the other statements in the decision about the obligation of trustees and receivers to discharge publicly owed environmental obligations of the bankrupt estate before making distributions to creditors.

28 The reasons under appeal here imply that the "assets unrelated" phrase requires that a distinction be made between various kinds of assets in the bankrupt estate. The disclaimed Manitok assets remain in the bankrupt estate and are encumbered with abandonment and reclamation obligations. Assets such as those sold to Persist become "unrelated" to the assets burdened by those obligations. Since Persist had assumed the abandonment and reclamation obligations on the assets it purchased, these were now "assets unrelated" to the contaminated disclaimed assets. Looking at it in another way, once the Persist assets are sold, they are converted to cash proceeds, which are said to be unencumbered by abandonment and reclamation obligations because those obligations cannot be attached to "assets unrelated". This concept of "unrelated" assets is however inconsistent with the *Redwater* decision, which accepted at para. 18 the approach of the Alberta Energy Regulator to treat all the assets of an oil and gas company as a "package".

29 This interpretation would render *Redwater* meaningless. If the proceeds of the sale of the bankrupt corporation's valuable assets can not be used to reclaim "unrelated assets" there would never be any proceeds available to satisfy public abandonment and reclamation obligations. The assets that are going to be disclaimed by a receiver or trustee because they are overwhelmed by abandonment and reclamation obligations are always going to be "unrelated" under this approach. The disclaimed and orphaned assets cannot, by definition, be sold because of their abandonment and reclamation obligations. Unless the sale proceeds of the valuable assets are available to satisfy those obligations, they can never be satisfied.

30 There is nothing in the Alberta regulatory regime, the *Bankruptcy and Insolvency Act*, or *Redwater* that permits a licensee to avoid its abandonment and reclamation obligations by converting valuable licensed assets into cash before an enforcement order can be issued. On this interpretation there would rarely, if ever, be any "related" proceeds in an insolvency available to satisfy abandonment and reclamation obligations. The whole point of *Redwater*, however, is that the proceeds of the sale of the valuable assets must be applied towards reclamation of the worthless orphaned assets.

31 Another noted aspect of para. 159 is the statement that "Redwater's only substantial assets were affected by an environmental condition or damage". Redwater (like Manitok) had some valuable properties, and some that were overwhelmed by their inherent abandonment and reclamation obligations and were to be disclaimed and orphaned. Redwater's trustee (like Manitok's) had sold the valuable assets and was holding the proceeds in trust. Those proceeds had to be used by Redwater's trustee to satisfy abandonment and reclamation obligations before any distribution to secured creditors. The point is that the outcome of *Redwater* demonstrates that the Supreme Court of Canada did not treat Redwater's assets as falling into different pools. All of the oil and gas assets were treated collectively as being contaminated, and they all had to answer for the abandonment and reclamation obligations attached to the disclaimed assets. None of the oil and gas assets were "assets unrelated" to the other oil and gas assets. Manitok is in exactly the same position. The "substantial assets" of Manitok are the same as the "substantial assets" of Redwater.

32 Further, the outcome in *Redwater* confirms that assets in the estate do not cease to be available to discharge abandonment and reclamation obligations because they are sold by the trustee and converted to cash. Both the assets in *Redwater*, and the assets sold to Persist have been converted to cash. That, however, does not relieve the trustee of the obligation to satisfy Manitok's public abandonment and reclamation duties.

Non-Oil and Gas Assets

33 The intervenor municipalities argue that the reference to "assets unrelated to the environmental condition or damage" means that the proceeds or value of non-oil and gas assets are not available for the satisfaction of abandonment and reclamation obligations. They argue that the ruling in *Redwater* that the trustee must discharge those obligations is limited to the value in the estate arising from "licensed assets, falling within the AER's regulatory authority".

34 This issue was identified by the majority of this Court in Grant Thornton Ltd v Alberta Energy Regulator, 2017 ABCA 124 at para. 102, 50 Alta LR (6th) 1:

> 102 Secondly, the Regulator does not insist that all of the assets in the bankrupt estate be applied towards environmental liabilities. It only insists on the oil and gas assets being used for that purpose. Thus, if Redwater had valuable non-oil and gas assets (for example, valuable real estate or shareholdings) the Regulator would not insist that the Receiver or Trustee use those assets to meet Redwater's environmental obligations. But again, if the Regulator is correct in its position, it could insist on all of the assets in the bankrupt estate being applied towards the "public duty" to perform the environmental cleanup. For example, if s. 14.06 only deals with personal liability of trustees, there would be no reason to limit the obligation to discharge environmental liabilities to the oil and gas assets themselves. Resort to all the assets in the estate appears to be authorized by the provisions of the *Environmental Protection and Enhancement Act*, RSA 2000, c. E-12, s. 240(3).

This was the decision overturned by the Supreme Court of Canada in ***Redwater***, but the Supreme Court did not directly address this particular issue.

35 One could read para. 159 of *Redwater* as excluding resort to "unrelated" non-oil and gas assets to cover abandonment and reclamation costs. However, as was pointed out by the Orphan Well Association, the reasons in *Redwater* refer repeatedly to the "assets of the estate", without drawing any such distinction: see for example *Redwater* at paras. 76, 102, 107, 114. Further, there is no clear boundary between licensed assets and other assets. For example, the sale to Persist (like many similar sales) included not only licensed assets but oil and gas rights, royalty rights, intellectual property, seismic data, vehicles and other chattels. *Redwater* gives no support to the municipalities' argument.

36 In the final analysis, the assets sold to Persist appear to be indistinguishable from the type of assets that the trustee in *Redwater* sold. *Redwater* confirms that the proceeds of the sale of those assets must be applied first towards the satisfaction of abandonment and reclamation obligations. To the extent that there is any issue about it, the status of assets completely unrelated to the oil and gas business can be left for another day.

Enforcement Action by the Alberta Energy Regulator

37 Paragraph 159 of *Redwater* states: " . . . the Abandonment Orders and the LMR [Liability Management Rating] replicate s. 14.06(7)'s effect in this case". The respondents argue this means that the outcome in *Redwater* was driven by the fact that the Alberta Energy Regulator had issued Abandonment Orders. The absence or timing of such enforcement orders is said to be critical to the outcome.

38 It is clear, however, that reclamation and abandonment obligations are inherent in oil and gas properties from the minute extraction of the resource commences: *Redwater* at para. 29; PricewaterhouseCoopers Inc v Perpetual Energy Inc, 2021 ABCA 16 at paras. 86–87; Panamericana De Bienes Y Servicios (Receiver of) v Northern Badger Oil & Gas Ltd, 1991 ABCA 181 at para. 32, 81 Alta LR (2d) 45, 117 AR 44. Abandonment and reclamation obligations are inchoate, but that does not mean that they do not arise until enforcement action is taken by the Alberta Energy Regulator. The public duty on the Receiver to use the assets of the Manitok estate to discharge Manitok's abandonment and reclamation obligations existed independently of any enforcement action taken by the Alberta Energy Regulator.

39 The respondents point out that in *Redwater* the Alberta Energy Regulator had issued abandonment orders after the receivership but before the bankruptcy. In the Manitok insolvency, abandonment and reclamation orders were issued in August 2019, after the date of bankruptcy, but that is not a reason to distinguish *Redwater*. Abandonment and reclamation obligations are imposed by statute on all licensees. As noted in *Redwater* at paras. 160, 212:

> . . . a persuasive distinction cannot be drawn between liability for an environmental condition or environmental damage . . . and liability for failure to comply with an order to remedy such a condition or such damage . . . :

Abandonment and reclamation obligations exist independently of the issuance of abandonment orders, which are merely an enforcement mechanism: ***Redwater*** at para. 92; ***Perpetual Energy*** at para. 87. There is also no reason to think that a receiver or trustee in bankruptcy would not discharge a statutory obligation on the estate in the absence of an enforcement order. It would be artificial to have the outcome of a priority dispute like this depend on whether the Alberta Energy Regulator had sufficient information to issue abandonment orders before, as opposed to after the insolvency event.

40 The use of the word "replicate" in para. 159 can best be understood by comparing the French text "reproduisent l'effet". Read in context, para. 159 is merely saying that recognizing the validity of the Alberta Energy Regulator's enforcement of environmental obligations in an insolvency is no more inconsistent with the *Bankruptcy and Insolvency Act* than s. 14.06(7), which also gives priority to the enforcement of environmental obligations.

41 In summary, neither the existence of enforcement orders nor the sequence in which enforcement action is taken is relevant to the Receiver's duty to discharge public environmental obligations. It is irrelevant that no enforcement orders were ever issued with respect to the Persist assets, because the proceeds of the sale of those assets are still a part of the Manitok bankruptcy estate. Contrary to what is implied in the reasons at paras. 39, 42, the fact that the Persist assets were sold before any enforcement orders were issued is not relevant.

The Effect of the Trust and Holdback

42 The chambers judge reasoned at paras. 41, 44 that the proceeds of the sale to Persist were paid into trust, and therefore were not captured by the *Redwater* decision. It is true that the physical oil and gas assets sold to Persist were no longer a part of the Manitok estate, because they had vested in Persist. This appeal, however, is not concerned with those physical assets, but rather with the proceeds resulting from the sale of those assets. Those proceeds are very much a part of the Manitok estate, even though they are held "in an interest bearing trust account". Under the Sale and Vesting Order they were specifically to stand in place of the physical assets that had been sold, without affecting in any way the priorities and claims of various claimants. The claims of the two respondent builders' lien claimants survive in those proceeds, but they are to be dealt with in accordance with the *Redwater* principles.

43 The respondents argue that this case is distinguishable from *Redwater* because the *Redwater* decision "changed the law". They argue that *Redwater* does not apply, because the Persist assets had been sold effective as of a date prior to the "seismic shift" caused by the reasons in *Redwater*, and the funds were paid into trust by court order. That is not an accurate statement of the legal position. The *Redwater* decision did not change the law. It merely stated what the law had always been, despite the opinions of some in the industry to the contrary. The law was always as stated in the *Bankruptcy and Insolvency Act*, *Northern Badger, Abitibi*, and as confirmed in *Redwater*. The 2019 *Redwater* decision stated the law as of the date that Redwater Energy Corporation became bankrupt four years earlier. The *Redwater* decision also stated the law as it existed on the day that Manitok became bankrupt, and it applies fully to these proceedings.

44 The builders' lien claimants overstate the effect of the "trust" created by the Sale and Vesting Order. The assets of an insolvent corporation belong to the estate of that corporation. Those assets are under the control of the receiver or trustee. The receiver or trustee obviously has no beneficial interest in those assets and would keep them segregated, and in that sense it is not inaccurate to say the assets are held "in trust" or "in an interest bearing trust account". But the "trust" is only to hold the assets for the stakeholders in the insolvency, in the same priority as their interests may appear. Any "trust" does not create any new or enhanced rights in any stakeholder, even if recited in a court order, and even if the assets are sub-segregated into smaller pools of assets. A court cannot by such a "trust order" reorder the priorities in an insolvency.

45 The Receiver was obviously required to hold the Persist proceeds "in an interest bearing trust account" for the bankrupt estate and its stakeholders, because the Receiver had no beneficial interest in them. The Order, however, did not create any new rights or trust beneficiaries or vary the entitlement of any stakeholder; it essentially provided that the funds were to be held in escrow pending a determination of entitlement: Toronto Dominion Bank v 1287839 Alberta Ltd, 2021 ABQB 205 at para. 17. The Order specifically stated that the funds were deemed to replace the sold real estate, and the claims of all stakeholders would

be unaffected. The quantum of the two builders' lien claims was relevant to setting the quantum of the holdback, but the Order neither enhanced nor diminished the substantive priority rights of the builders' lien claimants to the holdback funds. There was no new "trust" created in favour of the builders' lien claimants in the holdbacks by placing them "in an interest bearing trust account", other than the requirement that the funds be held in escrow until the court could rule on entitlement.

46 In summary, the fact the proceeds of the Persist sale were placed into trust by virtue of a court order does not affect the outcome of this appeal or distinguish this case from *Redwater*.

Conclusion

47 In conclusion, the analysis at paras. 39-42 of the reasons under appeal is directly inconsistent with the binding decision in *Redwater*. The appeal is allowed, and the chambers decision is set aside. The stated question must be answered affirmatively.

Appeal allowed.

TAB 18

2022 ABKB 839
Alberta Court of King's Bench

Orphan Well Association v. Trident Exploration Corp

2022 CarswellAlta 3672, 2022 ABKB 839, [2023] A.W.L.D. 259,
[2023] A.W.L.D. 260, 2022 A.C.W.S. 4922, 4 C.B.R. (7th) 258

Orphan Well Association (Applicant) and Trident Exploration Corp., Trident Exploration (WX) Corp., Trident Exploration (Alberta) Corp., Trident Limited Partnership, Trident Exploration (Aurora) Limited Partnership I, Trident Exploration (2006) Limited Partnership I, and Fenergy Corp. (Respondents)

R.A. Neufeld J.

Heard: September 20, 2022
Judgment: December 13, 2022
Docket: Calgary 1901-06244

Counsel: Kelsey J. Meyer, Adam Williams, for Pricewater House Coopers Licence Insolvency Trustee, court appointed receiver and manager of Trident Exploration Corp. and other Trident entities
Kelly J. Bourassa, for ATB Financial
Gregory Plester, Curtis J. Auch, for Woodlands County and Stettler County
Shauna N. Finlay, Moira Lavoie, for Kneehill County
Robyn Gurofsky, Jessica Cameron, Garrett Finegan, for Orphan Well Association
Candice A. Ross, for Alberta Energy Regulator

Subject: Insolvency; Natural Resources; Property; Municipal

REQUEST by receiver for advice and directions regarding whether AER or OWA was entitled to call on proceeds of sale of all of bankrupt's assets, including realty, and whether such entitlement took precedence over municipal tax obligations that were incurred post-receivership.

***R.A. Neufeld J.*:**

I. The Trident Insolvency

1 Trident is a group of privately-owned oil and gas exploration and production companies and partnerships. As of May 2019, it held interests in approximately 4500 petroleum and natural gas wells across Alberta, of which 3700 were licenced to Trident as operator.

2 On April 30, 2019, Trident issued a press release which advised that:

> 1) It had been engaged in discussions with the Alberta Energy Regulator (AER) and its lenders regarding restructuring, but without success;
>
> 2) As of April 30, 2019, its directors and management had resigned, and Trident had ceased operations and terminated all employees and contractors.

3 Trident's primary obligations at the time consisted of:

1) Abandonment and reclamation obligations (ARO) associated with wells, facilities and pipelines estimated at $407,000,000;

2) Secured debt in the amount of $71,106,000;

3) Unsecured trade debts in the amount of $18,920,921.

4 The effect of Trident's decision was to walk away from its obligations. Its licences were turned back to the AER, and its ARO would be assumed by the Orphan Well Association (OWA) : Orphan Fund Delegated Administration Regulation, Alta Reg 45/2001, s 3(1).

5 The AER, assisted by former (and unpaid) Trident employees and contractors attended to the immediate task of safely suspending Trident's field operations.

6 The OWA took the unusual step of applying to this Court for an order appointing a Receiver.

7 Historically, such an order would have been sought by secured creditors, but with the evolution of case law recognizing a "super priority" for environmental remediation (including ARO for oil and gas operations) and the magnitude of Trident's ARO, a different approach was considered appropriate.

II. Mandate of the Receiver

8 The primary objective of the Receivership was to reduce the Trident ARO that would ultimately rest with the OWA. This was to be accomplished by selling the Trident assets to solvent oil and gas companies who were willing and able to assume environmental liability for the assets involved.

9 The sales process was presented to the Court for approval. As asset sales were made, they too were presented to the Court for approval such that ownership of purchased assets would vest free and clear of all claims. These approvals were all granted without opposition as the process unfolded.

10 At the outset, the Receiver sought advice from the sales agent, Veracity, about whether certain Trident licenced oil and gas assets should be operated pending sale to generate cashflow. The Receiver reported to the Court that, as part of its analysis, it considered all costs that would be incurred if operations were restored, including property taxes among other variable costs.

11 The Receiver concluded that it would be uneconomic to operate Trident's assets and focused only on immediate steps for ensuring safe shut-in. As a result, throughout the Receivership proceedings, the Receiver did not pay other post-filing operational expenses, similar in nature to property taxes that would be incurred by a normal oil and gas company, including surface rentals, AER/OWA levies and payments for mineral leases, among other variable costs.

12 When licenced oil and gas assets were sold, the purchaser assumed the ownership liabilities and ARO for those assets. The terms of sale did not include assumption of outstanding municipal tax obligations or purchase price adjustments in that regard. However, all 19 affected municipalities were given notice of applications within the Receivership proceedings.

13 A different approach was used in the sale of two real estate parcels which did not contain licenced oil and gas assets. Those sales contained adjustments for outstanding municipal taxes as is standard real estate conveyancing practice.

III. Current Status

14 The Receiver reported in its August 15, 2022, Supplement to the 8th Report of the Receiver, that it views the sales process as successful because an estimated $266,000,000 (or 66%) of Trident's ARO was transferred to solvent oil and gas producers. This resulted in the continued operation of a significant number of assets to the benefit of all stakeholders. A further $5,000,000 was

applied for and received under the Federal Site Rehabilitation Program, which was sufficient to partially abandon approximately 300 wells.

15 At present, the Receiver holds approximately $900,000 in remaining funds, some or all of which was generated through the sale of non-licenced assets owned by Trident, such as real estate and machinery. The Receiver seeks advice and direction regarding the distribution of those funds. The AER/OWA contend that they should receive the funds pursuant to their super priority recognized in recent case law. The County of Kneehill, the County of Stettler and Woodland County argue that they should share in the proceeds as they also have a priority arising out of unpaid municipal taxes for Trident wells, pipelines and production facilities that accrued post-Receivership. The counties will be collectively referred to as the "Municipalities".

IV. Issues

16 The Receiver's request for advice and directions raises two issues:

> 1) whether the AER/OWA is entitled to call on the proceeds of sale of all of Trident's assets, including realty; and
>
> 2) whether such entitlement takes precedence over municipal tax obligations that were incurred post-receivership in relation to licenced oil and gas wells pipelines and production facilities. If not, should the remaining funds be shared between the AER/OWA and the Municipalities?

17 I have determined that the answer to both questions is yes. The AER/OWA is entitled to call on the proceeds of sale from all of Trident's assets and their entitlement takes precedence over municipal tax obligations because of the AER/OWA super priority over the funds in question.

V. Entitlement of the AER

18 In recent years, the obligation of Receivers to undertake abandonment and reclamation of oil and gas facilities before distribution of funds to creditors has been widely characterized as a "super priority." To understand why that is so, it is necessary to first review the process used under the Bankruptcy and Insolvency Act, RSC 1985 c B–3 [BIA], as amended for resolving claims against the debtor's estate.

A. Insolvency Process

19 Under the *BIA*, the monetization of assets and distribution of funds to creditors is done in a common proceeding. Existing actions against the debtor are stayed. Creditors are given the opportunity to submit claims for amounts owed at the time of bankruptcy or receivership. The trustee or receiver, whichever it may be, is tasked with monetizing the assets of the estate and considering the validity of the claims. That is, whether the debts alleged are owed and in what amount. The trustee or receiver may seek advice and directions on these issues, and to facilitate the monetization of assets, may obtain orders approving a sales process and individual sales so as to vest the assets in the purchaser free and clear of claims.

20 Throughout the process, interested stakeholders are given notice of applications within the insolvency proceeding and an opportunity to participate.

21 From time to time, the trustee or receiver may also seek approval to make interim distributions to creditors having provable claims and advice and direction regarding matters such as the validity of securities, the priorities among creditors and the interim or final distribution of estate proceeds.

22 Not all obligations owed by a debtor will give rise to a claim provable in bankruptcy. Provable claims are defined at BIA s. 121(1) to be:

> All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred

before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

23 Non-provable claims will continue after the insolvency proceeding has been completed. With the lifting of the stay of proceedings, they may continue to be pursued in the normal course. They cannot, however, be resolved within the insolvency process itself.

B. Abandonment and Reclamation Obligations

24 The appropriate treatment of environmental obligations of an estate in bankruptcy or receivership within the common proceeding rubric has been the subject of considerable debate and jurisprudence in recent years.

25 A series of cases decided by the Supreme Court of Canada and the Alberta Court of Appeal have provided direction.

1. Northern Badger

26 The first was Pan Americana de Bienes y Servicio v Northern Badger Oil & Gas Limited 1991 ABCA 181 [Northern Badger]. In that case, a creditor of Northern Badger obtained a receivership order and subsequently a bankruptcy order.

27 Northern Badger was the licenced operator of 33 wells. Northern Badger's receiver agreed to sell 21 wells and advised the Energy Resources Conservation Board (ERCB) shortly after the sales agreement that the remaining 12 wells had not been sold. In result, 7 wells were passed back to the receiver. When the receiver sought a discharge and proposed to distribute remaining cash on hand ($226,000) to Pan Americana, the ERCB responded by obtaining an order in council requiring the receiver to abandon the 7 wells at an estimated cost of $220,000.

28 Pan Americana challenged the constitutionality of the abandonment order, arguing that Alberta could not compel a receiver/manager to incur abandonment costs that would be at the expense of secured creditors as this would violate the priorities stipulated under the federal *BIA*. The chambers judge agreed and directed the receiver/manager to disregard the provincial abandonment order.

29 The Alberta Court of Appeal overturned the decision of the chambers judge. The Court held that the ERCB was not acting as a creditor in issuing the order. Rather, the ERCB was enforcing a public law. The ERCB could have become a creditor if it had undertaken the abandonment itself, and thereby become a creditor by virtue of the provisions of the Oil and Gas Conservation Act, RSA 2000, c O–6 [OGCA]. But the ERCB had not done so.

30 The Court went on to hold that a court-appointed receiver has an obligation to obey laws of general application. The receiver is not entitled to pick and choose only profitable wells for operation and sale, leaving behind wells whose environmental liabilities exceed potential revenue for the benefit of secured creditors. In result, the receiver/manager was found to be personally liable for the abandonment costs - a finding that created considerable controversy in the financial and insolvency fields.

31 Following *Northern Badger*, the *BIA* was amended to shield receivers from personal liability. The debate continued, however, about how environmental orders issued by regulatory authorities were to be characterized within an insolvency proceeding. That is, whether such orders created obligations to the public writ large or could or should be subject of proof in an insolvency proceeding (either as a subsisting debt or obligation that can be translated to a monetary value).

2. Abitibi

32 The answer to that question was provided by the 2012 decision of the Supreme Court in Newfoundland and Labrador v AbitibiBowater Inc 2012 SCC 67 [Abitibi].

33 Abitibi was a multi-national company that had operated a pulp and paper business in Newfoundland and Labrador for over 100 years. The company was in financial distress. It made a proposal for insolvency protection under the Companies' Creditors Arrangement Act, RSC 1985, c C–36 [CCAA], and closed its operations in the province, which put many people out of work.

34 The provincial government responded with legislation expropriating Abitibi's assets and made known its intent to undertake remediation of the expropriated lands. It then issued a series of orders requiring the company to conduct that remediation.

35 The chambers judge presiding in the *CCAA* proceeding found that when the remediation orders were issued, it was fully expected that the government would be remediating the Abitibi sites. The purpose of the orders was to obtain funds from the Abitibi estate to defray the cost of remediation.

36 The Supreme Court affirmed that an environmental remediation order can constitute a monetary claim in some circumstances. When it does, it is subject to resolution within an insolvency proceeding, and has no higher priority than that accorded to environmental claims in the *CCAA* *vis-à-vis* the claims of other creditors.

37 To determine whether an environmental protection order is, in substance, a provable claim, the Court must assess: (1) whether the regulator has advanced a claim as a creditor; (2) whether the asserted debt, liability or obligation, existed at the time of insolvency; and (3) whether it is possible to assign a monetary value to the claim: at para 26. The Court held that each criterion was met given the findings of fact made by the *CCAA* court.

38 Accordingly, the Newfoundland and Labrador claim was subject to the *CCAA* proceeding, and the priorities established under the *CCAA*: at para 19.

3. Redwater

39 While not necessarily inconsistent with the reasoning of the Alberta Court of Appeal in *Northern Badger*, the approach used in *Abitibi* created uncertainty regarding the treatment of abandonment and reclamation orders in insolvency proceedings for Alberta oil and gas companies.

40 Although subject to environmental laws of general application, the primary regulator of oil and gas exploration and production activities in Alberta is the AER, a successor to the ERCB involved in the *Northern Badger*. The AER administers a program designed to ensure, at the licencing (and licence transfer) stage, that operators will have sufficient liquidity to meet end-of-life obligations at wells, production facilities and pipelines. When an insolvency occurs, the AER may, as a matter of practice, participate in the proceedings as an interested party, including reviewing proposed asset dispositions and deciding on licence transfer requests. It may also issue formal abandonment and reclamation orders. If licences are ultimately turned back to the AER by a receiver as unmarketable, the abandonment and reclamation responsibility transfers to the OWA.

41 The OWA is established under Alta Reg 45/2001. It operates under the aegis of the AER, and is jointly funded by government and industry.

42 Given the Supreme Court's reasoning in *Abitibi*, it was uncertain whether ARO's would in substance constitute provable claims in an insolvency or create binding but non-monetary regulatory obligations. If the former, the AER would be subject to the proof of claim and priorities process. If the latter, its orders would need to be complied with to the extent possible before distribution of funds and creditors.

43 This uncertainty was addressed in Orphan Well Association v Grant Thornton Ltd 2019 SCC 5 [Redwater].

44 Redwater was an oil and gas exploration and production company. It owned a variety of wells, production facilities and pipelines. Some had value greater than their estimated abandonment and reclamation costs. Some did not.

45 On insolvency, Redwater's receiver sought approval of a sales process that would allow the receiver to sell economic assets and renounce and disclaim uneconomic assets. The AER responded with abandonment orders for the assets which the receiver sought to renounce. The chambers judge declared that disclamation was allowed and the receiver was not subject to any obligations under the Abandonment Orders for disclaimed assets pursuant to s. 14.06(4)(a)(ii) and (c) of the BIA. The chambers judge concluded that, in the circumstances, the Abandonment Orders were intrinsically financial according to the *Abitibi* test and therefore subject to the statutory claims and priorities process.

46 The Alberta Court of Appeal upheld the decision of the chambers judge: *Orphan Well Association v Grant Thornton Limited*, 2017 ABCA 124. Speaking for the majority, Slatter J.A. found that there was sufficient certainty of abandonment and reclamation taking place. The AER was a creditor notwithstanding the interposition of the OWA in the eventual abandonment and reclamation activities themselves. Justice Martin (as she then was) disagreed, stating as follows:

> The province has to be able to maintain control over the transfer of well and pipeline licences during a bankruptcy and there is no reason why that regulatory requirement cannot co-exist with the distribution of a debtor's estate. The trustee must comply with the licensing requirements during the bankruptcy process. The trustee cannot, for example, transfer AER-issued well licences to an unqualified licensee; AER approval is required for any transfer. Similarly, the trustee must comply with the LLR program when seeking to transfer licences. The requirement to post security as part of the licence transfer is not, in my view, a "debt" owed to the AER or the province. It is part of the conditions attached to the licence. The AER does not become a creditor when it seeks to enforce the licence conditions, whether it does so by the issuance of abandonment orders or otherwise. On appeal to the Supreme Court, it was held that the Abandonment Orders did not fit within the ***Abitibi*** test. The AER was acting as a regulator, in pursuit of the environmental protection, not as a creditor, who stood directly gain in the outcome, as was the case in ***Abitibi***.

47 The Supreme Court of Canada overturned the Court of Appeal, agreeing with the dissent. Chief Justice Wagner, for the majority, explained at paras 135 and 136:

> Based on the analysis in *Northern Badger*, it is clear that the Regulator is not a creditor of the Redwater estate. The end-of-life obligations the Regulator seeks to enforce against Redwater are public duties. Neither the Regulator nor the Government of Alberta stands to benefit financially from the enforcement of these obligations. These public duties are owed, not to a creditor, but, rather, to fellow citizens, and are therefore outside the scope of "provable claims". I do not intend to suggest, however, that a regulator will be a creditor only where it acts exactly as the province did in *Abitibi*. There may very well be situations in which a regulator's actions fall somewhere between those in *Abitibi* and those in the instant case. Notably, unlike some previous cases, the Regulator has performed no environmental work itself. I leave such situations to be addressed in future cases in which there are full factual records. Here, it is clear that the Regulator is seeking to enforce Redwater's public duties, whether by issuing the Abandonment Orders or by maintaining the LMR requirements. The Regulator is not a creditor within the meaning of the *Abitibi* test.
>
> I reject the suggestion that the foregoing analysis somehow overrules the first prong of the *Abitibi* test. The facts in *Abitibi* were not comparable to the facts of this appeal. Although this Court discussed *Northern Badger* in *Abitibi*, it merely referenced the subsequent amendments to the *BIA*, and did not overturn the earlier decision. The Court was clear that the ultimate outcome "must be grounded in the facts of each case" (para. 48). The dissenting reasons claim that, given the foregoing analysis, it will be nearly impossible to find that regulators are ever creditors. *Abitibi* itself shows this not to be the case. Furthermore, as I have said, there may well be cases that fall between *Abitibi* and the present case. However, if *Abitibi* is read as requiring only a determination of whether the regulator has exercised an enforcement power, it will in fact be impossible for a regulator *not* to be a creditor. The dissenting reasons do not seriously deny this, merely suggesting that regulators can publish guidelines or issue licences. The Regulator does both, yet, under the approach taken in the dissenting reasons, it is powerless to take any practical steps in the public interest regarding its guidelines or licences without qualifying as a creditor. As I have explained, *Abitibi* clearly contemplates a place for regulators who are not creditors.

48 In making this finding, the Supreme Court made it clear that the basic legal and policy considerations articulated in *Northern Badger* had not changed and did so with specific reference to Alberta's orphan well program. It is clear therefore that abandonment of oil and gas wells in Alberta is considered an overarching public duty. The Regulator does not become a creditor in enforcing such obligations and is not advancing a "non-provable" claim against the estate on behalf of the public. The Regulator may become a creditor if it incurs costs and asserts a statutory debt, but that is a choice for the Regulator to make.

49 These underlying legal and policy principles were reinforced and restated in a recent decision of the Alberta Court of Appeal, Manitok Energy Inc (Re) 2022 ABCA 117 [Manitok].

4. Manitok

50 The chambers judge in *Manitok* approved a proposed sales process in which the receiver of an oil and gas company would apply the sales proceeds of a group of wells and production facilities against the abandonment and reclamation costs of those assets only, leaving a surplus to be distributed to creditors. Other uneconomic assets would be disclaimed and turned back to the AER/OWA. The chambers justice found that such an approach was consistent with *Redwater*, based on findings made by the Supreme Court of Canada at para 159, where it stated:

> Accordingly, the end-of-life obligations binding on GTL are not claims provable in the Redwater bankruptcy, so they do not conflict with the general priority scheme in the *BIA*. This is not a mere matter of form, but of substance. Requiring Redwater to pay for abandonment before distributing value to creditors does not disrupt the priority scheme of the *BIA*. In crafting the priority scheme set out in the *BIA*, Parliament intended to permit regulators to place a first charge on real property of a bankrupt affected by an environmental condition or damage in order to fund remediation (see s. 14.06(7)). Thus, the *BIA* explicitly contemplates that environmental regulators will extract value from the bankrupt's real property if that property is affected by an environmental condition or damage. Although the nature of property ownership in the Alberta oil and gas industry meant that s. 14.06(7) was unavailable to the Regulator, the Abandonment Orders and the LMR replicate s. 14.06(7)'s effect in this case. Furthermore, it is important to note that Redwater's only substantial assets were affected by an environmental condition or damage. Accordingly, the Abandonment Orders and LMR requirements did not seek to force Redwater to fulfill end-of-life obligations with assets unrelated to the environmental condition or damage. In other words, recognizing that the Abandonment Orders and LMR requirements are not provable claims in this case does not interfere with the aims of the *BIA* — rather, it facilitates them.

51 On appeal, the Alberta Court of Appeal noted that para 159 of *Redwater* presents interpretational challenges. Notwithstanding those challenges, it remained that the division of assets and liabilities endorsed in chambers would undermine the basic principles articulated in *Northern Badger* and *Redwater* and could not be endorsed. At para 29, the Court writes:

> This interpretation would render ***Redwater*** meaningless. If the proceeds of the sale of the bankrupt corporation's valuable assets cannot be used to reclaim "unrelated assets" there would never be any proceeds available to satisfy public abandonment and reclamation obligations. The assets that are going to be disclaimed by a receiver or trustee because they are overwhelmed by abandonment and reclamation obligations are always going to be "unrelated" under this approach. The disclaimed and orphaned assets cannot, by definition, be sold because of their abandonment and reclamation obligations. Unless the sale proceeds of the valuable assets are available to satisfy those obligations, they can never be satisfied.

52 Intervenor municipalities argued in *Manitok* that the phrase "assets unrelated to environmental condition or damage" used in *Redwater* means that the proceeds or value of non-oil and gas assets are not available for the satisfaction of abandonment and reclamation obligations: at para 33. The Court acknowledged at paras 35 and 36 that one could read para 159 of *Redwater* as excluding resort to such assets, but expressed skepticism before declining to resolve the issue:

> One could read para. 159 of ***Redwater*** as excluding resort to "unrelated" non-oil and gas assets to cover abandonment and reclamation costs. However, as was pointed out by the Orphan Well Association, the reasons in ***Redwater*** refer repeatedly to the "assets of the estate", without drawing any such distinction: see for example ***Redwater*** at paras. 76, 102, 107, 114. Further, there is no clear boundary between licensed assets and other assets. For example, the sale to Persist (like many similar sales) included not only licensed assets but oil and gas rights, royalty rights, intellectual property, seismic data, vehicles and other chattels. ***Redwater*** gives no support to the municipalities' argument.
>
> In the final analysis, the assets sold to Persist appear to be indistinguishable from the type of assets that the trustee in ***Redwater*** sold. ***Redwater*** confirms that the proceeds of the sale of those assets must be applied first towards the satisfaction

of abandonment and reclamation obligations. To the extent that there is any issue about it, the status of assets completely unrelated to the oil and gas business can be left for another day.

VI. Is the Receiver Obligated to Pay Municipal Taxes Post-Insolvency?

53 Although the Court of Appeal left the door slightly open for municipalities to argue that not all assets of an insolvent oil and gas are subject to the AER super priority, the Municipalities in this proceeding do not do so. Nor do they dispute the fundamental finding in *Redwater*: that the ARO must be addressed by a Receiver to the extent reasonably possible and this must be done before distributions can be made. (Hence the term "super priority").

54 Rather, the Municipalities argue that the remaining funds should be shared with them because:

1. This case involves competing entitlements to proceeds by entities having non-provable claims, the AER claim pursuant to *Redwater* and the Municipalities claim for unpaid post-insolvency taxes under the *MGA*, with both claimants having a public interest mandate and neither having priority over the other. Hence, the benefits should be shared.

2. The Receiver was obligated to pay property tax on Trident's assets from its appointment to the date of sale or transfer back to the AER, as a Receivership expense. As an officer of the Court, the Receiver is bound to pay those as they accrue during the receivership.

3. Receivers are appointed pursuant to the *Judicature Act*, so the court may order an equitable division of remaining proceeds in the proportions it sees fit.

55 The AER/OWA do not dispute that the municipal taxes continued to accrue post-insolvency. Rather, the AER/OWA argue that the Receiver is not required to pay the municipal taxes outside of the priority scheme because:

1. The AER/OWA do not compete with the municipal taxes for priority. ARO is paid in priority because it is a non-monetary regulatory order, not a non-provable claim. Municipal taxes, as a non-provable claim, are subject to the priority sequence.

2. The Receiver is not liable to pay the municipal taxes because they are not "necessary costs of preservation" as the assets were not operated and payment of the taxes would not be for the benefit of all parties. And in any event, it is too late for the Municipalities complain that economic assets were sold without adjustment for municipal taxes. The time for such complaints was when the sales process was presented to the Court for approval.

3. Fairness and equity are not justifications to disregard clear and established principles which govern insolvency.

A. Does the Obligation to Pay Municipal Taxes Post-Receivership Confer a Priority on Municipal Governments that is Parallel to the Super Priority of the AER/OWA?

56 The municipal taxes owed by Trident may be considered in three categories based upon when the taxes arise. The taxes arise either pre-insolvency, post-insolvency, or post-sale of the assessed assets.

57 The Municipalities acknowledge that the municipal taxes owing when the Receiver was appointed constitute debts that would need to be proved. As there will be no proceeds available for provable claims, the Municipalities would receive nothing for these claims, even though they have statutory priority against creditors other than the Crown (which includes the AER) under the *MGA*: s. 348(c).

58 Similarly, the Municipalities also recognize that the post-sale municipal taxes constitute debts payable by the purchasers of Trident's assets. A claim for those taxes in bankruptcy, if it was ever to arise, would likely also constitute a provable claim against the purchaser subject to the priority scheme.

59 However, in the interim period, bookended by periods of taxes as provable claims, the Municipalities argue that post-insolvency municipal taxes become non-provable claims subject to a super priority similar to ARO. This is because both the

AER/OWA and the Municipalities have a public interest mandate and the Receiver has an obligation to pay municipal taxes, particularly for assets whose operation is simply suspended pending sale rather than destined for abandonment. Therefore, the municipal taxes should similarly be paid outside and in advance of the insolvency regime. The Municipalities point to the *Manitok* insolvency as an example of such payments being made pursuant to the sales process presented to and approved by the court.

60 There is no doubt that municipal governments provide necessary and valuable services to their communities. Many would argue that municipal government is the most efficient and valuable level of all. All community members bear responsibility to support their municipal government by paying property taxes, service levies and the like. But it is not as clear that the payment of municipal property taxes has any higher public interest component than obligations such as paying a farmer surface lease rentals for an expropriated wellsite or pipeline right-or-way post-insolvency, paying trade creditors for pre-insolvency debts, or even paying municipalities for outstanding pre-insolvency municipal taxes.

61 I agree with the OWA that the assertion of a parallel priority based on the public interest as between two holders of non-provable claims is based on a flawed interpretation of *Redwater*, which makes it clear that the OWA's entitlement to the proceeds of sale is not a claim on the estate that is subject to a determination of priorities. That is the essence of a "super priority" as that term has evolved.

62 The OWA's entitlement is addressed outside of the insolvency regime because it is a non-monetary obligation which cannot be not reduced to a provable claim through the test in *Abitibi*, not because it is non-provable. Producers, like Trident, have a legal obligation to ensure their wells are safely abandoned and reclaimed. The OWA acts as a safety net to ensure that those obligations are satisfied by ensuring that reclamation work is ultimately performed. Of course, a dollar figure can be put on end-of-life obligations, but that cost is what is necessary to satisfy the obligations of producers and ensure that wells are safely abandoned and reclaimed. The cost is not levied to generate revenue for the program. That is why the OWA entitlements "define the contours of the bankrupt estate available for distribution": *Redwater* at para 160.

63 Municipal taxes, on the other hand, are neither a non-monetary obligation nor incompatible with the *Abitibi* test. The purpose of municipal taxes is to generate revenue for the municipality: Smoky River Coal Ltd, Re, 2001 ABCA 209 at para 32. The only obligation on the taxpayer is to pay tax. There is no other corresponding regulatory obligation. And, indeed, the *MGA* makes clear that taxes "are recoverable as a debt due to the municipality" and that a taxpayer is a debtor: s. 348, s. 348.1. Taxes are evidently a monetary obligation.

64 Even if I accepted that this case described a competition between claims, the legislation provides instruction about the order in which claims are to be paid. The Municipalities' claims "take priority over the claims of every person except the Crown": *MGA*, s. 348(c). On a plain reading of the *MGA*, the legislature has contemplated where the claims of the Municipalities rank in the priority scheme. And that is second to the Crown.

65 There are those who might characterize the outcome of *Redwater* as shifting liability for environmental remediation in the oil and gas industry from "polluter-pay" to "lender-pay." I disagree.

66 In my view, *Redwater* shifts liability from "polluter-pay" to "everyone pays," starting with all of those who have suffered financial losses in dealing with the insolvent company, and ending with the OWA, which spreads remaining losses between the Province of Alberta and industry. This includes secured creditors who have lent money to the insolvent entity in good faith, trade creditors who have provided goods or services and remain unpaid, landowners who have hosted the wells, pipelines and production facilities, and municipal governments who are owed taxes dating back to pre-insolvency, among many others. The essence of the AER super priority is that it is not subject to prioritization because the obligation must be met before a distribution can be made to anyone else. It defines the contours of the funds that may be available for distribution.

67 I also find that the assets subject to the AER super priority are not limited to licenced oil and gas wells, pipelines and production facilities. Trident had certain real estate assets that were used for office or equipment storage and the like. However, Trident had only one business: exploration and production of oil and gas. It makes no sense to differentiate real estate assets from

other assets used in that business, just as it made no sense in *Manitok* to carve out economic licensed assets from uneconomic ones. In either case, the result would be to undermine the policy purposes upon which the super priority principle is based.

B. Are Post Insolvency Municipal Taxes a Necessary Cost of Preservation of Assets?

68 The Municipalities argue that municipal taxes can and should be paid by a Receiver as part as "necessary cost of preservation of assets," and the public interest: See Toronto Dominion Bank v Usarco Ltd (1997), 50 CBR (3d) 127, 1997 CanLII 12417*; Hamilton Wentworth Credit Union Ltd v Courtcliffe Parks Ltd (1995)*, 23 OR (3d) 781, 1995 CanLII 7059; Robert F Kowal Investments Ltd et al v Deeder Electric Ltd (1975) 9 OR (2d) 84, 59 DLR (3d) 492 [Kowal Investments]. The Municipalities conclude that:

> The unique difficulty here is that because both unpaid post-insolvency taxes and unfunded ARO constitute non-provable claims, we essentially have a priorities contest involving two interests that dwell outside the priorities scheme.
>
> The Municipalities agree with the Receiver that there is no legislation nor reported court decisions which give guidance as to how these non-provable claims should be treated as against each other. This makes allocating funds between these claims, which are not "provable claims", a somewhat novel exercise.

69 The AER/OWA dispute that the payment of post-insolvency municipal taxes was a necessary cost of preservation of estate assets. They say that such costs were not necessary to allow assets to be operated, as the Receiver chose not to operate any of the assets — whether marketable or otherwise. Among other considerations, the Receiver did not want to be exposed to any liabilities as an operator. They also argue it cannot be said that payment of property taxes was necessary to preserve assets as that concept is discussed in the case law.

70 In *Kowal Investments*, the Ontario Court of Appeal explained that "necessary costs of preservation" is one of three exceptions to the rule that receivers may not incur expenses on behalf of the estate, at the expense of creditors:

> To qualify, the payments must benefit all parties to the receivership, such as costs to maintain and repair property . . . or otherwise prevent destruction, waste or loss of property, including to prevent tax seizure.

71 In *Invictus*, this Court found that receiver/managers may be personally liable for post-receivership municipal taxes, in the same way as they may be personally liable for new contracts they enter into with third-parties in relation to the business, subject to a correlative right to be indemnified for those expenses out of the estate assets: *Alberta Treasury Branches v Invictus Financial Corporation*, ABQB Edmonton No 8303 13970, at para 63 [*Invictus*].

72 The Receiver here was not a receiver/manager as was the case in *Invictus*. Nor was it legally or practically necessary to pay post-insolvency municipal taxes in order to preserve assets of the estate for the overall benefit of its creditors.

73 The treatment of municipal taxes was part of the sales process presented to and approved by the Court. This was described in the Receiver's 8th report as follows:

> The Receiver determined it was uneconomic to operate Trident's assets after considering the associated costs, including post-filing property taxes, and therefore focused efforts on the safe shut-in of Trident's assets prior to initiating the Sales Process for the benefit of Trident's stakeholders. In the Receiver's view, and as described at length above, this was not an ordinary course receivership.

74 The sale of marketable assets without adjustment for municipal taxes (pre- or post-insolvency) was also approved by the Court as the insolvency progressed, with notice to affected municipalities. The Municipalities did not oppose the sales process application, nor any subsequent application for approval of specific assets sales.

75 It follows that payment of post-insolvency municipal taxes was not necessary to preserve Trident's exploration and production assets. On the contrary, the non-payment of such taxes made the assets more marketable to solvent companies, and

hence more likely to generate economic benefits (and taxes) for host municipalities and landowners following resumption of production.

C. Does Fairness and Equity Justify Payment of the Municipal Taxes?

76 Even if funds were available for distribution to the Municipalities, I would have been reluctant to order a distribution based on my jurisdiction under the *Judicature Act*. I agree with the AER/OWA, that the Municipalities' entreaties in this regard have been made too late.

77 The proceeds of sale of Trident assets were from the outset intended to be used to reduce Trident's legacy abandonment and reclamation obligations, and by extension those of the Orphan Well program under Alberta's scheme for management of a province and industry wide problem. The OWA applied for the Receivership of Trident with that objective being clearly stated. The Court approved the proposed plan, including the sales process and individual sales, free and clear of claims and encumbrances.

78 Had the Municipalities taken issue with the sales process when first proposed, it is possible that municipal taxes may have been treated differently within this Receivership proceeding. They (and perhaps others) may have proposed a formula similar to that which they say was used in *Manitok* (although in *Manitok*, the Receiver operated a number of producing assets for a number of years). Such a proposal may have been acceptable to the OWA and others, and if not, may have approved by the Court over the OWA's objection particularly if a financial case could be made for such treatment. They did not do so.

79 Therefore, even if these were funds available for an "equitable" distribution I would not have made such an order.

VII. Conclusion

80 In response to the request for advice and directions by the Receiver, I direct that the remaining funds will be distributed to the AER for use by the OWA. This includes proceeds of sale of non-licenced assets such as real estate and equipment.

81 Although I do not accept the Municipalities' request to share in the remaining funds, I agree with the Municipalities that the non-payment of municipal taxes on certain oil and gas assets that are shut-in pending sale or transfer to the OWA appears to place rural municipal governments in a very unfair position *vis-à-vis* the Province of Alberta. Counsel explained that the provincial assessor includes such assets when determining the assessed value of properties in a rural municipality and removes them from the assessment roll only after abandonment is complete. Municipalities must use those assessed values in setting taxes for their rate payers to meet their budgetary requirements and education-related remissions back to the Province even though they may have no opportunity to recoup taxes from the assets in question.

82 Although not directly in issue in this case, it seems to me that is there is a structural unfairness at play here from a municipal taxation and finance perspective as between the provincial government and rural municipalities. If that is indeed the case, it needs to be addressed by the Province of Alberta.

83 As the application for advice and directions was made in the context of addressing issues of precedential value, there will be no costs awarded.

Order accordingly.