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IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF ALASKA

In re:	)	
	)	Case No.: 13-00015 HAR
TERCON INVESTMENTS LTD.,	)	In Chapter 15
Debtors in Foreign Proceedings,	)	
	)	[Lead Case of Jointly Administered Cases
	)	A13-00015 through A13-00025 HAR]

RECEIVER'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITION FOR RECOGNITION

In response to this Court's email of February 17, 2013, at Docket No. 26, FTI Consulting Canada, LLC, ("the Receiver"), the Receiver appointed in *Dumas Holdings, Inc. Petitione, v. Tercon Investments Ltd. et. al*., Case No. S 128887 ("the Canadian Proceedings") in the Supreme Court of British Columbia, Vancouver Registry, ("the Canadian Court") responds as follows.

The Canadian Proceedings are "collective proceedings" within the meaning of Section 101(23)'s definition of "foreign proceedings. Section 101(23) of the Bankruptcy Code defines a foreign proceeding as:

> "The term 'foreign proceeding' means a **collective** judicial or administrative **proceeding** in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation."

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(emphasis added).

The term "collective proceedings" is not defined in the Bankruptcy Code, but in *In re Betcorp, Ltd.*, 400 B.R. 266, 281 (Bankr. Nev. 2009) the court explained that:

> A collective proceeding is one that considers the rights and obligations of all creditors. This is in contrast, for example, to a receivership instigated at the request, and for the benefit, of a single secured creditor.

The Canadian Proceedings in this case are governed by the Bankruptcy and Insolvency Act, R.S. C. 1985, c B-3 ("the BIA") and the Law and Equity Act, and easily qualify as collective proceedings.

Attached hereto as Exhibit A is *Ted Leroy Trucking [Century Services] Ltd.* (2010) 72. C.B.R. (5th) 170, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379 (Supreme Court of Canada), a Canadian case dealing with an apparent conflict between the BIA and the Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36 ("the CCAA"), the Canadian reorganization statute. The specific issue in dispute in that case, the priority of a governmental claim for taxes, has no bearing on the case at bar, but the court's discussion of the BIA is helpful:

> 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

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> 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.
>
> and:
>
> 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.

(emphasis in original).

Another instructive case is *Toronto Dominion Bank v. Usarco Ltd.* (2001), 196 D.L.R. (4th) 448, 24 C.B.R. (4th) 303 (Ont. C.A.), attached hereto as Exhibit B.

There, a court-appointed receiver collected rents from a property and turned the proceeds over to the first mortgage holder on the property instead of paying real property taxes as

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they became due. In the course of concluding that the bank had to repay some of the funds it had received, the court discussed the role of a court-appointed receiver:

> 30. Reference may usefully be made to *Bennett on Receiverships*, 2nd ed. (Toronto: Carswell, 1999), at 180-181 (footnotes omitted):
>
> A court-appointed receiver represents neither the security holder nor the debtor. As an officer of the court, the receiver is not an agent but a principal entrusted to discharge the powers granted to the receiver *bona fide*. Accordingly, the receiver has a fiduciary duty to comply with such powers provided in the order and to act honestly and in the best interests of all interested parties including the debtor. The receiver's primary duty is to account for the assets under the receiver's control and in the receiver's possession. This duty is owed to the court and to all persons having an interest in the debtor's assets, including the debtor and shareholders where the debtor is a corporation. As a court officer, the receiver is put in to discharge the duties prescribed in the order or in any subsequent order and is afforded protection on any motion for advice and directions. The receiver has a duty to make candid and full disclosure to the court including disclosing not only facts favourable to pending applications, but also facts that are unfavourable.
>
> . . .
>
> In setting the standard of care, the court-appointed receiver must act with meticulous correctness, but not to a standard of perfection. As a fiduciary, the receiver owes a duty to make full disclosure of information to all interested persons. . . . The court-appointed receiver owes no duty to any individual creditor who may attempt to interfere in the receivership. [Emphasis added.]

(italics and underlines in original)

In other Chapter 15 cases, United States bankruptcy courts have recognized Canadian insolvency cases in which a receiver was appointed under the BIA. A number of United States bankruptcy courts have recognized, as foreign proceedings, Canadian insolvency proceedings such as the one at bar in which a receiver

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was appointed under the BIA. See, for example, the receivership orders entered as *In re Salerno Plastic Film and Bags (USA), Inc.,* Case No. 10-14504 in the United States Bankruptcy Court for the Northern District of New York (Exhibit C hereto), *In re Cover-All Holding Corp, et al.,* Case No. 10-20835 in the United States Bankruptcy Court for the Eastern District of Pennsylvania, Reading Division (Exhibit D hereto), *In re: CRI Plastics Group Ltd., et al.,* Case No. 09-20175 in the United States Bankruptcy Court for the Eastern District of Washington (Exhibit E hereto), and *In re: Big Sky Farms, Inc.,* Case No. 12-01711 in the United States Bankruptcy Court for the District of Iowa (Exhibit F hereto).

Conclusion. For the foregoing reasons, this Court should find that the Canadian Proceedings in the case at bar are "collective judicial or administrative proceedings" within the meaning of Section 101(23) of the Bankruptcy Code.

Dated February 18, 2013.

LAW OFFICES OF
CABOT CHRISTIANSON, P.C.
Attorneys for FTI Consulting Canada Inc.

By: /s/ Cabot Christianson
Cabot Christianson

CERTIFICATE OF SERVICE
The undersigned hereby certifies that on February 18, 2013, a true and correct copy of this application was served by electronic means through the ECF system as indicated on the Notice of Electronic filing.

By: /s/ Margaret Stroble
Margaret Stroble

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Ted Leroy Trucking [Century Services] Ltd., Re

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

Supreme Court of Canada

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

Tax --- Goods and Services Tax — Collection and remittance — GST held in trust

Debtor owed Crown under Excise Tax Act (ETA) for unremitted GST — Debtor sought relief under Companies' Creditors Arrangement Act (CCAA) — Under order of BC Supreme Court, amount of GST debt was placed in trust account and remaining proceeds of sale of assets paid to major secured creditor — Debtor's application for partial lifting of stay of proceedings to assign itself into bankruptcy was granted, while Crown's application for payment of tax debt was dismissed — Crown's appeal to BC Court of Appeal was allowed — Creditor appealed to Supreme Court of Canada — Appeal allowed — Analysis of ETA and CCAA yielded conclusion that CCAA provides that statutory deemed trusts do not apply, and that Parliament did not intend to restore Crown's deemed trust priority in GST claims under CCAA when it amended ETA in 2000 — Parliament had moved away from asserting priority for Crown claims under both CCAA and Bankruptcy and Insolvency Act (BIA), and neither statute provided for preferred treatment of GST claims — Giving Crown priority over GST claims during CCAA proceedings but not in bankruptcy would

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

reduce use of more flexible and responsive CCAA regime — Parliament likely inadvertently succumbed to drafting anomaly — Section 222(3) of ETA could not be seen as having impliedly repealed s. 18.3 of CCAA by its subsequent passage, given recent amendments to CCAA — Court had discretion under CCAA to construct bridge to liquidation under BIA, and partially lift stay of proceedings to allow entry into liquidation — No "gap" should exist when moving from CCAA to BIA — Court order segregating funds did not have certainty that Crown rather than creditor would be beneficiary sufficient to support express trust — Amount held in respect of GST debt was not subject to deemed trust, priority or express trust in favour of Crown — Excise Tax Act, R.S.C. 1985, c. E-15, ss. 222(1), (1.1).

Tax --- General principles — Priority of tax claims in bankruptcy proceedings

Debtor owed Crown under Excise Tax Act (ETA) for unremitted GST — Debtor sought relief under Companies' Creditors Arrangement Act (CCAA) — Under order of BC Supreme Court, amount of GST debt was placed in trust account and remaining proceeds of sale of assets paid to major secured creditor — Debtor's application for partial lifting of stay of proceedings to assign itself into bankruptcy was granted, while Crown's application for payment of tax debt was dismissed — Crown's appeal to BC Court of Appeal was allowed — Creditor appealed to Supreme Court of Canada — Appeal allowed — Analysis of ETA and CCAA yielded conclusion that CCAA provides that statutory deemed trusts do not apply, and that Parliament did not intend to restore Crown's deemed trust priority in GST claims under CCAA when it amended ETA in 2000 — Parliament had moved away from asserting priority for Crown claims under both CCAA and Bankruptcy and Insolvency Act (BIA), and neither statute provided for preferred treatment of GST claims — Giving Crown priority over GST claims during CCAA proceedings but not in bankruptcy would reduce use of more flexible and responsive CCAA regime — Parliament likely inadvertently succumbed to drafting anomaly — Section 222(3) of ETA could not be seen as having impliedly repealed s. 18.3 of CCAA by its subsequent passage, given recent amendments to CCAA — Court had discretion under CCAA to construct bridge to liquidation under BIA, and partially lift stay of proceedings to allow entry into liquidation — No "gap" should exist when moving from CCAA to BIA — Court order segregating funds did not have certainty that Crown rather than creditor would be beneficiary sufficient to support express trust — Amount held in respect of GST debt was not subject to deemed trust, priority or express trust in favour of Crown.

Taxation --- Taxe sur les produits et services — Perception et versement — Montant de TPS détenu en fiducie

Débitrice devait à la Couronne des montants de TPS qu'elle n'avait pas remis, en vertu de la Loi sur la taxe d'accise (LTA) — Débitrice a entamé des procédures judiciaires en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC) — En vertu d'une ordonnance du tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance du produit de la vente des actifs a servi à payer le créancier garanti principal — Demande de la débitrice visant à obtenir la levée partielle de la suspension de procédures afin qu'elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement des montants de TPS non remis a été rejetée — Appel interjeté par la Couronne a été accueilli — Créancier a formé un pourvoi — Pourvoi accueilli — Analyse de la LTA et de la LACC conduisait à la conclusion que le législateur ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la LACC, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a modifié la LTA, en 2000 — Législateur avait mis un terme à la priorité accordée aux créances de la Couronne sous les régimes de la LACC et de la Loi sur la faillite et l'insolvabilité (LFI), et ni l'une ni l'autre de ces lois ne prévoyaient que les créances relatives à la TPS bénéficiaient d'un traitement préférentiel — Fait de faire primer la priorité de la Couronne sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet de restreindre le recours à la possibilité de se restructurer sous le régime plus souple et mieux adapté de la LACC — Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle — On ne pourrait pas considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC, compte tenu des modifications récemment apportées à la LACC — Sous le régime de la LACC, le tribunal avait discrétion pour établir une passerelle vers une liquidation opérée sous le régime de la LFI et de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation — Il n'y avait aucune certitude, en vertu de l'ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner naissance à une fiducie expresse — Montant perçu au

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

titre de la TPS ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

Taxation --- Principes généraux — Priorité des créances fiscales dans le cadre de procédures en faillite

Débitrice devait à la Couronne des montants de TPS qu'elle n'avait pas remis, en vertu de la Loi sur la taxe d'accise (LTA) — Débitrice a entamé des procédures judiciaires en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC) — En vertu d'une ordonnance du tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance du produit de la vente des actifs a servi à payer le créancier garanti principal — Demande de la débitrice visant à obtenir la levée partielle de la suspension de procédures afin qu'elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement des montants de TPS non remis a été rejetée — Appel interjeté par la Couronne a été accueilli — Créancier a formé un pourvoi — Pourvoi accueilli — Analyse de la LTA et de la LACC conduisait à la conclusion que le législateur ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la LACC, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a modifié la LTA, en 2000 — Législateur avait mis un terme à la priorité accordée aux créances de la Couronne sous les régimes de la LACC et de la Loi sur la faillite et l'insolvabilité (LFI), et ni l'une ni l'autre de ces lois ne prévoyaient que les créances relatives à la TPS bénéficiaient d'un traitement préférentiel — Fait de faire primer la priorité de la Couronne sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet de restreindre le recours à la possibilité de se restructurer sous le régime plus souple et mieux adapté de la LACC — Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle — On ne pourrait pas considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC, compte tenu des modifications récemment apportées à la LACC — Sous le régime de la LACC, le tribunal avait discrétion pour établir une passerelle vers une liquidation opérée sous le régime de la LFI et de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation — Il n'y avait aucune certitude, en vertu de l'ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner naissance à une fiducie expresse — Montant perçu au titre de la TPS ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

The debtor company owed the Crown under the Excise Tax Act (ETA) for GST that was not remitted. The debtor commenced proceedings under the Companies' Creditors Arrangement Act (CCAA). Under an order by the B.C. Supreme Court, the amount of the tax debt was placed in a trust account, and the remaining proceeds from the sale of the debtor's assets were paid to the major secured creditor. The debtor's application for a partial lifting of the stay of proceedings in order to assign itself into bankruptcy was granted, while the Crown's application for the immediate payment of the unremitted GST was dismissed.

The Crown's appeal to the B.C. Court of Appeal was allowed. The Court of Appeal found that the lower court was bound by the ETA to give the Crown priority once bankruptcy was inevitable. The Court of Appeal ruled that there was a deemed trust under s. 222 of the ETA or that an express trust was created in the Crown's favour by the court order segregating the GST funds in the trust account.

The creditor appealed to the Supreme Court of Canada.

Held: The appeal was allowed.

Per Deschamps J. (McLachlin C.J.C., Binnie, LeBel, Charron, Rothstein, Cromwell JJ. concurring): A purposive and contextual analysis of the ETA and CCAA yielded 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. Parliament had moved away from asserting priority for Crown claims in insolvency law under both the CCAA and Bankruptcy and Insolvency Act (BIA). Unlike for source deductions, there was no express statutory basis in the CCAA or BIA for concluding that GST claims enjoyed any preferential treatment. The internal logic of the CCAA also militated against upholding a deemed trust for GST claims.

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

Giving the Crown priority over GST claims during CCAA proceedings but not in bankruptcy would, in practice, deprive companies of the option to restructure under the more flexible and responsive CCAA regime. It seemed likely that Parliament had inadvertently succumbed to a drafting anomaly, which could be resolved by giving precedence to s. 18.3 of the CCAA. Section 222(3) of the ETA could no longer be seen as having impliedly repealed s. 18.3 of the CCAA by being passed subsequently to the CCAA, given the recent amendments to the CCAA. The legislative context supported the conclusion that s. 222(3) of the ETA was not intended to narrow the scope of s. 18.3 of the CCAA.

The breadth of the court's discretion under the CCAA was sufficient to construct a bridge to liquidation under the BIA, so there was authority under the CCAA to partially lift the stay of proceedings to allow the debtor's entry into liquidation. There should be no gap between the CCAA and BIA proceedings that would invite a race to the courthouse to assert priorities.

The court order did not have the certainty that the Crown would actually be the beneficiary of the funds sufficient to support an express trust, as the funds were segregated until the dispute between the creditor and the Crown could be resolved. The amount collected in respect of GST but not yet remitted to the Receiver General of Canada was not subject to a deemed trust, priority or express trust in favour of the Crown.

Per Fish J. (concurring): Parliament had declined to amend the provisions at issue after detailed consideration of the insolvency regime, so the apparent conflict between s. 18.3 of the CCAA and s. 222 of the ETA should not be treated as a drafting anomaly. In the insolvency context, a deemed trust would exist only when two complementary elements co-existed: first, a statutory provision creating the trust; and second, a CCAA or BIA provision confirming its effective operation. Parliament had created the Crown's deemed trust in the Income Tax Act, Canada Pension Plan and Employment Insurance Act and then confirmed in clear and unmistakable terms its continued operation under both the CCAA and the BIA regimes. In contrast, the ETA created a deemed trust in favour of the Crown, purportedly notwithstanding any contrary legislation, but Parliament did not expressly provide for its continued operation in either the BIA or the CCAA. The absence of this confirmation reflected Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings. Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings, and so s. 222 of the ETA mentioned the BIA so as to exclude it from its ambit, rather than include it as the other statutes did. As none of these statutes mentioned the CCAA expressly, the specific reference to the BIA had no bearing on the interaction with the CCAA. It was the confirmatory provisions in the insolvency statutes that would determine whether a given deemed trust would subsist during insolvency proceedings.

Per Abella J. (dissenting): The appellate court properly found that s. 222(3) of the ETA gave priority during CCAA proceedings to the Crown's deemed trust in unremitted GST. The failure to exempt the CCAA from the operation of this provision was a reflection of clear legislative intent. Despite the requests of various constituencies and case law confirming that the ETA took precedence over the CCAA, there was no responsive legislative revision and the BIA remained the only exempted statute. There was no policy justification for interfering, through interpretation, with this clarity of legislative intention and, in any event, the application of other principles of interpretation reinforced this conclusion. Contrary to the majority's view, the "later in time" principle did not favour the precedence of the CCAA, as the CCAA was merely re-enacted without significant substantive changes. According to the Interpretation Act, in such circumstances, s. 222(3) of the ETA remained the later provision. The chambers judge was required to respect the priority regime set out in s. 222(3) of the ETA and so did not have the authority to deny the Crown's request for payment of the GST funds during the CCAA proceedings.

La compagnie débitrice devait à la Couronne des montants de TPS qu'elle n'avait pas remis, en vertu de la Loi sur la taxe d'accise (LTA). La débitrice a entamé des procédures judiciaires en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC). En vertu d'une ordonnance du tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance du produit de la vente des actifs de la débitrice a servi à payer le

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créancier garanti principal. La demande de la débitrice visant à obtenir la levée partielle de la suspension de procédures afin qu'elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement immédiat des montants de TPS non remis a été rejetée.

L'appel interjeté par la Couronne a été accueilli. La Cour d'appel a conclu que le tribunal se devait, en vertu de la LTA, de donner priorité à la Couronne une fois la faillite inévitable. La Cour d'appel a estimé que l'art. 222 de la LTA établissait une fiducie présumée ou bien que l'ordonnance du tribunal à l'effet que les montants de TPS soient détenus dans un compte en fiducie créait une fiducie expresse en faveur de la Couronne.

Le créancier a formé un pourvoi.

Arrêt: Le pourvoi a été accueilli.

Deschamps, J. (McLachlin, J.C.C., Binnie, LeBel, Charron, Rothstein, Cromwell, JJ., souscrivant à son opinion) : Une analyse téléologique et contextuelle de la LTA et de la LACC conduisait à la conclusion que le législateur ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la LACC, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a modifié la LTA, en 2000. Le législateur avait mis un terme à la priorité accordée aux créances de la Couronne dans le cadre du droit de l'insolvabilité, sous le régime de la LACC et celui de la Loi sur la faillite et l'insolvabilité (LFI). Contrairement aux retenues à la source, aucune disposition législative expresse ne permettait de conclure que les créances relatives à la TPS bénéficiaient d'un traitement préférentiel sous le régime de la LACC ou celui de la LFI. La logique interne de la LACC allait également à l'encontre du maintien de la fiducie réputée à l'égard des créances découlant de la TPS.

Le fait de faire primer la priorité de la Couronne sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet, dans les faits, de priver les compagnies de la possibilité de se restructurer sous le régime plus souple et mieux adapté de la LACC. Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle, laquelle pouvait être corrigée en donnant préséance à l'art. 18.3 de la LACC. On ne pouvait plus considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC parce qu'il avait été adopté après la LACC, compte tenu des modifications récemment apportées à la LACC. Le contexte législatif étayait la conclusion suivant laquelle l'art. 222(3) de la LTA n'avait pas pour but de restreindre la portée de l'art. 18.3 de la LACC.

L'ampleur du pouvoir discrétionnaire conféré au tribunal par la LACC était suffisant pour établir une passerelle vers une liquidation opérée sous le régime de la LFI, de sorte qu'il avait, en vertu de la LACC, le pouvoir de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation. Il n'y avait aucune certitude, en vertu de l'ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner naissance à une fiducie expresse, puisque les fonds étaient détenus à part jusqu'à ce que le litige entre le créancier et la Couronne soit résolu. Le montant perçu au titre de la TPS mais non encore versé au receveur général du Canada ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

Fish, J. (souscrivant aux motifs des juges majoritaires) : Le législateur a refusé de modifier les dispositions en question suivant un examen approfondi du régime d'insolvabilité, de sorte qu'on ne devrait pas qualifier l'apparente contradiction entre l'art. 18.3 de la LACC et l'art. 222 de la LTA d'anomalie rédactionnelle. Dans un contexte d'insolvabilité, on ne pourrait conclure à l'existence d'une fiducie présumée que lorsque deux éléments complémentaires étaient réunis : en premier lieu, une disposition législative qui crée la fiducie et, en second lieu, une disposition de la LACC ou de la LFI qui confirme l'existence de la fiducie. Le législateur a établi une fiducie présumée en faveur de la Couronne dans la Loi de l'impôt sur le revenu, le Régime de pensions du Canada et la Loi sur l'assurance-emploi puis, il a confirmé en termes clairs et explicites sa volonté de voir cette fiducie présumée produire ses effets sous le régime de la LACC et de la LFI. Dans le cas de la LTA, il a établi une fiducie présumée en faveur de la Couronne, sciemment et sans égard pour

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

toute législation à l'effet contraire, mais n'a pas expressément prévu le maintien en vigueur de celle-ci sous le régime de la LFI ou celui de la LACC. L'absence d'une telle confirmation témoignait de l'intention du législateur de laisser la fiducie présumée devenir caduque au moment de l'introduction de la procédure d'insolvabilité. L'intention du législateur était manifestement de rendre inopérantes les fiducies présumées visant la TPS dès l'introduction d'une procédure d'insolvabilité et, par conséquent, l'art. 222 de la LTA mentionnait la LFI de manière à l'exclure de son champ d'application, et non de l'y inclure, comme le faisaient les autres lois. Puisqu'aucune de ces lois ne mentionnait spécifiquement la LACC, la mention explicite de la LFI n'avait aucune incidence sur l'interaction avec la LACC. C'était les dispositions confirmatoires que l'on trouvait dans les lois sur l'insolvabilité qui déterminaient si une fiducie présumée continuerait d'exister durant une procédure d'insolvabilité.

Abella, J. (dissidente) : La Cour d'appel a conclu à bon droit que l'art. 222(3) de la LTA donnait préséance à la fiducie présumée qui est établie en faveur de la Couronne à l'égard de la TPS non versée. Le fait que la LACC n'ait pas été soustraite à l'application de cette disposition témoignait d'une intention claire du législateur. Malgré les demandes répétées de divers groupes et la jurisprudence ayant confirmé que la LTA l'emportait sur la LACC, le législateur n'est pas intervenu et la LFI est demeurée la seule loi soustraite à l'application de cette disposition. Il n'y avait pas de considération de politique générale qui justifierait d'aller à l'encontre, par voie d'interprétation législative, de l'intention aussi clairement exprimée par le législateur et, de toutes manières, cette conclusion était renforcée par l'application d'autres principes d'interprétation. Contrairement à l'opinion des juges majoritaires, le principe de la préséance de la « loi postérieure » ne militait pas en faveur de la présance de la LACC, celle-ci ayant été simplement adoptée à nouveau sans que l'on ne lui ait apporté de modifications importantes. En vertu de la Loi d'interprétation, dans ces circonstances, l'art. 222(3) de la LTA demeurait la disposition postérieure. Le juge siégeant en son cabinet était tenu de respecter le régime de priorités établi à l'art. 222(3) de la LTA, et il ne pouvait pas refuser la demande présentée par la Couronne en vue de se faire payer la TPS dans le cadre de la procédure introduite en vertu de la LACC.

Cases considered by *Deschamps J.*:

Air Canada, Re (2003), 42 C.B.R. (4th) 173, 2003 CarswellOnt 2464 (Ont. S.C.J. [Commercial List]) — referred to

Air Canada, Re (2003), 2003 CarswellOnt 4967 (Ont. S.C.J. [Commercial List]) — referred to

Alternative granite & marbre inc., Re (2009), *(*sub nom. *Dep. Min. Rev. Quebec v. Caisse populaire Desjardins de Montmagny)* 2009 G.T.C. 2036 (Eng.), *(*sub nom. *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny)* [2009] 3 S.C.R. 286, 312 D.L.R. (4th) 577, [2009] G.S.T.C. 154, *(*sub nom. *9083-4185 Québec Inc. (Bankrupt), Re)* 394 N.R. 368, 60 C.B.R. (5th) 1, 2009 SCC 49, 2009 CarswellQue 10706, 2009 CarswellQue 10707 (S.C.C.) — referred to

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 ONCA 587, 2008 CarswellOnt 4811, *(*sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 240 O.A.C. 245, *(*sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 296 D.L.R. (4th) 135, *(*sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 92 O.R. (3d) 513, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123 (Ont. C.A.) — considered

Canadian Airlines Corp., Re (2000), [2000] 10 W.W.R. 269, 20 C.B.R. (4th) 1, 84 Alta. L.R. (3d) 9, 9 B.L.R. (3d) 41, 2000 CarswellAlta 662, 2000 ABQB 442, 265 A.R. 201 (Alta. Q.B.) — referred to

Canadian Red Cross Society / Société Canadienne de la Croix Rouge, Re (2000), 2000 CarswellOnt 3269, 19 C.B.R. (4th) 158 (Ont. S.C.J.) — referred to

Doré c. Verdun (Municipalité) (1997), *(*sub nom. *Doré v. Verdun (City))* [1997] 2 S.C.R. 862, *(*sub nom. *Doré v. Verdun (Ville))* 215 N.R. 81, *(*sub nom. *Doré v. Verdun (City))* 150 D.L.R. (4th) 385, 1997 CarswellQue 159,

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

1997 CarswellQue 850 (S.C.C.) — distinguished

Dylex Ltd., Re (1995), 31 C.B.R. (3d) 106, 1995 CarswellOnt 54 (Ont. Gen. Div. [Commercial List]) — considered

First Vancouver Finance v. Minister of National Revenue (2002), [2002] 3 C.T.C. 285, *(*sub nom. *Minister of National Revenue v. First Vancouver Finance)* 2002 D.T.C. 6998 (Eng.), *(*sub nom. *Minister of National Revenue v. First Vancouver Finance)* 2002 D.T.C. 7007 (Fr.), 288 N.R. 347, 212 D.L.R. (4th) 615, [2002] G.S.T.C. 23, [2003] 1 W.W.R. 1, 45 C.B.R. (4th) 213, 2002 SCC 49, 2002 CarswellSask 317, 2002 CarswellSask 318, [2002] 2 S.C.R. 720 (S.C.C.) — considered

Gauntlet Energy Corp., Re (2003), 30 Alta. L.R. (4th) 192, 2003 ABQB 894, 2003 CarswellAlta 1735, [2003] G.S.T.C. 193, 49 C.B.R. (4th) 213, [2004] 10 W.W.R. 180, 352 A.R. 28 (Alta. Q.B.) — referred to

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 51 B.C.L.R. (2d) 84, 1990 CarswellBC 394, 4 C.B.R. (3d) 311, *(*sub nom. *Chef Ready Foods Ltd. v. Hongkong Bank of Canada)* [1991] 2 W.W.R. 136 (B.C. C.A.) — referred to

Ivaco Inc., Re (2006), 2006 C.E.B. & P.G.R. 8218, 25 C.B.R. (5th) 176, 83 O.R. (3d) 108, 275 D.L.R. (4th) 132, 2006 CarswellOnt 6292, 56 C.C.P.B. 1, 26 B.L.R. (4th) 43 (Ont. C.A.) — referred to

Komunik Corp., Re (2010), 2010 CarswellQue 686, 2010 QCCA 183 (Que. C.A.) — referred to

Komunik Corp., Re (2009), 2009 QCCS 6332, 2009 CarswellQue 13962 (Que. S.C.) — referred to

Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1990 CarswellOnt 139, 1 C.B.R. (3d) 101, *(*sub nom. *Elan Corp. v. Comiskey)* 1 O.R. (3d) 289, *(*sub nom. *Elan Corp. v. Comiskey)* 41 O.A.C. 282 (Ont. C.A.) — considered

Ottawa Senators Hockey Club Corp., Re (2005), 2005 G.T.C. 1327 (Eng.), 6 C.B.R. (5th) 293, 2005 D.T.C. 5233 (Eng.), 2005 CarswellOnt 8, [2005] G.S.T.C. 1, 193 O.A.C. 95, 73 O.R. (3d) 737 (Ont. C.A.) — not followed

Pacific National Lease Holding Corp., Re (1992), 72 B.C.L.R. (2d) 368, 19 B.C.A.C. 134, 34 W.A.C. 134, 15 C.B.R. (3d) 265, 1992 CarswellBC 524 (B.C. C.A. [In Chambers]) — referred to

Philip's Manufacturing Ltd., Re (1992), 9 C.B.R. (3d) 25, 67 B.C.L.R. (2d) 84, 4 B.L.R. (2d) 142, 1992 CarswellBC 542 (B.C. C.A.) — referred to

Quebec (Deputy Minister of Revenue) c. Rainville (1979), *(*sub nom. *Bourgeault, Re)* 33 C.B.R. (N.S.) 301, *(*sub nom. *Bourgeault's Estate v. Quebec (Deputy Minister of Revenue))* 30 N.R. 24, *(*sub nom. *Bourgault, Re)* 105 D.L.R. (3d) 270, 1979 CarswellQue 165, 1979 CarswellQue 266, *(*sub nom. *Quebec (Deputy Minister of Revenue) v. Bourgeault (Trustee of))* [1980] 1 S.C.R. 35 (S.C.C.) — referred to

Reference re Companies' Creditors Arrangement Act (Canada) (1934), [1934] 4 D.L.R. 75, 1934 CarswellNat 1, 16 C.B.R. 1, [1934] S.C.R. 659 (S.C.C.) — referred to

Royal Bank v. Sparrow Electric Corp. (1997), 193 A.R. 321, 135 W.A.C. 321, [1997] 2 W.W.R. 457, 208 N.R. 161, 12 P.P.S.A.C. (2d) 68, 1997 CarswellAlta 112, 1997 CarswellAlta 113, 46 Alta. L.R. (3d) 87, *(*sub nom. *R. v. Royal Bank)* 97 D.T.C. 5089, 143 D.L.R. (4th) 385, 44 C.B.R. (3d) 1, [1997] 1 S.C.R. 411 (S.C.C.) — considered

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

Skeena Cellulose Inc., Re (2003), 2003 CarswellBC 1399, 2003 BCCA 344, 184 B.C.A.C. 54, 302 W.A.C. 54, 43 C.B.R. (4th) 187, 13 B.C.L.R. (4th) 236 (B.C. C.A.) — referred to

Skydome Corp., Re (1998), 16 C.B.R. (4th) 118, 1998 CarswellOnt 5922 (Ont. Gen. Div. [Commercial List]) — referred to

Solid Resources Ltd., Re (2002), [2003] G.S.T.C. 21, 2002 CarswellAlta 1699, 40 C.B.R. (4th) 219 (Alta. Q.B.) — referred to

Stelco Inc., Re (2005), 253 D.L.R. (4th) 109, 75 O.R. (3d) 5, 2 B.L.R. (4th) 238, 9 C.B.R. (5th) 135, 2005 CarswellOnt 1188, 196 O.A.C. 142 (Ont. C.A.) — referred to

United Used Auto & Truck Parts Ltd., Re (1999), 12 C.B.R. (4th) 144, 1999 CarswellBC 2673 (B.C. S.C. [In Chambers]) — referred to

United Used Auto & Truck Parts Ltd., Re (2000), 2000 BCCA 146, 135 B.C.A.C. 96, 221 W.A.C. 96, 2000 CarswellBC 414, 73 B.C.L.R. (3d) 236, 16 C.B.R. (4th) 141, [2000] 5 W.W.R. 178 (B.C. C.A.) — referred to

Cases considered by *Fish J.*:

Ottawa Senators Hockey Club Corp., Re (2005), 2005 G.T.C. 1327 (Eng.), 6 C.B.R. (5th) 293, 2005 D.T.C. 5233 (Eng.), 2005 CarswellOnt 8, [2005] G.S.T.C. 1, 193 O.A.C. 95, 73 O.R. (3d) 737 (Ont. C.A.) — not followed

Cases considered by *Abella J.* (dissenting):

Canada (Attorney General) v. Canada (Public Service Staff Relations Board) (1977), [1977] 2 F.C. 663, 14 N.R. 257, 74 D.L.R. (3d) 307, 1977 CarswellNat 62, 1977 CarswellNat 62F (Fed. C.A.) — referred to

Doré c. Verdun (Municipalité) (1997), *(*sub nom. *Doré v. Verdun (City))* [1997] 2 S.C.R. 862, *(*sub nom. *Doré v. Verdun (Ville))* 215 N.R. 81, *(*sub nom. *Doré v. Verdun (City))* 150 D.L.R. (4th) 385, 1997 CarswellQue 159, 1997 CarswellQue 850 (S.C.C.) — referred to

Ottawa Senators Hockey Club Corp., Re (2005), 2005 G.T.C. 1327 (Eng.), 6 C.B.R. (5th) 293, 2005 D.T.C. 5233 (Eng.), 2005 CarswellOnt 8, [2005] G.S.T.C. 1, 193 O.A.C. 95, 73 O.R. (3d) 737 (Ont. C.A.) — considered

R. v. Tele-Mobile Co. (2008), 2008 CarswellOnt 1588, 2008 CarswellOnt 1589, 2008 SCC 12, *(*sub nom. *Tele-Mobile Co. v. Ontario)* 372 N.R. 157, 55 C.R. (6th) 1, *(*sub nom. *Ontario v. Tele-Mobile Co.)* 229 C.C.C. (3d) 417, *(*sub nom. *Tele-Mobile Co. v. Ontario)* 235 O.A.C. 369, *(*sub nom. *Tele-Mobile Co. v. Ontario)* [2008] 1 S.C.R. 305, *(*sub nom. *R. v. Tele-Mobile Company (Telus Mobility))* 92 O.R. (3d) 478 (note), *(*sub nom. *Ontario v. Tele-Mobile Co.)* 291 D.L.R. (4th) 193 (S.C.C.) — considered

Statutes considered by *Deschamps J.*:

Bank Act, S.C. 1991, c. 46

Generally — referred to

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

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

Generally — referred to

s. 67(2) — referred to

s. 67(3) — referred to

s. 81.1 [en. 1992, c. 27, s. 38(1)] — considered

s. 81.2 [en. 1992, c. 27, s. 38(1)] — considered

s. 86(1) — considered

s. 86(3) — referred to

Bankruptcy Act and to amend the Income Tax Act in consequence thereof, Act to amend the, S.C. 1992, c. 27

Generally — referred to

s. 39 — referred to

Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act, Act to amend the, S.C. 1997, c. 12

s. 73 — referred to

s. 125 — referred to

s. 126 — referred to

Canada Pension Plan, R.S.C. 1985, c. C-8

Generally — referred to

s. 23(3) — referred to

s. 23(4) — referred to

Cités et villes, Loi sur les, L.R.Q., c. C-19

en général — referred to

Code civil du Québec, L.Q. 1991, c. 64

en général — referred to

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

art. 2930 — referred to

Companies' Creditors Arrangement Act, Act to Amend, S.C. 1952-53, c. 3

Generally — referred to

Companies' Creditors Arrangement Act, 1933, S.C. 1932-33, c. 36

Generally — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

s. 11 — considered

s. 11(1) — considered

s. 11(3) — referred to

s. 11(4) — referred to

s. 11(6) — referred to

s. 11.02 [en. 2005, c. 47, s. 128] — referred to

s. 11.09 [en. 2005, c. 47, s. 128] — considered

s. 11.4 [en. 1997, c. 12, s. 124] — referred to

s. 18.3 [en. 1997, c. 12, s. 125] — considered

s. 18.3(1) [en. 1997, c. 12, s. 125] — considered

s. 18.3(2) [en. 1997, c. 12, s. 125] — considered

s. 18.4 [en. 1997, c. 12, s. 125] — referred to

s. 18.4(1) [en. 1997, c. 12, s. 125] — considered

s. 18.4(3) [en. 1997, c. 12, s. 125] — considered

s. 20 — considered

s. 21 — considered

s. 37 — considered

s. 37(1) — referred to

Employment Insurance Act, S.C. 1996, c. 23

Generally — referred to

s. 86(2) — referred to

s. 86(2.1) [en. 1998, c. 19, s. 266(1)] — referred to

Excise Tax Act, R.S.C. 1985, c. E-15

Generally — referred to

s. 222(1) [en. 1990, c. 45, s. 12(1)] — referred to

s. 222(3) [en. 1990, c. 45, s. 12(1)] — considered

Fairness for the Self-Employed Act, S.C. 2009, c. 33

Generally — referred to

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

s. 227(4) — referred to

s. 227(4.1) [en. 1998, c. 19, s. 226(1)] — referred to

Interpretation Act, R.S.C. 1985, c. I-21

s. 44(f) — considered

Personal Property Security Act, S.A. 1988, c. P-4.05

Generally — referred to

Sales Tax and Excise Tax Amendments Act, 1999, S.C. 2000, c. 30

Generally — referred to

Wage Earner Protection Program Act, S.C. 2005, c. 47, s. 1

Generally — referred to

s. 69 — referred to

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

s. 128 — referred to

s. 131 — referred to

Statutes considered *Fish J.*:

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

Generally — referred to

s. 67(2) — considered

s. 67(3) — considered

Canada Pension Plan, R.S.C. 1985, c. C-8

Generally — referred to

s. 23 — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

s. 11 — considered

s. 18.3(1) [en. 1997, c. 12, s. 125] — considered

s. 18.3(2) [en. 1997, c. 12, s. 125] — considered

s. 37(1) — considered

Employment Insurance Act, S.C. 1996, c. 23

Generally — referred to

s. 86(2) — referred to

s. 86(2.1) [en. 1998, c. 19, s. 266(1)] — referred to

Excise Tax Act, R.S.C. 1985, c. E-15

Generally — referred to

s. 222 [en. 1990, c. 45, s. 12(1)] — considered

s. 222(1) [en. 1990, c. 45, s. 12(1)] — considered

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

s. 222(3) [en. 1990, c. 45, s. 12(1)] — considered

s. 222(3)(a) [en. 1990, c. 45, s. 12(1)] — considered

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

Generally — referred to

s. 227(4) — considered

s. 227(4.1) [en. 1998, c. 19, s. 226(1)] — considered

s. 227(4.1)(a) [en. 1998, c. 19, s. 226(1)] — considered

Statutes considered *Abella J.* (dissenting):

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

Generally — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

s. 11 — considered

s. 11(1) — considered

s. 11(3) — considered

s. 18.3(1) [en. 1997, c. 12, s. 125] — considered

s. 37(1) — considered

Excise Tax Act, R.S.C. 1985, c. E-15

Generally — referred to

s. 222 [en. 1990, c. 45, s. 12(1)] — considered

s. 222(3) [en. 1990, c. 45, s. 12(1)] — considered

Interpretation Act, R.S.C. 1985, c. I-21

s. 2(1)"enactment" — considered

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

s. 44(f) — considered

Winding-up and Restructuring Act, R.S.C. 1985, c. W-11

Generally — referred to

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.

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

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.

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

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)*,

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

[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

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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 (Que. S.C.), leave to appeal granted, 2010 QCCA 183 (Que. C.A.)). 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*.

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

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

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

> 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*,

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

> (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

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

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)

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

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,

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

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

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

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

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

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).

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

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

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

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
>
> (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 in-

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terest, ...

...

... 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:

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

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

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

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

109 With respect, unlike Tysoe J.A., I do not find it "inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception" (2009 BCCA 205, 98 B.C.L.R. (4th) 242, [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.

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

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[FN1] 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
>
> (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.

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.

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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

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

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*

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

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,[FN2] 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.

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

(*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.

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

(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

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

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

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(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

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(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)**

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

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

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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

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

"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

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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

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

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

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

***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

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

> *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.
>
> **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.

FN1 Section 11 was amended, effective September 18, 2009, and now states:

FN2 The amendments did not come into force until September 18, 2009.

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2001 CarswellOnt 525, 196 D.L.R. (4th) 448, 17 M.P.L.R. (3d) 57, 142 O.A.C. 70, 24 C.B.R. (4th) 303

2001 CarswellOnt 525, 196 D.L.R. (4th) 448, 17 M.P.L.R. (3d) 57, 142 O.A.C. 70, 24 C.B.R. (4th) 303

Toronto Dominion Bank v. Usarco Ltd.

The Toronto-Dominion Bank (Moving Party / Respondent / Appellant) and Usarco Limited and Frank Levy (Defendants) and The Corporation of the City of Hamilton (Moving Party / Respondent / Respondent in appeal) and Coopers & Lybrand Limited (Moving Party / Respondent / Respondent in appeal) and The Ministry of Labour (Respondent / Respondent in appeal)

Ontario Court of Appeal

Austin, Laskin, Simmons JJ.A.

Heard: October 11-12, 2000
Judgment: February 28, 2001
Docket: CA C29472

Proceedings: affirming (1997), 40 M.P.L.R. (2d) 293, 50 C.B.R. (3d) 127, 31 O.T.C. 81 (Ont. Gen. Div.)

Counsel: *John A. Campion*, *Michael J. MacNaughton* and *Carole J. Hunter*, for Appellant, The Toronto Dominion Bank

Neil C. Saxe, for Respondent, Coopers & Lybrand Limited

F. Paul Morrison and *David E. Leonard*, for Respondent, Corporation of the City of Hamilton

Subject: Insolvency; Public; Tax — Miscellaneous

Bankruptcy --- Priorities of claims — Claims for municipal taxes and public utilities rates — Preferred claims — Priority over secured creditors

Company had five properties on which bank held mortgages or guarantees as security for funds advanced to company — Company defaulted on loan payments and was indebted to bank for $18 million — Receiver paid $900,000 to bank and recovered additional $960,000 — Receiver failed to give notice of payment to municipality which was owed $2 million in property tax arrears — Municipality's motion for payment of tax arrears was granted — Motions judge held that receiver had breached duty to represent all creditors and that receiver failed to act meticulously in its duties — Bank appealed — Appeal dismissed — Section 382 of Municipal Act puts municipality's claim for arrears of property taxes ahead of all other claims by creditors except for Crown — Section 400 of Act accords right to municipality to distrain against goods and chattels of bankrupt — Court will not permit conduct by court-appointed receiver which has effect of changing rights of competing creditors — Trial judge correctly held that receiver breached normal duty to pay taxes as part of preserving bankrupt's property — Municipal Act, R.S.O. 1990, c. M.45, ss. 382, 400.

Cases considered by *Austin J.A.*:

Alberta Treasury Branches v. Invictus Financial Corp. (1986), 42 Alta. L.R. (2d) 181, 68 A.R. 207, 61 C.B.R. (N.S.) 238 (Alta. Q.B.) — considered

Alberta Treasury Branches v. Invictus Financial Corp. (1986), 47 Alta. L.R. (2d) 94, 61 C.B.R. (N.S.) 254 (Alta. C.A.) — considered

Blind River Pine Co., Re (1937), 19 C.B.R. 41 (Ont. S.C.) — considered

Canadian Imperial Bank of Commerce v. Barley Mow Inn Inc., 20 B.C.L.R. (3d) 70, [1996] 7 W.W.R. 296, 50 C.P.C. (3d) 29, 41 C.B.R. (3d) 251, 76 B.C.A.C. 190, 125 W.A.C. 190 (B.C. C.A.) — considered

Cecilian Co., Re (1922), 2 C.B.R. 330 (Ont. S.C.) — considered

Decker's Delicatessen, Re (1924), 5 C.B.R. 208, 56 O.L.R. 140, [1925] 1 D.L.R. 652 (Ont. S.C.) — considered

Ellis Co., Re (1929), 10 C.B.R. 491, 36 O.W.N. 202 (Ont. Master) — considered

Fotti v. 777 Management Inc., [1981] 5 W.W.R. 48, 9 Man. R. (2d) 142, 2 P.P.S.A.C. 32 (Man. Q.B.) — considered

General Fireproofing Co. of Canada, Re, 18 C.B.R. 159, [1937] S.C.R. 150, [1937] 2 D.L.R. 30 (S.C.C.) — considered

Goverde, Re, [1972] 2 O.R. 506, 16 C.B.R. (N.S.) 270, 26 D.L.R. (3d) 71 (Ont. S.C.) — considered

Hamilton Wentworth Credit Union Ltd. (Liquidator of) v. Courtcliffe Parks Ltd. (1995), 28 M.P.L.R. (2d) 59, 32 C.B.R. (3d) 303, *(*sub nom. *Hamilton Wentworth Credit Union Ltd. v. Courtcliffe Parks Ltd.)* 23 O.R. (3d) 781 (Ont. Gen. Div. [Commercial List]) — considered

Merrell v. A. Sung Holdings Ltd. (1992), 11 M.P.L.R. (2d) 62, 3 P.P.S.A.C. (2d) 193 (Ont. Gen. Div.) — considered

Merrell v. A. Sung Holdings Ltd. (1995), *(*sub nom. *Leavere v. Port Colborne (City))* 25 M.P.L.R. (2d) 122, *(*sub nom. *Leavere v. Port Colborne (City))* 22 O.R. (3d) 44, *(*sub nom. *Leavere v. Port Colborne (City))* 122 D.L.R. (4th) 200, *(*sub nom. *Leavere v. Port Colborne (City))* 9 P.P.S.A.C. (2d) 78, *(*sub nom. *Leavere v. Port Colborne (City))* 79 O.A.C. 16 (Ont. C.A.) — referred to

Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd., 8 C.B.R. (3d) 31, 81 Alta. L.R. (2d) 45, [1991] 5 W.W.R. 577, 81 D.L.R. (4th) 280, 7 C.E.L.R. (N.S.) 66, 117 A.R. 44, 2 W.A.C. 44 (Alta. C.A.) — applied

Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd. (1991), 8 C.B.R. (3d) 31 at 55, 120 A.R. 309, 8 W.A.C. 309, 86 D.L.R. (4th) 567, 3 C.P.C. (3d) 100, 84 Alta. L.R. (2d) 257 (Alta. C.A.) — considered

Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd. (1992), 8 C.B.R. (3d) 31n, 7 C.E.L.R. (N.S.) 66n, 83 Alta. L.R. (2d) lxvi, 86 D.L.R. (4th) 567n, 137 N.R. 394, 127 A.R. 396, 20 W.A.C. 396, 3 C.P.C. (3d) 100n (S.C.C.) — referred to

Royal Bank v. Lawton Development Inc. (1994), 19 M.P.L.R. (2d) 170 (Ont. Gen. Div.) — considered

Royal Bank v. Niagara Falls (City) (1992), 7 O.R. (3d) 147 (Ont. Gen. Div.) — considered

Royal Bank v. Sherkston Beaches Ltd. (1988), 37 M.P.L.R. 268, 64 O.R. (2d) 126, 49 D.L.R. (4th) 460, 70 C.B.R. (N.S.) 197 (Ont. H.C.) — considered

Royal Bank v. 238842 Alberta Ltd., [1985] 5 W.W.R. 373, 57 C.B.R. (N.S.) 242, 40 Sask. R. 177, 20 D.L.R. (4th) 450 (Sask. C.A.) — considered

West & Co., Re (1921), 2 C.B.R. 3, 50 O.L.R. 631, 62 D.L.R. 207 (Ont. S.C.) — considered

808757 Ontario Inc. (Receiver of), Re (1994), 26 C.B.R. (3d) 75, 21 M.P.L.R. (2d) 283 (Ont. Gen. Div. [Commercial List]) — considered

Statutes considered:

Assessment Amendment Act, 1917, S.O. 1917, c. 45

s. 10 — considered

Municipal Act, R.S.O. 1990, c. M.45

Generally — considered

s. 382 — considered

s. 384 — considered

s. 400 — considered

s. 400(1) — considered

s. 400(1)(a) — considered

s. 400(1)(d) — considered

s. 400(11) — considered

Municipal Tax Sales Act, R.S.O. 1990, c. M.60

Generally — referred to

Urban Municipality Act, R.S.S. 1978, c. U-10

s. 384 — considered

Suburban Area Development Act, Act to amend the, S.O. 1922, c. 77

Generally — considered

2001 CarswellOnt 525, 196 D.L.R. (4th) 448, 17 M.P.L.R. (3d) 57, 142 O.A.C. 70, 24 C.B.R. (4th) 303

APPEAL from judgment reported at (1997), 40 M.P.L.R. (2d) 293, 50 C.B.R. (3d) 127, 31 O.T.C. 81 (Ont. Gen. Div.), granting motion by municipality for payment of monies by receiver to municipality in satisfaction of municipal tax arrears.

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

1 The Toronto-Dominion Bank ("the Bank") appeals from the decision of Rosenberg J. made June 2, 1997, that Coopers & Lybrand Limited (the "Receiver") should have paid to the Corporation of the City of Hamilton (the "City") the municipal taxes on the property of Usarco Limited ("Usarco") and Frank Levy ("Levy") in receivership as they accrued due.

2 From the Bank's perspective, the issue is whether the claim of a fully secured creditor ranks ahead of a municipality's claim for realty taxes on a receivership. The City's position is that it had priority and that the Receiver was wrong in not paying the taxes as they accrued due. Rosenberg J. agreed with the City's position and ordered the Bank to refund the money received during the receivership to the Receiver. The Receiver was also ordered to pay to the City all the money it had realized with the exception of its fees and disbursements, including all the money refunded to it by the Bank. Rosenberg J.'s reasons are reported at (1997), 50 C.B.R. (3d) 127 (Ont. Gen. Div.) and at (1997), 40 M.P.L.R. (2d) 293 (Ont. Gen. Div.). I agree with his reasons and his conclusion. My reasons follow.

3 The matters in issue involve the duty of a court-appointed receiver and the interpretation of certain sections of the *Municipal Act* R.S.O. 1990 c. M.45 (the "Act"), insofar as they bear on the issue of priority. The facts are set out fully in the reasons of Rosenberg J. A summary will suffice for the purposes of the appeal.

4 Levy was a principal of Usarco. Usarco was a scrap metal dealer and processor for over 40 years. It operated on five properties in Hamilton, Ontario, some registered in its name and others in the name of Levy. All or some of these lands were believed to be highly contaminated because of the operations carried out on them.

5 Levy and Usarco had been dealing with the Bank for about 40 years. In 1989, Usarco's business was failing and Usarco owed the Bank about $18,000,000. As security for Usarco's obligations the Bank held, among other security, a registered general security agreement dated December 22, 1987, charging all of Usarco's property, a registered $3,000,000 demand debenture charging all of Usarco's property, a registered general assignment of book debts, mortgages on 371 Wellington Street North and 735 Strathearne Avenue and guarantees of Usarco's debts to the Bank provided by Levy, secured by mortgages upon 363 Wellington Street, 675 Strathearne Avenue and 725 Strathearne Avenue, all in Hamilton.

6 The Receiver was appointed by the order of Borins J. on October 11, 1990. The Receiver was not to go into possession or to manage or continue the business because of the contamination. The Receiver's function was "to sell, lease, transfer or otherwise dispose of" the assets. Those assets consisted of the five properties and the buildings, contents and equipment on them. The Receiver was granted the power and authority but not the obligation to make payments to persons having prior mortgages, charges or encumbrances upon the assets and to pay any debts, charges or expenses of Usarco and Levy considered "necessary and desirable for the purposes of carrying out this Order." Usarco and Levy remained the owners of the assets. Any tenants were to pay rents and arrears to the Receiver, but the Receiver was not obligated to fulfil any of the obligations of Usarco or Levy as landlords. No proceedings were to be taken or continued against the Receiver without leave of the court.

7 The Receiver actively carried on the receivership from the date of the order until 1996. By that time some of the property had been sold to Archibald Leach ("Leach") and the receivership had been discontinued with respect to the balance of the assets in light of the fact that they were unsaleable. The Receiver and the Bank were in the process of winding up the receivership when the City brought a motion seeking to recover municipal realty taxes.

8 During the receivership the Receiver dealt with the Ministry of Labour respecting claims of former employees, the Ministry of the Environment respecting contamination of the premises and the City with respect to the removal of chemicals from the lands in question into the city at large. The Receiver also dealt with Dofasco with respect to a part of the premises

leased to Dofasco.

9 During the receivership, the Receiver recorded receipts of $3,606,611.48 and disbursements of $2,561,238.30. Among the receipts was a payment by Dofasco of $115,245.23 in February 1993, for the years 1990, 1991 and 1992 in accordance with a lease requirement that the tenant's share of the municipal realty taxes be paid to the landlord.

10 Included in the disbursements made by the Receiver were the following:

Security	$267,638.39
Utilities	$120,687.06
Legal Fees	$110,756.34
Telephone	$ 4,408.66
Receiver's Fees	$467,374.52
Ministry of Labour	$509,557.14

The $115,245.23 paid by Dofasco to the Receiver on account of taxes was not paid over to the City.

11 As is the custom, the Receiver's activities were periodically reported to the court. These reports, some lengthy and detailed, were dated March 13 and July 14, 1992, November 15 and December 3, 1993, February 11 and August 10, 1994, September 28, 1995, and March 15 and October 30, 1996. They were presented to the court on or about their respective dates, each accompanied by a notice of motion requesting a particular order or orders, as for instance for the approval of a sale.

12 Although Dofasco's payment to the Receiver on account of taxes was made in February 1993, it does not appear in the lists of disbursements in the reports until October 1996. Presumably it was included under "Rental of Premises" in the earlier reports. No explanation for this accounting was provided. There is no reference to the payment of municipal realty taxes in any of the lists of disbursements in the reports.

13 As of October 11, 1990, $186,002.93 was owing on account of such taxes. Nothing was paid on that account by the Receiver. As a consequence, by January 15, 1997, $2,588,159 was owing for taxes, penalties and interest. No issue was raised with respect to the amounts of these debts.

14 The evidence before the court does not indicate when it was decided not to pay these taxes nor by whom or why. Borden & Elliot were the Receiver's solicitors. In June, 1992 they provided the Receiver with an opinion letter as to the Bank's priority over all other claims. "Unregistered Rights and Liens" were expressly excluded from that opinion. The letter dealt with municipal realty taxes at length. They were described as constituting a "special lien against the land in priority to all other claims except claims by the Crown". It was pointed out that notice of the lien did not require registration. As to s. 384 of the Act, which deals with leases, the letter stated that "[t]his provision takes effect upon the tenant receiving written notice from the "collector" or the treasurer of the municipality" and would not apply otherwise.

15 The only reflection of this opinion letter in the reports to the court is in the Report dated July 14, 1992, paragraph 8 of which states that:

> The Receiver has obtained an opinion from Messrs. Borden & Elliot that, subject to certain qualifications, the Security held by the Bank charges the Proceeds in priority to the claims of third parties.

16 That Report proposed that from its excess receipts, the Receiver should pay to the Bank $900,000 subject to agreement by the Bank to refund to the Receiver as much as might later be revealed to be required to satisfy the costs of the Receivership or a claim ranking in priority to the security held by the Bank. There was no indication in that Report that substantial municipal

taxes were owing and were not being paid. Nor is there any indication that any consideration was given to the propriety or otherwise of non-payment of municipal taxes or to the question whether the court should be advised of such non-payment and direction sought.

17 In the first Report dated March 13, 1992, it was noted that a cash offer of $525,000 which had been made for the land and equipment "was withdrawn upon the offeror learning of the property taxes payable in respect of the Wellington Street property".

18 In the same Report, there is a reference to the Receiver being required to pay the Minister of Labour a sum in excess of $500,000 on account of wages, vacation pay, termination pay and severance pay of former employees. An order to this effect was made by Farley J. on August 2, 1991.

19 The Receiver's statement of receipts and disbursements to September 30, 1993, includes the following disbursements:

Pension Plan	$509,557.14
Receiver's Fees	$387,965.95
Security Charges	$253,201.10
Utilities	$120,687.06

There is no mention of municipal taxes.

20 The Report of November 15, 1993, indicated that under the agreement with Leach the purchaser would be responsible for the settlement of all property taxes and that, based on information supplied by the City, the property tax arrears were approximately $260,000. The same report indicated a net excess of receipts over disbursements of $1,322,988.64, $900,000 of which had already been remitted to the Bank.

21 In dealing with the sale to Leach, the Report of December 3, 1993, states that the agreement is "conditional upon Leach making an arrangement with the City of Hamilton with respect to outstanding tax arrears".

22 The motion which accompanied the Report of December 3, 1993, was made on notice to the City. This was the first notice the City had of the receivership or of any of the proceedings before the court. The City was not given notice because of tax arrears owing to the City, but because the City claimed the Receiver was responsible for certain costs incurred when chemicals from the property were spread within the City and a "state of emergency" was declared. The Receiver's response was to send the City a copy of the original receiving order referring:

> in particular to paragraphs 1 and 2 of that Order which directs the Receiver not to and deems the Receiver not to have possession, management or control of Usarco's property . . . .

23 The Receiver's next Report was dated February 11, 1994. It noted that the Receiver's motion in respect of the partial termination of the receivership had been adjourned in December 1993, as a consequence of concerns raised by the Ministry of the Environment. These concerns were resolved through the sale by the Receiver of certain of Usarco's equipment for $25,000 and the application of that sum to environmental assessment of the Wellington Street property. In paragraphs 8 and 13 of this Report the Receiver refers to the Bank as "the only secured creditor of Usarco". The result of the Receiver's motion for approval of the Report of February 11, 1994, was an order of Farley J. dated February 18, 1994, reducing the receivership by deleting the unsold properties from it. The receivership was continued with respect to the lands still in the process of being sold to Leach.

24 The Report of March 15, 1996, advised that the sale to Leach had been completed. The Receiver's statement of receipts and disbursements showed that it expected a net receipt of $375,000 from the sale to Leach after commissions and expenses. Leach was responsible for and had assumed the tax arrears on the property purchased. He had not paid the taxes as of the date of

the hearing before Rosenberg J. Leach provided a limited indemnity to the Receiver and the Bank in respect of any claims that might be brought against them in regard to realty taxes.

25 The Bank's position is that there was a contest as to entitlement from the outset and that the Receiver's duty in the circumstances was to recognize this, to refrain from paying the municipal taxes and to wait until the court determined priorities, if necessary. The Bank argues that this approach is supported by the original order of October 11, 1990, which authorizes and empowers the Receiver to pay bills, including encumbrances, but does not order the Receiver to do so. The City's position is that the Receiver should have paid the municipal taxes as they became due. Had the Receiver done so, the total amount paid to the City would have been approximately $1,260,000, leaving about $600,000 available for distribution to the Bank.

26 In his decision, after setting out the facts, Rosenberg J. dealt with the issues as follows:

> Without criticizing the Receiver or Mr. MacNaughton as counsel for the Bank and sometimes counsel for the Receiver, the receivership has been conducted as if it were a private receivership by the Receiver for the Bank rather than a court appointed receiver. Even the indemnity from Leach with regard to the realty taxes is given both to the Receiver and the Bank. Mr. MacNaughton on behalf of the Bank argued that the position is analogous to a second mortgagee serving notice on tenants to attorn the rents to the second mortgagee. The funds that the second mortgagee thus realizes can be applied on account of the second mortgage until such time as the first mortgagee takes steps to protect its position. This analogy does not apply to the present situation. The City is prevented from taking any steps because of the order of this court. Even more significant is the duty owed by the Receiver to represent all of the creditors (at para 31).

27 After reference to the law, Rosenberg J., at paras 33, 36-40, continued as follows:

> At the time of the appointment of the Receiver the total tax arrears were approximately $186,000. Those tax arrears have increased and the latest statement shows the total tax arrears to be $2,588,000. In my view the Receiver would not be acting in a meticulously correct manner if during the term of receivership the Receiver realized some $1,900,000 while paying nothing on account of taxes and allowing tax arrears to accumulate and increase in the amount of some $2,500,000. The Receiver has not even paid on account of realty taxes the amount paid to the Receiver under the leases as contribution to realty taxes.
>
> . . .
>
> One other factor that makes this application unusual but reflects on the equities between the parties is the concern about the environment. The Bank and the Receiver were careful to make certain that the order of Borins J. did not make either the Bank or the Receiver subject to the strict requirements that might be ordered by the Ministry of the Environment with regard to cleaning up any pollution of the property. These requirements can be most onerous. It was prudent of the Bank and the Receiver to have the appointment in the nature of a liquidator and not as an occupier or owner. However if the City attempted to sell and if a purchaser were unable to be found the city would become the owner and subject to those onerous requirements. This is particularly relevant in the present case since it is already known from the Receiver's reports that there are no purchasers that have been located and likely none that can be located for the properties in question. It is also known that there maybe serious environmental problems with the properties.
>
> The *Municipal Act* R.S.O. 1990, c.M.45, section 400 gives the City recourse to chattels owned by the taxpayer and similarly other sections of the Act allow the City to collect rentals.
>
> It is not necessary for the Receiver to proceed under these sections of the *Municipal Act* on behalf of the City because the Court has already given the Receiver all rights to dispose of the chattels and to collect the rents. Accordingly it is not appropriate to deprive the City of the rights to proceeds of the sale of the chattels or the collection of rents on the ground that it could have taken steps to collect them and has not.

> For all of the foregoing reasons and in the peculiar circumstances of this case, it is appropriate that the net proceeds realized by the Receiver (especially in this case since they are less than the taxes that accrued during the receivership) should be paid to the City. Accordingly the Bank will pay back to the Receiver the sum of $900,000 paid to it together with interest at the prime bank rate from the time of receipt to the time of repayment to the Receiver and all of the net funds realized by the Receiver shall be paid to the City on account of taxes. The City shall also be entitled to its costs of these proceedings against the Bank after assessment thereof on a party and party basis.
>
> I wish to make it abundantly clear that in so deciding I am not criticising the actions of the Receiver or Mr. MacNaughton. The situation is an unusual one and neither the Receiver nor Mr. MacNaughton could be expected to predict that the City was entitled to priority for all monies realized.

28 I turn now to consider the law. As I do so, it is useful to repeat what was said at the outset of these reasons, namely that from the perspective of the appellant Bank, the issue in this appeal is whether the claim of a secured creditor on a receivership ranks ahead of a claim for municipal realty taxes. From the perspective of the respondent City, on the other hand, the issue is whether, during a receivership, the receiver is bound to pay such taxes as they become due.

29 A useful place to start (as Rosenberg J. did) is with the statement of Laycraft C.J.A. in *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.* (1991), 81 D.L.R. (4th) 280 (Alta. C.A.), at 292, 293 and 294; Supplementary Reasons at (1991), 86 D.L.R. (4th) 567 (Alta. C.A.) leave to appeal refused (1992), 86 D.L.R. (4th) 567n (S.C.C.):

> A receiver appointed by the court must act fairly and honestly as a fiduciary on behalf of all parties with an interest in the debtor's property and undertaking. The receiver is not the agent of the debtor or the creditor or of any other party, but has the duty of care, supervision and control which a reasonable person would exercise in the circumstances. The receiver may be liable for failure to exercise an appropriate standard of care.
>
> . . .
>
> A further factor affecting the obligation of a court-appointed receiver is the receiver's status as an officer of the court; the standard required because of that status is one of meticulous correctness. In *Alta. Treasury Branches v. Invictus Fin. Corp.* (1986), 42 Alta. L.R. (2d) 181, 68 A.R. 207 (Q.B.) Stratton J. (as he then was) said that the Receiver's obligations "reach further than merely acting honestly". He quoted with approval the statement of Wilson J. in *Fotti v. 777 Management Inc.* (1981), 2 P.P.S.A.C. 32 at p. 37, [1981] 5 W.W.R. 48, 9 Man. R. (2d) 142 (Q.B.):
>
> > . . . the receiver is an officer of the Court and in his discharge of that office he may not, in the name of the Court, lend his power to defeat the proper claims of those on whose behalf those powers are exercised. Clothed as he is with the mantle of this Court, his duties are to be approached not as the mere agent of the debenture holder, but as trustee for all parties interested in the fund of which he stands possessed. [Emphasis added.]
>
> The same concern for proper conduct by the court's appointed officer may be seen in the judgment of the Saskatchewan Court of Appeal in *Canadian Commercial Bank v. Simmons Drilling Ltd.* (1989), 62 D.L.R. (4th) 243, 76 C.B.R. (N.S.) 241, 35 C.L.R. 126 . . . per Sherstobitoff J.A. at pp. 250-51:
>
> > The receiver, and through it the bank, must bear responsibility for the consequences of the failure to act with sufficient diligence to discover the claims within a reasonable time, thereby permitting lapse of the limitation period.
> >
> > . . .
>
> The bank now seeks to benefit from that default and the receiver supports its position. That position is untenable. While it may not be improper for a private debtor to withhold payment of a debt due and owing, whether deliberately or by neglect or oversight, and thereby benefit from an intervening limitation period, the same is not true of a receiver, *for he is an officer*

> *of the court*. The receiver's action is the action of the court and the court will not permit or approve any action on the part of its officer which has the effect of changing the rights of competing creditors, whether deliberately or by default. [Italics in the original; underlining added.]

30 Reference may usefully be made to *Bennett on Receiverships*, 2nd ed. (Toronto: Carswell, 1999), at 180-181 (footnotes omitted):

> A court-appointed receiver represents neither the security holder nor the debtor. As an officer of the court, the receiver is not an agent but a principal entrusted to discharge the powers granted to the receiver *bona fide*. Accordingly, the receiver has a fiduciary duty to comply with such powers provided in the order and to act honestly and in the best interests of all interested parties including the debtor. The receiver's primary duty is to account for the assets under the receiver's control and in the receiver's possession. This duty is owed to the court and to all persons having an interest in the debtor's assets, including the debtor and shareholders where the debtor is a corporation. As a court officer, the receiver is put in to discharge the duties prescribed in the order or in any subsequent order and is afforded protection on any motion for advice and directions. The receiver has a duty to make candid and full disclosure to the court including disclosing not only facts favourable to pending applications, but also facts that are unfavourable.
>
> . . .
>
> In setting the standard of care, the court-appointed receiver must act with meticulous correctness, but not to a standard of perfection. As a fiduciary, the receiver owes a duty to make full disclosure of information to all interested sons. . . . The court-appointed receiver owes no duty to any individual creditor who may attempt to interfere in the receivership. [Emphasis added.]

31 Perhaps of limited significance here is the duty of a court-appointed receiver to the debtor and its shareholders. It would normally be a matter of some concern to a debtor and shareholders if the conduct of a receiver included the non-payment of taxes and the incurring of penalties and interest, thereby reducing the recovery or the chance of recovery of the owner. Barring extraordinary circumstances, such events should be fully disclosed to the court and the advice and instruction of the court sought.

32 The priority of a municipality with respect to municipal taxes is set out in the Act., Section 382 deals with realty, s. 384 deals with tenants and s. 400 with personalty. The relevant parts of those sections read as follows:

> **382.** The taxes due upon any land with costs may be recovered with interest as a debt due to the municipality from the owner or tenant originally assessed therefor and from any subsequent owner of the whole or any part thereof, saving that person's recourse against any other person, and are a special lien on the land in priority to every claim, privilege, lien or encumbrance of every person except the Crown, and the lien and its priority are not lost or impaired by any neglect, omission or error of the municipality or of any agent, or officer, or by want of registration. [Emphasis added.]
>
> **384.** (1) Where taxes are due upon any land occupied by a tenant, the collector or, after the roll has been returned, the treasurer, may give the tenant notice in writing requiring the tenant to pay such collector or treasurer the rent of the premises as it becomes due from time to time to the amount of the taxes due and unpaid and costs, and the collector or treasurer has the same authority as the landlord of the premises would have to collect the rent by distress or otherwise to the amount of the unpaid taxes and costs.
>
> (2) Nothing in this section prevents or impairs any other remedy for the recovery of the taxes or any portion thereof from the tenant or from any other person liable therefor.
>
> **400.** (1) Subject to section 399, if taxes that are a lien on land remain unpaid for twenty-one days after demand or notice made or given under section 392, 395 or 399 or, where a longer period has been authorized under subsection 399(6) such

taxes remain unpaid at the expiry of that period, the collector or, where there is no collector, the treasurer may alone or by an agent, subject to the exemptions and provisos mentioned in this section, levy them with costs by distress,

(a) upon the goods and chattels, wherever found within the county in which the municipality lies, belonging to or in the possession of the owner or tenant of the land whose name appears upon the collector's roll (the owner or the tenant in this section is called "the person taxed");

(b) upon the interest of the person taxed in any goods on the land, including an interest in any goods to the possession of which the person is entitled under a contract for purchase or a contract by which the person may or is to become the owner thereof upon performance of any condition;

(c) upon the goods and chattels of the owner of the land found thereon, though the owner's name does not appear upon the roll;

(d) upon any goods and chattels on the land, where title to such goods and chattel is claimed,

(i) by virtue of an execution against the person taxed or against the owner, though the person's name does not appear on the roll,

(ii) by purchase, gift, transfer or assignment from the person taxed, or from such owner, whether absolute or in trust, or by way of mortgage, or otherwise,

(iii) by the spouse, daughter, son, daughter-in-law or son-in-law of the person taxed, or of such owner, or by any of his or her relatives, in case such relative lives on the land as a member of the family, or

(iv) by virtue of any assignment or transfer made for the purpose of defeating distress,

provided that, where the person taxed or such owner is not in possession, goods and chattels on the land not belonging to the person taxed or to such owner are not subject to seizure, and the possession by the tenant of such goods and chattels on the premises is sufficient proof, in the absence of evidence to the contrary, that they belong to the tenant; provided also that no distress shall be made upon the goods and chattels of a tenant for any taxes not originally assessed against him, her or it as tenant; provided also that in cities and towns no distress for taxes in respect of vacant land shall be made upon goods and chattels of the owner except upon the land.

. . .

(11) Where personal property liable to seizure for taxes as hereinbefore provided is under seizure or attachment or has been seized by the sheriff or by a bailiff of any court or is claimed by or in possession of any assignee for the benefit of creditors or any liquidator, trustee or authorized trustee in bankruptcy or where such property has been converted into cash and is undistributed, it is sufficient for the tax collector to give to the sheriff, bailiff, assignee or liquidator or trustee or authorized trustee in bankruptcy notice of the amount due for taxes, and in such case the sheriff, bailiff, assignee or liquidator or trustee or authorized trustee in bankruptcy shall pay the amount to the collector in preference and priority to any other and all other fees, charges, liens or claims.

33 Courts have long recognized the importance of taxation to society. In *Decker's Delicatessen, Re* (1924), 56 O.L.R. 140 (Ont. S.C.), Fisher J., in the course of interpreting the predecessor to s. 382 of the Act, made the following observation at 142:

Governments and municipalities must secure revenue, otherwise they could not function; money must be secured, and taxation is the method adopted to secure it; and transactions between individuals must, therefore, unless excepted by sta-

> tute, be subordinated to that of the Government or municipality.

34 Also on the subject of priority, he said at the same page:

> It also seems to me that banks, loan companies, and persons engaged in the lending of money must have in mind, when valuing the security upon which they make a loan, to provide for taxes due to Dominion and Provincial Governments, or to a municipality, as being a prior charge or encumbrance in the event of insolvency.

35 More recently, MacPherson J. in *Royal Bank v. Lawton Development Inc.* (1994), 19 M.P.L.R. (2d) 170 (Ont. Gen. Div.) noted at 176 that s. 382 of the Act and its related provisions deserved of broad construction. As he explained:

> In recent years, Canadian courts have recognized that taxes serve important social purposes and are, therefore, entitled to judicial respect provided they are imposed in a clear fashion by a proper legislative body.

MacPherson J. also commented on the importance of property taxes at p. 175:

> It seems obvious that if a taxpayer owes a $1,000 municipal tax on January 1, 1994, and does not pay it, then the municipality is deprived of the use of that money. It will not have the money, to which it is legally entitled and on which it has counted, available to support the education, recreation, housing, social support and other programmes which it is required to provide. . . .

36 Inherent in the Bank's appeal is the proposition that the Receiver had no duty to keep current and to pay the arrears of property taxes owed by Usarco and Levy out of the proceeds of the receivership. In my view, this proposition is wrong. It fails to recognize the principles enunciated in *Decker's Delicatessen, Re*, *supra*. Further, it has been specifically rejected in numerous cases.

37 In *Royal Bank v. Lawton Development Inc.*, *supra*, a court-appointed receiver sought the court's advice regarding the payment of certain moneys owed to the municipality. While the receiver did not question that it had an obligation to pay the accrued property taxes, it did question its obligation to pay, *inter alia*, the penalties, interest and costs assessed by the municipality. MacPherson J. specifically endorsed the receiver's recognition of its obligation to pay the accrued property taxes at p. 173 as follows:

> The Royal Bank does not challenge the priority of the municipal tax over its security, almost certainly because of the clear language of s. 382 of the *Municipal Act*. . .

MacPherson J. continued at pp. 174-175:

> . . . the status and recovery of [a municipal] tax are governed by s. 382 ... [The provisions of s. 382] make it clear that a tax due upon land ... has priority over all other forms of security, except security held by the Crown. This conclusion has been reached by several judges of the Ontario courts in cases raising the relationship between a variety of municipal taxes and many different encumbrances held by private parties . . . It follows that the security held by the Royal Bank in the instant case does not take priority over the money owed to the City of Toronto . . .

In the end, MacPherson J. had little difficulty deciding that the priority granted to the City of Toronto under s. 382 of the Act extended to interest, penalties and certain costs.

38 In *Hamilton Wentworth Credit Union Ltd. (Liquidator of) v. Courtcliffe Parks Ltd.* (1995), 28 M.P.L.R. (2d) 59 (Ont. Gen. Div. [Commercial List]) Blair J. observed that the receiver had not made tax payments to the municipality on an ongoing basis, nor had it made any arrangements specifically providing for such payment. In contrast, however, the receiver had made

other payments, including legal fees, receivership fees and utilities. When the municipality proposed selling the property pursuant to its powers under the *Municipal Tax Sales Act*, R.S.O. 1990, c. M.60, it appeared there would be insufficient proceeds to pay both the property tax arrears and the receiver's own fees and disbursements. In denying the receiver priority over the municipality, Blair J. noted at p. 63:

> It is the failure [by the receiver] to keep taxes current that has led to the present predicament.

Blair J. also stated at pp. 72-73:

> Accordingly, I am of the opinion that the statutory scheme enacted through the *Municipal Act* and the *Municipal Tax Sales Act* for the imposition and collection of municipal property taxes precludes an order granting a receiver and manager priority over the Municipality for the receiver and manager's fees and disbursements, regardless of whether those fees and disbursements were incurred for the necessary preservation or improvement and realization of the property on behalf of all creditors.
>
> While this approach denies a receiver and manager a "super priority" with respect to municipal property taxes, it does not, in my view, alter what has traditionally been the case - and the understanding in the industry - concerning the payment of such taxes. Such taxes have traditionally been considered to be part of the "necessary costs of preservation" to be paid by a receiver and manager.

39 The City's claim with respect to realty is quite straightforward. Section 382 puts the City's claim ahead of all others except the Crown. As stated by Sherstobitoff J.A. in *Canadian Commercial Bank, supra* at p. 251, "the Court will not permit or approve any action on the part of its officer [the receiver] which has the effect of changing the rights of competing creditors . . . " This is precisely what the City says has happened. I agree with Sherstobitoff J.A. that the court will not permit such conduct. The same result is dictated by consideration for other interested parties. Levy and Ursaco should not be prejudiced by the City's claim increasing because of the accretion of penalties and interest.

40 Usarco leased part of the lands in question to Dofasco. This arrangement was continued following the Receiver's appointment. Under the lease Dofasco was responsible for taxes on that land. Dofasco paid $115,245.23 in taxes for the years 1990, 1991 and 1992 to the Receiver on or about February 15, 1993. Counsel for the Bank conceded during oral argument that this amount should have been paid over to the City on account of taxes. No similar concession was made by counsel for the Receiver.

41 In my respectful view, that amount should have been paid to the City on account of taxes in February 1993. It is my understanding that Dofasco remained liable for the taxes on the "leased lands" which were subsequently sold to Leach. To the extent that Dofasco has paid further amounts to the Receiver on account of taxes, such amounts should have been and must now be paid over to the City.

42 Personalty is dealt with under s. 400 of the Act. The Bank advances many reasons why the City has no entitlement to personalty or its proceeds. First, the Bank argues in its factum that the "goods and chattels" the City was entitled to pursuant to s. 400(1) did not include such items as Usarco's receivables, rent and like matters. I understood this argument respecting receivables was withdrawn during oral argument.

43 The Bank then argued that the City was further limited to applying the proceeds of the sale of personalty on a particular lot to the realty taxes on that lot. It was then argued that the City's lien respecting chattels did not arise until after distraint, and since the City never distrained any personalty, it had no lien in that regard and therefore no priority. Finally, in dealing with s. 400(11), which applies where personal property liable to seizure for taxes is in the hands of certain named persons, it was argued that as the Receiver was not one of such named persons, no relief was available to the City under s. 400(11).

44 The City's position is that s. 400(1)(a) accords the City the right to distrain against the goods and chattels of Usarco and

Levy situated anywhere in the county and that s. 400(1)(d) gives the City the right to distrain against any goods and chattels situated on the subject property, i.e. on the property on which municipal taxes remain unpaid.

45 The City also argues that "chattels" is one of the widest words known in law in its relation to personal property (*Goverde, Re*, [1972] 2 O.R. 506 (Ont. S.C.)), therefore it encompasses all personal property including:

> . . . choses in action such as money in a bank account, stocks, bonds, the right to receive money under a contract (e.g. rents under release) and debts (e.g. accounts receivable).

46 As a result, the City submits that in the instant case the meaning of "chattels" in s. 400(1) includes all of the assets realized upon by the Receiver and the proceeds thereof. Having regard to the concession by counsel for the Bank in the course of oral argument and his choosing not to argue further as to the meaning of "chattels", no specific ruling is required in this regard.

47 In view of the fact that s. 400(1)(a) refers to goods and chattels situated anywhere in the county and s. 400(1)(d) refers to *any* goods and chattels on the particular land on which taxes are unpaid, it does not seem to me that the City is limited by any geographic argument.

48 The real argument with respect to personalty is whether s. 400(11) applies to the Receiver in this case. The relevant language of that section is set out earlier in these reasons. The Bank argues that the section has no application because a court-appointed receiver or a receiver of any kind is not included in the list of persons to whom the subsection applies. Only a sheriff, bailiff of any court, assignee, liquidator, trustee or authorized trustee in bankruptcy are listed in s. 400(11). The City's position is that the Receiver is a "trustee" within the meaning of s. 400(11).

49 In my view, the purpose of s. 400(11) is to provide a municipality clear and simple means to assert its priority in circumstances where personalty otherwise available to be seized for taxes, has come under the control of some other person and has been or is in the process of being realized for the purpose of paying a debt or debts owed to that other person or his or her principal. In my opinion a receiver in these circumstances has no personal interest in the fund, apart from its fees and is therefore a trustee as well as a receiver. As such the Receiver comes within the ambit of the s. 400(11).

50 The jurisprudence on this point is mixed. In *Royal Bank v. 238842 Alberta Ltd.* (1985), 57 C.B.R. (N.S.) 242 (Sask. C.A.) the contest was between a debenture holder and a municipality claiming for business taxes and water and electric charges. The receiver, whose appointment by the debenture holder had been affirmed by the court, was directed to pay into court the proceeds of his sales of the debtor's assets. Section 384 of the *Saskatchewan Urban Municipality Act*, R.S.S. 978, c. U-10 was identical to our s. 400(11) for the purposes of these proceedings. At 247 and 248 Wakeling J.A. speaking for the majority said:

> The section [s. 384] certainly seems to be applicable in this instance as personal property was under seizure or attachment, the property was liable to seizure for taxes (s. 379), it had been converted into cash, was held by a trustee and was undistributed when the required notice was given by the city. In such circumstances, the priority provisions underlined above are to be applied and were so applied by Noble J. in the judgment from which this appeal is taken.
>
> The result is supported by the Ontario decision of *Re Decker's Delicatessen* . . . in which an almost identical section was interpreted to give priority to Ontario Hydro for electric rates which were acknowledged to be the equivalent of a municipal tax, rate or assessment.

51 The reasons of the court do not reveal any discussion apart from the foregoing as to whether the receiver in that case was a "trustee" within the meaning of s. 384.

52 In *Alberta Treasury Branches v. Invictus Financial Corp.* (1986), 42 Alta. L.R. (2d) 181 (Alta. Q.B.), aff'd (1986), 47 Alta. L.R. (2d) 94 (Alta. C.A.) a court appointed receiver-manager sought direction as to the priority of claims as amongst a

Workers' Compensation Board claim for employer contributions, claims of two municipalities for business taxes incurred both before and after the appointment of the receiver and the claim of a debenture holder under its debenture. Stratton J. of the Court of Queen's Bench decided that the Workers' Compensation Board ranked first because of the language of its legislation. One of the claiming municipalities was Lloydminster, which is partly in Alberta and partly in Saskatchewan, and as a consequence is governed by a charter. Section 330 of the charter is for our purposes identical to Ontario s. 400(11). At 189 and 190 Stratton J. said:

> Upon deciding that the *Decker's Delicatessen and Mowbrey Stout* [*Royal Bank v. 238842 Alberta Ltd.*] cases apply to the case at bar, it must then be determined whether, in the present case, the receiver-manager falls within any of the categories listed in s. 330 of the charter. "Receiver" is not expressly mentioned in that section.
>
> I am of the view that a court-appointed receiver-manager would fit within the term of "trustee." A court-appointed receiver-manager is a fiduciary. His obligations reach further than merely acting honestly and in good faith. Wilson J. of the Manitoba Court of Queen's bench indicated in *Fotti v. 777 Mgmt. Inc.* ... that a receiver-manager appointed under a court order is:
>
> > . . . an officer of the court and in his discharge of that office he may not, in the name of the court, lend his power to defeat the proper claims of those on whose behalf those powers are exercised. Clothed as he is with the mantle of this court, his duties are to be approached not as the mere agent of the debenture holder, but as trustee for all parties interested in the fund of which he stands possessed.
>
> The scope of the priority created by s. 330 of the charter is clearly limited to personal property and to the proceeds of personal property. [Emphasis added.]

53 Thus *Royal Bank v. 238842 Alberta Ltd.*, *supra*, *Alberta Treasury Branches v. Invictus Financial*, *supra* and *Fotti v. 777 Management Inc.* [reported [1981] 5 W.W.R. 48 (Man. Q.B.)], *supra* all equate a receiver with a trustee for the purposes of s. 400 (11). *Bennett on Receiverships*, *supra*, cites the *Alberta Treasury Branches v. Invictus Financial*, *supra*, as authority for the statement that "[a] court-appointed receiver is a trustee and fiduciary" (at p. 180, footnote 93).

54 *Royal Bank v. Sherkston Beaches Ltd.* (1988), 70 C.B.R. (N.S.) 197 (Ont. H.C.) stands for the contrary position. This case involved a claim by a municipality for business taxes assessed against Sherkston Beaches Limited. Sherkston Beaches Limited owned and operated a recreational park and camping facility within the limits of the municipality. Royal Bank was its major creditor and on its application a receiver was appointed by the court. The operation was sold to another company but the proceeds were not sufficient to pay both the business taxes assessed and the amount owing to the bank. With respect to the application or otherwise of s. 400(11) O'Driscoll J. at 202 and 205-207, said the following:

> **V. ISSUES**
>
> A. *Is the court-appointed receiver a "trustee or authorized trustee in bankruptcy" under the provisions of s. 387(11)* [now s. 400 (11)] of the Municipal Act?
>
> *Re P.W. Ellis Co.* (1929), 36 O.W.N. 202, 10 C.B.R. 491 at 493-94 (S.C.; Official Referee):
>
> Secondly, Mr. Herapath contends that if the proceeds are to be regarded as I think they must be, as being in the possession of Mr. Clarkson *qua* receiver on behalf of the bondholders, then the words in the subsection "or of any trustee" include a receiver such as Mr. Clarkson is and the section applies.
>
> I disagree with this contention also. The whole phrase must be read together, "or of any trustee or authorized trustee in bankruptcy," both referring, I think to a case of bankruptcy; and I cannot bring myself to believe, what Mr. Herapath's argument implies, that a trustee for a mortgagee claiming or being in possession of chattel property, is in a worse position

than the mortgagee himself would have been had he taken possession of the mortgaged property.

Conclusion

My answer to the question posed in "A" is: "No".

. . .

VI. SUBMISSION OF COUNSEL FOR THE CITY OF PORT COLBORNE

1. The receiver is a "trustee" under the provisions of s. 387(11) of the *Municipal Act*.

2. In the case at bar, "property has been converted into cash and is undistributed." (s. 387(11) of the *Municipal Act*).

3. Notice of the amount due was given to the "trustee".

4. The "trustee" is obliged to pay the city the arrears of business tax under s. 387(11) of the *Municipal Act*.

5. The following decisions support the city's position:

(a) *Royal Bank v. 238842 Alta. Ltd.;* *Saskatchewan v. Mowbrey Stout Ltd.*, 57 C.B.R. (N.S.) 2422, [1985] 5 W.W.R. 373, 20 D.L.R.(4th) 450, 40 Sask.R. 177 (C.A.)

(b) *Re Decker's Delicatessen*, O.L.R. 140, 5 C.B.R. 208, [1925] 1 D.L.R. 652 (S.C.)

My conclusions

1. The following quotations are found in the majority judgment in the Saskatchewan Court of Appeal in *Royal Bank v. 238842 Alta., Ltd., supra*:

Page 246:

> The section then goes on to indicate that the only interest which is protected from the city's remedy by distress is that of a vendor with a subsisting lien for the purchase price (s. 379(2)).

Pages 247-48:

> In the result, the provisions of s. 379 set up a different but very extensive system of priorities which are sweeping in nature, covering by specific mention the right to distrain against property other than that of the taxpayer and exempting only the claim of an unpaid vendor . . .
>
> The section certainly seems to be applicable in this instance as personal property was under seizure or attachment, the property was liable to seizure for taxes (s. 379), it had been converted into cash, was held by a trustee and was undistributed when the required notice was given by the city. In such circumstances, the priority provisions underlined above are to be applied and were so applied by Noble J. in the judgment from which this appeal is taken.
>
> The result is supported by the Ontario decision of *Re Decker's Delicatessen*[*supra*] in which an almost

> identical section was interpreted to give priority to Ontario Hydro for electric rates which were acknowledged to be the equivalent of a municipal tax, rate or assessment.
>
> 2. It will be observed that:
>
> (a) The Saskatchewan Court of Appeal in *Royal Bank v. 238842, supra*, did not consider the question: Was the personal property "liable to seizure for taxes"?
>
> (b) The Saskatchewan Court of Appeal did not deal with the question whether a court-appointed receiver falls within the phrase "trustee" in the legislation comparable to s. 387(11) of the *Municipal Act*.
>
> (c) (c) In *Re Decker's Delicatessen, supra*, Fisher J. was sitting as a *bankruptcy judge* and had to decide whether the priorities set out in s. 387(11) of the *Municipal Act* of Ontario should take precedence or whether a priority in the *Landlord and Tenant Act* of Ontario should take precedence.
>
> Fisher J. held (headnote [O.L.R.]):
>
> . . . [that] the trustee of the bankrupt estate is bound to pay, out of the proceeds of the personal property of the debtor liable to seizure for taxes and rent, rates payable by the debtor to Hydro-Electric Power Commission, in priority to the claim of the landlord for rent.
>
> (d) The case before me does not involve a bankrupt estate nor does it involve two competing statutes each setting out a priority.
>
> (e) In my view, *Re Decker's* is not analogous to the case before me.
>
> (f) The Saskatchewan Court of Appeal in *Royal Bank v. 238842 Alta. Ltd., supra*, dealt with a statute which gave wide powers to municipalities regarding distress for arrears of business taxes - powers much wider that the Ontario statute.
>
> If and insofar as the decision of the Saskatchewan Court of Appeal is in conflict with the Ontario decisions, I decline to follow it.

55 I am not certain what weight should be given to *Royal Bank v. Sherkston Beaches Ltd.*. First, it deals with business taxes rather than realty taxes and the powers of a municipality with respect to collecting realty taxes and business taxes are not co-extensive. In addition, the motions judge found that the goods in question were not "liable to seizure" because the bank's secured claim exceeded the value of the goods and accordingly Sherkston Beaches Ltd. had no interest or equity in the goods. As well, the decision of the Alberta Court of Appeal in *Alberta Treasury Branches v. Invictus Financial*, *supra*, does not appear to have been drawn to the attention of the motions judge.

56 If the motions judge's conclusion was based upon the Official Referee's opinion, then with respect, I would draw a distinction between the example referred to by the Official Referee, namely a person not appointed by the court, and the situation in the instant case. That same distinction was drawn by Sherstobitoff J.A. in *Canadian Commercial Bank, supra*, when he pointed out the difference between a "private debtor" and an "officer of the court". It may well be that, in the instant case, had the Bank itself taken and sold the personalty, it would have been in a stronger position than the Receiver. The Receiver was bound, by its appointment, to act on behalf of all interested parties, including Usarco, Levy and the City. Had the Bank taken possession, by itself or by a private receiver it could have looked to its own interests alone. I disagree with what appears to have been the opinion of the Official Referee in this regard.

57 In *Royal Bank v. Niagara Falls (City)* (1992), 7 O.R. (3d) 147 (Ont. Gen. Div.) Steele J. dealt with the lawfulness of a seizure for business taxes. After deciding the case in favour of the municipality, Steele J. said at 151:

> I do not think that s. 400(11) has any application. The private receiver appointed by the bank is not one of those persons referred to therein. In this regard, I agree with the conclusion in (1988), 64 O.R. (2d) 126, 49 D.L.R. (4th) 460 (H.C.J.), at p. 130 O.R., p. 464 D.L.R. I would distinguish the decision in the *Sherkston Beaches* case from the present one in that, in that case, no seizure had taken place. [Emphasis added.]

58 I agree with Steele J. that s. 400(11) had no application to the circumstances of that case. His remarks with respect to the decision in *Royal Bank v. Sherkston Beaches Ltd.*, *supra*, were accordingly *obiter*. It does not appear from the reasons of Steele J. that the decision in *Alberta Treasury Branches v. Invictus Financial*, *supra*, was drawn to his attention.

59 Having regard to the purpose of s. 400(11) as set out earlier and to the circumstances under which the court-appointed Receiver dealt with the properties in question, including both realty and personalty, I conclude that the Receiver in the instant case was a "trustee" within the meaning of s. 400(11). It is conceded that the requirement for notice in s. 400(11) was met. Accordingly the Bank's arguments with respect to priority with respect to the proceeds from the sale of personalty must be rejected.

60 I should note that in reaching this conclusion, in addition to the authorities discussed above, I have considered the following:

> *The Assessment Amendment Act*, S.O. 1917 c.45, s.10 (the original of what is now s. 400(11) of the *Municipal Act* R.S.O. 1990, c.M-45).
>
> In *West & Co., Re* (1921), 2 C.B.R. 3 (Ont. S.C.).
>
> In *Cecilian Co., Re* (1922), 2 C.B.R. 330 (Ont. S.C.).
>
> *The Suburban Area Development Act*, S.O. 1922, c.77, s.24 (which amended the *Assessment Act* by adding the words "or trustee or authorized trustee in bankruptcy").
>
> In *Ellis Co., Re* (1929), 10 C.B.R. 491 (Ont. Master).
>
> In *General Fireproofing Co. of Canada, Re* (1937), 18 C.B.R. 159 (S.C.C.).
>
> In *Blind River Pine Co., Re* (1937), 19 C.B.R. 41 (Ont. S.C.).
>
> *Merrell v. A. Sung Holdings Ltd.* (1992), 11 M.P.L.R. (2d) 62 (Ont. Gen. Div.) aff'd. (1995), 22 O.R. (3d) 44 (Ont. C.A.).
>
> *808757 Ontario Inc. (Receiver of), Re* (1994), 26 C.B.R. (3d) 75 (Ont. Gen. Div. [Commercial List]).
>
> *Canadian Imperial Bank of Commerce v. Barley Mow Inn Inc.* (1996), 41 C.B.R. (3d) 251 (B.C. C.A.)

61 The Bank has an alternative or additional argument. It submits that the Bank is entitled to any and all of the money recovered by virtue of its security, while the City is more limited in that it can only apply the money recovered by the disposition of realty and personalty owned by Usarco to the taxes owing by Usarco. Simply put, the money recovered from the sale of Levy's property cannot be applied to tax arrears on Usarco's property.

62 This submission was not made by the Bank at the hearing below nor does it appear in its factum. Counsel for the Bank

first advised counsel for the City of the argument at 8:30 a.m. on October 11, 2000, the day the appeal was to be argued. The court was advised of this submission when the case was called for argument, at which time counsel for the Bank sought to introduce a chart to illustrate this point. The City's position was that the court should not hear the argument because it was not raised before and notice was not given until that day. As the court anticipated that the hearing might run over into the following day, it decided to accept the chart and hear the argument without any commitment on the court's part to deal with the argument. Counsel for the City would be at liberty, if so advised, to file written submissions on the matter. He did so the following day.

63 The first two paragraphs of those submissions are as follows:

> 1. The Bank now raises, for the first time in these proceedings, the distinction between assets and property owned by the two Defendants, Usarco Limited ("Usarco") and Usarco's President, Director and majority shareholder Frank Levy ("Levy"). The Bank says that the assets of Usarco cannot be used to pay the realty tax arrears of Levy, and vice versa, and as a result, at most the City is entitled to recover $645,823.01 in respect of Usarco realty tax arrears and $276,980.32 in respect of Levy realty tax arrears.
>
> 2. This is wrong, it is submitted, in three ways:
>
> (a) it ignores the treatment of the Usarco and Levy properties and assets as one by the Receiver during the course of the receivership, as set out in more detail below and as evidenced in the attached documents from the Appeal Books;
>
> (b) it ignores the strong evidence that Usarco was a tenant on the Levy properties; and
>
> (c) even if the Appellant is correct in its submission, it fails to allocate to the Levy realty tax arrears the $541,800.00 the Receiver realized in respect of Usarco's inventory which was situated on Levy property (363 Wellington St. N.) and the $729,802.43 the Receiver realized in respect of Usarco's Accounts Receivable which were situated at Usarco's head office on Levy property (363 Wellington St. N.), as it should pursuant to s. 400(1)(d)(ii) of the *Municipal Act*.

64 I agree with those submissions. Arguments (a) and (b) run together. All the properties were used by Usarco or for Usarco's purposes. There was no indication that Levy's involvement in or ownership of the properties was personal. The Receiver treated the properties as a single pool of Usarco assets and the only reference to Levy was to identify which parcels were being talked about. Usarco assets were used for the benefit of "Levy" lands. When lands were sold, there was no apportionment of the price between the part in Levy's name and the part in Usarco's name.

65 Whether in retrospect the Receiver acted properly in treating this as a single receivership rather than as two, the fact remains that it did. To achieve the allocation now asserted by the Bank would require, at the least, consideration of a reaccounting to reflect separate ownerships. In my view it is neither timely nor appropriate to consider such a suggestion. The allocation argument must therefore be rejected.

66 In paragraph 25, I set out the position taken by counsel for the Bank on the appeal. This position was that the issue between the Bank and the City was a question of priorities and that the Receiver was correct in not paying any taxes during the receivership. Instead, the proper position was to protect, preserve and realize the assets and leave priorities to be worked out at the end. The Bank claimed that nothing had been lost and no one had been injured by the Receiver following such a course.

67 In my respectful view, that position is quite wrong and totally untenable. It overlooks the Receiver's normal duty to pay the taxes as part of preserving the property. The deliberate accretion of penalties and interest discriminated amongst interested parties, favouring the Bank at the expense of all others, including the City and the owners. There may well be receiverships where an uneven hand is appropriate. Such a position, however, should not be adopted unilaterally or at the suggestion or request of the petitioning creditors, but only upon direction from the court upon complete disclosure and on notice to parties who may be affected.

2001 CarswellOnt 525, 196 D.L.R. (4th) 448, 17 M.P.L.R. (3d) 57, 142 O.A.C. 70, 24 C.B.R. (4th) 303

68 The appeal of the Bank must therefore be dismissed with costs. The Receiver submitted its rights to the court and took no significant part in the argument. Its costs may be addressed by letter if so advised.

Appeal dismissed.

END OF DOCUMENT

r

SO ORDERED.

SIGNED this 13 day of January, 2011.

ROBERT E. LITTLEFIELD, JR.
CHIEF UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

In re:	)	**Chapter 15**
	)	
SALERNO PLASTIC FILM AND BAGS (USA) INC.,	)	**Case No. 10-14504**
	)	
Debtor.	)	
Tax ID No. xx-xxx9372	)	

ORDER (I) RECOGNIZING THE RECEIVERSHIP ORDER OF THE CANADIAN COURT DATED DECEMBER 6, 2010 AND (II) EXTENDING THE STAY GRANTED BY THE EMERGENCY ORDER ON A PERMANENT BASIS

This matter was brought upon by the motion (the "Motion")[1] of PricewaterhouseCoopers Inc. ("PwC" or "Receiver"), as the Canadian Court appointed receiver[2] for Salerno Plastic Film and Bags (USA) Inc. ("Salerno US" or the "Chapter 15 Debtor") and its affiliated Canadian debtors, Salerno Plastic Film and Bags (Canada) Inc. f/k/a Salerno Transparent Bags (1997) Ltd. ("Salerno Parent"), Salerno Canada Property Inc. ("Salerno Canada," and together with Salerno US and Salerno Parent, the "Salerno Entities") and foreign representative of Salerno

[1] Capitalized terms not otherwise defined herein shall have the meanings given to them in the Motion.

[2] PwC was appointed as receiver pursuant to section 243(1) of Canada's *Bankruptcy and Insolvency Act* (the "BIA") in proceedings (the "Canadian Proceeding") in the Superior Court, Commercial Division, District of Beauharnois, Province of Québec (the "Canadian Court") by order dated December 6, 2010 (the "Receivership Order").

EXHIBIT C Page 1 of 4

Date filed: 1/13/11
Docket No.: 18

US, pursuant to sections 1519 and 1521 of title 11 of the United States Code (the "Bankruptcy Code"), for (i) entry of an emergency order (the "Emergency Order") which imposes a stay of all proceedings in the United States against the Receiver or Salerno US, and Salerno US's business, property or assets located in the United States and any attempt to collect thereon and recognizes the Receivership Order on an interim basis, and grants certain relief under sections 363 and 364 of the Bankruptcy Code on an interim basis and (ii) concurrently with or after entry of a recognition order under section 1517 of the Bankruptcy Code, the entry of a final order (the "Final Order") recognizing the Receivership Order, and extending the stay granted in the Emergency Order on a permanent basis.

This Court entered the Emergency Order on December 7, 2010 and scheduled a hearing for January 12, 2011 at 10:30 a.m. to consider the Receiver's request for the relief set forth in the Final Order. The Court has considered and reviewed the Motion, the Petition for Recognition of the Canadian Proceeding filed by the Receiver under chapter 15 of the Bankruptcy Code (the "Petition"), the Affidavit of Bernard Brunet in support of the Petition and the Memorandum of Law filed in support of the Petition and the Motion. The Court also has considered any objections thereto and held a hearing in connection with the request for a Final Order. Based on the foregoing, this Court finds and concludes as follows:

(A) This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(P). Venue is proper in this District pursuant to 28 U.S.C. § 1410(1) and (3).

(B) Notice of the hearing on the Motion was sufficient under the circumstances and no further notice of, or hearing on, the Motion is necessary or required.

(C) The relief sought by the Receiver is authorized under sections 1520(a) and 1521(a)(7) of the Bankruptcy Code.

(D) The Receiver has demonstrated that the extension of the Emergency Order on a permanent basis is justified because:

(i) pursuant to the Order Granting Recognition as a Foreign Main Proceeding, dated on or about January 12, 2011, the Canadian Proceeding is a foreign main proceeding within the meaning of section 1502(4) of the Bankruptcy Code; and

(ii) the Receiver has demonstrated that Salerno US will be irreparably harmed in the absence of the relief requested in that the Receiver has demonstrated that unless the Emergency Order is extended on a permanent basis, there is a material risk that one or more parties in interest will take action against the Receiver or Salerno US, or Salerno US's business, assets or property, thereby interfering with the jurisdictional mandate of this Court under chapter 15 of the Bankruptcy Code, interfering with and causing harm to the Receiver's efforts to administer Salerno US's estate pursuant to the Canadian Proceeding, and undermining the Receiver's effort to give effect to the terms of the Purchase Agreement. As a result, the Receiver and Salerno US will suffer immediate and irreparable harm for which they will have no adequate remedy at law.

(E) In addition, the Receiver has demonstrated that this Court's recognition of the Receivership Order of the Canadian Court (i) is in the best interests of Salerno US, its estate, its creditors and other parties in interest, and (ii) is in the public interest because it will further the public policy of the United States as articulated in, *inter alia*, section 1501 of the Bankruptcy Code.

NOW, THEREFORE, IT IS HEREBY ORDERED AS FOLLOWS:

1. The Motion is granted.

2. The Receivership Order is hereby recognized and given full force and effect in the United States.

3. Without limitation of the foregoing, the relief granted in paragraphs 3-6 of the Interim Order is hereby authorized on a final basis.

4. The stay imposed by the Emergency Order is hereby extended on a permanent basis.

5. Nothing herein shall enjoin a police or regulatory act of a governmental unit, including a criminal action or proceeding.

6. This Court shall retain jurisdiction with respect to the enforcement of this Order.

###

EXHIBIT C

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
READING DIVISION

In re:	)	Chapter 15
	)	
COVER-ALL HOLDING CORP., *et al.*,[1]	)	Case No. 10-20835 (REF)
	)	
Debtors in a Foreign Proceeding.	)	
	)	
	)	

ORDER RECOGNIZING AND ENFORCING ORDERS OF THE COURT OF QUEEN'S BENCH OF ALBERTA, CANADA

Upon the Motion of PricewaterhouseCoopers Inc., as successor foreign representative of the Debtors (the "Successor Foreign Representative") for an Order Recognizing and Enforcing Orders of the Court of Queen's Bench of Alberta, Canada (the "Motion"), requesting the entry of an order, pursuant to sections 105(a), 363, 1507, 1517, 1518, 1520 and 1521, giving effect in the United States to certain orders entered by the Court of Queen's Bench of Alberta, Canada (the "Canadian Court") on April 23, 2010, (i) terminating the proceeding brought by the Debtors under the *Companies' Creditors Arrangement Act* ("CCAA Proceeding") and discharging Ernst & Young, Inc., as monitor (the "CCAA Termination Order") and (ii) appointing the Successor Foreign Representative as receiver of the Debtors under the *Bankruptcy and Insolvency Act* (the

[1] The Debtors, along with the last four digits of each U.S. Debtor's federal tax identification number, are: Cover-All Holding Corp. (a non-U.S. Debtor that does not maintain a U.S. federal tax identification number); Cover-All Building Systems Inc. (a non-U.S. Debtor that does not maintain a U.S. federal tax identification number); Cover-All Holdings U.S., LLC (9107); Cover-All U.S. Holding Corp. (9362); Eastern Cover-All, Inc. (a U.S. Debtor that does not maintain a U.S. federal tax identification number); NorthStar Cover-All, Inc. (a U.S. Debtor that does not maintain a U.S. federal tax identification number); NorthStar Cover-All, LLC (5968); Quick Structures, LLC (1513); Summit Project Management, LLC (a U.S. Debtor that does not maintain a U.S. federal tax identification number); Summit Structures U.S., LLC (a U.S. Debtor that does not maintain a U.S. federal tax identification number); and Summit Structures, LLC (4501). The location of the Debtors' corporate headquarters and the service address for all of the Debtors is: 3815 Wanuskewin Road, Saskatoon, Saskatchewan, Canada S7P 1A4.

"Receivership Order"), and the Court having reviewed the Motion; and appropriate and timely notice of the Motion having been given; and no other or further notice being necessary or required; and the Court having determined that the legal and factual bases set forth in the Motion and all other pleadings and proceedings relevant to the Motion establish just cause to grant the relief ordered herein; and after due deliberation;

IT IS HEREBY ORDERED that:

1. The Motion is granted;

2. The CCAA Termination Order is hereby given full force and effect in the United States, and Ernst & Young, Inc. shall be afforded all of the rights and benefits of the CCAA Termination Order in the United States; a true and correct copy of the CCAA Termination Order entered by the Canadian Court is attached as Exhibit 1;

3. The Receivership Order is hereby given full force and effect in the United States, and PricewaterhouseCoopers Inc., as Foreign Representative, shall be afforded all of the rights and benefits of the Receivership Order in the United States; a true and correct copy of the Receivership Order entered by the Canadian Court is attached as Exhibit 2;

4. Accordingly, PricewaterhouseCoopers Inc. is the duly appointed "foreign representative" of the Debtors within the meaning of section 101(24) of the Bankruptcy Code, retroactive to April 23, 2010;

5. This Court shall retain jurisdiction over all matters arising out of or related to the Motion and implementation of this Order.

Dated: Reading, Pennsylvania
June 3, 2010

United States Bankruptcy Judge

IT IS HEREBY ORDERED
AS DESCRIBED BELOW.

DATED: February 10, 2009

Honorable James E. Shapiro
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WISCONSIN

In re:	Case No. 09-20175-jes
CPI PLASTICS GROUP LTD., *et al.*	Chapter 15
Debtors in Foreign Proceedings.	(Jointly Administered)

ORDER GRANTING RECOGNITION AS A FOREIGN MAIN PROCEEDING AND RELATED RELIEF

This matter was brought before the Court by Deloitte and Touche Inc. ("*Deloitte*"), as the court-appointed interim receiver (the "*Receiver*") and authorized foreign representative of CPI Plastics Group Ltd., Crila Investments Inc., Crila Plastics Industries Inc., CPI Plastics Group, Inc. and CPI Plastics Group (Canada) Ltd. (collectively, "*CPI Plastics*") in the proceeding

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pending in the Superior Court of Justice in Ontario, Canada (Commercial List) (the "*Canadian Proceeding*") under Canada's Bankruptcy and Insolvency Act.

The Court has reviewed the official form petitions and the petitions for recognition as a foreign main proceeding (collectively, the "*Petition*"), each dated January 8, 2009, pursuant to section 1515 of title 11 of the United States Code (the "*Bankruptcy Code*"), for entry of an order recognizing the Canadian Proceeding as a foreign main proceeding pursuant to section 1517 of the Bankruptcy Code thereby granting related relief pursuant to section 1520 of the Bankruptcy Code and additional relief pursuant to section 1521 of the Bankruptcy Code.

Due and timely notice of the filing of the Petition was given pursuant to Rule 2002(q) of the Bankruptcy Rules.

After due deliberation and sufficient cause appearing, the Court finds and concludes as follows:

A. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and sections 109 and 1501 of the Bankruptcy Code.

B. Venue is proper in this district pursuant to 28 U.S.C. § 1410(1).

C. The Receiver is a person within the meaning of section 101(41) of the Bankruptcy Code and is the duly appointed foreign representative of CPI Plastics within the meaning of section 101(24) of the Bankruptcy Code.

D. This case was properly commenced pursuant to sections 1504 and 1515 of the Bankruptcy Code.

E. The Canadian Proceeding is a foreign proceeding within the meaning of section 101(23) of the Bankruptcy Code.

F. The Canadian Proceeding is entitled to recognition by this Court pursuant to section 1517 of the Bankruptcy Code.

G. The Canadian Proceeding is entitled to recognition as a foreign main proceeding pursuant to section 1502(4) of the Bankruptcy Code and is entitled to recognition as a foreign main proceeding pursuant to section 1517(b)(1) of the Bankruptcy Code.

H. The Receiver is entitled to the relief afforded under section 1520 of the Bankruptcy Code.

I. In order to protect the assets of the debtor and the interests of creditors, the Receiver is entitled to additional relief provided in and pursuant to section 1521 of the Bankruptcy Code.

J. The relief granted is necessary and appropriate, in the interest of the public and international comity, consistent with the United States public policy, and will not cause any hardship to any party-in-interest that is not outweighed by the benefits of granting that relief.

NOW, THEREFORE, IT IS HEREBY ORDERED AS FOLLOWS:

1. The Canadian Proceeding is hereby recognized as a foreign main proceeding pursuant to section 1517 of the Bankruptcy Code.

2. The Receiver is granted all of the relief afforded under section 1520 of the Bankruptcy Code.

3. The terms of the initial order granted in the Canadian Proceedings under the Canadian Bankruptcy and Insolvency Act (the "*BIA*") on January 8, 2009 (the "*BIA Order*") are given full force and effect in the United States.

4. The following additional relief is granted pursuant to section 1521 of the Bankruptcy Code:

a. The commencement or continuation of any action or proceeding concerning the assets, rights, obligations or liabilities of CPI Plastics, including any action or proceeding against Deloitte in its capacity as Receiver of CPI Plastics, to the extent not stayed under section 1520(a) of the Bankruptcy Code, is hereby stayed;

b. Execution against the assets of CPI Plastics to the extent not stayed under section 1520(a) of the Bankruptcy Code is hereby stayed;

c. The Receiver is authorized to examine witnesses, take evidence and deliver information concerning CPI Plastics' assets, affairs, rights, obligations and liabilities;

d. The administration or realization of all or part of the assets of CPI Plastics within the territorial jurisdiction of the United States is hereby entrusted to the Receiver, and the terms of the BIA Order shall apply to CPI Plastics, its creditors, the Receiver, and any other parties-in-interest; and

e. The right of any person or entity, other than the Receiver, to transfer or otherwise dispose of any assets of CPI Plastics to the extent not suspended under section 1520(a) of the Bankruptcy Code is hereby suspended unless authorized in writing by the Receiver or by Order of this Court.

5. Notwithstanding Rule 7062 of the Bankruptcy Rules, made applicable to this case by Rule 1018 of the Bankruptcy Rules, the terms and conditions of this Order shall be immediately effective and enforceable upon its entry, and upon its entry, shall become final and appealable.

6. This Court shall retain jurisdiction with respect to the enforcement, amendment or modification of this Order, any request for additional relief or any adversary proceeding brought in and through these chapter 15 foreign proceedings, and any request by an entity for relief from the provisions of this Order, for cause shown, that is properly commenced and within the jurisdiction of this Court.

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UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF IOWA

In re:	)	Case No. 12-01711
	)	Chapter 15
Big Sky Farms Inc. by Ernst & Young Inc., as its Receiver,	)	ORDER GRANTING RECOGNITION OF FOREIGN MAIN PROCEEDING
Debtor in a Foreign Proceeding.	)	

This matter came before the United States Bankruptcy Court for the Northern District of Iowa, Western Division (the "Court") on November 28, 2012, on the Petition for Recognition of a Foreign Main Proceeding Pursuant to 11 U.S.C. §§1515 and 1517 (the "Petition") filed on September 12, 2012 [Docket No. 2], by Julie Johnson McLean of the law firm of Davis, Brown, Koehn, Shors & Roberts, P.C., 215 10th Street, Suite 1300, Des Moines, Iowa 50309, as United States counsel for Ernst & Young Inc., an international insolvency and restructuring firm of Vancouver, British Columbia, Canada, as Receiver (the "Receiver") of Big Sky Farms Inc., a corporation formed under the law of Saskatchewan, Canada, and certain affiliated entities, including, without limitation, Big Sky Farms VII Limited Partnership and Big Sky Farms Services Limited Partnership (collectively, the "Debtor" or "Big Sky").

This Chapter 15 case arises out of an application of The Bank of Nova Scotia, as agent for itself, Bank of Montreal, National Bank of Canada, and Farm Credit Corporation (collectively, the "Lender Group"), the consent of Big Sky, and the consent of Ernst & Young Inc. to act as Receiver of the Debtor. Certified copies of the Order (the "Canadian Order") entered by the Court of Queen's Bench for Saskatchewan, Judicial Centre of Saskatoon (the "Canadian Court") under the Bankruptcy and Insolvency Act, R.S.C. 1985, The Queen's Bench Act, 1998, and The Personal Property Security Act, 1993, Q.B.G. No. 1305 of 2012 (the "Canadian Proceeding") on September 10, 2012 ("Receivership Date"), appointing the Receiver and the Consent to Appointment of the Receiver are attached to the Petition.

Upon review of the Petition and the Certificate of Service filed by Receiver's counsel on October 16, 2012 [Docket No. 22], the Court finds that the Receiver served copies of the Petition and the Notice of Hearing [Docket No. 21] on all creditors and parties in interest of Big Sky located in the United States in accordance with Bankruptcy Rule 2002(q)(1). The Court further finds that, in accordance with the Notice, B&B Swine, Daren Lauritsen, Dennis Kennebeck, Ivan and Linda Halbur Family Trust, John Opperman, Matt Halbur, R&J Staiert, Inc., Robert and Pamela Staiert, Wayne Riesberg, and Mike Vogel (collectively, "Contract Growers"), through their counsel, Mark C. Feldmann, timely filed an Objection [Docket No. 23] to the Petition. The Court further finds that Farmers Cooperative Company of Hinton ("Hinton"), through its counsel, Lance D. Ehmcke, timely filed an Objection [Docket No. 24] to the Petition. DEL-uxe Feeds, Inc. ("DEL-uxe"), through its counsel of record, Daniel E. DeKoter, also timely filed an Objection [Docket No. 26].

The Contract Growers, Hinton and DEL-uxe all claim to be secured creditors of Big Sky. The Contract Growers claim commodity production contract liens under Iowa Code Chapter

579B. Hinton and DEL-uxe claim agricultural supply dealer liens under Iowa Code Chapter 570A. The Court finds that their Objections relate not to whether recognition of the foreign proceeding is appropriate under the requirements of Chapter 15 of the Bankruptcy Code, but rather relate to the effect of such relief upon each of them during the pendency of the Chapter 15 case and whether their claimed lien interests in certain property of the Debtor are adequately protected.

According to the testimony of the Receiver, the property of the Debtor ("Assets") includes, without limitation, certain contract finisher pigs in the possession of contract growers located in Northwest Iowa pursuant to various grower contracts and market hogs in the possession of pork processing plants located in Iowa and Minnesota (collectively "Pigs"). The Pigs have consumed and will continue to consume feed supplied by four feed dealers located in Iowa, including Hinton, DEL-uxe and two other feed dealers. According to the books and records of Big Sky, four U.S. feed dealers are owed a total of $1,003,844.36 for feed delivered pre-petition and all post-petition feed deliveries have been paid in full in accordance with normal payment practices or in accordance with other payment practices acceptable to the Receiver and the dealer. In August 2012, Big Sky provided cancellation notices to its contract growers in Iowa. According to the Receiver, the contract growers have been paid for all post-petition services and the total amount owing to the contract growers for pre-petition services is $156,472.16. The Receiver is currently feeding out and delivering to slaughter the remaining Pig inventory in Iowa and elsewhere in the United States (currently estimated at 26,600 head with projected operating receipts upon finishing of approximately $4,758,214, less projected operating and other disbursements of approximately $1,216,944, for total projected net cash flow of approximately $3,541,270) and such inventory will be fully absorbed by the market during January 2013. No other Assets of the Debtor are located in the United States. The Canadian Assets of the Debtor will be sold pursuant to a stalking horse sales process in the Canadian Proceeding.

On September 19, 2012, this Court entered its Order Granting Provisional Relief Pursuant to U.S.C. §1519 [Docket No. 16] providing from September 14, 2012, until this Court's ruling on the Petition or other order, the following relief of a provisional nature:

(a) Staying execution against the Assets of Big Sky located in Iowa and the United States and all other collection or enforcement actions or proceedings against Big Sky;

(b) Entrusting the protection and preservation of all of the Assets of Big Sky located in the United States to the Debtor under the supervision of the Receiver and subject to orders of the Canadian Court in the Canadian Proceeding and the orders of this Court, in order to preserve the value of the Assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy;

(c) Authorizing the Receiver to collect information concerning the Debtor's Pigs as of the filing date and the transactions of various creditors, including an itemization and accounting of the numerous agricultural supply dealer liens claimed by dealers against certain Pigs of the Debtor consuming feed supplied by such dealers and purportedly perfected by the filing of financing statements under Iowa Code Chapter 570A and the collection of information

relevant to the extent of the priority, if any, of such liens over earlier perfected liens or security interests pursuant to formulas set out in Chapter 570A.

(d) Prohibiting the interference or discontinuance of any right or agreement in favor of Big Sky for the provision of goods and services, provided in each case that the normal prices or charges for all goods and services provided to Big Sky on and after September 14, 2012, are paid by Big Sky or the Receiver in accordance with normal payment practices or in accordance with such other payment practices as may be acceptable to the Receiver; provided, however, no individual or entity shall be prohibited from requiring immediate payment for goods, services or other valuable consideration provided on and after September 14, 2012, and no person shall be under any obligation to provide goods or services on credit or to provide further credit to Big Sky;

(e) Prohibiting all persons from interfering with, intercepting, or garnishing against monies, accounts receivable or other amounts payable to Big Sky by any party; provided, however, that no feed supplier shall be prohibited from asserting a lien against the proceeds of the sale of pigs under Iowa Code Chapter 570A or filing feed liens to the extent that such person provides feed on credit;

(f) Directing all persons:

(i) to continue to make payments to Big Sky or the Receiver for all goods sold by Big Sky to them (including, without limitation, pigs and related products) in accordance with ordinary payment terms between Big Sky and such persons;

(ii) to continue to make checks for such payments by such persons to Big Sky payable to Big Sky or the Receiver (and to no other party) for collection by the Receiver and deposit into one or more new Post Receivership Accounts to be opened by the Receiver pursuant to the Canadian Order of the Canadian Court, with the proceeds from the Assets of Big Sky located in Iowa and in the United States segregated in separate Post Receivership Accounts, and any liens which may exist under Iowa Code Chapter 570A to continue in such proceeds and paid in accordance with the rights of the parties under applicable law, further orders of this Court, the Canadian Order and any further orders of the Canadian Court, and directing that such persons shall incur no liability to any party in so doing; and

(iii) to continue to deliver checks for such payments by such persons to Big Sky at its offices in Canada or the Receiver in accordance with ordinary payment practices followed by the persons in regard to their dealings with Big Sky and directing that such persons shall incur no liability to any party in so doing; and

(g) Staying any collection or enforcement actions or proceedings commenced by any creditor of Big Sky, in respect of a debt due by Big Sky to such creditor prior to the making of the Canadian Order, between the time of the making of the Canadian Order, effective as of 12:01 a.m. on September 10, 2012, and the making of this Order of this Court and directing that all parties who have taken any such collection or enforcement actions or proceedings shall forthwith: (a) discontinue such collection or enforcement actions or proceedings; and (b) provide

such notice or other remedy as may reasonably be required to cease such collection or enforcement action or proceeding.

Upon review of the Petition, and hearing the arguments presented by counsel and the testimony of the Receiver during the hearing, and understanding that counsel for the Receiver, Contract Growers, Hinton and DEL-uxe have approved the form and substance of this Order, the Court finds that relief to protect the Assets of Big Sky located in the United States and the interests of all of the creditors of Big Sky is necessary and appropriate and, accordingly, finds the Petition should be granted.

THE COURT HEREBY FINDS AND DETERMINES THAT:

A. The findings and conclusions set forth herein constitute the Court's findings of fact and conclusions of law. To the extent any of the following findings of fact constitute conclusions of law, they are adopted as such. To the extent any of the following conclusions of law constitute findings of fact, they are adopted as such.

B. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§157 and 1334. This is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(P). Venue for this proceeding is proper before this Court pursuant to 28 U.S.C. §1410(1) because the principal Assets of Big Sky located in the United States are located in the Northern District of Iowa. Such Assets consist of the Pigs in the possession of various contract growers located in Northwest Iowa pursuant to grower contracts and in the possession of pork processing plants located in Iowa and Minnesota.

C. This Chapter 15 case arises out of the Canadian Proceeding commenced upon the application of the Lender Group, the consent of Big Sky, and the consent of Ernst & Young Inc. to act as Receiver of the Debtor under the Bankruptcy and Insolvency Act, R.S.C. 1985, The Queen's Bench Act, 1998, and The Personal Property Security Act, 1993, Q.B.G. No. 1305 of 2012, and the Canadian Court's Order entered by the Court of Queen's Bench for Saskatchewan Judicial Centre of Saskatoon on September 10, 2012, appointing the Receiver. Certified copies of the Canadian Order entered by the Canadian Court appointing the Receiver and the Consent to Appointment of the Receiver are attached to the Petition. The Canadian Proceeding is a "foreign proceeding" pursuant to Section 101(23) of the Bankruptcy Code.

D. The Petitioner under the Chapter 15 case is Ernst & Young Inc. which was appointed by the Canadian Court as Receiver in the Canadian Proceeding. The Receiver is a duly appointed and authorized person and "foreign representative" of Big Sky within the meaning of Section 101(24) of the Bankruptcy Code.

E. This Chapter 15 case was properly commenced pursuant to Sections 1504, 1509 and 1515 of the Bankruptcy Code, and the Chapter 15 Petition satisfies the requirements of Sections 1515 and 1517.

F. The Receiver has satisfied the requirements of Section 1515 of the Bankruptcy Code and the procedural requirements of Rules 1007(a)(4) and 2002(q) of the Federal Rules of Bankruptcy Procedure.

G. The Canadian Proceeding is entitled to recognition by this Court pursuant to Section 1517 of the Bankruptcy Code, provided that the interests of the creditors of the Debtor within the jurisdiction of this Court are adequately protected as provided herein.

H. Humboldt, Saskatchewan, Canada is alleged under oath to be the principal place of business of Big Sky. Canada is the center of main interests of Big Sky. Accordingly, the Canadian Proceeding is a "foreign main proceeding" pursuant to Section 1502(4) of the Bankruptcy Code, and is entitled to recognition as a foreign main proceeding pursuant to Section 1517(b)(1).

I. Big Sky maintains Assets in the United States that are not subject to the stay in place in the Canadian Proceeding. Thus, Big Sky and its Assets in the United States are susceptible to actions in the United States taken by one or more creditors, at the expense of all other creditors. Relief is necessary and appropriate to protect the interests of all creditors of the Debtor.

J. The Receiver and Big Sky are entitled to relief effective upon recognition of a foreign main proceeding under Section 1520 of the Bankruptcy Code without limitation.

K. The Receiver and Big Sky are further entitled to relief set forth in Section 1521(a) and (b) of the Bankruptcy Code.

L. The relief granted by this Court is necessary and appropriate, in the interests of the public and international comity, consistent with the public policy of the United States, and warranted under Sections 1515, 1517, 1520 and 1521 of the Bankruptcy Code.

NOW, THEREFORE, THE COURT HEREBY ORDERS, ADJUDGES, AND DECREES AS FOLLOWS:

1. The Canadian Proceeding is recognized by this Court as a foreign main proceeding pursuant to Section 1517 of the Bankruptcy Code.

2. The effects of this recognition include the provisions of 11 U.S.C. §1520(a),(b), and (c), including, without limitation, the automatic stay of Section 362 of the Bankruptcy Code applicable to Big Sky and the Assets of Big Sky throughout the duration of this case or until otherwise ordered by this Court, except as permitted in paragraphs 4(c)(i) and (ii) below.

3. Pursuant to Section 1521(a)(6), all provisional relief granted to Big Sky and/or the Receiver by this Court pursuant to Section 1519(a) of the Bankruptcy Code shall be extended and this Court's Order Granting Provisional Relief Pursuant to U.S.C. §1519 [Docket No. 16] entered on September 19, 2012, shall remain in full force and effect, notwithstanding anything to the contrary contained therein.

4. All entities (as that term is defined in Section 101(15) of the Bankruptcy Code), other than the Receiver and its expressly authorized representatives and agents, are hereby enjoined from:

(a) the commencement or continuation of any collection, enforcement or other action or proceeding against the Debtor or its Assets and execution against Big Sky's Assets, to the extent that such action has not been stayed under Section 1520(a);

(b) taking or continuing any act to obtain possession of, or exercise control over, Big Sky or any of its Assets;

(c) taking or continuing any act to enforce a lien or other security interest, set-off or other claim against Big Sky or any of its Assets, except (i) this provision shall not prevent any creditor from perfecting by filing a financing statement any lien or security interest permitted by law, and (ii) this provision shall not apply to enjoin any action filed in this Court seeking recognition of a lien against the property of Big Sky and seeking leave of this Court to subsequently enforce such lien thereafter;

(d) transferring, relinquishing or disposing of any property of Big Sky to any entity (as that term is defined in Section 101(15) of the Bankruptcy Code) other than the Receiver;

(e) interfering or discontinuing any right or agreement in favor of Big Sky for the provision of goods and services, provided in each case that the normal prices or charges for such goods and services provided to Big Sky on and after September 10, 2012, are paid by Big Sky or the Receiver in accordance with normal payment practices or in accordance with such other payment practices as may be acceptable to the Receiver, including those payment arrangements put in place immediately after the initial notice of the filing of the Petition herein; provided, however, this provision shall not require an individual or entity not subject to an ongoing agreement with Big Sky to continue to do business with Big Sky post-petition if it chooses not to do so, nor shall any person be under any obligation to provide goods or services on credit or to provide further credit to Big Sky;

(f) interfering with, intercepting, garnishing or asserting a claim against monies, accounts receivable or other amounts payable to Big Sky by any person, including, without limitation, JBS USA, LLC and any other packer, except (i) as may be agreed by Big Sky and the subject person, including, without limitation, the Contract Growers or any other contract grower, DEL-uxe, Hinton or any other feed supplier, in writing and provided to the packer; or (ii) to the extent a final non-appealable Order is entered providing the Contract Growers or any other contract grower, DEL-uxe, Hinton or any other feed supplier with adequate protection of its interest under Section 361 of the Bankruptcy Code as provided in paragraph 5 below or providing other relief to the subject person;

(g) requiring that any or all payments for goods sold pre-petition by Big Sky to JBS USA, LLC and any other packer (including, without limitation, Pigs and related products) be made payable to any person other than "Big Sky Farms Inc." or the Receiver;

(h) requiring that any or all payments for goods sold post-petition by Big Sky to JBS USA, LLC and any other packer (including, without limitation, Pigs and related products) be made payable to any person other than "Big Sky Farms Inc." or the Receiver without leave of this Court; and

(i) declaring or considering the filing of the Canadian Proceeding or this Chapter 15 case a default or event of default under any agreement, contract or arrangement;

provided, however, in each case, such injunction shall be effective solely within the territorial jurisdiction of the United States.

In order to protect all packers from any consequences resulting from the actions enjoined above, JBS USA, LLC and any and all other packers are directed to continue to make payments to Big Sky or the Receiver for all goods sold by Big Sky in accordance with ordinary payment terms between Big Sky and the subject packers, including, without limitation, to continue to make checks for such payments to Big Sky payable solely to "Big Sky Farms Inc." or the Receiver (and to no other party) and to continue to deliver such checks to Big Sky at its offices in Canada in accordance with ordinary payment practices, and the packers shall incur no liability to any party (including, without limitation, to the Contract Growers or any other contract growers or to DEL-uxe, Hinton or any other feed supplier); provided, however, any liens claimed by any contract grower, including the Contract Growers, and any feed supplier, including DEL-uxe and Hinton, in such payments shall not be prejudiced in so doing.

5. In order to provide adequate protection of the interests of all feed suppliers, contract growers and other creditors who claim to have perfected liens in the Pigs (the "Pre-Petition Lien Claimants"), the Receiver shall continue with the feeding out and delivery to slaughter of all of the remaining Pig inventory of Big Sky in Iowa and elsewhere in the United States and deposit the net proceeds from the sale of the Pigs in the United States into one or more post-Receivership accounts opened by the Receiver pursuant to the Canadian Order of the Canadian Court designated "U.S. Operations" used for the receipts and disbursements of the U.S. operations (the "U.S. Accounts"), with the proceeds separately accounted for by Big Sky and the Receiver and, from and after the date of the entry of this Order, the Receiver shall continue to deposit all of the net proceeds from the sale of the U.S. Pigs in such U.S. Accounts until the total balance of such U.S. Accounts accumulates to $1,500,000 and shall thereafter maintain the balance of such U.S. Accounts such that the total balance shall not be less than (a) $1,500,000, or (b) in the event that any amounts are paid to one or more of the Pre-Petition Lien Claimants in respect of their pre-petition perfected lien claims, the amount of $1,500,000 less any amount so paid. The U.S. Accounts holding any part of the fund balance created in this paragraph to constitute adequate protection for the interests of the Pre-Petition Lien Claimants shall be held in the name of the Receiver and, without limiting the jurisdiction of the Canadian Court, the Receiver agrees that it is subject to the orders regarding such funds of the United States

Bankruptcy Court for the Northern District of Iowa entered in this action. Such funds in said U.S. Accounts shall constitute adequate protection of the interests of the Pre-Petition Lien Claimants, with any existing liens continuing in such proceeds until such time as the claims are paid or the validity, enforceability and priority, if any, of the claims and liens are determined by a final non-appealable order of this Court or the Canadian Court (after such notice and an opportunity for hearing to all persons claiming an interest in the funds in such U.S. Account as this Court or the Canadian Court shall provide and determine) providing for and determining the validity, enforceability and priority of all liens which may exist for pre-petition claims under Iowa Code Chapter 579B and Chapter 570A and other law, the treatment of all such claims, and the disposition of the funds in such U.S. Accounts. For the sole purpose of determining the validity of the claims of the Pre-Petition Lien Claimants, the net proceeds from the sale of such slaughtered hogs (after payment of post-petition operating expenses) deposited in such U.S. Accounts shall, regardless of the source, be deemed to be the proceeds of hogs of the Debtor who (a) consumed the feed supplied pre-petition by the agricultural supply dealers of feed to the Debtor and represents the unpaid pre-petition feed account claims of such feed dealers as contemplated by Iowa Code Chapter 570A, or (b) were cared for and fed by the contract producers or growers in livestock facilities owned or leased by such growers pursuant to production or grower contracts with the Debtor from which the unpaid pre-petition grower contract claims arose as contemplated by Iowa Code Chapter 579B.

6. The Receiver is hereby authorized to apply the funds in the U.S. Accounts to pay the perfected lien claims of one or more of the Pre-Petition Lien Claimants where (i) the Receiver is satisfied, in its sole discretion, that the perfected lien claim of such Pre-Petition Lien Claimant is valid and enforceable and has priority over the claims of all other secured creditors of Big Sky to the funds in the U.S. Accounts, or (ii) a final, non-appealable order has issued from this Court or from the Canadian Court determining that the perfected lien claim of such Pre-Petition Lien Claimant is valid and enforceable and has priority over the claims of all other secured creditors of Big Sky to the funds in the U.S. Accounts. Upon the payment of all perfected lien claims of the Pre-Petition Lien Claimants, the Receiver may transfer any balance remaining in the U.S. Accounts into one or more post-Receivership accounts opened by the Receiver pursuant to the Canadian Order for disposition in accordance with further orders of the Canadian Court.

7. Nothing in this Order, including the provisions of paragraph 5 above, shall prevent or prejudice the Contract Growers, Hinton or DEL-uxe from asserting or claiming an interest in or lien against the Assets of the Debtor that are within the territorial jurisdiction of the United States, and the proceeds of the property originating within the territorial jurisdiction of the United States, wherever such proceeds may be located, or from seeking adequate protection of their respective interests under Sections 361 or 362 of the Bankruptcy Code; provided, however, no action may be commenced and no lien claims for any debt may be enforced by the Contract Growers, Hinton or DEL-uxe, without leave of this Court. Subject to paragraph 5 above, pursuant to the Canadian Court Order, Big Sky or the Receiver may continue to use the proceeds of the sale of the Pigs.

8. Subject to any order of the Canadian Court, the Receiver may exercise the rights and powers of a trustee under and to the extent provided by Section 1520 of the Bankruptcy Code.

9. The Receiver is hereby authorized to examine witnesses, take evidence, seek production of documents, and deliver information concerning the Assets, affairs, rights, obligations or liabilities of Big Sky, as such information is required in the Canadian Proceeding, subject to the law of the United States.

10. Except where inconsistent with orders entered by this Court, the Canadian Proceeding shall be granted comity and given full force and effect.

11. No action taken by the Receiver, Big Sky or each of their successors, agents, representatives, advisors or counsel, in preparing, disseminating, applying for, implementing or otherwise acting in furtherance of or in connection with the Canadian Proceeding, this Order or this Chapter 15 case, or any adversary proceeding herein, or any further proceeding commenced hereunder, shall be deemed to constitute a waiver of the rights, benefits or immunities afforded such persons under Sections 306 and 1510 of the Bankruptcy Code.

12. A copy of this Order shall be served, within three (3) business days of entry of this Order, by first-class U.S. mail, postage prepaid, upon: (i) all creditors of Big Sky known to the Debtor within the United States; (ii) all persons or bodies authorized to administer foreign proceedings of the Debtor; (iii) all entities against whom provisional relief is sought under Section 1519 of the Bankruptcy Code; (iv) all parties to litigation pending in the United States in which the Debtor is a party at the time of the filing of the Petition; (v) the Office of the United States Trustee; and (vi) any other person who has filed a notice of appearance in this Chapter 15 case. Such service shall be good and sufficient service and adequate notice for all purposes. United States counsel for the Receiver shall file a certificate of service of this Order in compliance with this paragraph 12 in this Chapter 15 case.

13. This Court shall retain jurisdiction with respect to: (i) the enforcement, amendment or modification of this Order; (ii) any requests for adequate protection, additional relief, or any adversary proceeding brought in and through this Chapter 15 case; and (iii) any request by an entity for relief from the provisions of this Order, for cause shown as to any of the foregoing and provided that the same is properly commenced and within the jurisdiction of this Court.

14. This order constitutes judgment as required by Federal Rule of Bankruptcy Procedure 9021.

DATED AND ENTERED: December 3, 2012

Thad J. Collins, Bankruptcy Judge

Order Prepared by Julie Johnson McLean, United States counsel for Ernst & Young Inc., Receiver

Order Approved in Form and Substance by:

/s/ *Mark C. Feldmann*
Mark C. Feldmann, Counsel for
Contract Growers

/s/ *Lance D. Ehmcke*
Lance D. Ehmcke, Counsel for
Farmers Cooperative Company of
Hinton

/s/ *Daniel E. DeKoter*
Daniel E. DeKoter, Counsel for
DEL-uxe Feeds, Inc.

/s/ *William J. Miller*
William J. Miller, Counsel for the
Lender Group