Court File No. CV-19-615862-00CL
Court File No. CV-19-616077-00CL
Court File No. CV-19-616779-00CL

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT,

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

AND IN THE MATTER OF A PLAN OF COMPROMISE
OR ARRANGEMENT OF **JTI-MACDONALD CORP.**

AND IN THE MATTER OF A PLAN OF COMPROMISE

OR ARRANGEMENT OF **IMPERIAL TOBACCO CANADA LIMITED**
AND **IMPERIAL TOBACCO COMPANY LIMITED**

AND IN THE MATTER OF A PLAN OF COMPROMISE

OR ARRANGEMENT OF **ROTHMANS, BENSON & HEDGES INC.**

Applicants

JOINT BOOK OF AUTHORITIES OF THE COURT-APPOINTED MEDIATOR & MONITORS

Motions for Meeting Orders and Claims Procedure Orders
(Returnable October 31, 2024)

VOLUME 1 OF 2

October 28, 2024

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COURT OF APPEAL FOR BRITISH COLUMBIA

See para. 49

Citation: *8640025 Canada Inc. (Re),* 2018 BCCA 93

Date: 20180314
Docket: CA44978

In the Matter of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended

In the Matter of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, as amended

In the Matter of a Plan of Compromise and Arrangement of 8640025 Canada Inc., Teliphone Data Centers Inc. and Teliphone Canada Corp.

Between:

8640025 Canada Inc., Teliphone Data Centers Inc. and Teliphone Canada Corp.

Respondents
(Petitioners)

And

TNW Networks Corp.; Teliphone Corp.; Cloud-Phone Inc.; ChoiceTel Networks Ltd.; Titan Communications Inc.; 8583498 Canada Ltd.; 9151-4877 Quebec Inc., dba Dialek Telecom; Orion Communications Inc.; Investel Capital Corporation; New York Telecommunication Exchange Inc.. operating as NYTEX; United American Corp. (US Florida), formerly Teliphone USA Corp.; Coastline Broadcasting Ltd.; and Benoit Laliberte

Applicants
(Appellants)

And

Ernest & Young Inc., Court-Appointed Monitor for the Petitioners

Respondent
(Respondent)

Before: The Honourable Madam Justice Newbury
The Honourable Madam Justice Kirkpatrick
The Honourable Madam Justice Fisher

On appeal from: An order of the Supreme Court of British Columbia, dated December 14, 2017 (*8640025 Canada Inc. (Re)*, Vancouver Registry Docket S1610905).

Counsel for the Appellant, Teliphone Corp.:	H.C.R. Clark, Q.C.
Counsel for all other Appellants:	G.F. Gregory
Counsel for the Respondent, Ernst & Young Inc., Court-Appointed Monitor of 8640025 Canada Inc. and Teliphone Data Centres Inc.:	G.G. Plottel S. Nelligan
Counsel for the Respondent, Navigata Communications Ltd.:	K.A. Robertson
Counsel for the Respondent, Bond Mezzanine Fund III Limited Partnership:	R.J. Argue
Place and Date of Hearing:	Vancouver, British Columbia January 30, 2018
Place and Date of Judgment:	Vancouver, British Columbia March 14, 2018

Written Reasons by:
The Honourable Madam Justice Newbury

Concurred in by:
The Honourable Madam Justice Kirkpatrick
The Honourable Madam Justice Fisher

Summary:

CCAA proceedings were taken by two companies (later joined by a third) that carried on a highly-integrated telecommunications business with other companies that were *not* *insolvent and therefore not under CCAA protection. Monitor was appointed and given authority inter alia to pursue a sale of (petitioners') business assets; various disputes arose concerning ownership thereof. BCSC ordered Monitor to carry out a 'derivation' analysis aimed at determining source of funds with which assets had been acquired. Monitor carried out detailed analysis, but in August 2017, this court on an appeal ruled Monitor had lacked authority to sell certain assets.*

Similar disputes arose again after Monitor rejected appellants' proof of claim. Leave was granted by this court on the sole issue of what standard of review applied to the Monitor's determination concerning ownership in the course of proof of claim process. Court of Appeal held that the appeal from the Monitor's determination of the proof of claim was a "true" appeal and that the applicable standards of review were those set forth in Housen v. Nikolaisen 2002 SCC 33. This conclusion was seen to be consistent with other Canadian authorities in the insolvency field, the statutory context and the practical realities of a CCAA administration.

Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] This is the second time this court has been asked to intervene in connection with a proposed sale on behalf of the petitioning companies 8640025 Canada Inc. ("864") and a subsidiary thereof, Teliphone Data Centres Inc., of certain business assets to a purchaser ("Distributel") pursuant to s. 36 of the *Companies' Creditors Arrangement Act* ("*CCAA*"). It is also the second time that the proposed sale has foundered on the issue of whether the petitioners in fact own the assets in question such that the assets can be sold in the *CCAA* proceeding. Uncertainty on that point arises because the purchaser wishes to acquire all the assets pertaining to a complex and highly integrated telecommunications business (the "Business") carried on by several corporations comprising the "TNW Group of Companies". The petitioners are part of that Group and are insolvent. They have sought the protection of the *CCAA*. Other members of the Group, appellants in this court, are *not* insolvent and are therefore not part of the *CCAA* proceeding. (We were not told what exactly membership in the 'Group' entails.)

Factual Background

[2] Nothing about this *CCAA* proceeding has been simple or typical. It began as a proceeding under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), when the petitioners filed a bankruptcy proposal on November 18, 2016 following the collapse of 864's relationship with an important supplier. Later in November, the petitioners returned to the Supreme Court of British Columbia seeking an initial order under the *CCAA,* including a stay of proceedings in the usual form, the appointment of a monitor, and permission to file a plan or plans of compromise and arrangement. On December 21, 2016, various creditors sought and obtained an order of the Supreme Court discharging the original monitor and replacing it with Ernst & Young Inc. (the "Monitor".) The order was granted and the Monitor was:

> … authorized and directed <u>as part of the Petitioners' restructuring to carry out a process for the solicitation of all offers to invest in the Petitioners</u> or to purchase all or part of the Petitioners' assets, whether as a going concern or otherwise (the "Solicitation Process") on the terms set out in this order….[Emphasis added.]

From this point, the Monitor became largely occupied with the possible sale of the assets of the Business as a going concern rather than with a compromise or arrangement with creditors. This proved to be an arduous task, given the complexity of the Group's organization and the fractious relations amongst its members and former members.

[3] The relevant chronology begins prior to the *BIA* filing when, as I understand it, customer agreements and accounts receivable listed in a proof of claim filed by various companies (including Teliphone Corp., formerly the parent company of 864) were assigned to TNW Networks effective January 1, 2016. Later in January, six creditors of the petitioners sought unsuccessfully to have TNW Networks, Teliphone Corp. and its subsidiary Teliphone Canada Corp. joined as petitioners in the *CCAA* proceeding. Mr. Justice Affleck dismissed the creditors' application in the absence of evidence that the three corporations were insolvent as required by the definition of "debtor company" in s. 2 of the *CCAA*. (See 2017 BCSC 303.)

[4] As observed by this court in previous reasons, various issues arose among members of the Group concerning the assets of the Business that could eventually be sold by the Monitor. Part of the problem was solved in February 2017 when TNW Networks was required by court order to assign to the Monitor all of its assets used in or necessary for the Business, including certain customer contracts. But the problem was not solved completely.

[5] On April 6, 2017, Mr. Justice Bowden made an order that joined Teliphone Canada Corp. as a petitioner and approved a 'dual-track' plan. It gave the Monitor enhanced powers of management of the petitioners' operations (which powers the Supreme Court later described as "receiver-like"). The Monitor was given the authority to pursue a compromise or arrangement, subject to the direction that doing so was not to delay a "Solicitation Process" for marketing the "Property" as a going concern. ("Property" was defined to mean all the property of the three petitioners and any property of TNW Networks "derived from" property of the petitioners.) The order also addressed the problem of ownership of the assets, instructing the Monitor to carry out a "derivative" analysis of the properties in question:

> Forthwith, the Monitor shall review, inventory and otherwise investigate the affairs and assets of Networks, <u>and shall determine what Property (as defined below) of Networks was not derived directly or indirectly from the Property of the Petitioners, their subsidiaries, or any other entities subject to the Applicants' security (the "Networks Property"), and report the same to the Court.</u> Any Property of Networks which the Monitor is unable to determine the origin of shall not be Networks Property, and for greater certainty<u>, until determined as set out herein, none of the Property shall be Networks Property</u>. Any party may challenge the determination of what constitutes Networks Property by application to this Court within 10 business days following the Monitor's report on the same and which matter shall be determined in this proceeding on a summary basis. [Emphasis added.]

[6] This court in later reasons (2017 BCCA 303) summarized para. 6 of Bowden J.'s order as having given the Monitor:

> … the authority to sell, subject to the approval of the court, <u>all of the assets of the Petitioners, together with those assets of TNW Networks Corp. that are not excluded</u> by the process established in para. 6. <u>Nothing in the April 6 order authorizes the Monitor to sell any other assets</u>. [At para. 24; emphasis added.]

The order was not appealed.

[7] Despite the April order, the difficulty of determining which assets relating to the Business were assets of the petitioners or TNW Networks, as opposed to assets of other companies in the Group that were asserting ownership (the “Claiming Persons”) continued. For example, Teliphone Corp. had filed a proof of claim for some $45 million, based an alleged sale of the shares of the petitioners to Investel Corp. as of the end of 2013. Teliphone asserted it had taken back security for some $22 million, but the Monitor was skeptical, given that no evidence of a registered security interest was located and given the lateness of the claim.

[8] In July 2017, the Monitor applied to the Supreme Court for an order approving an “Asset Purchase Agreement” for the sale of the “Purchased Assets” described therein, to Distributel. The appellants opposed the application on the basis that the Monitor lacked the authority to sell those assets that were property of entities other than the petitioners or TNW Networks.

[9] The Court had before it the Monitor’s seventh report, dated June 27, 2017. In it, the Monitor had described its efforts to determine finally the ownership of the assets “of the Business”. However, the Monitor reported:

> 119. ...the assets of the Business are highly integrated in nature and <u>there is no meaningful way to segregate the assets and customer relationships of the Business to various legal entities without a major examination, which would be extremely costly</u> and would likely conclude that all of the assets, at minimum, are subject to the security interests of the Secured Creditors. The Monitor notes that:
>
> a) the Business is managed by the same personnel;
>
> b) customer billings are deposited to the same bank account;
>
> c) cash disbursements are made from the same bank account and financed using the same sources of funds including customer billings and loans advanced by the DIP Lender, both prior to and after the commencement of these insolvency proceedings; and
>
> d) the transactions of the Business are all accounted for using a common general ledger.
>
> 120. The complex organizational structure of the Petitioners and the use of different entities makes it <u>extremely difficult to trace the ownership of assets. The Monitor is of the view the complexity of the organizational structure is entirely unnecessary given the relative simplicity of the operating model of the Business</u>.

. . .

> 122. Based on the foregoing, the Monitor is of the view that it has appropriately and in a cost effective manner carried out the responsibilities pursuant to Paragraph 6 of the Enhanced Monitor Powers Order that directed the Monitor to review, inventory and otherwise investigate the assets of TNW Networks, and determine which assets of TNW Networks, if any *was not derived directly* or indirectly from the Property of the Petitioners, their subsidiaries, *or any other entities subject to the security interests of the Secured Creditors*.
>
> 123. If this Honourable Court requires a more in-depth review the Monitor will be required to undertake a full scale forensic examination of the underlying transactions and sourcing of funds. The Monitor is prepared to undertake such a review, but notes that a review of this nature would take significant time and the professional costs included the Seventh Report Forecast does not include a provision for such an undertaking. [Emphasis by underlining added.]

[10] The chambers judge who heard the application on July 18, 2017 no doubt shared the Monitor's frustration. He concluded that it would be a waste of time and money to require further efforts on the Monitor's part and that such work was not required. In his words:

> The ownership and transfer of assets among the group of companies owned and controlled by the respondents was unusually complex. I am satisfied from Mr. Collins' detailed factual submissions on the first day of the hearing that the Monitor had the required interest in the sale assets to be able to sell them. I also note Appendix A to the Monitor's Eighth Report, dated July 7, 2017, which contains an acknowledgement and undertaking on behalf of the respondents, granting the Monitor an irrevocable assignment of the shares in TNW Networks Corp. and the assets of TNWN as determined by the Monitor. [At para. 20; emphasis added.]

As noted later by this court, the order not only vested the Purchased Assets in the purchaser but also "expunged and discharged" the "ownership or other adverse claims" of various Group members, including Teliphone Corp. The Court approved the sale on the terms sought by the Monitor.

[11] It was this order that came before this court, with leave, on August 14, 2017. I can do no better than quote from Mr. Justice Hunter's reasons concerning the issues before the Court on the appeal and its conclusions:

Because of the basis by which the Monitor sought to support his authority to sell the assets listed in the APA [Asset Purchase Agreement], we do not have the benefit of a finding of fact by the chambers judge on the question of whether the assets to be conveyed in the APA include third party assets. It will be recalled that the Monitor based his authority on the April 6 order and the proposition previously noted that if the assets were assets of the Petitioners' subsidiaries or were subject to the security of the Petitioners' Secured Creditors, that was sufficient to found authority to include them in the sale.

In my view it is necessary to determine this factual point in order to assess whether the jurisdictional issue argued by the appellants arises in this case.

The appellants have identified specific items in the schedules to the Distributel APA that they say belong to Teliphone Corp., its subsidiaries or other entities. They have provided source documentation substantiating their claims to ownership. The Monitor was unable to determine whether the claims are valid due to the complexity of the interrelated business operations of the TNW Group. As a consequence, at the time he appeared before the chambers judge, the Monitor was unable to confirm that all of the scheduled assets belonged to the Petitioners. On a review of the record before the *CCAA* court, the preponderance of evidence is that third party assets are included in the asset schedules attached to the APA.

The fact that the Monitor referred in both his 7th and 8th Reports to the sale of assets *of the Business* lends support to the conclusion that the Monitor was of the view that he had been authorized to sell the assets of the Business of the Petitioners, whether or not those assets included third party assets, as long as the third party assets were either assets of the Petitioners' subsidiaries or assets over which the Petitioners' Secured Creditors held security.

I then approach this appeal on the footing that the APA does include third party assets. The question is whether the *CCAA* court had the jurisdiction to sell third party assets as part of the assets of the Business of the Petitioners.

The Monitor has advanced three arguments said to support his authority to sell third party assets as part of the sale of the assets of the Petitioners. The first is that the April 6 order [of Bowden, J.] conferred that authority. The Monitor expressed this argument in the following way in his factum:

> Paragraph 6 of the Expanded Monitor Powers Order [i.e. the April 6 order] provides the Monitor with authority to sell assets of persons that are not necessarily the assets of the Companies but where such assets are subject to the interests of the Secured Creditors.

The chambers judge interpreted the April 6 order in a similar manner, holding that it contained "a presumption against the assets being the property of an entity whose assets the Monitor could not sell."

In my opinion, the April 6 order does not confer this authority. The April 6 order sets up a mechanism for separating the assets of TNW Networks Corp. that were derived from the Petitioners' Property or other designated entities from those that were not, and authorizing the Monitor to include in the asset sale those assets of TNW Networks Corp. that were in the former category.

> Paragraph 6 relates solely to the assets of TNW Networks Corp., not to the assets of Teliphone Corp. or any other entity.
>
> These provisions of the April 6 order were based on the irrevocable assignment by TNW Networks Corp. of its assets to the Monitor through the Undertaking and Acknowledgement of March 21, 2017. That Undertaking and Acknowledgement also related solely to the assets of TNW Networks Corp.
>
> The second argument made by the Monitor before the chambers judge and this Court is the proposition set out in his 8th Report in these terms:
>
>> The Monitor has reviewed Exhibit "Y" to the Trevor-Deutsch Affidavit including the categories of assets that are purportedly owned by Teliphone Corp. and has prepared a schedule attached as Appendix "H" to this report wherein the Monitor provides its view that those assets were either: (i) acquired directly by 864 in 2013; (ii) owned by one of the Petitioners subsidiaries; (iii) are subject to Secured Creditor's security; or (iv) do not form part of the Purchased Assets.
>
> With respect I cannot agree. The Petitioners and its subsidiaries are separate legal entities. Assets belonging to the subsidiaries of the Petitioners cannot be available for disposition as part of the *CCAA* process unless the subsidiaries have been brought within that process as debtor companies, which they have not.
>
> The fact that the assets of Teliphone Corp. and the other entities may be subject to security held by the secured creditors of the Petitioners cannot provide a basis for authorizing their sale in this transaction. The secured creditors have not taken steps to realize on that security and they cannot do so in this proceeding to which Teliphone and the other entities are not parties. As Affleck J. held in his January 30 reasons for judgment, Teliphone Corp. is not part of the *CCAA* proceedings and there is no basis on which its assets could be sold in that process. [At paras. 42–55; emphasis by underlining added.]

[12] In this court's analysis, the evidence suggesting that some of the assets to be sold belonged to Teliphone Corp. or "other entities not before the Court", together with the Monitor's inability to confirm that the assets were assets of the petitioners, had precluded the court below from approving the Asset Purchase Agreement. In the words of Hunter J.A., "The *CCAA* Court had *no jurisdiction* to authorize the sale of assets other than the assets of the petitioners and TNW Networks Corp." (My emphasis.) The appeal was allowed and the order of July 18, 2017 approving the Asset Purchase Agreement was set aside. The stay of proceedings was extended to give interested parties an opportunity to consider the implications of the judgment.

September Application

[13] The parties were next before the Supreme Court in September, 2017. By this time, the Monitor had issued its twelfth report and a supplement thereto, in which it described its renewed efforts to clarify ownership of the "Disputed Assets." This report stated that except for assets listed in a schedule as belonging to TNW Networks and customer accounts identified as belonging to other parties, the Disputed Assets consisted primarily of unused domain names, trademarks and tradenames associated with so-called "Legacy Entities" and did not have "material value." TNW Networks claimed ownership of some of these.

[14] The Monitor had reached a revised agreement with Distributel under which the Disputed Assets were to be 'carved out' out of the sale that was now proposed, except for the "Critical Disputed Property" (certain domain names described at para. 102 and an AS number) which the purchaser considered important to the Business, and customer contacts "purportedly assigned to [TNW Networks] in January 2016, which in the Monitor's view is the property of the Petitioners." The purchase price was unchanged from that under the previous agreement, but was subject to later adjustment in certain events, including "if the vendor is unable to vend title to the Disputed Assets." In the meantime, the "Required Purchased Assets" were to be sold and the purchaser was given an option to buy Disputed Assets found to be saleable to it, at a later date. The Monitor's analysis of these was set out at pp. 42–44 of the twelfth report.

[15] On September 15, 2017, the Monitor sought a vesting order approving the sale of the Required Purchased Assets to a Distributel nominee pursuant to the Revised Asset Purchase Agreement. A judge in chambers pronounced the transaction to be "commercially reasonable" and granted the order. Para. 2 of the order stated:

> This Court orders and declares that the Required Purchased Assets (as defined in the Sale Agreement and pursuant to the revised Schedule M to the Sale Agreement) <u>are rightfully owned by the Companies and capable of being sold to the Purchaser</u> by the Monitor pursuant to the terms and conditions of the Sale Agreement. [Emphasis added.]

As before, all encumbrances listed in the schedule to the order, and for greater certainty, "all of the Encumbrances affecting or relating to the Required Purchased Assets", were expunged and discharged as against those Assets. (At para. 3; my emphasis.)

[16] Para. 12 of the order authorized the Monitor to carry out a "Disputed Claims Process" in respect of the Disputed Assets. Specifically, the Monitor was to:

> (a) return some or all of the Disputed Assets to the person or persons, other than the Petitioners, who claim ownership of such Disputed Assets (the "Claiming Person"), <u>on terms that are agreed to by the Monitor, the Claiming Person, and the Purchaser</u>; or
>
> (b) consult, in its discretion, with Glen Gregory and Sandeep Panesar, who would be afforded reasonable supervised access to the Petitioners' books, records, executive management personnel and premises, <u>to seek a consensus</u> on whether a Disputed Asset may be determined to be:
>
> i) beneficially owned by a Petitioner or otherwise able to be sold by the Monitor pursuant to the Sale Agreement (collectively or individually, a "Saleable Asset"), in which case the Purchaser shall have the right to immediately exercise the Option (as defined in the Sale Agreement) with respect to such Saleable Asset without further order of this court; or
>
> ii) beneficially owned by a Claiming Person and not a Saleable Asset, in which case the Monitor shall release such asset as soon as practicable to such Claiming Person;
>
> (c) failing an agreement referred to in subparagraph (a), or a determination of a Saleable Asset pursuant to subparagraph (b)(i) on or before October 2, 2017, the Claiming Person shall deliver to the Monitor no later than October 13, 2017, a proof of claim, verified by affidavit giving the grounds on which the claim is based and sufficient particulars to enable the Disputed Asset to be identified. For clarity, such proof of claim may include more than one Disputed Asset. The Monitor shall then, <u>within 15 days of receipt of such proof of claim, on notice to the Claiming Person, either admit the claim or advise that the claim is not admitted</u>. Unless an application is brought in this proceeding to appeal the Monitor's determination within 15 days of notice of the Monitor's determination, the Monitor shall either:
>
> 1) release the Disputed Asset, if the claim is admitted; or
>
> 2) be entitled to classify such asset as a Saleable Asset, if the claim is not admitted.
>
> (the "Disputed Claims Process".)

Upon conclusion of this process, the Monitor was to file a report and seek any consequential orders. Importantly for purposes of this case, the order stated that any person dissatisfied with the Monitor's decision could appeal to the Supreme Court.

[17] I understand the closing of the sale of the Required Purchased Assets took place in the fall of 2017, although the purchase price may not yet have been paid in full.

[18] The Monitor duly began the Disputed Claims process. Proofs of claims were filed by counsel on behalf of TNW Networks, Teliphone Corp. and other "Claiming Persons", who are appellants herein. The Monitor responded by letters dated October 4 and 16, 2017 to counsel for the appellants. In the letters, it again recounted the various steps and court orders summarized above, including the April 2017 order and the August 2017 appeal. The Monitor acknowledged the effect of this court's reasons as follows:

> Paragraph 24 of the Court of Appeal Reasons for Judgment [quoted above at para. 11 of these reasons] confirmed that, pursuant to the April 6 Order, the Monitor has the authority to sell, subject to approval of the Court, all of the assets of the Petitioners, together with those assets of TNW Networks that are not excluded by the process established by paragraph 6 of the April 6 Order.
>
> Paragraph 51 of the Court of Appeal Reasons for Judgment states that the April 6 Order sets up a mechanism for separating assets <u>of TNW Networks</u> Corp. that were derived from the Petitioners' Property or other designated entities from those that were not, and authorizing the Monitor to include in the asset sale those assets <u>of TNW Networks C</u>orp. that were not in the former category.
>
> <u>The Court of Appeal Reasons for Judgment also make clear that the Monitor did not have jurisdiction to sell assets merely because they belonged to a subsidiary of one of the Petitioners, or because they may be subject to the interests of the secured creditors. The derivation test set out in the April 6 Order still had to be assessed by the Monitor to confirm whether it did not have jurisdiction to sell the assets.</u>
>
> Accordingly, the Court of Appeal Reasons for Judgment confirm that TNW Networks property, including the customer accounts, that is available to be sold <u>is to be determined in accordance with the derivation test set out in paragraph 6 of the April 6 Order</u>. [Emphasis added.]

As far as I am aware, none of the parties challenges the Monitor's assumption that the "derivation process" contemplated by Bowden J.'s April order was to continue in effect.

[19] The Monitor then embarked on an analysis of the Disputed Assets, classified according to each Claiming Person. It stated in the October 4 letter that it had:

> … undertaken the following analysis for each Claiming Person claiming ownership of the customer accounts that were assigned to TNW Networks Corp. by the Assignor Companies. This analysis concludes that the customer accounts were either (i) acquired directly by the Petitioners from Teliphone Corp. in 2013; (ii) assigned by one of the Subsidiaries to TNW Networks Corp.; (iii) <u>assigned to TNW Networks Corp. by other entities that are subject to Secured Creditor's security</u>; or (iv) do not form part of the Purchased Assets and will not be sold (an "Excluded Asset").

[20] I do not intend to describe each analysis in detail but will refer to some that may be of interest from a legal point of view. I note that at the outset of its analysis, the Monitor provided a table which purported to categorize the source of its "authority to vend property". The table had a column headed "Derived from Entity subject to Security of the Applicants", another headed "Derived from Subsidiary of Petitioners" and another headed "Owned by/Derived indirectly from the Petitioners."

[21] With respect to Teliphone Corp., the Monitor was satisfied that the petitioners had acquired its assets in return for the issuance of Class B shares of 864 on January 1, 2013. Accordingly, the Monitor concluded, the customer accounts were property of the petitioners and not of TNW Networks and were therefore "not subject to the derivation analysis".

[22] The Monitor added, however, that "another basis" for finding the accounts were not TNW Networks property for purposes of the April 6 order was that Teliphone Corp. had granted Bell Canada a general security agreement (GSA") in June 2012. Mr. Panesar of TNW Networks had disputed that Teliphone Corp. was subject to the GSA "as its debts were paid". The Monitor expected that Bell Canada would not recover its debt in full from the *CCAA* proceedings, so that there would be

a shortfall that Bell could seek to recoup as against Teliphone Corp. under the GSA. The Monitor concluded:

> Thus, if Teliphone Corp. did not sell its assets to 864, Teliphone Corp. clearly purported to assign its customer accounts to TNW Networks as noted on the [January 1, 2016] Assignment Letter. Accordingly, <u>those accounts were derived from an entity that was subject to the applicants' security, a criterion pursuant the April 6 Order</u>. [Emphasis added.]

[23] With regard to a company called Cloud-Phone Inc., Teliphone Corp. had adduced evidence to show that it was a subsidiary of Teliphone Corp., rather than of one of the Petitioners, but this assertion had not been substantiated by minute book records, share certificates, etc. The Monitor took the view that disputed contracts previously owned by Cloud-Phone Inc. were either property of 864 that had been assigned to TNW Networks, or that there was insufficient evidence to determine that they were Networks Property in accordance with the April order. The Monitor concluded that the accounts were "derived from a Subsidiary and were not, therefore, Networks Property within the terms of the April 6 order."

[24] Similar reasoning applied to a company called Coastline Broadcasting. The Monitor rejected evidence it had received to the effect that this company was owned by Teliphone Corp. It concluded that Coastline's accounts that had been assigned to TNW Networks were "property of a Subsidiary" that had been assigned to TNW. They were therefore not Networks Property.

[25] With respect to two companies – 9151-4877 Quebec Inc. and Orion Communications Inc. – the Monitor found that they had been acquired by Teliphone Corp. prior to the January 2016 transaction under which the Petitioners had acquired the assets of Teliphone Corp. According to the Monitor, the assets of each of these companies had been conveyed to the Petitioners under that transaction. The Monitor considered that evidence tendered by or on behalf of the Claiming Persons was not sufficient to prove that customer accounts derived from these companies were held by TNW Networks and had not been derived "directly or indirectly from an entity subject to the Applicants' security." (The Applicants were the secured creditors who were named as applicants in the text of the April 6 order.) In the result, these

accounts were determined not to be Networks Property and were saleable by the Monitor.

[26] With respect to TNW Networks itself, the Monitor said it understood that TNW Networks was claiming accounts of customers with whom it had entered directly into service agreements after January 1, 2016. However, the petitioners had paid all of TNW Networks' costs of doing so, including the costs of personnel and maintenance of infrastructure. TNW Networks, on the other hand, had not maintained a ledger to account for such transactions. The Monitor concluded that the accounts were "derived directly or indirectly from the Property of the Petitioners". As well, it noted, TNW Networks was subject to security held by Bond Mezzanine Fund III Limited Partnership ("Bond III") in the form of a GSA granted prior to the April 6 Order. The Monitor continued:

> That general security agreement attaches to all present and after-acquired property of TNW Networks. As a result, the Monitor has determined that all of the contracts that were assigned to TNW Networks Corp. on and after January 1, 2016 are subject to the Applicants' security and are therefore Property of the Petitioners available for sale. [Emphasis added.]

[27] The Monitor ended its letter of October 4 with the following summary:

> Based on the factors described above, and in particular the following factors, the Monitor has determined that all of the customer accounts assigned to TNW Networks Corp. pursuant to the Assignment Letter are capable of being sold by the Monitor pursuant to the April 6 Order:
>
> 1. the customer accounts were assigned to TNW Networks by the Assignor Companies on or about January 1, 2016, as evidenced by the Assignment Letter;
> 2. all of the customer accounts assigned to TNW Networks were determined by the Monitor to be used in or necessary for the business of the Petitioners;
> 3. the customer accounts were assigned to the Monitor pursuant to the Irrevocable Assignment;
> 4. the April 6 Order authorizes the Monitor to market and sell the assets and undertakings of the Companies (being the Petitioners and TNW Networks), other than assets the Monitor determines were not derived directly or indirectly from the property of the Petitioners, the Subsidiaries or any other entity subject to the secured creditors' security; and

> 5. all of the customer contracts and accounts (except for the Excluded Assets) have been determined by the Monitor to have not been derived, directly or indirectly, from the Property of the Petitioners, the Subsidiaries or any other entity subject to the secured creditors' security.
>
> Accordingly, the Proof of Claim of the Claiming Persons relating to the customer accounts, apart from the Excluded Assets, is not admitted, pursuant to the Vesting Order. [Emphasis added.]

[28] In its letter of October 16, 2017, the Monitor reviewed the reasons it had previously expressed for rejecting the proof of claim of the Claiming Persons. It summarized its reasons under three headings – "Claiming Persons were identified as shell companies", "Teliphone Corp. transferred its assets to the Petitioners" and "The derivation of assets held by TNW Networks". The Monitor also provided a table which again summarized its findings with respect to specific assets held by specific companies.

[29] In the end, the Monitor disallowed all the claims of the Claiming Persons.

The December 2017 Application

[30] On November 27, 2017, the purchaser under the Revised Purchase Agreement exercised its option to acquire certain of the Disputed Assets, conditional on Court approval. On December 14, 2017, counsel again appeared before the chambers judge below seeking a second vesting order and the Court's approval of the sale of the assets under the option. Although we are told that no formal notice of appeal was filed, the Court (see para. 6 of the reasons) and counsel treated the hearing as an appeal of the Monitor's disallowance of the proof of claim. (As noted earlier, the order of September 2017 had stated that anyone not satisfied with the Monitor's decisions to allow or reject proofs of claim could appeal to the Court.)

[31] The submissions of counsel occupied eight days and the Agreement was subject to a deadline of December 28 – a fact that made it impossible for the judge to deliver complete reasons at the end of the hearings on December 14. However, he provided a summary of his conclusions, acknowledging they were "inevitably conclusory, not analytical."

The Chambers Judge's Reasons

[32] The chambers judge noted the difficulties concerning ownership that had persisted throughout the *CCAA* process in this case, and this court's comments on those difficulties. He continued:

> The difficulties arise in large part for three reasons, in my view. The first and most important is that the management of the TNW Group made a decision before this *CCAA* process began to operate the Group as if it was a single company. For example, the whole of the business has been managed by the same people, all customer billings had been deposited to a pooled bank account, and all transactions, regardless of which company in the Group was involved in a particular transaction, have been records in a common general ledger.
>
> The second reason for difficulty in determining ownership of assets is that although the Monitor has asked for records of various important transactions to be provided, in several instances no such documents were forthcoming. There may be legitimate reasons for the absence of documents, one of which may be that they do not exist, but that has added to the difficulties, and it is for the appellants to demonstrate to the Monitor what they own. They have not provided readily accessible particulars of the claimed assets.
>
> A third reason for the difficulties is that affidavits proffered in this proceeding by the appellants have in some instances challenged the accuracy of audited financial statements long after they have been prepared.
>
> I will also comment that the reliability of affidavits made by the management of the TNW Group of companies has been called into question. The Monitor, in my opinion, has properly considered them with a critical eye. [At paras. 8–11.]

[33] A "salient feature" of the appellants' argument, the judge observed, was that the standard of review applicable on the appeal to the Monitor's determination was one of correctness. The chambers judge said he did "not agree entirely." He found that the leading authority on the question of standard of review was *Re AbitibiBowater Inc.* 2011 QCCS 4284, which (the judge stated at para. 13 of his reasons) indicated that a *reasonableness* standard applied to the Monitor's decision to reject the Claiming Persons' proof of claim. In his analysis, the Monitor's determinations about the ownership of assets had largely involved questions of *fact*: the proof of claim was "rejected principally because the management of the TNW Group was unable to provide the Monitor with satisfactory evidence of ownership."

[34] *Abitibi* involved the findings of a *claims officer* appointed by a *CCAA* monitor to determine, *inter alia*, the *value* of a claim asserted by a company, "Woodbridge", against a subsidiary of Abitibi Consolidated Corp. Inc., which was in *CCAA* proceedings. I note that s. 20 of the CCAA, which deals with the determination of the values or "amounts" of claims, does not state expressly by whom they are to be decided, although under s. 20(2) it is the company, or petitioner, that "may admit the amount of a claim for voting purposes under reserve of the right to contest liability" and that may divide the claims into classes under s. 22(1). Thus the Alberta Court of Appeal observed in *Alternative Fuel Systems Inc. v. Remington Development Corp.* 2004 ABCA 31:

> A company which invokes the *CCAA* process retains a great deal of control over it. Under the *CCAA* claims process, the company, not the monitor, initially accepts or rejects claims. Section 12(2)(a)(iii) [now s. 20(1)(a)(iii)] states, "if the amount so provable is not admitted by the company, the amount shall be determined by the court on summary application by the company or by the creditor".
>
> Section [20(2)(a)(iii)] permits different treatment of different claims. The company can admit a claim, or refer it to a court to determine by summary application or trial. In recent cases, recognizing the need for expedited valuation of claims to facilitate the process, the courts have begun appointing a claims officer to make this determination. [At paras. 52–3.]

If the company does not admit a proof of claim, the amount is to be determined by the court on summary application under s. 20(1)(a)(iii) or s. 20(1)(b).

[35] Appeals are dealt with in more general terms under s. 13, which provides:

> 13. Except in Yukon, <u>any person dissatisfied with an order or a decision made under this *Act* may appeal</u> from the order or decision on obtaining leave of the judge appealed from or of the court in which the appeal lies and on such terms as to security and in other respects as the judge or court directs. [Emphasis added.]

[36] The claims officer in *Abitibi* had had a written record before him as well as *viva voce* evidence from various witnesses. He ultimately adopted a value of $24 million (U.S.), considerably more than the $9 million (U.S.) that the monitor had allowed. As will be discussed more fully below, the Court decided that the appeal from the claims officer's decision to the Court was "not to proceed on a *de novo*

basis" but to be decided applying the criteria of a "true appeal". (At para. 70.) The standards of review applicable to the appeal were to be those enunciated in *Housen v. Nikolaisen* 2002 SCC 33.

[37] The chambers judge acknowledged that the case at bar did not involve a decision made after an adversarial proceeding before a claims officer. But, he observed, the Monitor here had been given "receiver-like powers" by the Court and had conducted its own inquiry into the proofs of claim in accordance with the April 2017 order. The appellants had put their full case before the Monitor and provided numerous affidavits. The judge then stated his conclusion on the question of standard of review:

> As in *Abitibi* I view the matter before me <u>as a true appeal</u>. The appellants <u>must demonstrate the Monitor fell into overriding and palpable error</u>. In my view, the Monitor properly made its determinations on the evidence before it. I do not agree with Mr. Gregory that it ignored relevant and probative evidence. Even when considering the evidence and making findings of fact, the Monitor is entitled to a margin of error. If I disagree with a factual finding of the Monitor, that is not sufficient in itself to set it aside. <u>It must be an overriding and palpable error; a clear and obvious mistake</u>. I am not persuaded the Monitor fell into that type of error. [At para. 15; emphasis added.]

It will be noted that this standard was *not* one of reasonableness, which the judge had approved earlier in his analysis.

[38] After dismissing some of the more specific arguments made by counsel, the chambers judge approved the "sale, assignment, transfer and conveyance of all of the [O]ptional [P]urchased [A]ssets" listed in a schedule to the Monitor's fifteenth report. Para. 3 of the order stated:

> This Court orders and declares that all of the Schedule "A" Assets are rightfully owned by the Companies and capable of being sold to the Purchaser by the Monitor pursuant to the terms and conditions of the APA.

The Appeal

[39] It is from this order that the appellants now appeal, with leave. I emphasize that leave was granted for an appeal limited to the following question:

> Did the chambers judge err in holding that in *Companies' Creditors Arrangement Act* proceedings the standard of review on an appeal from a determination made by a Court-appointed Monitor conducting a proof of claim process with respect to the ownership of disputed assets is "overriding and palpable error; a clear and obvious mistake", as opposed to "correctness"?

[40] Thus this court is not asked to rule on any particular finding on any specific proof of claim made by the Monitor and affirmed by the chambers judge, but simply to answer the question posited. Nevertheless, the appellants who are represented by Mr. Gregory seek in their factum an order that:

> a. This appeal from the order of [the chambers judge] be allowed,
>
> b. The appeal from the Monitor's decisions respecting 8583498 Canada Ltd. (often referred to as "Rocket") and ChoiceTel
>
>   i. be allowed;
>
>   ii. this Court declare that those companies own and have always owned the customer accounts and hard assets that the Court of Appeal list attributed to them; and
>
>   iii. those assets be returned to them forthwith.
>
> c. The appeal from the Monitor's decisions respecting all of the hard assets attributed to the remaining appellants
>
>   i. be allowed;
>
>   ii. this Court declare that those companies own and have always owned the customer accounts and hard assets that the Court of Appeal list attributed to them; and
>
>   iii. those assets be returned to them forthwith.
>
> d. The remaining issues be remitted to Mr. Justice Affleck for decision in accordance with this decision.

Teliphone Corp. on the other hand seeks an order setting aside the chambers judge's order dated December 14, without more.

[41] In my view, we ought not to undertake any issues beyond the one posed in the leave order. I would word the question slightly differently: what standard(s) of review was the chambers judge required to apply to the Monitor's determination, in the course of whether to allow or reject the proof of claim before it, of which assets could be sold to the purchaser? My answer is that the appeal to the Supreme Court was a "true appeal" in this case and was subject to the standards of review

applicable to most civil appeals – the standard of correctness for *extricable* questions of law, and the standard of "palpable and overriding error" for questions of fact or mixed fact and law. In my opinion, this conclusion accords not only with the binding authority of *Housen* and persuasive Canadian authorities in the insolvency field (including *Abitibi)*, but also with the statutory context and the practical realities of a *CCAA* administration. I turn briefly to these factors.

The CCAA

[42] As is well-known, the *CCAA* began its life as a very short statute in 1933 to "preserve enterprise value, jobs and good will through amicable settlement with creditors": see Janis Sarra, "The Evolution of the Companies' Creditors Arrangement Act in Light of Recent Developments", (2011) 50 *Can. Bus. L.J*. at 212. In her text *Rescue! The Companies' Creditors Arrangement Act* (2007), Professor J. Sarra defines the purposes of the *CCAA* as "providing a court-supervised process to facilitate the negotiation of compromise and arrangements where companies are experiencing financial distress, in order to allow them to devise a survival strategy that is acceptable to their creditors." (At 1.)

[43] In *Century Services Inc. v. Canada (Attorney General)* 2011 SCC 60, the Supreme Court described the purpose of the *CCAA* as being to permit insolvent debtors to "continue to carry on business and, where possible, avoid the social and economic cost of liquidating [their] assets." The Court noted that at the time of its enactment, the *Act* was "innovative", since it allowed the insolvent debtor to "attempt reorganization under judicial supervision outside the existing insolvency legislation which, once engaged, almost invariably resulted in liquidation." (At para. 16.) The Court also described 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 is compromised 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 organization's 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. [At para. 14.]

[44] The Supreme Court described the *BIA* and *CCAA* as "forming part of an integrated body of insolvency law" (at para. 78) and suggested that courts should rely first on an interpretation of the provisions of the statute before turning to inherent or equitable jurisdiction to "anchor measures taken in a *CCAA* proceeding." Deschamps J. for the majority agreed with Professor Sarra and Justice G. Jackson 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." (At para. 65.)

[45] In recent years, the *CCAA* has often been invoked in so-called "liquidating *CCAA*s" in which the sale of substantially all the assets of the debtor company takes place and the company ceases to operate. Although this development has been questioned as contrary to the original purpose of the *CCAA* (see A. Nocilla, "Is Corporate Rescue Working in Canada?" (2013) 53 *Can. Bus. L.J*. 382), innovation has been the hallmark of the evolution of the *CCAA* and in some instances, a liquidation may turn out to be the best way to avoid the "social and economic cost" attendant upon an insolvency. In the case at bar, the fact that a liquidation was undertaken led to the 'innovation' that the Monitor was given the task of deciding not the *values* of *creditors'* claims, but the *ownership of assets* claimed by other persons. To some extent, then, we are in unchartered territory under the statute.

[46] Finally, I note the time-pressured environment in which decisions must be made in *CCAA* proceedings – perhaps more so than under the *BIA*. As Yamamuchi J. observed in *Re Transglobal Communications Group Inc.* 2009 ABQB 195:

> Proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, have come to be known as "real-time litigation" because, as the Ontario Court of Appeal noted in *Re Androscoggin Energy LLC*, 2005 CarswellOnt 589; 8 C.B.R. (5th) 11 at para. 1, "Parties depend on the court system to be able to respond, as it has here, despite the inevitable time pressures." Bankruptcy liquidation proceedings have come to be known as

> "autopsy litigation." Proposal proceedings under the *BIA* are no less real-time litigation than proceedings under the *CCAA*. As Justice Farley, who was the individual who coined the phrase in the first instance, said in *Re Royal Oak Mines Inc.*, 1999 CarswellOnt 792; 7 C.B.R. (4th) 293 at para. 5 (Ont. Ct. Just. Gen. Div.):
>
> > Frequently those who do not have familiarity with real time litigation have difficulty appreciating that, in order to preserve value for everyone involved, Herculean tasks have to be successfully completed in head spinning short times. All the same everyone is entitled the opportunity to advance their interests.
>
> [At para. 48.]

There is no reason to suggest that liquidations are any less time-sensitive than the more usual compromises or restructurings under the *CCAA.*

The Role of the Monitor

[47] The use of court-appointed monitors has also been an innovation in the courts' treatment of *CCAA* cases. Prior to 1997, monitors were appointed pursuant to the inherent jurisdiction of the superior courts. They reviewed the financial and business affairs of the debtor, provided independent information to the court on the progress of the proceedings, and assisted in administrative matters such as notifying creditors and organizing and managing meetings of creditors: see Sarra, *Rescue* at 257.

[48] The professionalism and impartiality of the monitor's role were codified in 1997 following the recommendations of a task force that reported in 1994: see Sarra at 258. Section 11.7(1) now requires that a monitor be appointed by a court on the initial application and that the person so appointed be a trustee within the meaning of s. 2(1) of the *BIA*. Section 11.7(2) disqualifies certain persons who would have an interest in the debtor or would not be seen to be impartial. As officers of the court, monitors must remain impartial and "objectively look out for be concerned for the interests of all stakeholders": see *Re Laidlaw Inc.* (2002) 34 C.B.R. (4th) 72 (Ont. S.C.J.), *per* Farley J.

[49] Section 23 sets out the various duties of monitors, which apply unless the court orders otherwise. Generally, these are duties of monitoring the company's

business affairs and reporting to the court thereon, carrying out appraisals or investigations considered necessary by the monitor, assisting the company's creditors in certain respects, advising the court on the "reasonableness and fairness" of any proposed compromise or arrangement, making certain documents publicly available and carrying out "any other functions in relation to the company that the court may direct." Courts have used s. 23(1)(k) liberally to assign additional functions to monitors that go beyond investigating and reporting to the court. As noted by Yaad Rotem in "Contemplating a Corporate Governance Model for Bankruptcy Reorganizations: Lessons from Canada", (2008) 3 *Va. L.& Bus. Rev*. 125, monitors have been authorized to act as financial advisors to the parties or the court, to facilitate or mediate between management and creditors, and to fulfill certain functions of directors or managers. (At 148.) The monitor may even effectively replace the board of directors and senior management of a corporation: see *Re Royal Oak Mines Inc.* (1999) 11 C.B.R. (4th) 122 (Ont. Gen. Div.) Thus Professor Sarra writes:

> Long gone are the days when the monitor acted as a passive observer, reporting to the court. Monitors now play a range of roles, including mediator or facilitator in the negotiations, debtor advisor, creditor assuager and officer of the court. The recent amendments bolster this authority, requiring in a number of instances, such as DIP Financing and the sale of assets to related parties, that the court consider the views of the monitor. However, the court has observed that while the support or approval of the monitor is an important factor, it is not decisive in and of itself. The courts continue to stress the need for independence and impartiality of the monitor. In approving a series of agreements that provided the debtors with certainty with respect to ongoing funding, the resolution of inter-company issues, and a settlement with taxing authorities, <u>the court held it was appropriate to place reliance on the views of the monitor who had the benefit of intensive involvement for over a year and was active in the negotiations leading up to the proposed settlement</u>. [*Evolution, supra* at 234–5; emphasis added.]

In this case, it will be recalled, the April order 'enhanced' the Monitor's powers: it contemplated that the Monitor would carry out the day-to-day management of the petitioners' operations.

[50] In recent years, Canadian courts have also adopted the practice of appointing claims officers to assist in determining the "amount represented by a claim of any

secured or unsecured creditor" under s. 20 of the *CCAA*. Various provinces have developed model claims process orders, but these vary widely across Canada. Where the order provides for the appointment of a claims officer, that officer may be given the authority to determine the procedure for adjudicating such claims and may reach a determination of the value that is often stated to be final and binding on the company or creditor, subject to any further order of the court.

[51] The general role of a claims officer was dealt with in *Abitibi*, which as we have seen was cited with approval by the chambers judge in the case at bar. As noted, *Abitibi* involved a motion to vary the determination of a claims officer who had in accordance with a claims procedure order valued a claim at $24 million (U.S.) The creditor contended that the value was much greater and that in ruling upon the motion, the Court owed no deference to the claims officer's determination. It urged the Court to reassess the evidence, and to consider new evidence that had not been before the officer, and thus to make its own determination of the correct value of the claim. (At paras. 6-7.) Abitibi responded that Woodbridge had failed to establish "any error in law or any palpable and overriding error in fact" in the claims officer's determination.

[52] The Court in *Abitibi* formulated the first of three series of questions before it as follows:

> What is the standard of review of the Claims Officer's Determination? Should the Court proceed on the basis of a true appeal or *de novo*? What are the applicable criteria for the Court's intervention?

[53] Beginning its analysis at para. 66, the Court noted that a "thorough adversarial proceeding" had taken place before the claims officer at which both sides presented affidavit evidence, including expert reports. *Viva voce* testimony with cross-examination had also been allowed and counsel had made oral and written submissions. In the circumstances, the role of the Court was not to "conduct a trial *de novo* and plainly set aside the findings of the claims officer, reassess the matter and substitute its own discretion." (At para. 67.) This conclusion was found to be supported by case law, including the decision of Morawetz J. in *Re Tiercon*

Industries Inc. (2009) 62 C.B.R. (5th) 90 (Ont. S.C.J.), *aff'd* 2010 ONCA 666 and *Triton Tubular* (2005) 14 C.B.R. (5th) 264 (Ont. S.C.J.), which also involved a "full blown trial-like proceeding" before a claims officer under the *CCAA*. Lederman J. noted in the latter case that:

> By seeking a hearing *de novo* on this file, Steelcase is requesting a second trial. If the threshold for permitting appeals to be heard on a *de novo* basis is set too low, it will encourage such reviews and thereby add significantly to the costs and length of proceedings which are inconsistent with the fundamental purposes of the *CCAA* and the Commercial List practice. [At para. 14.]

(Cf. *J.J. Lacey in re Bankruptcy and Insolvency Act*, 2008 NSTD 9 at paras.14-8.)

[54] As was noted in *Abitibi*, the Court in *Re Canadian Airlines Corp.* 2001 ABQB 146 had reached the opposite conclusion, but the appeal in that case had been "solely concerned with matters of law," and it had been decided prior to *Tiercon* and *Triton*. (At para. 76.) The *Abitibi* Court also found guidance in the decision of the Ontario Court of Appeal in *Re Creditfinance Securities Ltd.* 2011 ONCA 160, where LaForme J.A. had stated for the Court:

> At the very least, the practice seems to be that an appeal court, when considering a Notice of Disallowance will first decide the issue of whether the matter proceeds as a true appeal or as a hearing *de novo*. The test that has evolved seems to be that a hearing *de novo* will occur if the court decides that to proceed otherwise would result in an injustice to the creditor: *Charleston Residential School (Re)* (2010), 70 C.B.R. (5th) 13 (Ont. S.C.) at paras. 1 and 18.
>
> I note that this practice is not used uniformly across the country. For example, in British Columbia an appeal under s. 81 of the *BIA* is not intended to be a trial *de novo* but rather a true appeal: *Galaxy Sports Inc. (Re)* (2004) 1 C.B.R. (5th) 20 (B.C.C.A.) at para. 40. <u>The policy rationale is that trustees in bankruptcy should be regarded as having experience and expertise in the area of business financing, restructurings and insolvency</u>.
>
> <u>This BC approach makes sense because, if evidence that was not before a Trustee were to be presented on an appeal as a matter of course, much of the efficiency and the operation of the bankruptcy scheme would be lost</u>. Creditors who neglected to file a proof of claim in compliance with the requirements of the scheme would be at an advantage because they could expect to enhance their proof on appeal. This, it seems to me, would impact on the objective implicit in the *BIA*, <u>which is to enable parties to have their rights and claims determined in an expeditious fashion, and add unwanted expense, delay and formality</u>: *Galaxy Sports* at para. 41. [At paras. 24–6; emphasis added.]

[55] With respect to standard of review, the Court in *Abitibi* also adopted the conclusions of Morawetz J. in *Tiercon*, who had summarized the standard of review applicable to a claims officer under a *receivership* order, essentially in the terms used in the seminal case of *Housen v. Nikolaisen* 2002 SCC 33, as follows:

> The Claims Procedure Order provides that a party may appeal a final determination of the claims officer.
>
> The appropriate standard of review for the appeal of the decision of the Claims Officer is as follows:
>
>> a. With respect of pure questions of law, the standard of review is correctness.
>>
>> b. With respect to questions of fact, the standard of review is that such findings are not to be reversed unless it can be established that the decision maker made a palpable and overriding error.
>>
>> c. With respect to questions of mixed fact and law, the standard of review, is that, in the absence of an "extricable" legal error or a palpable and overriding error, a finding of the decision maker should not be interfered with.
>>
>> d. With respect to the assessment of damages, a damage assessment should not be overturned unless it is based upon a wrong principle of law or the damage is so inordinately high or low that it must be an erroneous estimate of damages.
>
> . . .
>
> The role of the court on … appeal is to review the decision of the Claims Officer. It is not to conduct a trial *de novo*. [*Tiercon,* at paras. 11–12.]

(See also Morawetz J.'s comments in *Re Target Inc.* 2017 ONSC 2595 regarding a claims officer's determination of the value of claims under the *CCAA*, at paras. 11–13; and *Triton Tubular* at para. 15, adopting the *Housen* standards.)

[56] In the result in *Abitibi*, the Court rejected the possibility of a *de novo* hearing, observing an "appeal process" was "perfectly acceptable" given that the final say remained with the Court and not with the claims officer. (At para. 104.) The Court applied the standard of palpable and overriding error to the questions of *fact* that had been analyzed by the claims officer, finding that no such error had been shown. The appeal was dismissed. (Paras. 138, 145, 160.)

[57] As mentioned earlier, the chambers judge in the case at bar followed *Abitibi* to the extent that he viewed the matter before him as a "true appeal" in which the appellants had the onus to demonstrate that the Monitor had fallen into overriding and palpable error. (At para. 15, quoted earlier in these reasons.) At the same time, he rejected the proposition advanced by counsel for the appellants that the governing authority in British Columbia was *Re Galaxy Sports*. That case involved various decisions made by a trustee under s. 135 of the *BIA*, which provides that a trustee shall determine whether an unliquidated claim is provable and if so, the value thereof. As this court noted, s. 135(4) provides that a trustee's decision as to the value of such a claim or the disallowance of any claim under s. 135(2) is "final and conclusive" unless it is appealed within 30 days. (At para. 31.)

[58] The first issue raised in *Galax*y that is relevant to this appeal concerned whether the hearing in the Supreme Court was a trial *de novo* in which the Court was entitled, without recourse to the *Palmer* criteria for the admissibility of "fresh evidence", to consider evidence that was not before the trustee. This court noted that *Re Eskasoni Fisheries Ltd.* (2000) 16 C.B.R. (4th) 173 (N.S.S.C.) and *Re Port Chevrolet Oldsmobile Ltd.* 2004 BCCA 37 had proceeded on the basis that the chambers judge could consider, *as a matter of course*, material that had not been before the trustee in deciding whether the proof of claim had complied with s. 124 of the *BIA*. (See para. 36.) In *Galaxy,* however, we held that the Supreme Court's hearing of an appeal under s. 135(4) was not intended to be a trial *de novo* but a "true appeal", citing *McKenzie v. Mason* (1992) 72 B.C.L.R. (2d) 53 (C.A.) and *Dupras v. Mason* (1994) 120 D.L.R. (4th) 127 (C.A.), both of which dealt with appeal proceedings under the *Mineral Tenure Act*. The Court stated in *Galaxy:*

> … similar considerations apply in this case with respect to the expertise of trustees in bankruptcy. As I have already mentioned, they can be expected to have considerable experience and expertise in the area of business financing, restructurings and insolvency. If "fresh evidence" — i.e., evidence not before the trustee or chair at the time of his or her decision — were to be adduced in Supreme Court on appeal *as a matter of course*, it seems to me that much would be lost in the way of efficiency in the operation of the bankruptcy scheme generally. Creditors who neglected to file proofs of claim in compliance with the requirements of s. 124 would suffer no practical consequences if, in Farley J.'s phrase, they could expect to "cooper up" their

> proofs at a later date in court; and the business now conducted at creditors' meetings by trustees (who are generally supervised by inspectors under the *BIA*) would be largely co-opted to courts of law, with all the attendant expense, delay and formality. [At para. 41]

As I read *Abitibi*, the Court agreed with this conclusion, as did the chambers judge in the case at bar.

[59] With respect to standard of review, we were referred by counsel in *Galaxy* to the standard of review analysis in administrative law and in particular "the pragmatic and functional" approach that was applied to decisions of administrative tribunals at that time. On a consideration of the "contextual" factors mandated by that approach, this court saw:

> … no reason to disagree with the longstanding principle enunciated in *Re McCoubrey* [(1924) 5 C.B.R. 248 (Alta. T.D.)] which <u>requires the application of a "correctness" standard where compliance with a "mandatory provision</u>" (which I would equate to a question of law or statutory compliance) is involved, and the application of a "reasonableness" standard where the determination of a factual matter or an exercise of true discretion is called for. [At para. 39; emphasis added.]

Into the former category, the Court placed a decision of the chair of the creditors' meeting rejecting a proof of claim for voting purposes and the trustee's decision disallowing a proof of claim under ss. 124 and 135(2). In the latter category, the Court placed the trustee's role in valuing contingent and unliquidated claims under s. 135(1.1). (At para. 39.)

[60] Since *Galaxy* was decided, administrative law has changed substantially and the standards of review in ordinary civil appeals have solidified, beginning with *Housen*. Matters of mixed fact and law are now subject to the same standard as purely factual matters. I am doubtful that administrative law considerations should be injected into the analysis of standard of review in this case – except for the fact that the chambers judge appears to have conflated the "palpable and overriding error" standard (adopted at para. 15 of his reasons) with that of "reasonableness" (referred to in para. 13.) Although he purported to agree with *Abitibi*, the *Housen* standard – *not* reasonableness – was held to apply to the findings of fact or mixed fact and law

at issue in that case. (That said, the two are probably not far apart: where a palpable and overriding error as to a factual matter is made, it would be difficult to say the analysis is nonetheless reasonable.)

Application to this Case

[61] What then is the standard of review applicable to the determinations made by the Monitor in this instance as to the saleability (i.e., ownership) of the Disputed Assets in the course of determining the appellants' proofs of claims? As Teliphone Corp. observed in its factum, the *CCAA* does not expressly contemplate property ownership disputes. There appears to be no decision of an appellate court that establishes an appropriate process to determine *ownership* issues, or determines the applicable standard of review. Nevertheless, since the *CCAA* and *BIA* are to be regarded as parts of a larger scheme of insolvency legislation it is useful to consider comparable decision-makers under the *BIA. Galaxy* determined the decision of a trustee concerning compliance with a 'mandatory' provision under the *BIA* – an issue of law – was reviewable on a correctness standard. Subsequent lower court decisions have adopted similar reasoning with respect to decisions of trustees allowing or rejecting proofs of claim under s. 81(2): see *Sran v. Sands & Associates* 2010 BCSC 937 at paras. 46-7; and *Hertz v. 1593658 Ontario Inc.* 2011 SKQB 379 at para. 38.

[62] The process followed by the Monitor in the case at bar was not the creature of any statute but of the Supreme Court's order of September 2017. As the Monitor states in its factum:

> The Disputed Property Claims Process was customized for the purpose of these *CCAA* proceedings. The Monitor was authorized to fulfill the function of the arbiter, as it had developed considerable knowledge of this factually complex *CCAA* matter, was less costly than involving an outside party, and was unable to do so to meet the urgency of the circumstances. An extremely compressed timeline was involved, and no outside party could realistically fulfill the role in the circumstances. [At para. 53.]

As mentioned earlier, the order specified that any Claiming Party dissatisfied with the Monitor's decision could appeal to the court; as well, s. 13 of the *CCAA* provided an appeal with leave.

[63] The Process followed by the Monitor did not entail a formal hearing of witnesses' testimony, but clearly involved the examination of many documents, public and private, and lengthy affidavits of representatives of interested persons. The Monitor asserts that by making it the "arbiter" of the parties' disputes regarding assets, those parties could be taken to have understood that the Monitor would consider the information, documents and evidence it had amassed over the previous nine months, as well as any further evidence that the Claiming Persons were invited to file if they wished. Thus, the Monitor says, there was never any expectation of a "record" in the sense of a formal body of evidence to be considered by it. The Monitor analogizes the process it followed to the "reasonable investigations" normally conducted by trustees in bankruptcy in reviewing claims, citing paras. 39 and 42 of *Re Sran*. It goes on to assert that without a "record", it was "frankly impossible for the *CCAA* judge to consider the Monitor's <u>factual</u> determination on the basis of <u>correctness</u>." (My emphasis.)

[64] I agree that *factual* determinations and those of *mixed fact and law* are not subject to a correctness standard, but should now be subject to a standard of palpable and overriding error. However, in this case, the fact a sale of assets was being proposed made it necessary for the Monitor to determine exactly what assets were property of the petitioners or TNW Networks – a decision likely to involve issues of law not usually made by monitors under the *CCAA*. This court's decision of August 17, 2017 leaves no doubt, for example, that the Monitor here did not have the authority, as a matter of law, to approve the sale of assets belonging to entities other than the Petitioners and TNW Networks. Obviously, this court regarded this principle as one of law, and indeed of jurisdiction.

[65] In my view, these considerations all support the conclusion that the appeal contemplated by the September order was correctly regarded as a “true appeal” (at least in the absence of any determination that a *de novo* hearing was required to avoid a miscarriage of justice); and that the standard of review, on *extricable* questions of *law,* was correctness. To the extent that questions of law – for example the question of whether the assets of a company that is not in *CCAA* proceedings may be sold by reason of the fact that its *parent company* is in *CCAA* proceedings – can be ‘extricated’, the correctness standard applies. But obviously, not all issues entailed in determining a proof of claim will be extricable issues of law. Indeed, *most* such issues (including the valuation of creditors’ claims) will be ones of fact or mixed fact and law, to which the applicable standard will be that of palpable and overriding error.

[66] This result recognizes that although a formal adversarial process did not take place before the Monitor, the Monitor considered a great deal of evidence and *viva voce* testimony as well as taking advantage of his pre-existing familiarity with the factual background of the matters before him. Indeed, this is one of the reasons the Monitor was chosen to conduct the disputed claims process. Given that the Monitor is an officer of the Court, that it is expected to be ‘above the fray’ and that it is qualified to act as a trustee under the *BIA* and thus has some special expertise, it seems to me that its decisions of fact or mixed fact and law made in the course of ruling on proofs of claim are appropriately assessed on the deferential standard of ‘palpable and overriding error’. This conclusion is also consistent with the objectives of efficiency, certainty and cost-saving that underlie *CCAA* proceedings.

Disposition

[67] I would therefore allow the appeal, set aside the chambers judge's order and answer the question posed on this appeal as indicated in these reasons. I would also remit the matter of the Monitor's rejection of the proof of claim to the Supreme Court of British Columbia to be dealt with in accordance with these reasons.

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Madam Justice Kirkpatrick"

I AGREE:

"The Honourable Madam Justice Fisher"

9354-9186 Québec inc. and
9354-9178 Québec inc. *Appellants*

v.

Callidus Capital Corporation,
International Game Technology,
Deloitte LLP, Luc Carignan,
François Vigneault, Philippe Millette,
Francis Proulx and François Pelletier
Respondents

and

Ernst & Young Inc.,
IMF Bentham Limited (now known as Omni Bridgeway Limited),
Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited), Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals *Interveners*

- and -

IMF Bentham Limited (now known as Omni Bridgeway Limited) and
Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited) *Appellants*

v.

Callidus Capital Corporation,
International Game Technology,
Deloitte LLP, Luc Carignan,
François Vigneault, Philippe Millette,
Francis Proulx and François Pelletier
Respondents

and

9354-9186 Québec inc. et
9354-9178 Québec inc. *Appelantes*

c.

See paras. 40, 67

Callidus Capital Corporation,
International Game Technology,
Deloitte S.E.N.C.R.L., Luc Carignan,
François Vigneault, Philippe Millette,
Francis Proulx et François Pelletier *Intimés*

et

Ernst & Young Inc.,
IMF Bentham Limited (maintenant connue sous le nom d'Omni Bridgeway Limited), Corporation Bentham IMF Capital (maintenant connue sous le nom de Corporation Omni Bridgeway Capital (Canada)), Institut d'insolvabilité du Canada et Association canadienne des professionnels de l'insolvabilité et de la réorganisation
Intervenants

- et -

IMF Bentham Limited (maintenant connue sous le nom d'Omni Bridgeway Limited) et Corporation Bentham IMF Capital (maintenant connue sous le nom de Corporation Omni Bridgeway Capital (Canada)) *Appelantes*

c.

Callidus Capital Corporation,
International Game Technology,
Deloitte S.E.N.C.R.L., Luc Carignan,
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Ernst & Young Inc.,
9354-9186 Québec inc.,
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Canadian Association of Insolvency
and Restructuring Professionals *Interveners*

Indexed as: 9354-9186 Québec inc. *v.* Callidus Capital Corp.

2020 SCC 10

File No.: 38594.

Hearing and judgment: January 23, 2020.

Reasons delivered: May 8, 2020.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Rowe and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Bankruptcy and insolvency — Discretionary authority of supervising judge in proceedings under Companies' Creditors Arrangement Act — Appellate review of decisions of supervising judge — Whether supervising judge has discretion to bar creditor from voting on plan of arrangement where creditor is acting for improper purpose — Whether supervising judge can approve third party litigation funding as interim financing — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 11, 11.2.

The debtor companies filed a petition for the issuance of an initial order under the *Companies' Creditors Arrangement Act* ("*CCAA*") in November 2015. The petition succeeded, and the initial order was issued by a supervising judge, who became responsible for overseeing the proceedings. Since then, substantially all of the assets of the debtor companies have been liquidated, with the notable exception of retained claims for damages against the companies' only secured creditor. In September 2017, the secured creditor proposed a plan of arrangement, which later failed to receive sufficient creditor support. In February 2018, the secured creditor proposed another, virtually identical, plan of arrangement. It also sought the supervising judge's permission to vote on this new plan in the same class as the debtor companies' unsecured creditors, on the basis that its security was worth nil. Around the

Ernst & Young Inc.,
9354-9186 Québec inc.,
9354-9178 Québec inc.,
Institut d'insolvabilité du Canada et
Association canadienne des professionnels
de l'insolvabilité et de la réorganisation
Intervenants

Répertorié : 9354-9186 Québec inc. *c.* Callidus Capital Corp.

2020 CSC 10

N° du greffe : 38594.

Audition et jugement : 23 janvier 2020.

Motifs déposés : 8 mai 2020.

Présents : Le juge en chef Wagner et les juges Abella, Moldaver, Karakatsanis, Côté, Rowe et Kasirer.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Faillite et insolvabilité — Pouvoir discrétionnaire du juge surveillant dans une instance introduite sous le régime de la Loi sur les arrangements avec les créanciers des compagnies — Contrôle en appel des décisions du juge surveillant — Le juge surveillant a-t-il le pouvoir discrétionnaire d'empêcher un créancier de voter sur un plan d'arrangement si ce créancier agit dans un but illégitime? — Le juge surveillant peut-il approuver le financement de litige par un tiers à titre de financement temporaire? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, c. C-36, art. 11, 11.2.

En novembre 2015, les compagnies débitrices déposent une requête en délivrance d'une ordonnance initiale sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies* (« *LACC* »). La requête est accueillie, et l'ordonnance initiale est rendue par un juge surveillant, qui est chargé de surveiller le déroulement de l'instance. Depuis, la quasi-totalité des éléments d'actif de la compagnie débitrice ont été liquidés, à l'exception notable des réclamations réservées en dommages-intérêts contre le seul créancier garanti des compagnies. En septembre 2017, le créancier garanti propose un plan d'arrangement, qui n'obtient pas subséquemment l'appui nécessaire des créanciers. En février 2018, le créancier garanti propose un autre plan d'arrangement, presque identique au premier. Il demande aussi au juge surveillant la permission de voter sur ce nouveau plan dans la même catégorie que same time, the debtor companies sought interim financing in the form of a proposed third party litigation funding agreement, which would permit them to pursue litigation of the retained claims. They also sought the approval of a related super-priority litigation financing charge.

The supervising judge determined that the secured creditor should not be permitted to vote on the new plan because it was acting with an improper purpose. As a result, the new plan had no reasonable prospect of success and was not put to a creditors' vote. The supervising judge allowed the debtor companies' application, authorizing them to enter into a third party litigation funding agreement. On appeal by the secured creditor and certain of the unsecured creditors, the Court of Appeal set aside the supervising judge's order, holding that he had erred in reaching the foregoing conclusions.

Held: The appeal should be allowed and the supervising judge's order reinstated.

The supervising judge made no error in barring the secured creditor from voting or in authorizing the third party litigating funding agreement. A supervising judge has the discretion to bar a creditor from voting on a plan of arrangement where they determine that the creditor is acting for an improper purpose. A supervising judge can also approve third party litigation funding as interim financing, pursuant to s. 11.2 of the *CCAA*. The Court of Appeal was not justified in interfering with the supervising judge's discretionary decisions in this regard, having failed to treat them with the appropriate degree of deference.

The *CCAA* is one of three principal insolvency statutes in Canada. It pursues an array of overarching remedial objectives that reflect the wide ranging and potentially catastrophic impacts insolvency can have. These objectives include: providing for timely, efficient and impartial resolution of a debtor's insolvency; preserving and maximizing the value of a debtor's assets; ensuring fair and equitable treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company. The architecture of the *CCAA* leaves the case-specific assessment and balancing of these objectives to the supervising judge.

les créanciers non garantis des compagnies débitrices, au motif que sa sûreté ne vaut rien. À peu près au même moment, les compagnies débitrices demandent un financement temporaire sous forme d'un accord de financement de litige par un tiers qui leur permettrait de poursuivre l'instruction des réclamations réservées. Elles sollicitent également l'approbation d'une charge super-prioritaire pour financer le litige.

Le juge surveillant décide que le créancier garanti ne peut voter sur le nouveau plan parce qu'il agit dans un but illégitime. En conséquence, le nouveau plan n'a aucune possibilité raisonnable d'être avalisé et il n'est pas soumis au vote des créanciers. Le juge surveillant accueille la demande des compagnies débitrices et les autorise à conclure un accord de financement de litige par un tiers. À l'issue d'un appel formé par le créancier garanti et certains des créanciers non garantis, la Cour d'appel annule l'ordonnance du juge surveillant, estimant qu'il est parvenu à tort aux conclusions qui précèdent.

Arrêt : Le pourvoi est accueilli et l'ordonnance du juge surveillant est rétablie.

Le juge surveillant n'a commis aucune erreur en empêchant le créancier garanti de voter ou en approuvant l'accord de financement de litige par un tiers. Un juge surveillant a le pouvoir discrétionnaire d'empêcher un créancier de voter sur un plan d'arrangement s'il décide que le créancier agit dans un but illégitime. Un juge surveillant peut aussi approuver le financement de litige par un tiers à titre de financement temporaire, en vertu de l'art. 11.2 de la *LACC*. La Cour d'appel n'était pas justifiée de modifier les décisions discrétionnaires du juge surveillant à cet égard et n'a pas fait preuve de la déférence à laquelle elle était tenue par rapport à ces décisions.

La *LACC* est l'une des trois principales lois canadiennes en matière d'insolvabilité. Elle poursuit un grand nombre d'objectifs réparateurs généraux qui témoignent de la vaste gamme des conséquences potentiellement catastrophiques qui peuvent découler de l'insolvabilité. Ces objectifs incluent les suivants : régler de façon rapide, efficace et impartiale l'insolvabilité d'un débiteur; préserver et maximiser la valeur des actifs d'un débiteur; assurer un traitement juste et équitable des réclamations déposées contre un débiteur; protéger l'intérêt public; et, dans le contexte d'une insolvabilité commerciale, établir un équilibre entre les coûts et les bénéfices découlant de la restructuration ou de la liquidation d'une compagnie. La structure de la *LACC* laisse au juge surveillant le soin de procéder à un examen et à une mise en balance au cas par cas de ces objectifs.

From beginning to end, each proceeding under the *CCAA* is overseen by a single supervising judge, who has broad discretion to make a variety of orders that respond to the circumstances of each case. The anchor of this discretionary authority is s. 11 of the *CCAA*, with empowers a judge to make any order that they consider appropriate in the circumstances. This discretionary authority is broad, but not boundless. It must be exercised in furtherance of the remedial objectives of the *CCAA* and with three baseline considerations in mind: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence. The due diligence consideration discourages parties from sitting on their rights and ensures that creditors do not strategically manoeuvre or position themselves to gain an advantage. A high degree of deference is owed to discretionary decisions made by judges supervising *CCAA* proceedings and, as such, appellate intervention will only be justified if the supervising judge erred in principle or exercised their discretion unreasonably.

Chaque procédure fondée sur la *LACC* est supervisée du début à la fin par un seul juge surveillant, qui a le vaste pouvoir discrétionnaire de rendre toute une gamme d'ordonnances susceptibles de répondre aux circonstances de chaque cas. Le point d'ancrage de ce pouvoir discrétionnaire est l'art. 11 de la *LACC*, lequel confère au juge le pouvoir de rendre toute ordonnance qu'il estime indiquée. Quoique vaste, ce pouvoir discrétionnaire n'est pas sans limites. Son exercice doit tendre à la réalisation des objectifs réparateurs de la *LACC* et tenir compte de trois considérations de base : (1) que l'ordonnance demandée est indiquée, et (2) que le demandeur a agi de bonne foi et (3) avec la diligence voulue. La considération de diligence décourage les parties de rester sur leurs positions et fait en sorte que les créanciers n'usent pas stratégiquement de ruse ou ne se placent pas eux-mêmes dans une position pour obtenir un avantage. Les décisions discrétionnaires des juges chargés de la supervision des procédures intentées sous le régime de la *LACC* commandent un degré élevé de déférence. En conséquence, les cours d'appel ne seront justifiées d'intervenir que si le juge surveillant a commis une erreur de principe ou exercé son pouvoir discrétionnaire de manière déraisonnable.

A creditor can generally vote on a plan of arrangement or compromise that affects its rights, subject to any specific provisions of the *CCAA* that may restrict its voting rights, or a proper exercise of discretion by the supervising judge to constrain or bar the creditor's right to vote. Given that the *CCAA* regime contemplates creditor participation in decision-making as an integral facet of the workout regime, the discretion to bar a creditor from voting should only be exercised where the circumstances demand such an outcome. Where a creditor is seeking to exercise its voting rights in a manner that frustrates, undermines, or runs counter to the remedial objectives of the *CCAA* — that is, acting for an improper purpose — s. 11 of the *CCAA* supplies the supervising judge with the discretion to bar that creditor from voting. This discretion parallels the similar discretion that exists under the *Bankruptcy and Insolvency Act* and advances the basic fairness that permeates Canadian insolvency law and practice. Whether this discretion ought to be exercised in a particular case is a circumstance-specific inquiry that the supervising judge is best-positioned to undertake.

En général, un créancier peut voter sur un plan d'arrangement ou une transaction qui a une incidence sur ses droits, sous réserve des dispositions de la *LACC* qui peuvent limiter son droit de voter, ou de l'exercice justifié par le juge surveillant de son pouvoir discrétionnaire de limiter ou de supprimer ce droit. Étant donné que le régime de la *LACC*, dont l'un des aspects essentiels tient à la participation du créancier au processus décisionnel, les créanciers ne devraient être empêchés de voter que si les circonstances l'exigent. Lorsqu'un créancier cherche à exercer ses droits de vote de manière à contrecarrer ou à miner les objectifs réparateurs de la *LACC* ou à aller à l'encontre de ceux-ci — c'est-à-dire à agir dans un but illégitime — l'art. 11 de la *LACC* confère au juge surveillant le pouvoir discrétionnaire d'empêcher le créancier de voter. Ce pouvoir discrétionnaire s'apparente au pouvoir discrétionnaire semblable qui existe en vertu de la *Loi sur la faillite et l'insolvabilité* et favorise l'équité fondamentale qui imprègne le droit et la pratique en matière d'insolvabilité au Canada. La question de savoir s'il y a lieu d'exercer le pouvoir discrétionnaire dans une situation donnée appelle une analyse fondée sur les circonstances propres à chaque situation que le juge surveillant est le mieux placé pour effectuer.

In the instant case, the supervising judge's decision to bar the secured creditor from voting on the new plan discloses no error justifying appellate intervention. When he made this decision, the supervising judge was intimately

En l'espèce, la décision du juge surveillant d'empêcher le créancier garanti de voter sur le nouveau plan ne révèle aucune erreur justifiant l'intervention d'une cour d'appel. Lorsqu'il a rendu sa décision, le juge surveillant familiar with these proceedings, having presided over them for over 2 years, received 15 reports from the monitor, and issued approximately 25 orders. He considered the whole of the circumstances and concluded that the secured creditor's vote would serve an improper purpose. He was aware that the secured creditor had chosen not to value any of its claim as unsecured prior to the vote on the first plan and did not attempt to vote on that plan, which ultimately failed to receive the other creditors' approval. Between the failure of the first plan and the proposal of the (essentially identical) new plan, none of the factual circumstances relating to the debtor companies' financial or business affairs had materially changed. However, the secured creditor sought to value the entirety of its security at nil and, on that basis, sought leave to vote on the new plan as an unsecured creditor. If the secured creditor were permitted to vote in this way, the new plan would certainly have met the double majority threshold for approval under s. 6(1) of the *CCAA*. The inescapable inference was that the secured creditor was attempting to strategically value its security to acquire control over the outcome of the vote and thereby circumvent the creditor democracy the *CCAA* protects. The secured creditor's course of action was also plainly contrary to the expectation that parties act with due diligence in an insolvency proceeding, which includes acting with due diligence in valuing their claims and security. The secured creditor was therefore properly barred from voting on the new plan.

Whether third party litigation funding should be approved as interim financing is a case-specific inquiry that should have regard to the text of s. 11.2 of the *CCAA* and the remedial objectives of the *CCAA* more generally. Interim financing is a flexible tool that may take on a range of forms. This is apparent from the wording of s. 11.2(1), which is broad and does not mandate any standard form or terms. At its core, interim financing enables the preservation and realization of the value of a debtor's assets. In some circumstances, like the instant case, litigation funding furthers this basic purpose. Third party litigation funding agreements may therefore be approved as interim financing in *CCAA* proceedings when the supervising judge determines that doing so would be fair and appropriate, having regard to all the circumstances and the objectives of the Act. This requires consideration of the specific factors set out in s. 11.2(4) of the *CCAA*. These factors need not be mechanically applied or individually reviewed by the supervising judge, as not all of them will be significant in every case, nor are they exhaustive.

connaissait très bien les procédures en cause, car il les avait présidées pendant plus de 2 ans, avait reçu 15 rapports du contrôleur et avait délivré environ 25 ordonnances. Il a tenu compte de l'ensemble des circonstances et a conclu que le vote du créancier garanti viserait un but illégitime. Il savait qu'avant le vote sur le premier plan, le créancier garanti avait choisi de n'évaluer aucune partie de sa réclamation à titre de créancier non garanti et n'avait pas tenté de voter sur ce plan, qui n'a finalement pas reçu l'aval des autres créanciers. Entre l'insuccès du premier plan et la proposition du nouveau plan (identique pour l'essentiel au premier plan), les circonstances factuelles se rapportant aux affaires financières ou commerciales des compagnies débitrices n'avaient pas réellement changé. Pourtant, le créancier garanti a tenté d'évaluer la totalité de sa sûreté à zéro et, sur cette base, a demandé l'autorisation de voter sur le nouveau plan à titre de créancier non garanti. Si le créancier garanti avait été autorisé à voter de cette façon, le nouveau plan aurait certainement satisfait au critère d'approbation à double majorité prévu par le par. 6(1) de la *LACC*. La seule conclusion possible était que le créancier garanti tentait d'évaluer stratégiquement la valeur de sa sûreté afin de prendre le contrôle du vote et ainsi contourner la démocratie entre les créanciers que défend la *LACC*. La façon d'agir du créancier garanti était manifestement contraire à l'attente selon laquelle les parties agissent avec diligence dans une procédure d'insolvabilité, ce qui comprend le fait de faire preuve de diligence raisonnable dans l'évaluation de leurs réclamations et sûretés. Le créancier garanti a donc été empêché à bon droit de voter sur le nouveau plan.

La question de savoir s'il y a lieu d'approuver le financement d'un litige par un tiers à titre de financement temporaire commande une analyse fondée sur les faits de l'espèce qui doit tenir compte du libellé de l'art. 11.2 de la *LACC* et des objectifs réparateurs de la *LACC* de façon plus générale. Le financement temporaire est un outil souple qui peut revêtir différentes formes. Cela ressort du libellé du par. 11.2(1), qui est large et ne prescrit aucune forme ou condition type. Le financement temporaire permet essentiellement de préserver et de réaliser la valeur des éléments d'actif du débiteur. Dans certaines circonstances, comme en l'espèce, le financement de litige favorise la réalisation de cet objectif fondamental. Les accords de financement de litige par un tiers peuvent être approuvés à titre de financement temporaire dans le cadre des procédures fondées sur la *LACC* lorsque le juge surveillant estime qu'il serait juste et approprié de le faire, compte tenu de l'ensemble des circonstances et des objectifs de la Loi. Cela implique la prise en considération des facteurs précis énoncés au par. 11.2(4) de la *LACC*. Ces facteurs

Additionally, in order for a third party litigation funding agreement to be approved as interim financing, the agreement must not contain terms that effectively convert it into a plan of arrangement.

ne doivent pas être appliqués machinalement ou examinés individuellement par le juge surveillant, car ils ne seront pas tous importants dans tous les cas, et ils ne sont pas non plus exhaustifs. En outre, pour qu'un accord de financement de litige par un tiers soit approuvé à titre de financement temporaire, il ne doit pas comporter des conditions qui le convertissent effectivement en plan d'arrangement.

In the instant case, there is no basis upon which to interfere with the supervising judge's exercise of his discretion to approve the litigation funding agreement as interim financing. A review of the supervising judge's reasons as a whole, combined with a recognition of his manifest experience with the debtor companies' *CCAA* proceedings, leads to the conclusion that the factors listed in s. 11.2(4) concern matters that could not have escaped his attention and due consideration. It is apparent that he was focussed on the fairness at stake to all parties, the specific objectives of the *CCAA*, and the particular circumstances of this case when he approved the litigation funding agreement as interim financing. Further, the litigation funding agreement is not a plan of arrangement because it does not propose any compromise of the creditors' rights. The fact that the creditors may walk away with more or less money at the end of the day does not change the nature or existence of their rights to access the funds generated from the debtor companies' assets, nor can it be said to compromise those rights. Finally, the litigation financing charge does not convert the litigation funding agreement into a plan of arrangement. Holding otherwise would effectively extinguish the supervising judge's authority to approve these charges without a creditors' vote, which is expressly provided for in s. 11.2 of the *CCAA*.

En l'espèce, il n'y a aucune raison d'intervenir dans l'exercice par le juge surveillant de son pouvoir discrétionnaire d'approuver l'accord de financement de litige à titre de financement temporaire. L'examen des motifs du juge surveillant dans leur ensemble, conjugué à la reconnaissance de son expérience évidente des procédures intentées par les compagnies débitrices sous le régime de la *LACC*, mène à la conclusion que les facteurs énumérés au par. 11.2(4) concernent des questions qui n'auraient pu échapper à son attention et à son examen adéquat. Il est manifeste que le juge surveillant a mis l'accent sur l'équité envers toutes les parties, les objectifs précis de la *LACC* et les circonstances particulières de la présente affaire lorsqu'il a approuvé l'accord de financement de litige à titre de financement temporaire. De plus, l'accord de financement de litige ne constitue pas un plan d'arrangement parce qu'il ne propose aucune transaction visant les droits des créanciers. Le fait que les créanciers puissent en fin de compte remporter plus ou moins d'argent ne modifie en rien la nature ou l'existence de leurs droits d'avoir accès aux fonds provenant des actifs des compagnies débitrices, pas plus qu'on ne saurait dire qu'il s'agit d'une transaction à l'égard de leurs droits. Enfin, la charge relative au financement de litige ne convertit pas l'accord de financement de litige en plan d'arrangement. Une conclusion contraire aurait pour effet d'annihiler le pouvoir du juge surveillant d'approuver ces charges sans un vote des créanciers, un résultat qui est expressément prévu par l'art. 11.2 de la *LACC*.

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Citée par le juge en chef Wagner et le juge Moldaver

Arrêt appliqué : *Century Services Inc. c. Canada (Procureur général)*, 2010 CSC 60, [2010] 3 R.C.S. 379; **arrêts examinés :** *Re Crystallex*, 2012 ONCA 404, 293 O.A.C. 102; *Laserworks Computer Services Inc. (Bankruptcy), Re*, 1998 NSCA 42, 165 N.S.R. (2d) 296; **arrêts mentionnés :** *Bayens c. Kinross Gold Corporation*, 2013 ONSC 4974, 117 O.R. (3d) 150; *Hayes c. The City of Saint John*, 2016 NBQB 125; *Schenk c. Valeant Pharmaceuticals International Inc.*, 2015 ONSC 3215, 74 C.P.C. (7th) 332; *Re Blackburn*, 2011 BCSC 1671, 27 B.C.L.R. (5th) 199; *Sun Indalex Finance, LLC c. Syndicat des Métallos*, 2013 CSC 6, [2013] 1 R.C.S. 271; *Ernst*

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APPEALS from a judgment of the Quebec Court of Appeal (Dutil, Schrager and Dumas JJ.A.), 2019 QCCA 171, [2019] AZ-51566416, [2019] Q.J. No. 670 (QL), 2019 CarswellQue 94 (WL Can.), setting aside a decision of Michaud J., 2018 QCCS 1040, [2018] AZ-51477967, [2018] Q.J. No. 1986 (QL), 2018 CarswellQue 1923 (WL Can.). Appeals allowed.

Jean-Philippe Groleau, *Christian Lachance*, *Gabriel Lavery Lepage* and *Hannah Toledano*, for the appellants/interveners 9354-9186 Québec inc. and 9354-9178 Québec inc.

Neil A. Peden, for the appellants/interveners IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited).

Geneviève Cloutier and *Clifton P. Prophet*, for the respondent Callidus Capital Corporation.

Jocelyn Perreault, *Noah Zucker* and *François Alexandre Toupin*, for the respondents International

POURVOIS contre un arrêt de la Cour d'appel du Québec (les juges Dutil, Schrager et Dumas), 2019 QCCA 171, [2019] AZ-51566416, [2019] Q.J. No. 670 (QL), 2019 CarswellQue 94 (WL Can.), qui a infirmé une décision du juge Michaud, 2018 QCCS 1040, [2018] AZ-51477967, [2018] Q.J. No. 1986 (QL), 2018 CarswellQue 1923 (WL Can.). Pourvois accueillis.

Jean-Philippe Groleau, *Christian Lachance*, *Gabriel Lavery Lepage* et *Hannah Toledano*, pour les appelantes/intervenantes 9354-9186 Québec inc. et 9354-9178 Québec inc.

Neil A. Peden, pour les appelantes/intervenantes IMF Bentham Limited (maintenant connue sous le nom d'Omni Bridgeway Limited) et Corporation Bentham IMF Capital (maintenant connue sous le nom de Corporation Omni Bridgeway Capital (Canada)).

Geneviève Cloutier et *Clifton P. Prophet*, pour l'intimée Callidus Capital Corporation.

Jocelyn Perreault, *Noah Zucker* et *François Alexandre Toupin*, pour les intimés International

Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier.

Joseph Reynaud and *Nathalie Nouvet*, for the intervener Ernst & Young Inc.

Sylvain Rigaud, *Arad Mojtahedi* and *Saam Pousht-Mashhad*, for the interveners the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals.

The reasons for judgment of the Court were delivered by

The Chief Justice and Moldaver J.—

I. Overview

[1] These appeals arise in the context of an ongoing proceeding instituted under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), in which substantially all of the assets of the debtor companies have been liquidated. The proceeding was commenced well over four years ago. Since then, a single supervising judge has been responsible for its oversight. In this capacity, he has made numerous discretionary decisions.

[2] Two of the supervising judge's decisions are in issue before us. Each raises a question requiring this Court to clarify the nature and scope of judicial discretion in *CCAA* proceedings. The first is whether a supervising judge has the discretion to bar a creditor from voting on a plan of arrangement where they determine that the creditor is acting for an improper purpose. The second is whether a supervising judge can approve third party litigation funding as interim financing, pursuant to s. 11.2 of the *CCAA*.

[3] For the reasons that follow, we would answer both questions in the affirmative, as did the supervising judge. To the extent the Court of Appeal disagreed

Game Technology, Deloitte S.E.N.C.R.L., Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx et François Pelletier.

Joseph Reynaud et *Nathalie Nouvet*, pour l'intervenante Ernst & Young Inc.

Sylvain Rigaud, *Arad Mojtahedi* et *Saam Pousht-Mashhad*, pour les intervenants l'Institut d'insolvabilité du Canada et l'Association canadienne des professionnels de l'insolvabilité et de la réorganisation.

Version française des motifs de jugement de la Cour rendus par

Le juge en chef et le juge Moldaver —

I. Aperçu

[1] Ces pourvois s'inscrivent dans le contexte d'une instance toujours en cours introduite sous le régime de la *Loi sur les arrangements avec les créanciers de compagnies*, L.R.C. 1985, c. C-36 (« *LACC* »), dans le cadre de laquelle la quasi-totalité des éléments d'actif des compagnies débitrices ont été liquidés. L'instance a été introduite il y a plus de quatre ans. Depuis, un seul juge surveillant a été chargé de sa supervision. À ce titre, il a rendu de nombreuses décisions discrétionnaires.

[2] Deux de ces décisions du juge surveillant font l'objet du présent pourvoi. Chacune d'elles soulève une question exigeant de notre Cour qu'elle précise la nature et la portée du pouvoir discrétionnaire exercé par les tribunaux dans les instances relevant de la *LACC*. La première est de savoir si le juge surveillant dispose du pouvoir discrétionnaire d'interdire à un créancier de voter sur un plan d'arrangement s'il estime que ce créancier agit dans un but illégitime. La deuxième porte sur le pouvoir du juge surveillant d'approuver le financement du litige par un tiers à titre de financement temporaire, en vertu de l'art. 11.2 de la *LACC*.

[3] Pour les motifs qui suivent, nous sommes d'avis de répondre à ces deux questions par l'affirmative, à l'instar du juge surveillant. Dans la mesure où la

and went on to interfere with the supervising judge's discretionary decisions, we conclude that it was not justified in doing so. In our respectful view, the Court of Appeal failed to treat the supervising judge's decisions with the appropriate degree of deference. In the result, as we ordered at the conclusion of the hearing, these appeals are allowed and the supervising judge's order reinstated.

Cour d'appel s'est dite d'avis contraire et a modifié les décisions discrétionnaires du juge surveillant, nous concluons qu'elle n'était pas justifiée de le faire. Avec égards, la Cour d'appel n'a pas fait preuve de la déférence à laquelle elle était tenue par rapport aux décisions du juge surveillant. C'est pourquoi, comme nous l'avons ordonné à l'issue de l'audience, les pourvois sont accueillis et l'ordonnance du juge surveillant est rétablie.

II. Facts

[4] In 1994, Mr. Gérald Duhamel founded Bluberi Gaming Technologies Inc., which is now one of the appellants, 9354-9186 Québec inc. The corporation manufactured, distributed, installed, and serviced electronic casino gaming machines. It also provided management systems for gambling operations. Its sole shareholder has at all material times been Bluberi Group Inc., which is now another of the appellants, 9354-9178 Québec inc. Through a family trust, Mr. Duhamel controls Bluberi Group Inc. and, as a result, Bluberi Gaming (collectively, "Bluberi").

[5] In 2012, Bluberi sought financing from the respondent, Callidus Capital Corporation ("Callidus"), which describes itself as an "asset-based or distressed lender" (R.F., at para. 26). Callidus extended a credit facility of approximately $24 million to Bluberi. This debt was secured in part by a share pledge agreement.

[6] Over the next three years, Bluberi lost significant amounts of money, and Callidus continued to extend credit. By 2015, Bluberi owed approximately $86 million to Callidus — close to half of which Bluberi asserts is comprised of interest and fees.

A. *Bluberi's Institution of CCAA Proceedings and Initial Sale of Assets*

[7] On November 11, 2015, Bluberi filed a petition for the issuance of an initial order under the *CCAA*. In its petition, Bluberi alleged that its liquidity issues

II. Les faits

[4] En 1994, M. Gérald Duhamel fonde Bluberi Gaming Technologies Inc., qui est devenue l'une des appelantes, 9354-9186 Québec inc. L'entreprise fabriquait, distribuait, installait et entretenait des appareils de jeux électroniques pour casino. Elle offrait aussi des systèmes de gestion dans le domaine des jeux d'argent. Pendant toute la période pertinente, son unique actionnaire était Bluberi Group Inc., qui est devenue une autre des appelantes, 9354-9178 Québec inc. Par l'entremise d'une fiducie familiale, M. Duhamel contrôlait Bluberi Group inc. et, de ce fait, Bluberi Gaming (collectivement, « Bluberi »).

[5] En 2012, Bluberi demande du financement à l'intimée Callidus Capital Corporation (« Callidus »), qui se décrit comme un [TRADUCTION] « prêteur offrant du financement garanti par des actifs ou du financement à des entreprises en difficulté financière » (m.i., par. 26). Callidus lui consent une facilité de crédit d'environ 24 millions de dollars, que Bluberi garantit partiellement en signant une entente par laquelle elle met en gage ses actions.

[6] Au cours des trois années suivantes, Bluberi perd d'importantes sommes d'argent et Callidus continue de lui consentir du crédit. En 2015, Bluberi doit environ 86 millions de dollars à Callidus — Bluberi affirme que près de la moitié de cette somme est composée d'intérêts et de frais.

A. *L'introduction des procédures sous le régime de la LACC par Bluberi et la vente initiale d'actifs*

[7] Le 11 novembre 2015, Bluberi dépose une requête en délivrance d'une ordonnance initiale sous le régime de la *LACC*. Dans sa requête, Bluberi allègue

were the result of Callidus taking *de facto* control of the corporation and dictating a number of purposefully detrimental business decisions. Bluberi alleged that Callidus engaged in this conduct in order to deplete the corporation's equity value with a view to owning Bluberi and, ultimately, selling it.

que ses problèmes de liquidité découlent du fait que Callidus exerce un contrôle de facto à l'égard de son entreprise et lui dicte un certain nombre de décisions d'affaires dans l'intention de lui nuire. Bluberi prétend que Callidus agit ainsi afin de réduire la valeur des actions dans le but de devenir propriétaire de Bluberi et ultimement de la vendre.

[8] Over Callidus's objection, Bluberi's petition succeeded. The supervising judge, Michaud J., issued an initial order under the *CCAA*. Among other things, the initial order confirmed that Bluberi was a "debtor company" within the meaning of s. 2(1) of the Act; stayed any proceedings against Bluberi or any director or officer of Bluberi; and appointed Ernst & Young Inc. as monitor ("Monitor").

[8] Malgré l'objection de Callidus, la requête de Bluberi est accueillie. Le juge surveillant, le juge Michaud, rend une ordonnance initiale sous le régime de la *LACC*. Celle-ci confirme entre autres que Bluberi est une « compagnie débitrice » au sens du par. 2(1) de la Loi, suspend toute procédure introduite à l'encontre de Bluberi, de ses administrateurs ou dirigeants, et désigne Ernst & Young Inc. pour agir à titre de contrôleur (« contrôleur »).

[9] Working with the Monitor, Bluberi determined that a sale of its assets was necessary. On January 28, 2016, it proposed a sale solicitation process, which the supervising judge approved. That process led to Bluberi entering into an asset purchase agreement with Callidus. The agreement contemplated that Callidus would obtain all of Bluberi's assets in exchange for extinguishing almost the entirety of its secured claim against Bluberi, which had ballooned to approximately $135.7 million. Callidus would maintain an undischarged secured claim of $3 million against Bluberi. The agreement would also permit Bluberi to retain claims for damages against Callidus arising from its alleged involvement in Bluberi's financial difficulties ("Retained Claims").[1] Throughout these proceedings, Bluberi has asserted that the Retained Claims should amount to over $200 million in damages.

[9] Travaillant en collaboration avec le contrôleur, Bluberi décide que la vente de ses actifs est nécessaire. Le 28 janvier 2016, elle propose un processus de mise en vente que le juge surveillant approuve. Ce processus débouche sur la conclusion d'une convention d'achat d'actifs entre Bluberi et Callidus. Cette convention prévoit que Callidus obtient l'ensemble des actifs de Bluberi en échange de l'extinction de la presque totalité de la créance garantie qu'elle détient à l'encontre de Bluberi, qui s'élevait à environ 135,7 millions de dollars. Callidus conserve une créance garantie non libérée de 3 millions de dollars contre Bluberi. La convention prévoit aussi que Bluberi se réserve le droit de réclamer des dommages-intérêts à Callidus en raison de l'implication alléguée de celle-ci dans ses difficultés financières (les « réclamations réservées »)[1]. Tout au long de ces procédures, Bluberi affirme que la valeur des réclamations ainsi réservées représente plus de 200 millions de dollars en dommages-intérêts.

[10] The supervising judge approved the asset purchase agreement, and the sale of Bluberi's assets to Callidus closed in February 2017. As a result, Callidus effectively acquired Bluberi's business, and has continued to operate it as a going concern.

[10] Le juge surveillant approuve la convention d'achat d'actifs, et la vente des actifs de Bluberi à Callidus est conclue en février 2017. En conséquence, Callidus acquiert l'entreprise de Bluberi et en poursuit l'exploitation.

[1] Bluberi does not appear to have filed this claim yet (see 2018 QCCS 1040, at para. 10 (CanLII)).

[1] Bluberi semble ne pas avoir encore déposé cette action (voir 2018 QCCS 1040, par. 10 (CanLII)).

[11] Since the sale, the Retained Claims have been Bluberi's sole remaining asset and thus the sole security for Callidus's $3 million claim.

[11] Depuis la vente, les réclamations réservées sont le seul élément d'actif de Bluberi et représentent donc la seule garantie que possède Callidus pour sa créance de 3 millions de dollars.

B. *The Initial Competing Plans of Arrangement*

B. *Les premiers plans d'arrangement concurrents*

[12] On September 11, 2017, Bluberi filed an application seeking the approval of a $2 million interim financing credit facility to fund the litigation of the Retained Claims and other related relief. The lender was a joint venture numbered company incorporated as 9364-9739 Québec inc. This interim financing application was set to be heard on September 19, 2017.

[12] Le 11 septembre 2017, Bluberi dépose une demande par laquelle elle sollicite l'approbation d'un financement provisoire de 2 millions de dollars sous forme de facilité de crédit afin de financer le coût des procédures liées aux réclamations réservées ainsi que d'autres mesures de réparation accessoires. Le prêteur est une coentreprise constituée sous le numéro 9364-9739 Québec inc. Cette demande de financement provisoire devait être instruite le 19 septembre 2017.

[13] However, one day before the hearing, Callidus proposed a plan of arrangement ("First Plan") and applied for an order convening a creditors' meeting to vote on that plan. The First Plan proposed that Callidus would fund a $2.5 million (later increased to $2.63 million) distribution to Bluberi's creditors, except itself, in exchange for a release from the Retained Claims. This would have fully satisfied the claims of Bluberi's former employees and those creditors with claims worth less than $3000; creditors with larger claims were to receive, on average, 31 percent of their respective claims.

[13] Toutefois, la veille de l'audience, Callidus propose un plan d'arrangement (« premier plan ») et demande une ordonnance pour convoquer les créanciers à une assemblée afin qu'ils votent sur ce plan. Le premier plan proposait que Callidus avance la somme de 2,5 millions de dollars (puis plus tard 2,63 millions de dollars) aux fins de distribution aux créanciers de Bluberi, sauf elle-même, en échange de quoi elle serait libérée des réclamations réservées. Cette somme aurait permis d'acquitter entièrement les créances des anciens employés de Bluberi et toutes celles de moins de 3 000 $; les créanciers dont la créance était plus élevée devaient recevoir chacun en moyenne 31 pour 100 du montant de leur réclamation.

[14] The supervising judge adjourned the hearing of both applications to October 5, 2017. In the meantime, Bluberi filed its own plan of arrangement. Among other things, the plan proposed that half of any proceeds resulting from the Retained Claims, after payment of expenses and Bluberi's creditors' claims, would be distributed to the unsecured creditors, as long as the net proceeds exceeded $20 million.

[14] Le juge surveillant ajourne donc l'audition des deux demandes au 5 octobre 2017. Entre-temps, Bluberi dépose son propre plan d'arrangement dans lequel elle propose notamment que la moitié de toute somme provenant des réclamations réservées, après paiement des dépenses et acquittement des réclamations des créanciers de Bluberi, soit distribuée aux créanciers non garantis, pourvu que la somme nette ainsi obtenue soit supérieure à 20 millions de dollars.

[15] On October 5, 2017, the supervising judge ordered that the parties' plans of arrangement could be put to a creditors' vote. He ordered that both parties share the fees and expenses related to the

[15] Le 5 octobre 2017, le juge surveillant ordonne que les plans d'arrangement des parties soient soumis au vote des créanciers. Il ordonne que les honoraires et dépenses découlant de la présentation des

presentation of the plans of arrangement at a creditors' meeting, and that a party's failure to deposit those funds with the Monitor would bar the presentation of that party's plan of arrangement. Bluberi elected not to deposit the necessary funds, and, as a result, only Callidus's First Plan was put to the creditors.

C. *Creditors' Vote on Callidus's First Plan*

[16] On December 15, 2017, Callidus submitted its First Plan to a creditors' vote. The plan failed to receive sufficient support. Section 6(1) of the *CCAA* provides that, to be approved, a plan must receive a "double majority" vote in each class of creditors — that is, a majority in *number* of class members, which also represents two-thirds in *value* of the class members' claims. All of Bluberi's creditors, besides Callidus, formed a single voting class of unsecured creditors. Of the 100 voting unsecured creditors, 92 creditors (representing $3,450,882 of debt) voted in favour, and 8 voted against (representing $2,375,913 of debt). The First Plan failed because the creditors voting in favour only held 59.22 percent of the total value being voted, which did not meet the s. 6(1) threshold. Most notably, SMT Hautes Technologies ("SMT"), which held 36.7 percent of Bluberi's debt, voted against the plan.

[17] Callidus did not vote on the First Plan — despite the Monitor explicitly stating that Callidus could have "vote[d] . . . the portion of its claim, assessed by Callidus, to be an unsecured claim" (Joint R.R., vol. III, at p.188).

D. *Bluberi's Interim Financing Application and Callidus's New Plan*

[18] On February 6, 2018, Bluberi filed one of the applications underlying these appeals, seeking authorization of a proposed third party litigation funding agreement ("LFA") with a publicly traded

plans d'arrangement à l'assemblée des créanciers soient partagés entre les parties et qu'il soit interdit à toute partie qui ne dépose pas les fonds nécessaires auprès du contrôleur de présenter son plan d'arrangement. Bluberi choisit de ne pas déposer les fonds nécessaires et, en conséquence, seul le premier plan de Callidus est présenté aux créanciers.

C. *Le vote des créanciers sur le premier plan de Callidus*

[16] Le 15 décembre 2017, Callidus soumet son premier plan au vote des créanciers. Le plan n'obtient pas l'appui nécessaire. Le paragraphe 6(1) de la *LACC* prévoit que, pour être approuvé, le plan doit obtenir la « double majorité » de chaque catégorie de créanciers — c'est-à-dire, la majorité en *nombre* d'une catégorie de créanciers, qui représente aussi les deux tiers en *valeur* des réclamations de cette catégorie de créanciers. Tous les créanciers de Bluberi, hormis Callidus, forment une seule catégorie de créanciers non garantis ayant droit de vote. Des 100 créanciers non garantis, 92 (qui ont ensemble une créance de 3 450 882 $) votent en faveur du plan, et 8 votent contre (qui ont ensemble une créance de 2 375 913 $). Le premier plan échoue parce que les réclamations des créanciers ayant voté en sa faveur ne détiennent que 59,22 p. 100 en valeur des réclamations de ceux ayant voté, ce qui ne respectait pas le seuil établi au par. 6(1). Plus particulièrement, SMT Hautes Technologies (« SMT »), qui détient 36,7 p. 100 de la dette de Bluberi, vote contre le plan.

[17] Callidus ne vote pas sur le premier plan — malgré les propos explicites du contrôleur, selon qui Callidus pouvait [TRADUCTION] « voter [. . .] selon le pourcentage de sa créance qui, de l'avis de Callidus, était non garantie » (dossier conjoint des intimés, vol. III, p. 188).

D. *La demande de financement provisoire de Bluberi et le nouveau plan de Callidus*

[18] Le 6 février 2018, Bluberi dépose une des demandes à l'origine des présents pourvois. Elle demande au tribunal l'autorisation de conclure un accord de financement du litige par un tiers (« AFL »)

litigation funder, IMF Bentham Limited or its Canadian subsidiary, Bentham IMF Capital Limited (collectively, "Bentham"). Bluberi's application also sought the placement of a $20 million super-priority charge in favour of Bentham on Bluberi's assets ("Litigation Financing Charge").

[19] The LFA contemplated that Bentham would fund Bluberi's litigation of the Retained Claims in exchange for receiving a portion of any settlement or award after trial. However, were Bluberi's litigation to fail, Bentham would lose all of its invested funds. The LFA also provided that Bentham could terminate the litigation of the Retained Claims if, acting reasonably, it were no longer satisfied of the merits or commercial viability of the litigation.

[20] Callidus and certain unsecured creditors who voted in favour of its plan (who are now respondents and style themselves the "Creditors' Group") contested Bluberi's application on the ground that the LFA was a plan of arrangement and, as such, had to be submitted to a creditors' vote.[2]

[21] On February 12, 2018, Callidus filed the other application underlying these appeals, seeking to put another plan of arrangement to a creditors' vote ("New Plan"). The New Plan was essentially identical to the First Plan, except that Callidus increased the proposed distribution by $250,000 (from $2.63 million to $2.88 million). Further, Callidus filed an amended proof of claim, which purported to value the security attached to its $3 million claim at *nil*. Callidus was of the view that this valuation was proper because Bluberi had no assets other than the Retained Claims. On this basis, Callidus asserted that it stood in the position of an unsecured creditor, and sought the supervising judge's permission to vote on the New Plan with the other unsecured creditors.

[2] Notably, the Creditors' Group advised Callidus that it would lend its support to the New Plan. It also asked Callidus to reimburse any legal fees incurred in association with that support. At the same time, the Creditors' Group did not undertake to vote in any particular way, and confirmed that each of its members would assess all available alternatives individually.

avec un bailleur de fonds de litiges coté en bourse, IMF Bentham Limited ou sa filiale canadienne, Corporation Bentham IMF Capital (collectivement, « Bentham »). Bluberi demande également l'autorisation de grever son actif d'une charge superprioritaire de 20 millions de dollars en faveur de Bentham (« charge liée au financement du litige »).

[19] L'AFL prévoit que Bentham financera le litige relatif aux réclamations réservées de Bluberi et qu'en retour elle recevra un pourcentage de toute somme convenue par règlement ou accordée à l'issue d'un procès. Toutefois, dans l'éventualité où Bluberi serait déboutée, Bentham perdra la totalité des fonds investis. L'AFL prévoit aussi que Bentham peut mettre fin au recours si, agissant de façon raisonnable, elle n'est plus convaincue du bien-fondé du litige ou de sa viabilité commerciale.

[20] Callidus et certains créanciers non garantis qui ont voté en faveur de son plan (qui sont maintenant intimés au présent pourvoi et se font appeler le « groupe de créanciers ») contestent la demande de Bluberi au motif que l'AFL est un plan d'arrangement et qu'à ce titre, il doit être soumis au vote des créanciers[2].

[21] Le 12 février 2018, Callidus dépose l'autre demande qui est à l'origine des présents pourvois, laquelle vise à soumettre un autre plan d'arrangement au vote des créanciers (« nouveau plan »). Le nouveau plan est pour l'essentiel identique au premier plan, sauf que Callidus propose que la somme à distribuer soit augmentée de 250 000 $ (passant de 2,63 millions à 2,88 millions de dollars). Callidus a en outre déposé une preuve de réclamation modifiée qui ramène à *zéro* la valeur de la garantie liée à sa créance de 3 millions de dollars. Callidus considère que cette évaluation est juste parce que Bluberi n'a aucun autre élément d'actif que les revendications réservées. Sur cette base, elle fait valoir qu'elle se trouve dans la situation d'un créancier non garanti et

[2] Fait à remarquer, le groupe de créanciers a informé Callidus qu'il appuierait le nouveau plan. Il lui a aussi demandé de rembourser tous les frais juridiques découlant de cet appui. Par ailleurs, le groupe de créanciers ne s'est pas engagé à voter d'une certaine façon, et a confirmé que chacun de ses membres évaluerait toutes les possibilités qui s'offraient à lui.

Given the size of its claim, if Callidus were permitted to vote on the New Plan, the plan would necessarily pass a creditors' vote. Bluberi opposed Callidus's application.

demande au juge surveillant la permission de voter sur le nouveau plan avec les autres créanciers non garantis. Vu l'importance de sa réclamation, le plan serait nécessairement adopté par les créanciers si Callidus était autorisée à voter. Bluberi s'oppose à la demande de Callidus.

[22] The supervising judge heard Bluberi's interim financing application and Callidus's application regarding its New Plan together. Notably, the Monitor supported Bluberi's position.

[22] Le juge surveillant instruit ensemble la demande de financement provisoire de Bluberi ainsi que la demande présentée par Callidus concernant son nouveau plan. Il est à souligner que le contrôleur appuie la position de Bluberi.

III. Decisions Below

A. *Quebec Superior Court, 2018 QCCS 1040 (Michaud J.)*

[23] The supervising judge dismissed Callidus's application, declining to submit the New Plan to a creditors' vote. He granted Bluberi's application, authorizing Bluberi to enter into a litigation funding agreement with Bentham on the terms set forth in the LFA and imposing the Litigation Financing Charge on Bluberi's assets.

[24] With respect to Callidus's application, the supervising judge determined Callidus should not be permitted to vote on the New Plan because it was acting with an "improper purpose" (para. 48 (CanLII)). He acknowledged that creditors are generally entitled to vote in their own self-interest. However, given that the First Plan — which was almost identical to the New Plan — had been defeated by a creditors' vote, the supervising judge concluded that Callidus's attempt to vote on the New Plan was an attempt to override the result of the first vote. In particular, he wrote:

> Taking into consideration the creditors' interest, the Court accepted, in the fall of 2017, that Callidus' Plan be submitted to their vote with the understanding that, as a secured creditor, Callidus would not cast a vote. However, under the present circumstances, it would serve an improper purpose if Callidus was allowed to vote on its own plan, especially when its vote would very likely result in

III. Historique judiciaire

A. *Cour supérieure du Québec, 2018 QCCS 1040 (le juge Michaud)*

[23] Le juge surveillant rejette la demande de Callidus et refuse de soumettre le nouveau plan au vote des créanciers. Il accueille la demande de Bluberi, l'autorisant ainsi à conclure un accord de financement du litige avec Bentham aux conditions énoncées dans l'AFL et ordonne que les actifs de Bluberi soient grevés de la charge liée au financement du litige.

[24] En ce qui a trait à la demande de Callidus, le juge surveillant décide que cette dernière ne peut voter sur le nouveau plan parce qu'elle agit dans un [TRADUCTION] « but illégitime » (par. 48 (CanLII)). Il reconnaît que les créanciers ont habituellement le droit de voter dans leur propre intérêt. Or, étant donné que le premier plan — qui était presque identique au nouveau plan — a été rejeté par les créanciers, le juge surveillant conclut qu'en demandant à voter sur le nouveau plan, Callidus tentait de contourner le résultat du premier vote. Il écrit notamment :

> [TRADUCTION] Tenant compte de leur intérêt, la Cour a accepté à l'automne 2017 que le plan de Callidus soit soumis au vote des créanciers, étant entendu que, en tant que créancière garantie, celle-ci ne voterait pas. Toutefois, si, dans les circonstances actuelles, Callidus était autorisée à voter sur son propre plan, elle le ferait dans un but illégitime d'autant plus qu'il est probable que son vote

the New Plan meeting the two thirds threshold for approval under the CCAA.

As pointed out by SMT, the main unsecured creditor, Callidus' attempt to vote aims only at cancelling SMT's vote which prevented Callidus' Plan from being approved at the creditors' meeting.

It is one thing to let the creditors vote on a plan submitted by a secured creditor, it is another to allow this secured creditor to vote on its own plan in order to exert control over the vote for the sole purpose of obtaining releases. [paras. 45-47]

[25] The supervising judge concluded that, in these circumstances, allowing Callidus to vote would be both "unfair and unreasonable" (para. 47). He also observed that Callidus's conduct throughout the *CCAA* proceedings "lacked transparency" (at para. 41) and that Callidus was "solely motivated by the [pending] litigation" (para. 44). In sum, he found that Callidus's conduct was contrary to the "requirements of appropriateness, good faith, and due diligence", and ordered that Callidus would not be permitted to vote on the New Plan (para. 48, citing *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 70).

[26] Because Callidus was not permitted to vote on the New Plan and SMT had unequivocally stated its intention to vote against it, the supervising judge concluded that the plan had no reasonable prospect of success. He therefore declined to submit it to a creditors' vote.

[27] With respect to Bluberi's application, the supervising judge considered three issues relevant to these appeals: (1) whether the LFA should be submitted to a creditors' vote; (2) if not, whether the LFA ought to be approved by the court; and (3) if so, whether the $20 million Litigation Financing Charge should be imposed on Bluberi's assets.

[28] The supervising judge determined that the LFA did not need to be submitted to a creditors' vote because it was not a plan of arrangement. He considered a plan of arrangement to involve "an arrangement

permettrait d'atteindre le seuil de deux tiers nécessaire pour que le nouveau plan soit approuvé en vertu de la LACC.

Comme l'a souligné SMT, la principale créancière non garantie, Callidus souhaite voter afin d'annuler le vote de SMT, qui a empêché que son plan soit approuvé lors de l'assemblée des créanciers.

C'est une chose de laisser les créanciers voter sur un plan présenté par un créancier garanti, c'en est une autre de laisser ce créancier garanti voter sur son propre plan et exercer ainsi un contrôle sur le vote à seule fin d'être libéré de toute responsabilité. [par. 45-47]

[25] Le juge surveillant conclut que, dans les circonstances, permettre à Callidus de voter serait à la fois [TRADUCTION] « injuste et déraisonnable » (par. 47). Il note aussi que, tout au long de la procédure introduite en vertu de la *LACC*, Callidus a « manqué de transparence » (par. 41) et qu'elle « n'est motivée que par le litige [en cours] » (par. 44). En somme, il conclut que la conduite de Callidus est contraire à « l'opportunité, [à] la bonne foi et [à] la diligence » requises, et il ordonne que Callidus ne puisse pas voter sur le nouveau plan (par. 48, citant *Century Services Inc. c. Canada (Procureur général)*, 2010 CSC 60, [2010] 3 R.C.S. 379, par. 70).

[26] Puisque Callidus n'a pas été autorisée à voter sur le nouveau plan et que SMT a manifesté sans équivoque son intention de voter contre celui-ci, le juge surveillant conclut que le plan n'a aucune possibilité raisonnable de recevoir l'aval des créanciers. Il refuse donc de le soumettre au vote des créanciers.

[27] Pour ce qui est de la demande de Bluberi, le juge surveillant examine trois questions qui sont pertinentes pour les présents pourvois : (1) si l'AFL devait être soumis au vote des créanciers; (2) dans la négative, si l'AFL devait être approuvé par le tribunal; et (3) le cas échéant, s'il devait ordonner que la charge liée au financement du litige de 20 millions de dollars grève les actifs de Bluberi.

[28] Le juge surveillant décide qu'il n'est pas nécessaire de soumettre l'AFL au vote des créanciers parce qu'il ne s'agit pas d'un plan d'arrangement. Il considère qu'un tel plan suppose [TRADUCTION] « un

or compromise between a debtor and its creditors" (para. 71, citing *Re Crystallex*, 2012 ONCA 404, 293 O.A.C. 102, at para. 92 ("*Crystallex*")). In his view, the LFA lacked this essential feature. He also concluded that the LFA did not need to be accompanied by a plan, as Bluberi had stated its intention to file a plan in the future.

[29] After reviewing the terms of the LFA, the supervising judge found it met the criteria for approval of third party litigation funding set out in *Bayens v. Kinross Gold Corporation*, 2013 ONSC 4974, 117 O.R. (3d) 150, at para. 41, and *Hayes v. The City of Saint John*, 2016 NBQB 125, at para. 4 (CanLII). In particular, he considered Bentham's percentage of return to be reasonable in light of its level of investment and risk. Further, the supervising judge rejected Callidus and the Creditors' Group's argument that the LFA gave too much discretion to Bentham. He found that the LFA did not allow Bentham to exert undue influence on the litigation of the Retained Claims, noting similarly broad clauses had been approved in the *CCAA* context (para. 82, citing *Schenk v. Valeant Pharmaceuticals International Inc.*, 2015 ONSC 3215, 74 C.P.C. (7th) 332, at para. 23).

[30] Finally, the supervising judge imposed the Litigation Financing Charge on Bluberi's assets. While significant, the supervising judge considered the amount to be reasonable given: the amount of damages that would be claimed from Callidus; Bentham's financial commitment to the litigation; and the fact that Bentham was not charging any interim fees or interest (i.e., it would only profit in the event of successful litigation or settlement). Put simply, Bentham was taking substantial risks, and it was reasonable that it obtain certain guarantees in exchange.

[31] Callidus, again supported by the Creditors' Group, appealed the supervising judge's order, impleading Bentham in the process.

arrangement ou une transaction entre un débiteur et ses créanciers » (par. 71, citant *Re Crystallex*, 2012 ONCA 404, 293 O.A.C. 102, par. 92 (« *Crystallex* »)). À son avis, l'AFL est dépourvu de cette caractéristique essentielle. Il conclut aussi qu'il n'est pas nécessaire que l'AFL soit assorti d'un plan étant donné que Bluberi a exprimé l'intention d'en déposer un plus tard.

[29] Après en avoir examiné les modalités, le juge surveillant conclut que l'AFL respecte le critère d'approbation applicable en matière de financement d'un litige par un tiers qui est établi dans les décisions *Bayens c. Kinross Gold Corporation*, 2013 ONSC 4974, 117 O.R. (3d) 150, par. 41, et *Hayes c. The City of Saint John*, 2016 NBQB 125, par. 4 (CanLII). Plus particulièrement, il considère que le taux de retour de Bentham est raisonnable eu égard à son niveau d'investissement et de risque. Il rejette en outre l'argument avancé par Callidus et le groupe de créanciers, qui soutenaient que l'AFL donne trop de latitude à Bentham. Il conclut que l'AFL ne permet pas à Bentham d'exercer une influence indue sur le déroulement du litige lié aux réclamations réservées et souligne que des clauses générales semblables à celles qu'il contient ont déjà été approuvées dans le contexte de la *LACC* (par. 82, citant *Schenk c. Valeant Pharmaceuticals International Inc.*, 2015 ONSC 3215, 74 C.P.C. (7th) 332, par. 23).

[30] Enfin, le juge surveillant ordonne que les actifs de Bluberi soient grevés de la charge liée au financement du litige. Il juge que, même s'il est élevé, le montant en question est raisonnable étant donné : le montant des dommages-intérêts qui sont réclamés à Callidus; l'engagement financier de Bentham dans le litige; et le fait que Bentham n'exige aucune provision pour frais ou intérêts (c.-à-d. qu'elle ne tirera profit de l'accord que si le procès ou le règlement est couronné de succès). En termes simples, Bentham prend des risques importants et il est raisonnable qu'elle obtienne certaines garanties en échange.

[31] Callidus, de nouveau appuyée par le groupe de créanciers, interjette appel de l'ordonnance du juge surveillant et met en cause Bentham.

B. *Quebec Court of Appeal, 2019 QCCA 171 (Dutil and Schrager JJ.A. and Dumas J. (ad hoc))*

[32] The Court of Appeal allowed the appeal, finding that "[t]he exercise of the judge's discretion [was] not founded in law nor on a proper treatment of the facts so that irrespective of the standard of review applied, appellate intervention [was] justified" (para. 48 (CanLII)). In particular, the court identified two errors of relevance to these appeals.

[33] First, the court was of the view that the supervising judge erred in finding that Callidus had an improper purpose in seeking to vote on its New Plan. In its view, Callidus should have been permitted to vote. The court relied heavily on the notion that creditors have a right to vote in their own self-interest. It held that any judicial discretion to preclude voting due to improper purpose should be reserved for the "clearest of cases" (para. 62, referring to *Re Blackburn*, 2011 BCSC 1671, 27 B.C.L.R. (5th) 199, at para. 45). The court was of the view that Callidus's transparent attempt to obtain a release from Bluberi's claims against it did not amount to an improper purpose. The court also considered Callidus's conduct prior to and during the *CCAA* proceedings to be incapable of justifying a finding of improper purpose.

[34] Second, the court concluded that the supervising judge erred in approving the LFA as interim financing because, in its view, the LFA was not connected to Bluberi's commercial operations. The court concluded that the supervising judge had both "misconstrued in law the notion of interim financing and misapplied that notion to the factual circumstances of the case" (para. 78).

[35] In light of this perceived error, the court substituted its view that the LFA was a plan of arrangement and, as a result, should have been submitted

B. *Cour d'appel du Québec, 2019 QCCA 171 (les juges Dutil et Schrager et le juge Dumas (ad hoc))*

[32] La Cour d'appel accueille l'appel et conclut que [TRADUCTION] « [l]'exercice par le juge de son pouvoir discrétionnaire [n'était] pas fondé en droit, non plus qu'il ne reposait sur un traitement approprié des faits, de sorte que, peu importe la norme de contrôle appliquée, il [était] justifié d'intervenir en appel » (par. 48 (CanLII)). En particulier, la cour relève deux erreurs qui sont pertinentes pour les présents pourvois.

[33] D'une part, la cour conclut que le juge surveillant a commis une erreur en concluant que Callidus a agi dans un but illégitime en demandant l'autorisation de voter sur son nouveau plan. À son avis, Callidus aurait dû être autorisée à voter. La cour s'appuie grandement sur l'idée que les créanciers ont le droit de voter en fonction de leur propre intérêt. Elle juge que l'exercice du pouvoir discrétionnaire qui consiste à empêcher un créancier de voter dans un but illégitime devrait être [TRADUCTION] « réservé aux cas les plus évidents » (par. 62, renvoyant à *Re Blackburn*, 2011 BCSC 1671, 27 B.C.L.R. (5th) 199, par. 45). Selon elle, en tentant de façon transparente d'être libérée des réclamations de Bluberi à son égard, Callidus ne pouvait être considérée comme ayant agi dans un but illégitime. La cour conclut également que la conduite de Callidus, avant et pendant la procédure introduite en vertu de la *LACC*, ne pouvait justifier la conclusion qu'il existe un but illégitime.

[34] D'autre part, la cour conclut que le juge surveillant a eu tort d'approuver l'AFL en tant qu'accord de financement provisoire parce qu'à son avis, il n'est pas lié aux opérations commerciales de Bluberi. Elle conclut que le juge surveillant a [TRADUCTION] « donné à la notion de financement provisoire une interprétation non fondée en droit et qu'il a mal appliqué cette notion aux circonstances factuelles de l'affaire » (par. 78).

[35] À la lumière de ce qu'elle percevait comme une erreur, la cour substitue son opinion selon laquelle l'AFL est un plan d'arrangement et que pour

to a creditors' vote. It held that "[a]n arrangement or proposal can encompass both a compromise of creditors' claims as well as the process undertaken to satisfy them" (para. 85). The court considered the LFA to be a plan of arrangement because it affected the creditors' share in any eventual litigation proceeds, would cause them to wait for the outcome of any litigation, and could potentially leave them with nothing at all. Moreover, the court held that Bluberi's scheme "as a whole", being the prosecution of the Retained Claims and the LFA, should be submitted as a plan to the creditors for their approval (para. 89).

cette raison, il aurait dû être soumis au vote des créanciers. Elle conclut [TRADUCTION] « [qu'u]n arrangement ou une proposition peut englober une transaction visant les réclamations des créanciers ainsi que le processus suivi pour y donner suite » (par. 85). La cour juge que l'AFL est un plan d'arrangement parce qu'il a une incidence sur la participation des créanciers à l'indemnité susceptible d'être accordée à la suite d'un litige, qu'il oblige ceux-ci à attendre l'issue de tout litige, et qu'il est possible que les créanciers se retrouvent les mains vides. De plus, la cour conclut que le projet de Bluberi « dans son entièreté », soit la poursuite des réclamations réservées et l'AFL, doit être soumis à l'approbation des créanciers (par. 89).

[36] Bluberi and Bentham (collectively, "appellants"), again supported by the Monitor, now appeal to this Court.

[36] Bluberi et Bentham (collectivement, les « appelantes »), encore une fois appuyées par le contrôleur, se pourvoient maintenant devant notre Cour.

IV. Issues

IV. Questions en litige

[37] These appeals raise two issues:

(1) Did the supervising judge err in barring Callidus from voting on its New Plan on the basis that it was acting for an improper purpose?

(2) Did the supervising judge err in approving the LFA as interim financing, pursuant to s. 11.2 of the *CCAA*?

[37] Les pourvois soulèvent deux questions :

(1) Le juge surveillant a-t-il commis une erreur en empêchant Callidus de voter sur son nouveau plan au motif qu'elle agissait dans un but illégitime?

(2) Le juge surveillant a-t-il commis une erreur en approuvant l'AFL en tant que plan de financement provisoire, selon les termes de l'art. 11.2 de la *LACC*?

V. Analysis

V. Analyse

A. *Preliminary Considerations*

A. *Considérations préliminaires*

[38] Addressing the above issues requires situating them within the contemporary Canadian insolvency landscape and, more specifically, the *CCAA* regime. Accordingly, before turning to those issues, we review (1) the evolving nature of *CCAA* proceedings; (2) the role of the supervising judge in those proceedings; and (3) the proper scope of appellate review of a supervising judge's exercise of discretion.

[38] Pour répondre aux questions ci-dessus, nous devons les situer dans le contexte contemporain de l'insolvabilité au Canada, et plus précisément du régime de la *LACC*. Ainsi, avant de passer à ces questions, nous examinons (1) la nature évolutive des procédures intentées sous le régime de la *LACC*; (2) le rôle que joue le juge surveillant dans ces procédures; et (3) la portée du contrôle, en appel, de l'exercice du pouvoir discrétionnaire du juge surveillant.

(1) The Evolving Nature of *CCAA* Proceedings

[39] The *CCAA* is one of three principal insolvency statutes in Canada. The others are the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), which covers insolvencies of both individuals and companies, and the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11 ("*WURA*"), which covers insolvencies of financial institutions and certain other corporations, such as insurance companies (*WURA*, s. 6(1)). While both the *CCAA* and the *BIA* enable reorganizations of insolvent companies, access to the *CCAA* is restricted to debtor companies facing total claims in excess of $5 million (*CCAA*, s. 3(1)).

[40] Together, Canada's insolvency statutes pursue an array of overarching remedial objectives that reflect the wide ranging and potentially "catastrophic" impacts insolvency can have (*Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271, at para. 1). These objectives include: providing for timely, efficient and impartial resolution of a debtor's insolvency; preserving and maximizing the value of a debtor's assets; ensuring fair and equitable treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company (J. P. Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", in J. P. Sarra and B. Romaine, eds., *Annual Review of Insolvency Law 2016* (2017), 9, at pp. 9-10; J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2nd ed. 2013), at pp. 4-5 and 14; Standing Senate Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2003), at pp. 9-10; R. J. Wood, *Bankruptcy and Insolvency Law* (2nd ed. 2015), at pp. 4-5).

(1) La nature évolutive des procédures intentées sous le régime de la *LACC*

[39] La *LACC* est l'une des trois principales lois canadiennes en matière d'insolvabilité. Les autres sont la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985 c. B-3 (« *LFI* »), qui traite de l'insolvabilité des personnes physiques et des sociétés, et la *Loi sur les liquidations et les restructurations*, L.R.C. 1985 c. W-11 (« *LLR* »), qui traite de l'insolvabilité des institutions financières et de certaines autres personnes morales, telles que les compagnies d'assurance (*LLR*, par. 6(1)). Bien que la *LACC* et la *LFI* permettent toutes deux la restructuration de compagnies insolvables, l'accès à la *LACC* est limité aux sociétés débitrices qui sont aux prises avec des réclamations dont le montant total est supérieur à 5 millions de dollars (*LACC*, par. 3(1)).

[40] Ensemble, les lois canadiennes sur l'insolvabilité poursuivent un grand nombre d'objectifs réparateurs généraux qui témoignent de la vaste gamme des conséquences potentiellement « catastrophiques » qui peuvent découler de l'insolvabilité (*Sun Indalex Finance, LLC c. Syndicat des Métallos*, 2013 CSC 6, [2013] 1 R.C.S. 271, par. 1). Ces objectifs incluent les suivants : régler de façon rapide, efficace et impartiale l'insolvabilité d'un débiteur; préserver et maximiser la valeur des actifs d'un débiteur; assurer un traitement juste et équitable des réclamations déposées contre un débiteur; protéger l'intérêt public; et, dans le contexte d'une insolvabilité commerciale, établir un équilibre entre les coûts et les bénéfices découlant de la restructuration ou de la liquidation d'une compagnie (J. P. Sarra, « The Oscillating Pendulum : Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law », dans J. P. Sarra et B. Romaine, dir., *Annual Review of Insolvency Law 2016* (2017), 9, p. 9-10; J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2e éd. 2013), p. 4-5 et 14; Comité sénatorial permanent des banques et du commerce, *Les débiteurs et les créanciers doivent se partager le fardeau : Examen de la Loi sur la faillite et l'insolvabilité et de la Loi sur les arrangements avec les créanciers des compagnies* (2003), p. 13-14; R. J. Wood, *Bankruptcy and Insolvency Law* (2e éd. 2015), p. 4-5).

[41] Among these objectives, the *CCAA* generally prioritizes "avoiding the social and economic losses resulting from liquidation of an insolvent company" (*Century Services*, at para. 70). As a result, the typical *CCAA* case has historically involved an attempt to facilitate the reorganization and survival of the pre-filing debtor company in an operational state — that is, as a going concern. Where such a reorganization was not possible, the alternative course of action was seen as a liquidation through either a receivership or under the *BIA* regime. This is precisely the outcome that was sought in *Century Services* (see para. 14).

[42] That said, the *CCAA* is fundamentally insolvency legislation, and thus it also "has the simultaneous objectives of maximizing creditor recovery, preservation of going-concern value where possible, preservation of jobs and communities affected by the firm's financial distress . . . and enhancement of the credit system generally" (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 14; see also *Ernst & Young Inc. v. Essar Global Fund Ltd.*, 2017 ONCA 1014, 139 O.R. (3d) 1 ("*Essar*"), at para. 103). In pursuit of those objectives, *CCAA* proceedings have evolved to permit outcomes that do not result in the emergence of the pre-filing debtor company in a restructured state, but rather involve some form of liquidation of the debtor's assets under the auspices of the Act itself (Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at pp. 19-21). Such scenarios are referred to as "liquidating CCAAs", and they are now commonplace in the *CCAA* landscape (see *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508, 435 D.L.R. (4th) 416, at para. 70).

[41] Parmi ces objectifs, la *LACC* priorise en général le fait d'« éviter les pertes sociales et économiques résultant de la liquidation d'une compagnie insolvable » (*Century Services*, par. 70). C'est pourquoi les affaires types qui relèvent de cette loi ont historiquement facilité la restructuration de l'entreprise débitrice qui n'a pas encore déposé de proposition en la maintenant dans un état opérationnel, c'est-à-dire en permettant qu'elle poursuive ses activités. Lorsqu'une telle restructuration n'était pas possible, on considérait qu'il fallait alors procéder à la liquidation par voie de mise sous séquestre ou sous le régime de la *LFI*. C'est précisément le résultat qui était recherché dans l'affaire *Century Services* (voir par. 14).

[42] Cela dit, la *LACC* est fondamentalement une loi sur l'insolvabilité, et à ce titre, elle a aussi [TRADUCTION] « comme objectifs simultanés de maximiser le recouvrement au profit des créanciers, de préserver la valeur d'exploitation dans la mesure du possible, de protéger les emplois et les collectivités touchées par les difficultés financières de l'entreprise [. . .] et d'améliorer le système de crédit de manière générale » (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, p. 14; voir aussi *Ernst & Young Inc. c. Essar Global Fund Ltd.*, 2017 ONCA 1014, 139 O.R. (3d) 1 (« *Essar* »), par. 103). Afin d'atteindre ces objectifs, les procédures intentées sous le régime de la *LACC* ont évolué de telle sorte qu'elles permettent des solutions qui évitent l'émergence, sous une forme restructurée, de la société débitrice qui existait avant le début des procédures, mais qui impliquent plutôt une certaine forme de liquidation des actifs du débiteur sous le régime même de la Loi (Sarra, « The Oscillating Pendulum : Canada's Sesquicentennial and Finding the Equilibium for Insolvency Law », p. 19-21). Ces cas, qualifiés de [TRADUCTION] « procédures de liquidation sous le régime de la *LACC* », sont maintenant courants dans le contexte de la *LACC* (voir *Third Eye Capital Corporation c. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508, 435 D.L.R. (4th) 416, par. 70).

[43] Liquidating CCAAs take diverse forms and may involve, among other things: the sale of the debtor company as a going concern; an "en bloc" sale of assets that are capable of being operationalized by a buyer; a partial liquidation or downsizing of business operations; or a piecemeal sale of assets (B. Kaplan, "Liquidating CCAAs: Discretion Gone Awry?", in J. P. Sarra, ed., *Annual Review of Insolvency Law* (2008), 79, at pp. 87-89). The ultimate commercial outcomes facilitated by liquidating CCAAs are similarly diverse. Some may result in the continued operation of the business of the debtor under a different going concern entity (e.g., the liquidations in *Indalex* and *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 (Ont. C.J. (Gen. Div.)), while others may result in a sale of assets and inventory with no such entity emerging (e.g., the proceedings in *Re Target Canada Co.*, 2015 ONSC 303, 22 C.B.R. (6th) 323, at paras. 7 and 31). Others still, like the case at bar, may involve a going concern sale of most of the assets of the debtor, leaving residual assets to be dealt with by the debtor and its stakeholders.

[43] Les procédures de liquidation sous le régime de la *LACC* revêtent différentes formes et peuvent, entre autres, inclure la vente de la société débitrice à titre d'entreprise en activité; la vente « en bloc » des éléments d'actif susceptibles d'être exploités par un acquéreur; une liquidation partielle de l'entreprise ou une réduction de ses activités; ou encore une vente de ses actifs élément par élément (B. Kaplan, « Liquidating CCAAs : Discretion Gone Awry? » dans J. P. Sarra, dir., *Annual Review of Insolvency Law* (2008), 79, p. 87-89). Les résultats commerciaux ultimement obtenus à l'issue des procédures de liquidation introduites sous le régime de la *LACC* sont eux aussi variés. Certaines procédures peuvent avoir pour résultat la continuité des activités de la débitrice sous la forme d'une autre entité viable (p. ex., les sociétés liquidées dans *Indalex* et *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 (C.J. Ont., Div. gén.)), alors que d'autres peuvent simplement aboutir à la vente des actifs et de l'inventaire sans donner naissance à une nouvelle entité (p. ex., la procédure en cause dans *Re Target Canada Co.*, 2015 ONSC 303, 22 C.B.R. (6th) 323, par. 7 et 31). D'autres encore, comme dans le dossier qui nous occupe, peuvent donner lieu à la vente de la plupart des actifs de la débitrice en vue de la poursuite de son activité, laissant à la débitrice et aux parties intéressées le soin de s'occuper des actifs résiduaires.

[44] *CCAA* courts first began approving these forms of liquidation pursuant to the broad discretion conferred by the Act. The emergence of this practice was not without criticism, largely on the basis that it appeared to be inconsistent with the *CCAA* being a "restructuring statute" (see, e.g., *Uti Energy Corp. v. Fracmaster Ltd.*, 1999 ABCA 178, 244 A.R. 93, at paras. 15-16, aff'g 1999 ABQB 379, 11 C.B.R. (4th) 204, at paras. 40-43; A. Nocilla, "The History of the Companies' Creditors Arrangement Act and the Future of Re-Structuring Law in Canada" (2014), 56 *Can. Bus. L.J.* 73, at pp. 88-92).

[44] Les tribunaux chargés de l'application de la *LACC* ont d'abord commencé à approuver ces formes de liquidation en exerçant le vaste pouvoir discrétionnaire que leur confère la Loi. L'émergence de cette pratique a fait l'objet de critiques, essentiellement parce qu'elle semblait incompatible avec l'objectif de « restructuration » de la *LACC* (voir, p. ex., *Uti Energy Corp. c. Fracmaster Ltd.*, 1999 ABCA 178, 244 A.R. 93, par. 15-16, conf. 1999 ABQB 379, 11 C.B.R. (4th) 204, par. 40-43; A. Nocilla, « The History of the Companies' Creditors Arrangement Act and the Future of Re-Structuring Law in Canada » (2014), 56 *Rev. can. dr. comm.* 73, p. 88-92).

[45] However, since s. 36 of the *CCAA* came into force in 2009, courts have been using it to effect liquidating CCAAs. Section 36 empowers courts to authorize the sale or disposition of a debtor

[45] Toutefois, depuis que l'art. 36 de la *LACC* est entré en vigueur en 2009, les tribunaux l'utilisent pour consentir à une liquidation sous le régime de la *LACC*. L'article 36 confère aux tribunaux le pouvoir

company's assets outside the ordinary course of business.[3] Significantly, when the Standing Senate Committee on Banking, Trade and Commerce recommended the adoption of s. 36, it observed that liquidation is not necessarily inconsistent with the remedial objectives of the *CCAA*, and that it may be a means to "raise capital [to facilitate a restructuring], eliminate further loss for creditors or focus on the solvent operations of the business" (p. 147). Other commentators have observed that liquidation can be a "vehicle to restructure a business" by allowing the business to survive, albeit under a different corporate form or ownership (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 169; see also K. P. McElcheran, *Commercial Insolvency in Canada* (4th ed. 2019), at p. 311). Indeed, in *Indalex*, the company sold its assets under the *CCAA* in order to preserve the jobs of its employees, despite being unable to survive as their employer (see para. 51).

[46] Ultimately, the relative weight that the different objectives of the *CCAA* take on in a particular case may vary based on the factual circumstances, the stage of the proceedings, or the proposed solutions that are presented to the court for approval. Here, a parallel may be drawn with the *BIA* context. In *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5, [2019] 1 S.C.R. 150, at para. 67, this Court explained that, as a general matter, the *BIA* serves two purposes: (1) the bankrupt's financial rehabilitation and (2) the equitable distribution of the bankrupt's assets among creditors. However,

d'autoriser la vente ou la disposition des actifs d'une compagnie débitrice hors du cours ordinaire de ses affaires[3]. Fait important, lorsque le Comité sénatorial permanent des banques et du commerce a recommandé l'adoption de l'art. 36, il a fait observer que la liquidation n'est pas nécessairement incompatible avec les objectifs réparateurs de la *LACC* et qu'il pourrait s'agir d'un moyen « soit pour obtenir des capitaux [et faciliter la restructuration] ou éviter des pertes plus graves aux créanciers, soit pour se concentrer sur ses activités solvables » (p. 163). D'autres auteurs ont observé que la liquidation peut [TRADUCTION] « être un moyen de restructurer une entreprise » en lui permettant de survivre, quoique sous une forme corporative différente ou sous la gouverne de propriétaires différents (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, p. 169; voir aussi K. P. McElcheran, *Commercial Insolvency in Canada* (4e éd. 2019), p. 311). D'ailleurs, dans l'arrêt *Indalex*, la compagnie a vendu ses actifs sous le régime de la *LACC* afin de protéger les emplois de son personnel, même si elle ne pouvait demeurer leur employeur (voir par. 51).

[46] En définitive, le poids relatif attribué aux différents objectifs de la *LACC* dans une affaire donnée peut varier en fonction des circonstances factuelles, de l'étape des procédures ou des solutions qui sont présentées à la cour pour approbation. En l'espèce, il est possible d'établir un parallèle avec le contexte de la *LFI*. Dans l'arrêt *Orphan Well Association c. Grant Thornton Ltd.*, 2019 CSC 5, [2019] 1 R.C.S. 150, par. 67, notre Cour a expliqué que, de façon générale, la *LFI* vise deux objectifs : (1) la réhabilitation financière du failli, et (2) le partage équitable des actifs du failli entre les créanciers. Or, dans les cas où

3 We note that while s. 36 now codifies the jurisdiction of a supervising court to grant a sale and vesting order, and enumerates factors to guide the court's discretion to grant such an order, it is silent on when courts ought to approve a liquidation under the *CCAA* as opposed to requiring the parties to proceed to liquidation under a receivership or the *BIA* regime (see Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp. 167-68; A. Nocilla, "Asset Sales Under the Companies' Creditors Arrangement Act and the Failure of Section 36" (2012) 52 *Can. Bus. L.J.* 226, at pp. 243-44 and 247). This issue remains an open question and was not put to this Court in either *Indalex* or these appeals.

3 Mentionnons que, bien que l'art. 36 codifie désormais le pouvoir du juge surveillant de rendre une ordonnance de vente et de dévolution, et qu'il énonce les facteurs devant orienter l'exercice de son pouvoir discrétionnaire d'accorder une telle ordonnance, il est muet quant aux circonstances dans lesquelles les tribunaux doivent approuver une liquidation sous le régime de la *LACC* plutôt que d'exiger des parties qu'elles procèdent à la liquidation par voie de mise sous séquestre ou sous le régime de la *LFI* (voir Sarra, *Rescue! The Companies' Creditors Arrangement Act*, p. 167-168; A. Nocilla, « Asset Sales Under the Companies' Creditors Arrangement Act and the Failure of Section 36 » (2012) 52 *Rev. can. dr. comm.* 226, p. 243-244 et 247). Cette question demeure ouverte et n'a pas été soumise à la Cour dans *Indalex* non plus que dans les présents pourvois.

in circumstances where a debtor corporation will never emerge from bankruptcy, only the latter purpose is relevant (see para. 67). Similarly, under the *CCAA*, when a reorganization of the pre-filing debtor company is not a possibility, a liquidation that preserves going-concern value and the ongoing business operations of the pre-filing company may become the predominant remedial focus. Moreover, where a reorganization or liquidation is complete and the court is dealing with residual assets, the objective of maximizing creditor recovery from those assets may take centre stage. As we will explain, the architecture of the *CCAA* leaves the case-specific assessment and balancing of these remedial objectives to the supervising judge.

(2) The Role of a Supervising Judge in *CCAA* Proceedings

[47] One of the principal means through which the *CCAA* achieves its objectives is by carving out a unique supervisory role for judges (see Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp. 18-19). From beginning to end, each *CCAA* proceeding is overseen by a single supervising judge. The supervising judge acquires extensive knowledge and insight into the stakeholder dynamics and the business realities of the proceedings from their ongoing dealings with the parties.

[48] The *CCAA* capitalizes on this positional advantage by supplying supervising judges with broad discretion to make a variety of orders that respond to the circumstances of each case and "meet contemporary business and social needs" (*Century Services*, at para. 58) in "real-time" (para. 58, citing 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. 484). The anchor of this discretionary authority is s. 11, which empowers a judge "to make any order that [the judge] considers appropriate in the circumstances". This section has been described as "the engine" driving the statutory scheme (*Stelco*

la société débitrice ne s'extirpera jamais de la faillite, seul le dernier objectif est pertinent (voir par. 67). Dans la même veine, sous le régime de la *LACC*, lorsque la restructuration d'une société débitrice qui n'a pas déposé de proposition est impossible, une liquidation visant à protéger sa valeur d'exploitation et à maintenir ses activités courantes peut devenir l'objectif réparateur principal. En outre, lorsque la restructuration ou la liquidation est terminée et que le tribunal doit décider du sort des actifs résiduels, l'objectif de maximiser le recouvrement des créanciers à partir de ces actifs peut passer au premier plan. Comme nous l'expliquerons, la structure de la *LACC* laisse au juge surveillant le soin de procéder à un examen et à une mise en balance au cas par cas de ces objectifs réparateurs.

(2) Le rôle du juge surveillant dans les procédures intentées sous le régime de la *LACC*

[47] Un des principaux moyens par lesquels la *LACC* atteint ses objectifs réside dans le rôle particulier de surveillance qu'elle réserve aux juges (voir Sarra, *Rescue! The Companies' Creditors Arrangement Act*, p. 18-19). Chaque procédure fondée sur la *LACC* est supervisée du début à la fin par un seul juge surveillant. En raison de ses rapports continus avec les parties, ce dernier acquiert une connaissance approfondie de la dynamique entre les intéressés et des réalités commerciales entourant la procédure.

[48] La *LACC* mise sur la position avantageuse qu'occupe le juge surveillant en lui accordant le vaste pouvoir discrétionnaire de rendre toute une gamme d'ordonnances susceptibles de répondre aux circonstances de chaque cas et de « [s'adapter] aux besoins commerciaux et sociaux contemporains » (*Century Services*, par. 58) en « temps réel » (par. 58, citant R. B. Jones, « The Evolution of Canadian Restructuring : Challenges for the Rule of Law », dans J. P. Sarra, dir., *Annual Review of Insolvency Law 2005* (2006), 481, p. 484). Le point d'ancrage de ce pouvoir discrétionnaire est l'art. 11, qui confère au juge le pouvoir de « rendre toute ordonnance qu'il estime indiquée ». Cette disposition a été décrite

Inc. (Re) (2005), 253 D.L.R. (4th) 109 (Ont. C.A.), at para. 36).

[49] The discretionary authority conferred by the *CCAA*, while broad in nature, is not boundless. This authority must be exercised in furtherance of the remedial objectives of the *CCAA*, which we have explained above (see *Century Services*, at para. 59). Additionally, the court must keep in mind three "baseline considerations" (at para. 70), which the applicant bears the burden of demonstrating: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence (para. 69).

[50] The first two considerations of appropriateness and good faith are widely understood in the *CCAA* context. Appropriateness "is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*" (para. 70). Further, the well-established requirement that parties must act in good faith in insolvency proceedings has recently been made express in s. 18.6 of the *CCAA*, which provides:

Good faith

18.6 (1) Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.

Good faith — powers of court

(2) If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.

(See also *BIA*, s. 4.2; *Budget Implementation Act, 2019, No. 1*, S.C. 2019, c. 29, ss. 133 and 140.)

[51] The third consideration of due diligence requires some elaboration. Consistent with the *CCAA* regime generally, the due diligence consideration discourages parties from sitting on their rights and ensures that creditors do not strategically manoeuver or

comme étant le « moteur » du régime législatif (*Stelco Inc. (Re)* (2005), 253 D.L.R. (4th) 109 (C.A. Ont.), par. 36).

[49] Quoique vaste, le pouvoir discrétionnaire conféré par la *LACC* n'est pas sans limites. Son exercice doit tendre à la réalisation des objectifs réparateurs de la *LACC*, que nous avons expliqués ci-dessus (voir *Century Services*, par. 59). En outre, la cour doit garder à l'esprit les trois « considérations de base » (par. 70) qu'il incombe au demandeur de démontrer : (1) que l'ordonnance demandée est indiquée, et (2) qu'il a agi de bonne foi et (3) avec la diligence voulue (par. 69).

[50] Les deux premières considérations, l'opportunité et la bonne foi, sont largement connues dans le contexte de la *LACC*. Le tribunal « évalue l'opportunité de l'ordonnance demandée en déterminant si elle favorisera la réalisation des objectifs de politique générale qui sous-tendent la Loi » (par. 70). Par ailleurs, l'exigence bien établie selon laquelle les parties doivent agir de bonne foi dans les procédures d'insolvabilité est depuis peu mentionnée de façon expresse à l'art. 18.6 de la *LACC*, qui dispose :

Bonne foi

18.6 (1) Tout intéressé est tenu d'agir de bonne foi dans le cadre d'une procédure intentée au titre de la présente loi.

Bonne foi — pouvoirs du tribunal

(2) S'il est convaincu que l'intéressé n'agit pas de bonne foi, le tribunal peut, à la demande de tout intéressé, rendre toute ordonnance qu'il estime indiquée.

(Voir aussi *LFI*, art. 4.2; *Loi n^o 1 d'exécution du budget de 2019*, L.C. 2019, c. 29, art. 133 et 140.)

[51] La troisième considération, celle de la diligence, requiert qu'on s'y attarde. Conformément au régime de la *LACC* en général, la considération de diligence décourage les parties de rester sur leurs positions et fait en sorte que les créanciers n'usent

position themselves to gain an advantage (*Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. C.J. (Gen. Div.)), at p. 31). The procedures set out in the *CCAA* rely on negotiations and compromise between the debtor and its stakeholders, as overseen by the supervising judge and the monitor. This necessarily requires that, to the extent possible, those involved in the proceedings be on equal footing and have a clear understanding of their respective rights (see McElcheran, at p. 262). A party's failure to participate in *CCAA* proceedings in a diligent and timely fashion can undermine these procedures and, more generally, the effective functioning of the *CCAA* regime (see, e.g., *North American Tungsten Corp. v. Global Tungsten and Powders Corp.*, 2015 BCCA 390, 377 B.C.A.C. 6, at paras. 21-23; *Re BA Energy Inc.*, 2010 ABQB 507, 70 C.B.R. (5th) 24; *HSBC Bank Canada v. Bear Mountain Master Partnership*, 2010 BCSC 1563, 72 C.B.R. (5th) 276, at para. 11; *Caterpillar Financial Services Ltd. v. 360networks Corp.*, 2007 BCCA 14, 279 D.L.R. (4th) 701, at paras. 51-52, in which the courts seized on a party's failure to act diligently).

pas stratégiquement de ruse ou ne se placent pas eux-mêmes dans une position pour obtenir un avantage (*Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (C.J. Ont. (Div. gén.)), p. 31). La procédure prévue par la *LACC* se fonde sur les négociations et les transactions entre le débiteur et les intéressés, le tout étant supervisé par le juge surveillant et le contrôleur. Il faut donc nécessairement que, dans la mesure du possible, ceux qui participent au processus soient sur un pied d'égalité et aient une compréhension claire de leurs droits respectifs (voir McElcheran, p. 262). La partie qui, dans le cadre d'une procédure fondée sur la *LACC*, n'agit pas avec diligence et en temps utile risque de compromettre le processus et, de façon plus générale, de nuire à l'efficacité du régime de la Loi (voir, p. ex., *North American Tungsten Corp. c. Global Tungsten and Powders Corp.*, 2015 BCCA 390, 377 B.C.A.C. 6 par. 21-23; *Re BA Energy Inc.*, 2010 ABQB 507, 70 C.B.R. (5th) 24; *HSBC Bank Canada c. Bear Mountain Master Partnership*, 2010 BCSC 1563, 72 C.B.R. (5th) 276 par. 11; *Caterpillar Financial Services Ltd. c. 360networks Corp.*, 2007 BCCA 14, 279 D.L.R. (4th) 701, par. 51-52, où les tribunaux se sont penchés sur le manque de diligence d'une partie).

[52] We pause to note that supervising judges are assisted in their oversight role by a court appointed monitor whose qualifications and duties are set out in the *CCAA* (see ss. 11.7, 11.8 and 23 to 25). The monitor is an independent and impartial expert, acting as "the eyes and the ears of the court" throughout the proceedings (*Essar*, at para. 109). The core of the monitor's role includes providing an advisory opinion to the court as to the fairness of any proposed plan of arrangement and on orders sought by parties, including the sale of assets and requests for interim financing (see *CCAA*, s. 23(1)(d) and (i); Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp. 566 and 569).

[52] Nous soulignons que les juges surveillants s'acquittent de leur rôle de supervision avec l'aide d'un contrôleur qui est nommé par le tribunal et dont les compétences et les attributions sont énoncées dans la *LACC* (voir art. 11.7, 11.8 et 23 à 25). Le contrôleur est un expert indépendant et impartial qui agit comme [TRADUCTION] « les yeux et les oreilles du tribunal » tout au long de la procédure (*Essar*, par. 109). Il a essentiellement pour rôle de donner au tribunal des avis consultatifs sur le caractère équitable de tout plan d'arrangement proposé et sur les ordonnances demandées par les parties, y compris celles portant sur la vente d'actifs et le financement provisoire (voir *LACC*, al. 23(1)d) et i); Sarra, *Rescue! The Companies' Creditors Arrangement Act*, p. 566 et 569).

(3) Appellate Review of Exercises of Discretion by a Supervising Judge

[53] A high degree of deference is owed to discretionary decisions made by judges supervising *CCAA* proceedings. As such, appellate intervention will only be justified if the supervising judge erred in principle or exercised their discretion unreasonably (see *Grant Forest Products Inc. v. Toronto-Dominion Bank*, 2015 ONCA 570, 387 D.L.R. (4th) 426, at para. 98; *Bridging Finance Inc. v. Béton Brunet 2001 inc.*, 2017 QCCA 138, 44 C.B.R. (6th) 175, at para. 23). Appellate courts must be careful not to substitute their own discretion in place of the supervising judge's (*New Skeena Forest Products Inc., Re*, 2005 BCCA 192, 39 B.C.L.R. (4th) 338, at para. 20).

[54] This deferential standard of review accounts for the fact that supervising judges are steeped in the intricacies of the *CCAA* proceedings they oversee. In this respect, the comments of Tysoe J.A. in *Canadian Metropolitan Properties Corp. v. Libin Holdings Ltd.*, 2009 BCCA 40, 308 D.L.R. (4th) 339 ("*Re Edgewater Casino Inc.*), at para. 20, are apt:

> . . . one of the principal functions of the judge supervising the *CCAA* proceeding is to attempt to balance the interests of the various stakeholders during the reorganization process, and it will often be inappropriate to consider an exercise of discretion by the supervising judge in isolation of other exercises of discretion by the judge in endeavoring to balance the various interests. . . . *CCAA* proceedings are dynamic in nature and the supervising judge has intimate knowledge of the reorganization process. The nature of the proceedings often requires the supervising judge to make quick decisions in complicated circumstances.

[55] With the foregoing in mind, we turn to the issues on appeal.

(3) Le contrôle en appel de l'exercice du pouvoir discrétionnaire du juge surveillant

[53] Les décisions discrétionnaires des juges chargés de la supervision des procédures intentées sous le régime de la *LACC* commandent un degré élevé de déférence. Ainsi, les cours d'appel ne seront justifiées d'intervenir que si le juge surveillant a commis une erreur de principe ou exercé son pouvoir discrétionnaire de manière déraisonnable (voir *Grant Forest Products Inc. c. Toronto-Dominion Bank*, 2015 ONCA 570, 387 D.L.R. (4th) 426, par. 98; *Bridging Finance Inc. c. Béton Brunet 2001 inc.*, 2017 QCCA 138, 44 C.B.R. (6th) 175, par. 23). Elles doivent prendre garde de ne pas substituer leur propre pouvoir discrétionnaire à celui du juge surveillant (*New Skeena Forest Products Inc.*, *Re*, 2005 BCCA 192, 39 B.C.L.R. (4th) 338, par. 20).

[54] Cette norme déférente de contrôle tient compte du fait que le juge surveillant possède une connaissance intime des procédures intentées sous le régime de la *LACC* dont il assure la supervision. À cet égard, les observations formulées par le juge Tysoe dans *Canadian Metropolitan Properties Corp. c. Libin Holdings Ltd.*, 2009 BCCA 40, 308 D.L.R. (4th) 339 (« *Re Edgewater Casino Inc.* »), par. 20, sont pertinentes :

> [TRADUCTION] . . . une des fonctions principales du juge chargé de la supervision de la procédure fondée sur la *LACC* est d'essayer d'établir un équilibre entre les intérêts des différents intéressés durant le processus de restructuration, et il sera bien souvent inopportun d'examiner une des décisions qu'il aura rendues à cet égard isolément des autres. [. . .] Les procédures intentées sous le régime de la *LACC* sont de nature dynamique et le juge surveillant a une connaissance intime du processus de restructuration. La nature du processus l'oblige souvent à prendre des décisions rapides dans des situations complexes.

[55] En gardant ce qui précède à l'esprit, nous passons maintenant aux questions soulevées par le présent pourvoi.

B. *Callidus Should Not Be Permitted to Vote on Its New Plan*

[56] A creditor can generally vote on a plan of arrangement or compromise that affects its rights, subject to any specific provisions of the *CCAA* that may restrict its voting rights (e.g., s. 22(3)), or a proper exercise of discretion by the supervising judge to constrain or bar the creditor's right to vote. We conclude that one such constraint arises from s. 11 of the *CCAA*, which provides supervising judges with the discretion to bar a creditor from voting where the creditor is acting for an improper purpose. Supervising judges are best-placed to determine whether this discretion should be exercised in a particular case. In our view, the supervising judge here made no error in exercising his discretion to bar Callidus from voting on the New Plan.

(1) Parameters of Creditors' Right to Vote on Plans of Arrangement

[57] Creditor approval of any plan of arrangement or compromise is a key feature of the *CCAA*, as is the supervising judge's oversight of that process. Where a plan is proposed, an application may be made to the supervising judge to order a creditors' meeting to vote on the proposed plan (*CCAA*, ss. 4 and 5). The supervising judge has the discretion to determine whether to order the meeting. For the purposes of voting at a creditors' meeting, the debtor company may divide the creditors into classes, subject to court approval (*CCAA*, s. 22(1)). Creditors may be included in the same class if "their interests or rights are sufficiently similar to give them a commonality of interest" (*CCAA*, s. 22(2); see also L. W. Houlden, G. B. Morawetz and J. P. Sarra, *Bankruptcy and Insolvency Law of Canada* (4th ed. (loose-leaf)), vol. 4, at §149). If the requisite "double majority" in each class of creditors — again, a majority in *number* of class members, which also represents two-thirds in *value* of the class members' claims — vote in favour of the plan, the supervising judge may sanction the plan (*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 296 D.L.R. (4th) 135, at para. 34; see *CCAA*, s. 6). The supervising judge will conduct what is

B. *Callidus ne devrait pas être autorisée à voter sur son nouveau plan*

[56] En général, un créancier peut voter sur un plan d'arrangement ou une transaction qui a une incidence sur ses droits, sous réserve des dispositions de la *LACC* qui peuvent limiter son droit de voter (p. ex., par. 22(3)), ou de l'exercice justifié par le juge surveillant de son pouvoir discrétionnaire de limiter ou de supprimer ce droit. Nous concluons qu'une telle limite découle de l'art. 11 de la *LACC*, qui confère au juge surveillant le pouvoir discrétionnaire d'empêcher le créancier de voter lorsqu'il agit dans un but illégitime. Le juge surveillant est mieux placé que quiconque pour déterminer s'il doit exercer ce pouvoir dans un cas donné. À notre avis, le juge surveillant n'a, en l'espèce, commis aucune erreur en exerçant son pouvoir discrétionnaire pour empêcher Callidus de voter sur le nouveau plan.

(1) Les paramètres du droit d'un créancier de voter sur un plan d'arrangement

[57] L'approbation par les créanciers d'un plan d'arrangement ou d'une transaction est l'une des principales caractéristiques de la *LACC*, tout comme la supervision du processus assurée par le juge surveillant. Lorsqu'un plan est proposé, le juge surveillant peut, sur demande, ordonner que soit convoquée une assemblée des créanciers pour que ceux-ci puissent voter sur le plan proposé (*LACC*, art. 4 et 5). Le juge surveillant a le pouvoir discrétionnaire de décider ou non d'ordonner qu'une assemblée soit convoquée. Pour les besoins du vote à l'assemblée des créanciers, la compagnie débitrice peut établir des catégories de créanciers, sous réserve de l'approbation du tribunal (*LACC,* par. 22(1)). Peuvent faire partie de la même catégorie les créanciers « ayant des droits ou intérêts à ce point semblables [. . .] qu'on peut en conclure qu'ils ont un intérêt commun » (*LACC*, par. 22(2); voir aussi L. W. Houlden, G. B. Morawetz, et J. P. Sarra, *Bankruptcy and Insolvency Law of Canada* (4e éd. (feuilles mobiles)), vol. 4, §149). Si la « double majorité » requise dans chaque catégorie de créanciers — rappelons qu'il s'agit de la majorité en *nombre* d'une catégorie, qui représente aussi les deux-tiers en *valeur* des réclamations de cette catégorie — vote

commonly referred to as a "fairness hearing" to determine, among other things, whether the plan is fair and reasonable (Wood, at pp. 490-92; see also Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 529; Houlden, Morawetz and Sarra at §45). Once sanctioned by the supervising judge, the plan is binding on each class of creditors that participated in the vote (*CCAA*, s. 6(1)).

en faveur du plan, le juge surveillant peut homologuer celui-ci (*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 296 D.L.R. (4th) 135, par. 34; voir la *LACC*, art. 6). Le juge surveillant tiendra ce qu'on appelle communément une [TRADUCTION] « audience d'équité » pour décider, entre autres choses, si le plan est juste et raisonnable (Wood, p. 490-492; Sarra, *Rescue! The Companies' Creditors Arrangement Act*, p. 529; Houlden, Morawetz et Sarra, §45). Une fois homologué par le juge surveillant, le plan lie chaque catégorie de créanciers qui a participé au vote (*LACC*, par. 6(1)).

[58] Creditors with a provable claim against the debtor whose interests are affected by a proposed plan are usually entitled to vote on plans of arrangement (Wood, at p. 470). Indeed, there is no express provision in the *CCAA* barring such a creditor from voting on a plan of arrangement, including a plan it sponsors.

[58] Les créanciers qui ont une réclamation prouvable contre le débiteur et dont les intérêts sont touchés par un plan d'arrangement proposé ont habituellement le droit de voter sur un tel plan (Wood, p. 470). En fait, aucune disposition expresse de la *LACC* n'interdit à un créancier de voter sur un plan d'arrangement, y compris sur un plan dont il fait la promotion.

[59] Notwithstanding the foregoing, the appellants submit that a purposive interpretation of s. 22(3) of the *CCAA* reveals that, as a general matter, a creditor should be precluded from voting on its own plan. Section 22(3) provides:

Related creditors

(3) A creditor who is related to the company may vote against, but not for, a compromise or arrangement relating to the company.

The appellants note that s. 22(3) was meant to harmonize the *CCAA* scheme with s. 54(3) of the *BIA*, which provides that "[a] creditor who is related to the debtor may vote against but not for the acceptance of the proposal." The appellants point out that, under s. 50(1) of the *BIA*, only debtors can sponsor plans; as a result, the reference to "debtor" in s. 54(3) captures *all* plan sponsors. They submit that if s. 54(3) captures all plan sponsors, s. 22(3) of the *CCAA* must do the same. On this basis, the appellants ask us to extend the voting restriction in s. 22(3) to apply not only to creditors who are "related to the company", as the provision states, but to any

[59] Nonobstant ce qui précède, les appelantes soutiennent qu'une interprétation téléologique du par. 22(3) de la *LACC* révèle que, de façon générale, un créancier ne devrait pas pouvoir voter sur son propre plan. Le paragraphe 22(3) prévoit :

Créancier lié

(3) Le créancier lié à la compagnie peut voter contre, mais non pour, l'acceptation de la transaction ou de l'arrangement.

Les appelantes font remarquer que le par. 22(3) devait permettre d'harmoniser le régime de la *LACC* avec le par. 54(3) de la *LFI*, qui dispose que « [u]n créancier qui est lié au débiteur peut voter contre, mais non pour, l'acceptation de la proposition. » Elles soulignent que, en vertu du par. 50(1) de la *LFI*, seuls les débiteurs peuvent faire la promotion d'un plan; ainsi, le « débiteur » auquel renvoie le par. 54(3) s'entend de *tous* les promoteurs de plan. Elles soutiennent que, si le par. 54(3) vise tous les promoteurs de plan, le par. 22(3) de la *LACC* doit également les viser. Pour cette raison, les appelantes nous demandent d'étendre la restriction au droit de creditor who sponsors a plan. They submit that this interpretation gives effect to the underlying intention of both provisions, which they say is to ensure that a creditor who has a conflict of interest cannot "dilute" or overtake the votes of other creditors.

voter imposée par le par. 22(3) de manière à ce qu'elle s'applique non seulement aux créanciers « lié[s] à la compagnie », comme le prévoit la disposition, mais aussi à tous les créanciers qui font la promotion d'un plan. Elles soutiennent que cette interprétation donne effet à l'intention sous-jacente aux deux dispositions, intention qui, de dire les appelantes, est de faire en sorte qu'un créancier qui est en conflit d'intérêts ne puisse pas « diluer » ou supplanter le vote des autres créanciers.

[60] We would not accept this strained interpretation of s. 22(3). Section 22(3) makes no mention of conflicts of interest between creditors and plan sponsors generally. The wording of s. 22(3) only places voting restrictions on creditors who are "related to the [debtor] company". These words are "precise and unequivocal" and, as such, must "play a dominant role in the interpretive process" (*Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10). In our view, the appellants' analogy to the *BIA* is not sufficient to overcome the plain wording of this provision.

[60] Nous n'acceptons pas cette interprétation forcée du par. 22(3). Il n'est nullement question dans cette disposition de conflit d'intérêts entre les créanciers et les promoteurs d'un plan en général. Les restrictions au droit de voter imposées par le par. 22(3) ne s'appliquent qu'aux créanciers qui sont « lié[s] à la compagnie [débitrice] ». Ce libellé est « précis et non équivoque », et il doit ainsi « joue[r] un rôle primordial dans le processus d'interprétation » (*Hypothèques Trustco Canada c. Canada*, 2005 CSC 54, [2005] 2 R.C.S. 601, par. 10). À notre avis, l'analogie que les appelantes font avec la *LFI* ne suffit pas à écarter le libellé clair de cette disposition.

[61] While the appellants are correct that s. 22(3) was enacted to harmonize the treatment of related parties in the *CCAA* and *BIA*, its history demonstrates that it is not a general conflict of interest provision. Prior to the amendments incorporating s. 22(3) into the *CCAA*, the *CCAA* clearly allowed creditors to put forward a plan of arrangement (see Houlden, Morawetz and Sarra, at §33, *Red Cross*; *Re 1078385 Ontario Inc.* (2004), 206 O.A.C. 17). In contrast, under the *BIA*, only debtors could make proposals. Parliament is presumed to have been aware of this obvious difference between the two statutes (see *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 59; see also *Third Eye*, at para. 57). Despite this difference, Parliament imported, with necessary modification, the wording of the *BIA* related creditor provision into the *CCAA*. Going beyond this language entails accepting that Parliament failed to choose the right words to give effect to its intention, which we do not.

[61] Bien que les appelantes aient raison de dire que l'adoption du par. 22(3) visait à harmoniser le traitement réservé aux parties liées par la *LACC* et la *LFI*, son historique montre qu'il ne s'agit pas d'une disposition générale relative aux conflits d'intérêts. Avant qu'elle soit modifiée et qu'on y incorpore le par. 22(3), la *LACC* permettait clairement aux créanciers de présenter un plan d'arrangement (voir Houlden, Morawetz et Sarra, §33, *Red Cross*; *Re 1078385 Ontario Inc.* (2004), 206 O.A.C. 17). À l'opposé, en vertu de la *LFI*, seuls les débiteurs pouvaient déposer une proposition. Il faut présumer que le législateur était au fait de cette différence évidente entre les deux lois (voir *ATCO Gas and Pipelines Ltd. c. Alberta (Energy and Utilities Board)*, 2006 CSC 4, [2006] 1 R.C.S. 140, par. 59; voir aussi *Third Eye*, par. 57). Le législateur a malgré tout importé dans la *LACC*, avec les adaptations nécessaires, le texte de la disposition de la *LFI* portant sur les créanciers liés. Aller au-delà de ce libellé suppose d'accepter que le législateur n'a pas choisi les bons mots pour donner effet à son intention, ce que nous ne ferons pas.

[62] Indeed, Parliament did not mindlessly reproduce s. 54(3) of the *BIA* in s. 22(3) of the *CCAA*. Rather, it made two modifications to the language of s. 54(3) to bring it into conformity with the language of the *CCAA*. First, it changed "proposal" (a defined term in the *BIA*) to "compromise or arrangement" (a term used throughout the *CCAA*). Second, it changed "debtor" to "company", recognizing that companies are the only kind of debtor that exists in the *CCAA* context.

[63] Our view is further supported by Industry Canada's explanation of the rationale for s. 22(3) as being to "reduce the ability of debtor companies to organize a restructuring plan that confers additional benefits to related parties" (Office of the Superintendent of Bankruptcy Canada, *Bill C-12: Clause by Clause Analysis* (online), cl. 71, s. 22 (emphasis added); see also Standing Senate Committee on Banking, Trade and Commerce, at p. 151).

[64] Finally, we note that the *CCAA* contains other mechanisms that attenuate the concern that a creditor with conflicting legal interests with respect to a plan it proposes may distort the creditors' vote. Although we reject the appellants' interpretation of s. 22(3), that section still bars creditors who are related to the debtor company from voting in favour of *any* plan. Additionally, creditors who do not share a sufficient commonality of interest may be forced to vote in separate classes (s. 22(1) and (2)), and, as we will explain, a supervising judge may bar a creditor from voting where the creditor is acting for an improper purpose.

(2) Discretion to Bar a Creditor From Voting in Furtherance of an Improper Purpose

[65] There is no dispute that the *CCAA* is silent on when a creditor who is otherwise entitled to vote on a plan can be barred from voting. However, *CCAA* supervising judges are often called upon "to sanction measures for which there is no explicit authority in the *CCAA*" (*Century Services*, at para. 61; see also para. 62). In *Century Services*, this Court endorsed

[62] En fait, le législateur n'a pas reproduit de façon irréfléchie, au par. 22(3) de la *LACC,* le texte du par. 54(3) de la *LFI*. Au contraire, il a apporté deux modifications au libellé du par. 54(3) pour l'adapter à celui employé dans la *LACC*. Premièrement, il a remplacé le terme « proposition » (défini dans la *LFI*) par les mots « transaction ou arrangement » (employés tout au long dans la *LACC*). Deuxièmement, il a remplacé « débiteur » par « compagnie », reconnaissant ainsi que les compagnies sont les seuls débiteurs qui existent dans le contexte de la *LACC*.

[63] Notre opinion est en outre appuyée par Industrie Canada, selon qui l'adoption du par. 22(3) se justifie par la volonté de « réduire la capacité des compagnies débitrices d'établir un plan de restructuration apportant des avantages supplémentaires à des personnes qui leur sont liées » (Bureau du surintendant des faillites Canada, *Projet de loi C-12 : analyse article par article* (en ligne), cl. 71, art. 22 (nous soulignons); voir aussi Comité sénatorial permanent des banques et du commerce, p. 166).

[64] Enfin, nous soulignons que la *LACC* prévoit d'autres mécanismes qui réduisent le risque qu'un créancier en situation de conflit d'intérêts par rapport au plan qu'il propose puisse biaiser le vote des créanciers. Bien que nous rejetions l'interprétation donnée par les appelantes au par. 22(3), ce paragraphe interdit tout de même aux créanciers liés à la compagnie débitrice de voter en faveur de *tout* plan. De plus, les créanciers qui n'ont pas suffisamment d'intérêts en commun pourraient être contraints de voter dans des catégories distinctes (par. 22(1) et (2)); et, comme nous l'expliquerons, le juge surveillant peut empêcher un créancier de voter si ce dernier agit dans un but illégitime.

(2) Le pouvoir discrétionnaire d'interdire à un créancier de voter dans un but illégitime

[65] Il est acquis aux débats que la *LACC* ne contient aucune disposition énonçant les circonstances dans lesquelles un créancier, autrement admissible à voter sur un plan, peut être empêché de le faire. Toutefois, les juges chargés d'appliquer la *LACC* sont souvent appelés à « sanctionner des mesures non expressément prévues par la *LACC* »

a "hierarchical" approach to determining whether jurisdiction exists to sanction a proposed measure: ". . . courts [must] 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" (para. 65). In most circumstances, a purposive and liberal interpretation of the provisions of the *CCAA* will be sufficient "to ground measures necessary to achieve its objectives" (para. 65).

(*Century Services*, par. 61; voir aussi par. 62). Dans l'arrêt *Century Services*, notre Cour a souscrit à l'approche « hiérarchisée » qui vise à déterminer si le tribunal a compétence pour sanctionner une mesure proposée : « . . . les tribunaux procédèrent d'abord à une interprétation des dispositions de la *LACC* avant d'invoquer leur compétence inhérente ou leur compétence en equity pour justifier des mesures prises dans le cadre d'une procédure fondée sur la *LACC* » (par. 65). Dans la plupart des cas, une interprétation téléologique et large des dispositions de la *LACC* suffira à « justifier les mesures nécessaires à la réalisation de ses objectifs » (par. 65).

[66] Applying this approach, we conclude that jurisdiction exists under s. 11 of the *CCAA* to bar a creditor from voting on a plan of arrangement or compromise where the creditor is acting for an improper purpose.

[66] Après avoir appliqué cette approche, nous concluons que l'art. 11 de la *LACC* confère au tribunal le pouvoir d'interdire à un créancier de voter sur un plan d'arrangement ou une transaction s'il agit dans un but illégitime.

[67] Courts have long recognized that s. 11 of the *CCAA* signals legislative endorsement of the "broad reading of *CCAA* authority developed by the jurisprudence" (*Century Services*, at para. 68). Section 11 states:

General power of court

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, <u>the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act</u>, on notice to any other person or without notice as it may see fit, <u>make any order that it considers appropriate in the circumstances</u>.

On the plain wording of the provision, the jurisdiction granted by s. 11 is constrained only by restrictions set out in the *CCAA* itself, and the requirement that the order made be "appropriate in the circumstances".

[67] Les tribunaux reconnaissent depuis longtemps que le libellé de l'art. 11 de la *LACC* indique que le législateur a sanctionné « l'interprétation large du pouvoir conféré par la *LACC* qui a été élaborée par la jurisprudence » (*Century Services*, par. 68). L'article 11 est ainsi libellé :

Pouvoir général du tribunal

11 Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*, <u>le tribunal peut,</u> dans le cas de toute demande sous le régime de la présente loi à l'égard d'une compagnie débitrice, <u>rendre, sur demande d'un intéressé, mais sous réserve des restrictions prévues par la présente loi</u> et avec ou sans avis, <u>toute ordonnance qu'il estime indiquée</u>.

Selon le libellé clair de la disposition, le pouvoir conféré par l'art. 11 n'est limité que par les restrictions imposées par la *LACC* elle-même, ainsi que par l'exigence que l'ordonnance soit « indiquée » dans les circonstances.

[68] Where a party seeks an order relating to a matter that falls within the supervising judge's purview, and for which there is no *CCAA* provision conferring more specific jurisdiction, s. 11 necessarily is the

[68] Lorsqu'une partie sollicite une ordonnance relativement à une question qui entre dans le champ de compétence du juge surveillant, mais pour laquelle aucune disposition de la *LACC* ne confère plus

provision of first resort in anchoring jurisdiction. As Blair J.A. put it in *Stelco*, s. 11 "for the most part supplants the need to resort to inherent jurisdiction" in the *CCAA* context (para. 36).

précisément compétence, l'art. 11 est nécessairement la disposition à laquelle on peut recourir d'emblée pour fonder la compétence du tribunal. Comme l'a dit le juge Blair dans l'arrêt *Stelco*, l'art. 11 [TRADUCTION] « fait en sorte que la plupart du temps, il est inutile de recourir à la compétence inhérente » dans le contexte de la *LACC* (par. 36).

[69] Oversight of the plan negotiation, voting, and approval process falls squarely within the supervising judge's purview. As indicated, there are no specific provisions in the *CCAA* which govern when a creditor who is otherwise eligible to vote on a plan may nonetheless be barred from voting. Nor is there any provision in the *CCAA* which suggests that a creditor has an absolute right to vote on a plan that cannot be displaced by a proper exercise of judicial discretion. However, given that the *CCAA* regime contemplates creditor participation in decision-making as an integral facet of the workout regime, creditors should only be barred from voting where the circumstances demand such an outcome. In other words, it is necessarily a discretionary, circumstance-specific inquiry.

[69] La supervision des négociations entourant le plan, tout comme le vote et le processus d'approbation, relève nettement de la compétence du juge surveillant. Comme nous l'avons dit, aucune disposition de la *LACC* ne vise le cas où un créancier par ailleurs admissible à voter sur un plan peut néanmoins être empêché de le faire. Il n'existe non plus aucune disposition de la *LACC* selon laquelle le droit que possède un créancier de voter sur un plan est absolu et que ce droit ne peut pas être écarté par l'exercice légitime du pouvoir discrétionnaire du tribunal. Toutefois, étant donné le régime de la *LACC*, dont l'un des aspects essentiels tient à la participation du créancier au processus décisionnel, les créanciers ne devraient être empêchés de voter que si les circonstances l'exigent. Autrement dit, il faut nécessairement procéder à un examen discrétionnaire axé sur les circonstances propres à chaque situation.

[70] Thus, it is apparent that s. 11 serves as the source of the supervising judge's jurisdiction to issue a discretionary order barring a creditor from voting on a plan of arrangement. The exercise of this discretion must further the remedial objectives of the *CCAA* and be guided by the baseline considerations of appropriateness, good faith, and due diligence. This means that, where a creditor is seeking to exercise its voting rights in a manner that frustrates, undermines, or runs counter to those objectives — that is, acting for an "improper purpose" — the supervising judge has the discretion to bar that creditor from voting.

[70] L'article 11 constitue donc manifestement la source de la compétence du juge surveillant pour rendre une ordonnance discrétionnaire empêchant un créancier de voter sur un plan d'arrangement. L'exercice du pouvoir discrétionnaire doit favoriser la réalisation des objets réparateurs de la *LACC* et être fondé sur les considérations de base que sont l'opportunité, la bonne foi et la diligence. Cela signifie que, lorsqu'un créancier cherche à exercer ses droits de vote de manière à contrecarrer, à miner ces objectifs ou à aller à l'encontre de ceux-ci — c'est-à-dire à agir dans un « but illégitime » — le juge surveillant a le pouvoir discrétionnaire d'empêcher le créancier de voter.

[71] The discretion to bar a creditor from voting in furtherance of an improper purpose under the *CCAA* parallels the similar discretion that exists under the *BIA*, which was recognized in *Laserworks Computer Services Inc. (Bankruptcy), Re*, 1998 NSCA 42, 165 N.S.R. (2d) 296. In *Laserworks*, the Nova Scotia

[71] Le pouvoir discrétionnaire d'empêcher un créancier de voter dans un but illégitime au sens de la *LACC* s'apparente au pouvoir discrétionnaire semblable qui existe en vertu de la *LFI*, lequel a été reconnu dans l'arrêt *Laserworks Computer Services Inc. (Bankruptcy), Re*, 1998 NSCA 42, 165 N.S.R.

Court of Appeal concluded that the discretion to bar a creditor from voting in this way stemmed from the court's power, inherent in the scheme of the *BIA*, to supervise "[e]ach step in the bankruptcy process" (at para. 41), as reflected in ss. 43(7), 108(3), and 187(9) of the Act. The court explained that s. 187(9) specifically grants the power to remedy a "substantial injustice", which arises "when the *BIA* is used for an improper purpose" (para. 54). The court held that "[a]n improper purpose is any purpose collateral to the purpose for which the bankruptcy and insolvency legislation was enacted by Parliament" (para. 54).

[72] While not determinative, the existence of this discretion under the *BIA* lends support to the existence of similar discretion under the *CCAA* for two reasons.

[73] First, this conclusion would be consistent with this Court's recognition that the *CCAA* "offers a more flexible mechanism with <u>greater</u> judicial discretion" than the *BIA* (*Century Services*, at para. 14 (emphasis added)).

[74] Second, this Court has recognized the benefits of harmonizing the two statutes to the extent possible. For example, in *Indalex*, the Court observed that "in order to avoid a race to liquidation under the *BIA*, courts will favour an interpretation of the *CCAA* that affords creditors analogous entitlements" to those received under the *BIA* (para. 51; see also *Century Services*, at para. 24; *Nortel Networks Corp., Re*, 2015 ONCA 681, 391 D.L.R. (4th) 283, at paras. 34-46). Thus, where the statutes are capable of bearing a harmonious interpretation, that interpretation ought to be preferred "to avoid the ills that can arise from [insolvency] 'statute-shopping'" (*Kitchener Frame Ltd.*, 2012 ONSC 234, 86 C.B.R. (5th) 274, at para. 78; see also para. 73). In our view, the articulation of "improper purpose" set out in *Laserworks* — that is, any purpose collateral to the purpose of insolvency legislation — is entirely harmonious with the nature and scope of judicial discretion afforded by the *CCAA*. Indeed, as we have explained, this

(2d) 296. Dans *Laserworks*, la Cour d'appel de la Nouvelle-Écosse a conclu que le pouvoir discrétionnaire d'empêcher un créancier de voter de cette façon découlait du pouvoir du tribunal, inhérent au régime établi par la *LFI*, de superviser [TRADUCTION] « [c]haque étape du processus de faillite » (par. 41), comme l'indiquent les par. 43(7), 108(3) et 187(9) de la Loi. La cour a expliqué que le par. 187(9) confère expressément le pouvoir de remédier à une « injustice grave », laquelle se produit « lorsque la *LFI* est utilisée dans un but illégitime » (par. 54). La cour a statué que « [l]e but illégitime est un but qui est accessoire à l'objet pour lequel la loi en matière de faillite et d'insolvabilité a été adoptée par le législateur » (par. 54).

[72] Bien qu'elle ne soit pas déterminante, l'existence de ce pouvoir discrétionnaire en vertu de la *LFI* étaye l'existence d'un pouvoir discrétionnaire semblable en vertu de la *LACC* pour deux raisons.

[73] D'abord, cette conclusion serait compatible avec le fait que la Cour a reconnu que la *LACC* « établit un mécanisme plus souple, dans lequel les tribunaux disposent d'un <u>plus grand</u> pouvoir discrétionnaire » que sous le régime de la *LFI* (*Century Services*, par. 14 (nous soulignons)).

[74] Ensuite, la Cour a reconnu les bienfaits de l'harmonisation, dans la mesure du possible, des deux lois. À titre d'exemple, dans l'arrêt *Indalex*, la Cour a souligné que « pour éviter de précipiter une liquidation sous le régime de la *LFI*, les tribunaux privilégieront une interprétation de la *LACC* qui confère [. . .] aux créanciers [des droits analogues] » à ceux dont ils jouissent en vertu de la *LFI* (par. 51; voir également *Century Services*, par. 24; *Nortel Networks Corp., Re*, 2015 ONCA 681, 391 D.L.R. (4th) 283, par. 34-46). Ainsi, lorsque les lois permettent une interprétation harmonieuse, il y a lieu de retenir cette interprétation [TRADUCTION] « afin d'écarter les embûches pouvant découler du choix des créanciers de "recourir à la loi la plus favorable" [en matière d'insolvabilité] » (*Kitchener Frame Ltd.*, 2012 ONSC 234, 86 C.B.R. (5th) 274, par. 78; voir aussi par. 73). À notre avis, la manière dont a été formulé le « but illégitime » dans l'arrêt *Laserworks* — c'est-à-dire un but accessoire à l'objet de la loi en

discretion is to be exercised in accordance with the *CCAA*'s objectives as an insolvency statute.

matière d'insolvabilité — s'harmonise parfaitement avec la nature et la portée du pouvoir discrétionnaire judiciaire que confère la *LACC*. En effet, comme nous l'avons expliqué, ce pouvoir discrétionnaire doit être exercé conformément aux objets de la *LACC* en tant que loi en matière d'insolvabilité.

[75] We also observe that the recognition of this discretion under the *CCAA* advances the basic fairness that "permeates Canadian insolvency law and practice" (Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at p. 27; see also *Century Services*, at paras. 70 and 77). As Professor Sarra observes, fairness demands that supervising judges be in a position to recognize and meaningfully address circumstances in which parties are working against the goals of the statute:

> The Canadian insolvency regime is based on the assumption that creditors and the debtor share a common goal of maximizing recoveries. The substantive aspect of fairness in the insolvency regime is based on the assumption that all involved parties face real economic risks. Unfairness resides where only some face these risks, while others actually benefit from the situation . . . . If the *CCAA* is to be interpreted in a purposive way, the courts must be able to recognize when people have conflicting interests and are working actively against the goals of the statute. [Emphasis added.]

("The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at p. 30)

In this vein, the supervising judge's oversight of the *CCAA* voting regime must not only ensure strict compliance with the Act, but should further its goals as well. We are of the view that the policy objectives of the *CCAA* necessitate the recognition of the discretion to bar a creditor from voting where the creditor is acting for an improper purpose.

[75] Nous soulignons également que la reconnaissance de l'existence de ce pouvoir discrétionnaire sous le régime de la *LACC* favorise l'équité fondamentale qui [TRADUCTION] « imprègne le droit et la pratique en matière d'insolvabilité au Canada » (Sarra, « The Oscillating Pendulum : Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law », p. 27; voir également *Century Services*, par. 70 et 77). Comme le fait observer la professeure Sarra, l'équité commande que les juges surveillants soient en mesure de reconnaître les situations où les parties empêchent la réalisation des objectifs de la loi et de prendre des mesures utiles à leur égard :

> [TRADUCTION] Le régime d'insolvabilité canadien repose sur la présomption que les créanciers et le débiteur ont pour objectif commun de maximiser les recouvrements. L'aspect substantiel de la justice dans le régime d'insolvabilité repose sur la présomption que toutes les parties concernées sont exposées à de réels risques économiques. L'injustice réside dans les situations où seules certaines personnes sont exposées aux risques, tandis que d'autres tirent en fait avantage de la situation. [. . .] Si l'on veut que la *LACC* reçoive une interprétation téléologique, les tribunaux doivent être en mesure de reconnaître les situations où les gens ont des intérêts opposés et s'emploient activement à contrecarrer les objectifs de la loi. [Nous soulignons.]

(« The Oscillating Pendulum : Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law », p. 30)

Dans le même ordre d'idées, la surveillance du régime de droit de vote prévu par la *LACC* qu'exerce le juge surveillant ne doit pas seulement assurer une application stricte de la Loi, mais doit aussi favoriser la réalisation de ses objectifs. Nous estimons que la réalisation des objectifs de politique de la *LACC* nécessite la reconnaissance du pouvoir discrétionnaire d'empêcher un créancier de voter s'il agit dans un but illégitime.

[76] Whether this discretion ought to be exercised in a particular case is a circumstance-specific inquiry that must balance the various objectives of the *CCAA*. As this case demonstrates, the supervising judge is best-positioned to undertake this inquiry.

(3) The Supervising Judge Did Not Err in Prohibiting Callidus From Voting

[77] In our view, the supervising judge's decision to bar Callidus from voting on the New Plan discloses no error justifying appellate intervention. As we have explained, discretionary decisions like this one must be approached from the appropriate posture of deference. It bears mentioning that, when he made this decision, the supervising judge was intimately familiar with Bluberi's *CCAA* proceedings. He had presided over them for over 2 years, received 15 reports from the Monitor, and issued approximately 25 orders.

[78] The supervising judge considered the whole of the circumstances and concluded that Callidus's vote would serve an improper purpose (paras. 45 and 48). We agree with his determination. He was aware that, prior to the vote on the First Plan, Callidus had chosen not to value *any* of its claim as unsecured and later declined to vote at all — despite the Monitor explicitly inviting it do so.[4] The supervising judge was also aware that Callidus's First Plan had failed to receive the other creditors' approval at the creditors' meeting of December 15, 2017, and that Callidus had chosen not to take the opportunity to amend or increase the value of its plan at that time, which it was entitled to do (see *CCAA*, ss. 6 and 7; Monitor, I.F., at para. 17). Between the failure of the First Plan and the proposal of the New Plan — which was identical to the First Plan, save for a modest increase of $250,000 — none of the factual circumstances relating to Bluberi's financial or business

[4] It bears noting that the Monitor's statement in this regard did not decide whether Callidus would ultimately have been entitled to vote on the First Plan. Because Callidus did not even attempt to vote on the First Plan, this question was never put to the supervising judge.

[76] La question de savoir s'il y a lieu d'exercer le pouvoir discrétionnaire dans une situation donnée appelle une analyse fondée sur les circonstances propres à chaque situation qui doit mettre en balance les divers objectifs de la *LACC*. Comme le démontre le présent dossier, le juge surveillant est le mieux placé pour procéder à cette analyse.

(3) Le juge surveillant n'a pas commis d'erreur en interdisant à Callidus de voter

[77] À notre avis, la décision du juge surveillant d'empêcher Callidus de voter sur le nouveau plan ne révèle aucune erreur justifiant l'intervention d'une cour d'appel. Comme nous l'avons expliqué, il faut adopter l'attitude de déférence appropriée à l'égard des décisions discrétionnaires de ce genre. Il convient de mentionner que, lorsqu'il a rendu sa décision, le juge surveillant connaissait très bien les procédures fondées sur la *LACC* relatives à Bluberi. Il les avait présidées pendant plus de 2 ans, avait reçu 15 rapports du contrôleur et avait délivré environ 25 ordonnances.

[78] Le juge surveillant a tenu compte de l'ensemble des circonstances et a conclu que le vote de Callidus viserait un but illégitime (par. 45 et 48). Nous sommes d'accord avec cette conclusion. Il savait qu'avant le vote sur le premier plan, Callidus avait choisi de n'évaluer *aucune partie* de sa réclamation à titre de créancier non garanti et s'était par la suite abstenue de voter — bien que le contrôleur l'ait expressément invité à le faire[4]. Le juge surveillant savait aussi que le premier plan de Callidus n'avait pas reçu l'aval des autres créanciers à l'assemblée des créanciers tenue le 15 décembre 2017, et que Callidus avait choisi de ne pas profiter de l'occasion pour modifier ou augmenter la valeur de son plan à ce moment-là, ce qu'elle était en droit de faire (voir *LACC*, art. 6 et 7; contrôleur, m.i., par. 17). Entre l'insuccès du premier plan et la proposition du nouveau plan — qui était identique au premier plan, hormis la modeste augmentation de 250 000 $ — les

[4] Il convient de souligner que la déclaration du contrôleur à cet égard ne permettait pas de décider si Callidus aurait finalement eu le droit de voter sur le premier plan. Comme Callidus n'a même pas essayé de voter sur le premier plan, cette question n'a jamais été soumise au juge surveillant.

affairs had materially changed. However, Callidus sought to value the *entirety* of its security at *nil* and, on that basis, sought leave to vote on the New Plan as an unsecured creditor. If Callidus were permitted to vote in this way, the New Plan would certainly have met the s. 6(1) threshold for approval. In these circumstances, the inescapable inference was that Callidus was attempting to strategically value its security to acquire control over the outcome of the vote and thereby circumvent the creditor democracy the *CCAA* protects. Put simply, Callidus was seeking to take a "second kick at the can" and manipulate the vote on the New Plan. The supervising judge made no error in exercising his discretion to prevent Callidus from doing so.

circonstances factuelles se rapportant aux affaires financières ou commerciales de Bluberi n'avaient pas réellement changé. Pourtant, Callidus a tenté d'évaluer la *totalité* de sa sûreté à *zéro* et, sur cette base, a demandé l'autorisation de voter sur le nouveau plan à titre de créancier non garanti. Si Callidus avait été autorisée à voter de cette façon, le nouveau plan aurait certainement satisfait au critère d'approbation prévu par le par. 6(1). Dans ces circonstances, la seule conclusion possible était que Callidus tentait d'évaluer stratégiquement la valeur de sa sûreté afin de prendre le contrôle du vote et ainsi contourner la démocratie entre les créanciers que défend la *LACC*. En termes simples, Callidus cherchait à « se donner une seconde chance » et à manipuler le vote sur le nouveau plan. Le juge surveillant n'a pas commis d'erreur en exerçant son pouvoir discrétionnaire pour empêcher Callidus de le faire.

[79] Indeed, as the Monitor observes, "[o]nce a plan of arrangement or proposal has been submitted to the creditors of a debtor for voting purposes, to order a second creditors' meeting to vote on a substantially similar plan would not advance the policy objectives of the CCAA, nor would it serve and enhance the public's confidence in the process or otherwise serve the ends of justice" (I.F., at para. 18). This is particularly the case given that the cost of having another meeting to vote on the New Plan would have been upwards of $200,000 (see supervising judge's reasons, at para. 72).

[79] En effet, comme le fait observer le contrôleur, [TRADUCTION] « [u]ne fois que le plan d'arrangement ou la proposition ont été présentés aux créanciers du débiteur aux fins d'un vote, le fait d'ordonner la tenue d'une seconde assemblée des créanciers pour voter sur un plan à peu près semblable ne favoriserait pas la réalisation des objectifs de politique de la LACC, pas plus qu'il ne servirait ou n'accroîtrait la confiance du public dans le processus ou ne servirait par ailleurs les fins de la justice » (m.i., par. 18). C'est particulièrement le cas en l'espèce étant donné que la tenue d'une autre assemblée pour voter sur le nouveau plan aurait coûté plus de 200 000 $ (voir les motifs du juge surveillant, par. 72).

[80] We add that Callidus's course of action was plainly contrary to the expectation that parties act with due diligence in an insolvency proceeding — which, in our view, includes acting with due diligence in valuing their claims and security. At all material times, Bluberi's Retained Claims have been the sole asset securing Callidus's claim. Callidus has pointed to nothing in the record that indicates that the value of the Retained Claims has changed. Had Callidus been of the view that the Retained Claims had no value, one would have expected Callidus to have valued its security accordingly prior to the vote on the First Plan, if not earlier. Parenthetically, we note that, irrespective of the timing, an attempt at

[80] Ajoutons que la façon d'agir de Callidus était manifestement contraire à l'attente selon laquelle les parties agissent avec diligence dans les procédures d'insolvabilité — ce qui, à notre avis, comprend le fait de faire preuve de diligence raisonnable dans l'évaluation de leurs réclamations et sûretés. Pendant toute la période pertinente, les réclamations retenues de Bluberi ont constitué les seuls éléments d'actif garantissant la réclamation de Callidus. Cette dernière n'a rien relevé dans le dossier qui indique que la valeur des réclamations retenues a changé. Si Callidus estimait que les réclamations retenues n'avaient aucune valeur, on se serait attendu à ce qu'elle ait évalué sa sûreté en conséquence avant

such a valuation may well have failed. This would have prevented Callidus from voting as an unsecured creditor, even in the absence of Callidus's improper purpose.

le vote sur le premier plan, voire même plus tôt. Nous ouvrons une parenthèse pour souligner que, peu importe le moment, la tentative d'évaluer ainsi la sûreté aurait pu fort bien échouer. Cela aurait empêché Callidus de voter à titre de créancier non garanti même si elle ne poursuivait pas de but illégitime.

[81] As we have indicated, discretionary decisions attract a highly deferential standard of review. Deference demands that review of a discretionary decision begin with a proper characterization of the basis for the decision. Respectfully, the Court of Appeal failed in this regard. The Court of Appeal seized on the supervising judge's somewhat critical comments relating to Callidus's goal of being released from the Retained Claims and its conduct throughout the proceedings as being incapable of grounding a finding of improper purpose. However, as we have explained, these considerations did not drive the supervising judge's conclusion. His conclusion was squarely based on Callidus' attempt to manipulate the creditors' vote to ensure that its New Plan would succeed where its First Plan had failed (see supervising judge's reasons, at paras. 45-48). We see nothing in the Court of Appeal's reasons that grapples with this decisive impropriety, which goes far beyond a creditor merely acting in its own self-interest.

[81] Comme nous l'avons indiqué, les décisions discrétionnaires appellent une norme de contrôle empreinte d'une grande déférence. La déférence commande que l'examen d'une décision discrétionnaire commence par la qualification appropriée du fondement de la décision. Soit dit en tout respect, la Cour d'appel a échoué à cet égard. La Cour d'appel s'est saisie des commentaires quelque peu critiques formulés par le juge surveillant à l'égard de l'objectif de Callidus d'être libérée des réclamations retenues et de la conduite de celle-ci tout au long des procédures pour affirmer qu'il ne s'agissait pas de considérations pouvant donner lieu à une conclusion de but illégitime. Toutefois, comme nous l'avons expliqué, ce ne sont pas ces considérations qui ont amené le juge surveillant à tirer sa conclusion. Sa conclusion reposait nettement sur la tentative de Callidus de manipuler le vote des créanciers pour faire en sorte que son nouveau plan soit retenu alors que son premier plan ne l'avait pas été (voir les motifs du juge surveillant, par. 45-48). Nous ne voyons rien dans les motifs de la Cour d'appel qui s'attaque à cette irrégularité déterminante, qui va beaucoup plus loin que le simple fait pour un créancier d'agir dans son propre intérêt.

[82] In sum, we see nothing in the supervising judge's reasons on this point that would justify appellate intervention. Callidus was properly barred from voting on the New Plan.

[82] En résumé, nous ne voyons rien dans les motifs du juge surveillant sur ce point qui justifie l'intervention d'une cour d'appel. Callidus a été à juste titre empêchée de voter sur le nouveau plan.

[83] Before moving on, we note that the Court of Appeal addressed two further issues: whether Callidus is "related" to Bluberi within the meaning of s. 22(3) of the *CCAA*; and whether, if permitted to vote, Callidus should be ordered to vote in a separate class from Bluberi's other creditors (see *CCAA*, s. 22(1) and (2)). Given our conclusion that the supervising judge did not err in barring Callidus from voting on the New Plan on the basis that Callidus was acting for an improper purpose, it is unnecessary to

[83] Avant de passer au prochain point, soulignons que la Cour d'appel a abordé deux questions supplémentaires : Callidus est-elle « liée » à Bluberi au sens du par. 22(3) de la *LACC*? Si Callidus est autorisée à voter, convient-il de lui ordonner de voter dans une catégorie distincte des autres créanciers de Bluberi (voir la *LACC*, par. 22(1) et (2))? Vu notre conclusion que le juge surveillant n'a pas commis d'erreur en interdisant à Callidus de voter sur le nouveau plan au motif qu'elle avait agi dans un but illégitime, il n'est

address either of these issues. However, nothing in our reasons should be read as endorsing the Court of Appeal's analysis of them.

C. *Bluberi's LFA Should Be Approved as Interim Financing*

[84] In our view, the supervising judge made no error in approving the LFA as interim financing pursuant to s. 11.2 of the *CCAA*. Interim financing is a flexible tool that may take on a range of forms. As we will explain, third party litigation funding may be one such form. Whether third party litigation funding should be approved as interim financing is a case-specific inquiry that should have regard to the text of s. 11.2 and the remedial objectives of the *CCAA* more generally.

(1) Interim Financing and Section 11.2 of the *CCAA*

[85] Interim financing, despite being expressly provided for in s. 11.2 of the *CCAA*, is not defined in the Act. Professor Sarra has described it as "refer[ring] primarily to the working capital that the debtor corporation requires in order to keep operating during restructuring proceedings, as well as to the financing to pay the costs of the workout process" (*Rescue! The Companies' Creditors Arrangement Act*, at p. 197). Interim financing used in this way — sometimes referred to as "debtor-in-possession" financing — protects the going-concern value of the debtor company while it develops a workable solution to its insolvency issues (p. 197; *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314 (Ont. C.J. (Gen. Div.)), at paras. 7, 9 and 24; *Boutiques San Francisco Inc. v. Richter & Associés Inc.*, 2003 CanLII 36955 (Que. Sup. Ct.), at para. 32). That said, interim financing is not limited to providing debtor companies with immediate operating capital. Consistent with the remedial objectives of the *CCAA*, interim financing

pas nécessaire de se prononcer sur l'une ou l'autre de ces questions. Cependant, rien dans les présents motifs ne doit être interprété comme souscrivant à l'analyse que la Cour d'appel a faite de ces questions.

C. *L'AFL de Bluberi devrait être approuvé à titre de financement temporaire*

[84] À notre avis, le juge surveillant n'a commis aucune erreur en approuvant l'AFL à titre de financement temporaire en vertu de l'art. 11.2 de la *LACC*. Le financement temporaire est un outil souple qui peut revêtir différentes formes. Comme nous l'expliquerons, le financement d'un litige par un tiers peut constituer l'une de ces formes. La question de savoir s'il y a lieu d'approuver le financement d'un litige par un tiers à titre de financement temporaire commande une analyse fondée sur les faits de l'espèce qui doit tenir compte du libellé de l'art. 11.2 et des objectifs réparateurs de la *LACC* de façon plus générale.

(1) Le financement temporaire et l'art. 11.2 de la *LACC*

[85] Bien qu'il soit expressément prévu par l'art. 11.2 de la *LACC*, le financement temporaire n'est pas défini dans la Loi. La professeure Sarra l'a décrit comme [TRADUCTION] « vis[ant] principalement le fonds de roulement dont a besoin la société débitrice pour continuer de fonctionner pendant la restructuration ainsi que les fonds nécessaires pour payer les frais liés au processus de sauvetage » (*Rescue! The Companies' Creditors Arrangement Act*, p. 197). Utilisé de cette façon, le financement temporaire — parfois appelé financement de [TRADUCTION] « débiteur-exploitant » — protège la valeur d'exploitation de la compagnie débitrice pendant qu'elle met au point une solution viable à ses problèmes d'insolvabilité (p. 197; *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314 (C.J. Ont. (Div. gén.)), par. 7, 9 et 24; *Boutiques San Francisco Inc. c. Richter & Associés Inc.*, 2003 CanLII 36955 (C.S. Qc), par. 32). Cela dit, le financement temporaire ne se limite pas à fournir un fonds de roulement

at its core enables the preservation and realization of the value of a debtor's assets.

[86] Since 2009, s. 11.2(1) of the *CCAA* has codified a supervising judge's discretion to approve interim financing, and to grant a corresponding security or charge in favour of the lender in the amount the judge considers appropriate:

Interim financing

11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

[87] The breadth of a supervising judge's discretion to approve interim financing is apparent from the wording of s. 11.2(1). Aside from the protections regarding notice and pre-filing security, s. 11.2(1) does not mandate any standard form or terms.[5] It simply provides that the financing must be in an amount that is "appropriate" and "required by the company, having regard to its cash-flow statement".

[5] A further exception has been codified in the 2019 amendments to the *CCAA*, which create s. 11.2(5) (see *Budget Implementation Act, 2019, No. 1*, s. 138). This section provides that at the time an initial order is sought, "no order shall be made under subsection [11.2](1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period". This provision does not apply in this case, and the parties have not relied on it. However, it may be that it restricts the ability of supervising judges to approve LFAs as interim financing at the time of granting an Initial Order.

immédiat aux compagnies débitrices. Conformément aux objectifs réparateurs de la *LACC*, le financement temporaire permet essentiellement de préserver et de réaliser la valeur des éléments d'actif du débiteur.

[86] Depuis 2009, le par. 11.2(1) de la *LACC* a codifié le pouvoir discrétionnaire du juge surveillant d'approuver le financement temporaire et d'accorder une charge ou une sûreté correspondante, d'un montant qu'il estime indiqué, en faveur du prêteur :

Financement temporaire

11.2 (1) Sur demande de la compagnie débitrice, le tribunal peut par ordonnance, sur préavis de la demande aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de la compagnie sont grevés d'une charge ou sûreté — d'un montant qu'il estime indiqué — en faveur de la personne nommée dans l'ordonnance qui accepte de prêter à la compagnie la somme qu'il approuve compte tenu de l'état de l'évolution de l'encaisse et des besoins de celle-ci. La charge ou sûreté ne peut garantir qu'une obligation postérieure au prononcé de l'ordonnance.

[87] L'étendue du pouvoir discrétionnaire du juge surveillant d'approuver le financement temporaire ressort du libellé du par. 11.2(1). Abstraction faite des protections concernant le préavis et les sûretés constituées avant le dépôt des procédures, le par. 11.2(1) ne prescrit aucune forme ou condition type[5]. Il prévoit simplement que le financement doit être d'un montant qui est « indiqué » et qui tient compte de « l'état de l'évolution de l'encaisse et des besoins de [la compagnie] ».

[5] Une autre exception a été codifiée dans les modifications apportées en 2019 à la *LACC* qui créent le par. 11.2(5) (voir *Loi nº 1 d'exécution du budget de 2019*, art. 138). Cet article prévoit que, lorsqu'une ordonnance relative à la demande initiale a été demandée, « le tribunal ne rend l'ordonnance visée au paragraphe [11.2](1) que s'il est également convaincu que les modalités du financement temporaire demandé sont limitées à ce qui est normalement nécessaire à la continuation de l'exploitation de la compagnie débitrice dans le cours ordinaire de ses affaires durant cette période ». Cette disposition ne s'applique pas en l'espèce, et les parties ne l'ont pas invoquée. Toutefois, il se peut qu'elle ait pour effet d'empêcher les juges surveillants d'approuver des AFL à titre de financement temporaire au moment où l'ordonnance relative à la demande initiale est rendue.

[88] The supervising judge may also grant the lender a "super-priority charge" that will rank in priority over the claims of any secured creditors, pursuant to s. 11.2(2):

Priority — secured creditors

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[89] Such charges, also known as "priming liens", reduce lenders' risks, thereby incentivizing them to assist insolvent companies (Innovation, Science and Economic Development Canada, *Archived — Bill C-55: clause by clause analysis*, last updated December 29, 2016 (online), cl. 128, s. 11.2; Wood, at p. 387). As a practical matter, these charges are often the only way to encourage this lending. Normally, a lender protects itself against lending risk by taking a security interest in the borrower's assets. However, debtor companies under *CCAA* protection will often have pledged all or substantially all of their assets to other creditors. Accordingly, without the benefit of a super-priority charge, an interim financing lender would rank behind those other creditors (McElcheran, at pp. 298-99). Although super-priority charges do subordinate secured creditors' security positions to the interim financing lender's — a result that was controversial at common law — Parliament has indicated its general acceptance of the trade-offs associated with these charges by enacting s. 11.2(2) (see M. B. Rotsztain and A. Dostal, "Debtor-In-Possession Financing", in S. Ben-Ishai and A. Duggan, eds., *Canadian Bankruptcy and Insolvency Law: Bill C-55, Statute c. 47 and Beyond* (2007), 227, at pp. 228-29 and 240-50). Indeed, this balance was expressly considered by the Standing Senate Committee on Banking, Trade and Commerce that recommended codifying interim financing in the *CCAA* (pp. 100-104).

[90] Ultimately, whether proposed interim financing should be approved is a question that the supervising judge is best-placed to answer. The *CCAA*

[88] Le juge surveillant peut également accorder au prêteur une « charge super prioritaire » qui aura priorité sur toute réclamation des créanciers garantis, en vertu du par. 11.2(2) :

Priorité — créanciers garantis

(2) Le tribunal peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la compagnie.

[89] Ces charges, également appelées « superprivilèges », réduisent les risques des prêteurs, les incitant ainsi à aider les compagnies insolvables (Innovation, Sciences et Développement économique Canada, *Archivé — Projet de loi C-55 : analyse article par article*, dernière mise à jour le 29 décembre 2016 (en ligne), cl. 128, art. 11.2; Wood, p. 387). Sur le plan pratique, ces charges constituent souvent le seul moyen d'encourager ce type de prêt. Généralement, le prêteur se protège contre le risque de crédit en prenant une sûreté sur les éléments d'actifs de l'emprunteur. Or, les compagnies débitrices qui sont sous la protection de la *LACC* ont souvent donné en gage la totalité ou la presque totalité de leurs actifs à d'autres créanciers. En l'absence d'une charge super prioritaire, le prêteur qui accepte d'apporter un financement temporaire prendrait rang derrière les autres créanciers (McElcheran, p. 298-299). Bien que la charge super prioritaire subordonne les sûretés des créanciers garantis à celle du prêteur qui apporte un financement temporaire — un résultat qui a suscité la controverse en common law — le législateur a signifié son acceptation générale des transactions allant de pair avec ces charges en adoptant le par. 11.2(2) (voir M. B. Rotsztain et A. Dostal, « Debtor-In-Possession Financing », dans S. Ben-Ishai et A. Duggan, dir., *Canadian Bankruptcy and Insolvency Law : Bill C-55, Statute c. 47 and Beyond* (2007), 227, p. 228-229 et 240-250). En effet, cet équilibre a été expressément pris en considération par le Comité sénatorial permanent des banques et du commerce, qui a recommandé la codification du financement temporaire dans la *LACC* (p. 111-115).

[90] Au bout du compte, la question de savoir s'il y a lieu d'approuver le financement temporaire projeté est une question à laquelle le juge surveillant est le

sets out a number of factors that help guide the exercise of this discretion. The inclusion of these factors in s. 11.2 was informed by the Standing Senate Committee on Banking, Trade and Commerce's view that they would help meet the "fundamental principles" that have guided the development of Canadian insolvency law, including "fairness, predictability and efficiency" (p. 103; see also Innovation, Science and Economic Development Canada, cl. 128, s. 11.2). In deciding whether to grant interim financing, the supervising judge is to consider the following non-exhaustive list of factors:

Factors to be considered

(4) In deciding whether to make an order, the court is to consider, among other things,

(a) the period during which the company is expected to be subject to proceedings under this Act;

(b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report referred to in paragraph 23(1)(b), if any.

(*CCAA*, s. 11.2(4))

[91] Prior to the coming into force of the above provisions in 2009, courts had been using the general discretion conferred by s. 11 to authorize interim financing and associated super-priority charges

mieux placé pour répondre. La *LACC* énonce un certain nombre de facteurs qui encadrent l'exercice de ce pouvoir discrétionnaire. L'inclusion de ces facteurs dans le par. 11.2 reposait sur le point de vue du Comité sénatorial permanent des banques et du commerce selon lequel ils permettraient de respecter les « principes fondamentaux » ayant guidé la conception des lois en matière d'insolvabilité au Canada, notamment « l'équité, la prévisibilité et l'efficience » (p. 115; voir également Innovation, Sciences et Développement économique Canada, cl. 128, art. 11.2). Pour décider s'il y a lieu d'accorder le financement temporaire, le juge surveillant doit prendre en considération les facteurs non exhaustifs suivants :

Facteurs à prendre en considération

(4) Pour décider s'il rend l'ordonnance, le tribunal prend en considération, entre autres, les facteurs suivants :

a) la durée prévue des procédures intentées à l'égard de la compagnie sous le régime de la présente loi;

b) la façon dont les affaires financières et autres de la compagnie seront gérées au cours de ces procédures;

c) la question de savoir si ses dirigeants ont la confiance de ses créanciers les plus importants;

d) la question de savoir si le prêt favorisera la conclusion d'une transaction ou d'un arrangement viable à l'égard de la compagnie;

e) la nature et la valeur des biens de la compagnie;

f) la question de savoir si la charge ou sûreté causera un préjudice sérieux à l'un ou l'autre des créanciers de la compagnie;

g) le rapport du contrôleur visé à l'alinéa 23(1)b).

(*LACC*, par. 11.2(4))

[91] Avant l'entrée en vigueur en 2009 des dispositions susmentionnées, les tribunaux utilisaient le pouvoir discrétionnaire général que confère l'art. 11 pour autoriser le financement temporaire

(*Century Services*, at para. 62). Section 11.2 largely codifies the approaches those courts have taken (Wood, at p. 388; McElcheran, at p. 301). As a result, where appropriate, guidance may be drawn from the pre-codification interim financing jurisprudence.

et la constitution des charges super prioritaires s'y rattachant (*Century Services*, par. 62). L'article 11.2 codifie en grande partie les approches adoptées par ces tribunaux (Wood, p. 388; McElcheran, p. 301). En conséquence, il est possible, le cas échéant, de s'inspirer de la jurisprudence relative au financement temporaire antérieure à la codification.

[92] As with other measures available under the *CCAA*, interim financing is a flexible tool that may take different forms or attract different considerations in each case. Below, we explain that third party litigation funding may, in appropriate cases, be one such form.

[92] Comme c'est le cas pour les autres mesures susceptibles d'être prises sous le régime de la *LACC*, le financement temporaire est un outil souple qui peut revêtir différentes formes ou faire intervenir différentes considérations dans chaque cas. Comme nous l'expliquerons plus loin, le financement d'un litige par un tiers peut, dans les cas qui s'y prêtent, constituer l'une de ces formes.

(2) Supervising Judges May Approve Third Party Litigation Funding as Interim Financing

(2) Les juges surveillants peuvent approuver le financement d'un litige par un tiers à titre de financement temporaire

[93] Third party litigation funding generally involves "a third party, otherwise unconnected to the litigation, agree[ing] to pay some or all of a party's litigation costs, in exchange for a portion of that party's recovery in damages or costs" (R. K. Agarwal and D. Fenton, "Beyond Access to Justice: Litigation Funding Agreements Outside the Class Actions Context" (2017), 59 *Can. Bus. L.J*. 65, at p. 65). Third party litigation funding can take various forms. A common model involves the litigation funder agreeing to pay a plaintiff's disbursements and indemnify the plaintiff in the event of an adverse cost award in exchange for a share of the proceeds of any successful litigation or settlement (see *Dugal v. Manulife Financial Corp.*, 2011 ONSC 1785, 105 O.R. (3d) 364; *Bayens*).

[93] Le financement d'un litige par un tiers met généralement en cause [TRADUCTION] « un tiers, n'ayant par ailleurs aucun lien avec le litige, [qui] accepte de payer une partie ou la totalité des frais de litige d'une partie, en échange d'une portion de la somme recouvrée par cette partie au titre des dommages-intérêts ou des dépens » (R. K. Agarwal et D. Fenton, « Beyond Access to Justice : Litigation Funding Agreements Outside the Class Actions Context » (2017), 59 *Rev. can. dr. comm.* 65, p. 65). Le financement d'un litige par un tiers peut revêtir diverses formes. Un modèle courant met en cause un bailleur de fonds de litiges qui s'engage à payer les débours du demandeur et à indemniser ce dernier dans l'éventualité d'une adjudication des dépens défavorable, en échange d'une partie de la somme obtenue dans le cadre d'un procès ou d'un règlement couronné de succès (voir *Dugal c. Manulife Financial Corp.*, 2011 ONSC 1785, 105 O.R. (3d) 364; *Bayens*).

[94] Outside of the *CCAA* context, the approval of third party litigation funding agreements has been somewhat controversial. Part of that controversy arises from the potential of these agreements to offend the common law doctrines of champerty and

[94] En dehors du cadre de la *LACC*, l'approbation des accords de financement d'un litige par un tiers a été quelque peu controversée. Une partie de cette controverse découle de la possibilité que ces accords portent atteinte aux doctrines de common

maintenance.[6] The tort of maintenance prohibits "officious intermeddling with a lawsuit which in no way belongs to one" (L. N. Klar et al., *Remedies in Tort* (loose-leaf), vol. 1, by L. Berry, ed., at p. 14-11, citing *Langtry v. Dumoulin* (1884), 7 O.R. 644 (Ch. Div.), at p. 661). Champerty is a species of maintenance that involves an agreement to share in the proceeds or otherwise profit from a successful suit (*McIntyre Estate v. Ontario (Attorney General)* (2002), 218 D.L.R. (4th) 193 (Ont. C.A.), at para. 26).

law concernant la champartie (*champerty*) et le soutien abusif (*maintenance*)[6]. Le délit de soutien abusif interdit [TRADUCTION] « l'immixtion trop empressée dans une action avec laquelle on n'a rien à voir » (L. N. Klar et autres, *Remedies in Tort* (feuilles mobiles), vol. 1, par L. Berry, dir., p. 14-11, citant *Langtry c. Dumoulin* (1884), 7 O.R. 644 (Ch. Div.), p. 661). La champartie est une sorte de soutien abusif qui comporte un accord prévoyant le partage de la somme obtenue ou de tout autre profit réalisé dans le cadre d'une action réussie (*McIntyre Estate c. Ontario (Attorney General)* (2002), 218 D.L.R. (4th) 193 (C.A. Ont.), par. 26).

[95] Building on jurisprudence holding that *contingency fee* arrangements are not champertous where they are not motivated by an improper purpose (e.g., *McIntyre Estate*), lower courts have increasingly come to recognize that *litigation funding* agreements are also not *per se* champertous. This development has been focussed within class action proceedings, where it arose as a response to barriers like adverse cost awards, which were stymieing litigants' access to justice (see *Dugal*, at para. 33; *Marcotte v. Banque de Montréal*, 2015 QCCS 1915, at paras. 43-44 (CanLII); *Houle v. St. Jude Medical Inc.*, 2017 ONSC 5129, 9 C.P.C. (8th) 321, at para. 52, aff'd 2018 ONSC 6352, 429 D.L.R. (4th) 739 (Div. Ct.); see also *Stanway v. Wyeth*, 2013 BCSC 1585, 56 B.C.L.R. (5th) 192, at para. 13). The jurisprudence on the approval of third party litigation funding agreements in the class action context — and indeed, the parameters of their legality generally — is still evolving, and no party before this Court has invited us to evaluate it.

[95] S'appuyant sur la jurisprudence voulant que les conventions d'*honoraires conditionnels* ne constituent pas de la champartie lorsqu'elles ne sont pas motivées par un but illégitime (p. ex., *McIntyre Estate*), les tribunaux d'instance inférieure en sont venus progressivement à reconnaître que les accords de *financement d'un litige* ne constituent pas non plus de la champartie *en soi*. Cette évolution s'est opérée surtout dans le contexte des recours collectifs, en réaction aux obstacles, comme les adjudications de dépens défavorables, qui entravaient l'accès des parties à la justice (voir *Dugal*, par. 33; *Marcotte c. Banque de Montréal*, 2015 QCCS 1915, par. 43-44 (CanLII); *Houle c. St. Jude Medical Inc.*, 2017 ONSC 5129, 9 C.P.C. (8th) 321, par. 52, conf. par 2018 ONSC 6352, 429 D.L.R. (4th) 739 (C. div.); voir également *Stanway c. Wyeth*, 2013 BCSC 1585, 56 B.C.L.R. (5th) 192, par. 13). La jurisprudence relative à l'approbation des accords de financement de litige par un tiers dans le contexte des recours collectifs — et même les paramètres de leur légalité en général — continue d'évoluer, et aucune des parties au présent pourvoi ne nous a invités à l'analyser.

[6] The extent of this controversy varies by province. In Ontario, champertous agreements are forbidden by statute (see *An Act respecting Champerty*, R.S.O. 1897, c. 327). In Quebec, concerns associated with champerty and maintenance do not arise as acutely because champerty and maintenance are not part of the law as such (see *Montgrain v. Banque nationale du Canada*, 2006 QCCA 557, [2006] R.J.Q. 1009; G. Michaud, "New Frontier: The Emergence of Litigation Funding in the Canadian Insolvency Landscape" in J. P. Sarra et al., eds., *Annual Review of Insolvency Law 2018* (2019), 221, at p. 231).

[6] L'ampleur de la controverse varie selon les provinces. En Ontario, les accords de champartie sont interdits par la loi (voir *An Act respecting Champerty*, R.S.O. 1897, c. 327). Au Québec, les questions relatives à la champartie et au soutien abusif ne se posent pas de façon aussi aiguë parce que la champartie et le soutien abusif ne font pas partie du droit comme tel (voir *Montgrain c. Banque nationale du Canada*, 2006 QCCA 557, [2006] R.J.Q. 1009; G. Michaud, « New Frontier : The Emergence of Litigation Funding in the Canadian Insolvabilité Landscape » dans J. P. Sarra et autres, dir., *Annual Review of Insolvency Law 2018* (2019), 221, p. 231).

[96] That said, insofar as third party litigation funding agreements are not *per se* illegal, there is no principled basis upon which to restrict supervising judges from approving such agreements as interim financing in appropriate cases. We acknowledge that this funding differs from more common forms of interim financing that are simply designed to help the debtor "keep the lights on" (see *Royal Oak*, at paras. 7 and 24). However, in circumstances like the case at bar, where there is a single litigation asset that could be monetized for the benefit of creditors, the objective of maximizing creditor recovery has taken centre stage. In those circumstances, litigation funding furthers the basic purpose of interim financing: allowing the debtor to realize on the value of its assets.

[97] We conclude that third party litigation funding agreements may be approved as interim financing in *CCAA* proceedings when the supervising judge determines that doing so would be fair and appropriate, having regard to all the circumstances and the objectives of the Act. This requires consideration of the specific factors set out in s. 11.2(4) of the *CCAA*. That said, these factors need not be mechanically applied or individually reviewed by the supervising judge. Indeed, not all of them will be significant in every case, nor are they exhaustive. Further guidance may be drawn from other areas in which third party litigation funding agreements have been approved.

[98] The foregoing is consistent with the practice that is already occurring in lower courts. Most notably, in *Crystallex*, the Ontario Court of Appeal approved a third party litigation funding agreement in circumstances substantially similar to the case at bar. *Crystallex* involved a mining company that had the right to develop a large gold deposit in Venezuela. Crystallex eventually became insolvent and (similar to Bluberi) was left with only a single significant asset: a US$3.4 billion arbitration claim against Venezuela. After entering *CCAA* protection,

[96] Cela dit, dans la mesure où les accords de financement de litige par un tiers ne sont pas illégaux *en soi*, il n'y a aucune raison de principe qui permet d'empêcher les juges surveillants d'approuver ce type d'accord à titre de financement temporaire dans les cas qui s'y prêtent. Nous reconnaissons que cette forme de financement diffère des formes plus courantes de financement temporaire qui visent simplement à aider le débiteur à [TRADUCTION] « payer les frais courants » (voir *Royal Oak*, par. 7 et 24). Toutefois, dans des circonstances semblables à celles en l'espèce, lorsqu'il existait un seul élément d'actif susceptible de monétisation au bénéfice des créanciers, l'objectif visant à maximiser le recouvrement des créanciers a occupé le devant de la scène. En pareilles circonstances, le financement de litige favorise la réalisation de l'objectif fondamental du financement temporaire : permettre au débiteur de réaliser la valeur de ses éléments d'actif.

[97] Nous concluons que les accords de financement de litige par un tiers peuvent être approuvés à titre de financement temporaire dans le cadre des procédures fondées sur la *LACC* lorsque le juge surveillant estime qu'il serait juste et approprié de le faire, compte tenu de l'ensemble des circonstances et des objectifs de la Loi. Cela implique la prise en considération des facteurs précis énoncés au par. 11.2(4) de la *LACC*. Cela dit, ces facteurs ne doivent pas être appliqués machinalement ou examinés individuellement par le juge surveillant. En effet, ils ne seront pas tous importants dans tous les cas, et ils ne sont pas non plus exhaustifs. Des enseignements supplémentaires peuvent être tirés d'autres domaines où des accords de financement de litige par un tiers ont été approuvés.

[98] Ce qui précède est compatible avec la pratique qui a déjà cours devant les tribunaux d'instance inférieure. Plus particulièrement, dans *Crystallex*, la Cour d'appel de l'Ontario a approuvé un accord de financement de litige par un tiers dans des circonstances très semblables à celles en l'espèce. Cette affaire mettait en cause une société minière ayant le droit d'exploiter un grand gisement d'or au Venezuela. Crystallex est finalement devenue insolvable, et (comme Bluberi) il ne lui restait plus qu'un seul élément d'actif important : une réclamation

Crystallex sought the approval of a third party litigation funding agreement. The agreement contemplated that the lender would advance substantial funds to finance the arbitration in exchange for, among other things, a percentage of the net proceeds of any award or settlement. The supervising judge approved the agreement as interim financing pursuant to s. 11.2. The Court of Appeal unanimously found no error in the supervising judge's exercise of discretion. It concluded that s. 11.2 "does not restrict the ability of the supervising judge, where appropriate, to approve the grant of a charge securing financing before a plan is approved that may continue after the company emerges from CCAA protection" (para. 68).

[99] A key argument raised by the creditors in *Crystallex* — and one that Callidus and the Creditors' Group have put before us now — was that the litigation funding agreement at issue was a plan of arrangement and not interim financing. This was significant because, if the agreement was in fact a plan, it would have had to be put to a creditors' vote pursuant to ss. 4 and 5 of the *CCAA* prior to receiving court approval. The court in *Crystallex* rejected this argument, as do we.

[100] There is no definition of plan of arrangement in the *CCAA*. In fact, the *CCAA* does not refer to plans at all — it only refers to an "arrangement" or "compromise" (see ss. 4 and 5). The authors of *Bankruptcy and Insolvency Law of Canada* offer the following general definition of these terms, relying on early English case law:

> A "compromise" presupposes some dispute about the rights compromised and a settling of that dispute on terms that are satisfactory to the debtor and the creditor. An agreement to accept less than 100¢ on the dollar would be a compromise where the debtor disputes the debt or lacks the means to pay it. "Arrangement" is a broader word

d'arbitrage de 3,4 milliards de dollars américains contre le Venezuela. Après s'être placée sous la protection de la *LACC*, Crystallex a demandé l'approbation d'un accord de financement de litige par un tiers. L'accord prévoyait que le prêteur avancerait des fonds importants pour financer l'arbitrage en échange, notamment, d'un pourcentage de la somme nette obtenue à la suite d'une sentence ou d'un règlement. Le juge surveillant a approuvé l'accord à titre de financement temporaire en vertu de l'art. 11.2. La Cour d'appel a conclu à l'unanimité que le juge surveillant n'avait commis aucune erreur dans l'exercice de son pouvoir discrétionnaire. Elle a conclu que l'art. 11.2 [TRADUCTION] « n'empêche pas le juge surveillant d'approuver, s'il y a lieu, avant qu'un plan soit approuvé, l'octroi d'une charge garantissant un financement qui pourra continuer après que la compagnie aura émergé de la protection de la *LACC* » (par. 68).

[99] Dans *Crystallex*, l'un des principaux arguments soulevés par les créanciers — et l'un de ceux qu'ont soulevés Callidus et le groupe de créanciers dans le présent pourvoi — était que l'accord de financement de litige en cause était un plan d'arrangement et non pas un financement temporaire. Il s'agissait d'un argument important car, si l'accord était en fait un plan, il aurait dû être soumis à un vote des créanciers conformément aux art. 4 et 5 de la *LACC* avant de recevoir l'aval du tribunal. La cour, dans *Crystallex*, a rejeté cet argument, et nous en faisons autant.

[100] La *LACC* ne définit pas le plan d'arrangement. En fait, la *LACC* ne fait aucunement allusion aux plans — elle fait uniquement état d'un « arrangement » ou d'une « transaction » (voir art. 4 et 5). S'appuyant sur l'ancienne jurisprudence anglaise, les auteurs de *Bankruptcy and Insolvency Law of Canada* proposent la définition générale suivante de ces termes :

> [TRADUCTION] La « transaction » suppose d'emblée l'existence d'un différend au sujet des droits visés par la transaction et d'un règlement de ce différend selon des conditions jugées satisfaisantes par le débiteur et le créancier. L'accord visant à accepter une somme inférieure à 100 ¢ par dollar constituerait une transaction lorsque

than "compromise" and is not limited to something analogous to a compromise. It would include any scheme for reorganizing the affairs of the debtor: *Re Guardian Assur. Co.,* [1917] 1 Ch. 431, 61 Sol. Jo 232, [1917] H.B.R. 113 (C.A.); *Re Refund of Dues under Timber Regulations,* [1935] A.C. 185 (P.C.).

(Houlden, Morawetz and Sarra, at §33)

[101] The apparent breadth of these terms notwithstanding, they do have some limits. More recent jurisprudence suggests that they require, at minimum, some compromise of creditors' rights. For example, in *Crystallex* the litigation funding agreement at issue (known as the Tenor DIP facility) was held not to be a plan of arrangement because it did not "compromise the terms of [the creditors'] indebtedness or take away . . . their legal rights" (para. 93). The Court of Appeal adopted the following reasoning from the lower court's decision, with which we substantially agree:

A "plan of arrangement" or a "compromise" is not defined in the CCAA. It is, however, to be an arrangement or compromise between a debtor and its creditors. The Tenor DIP facility is not on its face such an arrangement or compromise between Crystallex and its creditors. Importantly the rights of the noteholders are not taken away from them by the Tenor DIP facility. The noteholders are unsecured creditors. Their rights are to sue to judgment and enforce the judgment. If not paid, they have a right to apply for a bankruptcy order under the BIA. Under the CCAA, they have the right to vote on a plan of arrangement or compromise. None of these rights are taken away by the Tenor DIP.

(*Re Crystallex International Corporation*, 2012 ONSC 2125, 91 C.B.R. (5th) 169, at para. 50)

[102] Setting out an exhaustive definition of plan of arrangement or compromise is unnecessary to resolve these appeals. For our purposes, it is sufficient to conclude that plans of arrangement require at least

le débiteur conteste la dette ou n'a pas les moyens de la payer. Le mot « arrangement » a un sens plus large que le mot « transaction » et ne se limite pas à quelque chose qui ressemble à une transaction. Il viserait tout plan de réorganisation des affaires du débiteur : *Re Guardian Assur. Co.*, [1917] 1 Ch. 431, 61 Sol. Jo 232, [1917] H.B.R. 113 (C.A.); *Re Refund of Dues under Timber Regulations*, [1935] A.C. 185 (C.P.).

(Houlden, Morawetz et Sarra, §33)

[101] Malgré leur vaste portée apparente, ces termes connaissent quand même certaines limites. Selon une jurisprudence plus récente, ils exigeraient, à tout le moins, une certaine transaction à l'égard des droits des créanciers. Dans *Crystallex*, par exemple, on a conclu que l'accord de financement de litige en cause (également appelé [TRADUCTION] « facilité de DE Tenor ») ne constituait pas un plan d'arrangement parce qu'il ne comportait pas [TRADUCTION] « une transaction visant les conditions [des] dettes envers [des créanciers] ni ne [. . .] privait [ceux-ci] de [. . .] leurs droits reconnus par la loi » (par. 93). La Cour d'appel a fait sien le raisonnement suivant du tribunal de première instance, auquel nous souscrivons pour l'essentiel :

[TRADUCTION] Le « plan d'arrangement » et la « transaction » ne sont pas définis dans la *LACC*. Il doit toutefois s'agir d'un arrangement ou d'une transaction entre un débiteur et ses créanciers. La facilité de DE Tenor ne constitue pas, à première vue, un arrangement ou une transaction entre Crystallex et ses créanciers. Fait important, les détenteurs de billets ne sont pas privés de leurs droits par la facilité de DE Tenor. Les détenteurs de billets sont des créanciers non garantis. Leurs droits se résument à poursuivre en vue d'obtenir un jugement et à faire exécuter ce jugement. S'ils ne sont pas payés, ils ont le droit de demander une ordonnance de faillite en vertu de la LFI. Sous le régime de la *LACC*, ils ont le droit de voter sur un plan d'arrangement ou une transaction. La facilité de DE Tenor ne les prive d'aucun de ces droits.

(*Re Crystallex International Corporation*, 2012 ONSC 2125, 91 C.B.R. (5th) 169, par. 50)

[102] Il n'est pas nécessaire de définir exhaustivement les notions de plan d'arrangement ou de transaction pour trancher les présents pourvois. Il suffit de conclure que les plans d'arrangement doivent au

some compromise of creditors' rights. It follows that a third party litigation funding agreement aimed at extending financing to a debtor company to realize on the value of a litigation asset does not necessarily constitute a plan of arrangement. We would leave it to supervising judges to determine whether, in the particular circumstances of the case before them, a particular third party litigation funding agreement contains terms that effectively convert it into a plan of arrangement. So long as the agreement does not contain such terms, it may be approved as interim financing pursuant to s. 11.2 of the *CCAA*.

[103] We add that there may be circumstances in which a third party litigation funding agreement may contain or incorporate a plan of arrangement (e.g., if it contemplates a plan for distribution of litigation proceeds among creditors). Alternatively, a supervising judge may determine that, despite an agreement itself not being a plan of arrangement, it should be packaged with a plan and submitted to a creditors' vote. That said, we repeat that third party litigation funding agreements are not necessarily, or even generally, plans of arrangement.

[104] None of the foregoing is seriously contested before us. The parties essentially agree that third party litigation funding agreements *can* be approved as interim financing. The dispute between them focusses on whether the supervising judge erred in exercising his discretion to approve the LFA in the absence of a vote of the creditors, either because it was a plan of arrangement or because it should have been accompanied by a plan of arrangement. We turn to these issues now.

(3) The Supervising Judge Did Not Err in Approving the LFA

[105] In our view, there is no basis upon which to interfere with the supervising judge's exercise of his discretion to approve the LFA as interim financing.

moins comporter une certaine transaction à l'égard des droits des créanciers. Il s'ensuit que l'accord de financement de litige par un tiers visant à apporter un financement à la compagnie débitrice pour réaliser la valeur d'un élément d'actif ne constitue pas nécessairement un plan d'arrangement. Nous sommes d'avis de laisser aux juges surveillants le soin de déterminer si, compte tenu des circonstances particulières de l'affaire dont ils sont saisis, l'accord de financement de litige par un tiers comporte des conditions qui le convertissent effectivement en plan d'arrangement. Si l'accord ne comporte pas de telles conditions, il peut être approuvé à titre de financement temporaire en vertu de l'art. 11.2 de la *LACC*.

[103] Ajoutons que, dans certaines circonstances, l'accord de financement de litige par un tiers peut contenir ou incorporer un plan d'arrangement (p. ex., s'il contient un plan prévoyant la distribution aux créanciers des sommes obtenues dans le cadre du litige). Subsidiairement, le juge surveillant peut décider que, bien que l'accord lui-même ne constitue pas un plan d'arrangement, il y a lieu de l'accompagner d'un plan et de le soumettre à un vote des créanciers. Cela dit, nous le répétons, les accords de financement de litige par un tiers ne constituent pas nécessairement, ni même généralement, des plans d'arrangement.

[104] Rien de ce qui précède n'est sérieusement contesté en l'espèce. Les parties s'entendent essentiellement pour dire que les accords de financement de litige par un tiers *peuvent* être approuvés à titre de financement temporaire. Le différend qui les oppose porte sur la question de savoir si le juge surveillant a commis une erreur en exerçant son pouvoir discrétionnaire d'approuver l'AFL en l'absence d'un vote des créanciers, soit parce qu'il constituait un plan d'arrangement, soit parce qu'il aurait dû être accompagné d'un plan d'arrangement. Nous abordons maintenant cette question.

(3) Le juge surveillant n'a pas commis d'erreur en approuvant l'AFL

[105] À notre avis, il n'y a aucune raison d'intervenir dans l'exercice par le juge surveillant de son pouvoir discrétionnaire d'approuver l'AFL à titre de

The supervising judge considered the LFA to be fair and reasonable, drawing guidance from the principles relevant to approving similar agreements in the class action context (para. 74, citing *Bayens*, at para. 41; *Hayes*, at para. 4). In particular, he canvassed the terms upon which Bentham and Bluberi's lawyers would be paid in the event the litigation was successful, the risks they were taking by investing in the litigation, and the extent of Bentham's control over the litigation going forward (paras. 79 and 81). The supervising judge also considered the unique objectives of *CCAA* proceedings in distinguishing the LFA from ostensibly similar agreements that had not received approval in the class action context (paras. 81-82, distinguishing *Houle*). His consideration of those objectives is also apparent from his reliance on *Crystallex*, which, as we have explained, involved the approval of interim financing in circumstances substantially similar to the case at bar (see paras. 67 and 71). We see no error in principle or unreasonableness to this approach.

financement temporaire. Se fondant sur les principes applicables à l'approbation d'accords semblables dans le contexte des recours collectifs (par. 74, citant *Bayens*, par. 41; *Hayes*, par. 4), le juge surveillant a estimé que l'AFL était juste et raisonnable. Plus particulièrement, il a examiné soigneusement les conditions selon lesquelles les avocats de Bentham et de Bluberi seraient payés si le litige était couronné de succès, les risques qu'ils prenaient en investissant dans le litige et l'étendue du contrôle qu'exercerait désormais Bentham sur le litige (par. 79 et 81). Le juge surveillant a également pris en compte les objectifs uniques des procédures fondées sur la *LACC* en établissant une distinction entre l'AFL et des accords apparemment semblables qui n'avaient pas été approuvés dans le contexte des recours collectifs (par. 81-82, établissant une distinction avec l'affaire *Houle*). Sa prise en compte de ces objectifs ressort également du fait qu'il s'est fondé sur *Crystallex*, qui, comme nous l'avons expliqué, portait sur l'approbation d'un financement temporaire dans des circonstances très semblables à celles en l'espèce (voir par. 67 et 71). Nous ne voyons aucune erreur de principe ni rien de déraisonnable dans cette approche.

[106] While the supervising judge did not canvass each of the factors set out in s. 11.2(4) of the *CCAA* individually before reaching his conclusion, this was not itself an error. A review of the supervising judge's reasons as a whole, combined with a recognition of his manifest experience with Bluberi's *CCAA* proceedings, leads us to conclude that the factors listed in s. 11.2(4) concern matters that could not have escaped his attention and due consideration. It bears repeating that, at the time of his decision, the supervising judge had been seized of these proceedings for well over two years and had the benefit of the Monitor's assistance. With respect to each of the s. 11.2(4) factors, we note that:

- the judge's supervisory role would have made him aware of the potential length of Bluberi's *CCAA* proceedings and the extent of creditor support for Bluberi's management (s. 11.2(4)(a) and (c)), though we observe that these factors

[106] Certes, le juge surveillant n'a pas examiné à fond chacun des facteurs énoncés au par. 11.2(4) de la *LACC* de façon individuelle avant de tirer sa conclusion, mais cela ne constituait pas une erreur en soi. L'examen des motifs du juge surveillant dans leur ensemble, conjugué à la reconnaissance de son expérience évidente des procédures intentées par Bluberi sous le régime de la *LACC*, nous mène à conclure que les facteurs énumérés au par. 11.2(4) concernent des questions qui n'auraient pu échapper à son attention et à son examen adéquat. Il convient de rappeler qu'au moment où il a rendu sa décision, le juge surveillant était saisi des procédures en question depuis plus de deux ans et avait pu bénéficier de l'aide du contrôleur. En ce qui a trait à chacun des facteurs énoncés au par. 11.2(4), nous soulignons ce qui suit :

- le rôle de surveillance du juge lui aurait permis de connaître la durée prévue des procédures intentées par Bluberi sous le régime de la *LACC* ainsi que la mesure dans laquelle les dirigeants de Bluberi bénéficiaient du soutien des créanciers appear to be less significant than the others in the context of this particular case (see para. 96);

- the LFA itself explains "how the company's business and financial affairs are to be managed during the proceedings" (s. 11.2(4)(b));

- the supervising judge was of the view that the LFA would enhance the prospect of a viable plan, as he accepted (1) that Bluberi intended to submit a plan and (2) Bluberi's submission that approval of the LFA would assist it in finalizing a plan "with a view towards achieving maximum realization" of its assets (para. 68, citing 9354-9186 Québec inc. and 9354-9178 Québec inc.'s application, at para. 99; s. 11.2(4)(d));

- the supervising judge was apprised of the "nature and value" of Bluberi's property, which was clearly limited to the Retained Claims (s. 11.2(4)(e));

- the supervising judge implicitly concluded that the creditors would not be materially prejudiced by the Litigation Financing Charge, as he stated that "[c]onsidering the results of the vote [on the First Plan], and given the particular circumstances of this matter, <u>the only potential recovery</u> lies with the lawsuit that the Debtors will launch" (para. 91 (emphasis added); s. 11.2(4)(f)); and

- the supervising judge was also well aware of the Monitor's reports, and drew from the most recent report at various points in his reasons (see, e.g., paras. 64-65 and fn. 1; s. 11.2(4)(g)). It is worth noting that the Monitor supported approving the LFA as interim financing.

[107] In our view, it is apparent that the supervising judge was focussed on the fairness at stake to all parties, the specific objectives of the *CCAA*, and the particular circumstances of this case when he approved the LFA as interim financing. We cannot say that he erred in the exercise of his discretion.

(al. 11.2(4)a) et c)), mais nous constatons que ces facteurs semblent revêtir beaucoup moins d'importance que les autres dans le contexte de la présente affaire (voir par. 96);

- l'AFL lui-même indique « la façon dont les affaires financières et autres de la compagnie seront gérées au cours de ces procédures » (al. 11.2(4)b));

- le juge surveillant était d'avis que l'AFL favoriserait la conclusion d'un plan viable, car il a accepté (1) le fait que Bluberi avait l'intention de présenter un plan et (2) l'argument de Bluberi selon lequel l'approbation de l'AFL l'aiderait à conclure un plan [TRADUCTION] « visant à atteindre une réalisation maximale » de ses éléments d'actif (par. 68, citant la demande de 9354-9186 Québec inc. et de 9354-9178 Québec inc., par. 99; al. 11.2(4)d));

- le juge surveillant était au courant de la « nature et [de] la valeur » des biens de Bluberi, qui se limitaient clairement aux réclamations retenues (al. 11.2(4)e));

- le juge surveillant a conclu implicitement que la charge relative au financement de litige ne causerait pas un préjudice sérieux aux créanciers, car il a affirmé que [TRADUCTION] « [c]ompte tenu du résultat du vote [sur le premier plan] et des circonstances particulières de la présente affaire, <u>la seule possibilité de recouvrement</u> réside dans l'action que vont intenter les débiteurs » (par. 91 (nous soulignons); al. 11.2(4)f));

- le juge surveillant était aussi bien au fait des rapports du contrôleur, et s'est appuyé sur le plus récent d'entre eux à divers endroits dans ses motifs (voir, p. ex., par. 64-65 et note 1; al. 11.2(4)g)). Il convient de souligner que le contrôleur appuyait l'approbation de l'AFL à titre de financement temporaire.

[107] À notre avis, il est manifeste que le juge surveillant a mis l'accent sur l'équité envers toutes les parties, les objectifs précis de la *LACC* et les circonstances particulières de la présente affaire lorsqu'il a approuvé l'AFL à titre de financement temporaire. Nous ne pouvons affirmer qu'il a commis une erreur

Although we are unsure whether the LFA was as favourable to Bluberi's creditors as it might have been — to some extent, it does prioritize Bentham's recovery over theirs — we nonetheless defer to the supervising judge's exercise of discretion.

dans l'exercice de son pouvoir discrétionnaire. Nous ne savons pas avec certitude si l'AFL était aussi favorable aux créanciers de Bluberi qu'il aurait pu l'être — dans une certaine mesure, il donne priorité au recouvrement de Bentham sur le leur — mais nous nous en remettons néanmoins à l'exercice par le juge surveillant de son pouvoir discrétionnaire.

[108] To the extent the Court of Appeal held otherwise, we respectfully do not agree. Generally speaking, our view is that the Court of Appeal again failed to afford the supervising judge the necessary deference. More specifically, we wish to comment on three of the purported errors in the supervising judge's decision that the Court of Appeal identified.

[108] Dans la mesure où la Cour d'appel a conclu le contraire, en toute déférence, nous ne sommes pas d'accord. De façon générale, nous estimons que la Cour d'appel a encore une fois omis de faire preuve de la déférence nécessaire à l'égard du juge surveillant. Plus particulièrement, nous souhaitons faire des observations sur trois des erreurs qu'aurait décelées la Cour d'appel dans la décision du juge surveillant.

[109] First, it follows from our conclusion that LFAs can constitute interim financing that the Court of Appeal was incorrect to hold that approving the LFA as interim financing "transcended the nature of such financing" (para. 78).

[109] Premièrement, il découle de notre conclusion selon laquelle les AFL peuvent constituer un financement temporaire que la Cour d'appel a eu tort de conclure que l'approbation de l'AFL à titre de financement temporaire [TRADUCTION] « transcendait la nature de ce type de financement » (par. 78).

[110] Second, in our view, the Court of Appeal was wrong to conclude that the LFA was a plan of arrangement, and that *Crystallex* was distinguishable on its facts. The Court of Appeal held that the LFA and associated super-priority Litigation Financing Charge formed a plan because they subordinated the rights of Bluberi's creditors to those of Bentham.

[110] Deuxièmement, à notre avis, la Cour d'appel a eu tort de conclure que l'AFL était un plan d'arrangement, et qu'il était possible d'établir une distinction entre l'espèce et les faits de l'affaire *Crystallex*. La Cour d'appel a conclu que l'AFL et la charge relative au financement de litige super prioritaire s'y rattachant constituaient un plan parce qu'ils subordonnaient les droits des créanciers de Bluberi à ceux de Bentham.

[111] We agree with the supervising judge that the LFA is not a plan of arrangement because it does not propose any compromise of the creditors' rights. To borrow from the Court of Appeal in *Crystallex*, Bluberi's litigation claim is akin to a "pot of gold" (para. 4). Plans of arrangement determine how to distribute that pot. They do not generally determine what a debtor company should do to fill it. The fact that the creditors may walk away with more or less money at the end of the day does not change the nature or existence of their rights to access the pot once it is filled, nor can it be said to "compromise" those rights. When the "pot of gold" is secure — that

[111] Nous souscrivons à l'opinion du juge surveillant selon laquelle l'AFL ne constitue pas un plan d'arrangement parce qu'il ne propose aucune transaction visant les droits des créanciers. Pour reprendre la formule qu'a employée la Cour d'appel dans *Crystallex*, la réclamation de Bluberi s'apparente à une [TRADUCTION] « marmite d'or » (par. 4). Les plans d'arrangement établissent la façon dont le contenu de cette marmite sera distribué. Ils n'indiquent généralement pas ce que la compagnie débitrice devra faire pour la remplir. Le fait que les créanciers puissent en fin de compte remporter plus ou moins d'argent ne modifie en rien la nature ou

is, in the event of any litigation or settlement — the net funds will be distributed to the creditors. Here, if the Retained Claims generate funds in excess of Bluberi's total liabilities, the creditors will be paid in full; if there is a shortfall, a plan of arrangement or compromise will determine how the funds are distributed. Bluberi has committed to proposing such a plan (see supervising judge's reasons, at para. 68, distinguishing *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327, 296 D.L.R. (4th) 577).

[112] This is the very same conclusion that was reached in *Crystallex* in similar circumstances:

The facts of this case are unusual: there is a single "pot of gold" asset which, if realized, will provide significantly more than required to repay the creditors. The supervising judge was in the best position to balance the interests of all stakeholders. I am of the view that the supervising judge's exercise of discretion in approving the Tenor DIP Loan was reasonable and appropriate, despite having the effect of constraining the negotiating position of the creditors.

. . .

. . . While the approval of the Tenor DIP Loan affected the Noteholders' leverage in negotiating a plan, and has made the negotiation of a plan more complex, it did not compromise the terms of their indebtedness or take away any of their legal rights. It is accordingly not an arrangement, and a creditor vote was not required. [paras. 82 and 93]

[113] We disagree with the Court of Appeal that *Crystallex* should be distinguished on the basis that it involved a single option for creditor recovery (i.e., the arbitration) while this case involves two (i.e., litigation of the Retained Claims and Callidus's New

l'existence de leurs droits d'avoir accès à la marmite une fois qu'elle est remplie, pas plus qu'on ne saurait dire qu'il s'agit d'une « transaction » à l'égard de leurs droits. Lorsque la « marmite d'or » aura été obtenue — c'est-à-dire dans l'éventualité d'une action ou d'un règlement — les sommes nettes seront distribuées aux créanciers. En l'espèce, si les réclamations retenues permettent de recouvrer des sommes qui dépassent le total des dettes de Bluberi, les créanciers seront payés en entier; si les sommes sont insuffisantes, un plan d'arrangement ou une transaction établira la façon dont les sommes seront distribuées. Bluberi s'est engagée à proposer un tel plan (voir les motifs du juge surveillant, par. 68, établissant une distinction avec *Cliffs Over Maple Bay Investments Ltd. c. Fisgard Capital Corp.*, 2008 BCCA 327, 296 D.L.R. (4th) 577).

[112] C'est exactement la même conclusion qui a été tirée dans *Crystallex* dans des circonstances semblables :

[TRADUCTION] Les faits de l'espèce sont inhabituels : la « marmite d'or » ne contient qu'un seul élément d'actif qui, s'il est réalisé, rapportera beaucoup plus que ce qui est nécessaire pour rembourser les créanciers. Le juge surveillant était le mieux placé pour établir un équilibre entre les intérêts de toutes les parties intéressées. J'estime que l'exercice par le juge surveillant de son pouvoir discrétionnaire d'approuver le prêt de DE Tenor était raisonnable et approprié, bien qu'il ait eu pour effet de limiter la position de négociation des créanciers.

. . .

. . . L'approbation du prêt de DE Tenor a certes amoindri l'influence que pouvaient exercer les détenteurs de billets lors de la négociation d'un plan, et rendu plus complexe la négociation d'un plan, mais ce prêt ne constituait pas une transaction visant les conditions de leurs dettes ni ne les privait de l'un de leurs droits reconnus par la loi. Il ne s'agit donc pas d'un arrangement, et un vote des créanciers n'était pas nécessaire. [par. 82 et 93]

[113] Nous ne souscrivons pas à l'opinion de la Cour d'appel selon laquelle il y a lieu d'établir une distinction avec *Crystallex* parce que, dans cette affaire, les créanciers disposaient d'un seul moyen de recouvrement (c.-à-d. l'arbitrage) tandis que, dans la

Plan). Given the supervising judge's conclusion that Callidus could not vote on the New Plan, that plan was not a viable alternative to the LFA. This left the LFA and litigation of the Retained Claims as the "only potential recovery" for Bluberi's creditors (supervising judge's reasons, at para. 91). Perhaps more significantly, even if there were multiple options for creditor recovery in either *Crystallex* or this case, the mere presence of those options would not necessarily have changed the character of the third party litigation funding agreements at issue or converted them into plans of arrangement. The question for the supervising judge in each case is whether the agreement before them ought to be approved as interim financing. While other options for creditor recovery may be relevant to that discretionary decision, they are not determinative.

présente affaire, il y en a deux (c.-à-d. l'introduction d'une action à l'égard des réclamations retenues et le nouveau plan de Callidus). Étant donné que le juge surveillant avait conclu que Callidus ne pouvait pas voter sur le nouveau plan, ce plan ne constituait pas une solution de rechange viable à l'AFL. La [TRADUCTION] « seule possibilité de recouvrement » qui s'offrait aux créanciers de Bluberi résidait donc dans l'AFL et l'introduction d'une action à l'égard des réclamations retenues (motifs du juge surveillant, par. 91). Fait peut-être plus important, même si les créanciers avaient disposé de plusieurs moyens de recouvrement, tant dans l'affaire *Crystallex* que dans la présente affaire, la simple existence de ces moyens n'aurait pas nécessairement modifié la nature des accords de financement de litige par un tiers en cause ni n'aurait eu pour effet de les convertir en plans d'arrangement. La question que doit se poser le juge surveillant dans chaque affaire est de savoir si l'accord qui lui est soumis doit être approuvé à titre de financement temporaire. Certes, les autres moyens de recouvrement dont disposent les créanciers peuvent entrer en ligne de compte dans la prise de cette décision discrétionnaire, mais ils ne sont pas déterminants.

[114] We add that the Litigation Financing Charge does not convert the LFA into a plan of arrangement by "subordinat[ing]" creditors' rights (C.A. reasons, at para. 90). We accept that this charge would have the effect of placing secured creditors like Callidus behind in priority to Bentham. However, this result is expressly provided for in s. 11.2 of the *CCAA*. This "subordination" does not convert statutorily authorized interim financing into a plan of arrangement. Accepting this interpretation would effectively extinguish the supervising judge's authority to approve these charges without a creditors' vote pursuant to s. 11.2(2).

[114] Ajoutons que la charge relative au financement de litige ne convertit pas l'AFL en plan d'arrangement en [TRADUCTION] « subordonn[ant] » les droits des créanciers (motifs de la Cour d'appel, par. 90). Nous reconnaissons que cette charge aurait pour effet de placer les créanciers garantis comme Callidus derrière Bentham dans l'ordre de priorité, mais ce résultat est expressément prévu par l'art. 11.2 de la *LACC*. Cette « subordination » ne convertit pas le financement temporaire autorisé par la loi en plan d'arrangement. Retenir cette interprétation aurait pour effet d'annihiler le pouvoir du juge surveillant d'approuver ces charges sans un vote des créanciers en vertu du par. 11.2(2).

[115] Third, we are of the view that the Court of Appeal was wrong to decide that the supervising judge should have submitted the LFA together with a plan to the creditors for their approval (para. 89). As we have indicated, whether to insist that a debtor package their third party litigation funding agreement

[115] Troisièmement, nous estimons que la Cour d'appel a eu tort de conclure que le juge surveillant aurait dû soumettre l'AFL accompagné d'un plan à l'approbation des créanciers (par. 89). Comme nous l'avons indiqué, la décision d'exiger que le débiteur accompagne d'un plan son accord de financement

with a plan is a discretionary decision for the supervising judge to make.

[116] Finally, at the appellants' insistence, we point out that the Court of Appeal's suggestion that the LFA is somehow "akin to an equity investment" was unhelpful and potentially confusing (para. 90). That said, this characterization was clearly *obiter dictum*. To the extent that the Court of Appeal relied on it as support for the conclusion that the LFA was a plan of arrangement, we have already explained why we believe the Court of Appeal was mistaken on this point.

VI. Conclusion

[117] For these reasons, at the conclusion of the hearing we allowed these appeals and reinstated the supervising judge's order. Costs were awarded to the appellants in this Court and the Court of Appeal.

Appeals allowed with costs in the Court and in the Court of Appeal.

Solicitors for the appellants/interveners 9354-9186 Québec inc. and 9354-9178 Québec inc.: Davies Ward Phillips & Vineberg, Montréal.

Solicitors for the appellants/interveners IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited): Woods, Montréal.

Solicitors for the respondent Callidus Capital Corporation: Gowling WLG (Canada), Montréal.

Solicitors for the respondents International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier: McCarthy Tétrault, Montréal.

Solicitors for the intervener Ernst & Young Inc.: Stikeman Elliott, Montréal.

de litige par un tiers est une décision discrétionnaire qui appartient au juge surveillant.

[116] Enfin, sur les instances des appelantes, nous soulignons que l'affirmation de la Cour d'appel selon laquelle l'AFL [TRADUCTION] « s'apparente [en quelque sorte] à un placement à échéance non déterminée » était inutile et pouvait prêter à confusion (par. 90). Cela dit, il s'agissait manifestement d'une remarque incidente. Dans la mesure où la Cour d'appel s'est fondée sur cette qualification pour conclure que l'AFL constituait un plan d'arrangement, nous avons déjà expliqué pourquoi nous croyons que la Cour d'appel a fait erreur sur ce point.

VI. Conclusion

[117] Pour ces motifs, à l'issue de l'audience, nous avons accueilli les pourvois et rétabli l'ordonnance du juge surveillant. Les dépens devant notre Cour et la Cour d'appel ont été adjugés aux appelantes.

Pourvois accueillis avec dépens devant la Cour et la Cour d'appel.

Procureurs des appelantes/intervenantes 9354-9186 Québec inc. et 9354-9178 Québec inc. : Davies Ward Phillips & Vineberg, Montréal.

Procureurs des appelantes/intervenantes IMF Bentham Limited (maintenant connue sous le nom d'Omni Bridgeway Limited) et Corporation Bentham IMF Capital (maintenant connue sous le nom de Corporation Omni Bridgeway Capital (Canada)) : Woods, Montréal.

Procureurs de l'intimée Callidus Capital Corporation : Gowling WLG (Canada), Montréal.

Procureurs des intimés International Game Technology, Deloitte S.E.N.C.R.L., Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx et François Pelletier : McCarthy Tétrault, Montréal.

Procureurs de l'intervenante Ernst & Young Inc. : Stikeman Elliott, Montréal.

Solicitors for the interveners the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals: Norton Rose Fulbright Canada, Montréal.

Procureurs des intervenants l'Institut d'insolvabilité du Canada et l'Association canadienne des professionnels de l'insolvabilité et de la réorganisation : Norton Rose Fulbright Canada, Montréal.

Ontario Supreme Court
Anvil Range Mining Corp., Re
Date: 2001-03-29

See para. 9

Heard: March 22, 2001

Judgment: March 29, 2001

Docket: Doc. 98-BK-001208

Kenneth Kraft and George Karayannides, for Deloitte & Touche Inc. in its capacity as Interim Receiver of Anvil Range Mining Corporation and Anvil Mining Properties Inc.

Tony Reyes, for Golden Hills Ventures Ltd., MacMillan Mining Contractors Ltd., and Vortex Mining Inc.

John Porter, for Her Majesty the Queen in Right of Canada as represented by the Department of Indian Affairs and Northern Development

Kevin R. Aalto and David Estrin, for Cumberland Asset Management, Berner Company Inc., Global Securities Corporation, Peel Brooke Inc., Robert N. Granger, Adrian M.S. White, and Hyundai Corporation

Derek T. Ground, for Ross River Dena Council and Ross River Development Corporation

Richard B. Jones, for Rose Creek Vangorda Mines and Pelly River Mines Limited (NPL)

David Hager, for Cominco Ltd.

Geoffrey B. Morawetz, for Yukon Energy Corporation and as agent for James Grout representing "Leitch Lien Claimants"

Frederick L. Myers, for Government of Yukon

Endorsement. *Farley J.:*

[1] This hearing involved the return of the motion of the Interim Receiver ("IR") which I adjourned on February 21, 2001 as a result of the Cumberland Group's complaint that the IR had not provided a "valuation" pursuant to Cameron J.'s Order of January 16, 2001 [properly December 19, 2000] required the IR's "report to include and updated valuation of the assets". The IR's motion was for the sanctioning of a plan of arrangement (the "Plan") of Anvil Range Mining Corporation and Anvil Mining Properties Inc. (collectively, "Anvil") as approved by certain classes of creditors of Anvil pursuant to the *Companies' Creditors Arrangement Act* ("CCAA") or in the alternative, the approval of a sale of the assets of Anvil on terms substantially similar to those provided in the Plan. The IR's further motion record served on March 14th, contained a March 12, 2001 Anvil Range Mining Corporation Valuation

Assessment of Strathcona Mineral Services Limited prepared by Graham Farquharson, together with a March 13, 2001 valuation of the assets of Anvil Range Mining Corporation of Deloitte & Touche Corporate Finance Canada Inc. prepared by Jim Horvath and Mark Keuleman. The Strathcona and Deloitte & Touche reports were advanced by the IR in satisfaction of its obligations to provide the updated valuation of assets.

[2] The IR also sought approval of its budgets and authorization for expenditures for the operating period April 1, 2001 - March 31, 2002 and authorization for the funding of special environmental projects for the period January 1 - March 31, 2001. This aspect was not opposed. This request appears reasonable in the circumstances and is therefore approved.

[3] As I expressed in my February 21st reasons:

> Certainly, the cited paragraphs in Farquharson's letter would point it to being unlikely that there was any significant value for the assets in question. Certainly Mr. Farquharson's letter is a <u>gloomy one</u> as to the prospect for the mining operations. (emphasis in original)

It should not come as a surprise to anyone then that the updated valuation of Strathcona and Deloitte & Touche do not present a rosy picture. Farquharson concludes:

> Consequently, for Anvil Range the Plimsoll Line as a continuing mining operation is well below the current water level. It is most unlikely that any mining company would purchase the property on the basis of obtaining value from the resumption of mining operations and without considering the assumption of any portion of the environmental liabilities. Anvil Range, therefore, has no value to the beneficiaries of the estate under this scenario.
>
> …
>
> The total amount realized from the sale or disposition of the foregoing assets on a salvage basis would appear to be in the order of \$10 - \$15 million without making any contribution towards the ongoing care and maintenance costs for the property or the reclamation requirements which we understand have become the responsibility of DIAND. There may also be some value ascribed to tax pools that remain from operating losses, capital expenditures and exploration expenditures by Anvil Range. However, presumably most of the value, if any, of those tax pools would only be applicable upon the resumption of mining operations on the property, and the Interim Receiver would be best positioned to comment on this item.

The Deloitte & Touche report concluded:

> Based on the scope of our review, assumptions and analysis, the estimated fair market value of all the assets of Anvil Range is in the range of \$11.1 million - \$19.9 million (Schedule 1), as at January 31, 2001. If asked to be more specific, we would suggest the mid-point of the foregoing range being \$15.5 million. Based on the above, there is no

> value remaining for the unsecured creditors as the amount owed to secured creditors of over $90.0 million exceeds the value of the assets of Anvil Range.

[4] This was not good news for the Cumberland Group as unsecured creditors nor for Hyundai Corporation as a holder of more than 20% of the shares of Anvil. Certainly it cannot have been unexpected news although one can readily appreciate that human nature may often lead those who have suffered great losses (as the unsecured creditors and shareholders of Anvil certainly have) to hope for a miracle to happen or to present hope as fact and speculation as a firm foundation and to ignore probability in opting for (remote) possibility.

[5] The Plan was unanimously approved by the three classes of secured creditors of Anvil on February 2, 2001. Given the Strathcona and Deloitte & Touche valuations, it was concluded that there was no material change to the circumstances under which these three classes voted and therefore it would be redundant to hold a fresh vote. The unsecured creditors were not part of the Plan and were not eligible pursuant to the Plan to vote.

[6] The Cumberland Group and Hyundai urged that the Plan should not be approved by this Court for a variety of reasons. Chief among these was the proposition that the secured debt really ahead of the unsecured may not be great as $90 million and that under certain scenarios there may be more value in the Anvil assets than the range of $10 - $19.9 million. *However, what must be appreciated is that one has to look at the situation based upon what is currently known as to existing facts and what is realistic in the foreseeable future.*

[7] On December 7, 1999, Blair J. granted leave to the IR or the secured creditors to file a plan of arrangement. The decision amongst them eventually was made amongst all the secured creditors was that the IR should prepare such a plan, with the costs being shared among the secured creditors including DIAND.

[8] The three general criteria which must be met for the Court to sanction a plan of arrangement under the CCAA are:

1. Has there been compliance with all statutory requirements and with all Court orders?

2. To determine, based on all materials filed and procedures carried out, if anything has been done or purported to be done that is not authorized by the CCAA; and

3. Is the Plan fair and reasonable?

See *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 12 O.R. (3d) 500 (Ont. Gen. Div.) at p. 506; *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada* (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.) at p. 201.

[9] Dealing with the first two elements, it appears that the meetings called for voting on the Plan were held pursuant to an order of the Court with the classification of creditors being as approved by this Court. The voting was as contemplated and the Plan was unanimously approved. However, an objection was raised by Messrs. Jones and Aalto that the CCAA did not allow a plan of arrangement to be advanced by an interim receiver and further according to Mr. Aalto that this role being assumed by the IR destroyed the neutrality of the IR. However I would note that similarly there is no provision specifically in the *Bankruptcy and Insolvency Act* for an interim receiver to file a proposal under that legislation. Notwithstanding that in *Re J.S. McMillan Fisheries Ltd.* (1998), 1 C.B.R. (4th) 226 (B.C. S.C.), Tysoe J. stated at p. 231:

> As the Company had no management, the Order appointing Ernst & Young Inc. as Interim Receiver authorized it to negotiate and file a Proposal in relation to the Company.

Further, Blair J. authorized the filing of a Plan by either the IR or the secured creditors and there was no appeal of his order. See the Court of Appeal decision in *Ontario (Registrar of Mortgage Brokers) v. Matrix Financial Corp.,* [1993] O.J. No. 2102 (Ont. C.A.). I would further point out that while the secured creditors had the opportunity of filing a Plan, they did not do so but rather they agreed amongst themselves that the authorized alternate, the IR, do so. The IR is an officer of the Court and pursuant to this court appointment, it owes a duty to be objective and neutral as amongst all of the affected parties in this insolvency, including the unsecured creditors and the shareholders. Given where the Plimsoll Line is in this situation, it is extremely inappropriate for the objectors to assert, without any evidence of substance, that the IR has adopted an adversarial role. Given my reasons of February 21, I would not have expected that barrage to have been repeated. That is not to say that, merely because the IR files a Plan, it should be taken by this Court as being fair and reasonable and further that objections not be received on this point. However, merely because the objectors (Cumberland Group) were advocating an alternative plan (a plan which in my view is unrealistic in the circumstances in light of the unsecureds being so far under water, the unworkability of this alternate, the concerns for remediation and the retention of $600,000 as working capital out of the purse of those who have a look at the Plimsoll Line) does not mean that the IR has lost its neutrality. Rather, this demonstrates in my view that the IR has exercised its judgment in a reasoned, practical and functional way, as it should.

[10] The Plan as presented is a compromise of the creditor claims of those creditors who have now (on a foreseeable future and realistic basis) a true or "actual" stake in Anvil—as opposed to those claims of the unsecured creditors and shareholders who unfortunately have only a chimera. Therefore although in *Northland* McEachern C.J.B.C. at p. 205, was not dealing with a situation where a class of creditors, as here, the unsecured, were not participating, when he observed:

> First, the authorities warn us against second-guessing businessmen (see *Re Alabama, supra* at p.244). In this case, the companies and their advisors, the bank and its advisors, and all the creditors except the two appellants, all voted for the Plan. As the authorities say, we should not be astute in finding technical arguments to overcome the decision of such a majority.

it would seem to me that his observation would hold true in these circumstances.

[11] While it is recognized that the main thrust of the CCAA is geared at a reorganization of the insolvent company—or enterprise, even if the company does not survive, the CCAA may be utilized to effect a sale, winding up or a liquidation of a company and its assets in appropriate circumstances. See *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) at p. 32; *Re Olympia & York Developments Ltd.* (1995), 34 C.B.R. (3d) 93 (Ont. Gen. Div. [Commercial List]) at p. 104. Integral to those circumstances would be where a Plan under the CCAA would maximize the value of the stakeholders' pie.

[12] The CCAA permits a debtor to propose a compromise or arrangement with its secured creditors. A Plan proposed solely to secured creditors is not unfair where the insolvent's assets are of insufficient value to yield any recovery to unsecured creditors. It is not unreasonable for a court in such circumstances to sanction a plan which is directly solely at secured creditors. See *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), *supra* at pp. 513-8; *Re Philip Services Corp.,* [1999] O.J. No. 4232 (Ont. S.C.J. [Commercial List]) at paras. 20-1. That the plan does not include any agreement with a class a creditors does not, by virtue solely of that omission, make it unfair where that class is not being legally affected. Nothing is being imposed upon the unsecureds; none of their rights are being confiscated. See *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), *supra* at pp. 508, 517-8.

[13] I have concluded that the secured claims are far in excess of the value of the assets. That value has to be determine on a current basis. See *Re Kostiuk,* 2000 CarswellBC 1523, 2000 BCSC 1115 (B.C. S.C.) at paras. 38-41. It is inappropriate to value the assets on a speculative or (remote) possibility basis. The Strathcona report used reasonable assumptions as to future metal prices. This should be contrasted to the Cumberland Group's assertions that it is possible that prices may spike at some future time. What must be appreciated is that the Anvil ore body as developed presently has a very short life but that the prices must be viewed as sustainable over that period. See my views about spike prices in *New Quebec Raglan Mines Ltd. v. Blok-Andersen* (1993), 9 B.L.R. (2d) 93 (Ont. Gen. Div. [Commercial List]).

[14] The Watts, Griffis & McOuat letter of March 21, 2001 has been hastily prepared in an attempt to throw doubt on some of the Strathcona observations and conclusions—but not to discredit them. In fact in numerous instances letter concurs with the Strathcona report. Rather the author of the letter has some questions. It must be appreciated that Strathcona/Farquharson has had significant involvement with the Anvil mining facilities over the past several years, whereas Watts, Griffis & McOuat has only had this rather peripheral engagement. I do not find it unusual that two experienced consultants in this mining field may have different views or approaches, nor that one may feel the need for more information than it was able to glean from reviewing the listed documents before reaching a conclusion. In the result, I think it reasonable to accept the views of Farquharson, an established and recognized expert in this field, who has had, as indicated, considerable experience with this matter over the past several years. Further, I think it inappropriate and unnecessary to further delay and incur additional costs to engage upon a further study.

[15] It appears that Mr. Aalto's clients have accepted the Cominco secured claim of $24 million. The *Miners Lien Act* ("MLA") claims of $18 million appear also to be undisputed. There was argument as to the DIAND claims since part of DIAND's claim is and always has been acknowledged as contingent since it relates to reclamation costs in the future. However, it has approximately $6 million of claims as to monies already expended. As a side note, I would observe there appears to be every likelihood to a certainty that every dollar in the budget for the year ending March 31, 2002 earmarked for reclamation will be spent. If one were to ignore any future remediation costs, the secured creditors in all three classes would

have claims in excess of $50 million. This is 2½ times the highest value of the assets. The Cumberland Group in another tack then asserts that DIAND and any other governmental authorities should not look to settle the remediation costs onto these assets at the present time based upon the recognized philosophy of "polluter pays" present in the environmental legislation.

Ralph Sultan, a former director of Anvil, swore a March 21, 2001 affidavit (i.e. the day before this hearing) that:

> 11 Prior to Anvil Range, which operated the Faro Mine for approximately 3 years, there had been a number of operators of the Faro Mine. Prior operators created the basic mine plan for the development and operation of the site which is subject to reclamation. Among those prior operators are Curragh, Cypress Anvil Mining Corporation, and Dome Petroleum. I believe that Cypress Anvil Mining Corporation is a subsidiary of Cyprus Amax Minerals Company which is now owned by Phelps Dodge Corporation a huge international mine conglomerate based in the United States. I believe that Cypress Amex held insurance for environmental reclamation costs which may include the Faro Mine. Others of the predecessors or their successors may also have some form of insurance for this type of claim. So far as I am aware, DIAND has taken no steps to pursue prior operators or insurance which may be available to satisfy any reclamation costs relative to the Faro Mine. Nor am I aware of any efforts made by the Interim Receiver to require DIAND to pursue other avenues of recovery apart from ascertaining a reclamation claim in these proceedings. Attached hereto is Exhibit "F" is a copy of a reference to insurance held by Cypress Amex in a report on Mining prepared by KPMG.

It is always, of course, important to test the theoretical against the real world. It is not disputed by anyone that each of the predecessors would have contributed in part to the overall environmental condition of the Anvil property as such condition now exists. Each successor has "inherited" not only the benefit of the assets but the obligations inherent or attached to those assets—for our purposes, the environmental liability existing as of acquisition. Should DIAND go after the predecessors, *to the exclusion* of looking to the present assets. The answer must reasonably be "no". The most it could do on a reliance solely of "polluter pays" would be to go after each predecessor for what it contributed. It is recognizable that Anvil contributed for 3 years. Curragh and Dome Petroleum have evaporated. Sultan only alludes to insurance which a parent of Cypress Anvil Mining Corporation may hold which might extend to their subsidiary whose continued existence has not been indicated, together with insurance other predecessors may have had. He has no direct knowledge of this insurance being in existence or being able to be called on in accordance with its terms and conditions at this date. It does not appear that the board and management of Anvil, of which Sultan was a member, concerned themselves with establishing what insurance of others it might call upon if Anvil were required during its regime to do reclamation work including these contributions of past polluters. For the purposes of this exercise then it seems to me that the objections as to the environmental concerns is a diversionary tactic. In any event, in or out, the environmental claims merely meant that the objectors are drowned either in 50 feet of water or at a depth of 100 feet after falling overboard from the heavily listing Anvil ship which was taking on water.

[16] The other secured creditors-always recognized, as did DIAND, that the significant value of DIAND's claim was contingent in the sense it related to future obligations. To suggest that the vote of the secureds would be any different if they had the "advantage" of my observations above before voting is to my view underestimating their intelligence.

[17] With respect to the tax pools, they only have value if there are profits from the mine. There does not appear to be any reasonable likelihood of this in the foreseeable future. The Memorandum of Understanding, dated August 10, 1999, among Cominco Ltd., Government of Yukon and DIAND in reciting its purpose should not be taken as establishing as a fact something which is not so established when it indicates:

> This MOU is to facilitate the protection of the environment and the preservation and protection of assets referred to in this MOU so that the mining operation may recommence in a cost effective and economic manner.

That is not any foundation for concluding that the mining operation will ever be economic so that it may recommence. Further this MOU statement and the MOU itself does not contradict that there is no present value to the mine. It does not appear that anyone will restart the mine under foreseeable circumstances. But it is conceivable that unforeseen circumstances may occur especially the longer one goes out on the horizon.

[18] In my view, the approval of this Plan will allow the creditors (both secured and unsecured) and the shareholders of Anvil to move on with their lives and activities while the mining properties including the mine will be under proper stewardship.

[19] The objectors assert that no value was attributed to Anvil's interest in the Kassandra Mines in Greece. Aside from the fact that on December 30, 1999 I decided that Anvil had no such interest, which decision was affirmed by the Court of Appeal on November 1, 2000, in a short six paragraph decision which indicated that I had correctly decided the matters in issue,

all that the Cumberland Group has to point to is that its leave to appeal to the Supreme Court of Canada has not been heard yet.

[20] Mr. Aalto referred to *Royal Bank v. Fracmaster Ltd.,* [1999] A.J. No. 675 (Alta. C.A.) at para. 16 with respect to the CCAA not being used to provide for a liquidation in a guise of a CCAA reorganization. But see my views above. In any event, the IR has sought alternative relief allowing it to sell the assets, which sale would be on a commercially equivalent basis as the Plan under the CCAA contemplates. Given that the Plan would operate more efficiently in that respect, I see no reason to provide that this proceed as a sale by the IR.

[21] In the end result, I am of the view that the Plan is fair and reasonable for the foregoing reasons and therefore the three part test has been met. The Plan is sanctioned and approved.

[22] I may be spoken to as to costs if necessary by booking an appointment through the Commercial List Office.

Motion granted.

DATE: 20020705
DOCKET: C36919

COURT OF APPEAL FOR ONTARIO

MORDEN, BORINS and FELDMAN JJ.A.

B E T W E E N :	
IN THE MATTER OF ANVIL RANGE MINING CORPORATION;	Kevin R. Aalto and David Estrin for the appellants Cumberland Asset Management, Berner & Company, Global Securities Corporation, Peel Brooke Inc, Inukshuk Resources Inc., Robert N. Granger and Adrian M.S. White
AND IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, C. c-36, AS AMENDED; AND IN THE MATTER OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C-43, AS AMENDED;	George Karayannides and Kenneth Kraft for the respondent Deloitte & Touche Inc., Interim Receiver of Anvil Range Mining Corporation and Anvil Mining Properties Inc.
AND IN THE MATTER OF *THE BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED;	David Hager for the respondent Cominco Ltd. John Porter, for the respondent Department of Indian Affairs and Northern Development
AND IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF ANVIL RANGE MINING CORPORATION	Jeremy Dacks for the respondent the Yukon Territorial Government Derek T. Ground for the respondent Ross River Dena Council and Ross River Development Corporation Geoffrey B. Morawetz for the respondent Yukon Energy Corporation **Heard:** March 6, 2002

On appeal from orders of Justice James Farley dated March 29, 2001 and May 7, 2001.

BY THE COURT:

1. [1] Cumberland Asset Management, and others, appeal from orders made by Farley J. dated March 29, 2001 and May 7, 2001. In the March 29, 2001 order Farley J. sanctioned a plan of arrangement under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (C.C.A.A.) proposed by Deloitte & Touche Inc., the Interim Receiver of Anvil Range Mining Range Mining Corporation and Anvil Range Properties Inc. In his May 7, 2001 order, Farley J. ordered that the appellants pay costs relating to the sanction motion in the total amount of $28,500.

2. [2] The facts respecting the sanctioning of the plan are set forth in Farley J.'s reasons which are reported at 25 C.B.R. (4th) 1 and need not be repeated in detail. The following is an outline, which contains some history of this proceeding which is not included in Farley J.'s reasons.

3. [3] Anvil Range Mining Corporation is the owner of a lead and zinc mine, known as the Faro Mine, in the Yukon Territory. It bought this mine for about $27,000,000 in 1994 from KPMG Inc., in its capacity as Interim Receiver of the then owner, Curragh Inc.

4. [4] Anvil Range began production in August 1995 after conducting a nine-month $75,000,000 pre-stripping and mill refurbishment program. It suspended mining operations in December 1996 and milling operations in the spring of 1997 because of falling metal prices. It recommenced operations in the fall of 1997 but ceased mining and milling early in 1998.

5. [5] In January 1998, Anvil Range applied for and received protection from its creditors under the C.C.A.A. This was the beginning of the proceeding in which the orders under appeal were, eventually, made. In March 1998, Cominco Ltd., a secured creditor of Anvil Range, moved for the appointment of an interim receiver and termination of the stay provided for in the C.C.A.A. proceeding. Deloitte & Touche Inc. was appointed Interim Receiver and the court directed it to report to the court on certain matters, including seeking advice and directions respecting a marketing plan for the mine.

6. [6] In response to this, the Interim Receiver filed its second report dated June 17, 1998 in which it recommended that "no funds be spent on marketing the mine for the present". This was based on several different facts, one of them being "the fact that no prospective purchasers had emerged to that date …. to express even minimal interest in the mine site despite the well publicized facts in the industry press".

7. [7] As part of the ongoing dispute among the parties, the Interim Receiver brought a motion before Blair J., which was heard on August 20, 1998, seeking approval to sell certain assets at the mine. Blair J. noted that the Interim Receiver had expressed the opinion on the basis of its market

analysis that it was “unlikely that the Faro Mine can be reopened within the next 2-3 years and possibly as long as 5 years.” He then said:

> I agree that it is difficult to be very optimistic about the future prospects of the Faro Mine, including the chance of its re-opening. On the other hand, Strathcona (acknowledged by all to be expert in the field) seems to feel strongly that the best chance of recovery is if the Grum Pit at least is kept on a “standby-mode” ready to be made operative quickly when a period of good metal prices arrives. To do this the equipment in question will be necessary. To replace it would be costly and it may well be a non-starter if what is being considered is only a 3 year operation or so.

8. [8] Blair J. did not dismiss the request for approval to sell the equipment but adjourned it to October 29, 1998 to enable the Yukon Territorial Government to do further analysis. This was because of the importance of the mine to the fabric of the Yukon Territory.

9. [9] After extensive negotiations and a filing of the Yukon Territorial Government report, a funding formula was established in December 1998 whereby the Department of Indian Affairs and Northern Development (“DIAND”) assumed most of the funding obligations of going forward. This funding was secured by a charge against the real property.

10. [10] In December 1999, the court granted leave to the Interim Receiver or the secured creditors to file a plan of arrangement. About a year of negotiations among the secured creditors followed, eventually leading to an extensive settlement conference held in Vancouver under the direction of Justice Kierans, sitting as a justice of the Supreme Court of the Yukon Territory. The conference resulted in a settlement among three groups of secured creditors: (1) the Mining Lien Act Claimants; (2) Cominco Ltd.; and (3) DIAND, the Yukon Territorial Government and the Yukon Workers’ Compensation, Health and Safety Board. The settlement was to be implemented by a plan under the C.C.A.A.

11. [11] As will be set forth in more detail later in these reasons, the three groups of secured creditors were the only parties with a legal and economic interest in the assets of Anvil Range. The plan settled a series of complex priority disputes both within creditor classes and among creditor classes and also dealt with allocating funds in the Interim Receiver’s possession.

12. [12] The plan divides the creditors who are affected by it (the "Affected Creditors") into three classes (the three groups mentioned above):

1. The Mining Lien Act Claimants.

2. Cominco Ltd.

3. The government creditors, DIAND, the Yukon Territorial Government, and the Yukon Workers' Compensation, Health and Safety Board.

13. [13] The plan provides for the class 3 creditors to acquire the mine and the mill located on it and certain other assets (the "Excluded Assets") and to assume responsibility for funding the ongoing necessary environmental, maintenance and security programs. The other two classes of Affected Creditors are to share in the proceeds of the sale of the remaining assets (the "Realization Assets").

14. [14] The Interim Receiver recommended approval of the plan as the best alternative for settling the outstanding priority issues in dispute and because there was no recovery possible other than to the Affected Creditors.

15. [15] The class 1 creditors' secured claims against Anvil Range property, as judicially declared by judgments of the Supreme Court of the Yukon Territory, total $18,312,169. The claim of the class 2 creditor, Cominco Ltd., was judicially determined by the Superior Court of Justice (Ontario) on January 27, 1999 to be $24,353,657 with post-judgment interest accruing on this amount at 8.5% per annum.

16. [16] With respect to the class 3 creditors, the Yukon Territorial Government and the Yukon Workers' Compensation and Health and Safety Board claim is about $1,000,000. The claim advanced on behalf of DIAND is said to total over $60,000,000 for funding the Interim Receiver's expenses and, also, the environmental remediation costs. We shall deal with the salient details of it shortly.

17. [17] The Affected Creditors unanimously approved the plan which was then sanctioned by the order of Farley J. dated March 29, 2001.

18. [18] The appellants' appeal is substantially based on the following submissions:

1. The plan is not "fair and reasonable" in all of its circumstances as it effectively eliminates the opportunity for unsecured creditors to realize anything.

2. The plan is contrary to the purposes underlying the C.C.A.A.

3. DIAND's reclamation claim is inconsistent with the "fair and reasonable principles" of the C.C.A.A. and environmental remediation legislation.

19. [19] Underlying these submissions is the submission that Farley J. erred in not requiring a more complete and in-depth valuation of Anvil Range's assets be obtained by the Interim Receiver.

20. [20] This last submission should be dealt with first because it is fundamental to the success of the appeal. Farley J.'s findings were based on two reports, one by Strathcona Mineral Services Ltd. dated March 12, 2001 and the other by Deloitte & Touche Corporate Finance Canada, Inc. dated March 13, 2001. In preparing its report, Deloitte & Touche reviewed the Strathcona report, among other materials.

21. [21] In its report Strathcona noted that in the Interim Receiver's 22nd report there was an estimate of the capital expenditures that would be required to resume mining activity at the Grum deposit (which was the only accessible resource base on the Anvil property) including the purchase of mining equipment, rehabilitation of the pit walls, and modifications and repairs to the process facilities. Strathcona said:

> The total is estimated at $80 to $100 million before working capital requirements and we consider this estimate to be reasonable and in the general range of what could be expected. It is clear that the capital expenditures to restart mining operations are going to exceed, perhaps by a factor of two, the cumulative gross operating margins for three years of operation that are indicated.

22. [22] Strathcona concluded its report as follows:

> The total amount realized from the sale or disposition of the foregoing assets on a salvage basis would appear to be in the order of $10-$15 million without making any contribution towards the ongoing care and maintenance costs for the property or the reclamation requirements which we understand have become the responsibility of DIAND. There may also be some value ascribed to tax pools that remain from operating

> losses, capital expenditures and exploration expenditures by Anvil Range. However, presumably most of the value, if any, of those tax pools would only be applicable upon the resumption of mining operations on the property, and the Interim Receiver would be best positioned to comment on this item.

23. [23] Deloitte & Touche Corporate Finance Canada, Inc. concluded that the established market value of all the assets to be "in the range of $11.1 to $19.9 million (Schedule 1), as at January 31, 2001" and that, if it were asked to be more specific, "[it] would suggest the mid-point of the foregoing range, being $15.5 million." It concluded: "Based on the above, there is no value remaining for the unsecured creditors, as the amount owed to secured creditors of over $90.0 million exceeds the value of the assets of Anvil Range."

24. [24] The appellants submitted a letter from Watts, Griffis & McOuat, Consulting Geologists and Engineers, dated March 21, 2001 which reviewed several documents, "in particular" the Strathcona report dated March 12, 2001. In this letter, Watts, Griffis & McOuat stated "a number of questions about the methodology and logic that Strathcona is using". It did not state an opinion on the value of the Anvil Range property.

25. [25] On these materials, Farley J. concluded that "the secured claims are far in excess of the value of the assets" and that the value had to be determined "on a current basis" and not "on a speculative or (remote) possibility basis." He dealt with the evidence submitted by the appellant as follows:

> The Watts, Griffis & McOuat letter of March 21, 2001 has been hastily prepared in an attempt to throw doubt on some of the Strathcona observations and conclusions – but not to discredit them. In fact in numerous instances [the] letter concurs with the Strathcona report. Rather the author of the letter has some questions. It must be appreciated that Strathcona/Farquharson has had significant involvement with the Anvil mining facilities over the past several years, whereas Watts, Griffis & McOuat has only had this rather peripheral engagement. I do not find it unusual that two experienced consultants in this mining field may have different views or approaches, nor that one may feel the need for more information than it was able to glean from reviewing

> the listed documents before reaching a conclusion. In the result, I think it reasonable to accept the views of Farquharson, an established and recognized expert in this field, who has had, as indicated, considerable experience with this matter over the past several years. Further, I think it inappropriate and unnecessary to further delay and incur additional costs to engage upon a further study.

26. [26] In our view, Farley J. did not err in accepting the respondent's evidence as affording a reasonable basis for his findings and, further, he did not make any error in his assessment of this evidence that would justify our interfering with his conclusions: *Equity Waste Management of Canada v. Halton Hills* (*Town)* (1997), 35 O.R. (3d) 321 (C.A.) at 333-336.

27. [27] It may be that the Strathcona report, as a free standing document, could have been more detailed but this is far from saying that it was not capable, particularly in the context of this proceeding, which began in 1998, of forming a reasonable basis for Farley J.'s findings. This context includes the evidence that Anvil Range bought the property in 1994 for $27,000,000, that its resources underwent depletion since then, that the cost of putting the property in a state where it could recommence operations was some $80,000,000 to $100,000,000 and, although it had been known for sometime in the industry that the property was "available", no one had expressed any interest in it.

28. [28] We turn now to the three basic submissions of the appellant set forth in paragraph 18 of these reasons.

29. [29] It will be helpful to deal with the third submission first, that relating to the DIAND claim. The total DIAND claim is for something over $60,000,000. The appellants submit that by reason of the "polluter pays" principle, it is wrong that DIAND should have a secured claim against the assets of Anvil Range for environmental remediation at the expense of the unsecured creditors. There are several facets to this submission but, because of the particular facts of this case, we need not explore them. Of the total DIAND claim, some $16,000,000 relates to funds expended under court orders for the Interim Receiver and this is, undeniably, a valid secured claim. As will be apparent, it is sufficient to resolve this appeal if only this part of DIAND's claim is taken into account – and it may well not be necessary to take any part of the claim into account.

30. [30] We turn now to the first two of the appellant's specific submissions. The first is that the plan is not fair and reasonable because it

effectively eliminates the opportunity for unsecured creditors to realize anything.

31. [31] From the accepted valuation the maximum possible total value of Anvil Range's assets is $19,900,000. After eliminating the portion of DIAND's claim for remediation costs, the secured claims total at least $60,000.000. Accordingly, even after allowing for a fair margin of error on each side of the equation (the assets side and the claims side) it can be seen that the unsecured creditors have no legal or economic interest in the assets in question.

32. [32] The second submission is that the plan is contrary to the purposes of the C.C.A.A. Courts have recognized that the purpose of the C.C.A.A. is to enable compromises to be made for the common benefit of the creditors and the company and to keep the company alive and out of the hands of liquidators. See, for example, *Northland Properties Ltd. v. Excelsior Life Ins. Co. of Can.* (1989), 73 C.B.R. (NS) 195 (B.C.C.A.) at 201. Farley J. recognized this but also expressed the view in paragraph 11 of his reasons that:

> The CCAA may be utilized to effect a sale, winding up or a liquidation of a company and its assets in appropriate circumstances. See *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) at p. 32; *Re Olympia & York Developments Ltd.* (1995), 34 C.B.R. (3d) 93 (Ont. Gen. Div. [Commercial List] at p. 104. Integral to those circumstances would be where a Plan under the CCAA would maximize the value of the stakeholders' pie.

33. [33] Further to this it may be noted that the plan in this case reflected a compromise of difficult priority issues among the secured creditors and, as stated later in Farley J.'s reasons, "the approval of this Plan will allow the creditors (both secured and unsecured) and the shareholders of Anvil to move on with their lives and activities while the mining properties including the mine will be under proper stewardship."

34. [34] It may also be noted that s. 5 of the C.C.A.A. contemplates a plan which is a compromise between a debtor company and its secured creditors and that by the terms of s. 6 of the Act, applied to the facts of this case, the plan is binding only on the secured creditors and the company and not on the unsecured creditors.

35. [35] Relevant to this issue is the fact that the appellants put forward an alternative plan, which involved their receiving the corporate shell of Anvil Range together with $500,000, and other terms. This plan,

however, had no viability. As Farley J. noted in his reasons for the costs disposition it was "doomed to failure given the stated opposition to same [the alternate plan] of the secureds-Cominco Lien and Claimants and DIAND".

36. [36] It is not necessary to resolve this issue to decide the appeal. If the order under appeal was not properly made under the C.C.A.A., there is no doubt that it could have been made by Farley J. in response to the alternative relief sought, which was that of approving a sale of Anvil Range's assets by the Interim Receiver on terms substantially similar to those provided for in the plan. Taking into account that the assets are insufficient to pay even half of the secured creditors claims, it is clear that the order under appeal occasioned no prejudice whatsoever to the appellants. Accordingly we do not give effect to this submission.

37. [37] In the complex circumstances of the operation of the mine and given that there is no hope of the sale generating sufficient funds to satisfy the secured creditors, it cannot be said that Farley J. erred in approving the plan as being fair and reasonable.

COSTS

38. [38] The other appeal is from Farley J.'s order requiring the appellants to pay costs relating to the motion which he fixed in the total amount of $28,500 and allocated as follows:

$15,000 to the Interim Receiver;
$ 7,000 to Cominco;
$ 5,000 to DIAND;
$ 1,500 to Yukon Energy Corporation

39. [39] The appellants submit that Farley J. erred in this costs disposition because parties with an interest in a company governed by the C.C.A.A. should be free to appear in court and oppose the sanctioning of a plan on legitimate grounds without the threat of the penalty of the costs being imposed against them.

40. [40] The award of costs, of course, was a matter within the discretion of the judge and we are not entitled to interfere with the exercise of the discretion just because we may have exercised it differently. To succeed the appellants must show that the exercise of discretion was affected by some error in principle or by misapprehension of the facts. In this case, while we might have been inclined simply to deprive the appellant of costs relating to the motion, we cannot say that there was no principled basis for the disposition which Farley J. made. He was entitled

to conclude, as he did, that there was no realistic basis supporting the appellants' opposition to the plan.

DISPOSITION

41. [41] In the result, the appeal is dismissed with costs payable by the appellants to the respondents who delivered factums and appeared on the hearing of the appeal. These respondents should deliver their submissions respecting the costs of the appeal, in writing, within seven days of the release of these reasons and the appellants should deliver their submissions within fourteen days of the release of the reasons.

42. "J.W. Morden J.A."

43. "Stephen Borins J.A."

44. "K. Feldman J.A."

Released: July 5, 2002

SUPERIOR COURT
(Commercial Division)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

N° : 500-11-049838-150

DATE : JULY 4, 2019

BY THE HONOURABLE DAVID R. COLLIER, J.S.C.

In the matter of the *Companies' Creditors Arrangement Act*

9323-7055 QUEBEC INC.
(formerly Aquadis International Inc.)
Debtor

and

RAYMOND CHABOT Inc, (Mr Jean Gagnon, CPA, CA, CIRP)
Applicant / Monitor

JUDGMENT

I. OVERVIEW

[1] The Monitor has submitted a Plan of Compromise and Arrangement for the Court's approval (the "Plan"). The Plan has received the unanimous approval of the creditors of 9323-7055 Québec inc., formerly Aquadis International inc. ("Aquadis"). Nevertheless, a number of persons who are not party to the Plan oppose its ratification (the "Opposing Retailers"). The Opposing Retailers object that the Plan would entitle the Monitor to take legal action against them on behalf of Aquadis' creditors. They argue that such an action would not be necessary for the restructuring of Aquadis and

that granting this power to the Monitor under the Plan would therefore be a misuse of the *Companies' Creditors Arrangement Act*.[1]

[2] Aquadis' problems arose in 2010 from its sale of defective water faucets. The faucets were manufactured in Taiwan by JYIC Industrial Corporation and Jing Yudh Industrial Co. Ltd. (collectively "JYIC"). Gearex Corporation, a Taiwanese distributor, purchased the faucets from JYIC and resold them to Aquadis. Aquadis in turn sold the faucets to a number of Canadian distributors, including the Opposing Retailers, for resale to builders and consumers.

[3] The Opposing Retailers include Home Depot Canada Inc., RONA Inc., Home Hardware Stores Limited, Groupe BMR Inc., Groupe Patrick Morin Inc. and Matériaux Laurentien Inc. Intact Compagnie d'Assurance Inc. has also opposed the Plan.

[4] Aquadis' creditors include numerous insurance companies who have indemnified their clients for water damage caused by the defective faucets and therefore have subrogated claims against the Opposing Retailers, Aquadis and JYIC. In 2018, the creditors settled with JYIC's distributor, Gearex, which was released from all claims.

[5] The Opposing Retailers and Aquadis also have recursory and other rights against JYIC.

[6] Under the Plan, the Monitor would be allowed to distribute to creditors the settlement funds of $4.7 million received from Gearex and the other settling parties. The Monitor would also be allowed to continue the product liability suit filed against JYIC in November 2017 on behalf of Aquadis and its creditors. Finally, the Plan would recognize the Monitor's ability to take legal action against the Opposing Retailers on behalf of Aquadis' creditors.

[7] The Monitor argues that since the Initial Order was issued in December 2015 suspending all legal proceedings in connection with the sale of the defective faucets, he has been unable to reach a settlement with JYIC and the Opposing Retailers. Consequently, the Monitor argues that there can only be a global settlement of all claims if he is allowed to continue the suit against JYIC and commence an action against the Opposing Retailers. Under the Plan, the Monitor will make a final distribution to creditors once the litigation is terminated or settled.

[8] It is worth noting that in November 2016 the Monitor obtained Court approval to institute legal proceedings against Aquadis' Canadian distributors. At the time, the Opposing Retailers did not voice any objection. However, now that the Monitor seeks to approve the Plan and file suit, the Opposing Parties object.

[9] The Opposing Retailers' objection is based on the legal distinction between the Monitor's action against JYIC and his proposed action against them. In suing JYIC on behalf of Aquadis' creditors, the Monitor is exercising Aquadis' rights against the

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

manufacturer.[2] His action on behalf of creditors is an attempt to recover Aquadis' unliquidated assets, a legitimate objective under a CCAA plan of arrangement. However, the Opposing Retailers argue that because Aquadis has no right of action against the Canadian distributors to whom it sold the defective faucets, the Monitor's action against them is unrelated to a restructuring of Aquadis' affairs under the CCAA.

[10] The Opposing Retailers rely on the decision in *Ernst & Young Inc. v Essar Global Fund Limited*,[3] where the Ontario Court of Appeal held that a monitor may exceptionally play an active role (in this case as a complainant in an oppression remedy) where the proposed action has a restructuring purpose that "materially advances or removes an impediment to a restructuring".

[11] Consequently, in deciding whether to sanction the Plan, the Court is called upon to determine whether the Plan meets the legal test set out in the case law and is consistent with the objectives of the CCAA. For the following reasons, the Court finds that the Plan satisfies these criteria.

II. ANALYSIS

[12] The jurisprudential test applicable to the sanctioning of a plan of compromise or arrangement under the CCAA was repeated by Justice Gascon of the Québec Superior Court (as he then was) in *AbitibiBowater inc. (Arrangement relatif à)* :[4]

> The exercise of the Court's authority to sanction a compromise or arrangement under the CCAA is a matter of judicial discretion. In that exercise, the general requirements to be met are well established. In summary, before doing so, the Court must be satisfied that:
>
> a) There has been strict compliance with all statutory requirements;
>
> b) Nothing has been done or purported to be done that was not authorized by the CCAA; and
>
> c) The Plan is fair and reasonable.
>
> [citations omitted]

[13] In the present case, the first and second conditions are not at issue, despite the arguments made by Home Depot of Canada Inc. The Court is satisfied that the Monitor has complied with all statutory requirements and that nothing has been done that was not authorized by the CCAA. The real question is whether the Plan is fair and reasonable and in keeping with the spirit of the CCAA. The Court believes that it is.

[14] It is worth recalling that the Monitor's objective in applying for a continuation of the proceedings under the CCAA[5] was to present a plan of compromise or arrangement

[2] Articles 1529 and 1730 CCQ.
[3] 2017 ONCA 1014, paras 119-123.
[4] 2010 QCCS 4450, para 19.

that would apply a “global solution” to the many outstanding claims against Aquadis.[6] Indeed, when the CCAA application was filed in December 2015, the company faced 296 claims totalling over $18 million, with new claims relating to the defective faucets being added regularly.

[15] This Court described the purpose of the present proceeding in its June 2018 decision approving the transaction between the Monitor and Gearex:

> The present CCAA proceeding seeks to maximize the assets available to Aquadis' creditors. It has the advantage of centralizing all claims and rights of action in the hands of the Monitor, thereby putting an end to a multitude of judicial proceedings between numerous parties. The process allows the manufacturer, distributors, vendors, purchasers and insurers to advance their competing interests in a comprehensive and expeditious fashion, the whole in keeping with the objectives of the CCAA.[7]

[16] This description highlighted the flexible nature of the CCAA, a feature previously commented on by the courts:

> [T]he CCAA is designed to be a flexible instrument and it is that very flexibility which gives it its efficacy. (…) [O]rders are made if the circumstances are appropriate and the orders can be made within the framework and in the spirit of the CCAA legislation.[8]

[17] The Monitor's objective of using the CCAA to reach a global resolution of the product liability claims is not without precedent. In recent years the statute has served to liquidate a debtor company's assets and propose an arrangement whereby the debtor and other parties contribute to an indemnity fund intended to compensate creditors. Plans of arrangement have been approved by the courts to resolve multi-party litigation related to the Mégantic rail disaster, [9] financial fraud, [10] product liability claims[11] and a class action suit.[12]

[18] Whatever its form, a plan of compromise or arrangement is intended to settle all the existing issues between the debtor company and its creditors. The purpose of the

---

5 On June 11, 2015, 9323-7055 Québec inc. filed a Notice of Intention under para 50.4 (1) of the *Bankruptcy and Insolvency Act*.

6 *Requête pour continuer les procédures de restructuration sous la Loi sur les arrangements avec les créanciers des compagnies et pour l'émission d'une ordonnance initiale*, December 8, 2015, para 4d).

7 Arrangement relative à 9323-7055 Québec inc (Aquadis International inc.), 2018 QCCS 2945, para 18.

8 *Re Canadian Red Cross Society/Société canadienne de la croix-rouge*, (1998) 5 C.B.R. (4th) 299, para 45.

9 *Montréal, Maine & Atlantique Canada Cie. (Arrangement relative à),* Court file No. 450-11-000167-134, June 8, 2015, Superior Court of Québec.

10 *Corporation Mount Real (Arrangement relative à),* Court File No. 500-11-051741-169, April 26, 2917, Superior Court of Québec.

11 *Muscletech Research and Development Inc*., 2006 CanLII 1020 (ON SC).

12 *Sino-Forest Corporation (Re),* Court file No. CV-12-9667-00CL, December 3, 2012, Ontario Superior Court of Justice.

CCAA is to create an environment of negotiation and compromise and often it is the stay provision that creates the necessary stability for that process to unfold.[13]

[19] In the present case, the stay provision has been in place for three and a half years. During that time, the Monitor has reached an agreement with Gearex and others, but has not been able to settle the claims involving the manufacturer and retailers. As a result, the Monitor cannot at this time present a plan of compromise or arrangement that offers a definitive solution to all of the product liability claims involving Aquadis. The Monitor's solution is to present a plan whereby the sums recovered to date will be distributed to creditors, with a final distribution to be made when the Monitor's legal proceedings against JYIC and the retailers have resulted in final judgments or been settled.

[20] In light of this objective, the Opposing Retailers' argument that the CCAA is being misused to allow the Monitor to prosecute an action that cannot be legally asserted against them by Aquadis appears both narrowly technical and unconvincing. It is the position adopted by the Opposing Retailers, not the Monitor, which appears at odds with the CCAA objective to settle all outstanding issues between the debtor and its creditors.

[21] In the absence of a compromise, a global restructuring of Aquadis' liabilities is only possible by litigating the claims against the Opposing Retailers and JYIC. To borrow the words of the court in *Essar*,[14] litigation has become necessary to "materially advance" the restructuring process contemplated by the Initial CCAA Order.

[22] Furthermore, the bringing of consolidated proceedings by the Monitor is the only practical solution to a global resolution. If the Monitor pursues his claim against JYIC under the Plan, while the insurers continue their individual claims against the Opposing Retailers outside the Plan, any amounts recovered from one defendant will have to take account of amounts recovered from the other defendants. In addition, all awards or settlements will have to take into account the amounts already recovered from Gearex and other parties. The creditors' claims against Aquadis will only be settled once and for all when the contribution of each actor in the chain of distribution has been established.

[23] It is a sensible use of judicial resources to authorize a consolidated action by the Monitor against the Opposing Retailers, and avoid the reactivation of a multitude of individual legal actions. A single action respects the guiding principle of proportionality found in the Québec *Code of Civil Procedure*, and is in keeping with the social objective of the CCAA, which requires an examination of the wider public interest when assessing a plan of compromise.[15]

[24] The Opposing Retailers cannot argue they are prejudiced by having to defend a single action by the Monitor as opposed to a cascade of litigation by individual insurers.

[13] *Canadian Airlines Corp., Re,* 2000 ABQB 442, para 152.
[14] *Supra*, note 3.
[15] *ATB Financial v Metcalfe & Mansfield Alternative Investments II Corp.,* 2008 ONCA 587, paras 51-52.

[25] The Monitor could have brought one action naming JYIC and the retailers as joint defendants. Instead he sued JYIC, excluding the retailers because he was still negotiating with them. Had the retailers been included in the action, they would certainly have invoked their recursory right against JYIC – as they are sure to do in the Monitor's proposed action. Assuming the Court has jurisdiction over JYIC,[16] it is foreseeable that the two actions will be joined.

[26] It is important to note that under the Plan all of Aquadis' creditors, whether they are party to the Plan, or merely subject to it like the Opposing Retailers, receive equal treatment regarding their claims.

[27] It bears mention that the Opposing Retailers were aware in November 2016 of the Court's Order authorizing the Monitor to institute legal action against Canadian distributors. They did not oppose the Order at that time, or thereafter attempt to have it set aside or varied. The Opposing Retailers claim they are not challenging the Order now, but they are clearly doing so, and their complaint is late. The Plan merely continues the power granted to the Monitor over two and a half years ago.

[28] Finally, the Monitor has asked for an order condemning the Opposing Retailers to pay costs on a solicitor-client basis, arguing that their opposition to the Plan is entirely without merit. The Court notes the novel character of the Plan and does not consider the opposition abusive.

FOR THESE REASONS, THE COURT:

[29] **GRANTS** the Monitor's application to sanction and approve the Amended Plan of Compromise and Arrangement dated April 25, 2019;

[30] **THE WHOLE** with costs against the Opposing Parties.

DAVID R. COLLIER, J.S.C.

Mtre Alain N. Tardif
Mtre Gabriel Faure
MC CARTHY TETREAULT
Mtre Francis C. Meagher
LAPOINTE ROSENSTEIN MARCHAND MELANÇON
Counsel for Applicant / Monitor

[16] JYIC has filed a declinatory exception contesting the Court's jurisdiction over it. The motion has not yet been heard.

Mtre Éric Savard
LANGLOIS AVOCATS
Counsel for Creditors committee

Mtre Hubert Sibre
MILLER THOMSON
Counsel for Home Depot

Mtre Julie Himo
Mtre Dominic Dupoy
NORTON ROSE FULBRIGHT CANADA
Counsel for Rona

Mtre Alexander Bayus
GOWLING WLG (CANADA)
Counsel for Home Hardware Stores Ltd

Mtre Pierre Goulet
Counsel for Intact and BMR and Patrick Morin

Mtre François D. Gagnon
Mtre Panagiota Kyres
BORDEN LADNER GERVAIS
Counsel for JYIC and Cathay

Hearing date : June 5, 2019

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No.: 500-09-028436-194, 500-09-028474-195, 500-09-028476-190
(500-11-049838-150)

DATE: May 21, 2020

CORAM: THE HONOURABLE MARK SCHRAGER, J.A.
PATRICK HEALY, J.A.
LUCIE FOURNIER, J.A.

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT

No.: 500-09-028436-194

HOME DEPOT OF CANADA INC.
APPELLANT – Impleaded Party
v.
9323-7055 QUÉBEC INC. (Formerly known as Aquadis International Inc.)
RAYMOND CHABOT INC.
RESPONDENTS/ INCIDENTAL RESPONDENTS
and
HOME HARDWARE STORES LIMITED
IMPLEADED PARTY/INCIDENTAL APPELLANT– Impleaded party
and
RONA INC.
ROYAL & SUN ALLIANCE INSURANCE COMPANY OF CANADA
CATHAY CENTURY INSURANCE CO., LTD
JING YUDH INDUSTRIAL CO., LTD
GROUPE BMR INC. (Formerly known as Gestion BMR Inc.)
GROUPE PATRICK MORIN INC. (Formerly known as Patrick Morin Inc.)
MATÉRIAUX LAURENTIENS INC.
DESJARDINS GENERAL INSURANCE INC.
THE PERSONAL GENERAL INSURANCE INC.
INTACT INSURANCE COMPANY

L'UNIQUE GENERAL INSURANCE INC.
LA CAPITALE GENERAL INSURANCE INC.
PROMUTUEL INSURANCE BAGOT
PROMUTUEL INSURANCE BORÉALE
PROMUTUEL INSURANCE BOIS-FRANCS
PROMUTUEL INSURANCE CHAUDIÈRE-APPALACHES
PROMUTUEL INSURANCE L'ESTUAIRE
PROMUTUEL INSURANCE DEUX-MONTAGNES
PROMUTUEL INSURANCE LAC AU FLEUVE
PROMUTUEL INSURANCE OUTAOUAIS
PROMUTUEL INSURANCE LA VALLÉE
PROMUTUEL INSURANCE MONTMAGNY-L'ISLET
PROMUTUEL INSURANCE PORTNEUF-CHAMPLAIN
PROMUTUEL INSURANCE RÉASSURANCE
PROMUTUEL INSURANCE RIVE-SUD
PROMUTUEL INSURANCE VALLÉE DU SAINT-LAURENT
PROMUTUEL INSURANCE VAUDREUIL- SOULANGES
PROMUTUEL INSURANCE VERCHÈRES-LES-FORGES
PROMUTUEL INSURANCE LANAUDIÈRE
AIG TAIWAN INSURANCE CO LTD
AVIVA INSURANCE COMPANY OF CANADA
SOVEREIGN GENERAL INSURANCE COMPANY
INTERNATIONAL ASSOCIATION OF PLUMBING AND MECHANICAL OFFICIALS
JYIC INDUSTRIAL CORPORATION
INSURANCE COMPANY OF NORTH AMERICA
IAPMO RESEARCH AND TESTING INC.
FUBON INSURANCE CO. LTD
GEAREX CORPORATION
SEAN MURPHY in his capacity as Canada's attorney for Lloyd's underwriters
IMPLEADED PARTIES – Impleaded Parties

No.: 500-09-028474-195

GROUPE BRM INC. (Formerly known as Gestion BMR inc.)
GROUPE PATRICK MORIN INC. (Formerly known as Patrick Morin inc.)
MATÉRIAUX LAURENTIENS INC.
INTACT INSURANCE COMPANY
APPELLANTS – Impleaded Parties

v.

9323-7055 QUÉBEC INC. (Formerly known as Aquadis International Inc.
RAYMOND CHABOT INC.
RESPONDENTS/INCIDENTAL RESPONDENTS

and

HOME HARDWARE STORES LIMITED

IMPLEADED PARTY/INCIDENTAL APPELLANT– Impleaded party

and

CATHAY CENTURY INSURANCE CO., LTD
JING YUDH INDUSTRIAL CO., LTD
DESJARDINS GENERAL INSURANCE INC.
THE PERSONAL GENERAL INSURANCE INC.
L'UNIQUE GENERAL INSURANCE INC.
LA CAPITAL GENERAL INSURANCE INC.
PROMUTUEL INSURANCE BAGOT
PROMUTUEL INSURANCE BORÉALE
PROMUTUEL INSURANCE BOIS-FRANCS
PROMUTUEL INSURANCE CHAUDIÈRES-APPALACHES
PROMUTUEL INSURANCE L'ESTUAIRE
PROMUTUEL INSURANCE DEUX-MONTAGNES
PROMUTUEL INSURANCE LAC AU FLEUVE
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PROMUTUEL INSURANCE MONTMAGNY-L'ISLET
PROMUTUEL INSURANCE PORTNEUF-CHAMPLAIN
PROMUTUEL INSURANCE RÉASSURANCE
PROMUTUEL INSURANCE RIVE-SUD
PROMUTUEL INSURANCE VALLÉE DU SAINT-LAURENT
PROMUTUEL INSURANCE VAUDREUIL-SOULANGES
PROMUTUEL INSURANCE VERCHÈRES-LES-FORGES
PROMUTUEL INSURANCE LANAUDIÈRE
RONA INC.
ROYAL & SUN ALLIANCE INSURANCE COMPANY OF CANADA
HOME DEPOT OF CANADA INC.
AIG TAIWAN INSURANCE CO LTD
AVIVA INSURANCE COMPANY OF CANADA
SOVEREIGN GENERAL INSURANCE COMPANY
INTERNATIONAL ASSOCIATION OF PLUMBING AND MECHANICAL OFFICIALS
JYIC INDUSTRIAL CORPORATION
INSURANCE COMPANY OF NORTH AMERICA
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FUBON INSURANCE CO. LTD
GEAREX CORPORATION
SEAN MURPHY in his capacity as Canada's attorney for Lloyd's underwriters

IMPLEADED PARTIES – Impleaded Parties

No.: 500-09-028476-190

RONA INC.
ROYAL & SUN ALLIANCE INSURANCE COMPANY OF CANADA
APPELLANTS – Impleaded Parties
v.
9323-7055 QUÉBEC INC. (Formerly known as Aquadis International inc.)
RAYMOND CHABOT INC.
RESPONDENTS/INCIDENTAL RESPONDENTS
and
HOME HARDWARE STORES LIMITED
IMPLEADED PARTY/INCIDENTAL APPELLANT – Impleaded party
and
HOME DEPOT OF CANADA INC.
CATHAY CENTURY INSURANCE CO., LTD
JING YUDH INDUSTRIAL CO., LTD
GROUPE BMR INC. (Formerly known as Gestion BMR Inc.)
GROUPE PATRICK MORIN INC. (Formerly known as Patrick Morin inc.)
MATÉRIAUX LAURENTIENS INC.
DESJARDINS GENERAL INSURANCE INC.
THE PERSONAL GENERAL INSURANCE INC.
INTACT INSURANCE COMPANY
L'UNIQUE GENERAL INSURANCE INC.
LA CAPITALE GENERAL INSURANCE INC.
PROMUTUEL INSURANCE BAGOT
PROMUTUEL INSURANCE BORÉALE
PROMUTUEL INSURANCE BOIS-FRANCS
PROMUTUEL INSURANCE CHAUDIÈRE-APPALACHES
PROMUTUEL INSURANCE L'ESTUAIRE
PROMUTUEL INSURANCE DEUX-MONTAGNES
PROMUTUEL INSURANCE LAC AU FLEUVE
PROMUTUEL INSURANCE OUTAOUAIS
PROMUTUEL INSURANCE LA VALLÉE
PROMUTUEL INSURANCE MONTMAGNY-L'ISLET
PROMUTUEL INSURANCE PORTNEUF-CHAMPLAIN
PROMUTUEL INSURANCE RÉASSURANCE
PROMUTUEL INSURANCE RIVE-SUD
PROMUTUEL INSURANCE VALLÉE DU SAINT-LAURENT
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JYIC INDUSTRIAL CORPORATION
INSURANCE COMPANY OF NORTH AMERICA
IAPMO RESEARCH AND TESTING INC.
FUBON INSURANCE CO. LTD
GEAREX CORPORATION
SEAN MURPHY in his capacity as Canada's attorney for Lloyd's underwriters
IMPLEADED PARTIES – Impleaded Parties

JUDGMENT

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[1] On appeal from a judgment rendered on July 4, 2019 by the Superior Court, District of Montreal, Commercial Division (the Honourable David R. Collier), that approved a plan of arrangement (the "**Plan of Arrangement**" or the "**Plan**") under the *Companies' Creditors Arrangement Act* ("***CCAA***") relating to Aquadis International Inc. (now the Respondent 9323-7055 Québec Inc.).

[2] For the reasons of Justice Schrager, J.A., with which Justices Healy and Fournier, JJ.A., concur, **THE COURT**:

<u>In the file 500-09-028436-194</u>

[3] **DISMISSES** the appeal with legal costs;

[4] **DISMISSES** the incidental appeal without legal costs

<u>In the file 500-09-028474-195</u>

[5] **DISMISSES** the appeal with legal costs;

[6] **DISMISSES** the incidental appeal without legal costs

<u>In the file 500-09-28476-190</u>

[7] **DISMISSES** the appeal with legal costs;

[8] **DISMISSES** the incidental appeal without legal costs.

MARK SCHRAGER, J.A.

PATRICK HEALY, J.A.

LUCIE FOURNIER, J.A.

Mtre Hubert Sibre
Mtre Rosemarie Sarrazin
MILLER THOMSON
For Home Depot of Canada Inc.

Mtre Pierre Goulet
For Groupe BMR Inc., Groupe Patrick Morin Inc., Matériaux Laurentiens, Intact Compagnie d'assurance inc.

Mtre Julie Himo
Mtre Dominic Dupoy
Mtre Arad Mojtahedi
NORTON ROSE FULBRIGHT CANADA
For Rona Inc., Royal & Sun Alliance Insurance Company of Canada

Mtre Jocelyn Perreault
Mtre Gabriel Faure
McCARTHY TÉTRAULT
Mtre Antoine Melançon
LAPOINTE ROSENSTEIN MARCHAND MELANÇON
For Raymond Chabot inc.

Mtre Éric Savard
LANGLOIS AVOCATS
For Desjardins General Insurance Inc., The Personal General Insurance Inc., Intact Insurance Company, L'unique General Insurance Inc., La Capital General Insurance Inc., Promutuel Insurance Bagot, Promutuel Insurance Boréale, Promutuel Insurance Bois-Francs, Promutuel Insurance Chaudières-Appalaches, Promutuel Insurance L'estuaire, Promutuel Insurance Deux-Montagnes, Promutuel Insurance Lac Au Fleuve, Promutuel Insurance Outaouais, Promutuel Insurance La Vallée, Promutuel Insurance Montmagny-L'islet, Promutuel Insurance Portneuf-Champlain, Promutuel Insurance Réassurance, Promutuel Insurance Rive-Sud, Promutuel Insurance Vallée Du Saint-Laurent, Promutuel Insurance Vaudreuil-Soulanges, Promutuel Insurance Verchères-Les-Forges, Promutuel Insurance Lanaudière, Royal Sun Alliance Insurance Company

of Canada, Aviva Insurance Company of Canada

Mtre Alexandre Bayus
GOWLING WLG (Canada)
For Home Hardware Stores Limited

Date of hearing: March 11, 2020

REASONS OF SCHRAGER, J.A.

---

[9] These are appeals from a judgment rendered on July 4, 2019 by the Superior Court, District of Montreal, Commercial Division (the Honourable David R. Collier),[1] that approved a plan of arrangement (the "**Plan of Arrangement**" or the "**Plan**") under the *Companies' Creditors Arrangement Act*[2] ("***CCAA***") relating to Aquadis International Inc. (now the Respondent 9323-7055 Québec Inc.).

[10] The Appellants (sometimes hereinafter the "**Retailers**") oppose the Plan because it authorizes the Respondent Raymond Chabot Inc. (the "**Monitor**") to take legal proceedings against them on behalf of creditors of Aquadis International Inc. ("**Aquadis**" or the "**Debtor**"). Most of the creditors are insurers by way of subrogation in the rights of policy holders whose homes were damaged due to the allegedly defective faucets sold by Aquadis.

[11] The appeals are concerned with the scope of the powers that may be conferred on the Monitor.

[12] The Monitor was authorized to exercise the rights of creditors rather than those of the Debtor. While some reported judgments may present certain analogies, the present case appears to be unique in Canadian jurisprudence.

[13] There are also procedural issues raised against the Appellants' challenge of the specific clause in the Plan of Arrangement. As will be explained below, the Respondents argue primarily that these appeals are an indirect challenge of the *CCAA* judge's November 2016 order to vary the Monitor's powers (the "**November 2016 Order**").

I. FACTS AND PROCEDURAL HISTORY

[14] The case arises from the sale of faucets that were allegedly affected by manufacturing defects and the subsequent claims arising from the resulting water damage suffered by purchasers of the product.

[15] Aquadis imported and distributed bathroom products, including faucets.

[16] Jing Yudh Industrial Co. ("**JYIC**") is a China-based manufacturer of various valve products. The faucets in question were manufactured by JYIC and sold to a Chinese

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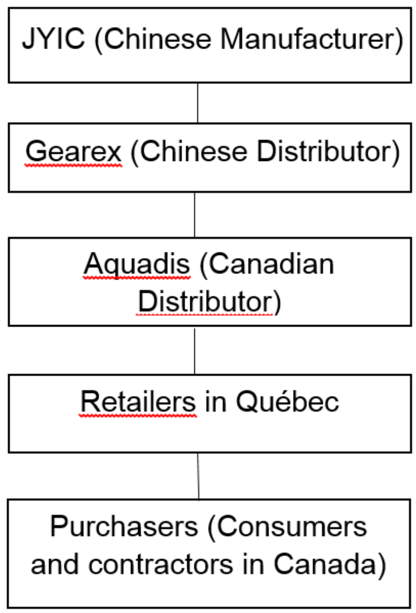
[1] Judgment in appeal.
[2] *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36.

distributor, Gearex, which, in turn, sold them to Aquadis. The latter resold the faucets to various retailers in Quebec. These include the Appellants Rona Inc. ("**Rona**"), BMR Group Inc. ("**BMR**"), The Home Depot of Canada ("**Home Depot**"), Matériaux Laurentiens and Home Hardware Stores Limited ("**Home Hardware**"). The Appellants ultimately resold the faucets to Quebec-based consumers or contractors. The flowchart in the Appellants' factum, appropriately translated, represents the chain of distribution as follows:



[17] It should be noted that the Retailers are not creditors in the insolvency proceedings in that they did not file proofs of claim. Rona sought leave to file two years after the deadline set forth in the court-approved claims protocol. Such leave was denied by the *CCAA* judge on March 13, 2019.[3]

[18] Claiming water damage caused by faulty faucets, many consumers sought compensation from their insurers, who upon payment were subrogated in the rights of their insureds.

[19] The insurers then instituted legal proceedings against Aquadis, the aggregate of which claims exceeded Aquadis' insurance coverage. Faced with this multitude of recourses, Aquadis obtained stays of proceedings through the filing of a notice of intention to file a proposal under the *Bankruptcy and Insolvency Act*[4] ("*BIA*") in June 2015, which was continued under the *CCAA* pursuant to an initial order made on

3 *Arrangement relatif à 9323-7055 Québec inc. (Aquadis International Inc.)*, 2019 QCCS 1396.
4 *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [*BIA*].

December 9, 2015. Raymond Chabot Inc. was appointed Monitor and granted the powers of the board of directors given the resignation of all members of the board. Legal proceedings instituted against Aquadis or anyone in the distribution chain (i.e., the Retailers) were suspended in accordance with the provisions of the *CCAA*. At the time, approximately 20 actions regrouping several hundred consumers' claims were pending before the courts of Quebec and two other provinces.[5]

[20] On January 6, 2016, the Superior Court issued an order regarding the filing and processing of creditors' claims.

[21] On November 9, 2016, the Monitor sought an order to amend its powers "to conclude transactions or, failing that, to take proceedings against persons having resold or installed defective products purchased from Aquadis, such as distributors, retailers and general contractors". Rona was the only Appellant that was notified of the motion giving rise to such order as it was the only one that had requested to be entered on the service list.

[22] On November 14, 2016, the Court granted the application to vary the Monitor's powers and thus granted the Monitor the right to commence or continue any action for and in the name of Aquadis' creditors having any connection with defective faucets. This is the November 2016 Order referred to above.[6]

[23] That judgment was not appealed nor was there an attempt to seek its revision in the lower court or in the present appeal.

[24] Following the issuance of the November 2016 Order, the Monitor began negotiations with the Retailers that stretched over a period of two years with a view to arriving at a "global settlement" in virtue of which the Retailers would contribute to a litigation pool in exchange for full releases from any liability arising as a result of the sale of any defective faucets.

[25] On December 19, 2016, the Monitor initiated legal proceedings against JYIC and Gearex to enforce the rights of Aquadis regarding the defective faucets. Settlements were reached with some of JYIC's and Gearex's insurers generating the receipt of over $7 million ($4.7 million net of fees and costs) in consideration of full releases. However,

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5 In virtue of arts. 1728, 1729 and 1730 *C.C.Q.*, each group in the supply chain would have a recourse against relevant parties above them at each step in the chain.

6 The November 2016 Order is in these terms:

> initier ou continuer toute réclamation, poursuite, action en garantie ou autre recours des créanciers de 9323-7055 Québec inc. (anciennement connue sous le nom d'Aquadis International inc., « Aquadls ») au nom et pour le compte de ces créanciers contre des personnes opérant au Canada découlant, directement ou indirectement, ou ayant un lien ou pouvant avoir raisonnablement un lien, direct ou indirect, avec un défaut de fabrication affectant des biens vendus par Aquadis, avec l'accord préalable du comité des créanciers constitue par le paragraphe n° 24 de l'Ordonnance initiale (le « Comite des créanciers »).
> (Emphasis added)

the Monitor was unable to reach an agreement with one of JYIC's insurers, Cathay Century Insurance Co. Ltd. On June 20, 2018, the Superior Court approved these transactions between Aquadis, its insurers and the manufacturer of the products in a judgment executory notwithstanding appeal. The Retailers opposed this because, in their view, the proceedings under the *CCAA* were being used to settle disputes not involving Aquadis' creditors, but rather third parties. On June 28, 2018, Rona sought leave to appeal and a stay of the foregoing judgment which was dismissed by a judge of this Court since the matter had become hypothetical given the completion of the transaction immediately following the issuance of the judgment.[7]

[26] At the beginning of 2019, the Monitor filed the Plan of Arrangement providing for the establishment of a litigation pool made up of all the sums collected by the Monitor in exchange for full releases. The Plan of Arrangement also includes the power of the Monitor to sue the Retailers on behalf of the creditors, which is the subject of these appeals.

[27] The Plan, as amended, was unanimously approved at the meeting of creditors called for such purpose on April 25, 2019. All creditors voting (831 in number representing $20,686,727) were in favour. The total claims in the file (885) are $22,424,476, of which 738 creditors held $18,190,120 (or 81%) of the debt. These 738 creditors, who are represented on the creditors’ committee, all voted in favour. They are all insurers of consumers who claimed damages arising from the faucets.

[28] On May 23, 2019, the Monitor instituted actions in damages against the Retailers as contemplated in the Plan. These actions were suspended pending judgment in these appeals. The Monitor seeks condemnations against the Retailers based on the total amount of claims received for damages incurred by consumers divided amongst the Retailers on the basis of the proportion of defective faucets sold. The validity of the approach is not in issue in these appeals. The eventual success or failure of these actions based on the evidence presented will be for another day in another court.

[29] The Plan of Arrangement, as amended at the meeting of creditors, was approved by the Superior Court on July 4, 2019 despite the Retailers’ contestation. This is the judgment in appeal.

II. THE JUDGMENT IN APPEAL

[30] The *CCAA* judge emphasized from the outset that the Retailers' opposition was based primarily on the fact that Aquadis had no right of action against them. He undertook an analysis of the Plan of Arrangement in light of the three criteria developed by the case law as relevant to approval: (1) that all statutory provisions are complied

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7 Arrangement relatif à 9323-7055 Québec inc., 2018 QCCA 1345 (Schrager, J.A.).

with; (2) that nothing was done that was not authorized by the *CCAA*; and (3) that the plan is fair and reasonable.

[31] The first two criteria were not in issue. The judge concluded that the Plan of Arrangement satisfies the third criterion since the Monitor's main objective was to achieve an overall solution to all the actions brought against Aquadis. The Monitor's proceedings against the Retailers were therefore aimed at maximizing Aquadis' assets in liquidation, which is a proper purpose recognized in the case law. Thus, the Plan would, upon resolution of the law suits, allow for distribution of all the sums collected in partial satisfaction of creditors' claims.

[32] The judge rejected the Appellants' argument that the objectives of the *CCAA* are being thwarted by allowing the Monitor to pursue a remedy to which it is not entitled. He characterized this argument as technical and unconvincing because, in the absence of consensual settlements, recourse against the Retailers (and JYIC) is the only possible avenue leading to a global treatment of Aquadis' liabilities. Thus, the powers sought by the Monitor were deemed necessary in order to materially advance the restructuring process. The judge accepted this course of action as the only practical resolution of this case. As such, he indicated that the solution chosen was a sensible use of judicial resources since it avoids the multiplication of individual actions outside the framework of the Plan of Arrangement. He also pointed out that the Appellants cannot complain that they are prejudiced by having to defend themselves against a single action rather than a "cascade of litigation by individual insurers".

[33] Finally, the judge noted that the Retailers were aware, in 2016, of the November 2016 Order granting the Monitor the power to sue them but failed to challenge it. As such, their challenge of such power in the Plan of Arrangement was late.

[34] The judge thus approved the Plan of Arrangement.

III. **ISSUES**

[35] The Appellants submit two questions to the Court:

a) Can a monitor appointed under the provisions of the *CCAA* exercise the rights, not of the insolvent debtor, but of certain creditors of the insolvent debtor to sue third parties for damages?

b) Does the mere fact that the Retailers did not challenge the November 2016 Order mean that they could not challenge the application for approval of the corresponding provision of the Plan of Arrangement?

[36] The Respondent Monitor adds that the appeal should be dismissed as hypothetical, since the November 2016 Order granting it the power to sue is not challenged and as such will remain in effect even if this Court allows the appeals.

IV. **APPELLANTS' POSITION**

[37] The Appellants submit to the Court that the judge of first instance erred in granting the Monitor the right to bring actions on behalf of Aquadis' creditors against the Retailers, because this power is not "in respect of the company" within the meaning of section 23 of the *CCAA* which enumerates the Monitor's duties.

[38] In addition, they argue that since these claims are not assets of the Debtor, the mere fact that the law suits relate to products distributed by the Debtor is insufficient to give the Monitor the right to sue the Retailers on behalf of the creditors. The Appellants contend that the Monitor cannot pursue recourses between the various creditors of an insolvent company given the lack of a sufficient connection with the insolvency of the Debtor. Stays of proceedings granted by a *CCAA* judge should apply only to actions against the debtor and its assets. Lawsuits by the creditors against the Retailers fall outside the *CCAA* estate and should not be stayed or otherwise dealt with in the file.

[39] The Appellants further submit that the Monitor's exercise of remedies on behalf of Aquadis' creditors compromises the Monitor's duty of neutrality. They argue that by exercising the rights of the creditors the Monitor is acting for the benefit of some of the Debtor's creditors. They also point out that the Monitor failed to act transparently in the process leading up to the November 2016 Order and that the contingency fee agreed upon with the creditors' committee places the Monitor in a conflict of interest.

[40] The Appellants contend that the hearings of damage actions based on the *Civil Code of Québec* before the Commercial Division of the Superior Court results in inappropriate preferential treatment of such claims over similar ones filed before the Civil Division, which is contrary to the proper administration of justice. Specifically, the Monitor, by instituting proceedings in the Commercial Division, avoids the filing of a case protocol[8] and may improperly rely on the *Canada Evidence Act*.[9] They add that their rights of appeal under the *CCAA* are subject to leave[10] whereas under the *Code of Civil Procedure* they would have a right of appeal for any condemnation exceeding $60,000.[11]

[41] The Appellants also argue that, according to established and recognized principles of statutory interpretation, a tribunal must favour an interpretation of the law

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8 Under arts. 148 and following *Code of Civil Procedure* [*C.C.P.*].
9 *Canada Evidence Act*, R.S.C. 1985, c. C-5 [*CEA*].
10 See s. 13 *CCAA*.
11 See art. 30 *C.C.P.*

that is respectful of the division of powers under the *Canadian Constitution*.[12] They point out that an interpretation conferring rights on the Monitor to exercise remedies on behalf of solvent creditors against solvent defendants (the Retailers) constitutes an unwarranted intrusion by Parliament into the jurisdiction of the provincial legislatures over property and civil rights, thereby contravening the division of powers. They argue that the interpretation of the scope of *CCAA* jurisdiction should be directed to a result that is constitutionally coherent.

[42] As for the second question in appeal, the Appellants argue that they are entitled to challenge the Plan of Arrangement and are not precluded from doing so despite the absence of any contestation of the November 2016 Order, now or previously.

[43] For the Appellants, the Plan of Arrangement is not merely a confirmation of the powers granted by the November 2016 Order, but rather has the effect of replacing the interlocutory orders. In that sense, the present challenge is not, in their view, a collateral attack on the November 2016 Order. Moreover, since that order is the product of an interlocutory decision, it does not benefit from the presumption of *res judicata*.

[44] The Appellants further indicate that they were not notified of the application to vary the Monitor's powers until two years after the fact and, in that sense, they could not oppose the granting of the November 2016 Order. They further state that the consumers or their insurers (i.e. the creditors) are not prejudiced by the failure to challenge the November 2016 Order as this has had no impact on any party who chose to settle.

[45] In addition, the Appellants contend that even if they are effectively precluded from challenging the November 2016 Order, the question as to whether the judge had jurisdiction to sanction a plan of arrangement granting the Monitor the right to exercise the rights of creditors against the Retailers remains open. In that sense, the November 2016 Order does not, in the Appellants' view, establish the validity of any such power under a plan of arrangement made pursuant to the *CCAA*.

V. **DISCUSSION**

[46] I am of the view that the judge's approval of the Plan of Arrangement and, specifically, the Monitor's power to institute proceedings to recover from the Retailers damages allegedly suffered by consumers is not tainted by a reviewable error. Though I think that reasoning in addition to that found in the judgment is required to justify such a position, the result is not an erroneous or unreasonable exercise of the judge's discretion. As such, I propose to dismiss the appeals.

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[12] *Constitution Act, 1867* (UK), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, Appendix II, No. 5 [*Constitution Act*].

[47] Given such results, it is not strictly necessary to dispose of the Appellants' second ground regarding the right to challenge the Plan given the November 2016 Order, but I think a few words are appropriate to set the record straight from the point of view of both Appellants and Respondent Monitor, because of the emphasis put on such matter by the parties.

[48] The judge said this:

> [27] It bears mention that the Opposing Retailers were aware in November 2016 of the Court's Order authorizing the Monitor to institute legal action against Canadian distributors. They did not oppose the Order at that time, or thereafter attempt to have it set aside or varied. The Opposing Retailers claim they are not challenging the Order now, but they are clearly doing so, and their complaint is late. The Plan merely continues the power granted to the Monitor over two and a half years ago.

[49] This, essentially, is in answer to the Monitor's argument, reiterated in appeal, that the contestation of the Plan of Arrangement by the Appellants constitutes a collateral attack against the November 2016 Order long after the expiry of the time limit to appeal and after the expiry of any time limit which could be reasonable to either revoke it (under the *Code of Civil Procedure*)[13] or vary it (under the comeback clause in the initial order issued under the *CCAA*), the whole given the Appellants' lack of diligence in the matter.

[50] The time limit to seek leave to appeal under the *CCAA* is 21 days.[14] The "comeback clause" in the initial order[15] permits parties such as the Appellants, who may be affected by an order of the *CCAA* court, to seek to vary such provision even after the expiry of the time limit to appeal. Even in the absence of such a clause, a party that was not served with the proceedings could seek its revision.[16] However, a party seeking "comeback relief" must act diligently.[17]

[51] The Appellants underline that with the exception of Rona, they were not served with the proceedings giving rise to the November 2016 Order as they were not on the service list. They contend that they were only informed two years after the fact as

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13 Arts. 347 and 348 *C.C.P*.

14 S. 14 (2) *CCAA*.

15 Paragraph 44 of the Order of December 9, 2016.

16 Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed., Toronto, Carswell, 2013, pp. 58-60. *Indalex Limited (Re)*, 2011 ONCA 265, para. 55 [*Indalex*]; *Canada North Group Inc (Companies' Creditors Arrangement Act)*, 2017 ABQB 550, para. 48 [*Canada North Group*].

17 See *Indalex*, *supra*, note 16, paras. 157, 161 and 166, reversed on other grounds in *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271; *Parc Industriel Laprade Inc. v. Conporec Inc*., 2008 QCCA 2222, paras. 7 and 17; *Montréal, Maine & Atlantique Canada Cie (Arrangement relatif à)*, 2015 QCCS 3236, para. 33; *White Birch Paper Holding Company (Arrangement relatif à)*, 2012 QCCS 1679, para. 238; *Muscletech Research and Development Inc., Re*, 2006 CanLII 1020 (Ont. Sup. Ct.), para. 5; *Canada North Group Inc*, *supra*, note 16, para. 48.

disclosed by the correspondence filed as exhibits.[18] However, and though the record does not *per se* disclose it, the fact of not being on the service list is, experience indicates, purely a result of not asking the Monitor or its counsel to be placed on the list.[19]

[52] The Respondents contend that the Appellants have not acted with sufficient diligence in the matter and point to analogous situations arising before the Ontario Court of Appeal in *Indalex* and before the Quebec Superior Court in *Aveos*.[20]

[53] In *Indalex*, the interim lender sought the benefit from the proceeds of asset sales in the repayment of loans in accordance with the priority granted by the *CCAA* court three months earlier. The debtor company's pension fund sought to enforce its alleged priority over the monies, which the monitor contested, pleading that the pension fund was in effect attacking the security previously granted the lenders in priority to the pension fund. The Ontario Court of Appeal held that the pension fund had acted in a timely manner since it was only upon the court application to distribute the funds received from the asset sales that "it became clear" that the debtor company was abandoning the pension plans in their underfunded states.

[54] In *Aveos*, the Superintendent of Financial Institutions claimed that the statutory deemed trust created in its favour afforded a priority for monthly pension plan contributions to defray the pension plan deficit. These payments were stopped with court approval at the inception of the *CCAA* process. The present Respondents quote the undersigned, then the *CCAA* judge treating the argument, as follows:

> [92] The Initial Order was renewed six (6) times. The Superintendent has been on the service list. It is not sufficient to reserve one's rights. These rights must be exercised. Where a failure to exercise those rights may cause prejudice to other parties, those rights, though not time barred by statute, may be subject to an estoppel in virtue of the doctrine of laches in common law or as a result of the doctrine of "fin de non-recevoir" in civil law.
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> (…)
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> [95] Accordingly, in the opinion of the undersigned, the Superintendent is barred from seeking an amendment to the Initial Order at this time to, in effect, retroactively reverse the power of Aveos to interrupt the pension payments and to order Aveos to pay to the pension fund the $2,804,450.00.[21]

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[18] The record indicates that this is not the case for all of the Appellants (*infra*, para. [55]).

[19] Para. 41 of the Initial Order of December 9, 2015 provides for service of proceedings to all who have given notice to the Monitor or its counsel.

[20] *Aveos Fleet Performance Inc./Aveos Performance aéronautique inc. (Arrangement relatif à)*, 2013 QCCS 5762 [*Aveos*] and Indalex, *supra*, note 16, reversed on other grounds in *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271.

[21] *Aveos*, *supra*, note 20, paras. 85, 91-95.

Aveos does not support the Respondents' position on the matter of delay since, in effect, the secured creditor in *Aveos* would have retroactively been obliged to cede priority to the $2.8 million of pension deficit. The debtor company and the secured creditor acted throughout on the premise arising from the court's order that the pension payments need not be made in priority to repayments to the secured creditor. In the present matter, the inaction of the Appellants since November 2016 has not caused the Monitor to act to its detriment. The only material prejudice the Monitor points to is the time and energy invested in negotiating with the Retailers, but there is no quantification of a proof of loss and, in any event, the Monitor's fees are calculated on a contingency basis, not on a "time spent on the matter" basis.

[55] In the cases at bar, the Appellants contend that until the Plan was approved (and almost simultaneously the legal proceedings against them filed) it was not clear that their potential liability in the matter would be the object of litigation rather than negotiated settlements. However, they had previously received demand letters from the Monitor[22] and contested the approval of settlements reached by the Monitor with the insurers of the Debtor and the manufacturer. The judgment of Collier, J.S.C., approving the settlements, refers specifically to the November 2016 Order, and counsel for the Appellants Home Depot, Rona and BMR were heard on the application.[23]

[56] The Appellants appear to have had sufficient knowledge of the November 2016 Order prior to the filing of the Plan in 2019. However, even if I were to ignore this, I think that they would still be barred from seeking the revision of the November 2016 Order as part of their contestation of the Plan of Arrangement simply because they have not sought any formal conclusions regarding the November 2016 Order. They target only the powers afforded the Monitor in clause 6.2 of the Plan of Arrangement. The Respondents plead that even if the Plan is set aside, the same powers subsist under the November 2016 Order.[24] As such, the Monitor maintains that the Appellants' contestation is an indefensible collateral attack[25] on the November 2016 Order or, alternatively, that the appeal raises a moot point,[26] because, as stated above, even if

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[22] BMR, Groupe Patrick Morin inc. and Rona appear to have received the letters in 2016 while Home Hardware and Matériaux Laurentiens inc. received one in 2018. No letter addressed to Home Dépôt is filed in the record.

[23] *Arrangement relatif à 9323-7055 Québec inc. (Aquadis International Inc.)*, 2018 QCCS 2945.

[24] Moreover, the Monitor amended the Plan at the meeting of creditors to provide that the previous orders survive the Plan sanction: "6.2(d) … the Initial Order remains in effect … until the final distribution date." This is reflected in para. 19 of the sanction order.

[25] See for example: *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585 par. 61; *Boucher v. Stelco Inc.*, 2005 SCC 64, [2005] 3 S.C.R. 279, para. 35; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, paras. 33-34.

[26] *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342. See also: *R. v. Oland*, 2017 SCC 17; [2017] 1 S.C.R. 250; *R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46; *Forget v. Québec (Attorney General)*, [1988] 2 S.C.R. 90, paras. 67-68. Art. 10, para. 3 *C.C.P*.

section 6.2(c) of the Plan is set aside, the power to sue the Retailers subsists under the November 2016 Order.

[57] I would tend to think that, on the facts, no reviewable error is made out in the judge's conclusion that the attack is late. Moreover, the November 2016 Order would survive the Plan sanction and, in all events, the Appellants do not directly seek conclusions contrary to said order. However, as mentioned earlier, these questions do not require definite resolution given my answer to the primary point of the appeal, which is the validity of the power granted the Monitor in the Plan to sue on behalf of a group of creditors rather than in the exercise of the Debtor's rights. I now address that issue.

* * *

[58] As indicated in the review of the facts above, parties in the distribution chain would in the normal course have recourse against those above them in the flowchart. The recourses (exercised or not) of the ultimate purchasers of the faucets (and their insurers) and the Retailers were stayed upon the initial insolvency filing in 2015. The November 2016 Order led to some negotiated settlements. The consumers (or their insurers) filed proofs of claim; the Retailers did not, nor did they settle any claims asserted by the Monitor. It is against this factual background that the Monitor was granted the power to sue the Retailers under the Plan of Arrangement.

[59] The purpose of the proposed legal proceedings is consonant with a legitimate purpose under the *CCAA,* as the Monitor seeks to establish a "litigation pool" with a view to paying creditors of Aquadis on a *pro rata* basis. In itself, this more than satisfies the spirit of the *CCAA,* but is also supported by examples in the reported cases. Specifically, and of close resemblance is the arrangement in the matter of *Muscletech*,[27] where the debtor was a distributor of dietary supplements in the middle of a multi-tier distribution chain between the manufacturer at one end and ultimate consumers at the other. The plan of arrangement provided for releases from liability to be given to those in the chain who paid into the litigation pool as compensation arising from selling the defective product. The scheme was voluntary – i.e. the monitor was not given power to sue. However, the situation is similar to that in the case at bar. Other examples of voluntary litigation pools where contributors receive releases exist, but the precise factual matrix of the present plan, where the Monitor is empowered to sue, appears to be novel.[28]

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27 *Muscletech Research and Development Inc. (Re)*, 2007 CanLII 5146 (Ont. Sup. Ct.).

28 *Société industrielle de décolletage et d'outillage (SIDO) ltée (Arrangement relatif à)*, 2010 QCCA 403, paras. 6 and 33; *Metcalfe & Mansfield Alternative Investments II Corp (Re)*, 2008 ONCA 587, paras. 69-71 [*Metcalfe*]; *Montreal, Maine & Atlantic City Canada Co./(Montreal, Maine & Atlantique Canada Cie) (Arrangement relatif à)*, 2015 QCCS 3235.

[60] The granting of releases for third parties in consideration of their contribution to a litigation pool to satisfy creditors' claims is now well entrenched in *CCAA* jurisprudence.[29]

[61] The *CCAA* expressly provides for certain powers and duties of the monitor.[30] These powers and duties may be extended, because s. 23 *CCAA* provides that a monitor is required to "do anything in respect of the company that the court directs the monitor to do".[31] Thus, while the law does provide the basic framework within which the monitor must act, the courts may use their discretion to grant additional powers considered appropriate.[32]

[62] This discretion cannot be exercised arbitrarily; it must be exercised in a manner consistent with and directed toward the attainment of the objectives of the *CCAA*. In *Century Services Inc.,* Justice Deschamps observed for the Supreme Court that:

> [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". (References omitted)

She added that judicial discretion may be exercised in furtherance of the *CCAA*'s purposes,[33] which in the case at bar is the maximization of creditor recovery, since Aquadis has ceased carrying on business.

[63] The courts, however, have expressed reservations regarding the imposition of third-party settlements under the *CCAA,* indicating that the purpose of the *CCAA* is not to settle disputes between parties other than the debtor and its creditors.[34] Nonetheless, the precise point in issue – i.e. whether a judge may allow a monitor to exercise the rights and remedies of certain creditors against other persons or creditors of a debtor appears to be without precedent.

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[29] *Metcalfe*, *supra*, note 28.

[30] S. 23 *CCAA*.

[31] S. 23 (1) (*k*) *CCAA*.

[32] *Ernst & Young Inc. v. Essar Global Fund Limited*, 2017 ONCA 1014, paras. 105-106 [*Essar*]; *MEI Computer Technology Group Inc. (Bankruptcy), Re*, 2005 CanLII 15656 (Qc. Sup. Ct.), para. 20.

[33] *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, para. 59.

[34] The courts have also indicated that proceedings under the *CCAA* were not intended to alter priorities amongst creditors: "The *CCAA* is to be interpreted in a broad and liberal fashion to facilitate that objective. That broad and liberal interpretation, however, must not permit the enhancement of one stakeholders (sic) position at the expense of others - there should be no confiscation of legal rights.": *843504 Alberta Ltd., Re*, 2003 ABQB 1015, para. 13. See also: *Royal Oak Mines Inc., Re*, 1999 CanLII 14843 (Ont. Sup. Ct.), para. 1.

[64] In *Urbancorp*,[35] the Ontario Superior Court of Justice refused to recognize the power of a monitor to claw back a payment in kind made by the debtor to a third party who was a creditor of a company related to the debtor. While Justice Myers acknowledged that "… Monitors can certainly be empowered to bring legal proceedings to act on behalf of *CCAA* debtors",[36] he disagreed that the monitor should act as a bankruptcy trustee to bring proceedings in the place of *CCAA* creditors. The latter could initiate their own proceedings outside of the insolvency or provoke a bankruptcy for a trustee to initiate those proceedings for them. It should be emphasized that a single payment was in issue in *Urbancorp*. Justice Myers distinguished *Essar*,[37] which is relied on by Respondents. In that case, the Ontario Court of Appeal confirmed the lower court's authorization of the monitor to institute oppression proceedings for the benefit of various creditors (or stakeholders) in the *CCAA* estate: "(…) the Monitor could efficiently advance an oppression claim, representing a conglomeration of stakeholders, namely the pensioners, retirees, employees, and trade creditors (…)".[38] The court noted as well that the debtor would also benefit from such proceedings, particularly in the sense that an impediment to restructuring would potentially be removed by the oppression remedy.

[65] The result in *Urbancorp* was echoed in *Pacific Costal Airlines*,[39] where the British Columbia Supreme Court indicated that "proceedings under the *CCAA* are not intended to resolve disputes between a creditor and third parties":

> [24] It is true that, in addition to alleging breach of contract by Canadian, the Dispute Notice made reference to allegations against Air Canada for inducing breach of contract, breach of fiduciary duty and other economic torts. However, the Plaintiff could not have pursued those claims in the *CCAA* proceedings. The purpose of a *CCAA* proceeding, as reflected in the preamble to the legislation, is to "facilitate compromises and arrangements between companies and their creditors". Its purpose is not to deal with disputes between a creditor of a company and a third party, even if the company was also involved in the subject matter of the dispute. While issues between the debtor company and non-creditors are sometimes dealt with in *CCAA* proceedings, it is not a proper use of a *CCAA* proceeding to determine disputes between parties other than the debtor company.[40]

[66] The *Stelco*[41] case, for its part, raised issues relating to a dispute between certain creditors near the end of the debtor's restructuring process over the distribution of

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35 *Urbancorp Cumberland 2 GP Inc., (Re)*, 2017 ONSC 7649.
36 *Ibid*.
37 *Essar*, *supra*, note 32.
38 *Essar*, *supra*, note 32, para. 124.
39 *Pacific Coastal Airlines Ltd. v. Air Canada*, 2001 BCSC 1721, para. 24; see also *Stelco Inc., Re*, 2005 CanLII 42247 (Ont. C.A.), para. 32 [*Stelco*].
40 *Id*., para. 24.
41 *Stelco*, *supra*, note 39.

certain amounts payable to holders of subordinated notes and the priority entitlement to interest payments. Farley, J. commented as follows:

> [7] The *CCAA* is styled as "An act to facilitate compromises and arrangements between companies and their creditors" and its short title is: *Companies' Creditors Arrangement Act*. Ss. 4, 5 and 6 talk of compromises or arrangements between a company and its creditors. There is no mention of this extending by statute to encompass a change of relationship among the creditors vis-à-vis the creditors themselves and not directly involving the company.[42] (References omitted)

[67] The *dicta* in all of these cases reflect the orthodox view of the law put forward by the Appellants. However, none of the fact patterns resemble the chain of distribution in the present case. Nor were these judgments focused on a huge number of claims, which were stayed in this case and are effectively replaced by the Monitor's proceedings authorized under the Plan. This factual distinction makes these judgments of limited instructive or precedential value.

[68] What is inescapable and particularly applicable here is the acceptance, in the practice and case law, of the liquidating *CCAA*[43] and the expanded view of the role of the monitor, indeed the baptism of the "super monitor".[44] The Appellants concede, if only indirectly, that the Monitor could be authorized to exercise rights of the Debtor against third parties as could a bankruptcy trustee. However, they object to the Monitor's power to sue one group of creditors (the Respondents) on behalf of another group of creditors (the consumers or their insurers).

[69] In my opinion, the Appellants objections are not well founded.

[70] Firstly, the bankruptcy trustee analogy is only a half truth. Trustees are the assignees of a bankrupt's property, and as such, exercise the patrimonial rights of the debtor but they also wear a second hat.[45] Trustees exercise rights and recourses on behalf of creditors against other creditors and against third parties.[46] Such rights and recourses arise from the *BIA* (for example, under s. 95 for preferences) as well as under the civil law generally (for example, the paulian action under arts. 1631 and following *C.C.Q.*). Most significantly, the *BIA* recourses to attack preferences, transfers under value and dividends paid by insolvent corporations have been available to *CCAA* monitors since the amendments adopted in 2007.[47] Thus, the mere fact that the

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[42] *Stelco Inc., Re*, 2005 CanLII 41379 (Ont. Sup. Ct.).
[43] *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, para. 42 [*Callidus*].
[44] Luc Morin and Arad Mojtahedi, "In Search of a Purpose: The Rise of Super Monitors & Creditor-Driven *CCAA*s" in Jill Corraini and Blair Nixon (eds.), Annual Review of Insolvency Law, Toronto, Thomson Reuters, 2019, p. 650.
[45] *Giffen (Re)*, 1998 CanLII 844 (SCC), [1998] 1 S.C.R. 91, para. 33.
[46] *Lefebvre (Trustee of); Tremblay (Trustee of)*, 2004 SCC 63, [2004] 3 S.C.R. 326, paras. 32-40.
[47] S. 36.1 *CCAA*.

judgment in appeal empowers the Monitor to sue to enforce rights of creditors is not conceptually foreign to the general framework of insolvency law.

[71] Moreover, and without making too fine a point, the Appellants' are not creditors of the *CCAA* estate. They might have been, but they chose not to file claims. As such, they are third parties. This eliminates another conceptual, if not legal, difficulty in that, they do not potentially share in the litigation pool after contributing to it.

[72] The Appellants also object, saying that the power given to the Monitor to sue runs contrary to the principle of a monitor's neutrality. However, the case law and literature recognize that this neutrality is far from absolute:

> [110] Of necessity, the positions taken will favour certain stakeholders over others depending on the context. Again, as stated by Messrs. Kent and Rostom:
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> > Quite fairly, monitors state that creditors and the Court currently expect them to express opinions and make recommendations. … [T]he expanded role of the monitor forces the monitor more and more into the fray. Monitors have become less the detached observer and expert witness contemplated by the Court decisions, and more of an active participant or party in the proceedings.
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> (…)
>
> [119] Generally speaking, the monitor plays a neutral role in a *CCAA* proceeding. To the extent it takes positions, typically those positions should be in support of a restructuring purpose. As stated by this court in *Ivaco Inc., Re* (2006), 2006 CanLII 34551 (ON CA), 83 O.R. (3d) 108 (C.A.), at paras. 49-53, a monitor is not necessarily a fiduciary; it only becomes one if the court specifically assigns it a responsibility to which fiduciary duties attach.
>
> [120] However, in exceptional circumstances, it may be appropriate for a monitor to serve as a complainant. (…).[48]

[73] As long as the monitor is objective and not biased and takes positions based on reasoned criteria to further legitimate *CCAA* purposes, it now appears inescapable that the neutrality it must maintain is attenuated.

[74] It must be repeated that the Retailers are not creditors in the *CCAA* estate as they did not file proofs of claim. As such, their status as "stakeholders" is tenuous, so that any resulting duty to them by the Monitor is questionable.

[75] Neither is the contingency fee arrangement of the Monitor and its counsel a valid ground to attack the Monitor's neutrality. The contingency fee may give the Monitor an interest in the outcome of the litigation, but such arrangements have a long history, particularly with lawyers' mandates, and are recognized as legitimate and, indeed, as

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48 *Essar*, *supra*, note 32.

enhancing access to justice. The fee arrangement dates back to the initial order. Given that Aquadis had no assets, there would be no other way to pay professionals to act in the matter. In effect, the professionals are financing the recovery efforts.

[76] The Appellants also submitted that the Monitor has lacked transparency. This position has no merit. The Plan sanction was the product of a legal process served on parties that appeared in the record by entry on the service list and followed a creditors' meeting and a court hearing before an impartial judge. The Monitor's agenda was not hidden.

* * *

[77] I agree with the judge that on practical and equitable grounds the power accorded to the Monitor to sue the Retailers in the context of the present matter makes *CCAA* sense. In my mind, however, that is not enough to justify the judge's exercise of discretion to approve the Plan.

[78] The broad judicial discretion propounded in much of the case law and literature is not boundless.[49] It, like all judicial discretion, must be exercised judiciously, meaning that it must be based on legal rules and principles. In my opinion mere commercial expediency or good sense is not enough to qualify the exercise of judicial discretion under the *CCAA* as appropriate[50] nor for a plan to qualify as fair and reasonable. Rulings (even discretionary ones) must have some measure of predictability if confidence in the legal system is to be maintained.[51] That predictability stems from adherence to the application of the law. I am not willing to cross the Rubicon from the realm of the law to the land of the lore.

[79] That being said, there is, in the present case, legal and not merely commercial or practical justification for the judgment. The Appellants attack it based on an analogous reasoning of the powers of a bankruptcy trustee to exercise the debtor's rights against third parties but not the rights of creditors. However, this is not really true as I have indicated above. The trustee in bankruptcy can exercise rights for the benefit of creditors.

[80] Significantly, the creditors voted unanimously that their rights against the Retailers be exercised by the Monitor in their place and stead and for their benefit through the proposed proceedings and the litigation pool within the *CCAA* framework.

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49 *Callidus*, *supra*, note 43, paras. 48-49.
50 *Ibid*.
51 See Sharpe, Robert J., *Good judgment – Making Judicial Decisions*, Toronto, University of Toronto Press, 2018, p. 129; *Nechi Investments Inc. v. Autorité des marchés financiers*, 2011 QCCA 214, paras. 22-23.

[81] Absent a *CCAA* process, the creditors would have been free to consensually assign their rights or subrogate others, including, by way of example, a trustee of a litigation trust. Again, there is precedent in *CCAA* matters for such litigation trusts,[52] which trusts include rights of actions against third parties.[53] With the *CCAA* file, the Monitor, through the Plan, the vote and the sanctioning judgment in appeal, is in such position to exercise those rights against the Retailers. The Monitor is putting into effect the collective will of the creditors expressed through their unanimous vote approving the Plan of Arrangement. Giving effect to creditor democracy reflected in the *CCAA*[54] is a sound basis for a court to approve the Plan.

[82] Accordingly and in conclusion, given that the parties being sued are third parties vis-à-vis the *CCAA* estate and as such, have no claim on the litigation pool, and given that the creditors/beneficiaries of the litigation pool voted unanimously in favour of the Plan of Arrangement, there is sufficient legal rationale to grant the power in question. In addition, as indicated by the trial judge, the mechanism is a direct and practical way to maximize recovery for creditors.

* * *

[83] The Appellants have also argued that granting the Monitor the power to sue is a misuse of the resources of the Commercial Division of the Superior Court, since the proposed proceedings should be taken in the Civil Division. This, however, is purely a matter of case management for the Superior Court. There is but one Superior Court; its administrative divisions, such as the Commercial Division, are not separate and distinct tribunals.[55] Accordingly, there is no valid argument based on the jurisdiction of the Superior Court which can be brought to bear against the judgment of the lower court.

[84] The Appellants submit that they are prejudiced by the judgment in that eventual rights of appeal are restricted because leave is required under the *CCAA* but not under the *C.C.P.* for awards exceeding $60,000. The argument is not persuasive given that the judgment is not erroneous, the Monitor's recourses against the Retailers fall under the *CCAA* and consequently eventual appeals would be governed by s. 14 *CCAA*.

[85] In addition, the Appellants put forward a constitutional argument claiming that since the creditors and Retailers are not insolvent, proceedings of one against the other under the umbrella of the *CCAA* should not apply to them.

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52 Plan of Compromise and re-organization of Sino-Forest Corporation, December 3, 2012, Ont. Sup. Ct. CV-12-9667-00CL.

53 *Lutheran Church Canada (Re)*, 2016 ABQB 419, paras. 125, 134 and 135.

54 S. 6 *CCAA*.

55 *Re Arctic Gardens Inc.*, 1990 R.J.Q. 6 (Qc. C.A.). See also *TVA Publications inc. v. Quebecor World Inc.*, 2009 QCCA 1352, para. 71 (Morissette, J.A.); *Formula E Operations Limited v. Ville de Montréal*, 2019 QCCS 884.

[86] The constitutional validity of the *CCAA* is grounded in Parliament's jurisdiction under s. 91(21) of the *Constitution Act*[56] with respect to bankruptcy and insolvency. The statute should be applied, say the Appellants, in a manner consistent with its constitutional foundation.

[87] The Ontario Court of Appeal made it clear in *Metcalfe & Mansfield* that the granting of releases to solvent third parties in proceedings under the *CCAA* is not contrary to the constitutional division of powers. To the extent that the granting of such powers to the Monitor enables the objectives of the *CCAA* to be achieved, the impact of the exercise of ancillary powers in respect of solvent third parties (such as suing the Retailers) cannot constitute an infringement of the constitutional division of powers. Rather, the powers granted to the Monitor in clause 6.2 of the Plan arise out of, and are necessary for, the valid exercise of federal jurisdiction.[57]

[88] In the case at bar, the Plan provides for releases to be granted to, *inter alia*, Retailers who contribute to the litigation pool destined to satisfy claims of creditors against the Debtor. The Monitor has the additional power to compel such contribution by instituting legal proceedings. Such actions are calculated to maximize creditor recovery, a proper *CCAA* purpose[58] falling within the ambit of s. 91(21) of the *Constitution Act*. Moreover, the parties who might have raised a contestation analogous to that of the objecting parties in *Metcalfe & Mansfield* are the consumers (or their insurers) who can no longer sue the Retailers outside of the Plan of Arrangement. However, they voted unanimously in favour of the arrangement.

[89] As for the other consequence for the Appellants, their direct recourse for any loss would be against Aquadis, but that recourse is stayed and such stay of proceedings is, self-evidently, a valid exercise by way of the *CCAA* of federal jurisdiction in insolvency matters under s. 91(21) of the *Constitution Act*.

[90] The Appellants' submissions based on the division of powers have no merit.

* * *

[91] Plans of arrangement are sanctioned by the courts where considered "fair and reasonable", which raises mixed questions of fact and law. Accordingly, the standard of review is one of deference.[59] Appellate intervention is only warranted where the

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56 *Constitution Act*, *supra*, note 12, s. 91; See *Reference re constitutional validity of the Companies Creditors Arrangement Act (Dom.)*, [1934] S.C.R. 659.
57 *Metcalfe*, *supra*, note 28.
58 *Essar*, *supra*, note 32, para. 103.
59 *Metcalfe*, *supra*, note 28.

judgment is affected by an error of principle or results from an unreasonable exercise of judicial discretion.[60] The Appellants have failed to satisfy this standard.

[92] For all the foregoing reasons, I propose that the appeals be dismissed with legal costs.

MARK SCHRAGER, J.A.

60 *Re New Skeena Forest Products Inc.*, 2005 BCCA 192, para. 20; *Ivaco Inc., Re*, 2006 CanLII 34551 (Ont. C.A.), para. 71; *Re Air Canada*, 2003 CanLII 36792 (Ont. C.A.), para. 25; *Re Royal Crest Lifecare Group Inc.*, 2004 CanLII 19809 (Ont. C.A.), para. 23; *Algoma Steel Inc. v. Union Gas Ltd.*, 2003 CanLII 30833 (Ont. C.A.), para. 16.

SUPERIOR COURT

See para. 19

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-11-048114-157

DATE: April 25, 2018

PRESIDED BY: THE HONOURABLE STEPHEN W. HAMILTON, J.S.C.

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

BLOOM LAKE GENERAL PARTNER LIMITED
QUINTO MINING CORPORATION
8568391 CANADA LIMITED
CLIFFS QUÉBEC IRON MINING ULC
WABUSH IRON CO. LIMITED
WABUSH RESOURCES INC.
Petitioners
and
THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP
BLOOM LAKE RAILWAY COMPANY LIMITED
WABUSH MINES
ARNAUD RAILWAY COMPANY
WABUSH LAKE RAILWAY COMPANY LIMITED
Mises-en-cause
and
FTI CONSULTING CANADA INC.
Monitor
and
MICHAEL KEEPER, TERENCE WATT,
DAMIEN LEBEL AND NEIL JOHNSON
and
SYNDICAT DES MÉTALLOS, LOCAL 6254,
SYNDICAT DES MÉTALLOS, LOCAL 6285
SYNDICAT DES MÉTALLOS, LOCAL 9996
Objecting parties

RECTIFIED JUDGMENT ON THE AMENDED MOTION FOR THE ISSUANCE OF A PLAN FILING AND MEETINGS ORDER (#642)[*]

OVERVIEW

[1] The CCAA Parties seek the issuance of a Plan Filing and Meetings Order (the "Meetings Order") which would, *inter alia*, authorize the CCAA Parties to (1) file the Joint Plan of Compromise and Arrangement dated April 16, 2018 (the "Plan") and (2) convene meetings of their creditors for the purpose of considering and voting on the Plan.

[2] The creditors of the CCAA Parties are, for the most part, in agreement that the proposed Meetings Order should be issued.

[3] The Representative Employees and the Union ask the Court to amend the proposed Meetings Order to give their counsel a deemed proxy to vote in counsel's discretion the claims of the salaried employees and retirees and the unionized employees and retirees respectively, unless the employee or retiree opts out by advising the Monitor that he or she will attend the meeting in person or appoints a different person to act as proxy.

CONTEXT

[4] The CCAA Parties[1] sought and received Court protection under the *Companies' Creditors Arrangement Act*[2] on January 27, 2015 (for the Bloom Lake CCAA Parties) and May 20, 2015 (for the Wabush CCAA Parties). That protection has been extended by the Court on a number of occasions. FTI Consulting Canada Inc. was appointed as Monitor.

[5] While under Court protection, the CCAA Parties have liquidated all or virtually all of their assets with the result that the Monitor holds substantial funds. The major remaining assets are (1) the potential preference claim by Cliffs Québec Iron Mining ULC ("CQIM") against various non-filed affiliates ("NFA") arising from the reorganization of CQIM in December 2014 that included a $142 million cash payment by CQIM and the transfer of the Australian subsidiaries of CQIM, and (2) potential preference claims by other CCAA Parties against NFA arising from certain payments in an aggregate amount of approximately US$30.6 million.

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* The Court rectifies its judgment dated April 20, 2018 (1) to correct in paragraph 16 that the Attorney-General of Canada on behalf of the Office of the Superintendent of Financial Institutions did not take any position on the amendment proposed by the Representative Employees and the Union and (2) to make incidental changes to paragraphs 5, 6 and 8 of the Plan Filing and Meetings Order annexed to the judgment to make the Order consistent with the judgment.

1 The Petitioners and the Mis-en-cause.

2 R.S.C. 1985, c. C-36 (the "CCAA").

[6] In March 2018, the Monitor negotiated a settlement of these potential claims. Essentially, the NFA agreed to forego the benefit of any distributions or payments they may otherwise be entitled to receive as secured and unsecured creditors of the CCAA Parties[3] and to make an additional cash contribution of $5 million, in exchange for releases. The Monitor estimates that the overall increase in the aggregate amounts that would be distributed to the third party unsecured creditors of the CCAA Parties as a result of the proposed settlement and the Plan would likely be in the range of approximately $62 million to approximately $100 million.[4]

[7] The Monitor consulted with Quebec North Shore and Labrador Railway Company Inc. ("QNS&L"), the largest single third party unsecured creditor of CQIM, which supports the settlement. The Monitor did not consult with any other creditor. The employees and retirees are not creditors of CQIM.

[8] Based on this settlement, the CCAA Parties prepared the Plan. It is a joint plan on behalf of all of the CCAA Parties.[5] Essentially, the Plan distributes the liquidation proceeds and the settlement proceeds allocated to each CCAA Party amongst its third party unsecured creditors on a *pro rata* basis. The Plan proposes the limited substantive consolidation of certain CCAA Parties for the purposes of voting and distributions under the Plan, such that there are five classes of creditors:

a) Unsecured creditors of CQIM and Quinto Mining Corporation;

b) Unsecured creditors of Bloom Lake General Partner Limited ("BLGP") and The Bloom Lake Iron Ore Mine Limited Partnership ("BLLP");

c) Unsecured creditors of Wabush Iron Co. Limited, Wabush Resources Inc. and Wabush Mines;

d) Unsecured creditors of Arnaud Railway Company;

e) Unsecured creditors of Wabush Lake Railway Company Limited.

[9] The Plan also provides for broad releases in favour of the NFA, the Monitor and the directors, officer, employees, advisors, legal counsel and agents of the CCAA Parties, the Monitor and the NFA. The Plan does not release the NFA and their directors from class actions instituted in Newfoundland and Labrador on behalf of the employees and retirees.

[10] The CCAA Parties seek the issuance of the Meetings Order, which provides, *inter alia*, for:

a) authorizing the filing of the Plan;

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3 The NFA filed secured and unsecured claims in excess of $1 billion against the CCAA Parties.

4 Forty-Third Report to the Court submitted by FTI Consulting Canada Inc., in its Capacity as Monitor, dated March 19, 2018.

5 8568391 Canada Limited and Bloom Lake Railway Company Limited ("BLRC"), have no pre-filing creditors and will be dissolved.

b) authorizing the CCAA Parties to convene meetings of the third party unsecured creditors;

c) approval of (i) the notice and documentation to be sent to the third party unsecured creditors in respect of the meetings; and (ii) and the procedure for the conduct of the meetings;

d) the scheduling of a hearing for the sanctioning of the Plan on June 29, 2018;

e) approval of the exclusion of 8568391 and BLRC, which have no pre-filing creditors, and limited substantive consolidation of (i) CQIM and Quinto, (ii) BLGP and BLLP, and (iii) Wabush Iron, Wabush Resources and Wabush Mines for the purposes of voting and distributions under the Plan;

f) approval of the classification of the third party unsecured creditors of each CCAA Party; and

g) other ancillary orders and declarations.

[11] The Monitor has recommended that the Motion should be granted and that the proposed Meetings Order should be issued.[6] The third party creditors of the CCAA Parties are, for the most part, in agreement.

[12] The issue relates to the voting rights of the 2,400 employees and retirees of the Wabush CCAA parties.[7] On June 22, 2015, Michael Keeper, Terence Watt, Damien Lebel and Neil Johnson (the “Representative Employees”) were appointed as representatives for the non-unionized employees and retirees of the Wabush CCAA Parties. The order provided from an opt-out right, but the Court is advised that no non-unionized employee or retiree opted out of representation by the Representative Employees. The Union has acted on behalf of the unionized employees and retirees since the beginning of the CCAA proceedings pursuant to its right and duty to represent its members. There is no express order of the Court appointing it as representative, but the Court did authorize the Union to file proofs of claim on behalf of its members.

[13] The employees and retirees are significant creditors of the Wabush CCAA Parties. The employees and retirees have filed 1,089 claims totalling $103.8 million against Wabush Iron, Wabush Resources and Wabush Mines, 449 claims totalling $27.9 million against Arnaud Railway and 393 claims totalling $50.5 million against Wabush Lake Railway, with respect to other post-employment benefits (“OPEBs”), including life insurance and health care.[8] In addition, four claims in the aggregate amount of approximately $3.3 million relate to employee grievances, were filed jointly and severally against Arnaud Railway and Wabush Iron, Wabush Resources and Wabush Mines. 2,376 employees and retirees are members of the Wabush pension plans. The Plan Administrator has filed claims of approximately $56 million in the aggregate against Wabush Iron, Wabush Resources and Wabush Mines, Arnaud

6 Forty-Fourth Report to the Court submitted by FTI Consulting Canada Inc., in its Capacity as Monitor, dated March 22, 2018, par. 68.
7 Wabush Iron, Wabush Resources, Wabush Mines, Arnaud Railway and Wabush Lake Railway.
8 The claims against Arnaud Railway and Wabush Lake Railway overlap with the claims against Wabush Mines.

Railway and Wabush Lake Railway with respect to the amounts owing to the Wabush pension plans, including the deficit in the plans. The issue of whether those claims are unsecured or benefit from a deemed trust is currently before the Québec Court of Appeal, with a hearing starting June 11, 2018.

POSITION OF THE PARTIES

[14] As described above, the Representative Employees and the Union ask the Court to amend the proposed Meetings Order to give their counsel a deemed proxy to vote in counsel's discretion the claims of the salaried employees and retirees and the unionized employees and retirees respectively, unless the employee or retiree opts out by advising the Monitor that he or she will attend the meeting in person or appoints a different person to act as proxy.

[15] The Union also argues that it has the right to vote on behalf of its members and retirees pursuant to its "monopole de représentation".

[16] The Pension Plan Administrator […] and the Superintendent of Pensions of Newfoundland […] support the amendment.

[17] The CCAA Parties, the Monitor and QNS&L, the largest third party unsecured creditor, oppose the amendment.

ISSUES IN DISPUTE

[18] The issues that the Court must decide can be summarized as follows:

1. Should it issue the Meetings Order?
2. Does the Union have the right to vote on behalf of its members and retirees?
3. Should the Court give counsel for the Representative Employees and counsel for the Union a discretionary deemed proxy to vote the claims of the employees and retirees, subject only to an opt-out right?

ANALYSIS

1. Issuance of the Meetings Order

[19] The standard for issuing a meeting order is low. The Court can refuse to summon a meeting of the creditors if it determines that the plan is contrary to the creditors' interests, lacks economic reality, is unworkable and unrealistic in the circumstances, or is doomed to failure due to a lack of creditor support.[9]

[9] *Unique Broadband Systems (Re)*, 2013 ONSC 676, par. 52 and 95; *Kerr Interior Systems Ltd. (Re)*, 2011 ABQB 214, par. 29; *ScoZinc Ltd. (Re)*, 2009 NSSC 163, par. 7-9; *Re Fracmaster Ltd.*, 1999 ABQB 379, par. 24; *Canadian Red Cros Society/la Société canadienne de la Croix-Rouge, Re*, 1998 CanLII 14907 (ON SC), par. 37.

[20] The Monitor has reviewed the Plan and the Meetings Order and it recommends that the proposed Meetings Order be issued, based on the following considerations:[10]

- The filing of a joint plan significantly simplifies matters and creates no apparent material prejudice to any creditor;
- The limited substantive consolidation is reasonable and appropriate;
- The Plan provides significant incremental recoveries for the creditors and is in the best interests of all stakeholders;
- The granting of the Meetings Order would provide the forum for the creditors to consider and vote on the Plan;
- There is nothing about the Plan that would render it incapable of being approved by the creditors or sanctioned by the Court;
- The classification of creditors is reasonable and appropriate;
- The Meetings Order provides for reasonable and sufficient notice;
- The deadline for filing proxies is reasonable in the circumstances;
- The provisions of the Meetings Order governing the conduct of the meetings are reasonable and appropriate in the circumstances.

[21] Save for the issue of the voting rights of the employees and retirees, the creditors all agree that the Meetings Order should be issued.

[22] The Court concludes that there should be meetings of creditors to consider and vote on the Plan. It will grant the Meetings Order.

2. Union's right to vote

[23] The Union pleads that it has the right to vote on behalf of the unionized employees and retirees pursuant to its monopoly on representation of its members.

[24] The Union points to Section 69 of the Québec *Labour Code*:[11]

> **69.** A certified association may exercise all the recourses which the collective agreement grants to each employee whom it represents without being required to prove that the interested party has assigned his claim.

[25] The Supreme Court refers to this as the principle of exclusive representation or the monopoly of representation:

> 41 <u>One of the fundamental principles we find in Quebec labour law, and one which it has in common with federal law and the law of the other provinces, is the monopoly that the union is granted over representation.</u> This principle applies in respect of a defined group of employees or bargaining unit,

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[10] 44th Report, *supra* note 6, par. 60-68.
[11] CQLR, chapter C-27.

> in relation to a specific employer or company, at the end of a procedure of certification by an administrative tribunal or agency. Once certification is granted, it imposes significant obligations on the employer, imposing on it a duty to recognize the certified union and bargain with it in good faith with the aim of concluding a collective agreement (s. 53 L.C.). Once the collective agreement is concluded, it is binding on both the employees and the employer (ss. 67 and 68 L.C.). For the purposes of administering the collective agreement, the certified association exercises all the recourses of the employees whom it represents without being required to prove that the interested party has assigned his or her claim (s. 69 L.C.).[12]
>
> [Emphasis added]

[26] The Union also points to the Newfoundland and Labrador *Labour Relations Act*,[13] which is very relevant given that more than half of the employees reported for work in Labrador. Section 50 provides:

> **50.** Where a trade union or a council of trade unions is certified, under this Act, as the bargaining agent of a unit,
>
> (a) the bargaining agent so certified immediately replaces another bargaining agent of the unit and has exclusive authority to conduct collective bargaining on behalf of employees in the unit and to bind them by a collective agreement until its certification in respect of employees in the unit is revoked;
>
> […]
>
> [Emphasis added]

[27] Even though the language in the Newfoundland and Labrador statute relates only to the negotiation and conclusion of the collective agreement, the Court will assume that the principle of exclusive representation exists and is just as broad under the laws of Newfoundland and Labrador as it is in Québec.

[28] It is clear that the principle of exclusive representation means that an individual employee or retiree does not have the right to file and to pursue a grievance with respect to a breach of the collective agreement.[14]

[29] The Court is not satisfied, however, that the principle of exclusive representation gives the Union the right to vote the employees' and retirees' claims in the CCAA.

[30] First, the principle of exclusive representation relates to claims under the collective agreement. It does not give the Union the right to vote for the employees and retirees in all circumstances. For example, employees retain the right to vote individually on such important issues as the acceptance of a collective agreement or the decision to strike. The vote on a plan under the CCAA is not the exercise of a claim under the collective agreement. In some cases (although not in the present matter), the vote may determine whether the employer continues its operations and whether the employees keep their jobs.

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12 *Noël* v. *Société d'énergie de la Baie James*, 2001 SCC 39, par. 41.
13 RSNL 1990, chapter L-1.
14 *Québec (Procureur général)* c. *Désir*, 2008 QCCA 1756, par. 8.

[31] Further, the Union was not able to point to any authority extending the principle of exclusive representation to voting on a proof of claim with the result that the union had the right to vote on behalf of its members without any court authorization. There are a few examples of CCAA proceedings where the court has authorized the union to vote the claims of its members,[15] but no example was given to the Court of any case where the court concluded that the union had the right to vote on behalf of its members without such authorization.

[32] Finally, the Court notes that if the right to vote on behalf of the members belongs to the Union pursuant to the principle of exclusive representation, then the proposed opt-out would be a breach of that monopoly and would be invalid.

[33] These arguments lead the Court to dismiss the Union's argument that it has the right to vote on behalf of the unionized employees and retirees pursuant to the principle of exclusive representation.

3. Discretionary deemed proxy

[34] The Court will analyze the appropriateness of a discretionary deemed proxy by asking several questions.

3.1 Is a deemed proxy appropriate?

[35] First, before giving a deemed proxy to anyone, the Court must be satisfied that there is a valid reason to do so.

[36] The Representative Employees and the Union plead that the deemed proxy is necessary to ensure that all of the employees and retirees exercise their right to vote. In his affidavit, Michael Keeper, one of the Representative Employees, states the following:

> 24. Individual voting by the 690 Salaried Members, as advocated by the Monitor and CCAA Parties, is completely inappropriate for our large, vulnerable creditor group who are not sophisticated commercial creditors. The Salaried Members are spread across Canada, many in the remote regions. This will make it impossible to reach many of them with the Proposed Plan, all the related documents, and the associated ballot in time to allow them to cast their vote. Many Salaried Members are old and infirmed, living in nursing home facilities, do not have internet access or fax machines, and many cannot understand complex legal documents, such as the Proposed Plan, the court orders, and the Monitor's Reports. For many, they will not understand the nature or consequences of the Proposed Plan and how it affects them, and it is not practical for Representative Counsel nor the Representatives to contact

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15 See the meeting orders issued with respect to U.S. Steel Canada Inc., Collins & Aikman Canada Inc., Nortel Networks Corporation, Hollinger Canadian Publishing Holdings Co., Co-op Atlantic and NewPage Port Hawkesbury Corp., and the Frequently Asked Questions with respect to Fraser Papers inc.

> every one of them to provide advice and answer their questions in time to ensure that they are able to make an informed decision as to their rights and how the Proposed Plan impacts them.

[37] Nicolas Lapierre, the Union representative responsible for this matter, makes similar comments in his sworn declaration:

> 16. En effet, j'ai lu le Plan et l'ensemble des documents qui l'accompagnent, que je trouve compliqués et difficiles à comprendre;
>
> 17. En raison de cette complexité, plusieurs Membres ne seront pas en mesure de comprendre ce qu'ils doivent faire avec ces documents ou ce qu'ils signifient, d'autant plus que certains de ces travailleurs sont partiellement ou totalement analphabètes, alors que d'autres sont âgés et maladies à un point tel où ils ne sont plus en mesure de s'occuper de leurs affaires par eux-mêmes;
>
> 18. Il y a ainsi de réelles possibilités que les Membres ne soient pas en mesure de voter ou de désigner quelqu'un pour le faire en leur nom, ce qui équivaudrait à les priver de leur droit de vote.

[38] The Court considers these concerns to be somewhat overstated. There is nothing exceptional about the Wabush employees and retirees as compared to the employees and retirees of other companies. It should be possible to reach the great majority of them. While some of them may not have access to the internet or a fax machine, the Court doubts that the number is large. While some may not have the capacity to make a decision, there is likely someone who can make a decision on their behalf. The Plan itself is a complicated legal document that uses language which is difficult to understand, but the Monitor's reports are much easier to understand and the parties have the opportunity to include in the package that goes to the creditors a letter explaining matters in even simpler terms. The decision that the employees and retirees have to take is a fairly simple yes or no decision and the consequences of each decision can be explained.

[39] Nevertheless, it remains clear that a number of votes will be lost. Each employee and retiree has the right to vote on the Plan and every vote is important. One of the Court's objectives in this matter is to ensure that each employee and retiree is given the opportunity to vote and the Court's hope is that all will vote. The deemed proxy is a way to achieve that result.

[40] In addition to the cases where a deemed proxy was given to the union,[16] the parties point to only three examples of cases where deemed proxies were given to vote on behalf of non-unionized employees and retirees.[17] The CCAA Parties and the Monitor distinguish those cases on the basis that the deemed proxies were to vote in favour of the plan.

[41] These examples of deemed proxies confirm that the Court has jurisdiction to give deemed proxies in the present matter. That jurisdiction is not affected by whether the vote is in favour of the plan or against it.

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16 *Ibid*.
17 See the Nortel, Hollinger and U.S. Steel meeting orders.

[42] The CCAA Parties and the monitor also argue that a deemed proxy gives the proxy holder too much leverage.

[43] The Court does not agree. The deemed proxy simply ensures that the employees and retirees exercise the leverage that they should have, based on their numbers and the value of their claims.

[44] For all of these reasons, the Court concludes that it is appropriate to give a deemed proxy.

3.2 Who should exercise the deemed proxy?

[45] The Representative Employees and the Union argue that their counsel should exercise the deemed proxy.

[46] The Court agrees.

[47] The Representative Employees were appointed by the Court for the purpose of representing the non-unionized employees and retirees. The Union is given that role by statute. They are the appropriate representatives to exercise the deemed proxies.

[48] The Court adopts the following reasoning of Justice Wilton-Siegel in the U.S. Steel CCAA proceedings:

> [15] Further, I am satisfied that it is appropriate that Representative Counsel act as the deemed proxy for the administrator for the non-unionized pension plans and for the current and former non-unionized employees having OPEB claims, given the active involvement of Representative Counsel in these proceedings to date on behalf of, and the commonality of interest of, the current and former non-unionized employees. I note as well that a procedure exists for individuals who have opted to represent themselves, and for individuals who have been represented by Representative Counsel but who choose to participate directly at the creditors meetings, to appoint an alternative proxy or to attend and vote in person at the creditors meetings.[18]

[49] The CCAA Parties and the Monitor argue that there is no commonality of interest in the present matter in that not all of the employees and retirees have both a pension claim and an OPEB claim. They argue that some employees and retirees may want the pension issues pursued rather than the OPEB claims while others may want the opposite, because of their personal circumstances.

[50] Those considerations may be relevant in assessing whether it is appropriate for the Representative Employees and the Union to pursue the deemed trust for the pension claims. However, that matter is not before the Court today and that issue was not raised when the matter was before the Court.

[51] Moreover, these considerations are of no relevance on the deemed proxy issue: the pension issues are excluded from the Plan and the only issue being raised is whether the settlement with the NFA should have generated more for the unsecured creditors. No employee or retiree has a divergent interest on this issue.

18 *U.S. Steel Canada Inc. (Re)*, 2017 ONSC 1967, par. 15.

[52] The Court therefore concludes that counsel for the Representative Employees and for the Union are the appropriate persons to hold the deemed proxies.

3.3 Should the deemed proxy be discretionary?

[53] The Representative Employees and the Union say that they have not yet taken a position on whether they will vote for or against the Plan. They have concerns as to whether the settlement with the NFA is the best deal that could be achieved, but they have not had any discussions with the Monitor or with anyone else. They anticipate, as do the CCAA Parties and the Monitor, that there will be further discussions and negotiations right up until the vote. In that context, the Representative Employees and the Union ask that the proxy holder be allowed to vote the claims in his or her discretion. They argue that an employee or retiree who wants to vote for or against the Plan can opt out of the deemed proxy by attending the meeting, by appointing a different proxy, or by indicating his or her vote on the proxy form.

[54] The discretionary deemed proxy is fundamentally undemocratic. The deemed proxy is intended to ensure that all of the employee and retiree claims are voted. But making it discretionary has the effect of taking away the individuals' right to vote or even to know how his or her claim is being voted and giving it to someone else. This is not a good outcome.

[55] The opt-out right suggested by counsel for the Representative Employees and the Union does not solve these problems. If negotiations and discussions continue right up to the vote, as the parties seem to anticipate, the employees and retirees will have to decide whether to opt out on the basis of a Plan that may not the final version and without knowing the final recommendation of the Representative Employees and the Union or the position the proxy holder will take on their behalf if they do not opt out.

[56] The CCAA Parties and the Monitor argue that there is no precedent for such a discretionary deemed proxy. They argue that the few examples of deemed proxies all provide that the proxy holder will vote in favour of the plan. They found no examples of deemed proxies to vote against the plan or to vote in the discretion of the proxy holder. The Representative Employees and the Union did not submit any examples either.

[57] The Representative Employees and the Union plead that there is no difference between a deemed proxy to vote in favour of the plan and a deemed proxy to vote against it. The Court agrees in principle. In the three examples of deemed proxies to vote in favour of the plan, it appears from the materials that the representatives of the employees participated or were consulted in the preparation of the plan and were prepared to support it. The practical reality is that there are no deemed proxies to vote against a plan because if the employees representatives are consulted before the plan is filed and they are opposed to the plan, the plan will likely be modified before it is filed in order to gain their support.

[58] The problem in the present matter is that there were no negotiations or discussions prior to the filing of the Plan and there have been no discussions in the three weeks since the filing of the Plan. Everyone is waiting for this order before they begin serious discussions.

[59] That is unfortunate. The negotiations anticipated by the parties will have the effect of depriving the employees and retirees of any real participation in the process. There will be a meeting to explain the Plan to them, but subsequent negotiations will mean that the Plan as explained to them is not the final version of the Plan. If negotiations continue up until the meeting, there will be no time to explain the final version of the Plan to the employees and retirees.

[60] In other words, the justification for the discretionary deemed proxy is that the Representative Employees and the Union cannot take a final position on the Plan today and that the Plan may be amended up until the vote. The solution is to give them more time to take a final position and to ensure that the Plan is not amended after they take that final position, not to give them the right to vote the individuals' claims in their discretion.

[61] For these reasons, the Court will not authorize a discretionary deemed proxy. The deemed proxy must be either a deemed proxy to vote for the Plan or a deemed proxy to vote against it. The Court will delay the mailing of the Meeting Materials to allow the parties to have the discussions and negotiations that should have taken place before now so that the Representative Employees and the Union can take a final position for or against the Plan.

CONCLUSIONS

[62] As a result, the Court will order the following.

[63] The date of the meetings will remain June 18, 2018. That is two months from now. There is time for the parties to discuss the current version of the Plan and either satisfy themselves that it is reasonable or negotiate changes to it. The Court will give them one month to do so.

[64] The date for mailing the Meeting Materials to the creditors will be pushed back to May 21, 2018 to allow for this month of negotiations. The Meeting Materials will include the final version of the Plan as well as letters from counsel for the Representative Employees and the Union in which they must take a position for or against the Plan. The deemed proxy will be to vote in accordance with that recommendation. That way, the employees and retirees will have the opportunity to make a real choice, based on the final version of the Plan and in full knowledge of how their claim will be voted if they do not execute a proxy.

[65] It follows that there can be no amendments to the Plan after May 18, 2018 without the authorization of the Court. Moreover, any amendment authorized after that date will likely involve the postponement of the creditors' meetings scheduled for June 18, 2018.

FOR THESE REASONS, THE COURT:

[66] **GRANTS** the Plan Filing and Meetings Order as amended by the Court and annexed to this judgment;

[67] **ORDERS** the parties not to amend the Plan after May 18, 2018 without the authorization of the Court;

[68] **RESERVES** the right of the parties to make further representations to the Court with respect to the documents to be mailed to the creditors on May 21, 2018;

[69] **THE WHOLE, WITHOUT COSTS.**

____
STEPHEN W. HAMILTON, J.S.C.

Mtre Bernard Boucher
Mtre Natalie Bussière
Mtre Emily Hazlett
BLAKE, CASSELS & GRAYDON LLP
For the Petitioners and the Mises-en-cause

Mtre Sylvain Rigaud
Mtre Crystal Ashby
NORTON ROSE FULLBRIGHT LLP
For the Monitor

Mtre Andrew J. Hatnay
KOSKIE MINSKY LLP
Mtre Mark Meland
FISHMAN FLANZ MELAND PAQUIN LLP
For the Objecting parties Michael Keeper, Terence Watt, Damien Lebel and Neil Johnson

Mtre Daniel Boudreault
PHILION LEBLANC BEAUDRY AVOCATS
For the Objecting parties Syndicat des Métallos Section locale 6254, 6285 et 9996

Mtre Edward Bechard-Torres
IMK LLP
For the Superintendent of Pensions of Newfoundland

Mtre Antoine Lippé
DEPARTMENT OF JUSTICE – CANADA
For the Attorney General of Canada

Mtre Louis Robillard
RETRAITE QUÉBEC
For Retraite Québec

Mtre Gerry Apostolatos
LANGLOIS AVOCATS
For Quebec North Shore and Labrador Railway Company Inc.

Mtre Gabriel Serena
CAIN LAMARRE
For Ville de Fermont

Mtre Martin Roy
STEIN MONAST
For Ville de Sept-Ïles

Mtre Ouassim Tadlaoui
BORDEN LADNER GERVAIS
For Groupe UNNU-EBC S.E.N.C.

Hearing date: April 16, 2018

SUPERIOR COURT

C A N A D A
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL
N^{o}: **500-11-048114-157**
DATE: **April 20, 2018**

PRESIDING: THE HONOURABLE STEPHEN W. HAMILTON J.S.C.

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

BLOOM LAKE GENERAL PARTNER LIMITED

QUINTO MINING CORPORATION

8568391 CANADA LIMITED

CLIFFS QUÉBEC IRON MINING ULC

WABUSH IRON CO. LIMITED

WABUSH RESOURCES INC.

Petitioners

-and-

THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP

BLOOM LAKE RAILWAY COMPANY LIMITED

WABUSH MINES

ARNAUD RAILWAY COMPANY

WABUSH LAKE RAILWAY COMPANY LIMITED

Mises-en-cause

(Petitioners and Mises-en-cause hereinafter the "**CCAA Parties**")

-and-

FTI CONSULTING CANADA INC.

Monitor

PLAN FILING AND MEETINGS ORDER

HAVING READ the CCAA Parties' (the "**Petitioners**") *Amended Motion for the Issuance of a Plan Filing and Meetings Order,* and the attached exhibits thereof, and the affidavit in support thereof (the "**Motion**"), the Monitor's Forty-Fourth Report and the submissions of counsels for the Petitioners, the Monitor and other interested parties;

GIVEN the provisions of the Initial Orders granted on January 27, 2015 and May 20, 2015, as subsequently amended, rectified or restated (together, the "**Initial Orders**");

GIVEN the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, C. c-36 (the "**CCAA**").

THE COURT:

1. **GRANTS** the Motion.

Service

2. **DECLARES** that the Petitioners have given sufficient prior notice of the presentation of this Motion to interested parties and that the time for service of the Motion herein be and is hereby abridged.

Definitions

3. **DECLARES** that the capitalized terms not otherwise defined in this Order shall have the meanings ascribed in **Schedule "A"** attached hereto. The following terms shall have the meanings set out below:

3.1 "**Chair**" shall have the meaning ascribed to such term in Paragraph 29;

3.2 "**Creditor Letter**" means the letter (in English and French) sent to Affected Unsecured Creditors in substantially the form of **Schedule "B"** hereto;

3.3 "**Meeting Materials**" shall have the meaning ascribed to such term in Paragraph 8;

3.4 "**Notice of Creditors' Meetings and Sanction Hearing**" means the notice which shall be given to the Affected Unsecured Creditors of the Meetings to be held for the approval of the Plan, and of the Sanction Hearing of the Plan, being substantially in the form of **Schedule "C"** hereto;

3.5 "**Proxy**" means a proxy and instructions to Affected Unsecured Creditors for explaining how to complete same, substantially in the form of **Schedule "D"** hereto;

3.6 "**Resolution**" means the resolution substantially in the form attached as **Schedule "E"**; and

3.7 "**Website**" means http://cfcanada.fticonsulting.com/bloomlake.

Joint Plan of Compromise and Arrangement

4. **ORDERS** that the Joint Plan of Compromise and Arrangement pursuant to the CCAA filed by the Participating CCAA Parties dated April 16, 2018, (as may be amended,

supplemented and restated from time to time, the "**Plan**") is hereby accepted for filing, and the Participating CCAA Parties are hereby authorized to seek approval of the Plan from the Affected Unsecured Creditors in the manner set forth herein.

5. **ORDERS** that the Participating CCAA Parties, be, and they are hereby, authorized to file, in accordance with its terms, any amendment, restatement, modification of or supplement to, the Plan (each a "**Plan Modification**") prior to May 18, 2018 pursuant to and in accordance with the terms of the Plan, in which case any such Plan Modification shall, for all purposes, be and be deemed to form part of and be incorporated into the Plan. The Participating CCAA Parties shall […] include any such Plan Modification […] in the Meeting Materials. The Participating CCAA Parties may give notice of any such Plan Modification […] by notice which shall be sufficient if […] provided to those Persons listed on the service list posted on the Website (as amended from time to time, the "**Service List**"). The Monitor shall post on the Website, as soon as practicable, any such Plan Modification, with notice of such posting forthwith provided to the Service List. Any Plan Modification after May 18, 2018 requires Court authorization, and the Court will determine what notice is required and whether the Meetings scheduled for June 18, 2018 will be postponed.

6. **ORDERS** that after the Meetings (and both prior to and subsequent to the obtaining of the Sanction Order), the Participating CCAA Parties may at any time and from time to time effect a Plan Modification pursuant to and in accordance with the terms of the Plan and with the authorization of the Court. The Monitor shall forthwith post on the Website any such Plan Modification, with notice of such posting forthwith provided to the Service List.

Form of Documents

7. **ORDERS** that the forms of: (i) the Notice of Creditors' Meetings and Sanction Hearing, (ii) the Creditor Letter, (iii) the Proxy, and (iv) the Resolution are each hereby approved, and the Monitor, in consultation with the Participating CCAA Parties, is authorized to make such minor changes to such forms of documents as it consider necessary or desirable to conform the content thereof to the terms of the Plan or this Order or any further Orders of the Court.

Notification Procedures

8. **ORDERS** that the Monitor shall cause to be sent, by regular mail, courier or email a copy of the Notice of Creditors' Meetings and Sanction Hearing, the Creditor Letter, the Proxy, the Resolution, the Plan, and this Order (collectively, with the Report of the Monitor to be filed in connection with the Meetings, the "**Meeting Materials**") as soon as reasonably practicable after the granting of this Order and, in any event, no later than **5:00 p.m.** (Eastern time) on May 21, 2018 to each Affected Unsecured Creditor known to the Monitor as of the date of this Order at the address for such Affected Unsecured Creditor set out in such Affected Unsecured Creditor's Proof of Claim or to such other address that has been provided to the Monitor by such Affected Unsecured Creditor pursuant to Paragraph 34 or 36.

9. **ORDERS** that the Monitor shall (i) forthwith publish on the Website an electronic copy of the Meeting Materials, (ii) send a copy of the Meeting Materials to the Service List, and (iii) provide a copy to any Affected Unsecured Creditor upon written request by such Affected Unsecured Creditor provided that such written request is received by

the Monitor no later than three (3) Business Days prior to the Meetings (or any adjournment thereof).

10. **ORDERS** that the Participating CCAA Parties and the Monitor be and they are hereby authorized to provide such supplemental information ("**Additional Information**") to the Meeting Materials as the Participating CCAA Parties may determine, with the consent of the Monitor, and the Additional Information shall be distributed or made available by posting on the Website and served on the Service List, and any such other method of delivery that the Participating CCAA Parties, with the consent of the Monitor, determine is appropriate.

11. **ORDERS** that the publications and/or delivery referred to in Paragraphs 8, 9 and 10 hereof, shall constitute good and sufficient service of the Meeting Materials on all Persons who may be entitled to receive notice thereof, or of these proceedings, or who may wish to be present in person or represented by proxy at the Meeting in respect of the Unsecured Creditor Class to which each such Person belongs, or who may wish to appear in these proceedings, and no other form of notice or service need be made on such Persons, and no other document or material need be served on such Persons in respect of these proceedings.

12. **ORDERS** that the non-receipt of a copy of the Meeting Materials beyond the reasonable control of the Monitor shall not constitute a breach of this Order and the non-receipt of a copy of the Meeting Materials shall not invalidate any resolution passed or proceedings taken at the Meetings.

Employee Addresses and Information

13. **ORDERS** that the Monitor is hereby authorized to deliver to Employees with Proven or Unresolved Claims a notice that such Employees must provide their Social Insurance Numbers to the Monitor as a condition to receiving any distributions under the Plan.

Limited Substantive Consolidation of certain Participating CCAA Parties

14. **ORDERS** that the following Participating CCAA Parties shall be substantively consolidated for the purposes of voting and distribution on the Plan, and all references in this Order to Participating CCAA Parties shall mean to such Participating CCAA Parties, as so consolidated:

    14.1 CQIM and Quinto (together, the "**CQIM/Quinto Parties**");

    14.2 BLGP and BLLP (together, the "**BL Parties**"); and

    14.3 Wabush Iron, Wabush Resources and the Wabush Mines (together, the "**Wabush Mines Parties**").

Classes of Unsecured Creditors

15. **ORDERS** that the Affected Unsecured Creditors with respect of each Participating CCAA Party shall be grouped into the following classes for voting (in respect of their Eligible Voting Claims) and distribution purposes (in respect of their Proven Claims) (each an "**Unsecured Creditor Class**" and together the "**Unsecured Creditor Classes**"):

15.1 **CQIM/Quinto Unsecured Creditor Class**: being Affected Unsecured Creditors of any of the CQIM/Quinto Parties;

15.2 **BL Parties Unsecured Creditor Class**: being Affected Unsecured Creditors of any of the BL Parties;

15.3 **Wabush Mines Unsecured Creditor Class**: being Affected Unsecured Creditors of any of the Wabush Mines Parties;

15.4 **Arnaud Unsecured Creditor Class**: being Affected Unsecured Creditors of Arnaud; and

15.5 **Wabush Railway Unsecured Creditor Class**: being Affected Unsecured Creditors of Wabush Railway.

Meetings

16. **DECLARES** that the Participating CCAA Parties are hereby authorized to call, hold and conduct the following Meetings, being understood that there will be a separate Meeting for each Unsecured Creditor Class listed below, in Montréal, Québec, for the purpose of voting upon, with or without variation, the Resolution to approve the Plan:

    1. **Meeting of CQIM/Quinto Unsecured Creditor Class:** June 18, 2018 at 9:30 a.m. Montréal time at Norton Rose Fulbright Canada LLP, Suite 2500, 1 Place Ville Marie Montréal, QC H3B 1R1

    2. **Meeting of BL Parties Unsecured Creditor Class**: June 18, 2018 at 9:30 a.m. Montréal time at Norton Rose Fulbright Canada LLP, Suite 2500, 1 Place Ville Marie Montréal, QC H3B 1R1

    3. **Meeting of Wabush Mines Unsecured Creditor Class**: June 18, 2018 at 11:00 a.m. Montréal time at Norton Rose Fulbright Canada LLP, Suite 2500, 1 Place Ville Marie Montréal, QC H3B 1R1

    4. **Meeting of Arnaud Unsecured Creditor Class**: June 18, 2018 at 11:00 a.m. Montréal time at Norton Rose Fulbright Canada LLP, Suite 2500, 1 Place Ville Marie Montréal, QC H3B 1R1

    5. **Meeting of Wabush Railway Unsecured Creditor Class**: June 18, 2018 at 11:00 a.m. Montréal time at Norton Rose Fulbright Canada LLP, Suite 2500, 1 Place Ville Marie Montréal, QC H3B 1R1

17. **DECLARES** that the only Persons entitled to notice of, to attend and speak at a Meeting are Eligible Voting Creditors of such Unsecured Creditor Class (or their respective duly appointed Proxy holders and their legal counsel), representatives of the Monitor, the Participating CCAA Parties, all such parties' financial and legal advisors, Salaried Members Representative Counsel, USW Counsel, the Chair (as defined below), the secretary and any scrutineers appointed in accordance with Paragraph 31 hereof. Any other Person may be admitted to the Meetings on invitation of the Participating CCAA Parties or the Monitor.

18. **ORDERS** that any Proxy which any Eligible Voting Creditor wishes to submit in respect of a Meeting (or any adjournment, postponement or other rescheduling

thereof) must be substantially in the form attached hereto as **Schedule "D"** (or in such other form acceptable to the Monitor or the Chair).

19. **ORDERS** that any Proxy in respect of a Meeting (or any adjournment, postponement or other rescheduling thereof) must be received by the Monitor in accordance with Paragraph 36 hereof by 5:00 p.m. (Eastern time) June 14, 2018 (the "**Proxy Deadline**"), being two (2) Business Days prior to the date set for the Meetings in Paragraph 16 hereof. The Monitor is hereby authorized to use reasonable discretion as to the adequacy of compliance with respect to the manner in which a Proxy is completed.

20. **ORDERS** that, in the absence of instruction to vote for or against the approval of the Resolution in a duly signed and returned Proxy that appoints a representative of the Monitor as Proxy holder, the Proxy shall be deemed to include instructions to vote for the approval of the Resolution, provided the Proxy holder does not otherwise revoke the Proxy by written notice to the Monitor delivered so that it is received by the Monitor no later than the Proxy Deadline.

21. **ORDERS** that the quorum required at each Meeting shall be one Eligible Voting Creditor present at each Meeting in person or by Proxy. If the (a) requisite quorum is not present at any Meeting, or (b) any Meeting is adjourned, postponed or rescheduled by the Chair (whether (i) by the request of the Participating CCAA Parties; (ii) by vote of the majority in value of Affected Unsecured Creditors holding Eligible Voting Claims in person or by Proxy at any Meeting; or (iii) otherwise as determined by the Chair), then any such Meetings shall be adjourned, postponed or rescheduled to such time(s) and place(s) as the Chair deems necessary or desirable.

22. **ORDERS** that the Chair, with the consent of the Participating CCAA Parties and the Plan Sponsors, not to be unreasonably withheld, be and he or she is hereby, authorized to adjourn, postpone or otherwise reschedule any Meeting on one or more occasions to such time(s), date(s) and place(s) as the Chair, with the consent of the Participating CCAA Parties and Plan Sponsors, not to be unreasonably withheld, deem necessary or desirable (without the need to first convene any such Meetings for the purpose of any adjournment, postponement or other rescheduling thereof). None of the Participating CCAA Parties, the Chair or the Monitor shall be required to deliver any notice of the adjournment, postponement or rescheduling of the Meeting(s) or adjourned Meeting(s), as applicable, provided that the Monitor shall:

    22.1 announce the adjournment, postponement or rescheduling of the applicable Meeting(s) or adjourned Meeting(s) to the participants at the applicable Meeting(s) if the commencement of the Meeting(s) has occurred prior to the adjournment, postponement or rescheduling;

    22.2 post notice of the adjournment, postponement or rescheduling at the originally designated time and location of each of the Meeting(s) or adjourned Meeting(s), as applicable;

    22.3 forthwith post notice of the adjournment, postponement or rescheduling on the Website; and

    22.4 provide notice of the adjournment, postponement or rescheduling to the Service List forthwith. Any Proxies validly delivered in connection with the Meeting(s) shall be accepted as Proxies in respect of any adjourned, postponed or rescheduled Meeting(s).

23. **DECLARES** that the only Persons entitled to vote at a Meeting shall be Eligible Voting Creditors of such Unsecured Creditor Class or their Proxy holders. Each Eligible Voting Creditor will be entitled to a vote with a value equal to the value in dollars of its Voting Claim, and/or the value in dollars of its Unresolved Voting Claim, if any, as determined in accordance with this Paragraph 23 of this Order.

24. **ORDERS** that the dollar value of an Unresolved Voting Claim for voting purposes at the applicable Meeting shall be: (i) the amount set out in such Creditor's Proof of Claim if no Notice of Allowance or Notice of Revision or Disallowance (in each case as defined in the Amended Claims Procedure Order) has been issued; (ii) the amount set out in the Notice of Revision or Disallowance in respect of such Claim if no Notice of Dispute (as defined in the Amended Claims Procedure Order) has been filed and the time for doing so has not expired; (iii) the amount set out in the Notice of Dispute in respect of such Claim if a Notice of Dispute has been timely filed, in all respects without prejudice to the determination of the dollar value of such Affected Unsecured Claim for distribution purposes in accordance with the Amended Claims Procedure Order; or (iv) the amount as may be agreed to between the Monitor and the Affected Unsecured Creditor, or between the Monitor and the Salaried Members Representative Counsel or the Monitor and the USW Counsel, as applicable.

25. **DECLARES** that in respect of the Eligible Voting Claims of the Salaried Members and the USW Members:

25.1 The Salaried Members Representative Counsel shall be deemed to be a Proxy holder in respect of each Eligible Voting Claim related to or arising from the employment of the Salaried Members and shall be entitled to vote them at a Meeting on their behalf, without the requirement for any Salaried Member to submit a Proxy to the Monitor, save in respect of any Salaried Member who, prior to a Meeting, notifies the Monitor by an instrument in writing that he revokes this deemed Proxy;

25.2 The USW Counsel shall be deemed to be a Proxy holder in respect of each Eligible Voting Claim related to or arising from the employment of the USW Members and shall be entitled to vote them at a Meeting on their behalf, without the requirement for any USW Member to submit a Proxy to the Monitor, save in respect of any USW Member who, prior to a Meeting, notifies the Monitor by an instrument in writing that he revokes this deemed Proxy; and

25.3 The Salaried Members Representative Counsel and the USW Counsel shall vote each Eligible Voting Claim in accordance with the recommendation made by the Salaried Members Representative Counsel to the Salaried Members and by USW Counsel to the USW Members in the Meeting Materials.

For greater certainty, however, only the Pension Plan Administrator or its designated Proxy may vote the Pension claims.

26. **ORDERS** that a Voting Claim or Unresolved Voting Claim shall not include fractional numbers and shall be rounded down to the nearest whole Canadian dollar amount.

27. **ORDERS** that the Monitor shall keep a separate record of the votes cast by Affected Unsecured Creditors holding Unresolved Voting Claims and shall report to the Court with respect thereto at the Sanction Motion.

28. **ORDERS** that the results of any and all votes conducted at the Meetings shall be binding on all Affected Unsecured Creditors, whether or not any such Affected Unsecured Creditor is present or voting at the Meetings.

29. **ORDERS** that a representative of the Monitor shall preside as the chair of each Meeting (the "**Chair**") and, subject to any further order of this Court, shall decide all matters relating to the conduct of such Meeting. The Participating CCAA Party and any Eligible Voting Creditor may appeal from any decision of the Chair to the Court, within three (3) Business Days of any such decision.

30. **DECLARES** that, at each Meeting, the Chair is authorized to direct a vote on the Resolution to approve the Plan, and any amendments thereto made in accordance with Paragraph 5 of this Order.

31. **ORDERS** that the Monitor may appoint scrutineers for the supervision and tabulation of the attendance at, quorum at and votes cast at each Meeting. Person(s) designated by the Monitor shall act as secretary at each Meeting.

32. **ORDERS** that the Monitor shall be directed to calculate the votes cast at each Meeting called to consider the Plan and report the results in accordance with Paragraph 42 of this Order.

33. **ORDERS** that an Affected Unsecured Creditor that is not an individual may only attend and vote at a Meeting if it has appointed a Proxy holder to attend and act on its behalf at such Meeting.

Notice of Transfers

34. **ORDERS** that, for purposes of voting at a Meeting, if an Affected Unsecured Creditor transfers or assigns all of its Affected Unsecured Claim, then the transferee or assignee shall only be entitled to vote and attend the applicable Meeting if the transferee or assignee delivers evidence satisfactory to the Monitor of its ownership of all of such Affected Unsecured Claim and a written request to the Monitor, not later than 5:00 pm on the date that is seven (7) days prior to the date of the Meeting, or such later time that the Monitor may agree to, that such transferee's or assignee's name be included on the list of Eligible Voting Creditors entitled to vote, either in person or by proxy, the transferor's or assignor's Voting Claim or Unresolved Voting Claim, as applicable, at the applicable Meeting in lieu of the transferor or assignor.

35. **ORDERS** that if the holder of an Affected Unsecured Claim or any subsequent holder of the whole of an Affected Unsecured Claim who has been acknowledged by the Monitor as the Affected Unsecured Creditor in respect of such Affected Unsecured Claim, transfers or assigns the whole of such Claim to more than one Person or part of such Claim to another Person or Persons, such transfer or assignment shall not create a separate Affected Unsecured Claim or Affected Unsecured Claims and such Affected Unsecured Claim shall continue to constitute and be dealt with as a single Claim as if such Claim (or portion of such Claim) had not been transferred or assigned, notwithstanding such transfer or assignment, and the Monitor and the Participating CCAA Parties shall in each such case not be bound to recognize or

acknowledge any such transfer or assignment and shall be entitled to give notices to and to otherwise deal with such Affected Unsecured Claim only as a whole and then only to and with the Person last holding such Affected Unsecured Claim in whole as the Affected Unsecured Creditor in respect of such Affected Unsecured Claim, provided such Affected Unsecured Creditor may by notice in writing to the Monitor delivered so that it is received by the Monitor on or before the tenth day prior to any Meeting or distribution in respect of such Affected Unsecured Claim, direct that subsequent dealings in respect of such Affected Unsecured Claim, but only as a whole, shall be with a specified transferee or assignee and in such event, such Affected Unsecured Creditor and such transferee or assignee of the Affected Unsecured Claim shall be bound by any notices given to the transferor or assignor and prior steps taken in respect of such Claim.

Notices and Communications

36. **ORDERS** that any notice or other communication to be given under this Order by an Affected Unsecured Creditor to the Monitor or the Participating CCAA Parties shall be in writing and will be sufficiently given only if given by pre-paid mail, registered mail, e-mail, courier addressed to:

Monitor:	FTI Consulting Canada Inc. TD Waterhouse Tower 79 Wellington Street West Suite 2010, P.O. Box 104 Toronto, ON M5K 1G8
	Attention: Nigel Meakin
	E-mail: bloomlake@fticonsulting.com

With a Copy to:	Norton, Rose, Fulbright LLP Suite 2500, 1 Place Ville Marie Montréal, QC H3B 1R1
	Attention: Sylvain Rigaud
	E-mail: sylvain.rigaud@nortonrosefulbright.com

Participating CCAA Parties:	Bloom Lake General Partner Limited *et al* c/o Blake, Cassels & Graydon LLP 199 Bay Street Suite 4000, Commerce Court West Toronto Ontario M5L 1A9
	Attention: Clifford T. Smith, Officer
	E-mail: clifford.smith@CliffsNR.com

With a Copy to:	Blake, Cassels & Graydon LLP 199 Bay Street Suite 4000, Commerce Court West Toronto Ontario M5L 1A9
	Attention: Milly Chow
	E-mail: milly.chow@blakes.com

37. **ORDERS** that any document sent by the Monitor or the Participating CCAA Parties pursuant to this Order may be sent by e-mail, ordinary mail, registered mail or courier. A Creditor shall be deemed to have received any document sent pursuant to this Order two (2) Business Days after the document is sent by mail and one (1) Business Day after the document is sent by courier or e-mail. Documents shall not be sent by ordinary or registered mail during a postal strike or work stoppage of general application. For greater certainty, the Monitor shall not be deemed to have received any document unless and until such document is actually received by the Monitor at the address noted above.

38. **ORDERS** that, in the event that the day on which any notice or communication required to be delivered pursuant to this Order is not a Business Day, then such notice or communication shall be required to be delivered on the next Business Day.

39. **ORDERS** that if, during any period during which notices or other communications are being given pursuant to this Order, a postal strike or postal work stoppage of general application should occur, such notices or other communications sent by ordinary or registered mail and then not received shall not, absent further Order of this Court, be effective and notices and other communications given hereunder during the course of any such postal strike or work stoppage of general application shall only be effective if given by courier, personal delivery or e-mail in accordance with this Order.

40. **ORDERS** that all references to time in this Order shall mean prevailing local time in Montréal, Québec and any references to an event occurring on a Business Day shall mean prior to 5:00 p.m. on the Business Day unless otherwise indicated.

41. **ORDERS** that references to the singular shall include the plural, references to the plural shall include the singular and to any gender shall include the other gender.

Sanction Hearing

42. **ORDERS** that the Monitor shall provide a report to the Court as soon as practicable after the Meetings by no later than June 21, 2018 (the "**Monitor's Report Regarding the Meetings**") with respect to:

    42.1 the results of voting at the Meetings;

    42.2 whether the Required Majority of each Unsecured Creditor Class has approved the Plan;

    42.3 the separate tabulation of the Unresolved Voting Claims as required by Paragraph 27; and

    42.4 in its discretion, any other matter relating to the Participating CCAA Parties' motion(s) seeking sanction of the Plan.

43. **ORDERS** that an electronic copy of the Monitor's Report Regarding the Meetings, the Plan, including any Plan Modification, and a copy of the materials filed in respect of the Sanction Motion shall be posted on the Website prior to the Sanction Motion.

44. **ORDERS** that in the event the Plan has been approved by the Required Majority of each Unsecured Creditor Class, the Participating CCAA Parties may seek the sanction of the Plan before this Court on June 29, 2018 (the “**Sanction Motion**”), or

such later date as the Monitor may advise the Service List in these proceedings, provided that such later date shall be acceptable to the Participating CCAA Parties, the Parent and the Monitor.

45. **ORDERS** that service of this Order by the CCAA Parties to the parties on the Service List, the delivery of the Meeting Materials in accordance with Paragraph 8 hereof and the posting of the Meeting Materials on the Website in accordance with Paragraph 9 hereof shall constitute good and sufficient service and notice of the Sanction Motion.

46. **ORDERS** that in the event that the Sanction Motion is adjourned, only those Persons appearing on the Service List as of the date of service shall be served with notice of the adjourned date.

47. **ORDERS** that, subject to any further Order of the Court, in the event of any conflict, inconsistency, ambiguity or difference between the provisions of the Plan and this Order, the terms, conditions and provisions of the Plan, as sanctioned, shall govern and be paramount, and any such provision of this Order shall be deemed to be amended to the extent necessary to eliminate any such conflict, inconsistency, ambiguity or difference.

48. **ORDERS** that any person who wishes to oppose the Sanction Motion shall serve upon the parties on the Service List, and file with the Court a copy of the materials to be used to oppose the Sanction Motion by no later than 5:00 p.m. (Eastern time) on June 26, 2018 or, if applicable, four days' prior to any adjourned or rescheduled Sanction Motion.

Monitor's Role

49. **ORDERS** that the Monitor, in addition to its prescribed rights and obligations under (i) the CCAA; (ii) the Initial Orders; and (iii) the Amended Claims Procedure Order, is hereby directed and empowered to take such other actions and fulfill such other roles as are authorized by this Order.

50. **ORDERS** that: (i) in carrying out the terms of this Order, the Monitor shall have all the protections given to it by the CCAA, the Initial Orders, the Amended Claims Procedure Order, and any other Order granted in these CCAA Proceedings and as an officer of the Court, including the stay of proceedings in its favour; (ii) the Monitor shall incur no liability or obligation as a result of carrying out the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part; (iii) the Monitor shall be entitled to rely on the books and records of the Participating CCAA Parties and any information provided by the Participating CCAA Parties, and any information acquired by the Monitor as a result of carrying out its duties under this Order without independent investigation; and (iv) the Monitor shall not be liable for any claims or damages resulting from any errors or omissions in such books, records or information.

Aid and Assistance of Other Courts

51. **REQUESTS** the aid and recognition of any court or any judicial, regulatory or administrative body in any province or territory of Canada and any judicial, regulatory or administrative tribunal or other court constituted pursuant to the Parliament of Canada or the legislature of any province or any court or any judicial, regulatory or administrative body of the United States and of any other nation or state to act in aid of and to be complementary to this Court in carrying out the terms of this Order.

General Provisions

52. **ORDERS** that the Monitor shall use reasonable discretion as to the adequacy of completion and execution of any document completed and executed pursuant to this Order and, where the Monitor is satisfied that any matter to be proven under this Order has been adequately proven, the Monitor may waive strict compliance with the requirements of this Order as to the completion and execution of documents.

53. **DECLARES** that the Monitor may apply to this Court for advice and direction in connection with the discharge or variation of its powers and duties under this Order.

54. **ORDERS** the provisional execution of this Order notwithstanding appeal.

55. **THE WHOLE** without costs.

STEPHEN W. HAMILTON J.S.C.

Mtre Bernard Boucher
Mtre Emily Hazlett
(Blake, Cassels & Graydon LLP)
Attorneys for the CCAA Parties

Date of hearing: April 16, 2018

Schedule A: Definitions
Schedule B: Creditor Letter
Schedule C: Notice of Creditor's Meetings and Sanction Hearing
Schedule D: Proxy
Schedule E: Form of Resolution

Schedule "A" to the Plan Filing and Meetings Order
Definitions

"**8568391**" means 8568391 Canada Limited;

"**Administration Charges**" means, collectively, the BL Administration Charge and the Wabush Administration Charge in the aggregate amount of the BL Administration Charge and the Wabush Administration Charge, as such amount may be reduced from time to time by further Court Order;

"**Affected Claim**" means any Claim other than an Unaffected Claim;

"**Affected Creditor**" means any Creditor holding an Affected Claim, including a Non-Filed Affiliate holding an Affected Claim and a CCAA Party holding an Affected Claim;

"**Affected Unsecured Claim**" means an Affected Claim that is an Unsecured Claim, including without limitation, any Deficiency Claims;

"**Affected Unsecured Creditor**" means any Affected Creditor holding an Affected Unsecured Claim, including a Non-Filed Affiliate and a CCAA Party holding an Affected Unsecured Claim;

"**Affiliate**" means, with respect to any Person, any other Person who directly or indirectly controls, is controlled by, or is under direct control or indirect common control with, such Person, and includes any Person in like relation to an Affiliate. A Person shall be deemed to "**control**" another Person if such Person possesses, directly or indirectly, the power to direct or cause the direction of the management and policies of such other Person, whether through ownership of voting securities, by contract or otherwise, and the term "**controlled**" shall have a similar meaning;

"**Allocation Methodology**" means the methodology for the allocation of proceeds of realizations of the CCAA Parties' assets and the costs of the CCAA Proceedings amongst the CCAA Parties and, to the extent necessary, amongst assets or asset categories, which was approved by an Order of the Court on July 25, 2017 as may be amended upon Final Determination of the Fermont Allocation Appeal;

"**Allocated Value**" means, in respect of any particular asset of a Participating CCAA Party, the amount of the sale proceeds realized from such asset, net of costs allocated to such asset all pursuant to the Allocation Methodology and, in respect of any Secured Claim, the amount of such sale proceeds receivable on account of such Secured Claim after taking into account the priority of such Secured Claims relative to other creditors holding a Lien in such asset;

"**Allowed Claim**" shall have the meaning given to it in the Amended Claims Procedure Order;

"**Amended Claims Procedure Order**" means the Amended Claims Procedure Order dated November 16, 2015, approving and implementing the claims procedure in respect of the

CCAA Parties and the Directors and Officers (including all schedules and appendices thereof);

"**Applicable Law**" means any law (including any principle of civil law, common law or equity), statute, order, decree, judgment, rule, regulation, ordinance, or other pronouncement having the effect of law, whether in Canada or any other country or any domestic or foreign province, state, city, county or other political subdivision;

"**Arnaud**" means Arnaud Railway Company;

"**BIA**" means the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended;

"**BL Administration Charge**" means the charge over the BL Property created by paragraph 45 of the Bloom Lake Initial Order and having the priority provided in paragraphs 46 and 47 of such Court Order in the amount of Cdn.$2.5 million, as such amount may be reduced from time to time by further Court Order;

"**BL Directors' Charge**" means the charge over the BL Property of the BL Parties created by paragraph 31 of the Bloom Lake Initial Order, and having the priority provided in paragraphs 46 and 47 of such Order in the amount of Cdn.$2.5 million, as such amount may be reduced from time to time by further Court Order;

"**BLGP**" means Bloom Lake General Partner Limited;
"**BLLP**" means The Bloom Lake Iron Ore Mine Limited Partnership;
"**Bloom Lake CCAA Parties**" means, collectively, BLGP, Quinto, 8568391, CQIM, BLLP, and BLRC;
"**BL Parties**" means BLGP and BLLP;
"**BL Property**" means all current and future assets, rights, undertakings and properties of the Bloom Lake CCAA Parties, of every nature and kind whatsoever, and wherever situate, including all Cash or other proceeds thereof;

"**BLRC**" means Bloom Lake Railway Company Limited;

"**Business**" means the direct and indirect operations and activities formerly carried on by the Participating CCAA Parties;

"**Business Day**" means a day, other than a Saturday, a Sunday, or a non-juridical day (as defined in article 6 of the Code of Civil Procedure, R.S.Q., c. C-25, as amended);

"**Cash**" means cash, certificates of deposit, bank deposits, commercial paper, treasury bills and other cash equivalents;

"**CCAA**" means the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended;

"**CCAA Charges**" means the Administration Charge and the Directors' Charge;

"**CCAA Parties**" means the Wabush CCAA Parties, together with the Bloom Lake CCAA Parties, and **"CCAA Party**" means any one of the CCAA Parties;

"**CCAA Party Pre-Filing Interco Claims**" means Claims of the Participating CCAA Parties against other Participating CCAA Parties as set out in Schedule "H" hereto;

"**CCAA Proceedings**" means the proceedings commenced pursuant to the CCAA by a Court Order issued on January 27, 2015, bearing Court File No. 500-11-048114-157;

"**Claim**" means:

(a) any right or claim of any Person that may be asserted or made in whole or in part against the Participating CCAA Parties (or any of them), whether or not asserted or made, in connection with any indebtedness, liability or obligation of any kind whatsoever, and any interest accrued thereon or costs payable in respect thereof, in existence on, or which is based on, an event, fact, act or omission which occurred in whole or in part prior to the applicable Filing Date, at law or in equity, by reason of the commission of a tort (intentional or unintentional), any breach of contract, lease or other agreement (oral or written), any breach of duty (including, without limitation, any legal, statutory, equitable or fiduciary duty), any breach of extra-contractual obligation, any right of ownership of or title to property, employment, contract or assets or right to a trust or deemed trust (statutory, express, implied, resulting, constructive or otherwise) or for any reason whatsoever against any of the Participating CCAA Parties or any of their property or assets, and whether or not any such indebtedness, liability or obligation is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmetered, disputed, legal, equitable, secured (by guarantee, surety or otherwise), unsecured, present, future, known or unknown, and whether or not any such right or claim is executory or anticipatory in nature, including any right or ability of any Person to advance a claim for contribution or indemnity or otherwise with respect to any matter, action, cause or chose in action, whether existing at present or commenced in the future, together with any other rights or claims not referred to above that are or would be claims provable under the BIA had the Participating CCAA Parties (or any one of them) become bankrupt on the applicable Filing Date, including, for greater certainty, any Tax Claim and any monetary claim in connection with any indebtedness, liability or obligation by reason of a breach of a collective bargaining agreement, including grievances in relation thereto, or by reason of a breach of a legal or statutory duty under any employment legislation or pay equity legislation;

(b) a D&O Claim; and

(c) a Restructuring Claim,

provided, however, that Excluded Claims are not Claims, but for greater certainty, a Claim includes any claim arising through subrogation or assignment against any Participating CCAA Party or Director or Officer;

"**Claims Bar Date**" means as provided for in the Amended Claims Procedure Order: (a) in respect of a Claim or D&O Claim, 5:00 p.m. on December 18, 2015, or such other date as may be ordered by the Court; and (b) in respect of a Restructuring Claim, the later of (i) 5:00 p.m. on December 18, 2015 (ii) 5:00 p.m. on the day that is 21 days after either (A) the date that the applicable Notice of Disclaimer or Resiliation becomes effective, (B) the Court Order settling a contestation against such Notice of Disclaimer or Resiliation brought pursuant to Section 32(5)(b) CCAA, or (C) the date of the event giving rise to the Restructuring Claim; or (iii) such other date as may be ordered by the Court;

"**Claims Officer**" means the individual or individuals appointed by the Monitor pursuant to the Amended Claims Procedure Order;

“**CMC Secured Claims**” has the meaning ascribed thereto in the Thirty-Ninth Report dated September 11, 2017 of the Monitor;

“**CNR Key Bank Claims**” has the meaning ascribed thereto in the Thirty-Ninth Report dated September 11, 2017 of the Monitor;

“**Conditions Certificates**” means written notice confirming, as applicable, the fulfilment or waiver, to the extent available, of the conditions precedent to implementation of the Plan as set out in Section 11.3 of the Plan;

“**Construction Lien Claim**” means a Claim asserting a Lien over real property of a Participating CCAA Party in respect of goods or services provided to such Participating CCAA Party that improved such real property;

“**Court**” means the Québec Superior Court of Justice (Commercial Division) or any appellate court seized with jurisdiction in the CCAA Proceedings, as the case may be;

“**Court Order**” means any order of the Court;

“**CQIM**” means Cliffs Québec Iron Mining ULC;

“**CQIM/Quinto Parties**” means CQIM and Quinto together;

“**Creditor**” means any Person having a Claim, but only with respect to and to the extent of such Claim, including the transferee or assignee of a transferred Claim that is recognized as a Creditor in accordance with the Amended Claims Procedure Order, the Plan and the Meetings Order, or a trustee, executor, liquidator, receiver, receiver and manager, or other Person acting on behalf of or through such Person;

“**D&O Bar Date**” means 5:00 p.m. (prevailing Eastern Time) on December 18, 2015, or such other date as may be ordered by the Court;

“**D&O Claim**” means any right or claim of any Person against one or more of the Directors and/or Officers howsoever arising on or before the D&O Bar Date, for which the Directors and/or Officers, or any of them, are by statute liable to pay in their capacity as Directors and/or Officers or which are secured by way of any one of the Directors’ Charges;

“**Deficiency Claim**” means, in respect of a Secured Creditor holding a Proven Secured Claim, the amount by which such Secured Claim exceeds the Allocated Value of the Property secured by its Lien, and for greater certainty, includes, as applicable, the deficiency Claim, if any, of (a) the Pension Plan Administrator arising from any of the Pension Claims being Finally Determined to be a Priority Pension Claim, and (b) the Non-Filed Affiliate Secured Interco Claims;

“**Director**” means anyone who is or was or may be deemed to be or have been, whether by statute, operation of law or otherwise, a director or *de facto* director of any of the Participating CCAA Parties, in such capacity;

“**Directors’ Charges**” means, collectively, the BL Directors’ Charge and the Wabush Directors’ Charge;

“**Eligible Voting Claims**” means a Voting Claim or an Unresolved Voting Claim;

"**Eligible Voting Creditors**" means, subject to Section 4.2(b) of the Plan, Affected Unsecured Creditors holding Voting Claims or Unresolved Voting Claims;

"**Employee**" means a former employee of a Participating CCAA Party other than a Director or Officer;

"**Employee Priority Claims**" means, in respect of a Participating CCAA Party, the following claims of Employees of such Participating CCAA Party:

(a) claims equal to the amounts that such Employees would have been qualified to receive under paragraph 136(1)(d) of the BIA if the Participating CCAA Party had become bankrupt on the Plan Sanction Date, which for greater certainty, excludes any OPEB, pension contribution, and termination and severance entitlements;

(b) claims for wages, salaries, commissions or compensation for services rendered by such Employees after the applicable Filing Date and on or before the Plan Implementation Date together with, in the case of travelling salespersons, disbursements properly incurred by them in and about the Business during the same period, which for greater certainty, excludes any OPEB, pension contribution, and termination and severance entitlements; and

(c) any amounts in excess of (a) and (b), that the Employees may have been entitled to receive pursuant to the *Wage Earner Protection Program Act* (Canada) if such Participating CCAA Party had become a bankrupt on the Plan Sanction Date, which for greater certainty, excludes OPEB and pension contributions;

"**Excluded Claim**" means, subject to further Court Order, any right or claim of any Person that may be asserted or made in whole or in part against the Participating CCAA Parties (or any one of them) in connection with any indebtedness, liability or obligation of any kind which arose in respect of obligations first incurred on or after the applicable Filing Date (other than Restructuring Claims and D&O Claims), and any interest thereon, including any obligation of the Participating CCAA Parties toward creditors who have supplied or shall supply services, utilities, goods or materials, or who have or shall have advanced funds to the Participating CCAA Parties on or after the applicable Filing Date, but only to the extent of their claims in respect of the supply or advance of such services, utilities, goods, materials or funds on or after the applicable Filing Date, and:

(a) any claim secured by any CCAA Charge;

(b) any claim with respect to fees and disbursements incurred by counsel for any CCAA Party, Director, the Monitor, Claims Officer, any financial advisor retained by any of the foregoing, or Representatives' Counsel as approved by the Court to the extent required;

"**Fermont Allocation Appeal**" means the appeal by Ville de Fermont of the judgment of the Court in the CCAA Proceedings approving the Allocation Methodology dated July 25, 2017 under Court File Number 500-09-027026-178;

"**Filing Date**" means January 27, 2015 for the Bloom Lake CCAA Parties, and May 20, 2015 for the Wabush CCAA Parties;

"**Final Determination**" and "**Finally Determined**" as pertains to a Claim, matter or issue, means either:

(a) in respect of a Claim, such Claim has been finally determined as provided for in the Amended Claims Procedure Order;

(b) there has been a Final Order in respect of the matter or issue; or

(c) there has been an agreed settlement of the issue or matter by the relevant parties, which settlement has been approved by a Final Order, as may be required, or as determined by the Monitor, in consultation with the Participating CCAA Parties, to be approved by the Court;

"**Final Order**" means a Court Order, which has not been reversed, modified or vacated, and is not subject to any stay or appeal, and for which any and all applicable appeal periods have expired;

"**Governmental Authority**" means any government, including any federal, provincial, territorial or municipal government, and any government department, body, ministry, agency, tribunal, commission, board, court, bureau or other authority exercising or purporting to exercise executive, legislative, judicial, regulatory or administrative functions of, or pertaining to, government including without limitation any Taxing Authority;

"**Government Priority Claims**" means all claims of Governmental Authorities that are described in section 6(3) of the CCAA;

"**Initial Order**" means, collectively, in respect of the Bloom Lake CCAA Parties, the Bloom Lake Initial Order, and in respect of the Wabush CCAA Parties, the Wabush Initial Order;

"**Liability**" means any indebtedness, obligations and other liabilities of a Person whether absolute, accrued, contingent, fixed or otherwise, or whether due or to become due;

"**Lien**" means any lien, mortgage, charge, security interest, hypothec or deemed trust, arising pursuant to contract, statute or Applicable Law;

"**Meetings**" means the meetings of Affected Unsecured Creditors in the Unsecured Creditor Classes in respect of each Participating CCAA Party called for the purposes of considering and voting in respect of the Plan, which has been set by the Meetings Order to take place at the times, dates and locations as set out in the Meetings Order;

"**Meetings Order**" means this Plan Filing and Meetings Order, including the Schedules hereto, as may be amended or varied from time to time by subsequent Court Order;

"**Monitor**" means FTI Consulting Canada Inc., in its capacity as Monitor of the CCAA Parties and not in its personal or corporate capacity;

"**Newfoundland Reference Proceedings**" means the reference proceeding commenced in the Newfoundland Court of Appeal in respect of the Pension Claims as Docket No. 201701H0029, as appealed to the Supreme Court of Canada;

"**Non-Filed Affiliates**" means the Parent, its former and current direct and indirect subsidiaries and its current and former Affiliates who are not petitioners or mises-en-cause in the CCAA Proceedings, and for greater certainty does not include any CCAA Party but does include any subsidiary of a CCAA Party;

"**Non-Filed Affiliate Interco Claims**" means, collectively, the Non-Filed Affiliate Unsecured Interco Claims and the Non-Filed Affiliate Secured Interco Claims;
"**Non-Filed Affiliate Secured Interco Claims**" means, collectively, (a) the CNR Key Bank Claims and (b) the CMC Secured Claims, in each case only to the extent of the Allocated Value of the Property securing such Claims as set out in the Schedule "G" to this Order and to the extent not a Deficiency Claim;
"**Non-Filed Affiliate Unsecured Interco Claims**" means all Claims filed in the CCAA Proceedings by a Non-Filed Affiliate determined in accordance with the Plan (other than Non-Filed Affiliate Secured Claims) as set out in the Schedule "F" to this Order, and for greater certainty, includes any Deficiency Claims held by a Non-Filed Affiliate;
"**Notice of Disclaimer or Resiliation**" means a written notice issued, either pursuant to the provisions of an agreement, under Section 32 of the CCAA or otherwise, on or after the applicable Filing Date of the Participating CCAA Parties, and copied to the Monitor, advising a Person of the restructuring, disclaimer, resiliation, suspension or termination of any contract, employment agreement, lease or other agreement or arrangement of any nature whatsoever, whether written or oral, and whether such restructuring, disclaimer, resiliation, suspension or termination took place or takes place before or after the date of the Amended Claims Procedure Order;

"**Officer**" means any Person who is or was, or may be deemed to be or have been, whether by statute, operation of law or otherwise, an officer or *de facto* officer of any of the Participating CCAA Parties;

"**Parent**" means Cleveland-Cliffs Inc.;

"**Participating CCAA Parties**" means the CCAA Parties, other than 8568391 and BLRC, and **"Participating CCAA Party**" means any of the Participating CCAA Parties;

"**Pension Plan Administrator**" means Morneau Shepell Ltd., the Plan Administrator of the Wabush Pension Plans, or any replacement thereof;

"**Pension Claims**" means Claims with respect to the administration, funding or termination of the Wabush Pension Plans, including any Claim for unpaid normal cost payments, or special/amortization payments or any wind up deficiency and "**Pension Claim**" means any one of them;

"**Pension Priority Proceedings**" means (a) the motion for advice and directions of the Monitor dated September 20, 2016 in respect of priority arguments asserted pursuant to the *Pension Benefits Act* (Newfoundland and Labrador), the *Pension Benefits Standards Act* (Canada) and the *Supplemental Pension Plans Act* (Québec) in connection with the claims arising from any failure of the Wabush CCAA Parties to make certain normal course payments or special payments under the Wabush Pension Plans and for the wind-up deficit under the Wabush Pension Plans currently subject to an appeal of Mr. Justice Hamilton's decision dated September 11, 2017, as may be further appealed, and (b) the Newfoundland Reference Proceedings with regards to the interpretation of the *Pension Benefits Act* (Newfoundland and Labrador) and the applicable pension legislation to members and beneficiaries of the Wabush Pension Plans;

"**Person**" means any individual, firm, corporation, limited or unlimited liability company, general or limited partnership, association, trust (including a real estate investment trust), unincorporated organization, joint venture, government or any agency or instrumentality thereof or any other entity;

"**Plan**" has the meaning given to such term in Paragraph 4;

"**Plan Implementation Date**" means the Business Day on which all of the conditions precedent to the implementation of the Plan have been fulfilled, or, to the extent permitted pursuant to the terms and conditions of the Plan, waived, as evidenced by the Monitor's Plan Implementation Date Certificate to be filed with the Court;

"**Plan Implementation Date Certificate**" means the certificate substantially in the form to be attached to the Sanction Order to be filed by the Monitor with the Court, declaring that all of the conditions precedent to implementation of the Plan have been satisfied or waived;

"**Plan Modification**" shall have the meaning ascribed thereto in the Meetings Order;

"**Plan Sanction Date**" means the date that the Sanction Order issued by the Court;

"**Plan Sponsors**" means the Parent and all other Non-Filed Affiliates;

"**Post-Filing Claims Procedure Order**" means the Post-Filing Claims Procedures Order to be sought by the CCAA Parties, which, *inter alia*, seeks to establish a post-filing claims procedure with respect to post-filing claims, if any, against the CCAA Parties and their Officers and Directors, as such may be amended, restated or supplemented from time to time;

"**Priority Claims**" means, collectively, the (a) Employee Priority Claim; and (b) Government Priority Claims;

"**Priority Pension Claim**" means a Pension Claim that is Finally Determined to have priority over Secured Claims or Unsecured Claims;

"**Proof of Claim**" means the proof of claim form that was required to be completed by a Creditor setting forth its applicable Claim and filed by the Claims Bar Date, pursuant to the Amended Claims Procedure Order;

"**Property**" means, collectively, the BL Property and the Wabush Property;

"**Proven Affected Unsecured Claim**" means an Affected Unsecured Claim that is a Proven Claim;

"**Proven Claim**" means (a) a Claim of a Creditor, Finally Determined as an Allowed Claim for voting, distribution and payment purposes under the Plan, (b) in the case of the Participating CCAA Parties in respect of their CCAA Party Pre-Filing Interco Claims, and in the case of the Non-Filed Affiliates in respect of their Non-Filed Affiliate Unsecured Interco Claims and Non-Filed Affiliate Secured Interco Claims, as such Claims are declared, solely for the purposes of the Plan, to be Proven Claims pursuant to and in the amounts set out in this Order, and (c) in the case of Employee Priority Claims and Government Priority Claims, as Finally Determined to be a valid post-Filing Date claim against a Participating CCAA Party;

"**Proven Secured Claim**" means a Secured Claim that is a Proven Claim;

"**Quinto"** means Quinto Mining Corporation;

"**Representative Court Order**" means the Court Order dated June 22, 2015, as such order may be amended, supplemented, restated or rectified from time to time;

"**Required Majority**" means, with respect to each Unsecured Creditor Class, a majority in number of Affected Unsecured Creditors who represent at least two-thirds in value of the Claims of Affected Unsecured Creditors who actually vote approving the Plan (in person, by proxy or by ballot) at the Meeting;

"**Restructuring Claim**" means any right or claim of any Person against the Participating CCAA Parties (or any one of them) in connection with any indebtedness, liability or obligation of any kind whatsoever owed by the Participating CCAA Parties (or any one of them) to such Person, arising out of the restructuring, disclaimer, resiliation, termination or breach or suspension, on or after the applicable Filing Date, of any contract, employment agreement, lease or other agreement or arrangement, whether written or oral, and whether such restructuring, disclaimer, resiliation, termination or breach took place or takes place before or after the date of the Amended Claims Procedure Order, and, for greater certainty, includes any right or claim of an Employee of any of the Participating CCAA Parties arising from a termination of its employment after the applicable Filing Date, *provided, however*, that "**Restructuring Claim**" shall not include an Excluded Claim;

"**Salaried Members**" means, collectively, all salaried/non-Union Employees and retirees of the Wabush CCAA Parties or any person claiming an interest under or on behalf of such former employees or pensioners and surviving spouses, or group or class of them (excluding any individual who opted out of representation by the Salaried Members Representatives and Salaried Representative Counsel in accordance with the Representative Court Order, if any);

"**Salaried Members Representatives"** means Michael Keeper, Terrence Watt, Damien Lebel and Neil Johnson, in their capacity as Court-appointed representatives of all the Salaried Members of the Wabush CCAA Parties, the whole pursuant to and subject to the terms of the Representative Court Order;

"**Salaried Members Representative Counsel**" means Koskie Minsky LLP and Fishman Flanz Meland Paquin LLP, in their capacity as legal counsel to the Salaried Members Representatives, or any replacement thereof;

"**Salaried Pension Plan**" means the defined benefit plan known as the Contributory Pension Plan for Salaried Employees of Wabush Mines, Cliffs Mining Company, Managing Agent (Canada Revenue Agency registration number 0343558);

"**Sanction Hearing**" means the hearing of the Sanction Motion;

"**Sanction Motion**" means the motion by the Participating CCAA Parties seeking the Sanction Order;

"**Sanction Order**" means the Court Order to be sought by the Participating CCAA Parties from the Court as contemplated under the Plan which, *inter alia*, approves and sanctions the Plan and the transactions contemplated thereunder, pursuant to Section 6(1) of the CCAA, substantially in the form of Schedule "E" to the Plan or otherwise in form and content acceptable to the Participating CCAA Parties, the Monitor and the Parent, in each case, acting reasonably;;

"**Secured Claims**" means Claims held by "secured creditors" as defined in the CCAA, including Construction Lien Claims, to the extent of the Allocated Value of the Property securing such Claim, with the balance of the Claim being a Deficiency Claim, and amounts subject to section 6(6) of the CCAA;

"**Service List**" means the service list in the CCAA Proceedings;

"**Secured Creditors**" means Creditors holding Secured Claims;

"**Stay of Proceedings**" means the stay of proceedings created by the Initial Order as amended and extended by further Court Order from time to time;

"**Tax**" or "**Taxes**" means any and all taxes including all income, sales, use, goods and services, harmonized sales, value added, capital gains, alternative, net worth, transfer, profits, withholding, payroll, employer health, excise, franchise, real property, and personal property taxes and other taxes, customs, duties, fees, levies, imposts and other assessments or similar charges in the nature of a tax, including Canada Pension Plan and provincial pension plan contributions, employment insurance and unemployment insurance payments and workers' compensation premiums, together with any instalments with respect thereto, and any interest, penalties, fines, fees, other charges and additions with respect thereto;

"**Tax Claims**" means any Claim against the Participating CCAA Parties (or any one of them) for any Taxes in respect of any taxation year or period ending on or prior to the applicable Filing Date, and in any case where a taxation year or period commences on or prior to the applicable Filing Date, for any Taxes in respect of or attributable to the portion of the taxation period commencing prior to the applicable Filing Date and up to and including the applicable Filing Date. For greater certainty, a Tax Claim shall include, without limitation, (a) any and all Claims of any Taxing Authority in respect of transfer pricing adjustments and any Canadian or non-resident Tax related thereto, and (b) any Claims against any BL/Wabush Released Party in respect of such Taxes;

"**Taxing Authorities**" means Her Majesty the Queen in right of Canada, Her Majesty the Queen in right of any province or territory of Canada, any municipality of Canada, the Canada Revenue Agency, the Canada Border Services Agency, any similar revenue or taxing authority of Canada and each and every province or territory of Canada (including Revenu Québec) and any political subdivision thereof and any Canadian or foreign government, regulatory authority, government department, agency, commission, bureau, minister, court, tribunal or body or regulation making entity exercising taxing authority or power, and "**Taxing Authority**" means any one of the Taxing Authorities;

"**Unaffected Claims**" means:

(a) Excluded Claims;

(b) Secured Claims;

(c) amounts payable under Section 6(3), 6(5) and 6(6) of the CCAA;

(d) Priority Claims; and

(e) D&O Claims that are not permitted to be compromised under section 5.1(2) of the CCAA;

"**Union Pension Plan**" means the defined benefit plan known as the Pension Plan Bargaining Unit Employees of Wabush Mines, Cliffs Mining Company, Managing Agent (Canada Revenue Agency registration number 0555201);

"**Unresolved Affected Unsecured Claim**" means an Affected Unsecured Claim that is an Unresolved Claim;

"**Unresolved Claim**" means a Claim, which at the relevant time, in whole or in part: (a) has not been Finally Determined to be a Proven Claim in accordance with the Amended Claims Procedure Order and this Plan; (b) is validly disputed in accordance with the Amended Claims Procedure Order; and/or (c) remains subject to review and for which a Notice of Allowance or Notice of Revision or Disallowance (each as defined in the Amended Claims Procedure Order) has not been issued to the Creditor in accordance with the Amended Claims Procedure Order as at the date of this Plan, in each of the foregoing clauses, including both as to proof and/or quantum, and for greater certainty includes a Non-Filed Affiliate Interco Claim or CCAA Party Pre-Filing Interco Claim in respect of the Wabush CCAA Parties prior to the Final Determination of the Pension Priority Proceedings;

"**Unresolved Voting Claim**" means the amount of the Unresolved Affected Unsecured Claim of an Affected Unsecured Creditor as determined in accordance with the terms of the Amended Claims Procedure Order entitling such Affected Unsecured Creditor to vote at the applicable Meeting in accordance with the provisions of the Meetings Order, the Plan and the CCAA;

"**Unsecured Claims**" means Claims that are not secured by any Lien;

"**Unsecured Creditor Class**" means each of the CQIM/Quinto Unsecured Creditor Class, BL Parties Unsecured Creditor Class, Wabush Mines Unsecured Creditor Class, Arnaud Unsecured Creditor Class and Wabush Railway Unsecured Creditor Class;

"**USW Counsel**" means Philion Leblanc Beaudry avocats, in their capacity as legal counsel to the United Steelworkers, Locals 6254, 6285 and 9996;

"USW Members" means any Employee or retiree who is or was a member of the United Steelworkers, locals 6254, 6285 or 9996, including any successor of such Employees or retirees;

"**Voting Claim**" means the amount of the Affected Unsecured Claim of an Affected Unsecured Creditor as Finally Determined in the manner set out in the Amended Claims Procedure Order entitling such Affected Unsecured Creditor to vote at the applicable Meeting in accordance with the provisions of the Meetings Order, the Plan and the CCAA;

"**Wabush Administration Charge**" means the charge over the Wabush Property created by paragraph 45 of the Wabush Initial Order and having the priority provided in paragraphs 46 and 47 of such Order in the amount of Cdn$1.75 million, as such amount may be reduced from time to time by further Court Order;

"**Wabush CCAA Parties**" means, collectively, Wabush Iron, Wabush Resources, Wabush Mines, Arnaud and Wabush Railway;

"**Wabush Directors' Charge**" means the charge over the Wabush Property created by paragraph 31 of the Wabush Initial Order, and having the priority provided in paragraphs 46 and 47 of such Court Order in the amount of Cdn$2 million, as such amount may be reduced from time to time by further Court Order;

"**Wabush Iron**" means Wabush Iron Co. Limited;

“**Wabush Mines Parties**” means collectively, Wabush Iron, Wabush Resources and Wabush Mines;

“**Wabush Pension Plans**” means, collectively, the Salaried Pension Plan and the Union Pension Plan;

“**Wabush Property**” means all current and future assets, rights, undertakings and properties of the Wabush CCAA Parties, of every nature and kind whatsoever, and wherever situate, including all Cash or other proceeds thereof;

“**Wabush Railway**” means Wabush Lake Railway Company Limited;

“**Wabush Resources**” means Wabush Resources Inc.;

“**Website**” means www.cfcanada.fticonsulting.com/bloomlake.

[LETTERHEAD OF MONITOR]

May __, 2018

TO: Creditors of Cliffs Québec Iron Mining ULC ("**CQIM**"), Bloom Lake General Partner Limited ("**BLGP**"), The Bloom Lake Iron Ore Mine Limited Partnership ("**BLLP**") and Quinto Mining Corporation ("**Quinto**" and, together with CQIM, BLGP and BLLP, the "**Participating BL CCAA Parties**") and Wabush Iron Co. Limited ("**WICL**"), Wabush Resources Inc. ("**WRI**"), Wabush Mines ("**Wabush Mines**"), Arnaud Railway Company ("**Arnaud**") and Wabush Lake Railway Company Limited ("**Wabush Railway**" and, together with WICL, WRI, Wabush Mines and Arnaud, the "**Wabush CCAA Parties**" and, together with the Participating BL CCAA Parties, as certain of them may be consolidated under the Plan (as defined below), the "**Participating CCAA Parties**").

Dear Sirs/Mesdames:

Proposed Joint Plan of Compromise and Arrangement of the Participating CCAA Parties

Please find attached a Joint Plan of Compromise and Arrangement (as amended, restated or supplemented from time to time in accordance with the provisions thereof, the "**Plan**") under the *Companies' Creditors Arrangement Act* (Canada) (the "**CCAA**") as filed by the Participating CCAA Parties (as defined above) with the Quebec Superior Court on April 16, 2018. Capitalized terms used in this letter not otherwise defined are as defined in Schedule "A" to the Plan.

The Plan seeks to implement the principal terms of a proposed settlement (the "**Settlement**") between the Participating CCAA Parties and Cleveland-Cliffs Inc. (the "**Parent**") and its former and current direct and indirect subsidiaries and affiliates (collectively with the Parent, the "**Non-Filed Affiliates**") as negotiated by FTI Consulting Canada Inc., in its capacity as the independent court-appointed Monitor in the CCAA proceedings (the "**Monitor**") and to distribute remaining assets of the Participating CCAA Parties to their creditors.

If the Plan is approved by the required majorities of creditors and sanctioned by the Court, the Plan will:

- resolve potential claims (collectively, the "**Potential Recovery Claims**") against certain of the Non-Filed Affiliates, without the significant time and expense of litigation and of obtaining payment from defendants in multiple foreign jurisdictions, the whole with an uncertain outcome;
- resolve significant intercompany claims between the CCAA Parties and between the CCAA Parties and certain Non-Filed Affiliates without the significant time and expense that would otherwise be incurred;
- provide significant additional monetary recoveries to third-party creditors which would not be available absent successful litigation in respect of the Potential Recovery Claims; and
- accelerate the payment of interim distributions to third-party creditors.

Pursuant to the Settlement, the Non-Filed Affiliates have agreed to sponsor the Plan by contributing the following to the Participating CCAA Parties' estates for the benefit of Third Party Affected Unsecured Creditors with Proven Claims:

(a) a cash contribution of CDN$5 million, of which CDN$4 million will be allocated to the CQIM/Quinto Unsecured Creditor Class and CDN$1 million will be allocated amongst unsecured creditors of the other Participating CCAA Parties pro-rata based upon the amount of third party Proven Claims against such other CCAA Parties; and

(b) all of the secured and unsecured distributions to which certain Non-Filed Affiliates would otherwise be entitled, which will be contributed to the CQIM/Quinto Parties (such Non-Filed Affiliates, being the "**Designated Non-Filed Affiliates**").

While the value of the distributions to be contributed by the Designated Non-Filed Affiliates cannot be calculated with certainty at this time because of various outstanding issues in the CCAA Proceedings, the Monitor estimates that the total incremental amount available to third-party creditors in the event that the Plan is implemented would be in the range of approximately CDN$62 million to CDN$100 million.

The Plan is a single joint Plan that will be subject to approval by each of the Unsecured Creditor Classes, which are:

(a) CQIM/Quinto Unsecured Creditor Class: Affected Unsecured Creditors of CQIM or Quinto;
(b) BL Parties Unsecured Creditor Class: Affected Unsecured Creditors of BLGP or BLLP;
(c) Wabush Mines Parties Unsecured Creditor Class: Affected Unsecured Creditors of WICL, WRI or Wabush Mines;
(d) Arnaud Unsecured Creditor Class: Affected Unsecured Creditors of Arnaud; and
(e) Wabush Railway Unsecured Creditor Class: Affected Unsecured Creditors of Wabush Railway.

Third Party Affected Unsecured Creditors in each as class will be entitled to vote the amount of their Claim proven in accordance with the Claims Procedure Order. To the extent that a Claim or any part of a Claim remains unresolved, the Affected Unsecured Creditor will also be able to vote its Unresolved Claim and such vote shall be tabulated separately from the votes of Affected Unsecured Creditors with Proven Claims.

Distributions on account of Proven Claims of Affected Unsecured Creditors in each Unsecured Creditor Class will be based on the pro-rata share of the net amounts available in each estate from realizations as determined pursuant to the Allocation Methodology approved by the Court by an Order granted July 25, 2017, as supplemented by the amounts being contributed by the Designated Non-Filed Affiliates. The methodology for calculating the distribution entitlement of individual Affected Unsecured Creditors is the same for each Unsecured Creditor Class.

The Plan provides for customary releases for the Participating CCAA Parties and their respective Directors, Officers, Employees, advisors, legal counsel and agents, the Monitor, FTI and their respective current and former affiliates, directors, officers and employees and all of their respective advisors, legal counsel and agents, and the Non-Filed Affiliates and their respective current and former members, shareholders, directors, officers and employees, advisors, legal counsel and agents. The defendants named in class action proceedings filed in the Supreme Court of Newfoundland and Labrador on behalf of former salaried and union employees are not released from the claims asserted in those class action proceedings. Accordingly, those class action proceedings are not impacted by the Plan.

The Plan does not affect the determination of the Pension Priority Proceedings, which matters are the subject of dispute and must be resolved prior to any distributions to Affected Unsecured Creditors of the Wabush CCAA Parties.

The information provided in this letter is intended to give a high-level overview to help you understand the Plan. You should note, however, that the governing document is the Plan. Accompanying this letter are the following important documents:

- The Plan;
- The Meetings Order, granted April 20, 2018;
- A Notice of Creditors' Meetings and Sanction Hearing;
- A form of Proxy and instructions for its completion;
- The Monitor's Report on the Plan;
- A Letter from Salaried Members Representative Counsel; and
- A Letter from USW Counsel.

You should read each of these documents carefully and in their entirety. You may wish to consult financial, tax or other professional advisors regarding the Plan and should not construe the contents of this letter as investment, legal or tax advice.

The Creditors' Meetings will be held on June 18, 2018 in Montreal, Quebec. Details of the Creditors' Meetings and the Sanction Hearing are contained in the Notice of Creditors' Meetings and Sanction Hearing.

Creditors that are corporations, partnerships or trusts wishing to vote on the Plan must submit a properly completed Proxy by no later than **5:00 p.m. (Eastern time) June 14, 2018** (the "**Proxy Deadline**") appointing a proxy holder to attend and vote at the Creditors' Meeting.

Creditors that are individuals wishing to vote on the Plan may (i) appoint a proxy holder to attend and vote at the Creditor's Meeting by submitting a properly completed Proxy by no later than the Proxy Deadline; or (ii) vote in person at the Creditors' Meeting.

As stated in the Monitor's Report on the Plan, and for the reasons set out therein, the Monitor recommends that creditors vote **FOR** the Plan.

The Salaried Members Representative Counsel (the lawyers representing the salaried/non-Union Employees and retirees of the Wabush CCAA Parties in these proceedings, the

"Salaried Members") and the USW Counsel (the lawyers representing the Employees and retirees of the Wabush CCAA Parties that are or were members of United Steelworkers locals 6254, 6285 or 9996, including any successor of such Employees and retirees, the "USW Members") recommend that you vote **FOR/AGAINST** the Plan. You will find enclosed letters from the Salaried Members Representative Counsel and the USW Counsel explaining their reasons.

If you are a Salaried Member and you **AGREE** with the recommendation of the Salaried Members Representative Counsel, you do NOT have to fill out, sign or return any Proxy or any other form to the Monitor since the Salaried Members Representative Counsel have been authorized by the CCAA Court to attend at the Creditors' Meeting and to vote your employee claims on your behalf according to that recommendation (the "Salaried Members Deemed Proxy"). If however, you **DISAGREE** with the recommendation, you have the right to opt out of the Salaried Members Deemed Proxy by advising the Monitor in writing of your desire to do so and you may vote in person at the Creditors' Meeting in Montreal or you may appoint a different Proxy holder by using the Proxy form.

If you are a USW Member and you **AGREE** with the recommendation of the USW Counsel, you do NOT have to fill out, sign or return any Proxy or any other form to the Monitor since the USW Counsel have been authorized by the CCAA Court to attend at the Creditors' Meeting and to vote your employee claims on your behalf according to that recommendation (the "USW Deemed Proxy"). If however, you **DISAGREE** with the recommendation, you have the right to opt out of the USW Deemed Proxy by advising the Monitor in writing of your desire to do so and you may vote in person at the Creditors' Meeting in Montreal or you may appoint a different Proxy holder by using the Proxy form.

If you have any questions regarding the Plan, the vote, or matters with respect to the Creditors' Meetings or Sanction Hearing, please contact the Monitor by email at bloomlake@fticonsulting.com or by telephone at 1-844-669-6338 or 416-649-8126.

Yours sincerely,

FTI Consulting Canada Inc., solely in its capacity as Court-Appointed
Monitor of the CCAA Parties

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

AND IN THE MATTER OF A JOINT PLAN OF COMPROMISE OR ARRANGEMENT OF BLOOM LAKE GENERAL PARTNER LIMITED, THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP, QUINTO MINING CORPORATION, CLIFFS QUÉBEC IRON MINING ULC, WABUSH IRON CO. LIMITED, WABUSH RESOURCES INC., WABUSH MINES, ARNAUD RAILWAY COMPANY, WABUSH LAKE RAILWAY COMPANY LIMITED
(collectively, the "Participating CCAA Parties")

NOTICE OF MEETINGS AND SANCTION HEARING

TO: The Affected Unsecured Creditors of the Participating CCAA Parties

Capitalized terms used and not otherwise defined in this Notice are as defined in the Joint Plan of Compromise and Arrangement of the Participating CCAA Parties dated April 16, 2018 (as amended, restated and/or supplemented from time to time in accordance with the terms thereof, the "**Plan**").

NOTICE IS HEREBY GIVEN that Meetings of each of the following Unsecured Creditor Classes of the Participating CCAA Parties will be held at the following dates, times and locations:

Unsecured Creditor Class	Meeting Information
Cliffs Québec Iron Mining ULC and Quinto Mining Corporation, voting together as one Unsecured Creditor Class	**June 18, 2018 at 9:30 am** at: Norton Rose Fulbright Canada LLP Suite 2500, 1 Place Ville Marie Montréal, QC H3B 1R1
Bloom Lake General Partner Limited and The Bloom Lake Iron Ore Mine Limited Partnership, voting together as one Unsecured Creditor Class	**June 18, 2018 at 9:30 am** at: Norton Rose Fulbright Canada LLP Suite 2500, 1 Place Ville Marie Montréal, QC H3B 1R1
Wabush Iron Co. Limited, Wabush Resources Inc., and Wabush Mines, voting together as one Unsecured Creditor Class	**June 18, 2018 at 11:00 am** at: Norton Rose Fulbright Canada LLP Suite 2500, 1 Place Ville Marie Montréal, QC H3B 1R1
Arnaud Railway Company	**June 18, 2018 at 11:00 am** at: Norton Rose Fulbright Canada LLP Suite 2500, 1 Place Ville Marie Montréal, QC H3B 1R1
Wabush Lake Railway Company Limited	**June 18, 2018 at 11:00 am** at: Norton Rose Fulbright Canada LLP Suite 2500, 1 Place Ville Marie Montréal, QC H3B 1R1

The purpose of the Meetings is to:

a) consider, and if deemed advisable, to pass, with or without variation, a resolution (the "**Resolution**") approving the Plan; and

b) transact such other business as may properly come before the Meetings or any adjournment or postponement thereof.

The Meetings are being held pursuant to an order (the "**Plan Filing and Meetings Order**") of the Québec Superior Court ("**CCAA Court**") made on April 20, 2018, which establishes the procedures for FTI Consulting Canada Inc. (in such capacity and not in its personal or corporate capacity, the "**Monitor**") to call, hold and conduct the Meetings.

The Plan provides for the compromise of the Affected Claims. The quorum for each Meeting will be one Affected Unsecured Creditor holding a Voting Claim or an Unresolved Voting Claim (each such creditor, an "**Eligible Voting Creditor**") present in person or by proxy.

In order for the Plan to be approved and binding in accordance with the CCAA, the Resolution must be approved by a majority in number of Affected Unsecured Creditors in each Unsecured Creditor Class representing at least two-thirds in value of the Claims of Affected Unsecured Creditors who actually vote (in person or by proxy) on the Resolution at the applicable Meeting (the "**Required Majority**").

All Eligible Voting Creditors will be eligible to attend the applicable Meeting and vote on the Plan. The votes of Eligible Voting Creditors holding Unresolved Voting Claims will be separately tabulated by the Monitor, and Unresolved Claims will be resolved in accordance with the Amended Claims Procedure Order prior to any distribution on account of such Unresolved Claims. Holders of an Unaffected Claim will not be entitled to attend and vote at any Meeting.

Forms and Proxies for Affected Unsecured Creditors

Any Eligible Voting Creditor who is unable to attend the applicable Meeting may vote by proxy. Further, any Eligible Voting Creditor who is not an individual may only attend and vote at the applicable Meeting if a proxyholder has been appointed to act on its behalf at such Meeting. A form of Proxy is included as part of the Meeting Materials being distributed by the Monitor to each Affected Unsecured Creditor.

Proxies, once duly completed, dated and signed, must be sent by email to the Monitor, or if cannot be sent by email, delivered to the Monitor at the address of the Monitor as set out on the Proxy form. Proxies must be received by the Monitor by no later than **5:00 p.m. (Eastern time) June 14, 2018** (the "**Proxy Deadline**").

Notice of Sanction Hearing

NOTICE IS ALSO HEREBY GIVEN that if the Plan is approved by the Required Majority of each Unsecured Creditor Class at the Meetings, the Participating CCAA Parties intend to bring a motion before the CCAA Court on **June 29, 2018 at 9:00 am** (Eastern Time) (the "**Sanction Hearing**"). The motion will be seeking the granting of the Sanction Order sanctioning the Plan under the CCAA and for ancillary relief consequent upon such sanction. Any person wishing to oppose the motion for the Sanction Order must serve upon the parties on the Service List as posted on the Monitor's Website and file with the CCAA Court, a copy of the materials to be used to oppose the Sanction Order by no later than 5:00 pm (Eastern Time) on June 26, 2018.

This Notice is given by the Participating CCAA Parties pursuant to the Plan Filing and Meetings Order. Additional copies of the Meeting Materials, including the Plan, may be obtained from the Monitor's Website (http://cfcanada.fticonsulting.com/bloomlake), or by requesting one from the Monitor by email at bloomlake@fticonsulting.com.

DATED this ______day of ____________, 2018.

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

AND IN THE MATTER OF A JOINT PLAN OF COMPROMISE OR ARRANGEMENT OF BLOOM LAKE GENERAL PARTNER LIMITED, THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP, QUINTO MINING CORPORATION, CLIFFS QUÉBEC IRON MINING ULC, WABUSH IRON CO. LIMITED, WABUSH RESOURCES INC., WABUSH MINES, ARNAUD RAILWAY COMPANY, WABUSH LAKE RAILWAY COMPANY LIMITED (collectively, the "PARTICIPATING CCAA PARTIES")

PROXY

Before completing this Proxy, please read carefully the accompanying instructions for the proper completion and return of the form.

Capitalized terms used and not otherwise defined herein have the meanings ascribed to them in the Joint Plan of Compromise and Arrangement of the Participating CCAA Parties dated April 16, 2018 (as may be amended, supplemented and/or restated from time to time, the "Plan") filed pursuant to the *Companies' Creditors Arrangement Act* (the "CCAA") with the Quebec Superior Court (the "CCAA Court") on April 16, 2018.

In accordance with the Plan, Proxies may only be filed by Affected Unsecured Creditors having a Voting Claim or an Unresolved Voting Claim ("Eligible Voting Creditors").

PROXIES, ONCE DULY COMPLETED, DATED AND SIGNED, MUST BE SENT BY EMAIL TO THE MONITOR, OR IF CANNOT BE SENT BY EMAIL, DELIVERED TO THE MONITOR BY NO LATER THAN 5:00 P.M. (EASTERN TIME) ON JUNE 14, 2018 (THE "PROXY DEADLINE").

THE UNDERSIGNED ELIGIBLE VOTING CREDITOR hereby revokes all Proxies previously given, if any, and nominates, constitutes, and appoints **Mr. Nigel Meakin** of FTI Consulting Canada Inc., in its capacity as Monitor, or such Person as he, in his sole discretion, may designate or, instead of the foregoing, appoints:

____

Print Name of Proxy holder if wishing to appoint someone other than Mr. Nigel Meakin

to attend on behalf of and act for the Eligible Voting Creditor at the applicable Meeting(s) to be held in connection with the Plan and at any and all adjournments, postponements or other rescheduling of the Meeting(s), and to vote the dollar value of the Eligible Voting Creditor's Eligible Voting Claim(s) as determined by and accepted for voting purposes in accordance with the Meetings Order and as set out in the Plan as follows:

A. (mark one only):

❑Vote FOR approval of the resolution to accept the Plan; or

❑Vote AGAINST approval of the resolution to accept the Plan.

B. If a box is not marked as a vote FOR or AGAINST approval of the Plan:

a) if Mr. Nigel Meakin or his designate is appointed as proxy holder, this Proxy shall be voted

FOR approval of the Plan; or

b) if someone other than Mr. Nigel Meakin or his designate is appointed as proxy holder, the nominee shall vote at his or her discretion and otherwise act for and on behalf of the undersigned Eligible Voting Creditor with respect to any amendments or variations to the matters identified in the notice of the Meeting and in this Plan, and with respect to other matters that may properly presented at Meeting.

Dated this ___________day of ________________, 2018.

Print Name of Eligible Voting Creditor	Title of the authorized signing officer of the corporation, partnership or trust, if applicable
Signature of Eligible Voting Creditor or, if the Eligible Voting Creditor is a corporation, partnership or trust, signature of an authorized signing officer of the corporation, partnership or trust	Telephone number of the Eligible Voting Creditor or authorized signing officer
Mailing Address of Eligible Voting Creditor	Email address of Eligible Voting Creditor
Print Name of Witness, if Eligible Voting Creditor is an individual	
Signature of Witness	

INSTRUCTIONS FOR COMPLETION OF PROXY

1. This Proxy should be read in conjunction with the Joint Plan of Compromise and Arrangement of the Applicant dated April 16, 2018 (as it may be amended, restated or supplemented from time to time, the "Plan") filed pursuant to the *Companies' Creditors Arrangement Act* (the "CCAA") with the Quebec Superior Court (the "CCAA Court") on April 16, 2018 and the Meetings Order. Capitalized terms used herein not otherwise defined shall have the meanings ascribed to them in the Plan.

2. Each Eligible Voting Creditor has the right to appoint a person (who need not be a Creditor) (a "Proxy holder") to attend, act and vote for and on behalf of such Eligible Voting Creditor and such right may be exercised by inserting the name of the Proxy holder in the blank space provided on the Proxy.

3. If no name has been inserted in the space provided to designate the Proxy holder on the Proxy, the Eligible Voting Creditor will be deemed to have appointed Mr. Nigel Meakin of FTI Consulting Canada Inc., in its capacity as Monitor (or such other Person as he, in his sole discretion, may designate), as the Eligible Voting Creditor's Proxy holder.

4. An Eligible Voting Creditor who has given a Proxy may revoke it by an instrument in writing executed by such Eligible Voting Creditor or by its attorney, duly authorized in writing or, if an Eligible Voting Creditor is not an individual, by an officer or attorney thereof duly authorized, and deposited with the Monitor in each case before the Proxy Deadline.

5. If this Proxy is not dated in the space provided, it shall be deemed to be dated as of the date on which it is received by the Monitor.

6. A valid Proxy from the same Eligible Voting Creditor bearing or deemed to bear a later date than this Proxy will be deemed to revoke this Proxy. If more than one valid Proxy from the same Eligible Voting Creditor and bearing or deemed to bear the same date are received by the Monitor with conflicting instructions, such Proxies shall not be counted for the purposes of the vote.

7. This Proxy confers discretionary authority upon the Proxy holder with respect to amendments or variations to the matters identified in the notice of the Meeting and in the Plan, and with respect to other matters that may properly come before the Meeting.

8. The Proxy holder shall vote the Eligible Voting Claim of the Eligible Voting Creditor in accordance with the direction of the Eligible Voting Creditor appointing him/her on any ballot that may be called for at the applicable Meeting. **IF AN ELIGIBLE VOTING CREDITOR FAILS TO INDICATE ON THIS PROXY A VOTE FOR OR AGAINST APPROVAL OF THE RESOLUTION TO ACCEPT THE PLAN, AND MR. NIGEL MEAKIN OR HIS DESIGNATE IS APPOINTED AS PROXY HOLDER, THIS PROXY WILL BE VOTED FOR THE RESOLUTION TO APPROVE THE PLAN, INCLUDING ANY AMENDMENTS, VARIATIONS OR SUPPLEMENTS THERETO. IF AN ELIGIBLE VOTING CREDITOR FAILS TO INDICATE ON THIS PROXY A VOTE FOR OR AGAINST APPROVAL OF THE RESOLUTION TO ACCEPT THE PLAN AND APPOINTS A PROXY HOLDER OTHER THAN**

MR. NIGEL MEAKIN OR HIS DESIGNATE, THE PROXY HOLDER MAY VOTE ON THE RESOLUTION AS HE OR SHE DETERMINES AT THE APPLICABLE MEETING.

9. If the Eligible Voting Creditor is an individual, this Proxy must be signed by the Eligible Voting Creditor or by a person duly authorized (by power of attorney) to sign on the Eligible Voting Creditor's behalf. If the Eligible Voting Creditor is a corporation, partnership or trust, this proxy must be signed by a duly authorized officer or attorney of the corporation, partnership or trust. If you are voting on behalf of a corporation, partnership or trust or on behalf of another individual at a Meeting, you must have been appointed as a proxy holder by a duly completed proxy submitted to the Monitor by the Proxy Deadline. You may be required to provide documentation evidencing your power and authority to sign this Proxy.

10. PROXIES, ONCE DULY COMPLETED, DATED AND SIGNED, MUST BE SENT BY EMAIL TO THE MONITOR, OR IF CANNOT BE SENT BY EMAIL, DELIVERED TO THE MONITOR BY NO LATER THAN 5:00 P.M. (EASTERN TIME) ON JUNE 14, 2018 (THE "PROXY DEADLINE").

By email:	bloomlake@fticonsulting.com
By mail or courier:	FTI Consulting Canada Inc. Monitor of Bloom Lake General Partners Limited, et al. TD Waterhouse Tower 79 Wellington Street West Suite 2010, P.O. Box 104 Toronto, Ontario M5K 1G8

11. The Applicant and the Monitor are authorized to use reasonable discretion as to the adequacy of compliance with respect to the manner in which any Proxy is completed and executed, and may waive strict compliance with the requirements in connection with the deadlines imposed by the Meetings Order.

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

AND IN THE MATTER OF A JOINT PLAN OF COMPROMISE OR ARRANGEMENT OF BLOOM LAKE GENERAL PARTNER LIMITED, THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP, QUINTO MINING CORPORATION, CLIFFS QUÉBEC IRON MINING ULC, WABUSH IRON CO. LIMITED, WABUSH RESOURCES INC., WABUSH MINES, ARNAUD RAILWAY COMPANY, WABUSH LAKE RAILWAY COMPANY LIMITED
(collectively, the "Participating CCAA Parties" and each a "Participating CCAA Party")

RESOLUTION OF UNSECURED CREDITOR CLASS

BE IT RESOLVED THAT:

1. the Joint Plan of Compromise and Arrangement dated April 16, 2018 filed by the Participating CCAA Parties under the *Companies' Creditors Arrangement Act*, as may be amended, restated or supplemented from time to time in accordance with its terms (the "**Plan**"), which Plan has been presented to this Meeting, be and is hereby accepted, approved, and authorized;

2. any director or officer of the applicable Participating CCAA Party be and is hereby authorized, empowered and instructed, acting for, and in the name of and on behalf of such Participating CCAA Party, to execute and deliver, or cause to be executed and delivered, all such documents, agreements and instruments and to do or cause to be done all such other acts and things as such director or officer determines to be necessary or desirable in order to carry out the Plan, such determination to be conclusively evidenced by the execution and delivery by such directors or officers of such documents, agreements or instruments or the doing of any such act or thing.

3. notwithstanding that this Resolution has been passed and the Plan has been approved by the Affected Unsecured Creditors and the Court, the directors of the Participating CCAA Parties be and are hereby authorized and empowered to amend the Plan or not proceed to implement the Plan subject to and in accordance with the terms of the Plan.

Her Majesty The Queen in Right of Canada
Appellant

v.

Canada North Group Inc.,
Canada North Camps Inc.,
Campcorp Structures Ltd.,
DJ Catering Ltd.,
816956 Alberta Ltd.,
1371047 Alberta Ltd.,
1919209 Alberta Ltd.,
Ernst & Young Inc. in its capacity as monitor and
Business Development Bank of Canada
Respondents

and

Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals *Interveners*

Indexed as: Canada *v.* Canada North Group Inc.

2021 SCC 30

File No.: 38871.

2020: December 1; 2021: July 28.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA

Bankruptcy and insolvency — Priority — Source deductions — Priming charges — Employee source deductions not remitted to Crown by companies in receivership — Judge supervising restructuring proceedings under Companies' Creditors Arrangement Act ordering priming charges over debtor companies' assets in favour of interim lender, monitor and directors — Order giving priority to priming charges over claims of secured creditors and providing that they are not to be limited or impaired in any way by provisions of any federal or

Sa Majesté la Reine du chef du Canada
Appelante

See para. 21

c.

Canada North Group Inc.,
Canada North Camps Inc.,
Campcorp Structures Ltd.,
DJ Catering Ltd.,
816956 Alberta Ltd.,
1371047 Alberta Ltd.,
1919209 Alberta Ltd.,
Ernst & Young Inc. en sa qualité de contrôleur et
Banque de développement du Canada
Intimées

et

Institut d'insolvabilité du Canada et Association canadienne des professionnels de l'insolvabilité et de la réorganisation
Intervenants

Répertorié : Canada *c.* Canada North Group Inc.

2021 CSC 30

N° du greffe : 38871.

2020 : 1er décembre; 2021 : 28 juillet.

Présents : Le juge en chef Wagner et les juges Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin et Kasirer.

EN APPEL DE LA COUR D'APPEL DE L'ALBERTA

Faillite et insolvabilité — Priorité — Retenues à la source — Charges super prioritaires — Retenues à la source des employés non versées à la Couronne par les compagnies mises sous séquestre — Juge chargé de surveiller la procédure de restructuration intentée sous le régime de la Loi sur les arrangements avec les créanciers des compagnies ordonnant que les actifs des compagnies soient grevés de charges super prioritaires en faveur du prêteur temporaire, du contrôleur et des administrateurs — Ordonnance accordant aux charges super *provincial statute — Property of debtor companies subject to deemed trust in favour of Crown for unremitted source deductions under Income Tax Act — Whether court has authority to rank priming charges ahead of Crown's deemed trust for unremitted source deductions — Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), s. 227(4.1) — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 11, 11.2, 11.51, 11.52.*

Canada North Group and six related corporations initiated restructuring proceedings under the *Companies' Creditors Arrangement Act* ("*CCAA*"). In their initial *CCAA* application, they requested a package of relief including the creation of three priming charges (or court-ordered super-priority charges): an administration charge in favour of counsel, a monitor and a chief restructuring officer for the fees they incurred, a financing charge in favour of an interim lender, and a directors' charge protecting their directors and officers against liabilities incurred after the commencement of the proceedings. The application included an affidavit from one of their directors attesting to a debt to Her Majesty The Queen for unremitted employee source deductions and GST. The *CCAA* judge made an order ("Initial Order") that the priming charges were to "rank in priority to all other security interests, . . . charges and encumbrances, claims of secured creditors, statutory or otherwise", and that they were not to be "otherwise . . . limited or impaired in any way by . . . the provisions of any federal or provincial statutes" ("Priming Charges"). The Crown subsequently filed a motion for variance, arguing that the Priming Charges could not take priority over the deemed trust created by s. 227(4.1) of the *Income Tax Act* ("*ITA*") for unremitted source deductions. The motion to vary was dismissed, and the Crown's appeal to the Court of Appeal was also dismissed.

Held (Abella, Moldaver, Brown and Rowe JJ. dissenting): The appeal should be dismissed.

Per Wagner C.J. and Côté and Kasirer JJ.: The Priming Charges prevail over the deemed trust. Section 227(4.1)

prioritaires priorité sur les réclamations des créanciers garantis et précisant que ces charges ne doivent pas être limitées ou compromises de quelque façon que ce soit par les dispositions de toute loi fédérale ou provinciale — Biens des compagnies débitrices assujettis à la fiducie réputée en faveur de la Couronne à l'égard des retenues à la source non versées en application de la Loi de l'impôt sur le revenu — Le tribunal a-t-il le pouvoir d'accorder aux charges super prioritaires priorité de rang sur la fiducie réputée de la Couronne à l'égard des retenues à la source non versées? — Loi de l'impôt sur le revenu, L.R.C. 1985, c. 1 (5^{e} suppl.), art. 227(4.1) — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, c. C-36, art. 11, 11.2, 11.51, 11.52.

Canada North Group et six sociétés liées ont intenté une procédure de restructuration sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies* (« *LACC* »). Dans la demande initiale qu'elles ont présentée en vertu de la *LACC*, elles réclamaient une série de mesures, y compris la création de trois charges super prioritaires : une charge visant des frais administratifs constituée en faveur des avocats, du contrôleur et du directeur de la restructuration pour les frais qu'ils ont engagés, une charge de financement en faveur d'un prêteur temporaire, et une charge constituée en faveur des administrateurs en vue de les protéger ainsi que les dirigeants contre les obligations contractées après l'introduction de l'instance. La demande comprenait un affidavit de l'un de leurs administrateurs pour attester l'existence d'une dette envers Sa Majesté la Reine à l'égard de la TPS et de retenues à la source des employés non versées. Le juge chargé d'appliquer la *LACC* a rendu une ordonnance (« ordonnance initiale ») précisant que les charges super prioritaires devaient avoir « priorité sur tou[tes] les autres [. . .], garanties, [. . .], charges et sûretés, créances de créanciers garantis, d'origine législative ou autre », et ne devaient pas être « autrement limitées ou compromises de quelque façon que ce soit par [. . .] les dispositions de toute loi fédérale ou provinciale ». La Couronne a par la suite déposé une requête en modification, plaidant que les charges super prioritaires ne pouvaient avoir priorité sur la fiducie réputée créée par le par. 227(4.1) de la *Loi de l'impôt sur le revenu* (« *LIR* ») à l'égard des retenues à la source non versées. La requête en modification a été rejetée, tout comme l'appel de la Couronne à la Cour d'appel.

Arrêt (les juges Abella, Moldaver, Brown et Rowe sont dissidents) : Le pourvoi est rejeté.

Le juge en chef Wagner et les juges Côté et Kasirer : Les charges super prioritaires l'emportent sur la fiducie does not create a proprietary interest in the debtor's property. Further, a court-ordered super-priority charge under the *CCAA* is not a security interest within the meaning of s. 224(1.3) of the *ITA*. As a result, there is no conflict between s. 227(4.1) of the *ITA* and the Initial Order made in this case, or between the *ITA* and s. 11 of the *CCAA*.

In general, courts supervising a *CCAA* reorganization have the authority to order super-priority charges to facilitate the restructuring process. The most important feature of the *CCAA* is the broad discretionary power it vests in the supervising court: s. 11 of the *CCAA* confers jurisdiction on the supervising court to "make any order that it considers appropriate in the circumstances". This jurisdiction is constrained only by restrictions set out in the *CCAA* itself and the requirement that the order made be appropriate in the circumstances — its general language is not restricted by the availability of more specific orders in ss. 11.2, 11.4, 11.51 and 11.52. As restructuring under the *CCAA* often requires the assistance of many professionals, giving super priority to priming charges in favour of those professionals is required to derive the most value for the stakeholders. For a monitor and financiers to put themselves at risk to restructure and develop assets, only to later discover that a deemed trust supersedes all claims, would defy fairness and common sense.

Her Majesty does not have a proprietary interest in a debtor's property that is adequate to prevent the exercise of a supervising judge's discretion to order super-priority charges under s. 11 of the *CCAA* or any of the sections that follow it. Section 227(4.1) does not create a beneficial interest that can be considered a proprietary interest, and it does not give the Crown the same property interest a common law trust would. Without attaching to specific property, creating the usual right to the enjoyment of property or the fiduciary obligations of a trustee, the interest created by s. 227(4.1) lacks the qualities that allow a court to refer to a beneficiary as a beneficial owner.

Furthermore, under Quebec civil law, it is clear that s. 227(4.1) does not establish a legal trust as it does not meet the three requirements set out in arts. 1260 and 1261 of the *Civil Code of Québec*. Although s. 227(4.1) provides

réputée. Le paragraphe 227(4.1) ne crée pas un intérêt à titre de propriétaire sur les biens du débiteur. En outre, une charge super prioritaire ordonnée par un tribunal en vertu de la *LACC* n'est pas une garantie au sens du par. 224(1.3) de la *LIR*. Il n'y a donc pas de conflit entre le par. 227(4.1) de la *LIR* et l'ordonnance initiale rendue en l'espèce, ni entre la *LIR* et l'art. 11 de la *LACC*.

En général, les tribunaux chargés de surveiller les restructurations sous le régime de la *LACC* ont le pouvoir d'ordonner des charges super prioritaires afin de faciliter le processus de restructuration. La caractéristique la plus importante de la *LACC* est le vaste pouvoir discrétionnaire qu'elle confère au tribunal de surveillance : l'art. 11 de la *LACC* accorde à ce tribunal le pouvoir de « rendre [. . .] toute ordonnance qu'il estime indiquée ». Ce pouvoir n'est limité que par les restrictions imposées par la *LACC* elle-même, ainsi que par la condition requérant que l'ordonnance soit indiquée dans les circonstances — la possibilité de rendre ces ordonnances plus spécifiques en vertu des art. 11.2, 11.4, 11.51 et 11.52 n'a pas pour effet de restreindre la portée des termes généraux qui y sont employés. Comme il faut souvent obtenir l'aide de nombreux professionnels pour restructurer une compagnie sous le régime de la *LACC*, il est nécessaire de constituer des charges super prioritaires en faveur de ces professionnels pour que les parties prenantes bénéficient d'une valorisation maximale. Il serait contraire à l'équité et au bon sens qu'un contrôleur et des prêteurs s'exposent à des risques afin de restructurer une compagnie et de l'aider à se développer, puis découvrent par la suite qu'une fiducie réputée prévaut sur l'ensemble des créances.

Sa Majesté n'a pas sur les biens du débiteur un intérêt à titre de propriétaire suffisant pour empêcher le juge surveillant d'ordonner des charges super prioritaires en vertu du pouvoir discrétionnaire que lui confère l'art. 11 de la *LACC*, ou de l'un ou l'autre des articles qui le suivent. Le paragraphe 227(4.1) ne crée pas un droit de bénéficiaire qui peut être considéré comme un intérêt à titre de propriétaire, et il ne confère pas à la Couronne le même droit de propriété qu'une fiducie de common law. N'étant associé à aucun bien précis, ce qui conférerait à son titulaire le droit habituel à la jouissance du bien ou lui imposerait les obligations d'un fiduciaire, l'intérêt créé par le par. 227(4.1) ne possède pas les attributs qui permettent à un tribunal de qualifier le bénéficiaire de propriétaire bénéficiaire.

En outre, en droit civil québécois, il est clair que le par. 227(4.1) ne crée pas de fiducie légale, car il ne satisfait pas aux trois conditions prévues aux art. 1260 et 1261 du *Code civil du Québec*. Bien que le par. 227(4.1) that the assets are deemed to be held "separate and apart from the property of the person" and "to form no part of the estate or property of the person", the main element of a civilian trust is absent in the deemed trust established by s. 227(4.1): no specific property is transferred to a trust patrimony, and there is no autonomous patrimony to which specific property is transferred.

dispose que les biens soient réputés détenus « séparés des propres biens de la personne » et « ne pas faire partie du patrimoine ou des biens de la personne », on ne retrouve pas l'élément principal d'une fiducie civiliste dans la fiducie réputée créée en application du par. 227(4.1) : aucun bien précis n'est transféré au patrimoine fiduciaire, et il n'existe aucun patrimoine autonome auquel sont transférés des biens précis.

Section 227(4.1) states that the Receiver General shall be paid the proceeds of a debtor's property "in priority to all such security interests", as defined in s. 224(1.3), but court-ordered super-priority charges under s. 11 of the *CCAA* or any of the sections that follow it are not security interests within the meaning of s. 224(1.3). Section 224(1.3) defines "security interest" as meaning "any interest in, or for civil law any right in, property that secures payment or performance of an obligation" and including "an interest, or for civil law a right, created by or arising out of a debenture, mortgage, hypothec, lien, pledge, charge, deemed or actual trust, assignment or encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for". The grammatical structure of this provision evidences Parliament's intent that the list have limiting effect, such that only the instruments enumerated and instruments that are similar in nature fall within the definition. Court-ordered super-priority charges are utterly different from any of the interests listed in s. 227(4.1) because they were not made for the sole benefit of the holder of the charge, nor were they made by consensual agreement or by operation of law. Instead, they were ordered by the *CCAA* judge to facilitate the restructuring in furtherance of the interests of all stakeholders. This interpretation is consistent with the presumption against tautology, which suggests that Parliament intended interpretive weight to be placed on the examples, and with the *ejusdem generis* principle, which limits the generality of the final words on the basis of the narrow enumeration that precedes them.

Le paragraphe 227(4.1) précise que le receveur général reçoit le produit découlant des biens du débiteur « par priorité sur une telle garantie », au sens du par. 224(1.3), mais les charges super prioritaires ordonnées par le tribunal en vertu de l'art. 11 de la *LACC* ou de l'un ou l'autre des articles qui le suivent ne sont pas des garanties au sens du par. 224(1.3). Selon la définition de ce terme au par. 224(1.3), « garantie » s'entend d'un « [i]ntérêt ou, pour l'application du droit civil, [d'un] droit sur un bien qui garantit l'exécution d'une obligation, notamment un paiement », et « [s]ont en particulier des garanties les intérêts ou, pour l'application du droit civil, les droits nés ou découlant de débentures, hypothèques, privilèges, nantissements, sûretés, fiducies réputées ou réelles, cessions et charges, quelle qu'en soit la nature, de quelque façon ou à quelque date qu'elles soient créées, réputées exister ou prévues par ailleurs ». La structure grammaticale de cette disposition témoigne de l'intention du législateur de restreindre la portée de l'énumération, si bien que seuls les instruments énumérés ou les instruments de nature similaire répondent à la définition. Les charges super prioritaires d'origine judiciaire sont radicalement différentes de n'importe lequel des intérêts énumérés au par. 227(4.1), puisqu'elles n'ont pas été constituées au seul bénéfice de leur détenteur, ni par accord consensuel ou par application de la loi. Elles ont plutôt été ordonnées par le juge chargé d'appliquer la *LACC* dans le but de faciliter la restructuration dans l'intérêt de toutes les parties prenantes. Cette interprétation s'accorde avec la présomption d'absence de tautologie, laquelle donne à penser que le législateur voulait que l'on attribue une valeur interprétative aux exemples, de même qu'avec la règle *ejusdem generis*, qui limite la portée générale des derniers termes sur la base de l'énumération des exemples précis qui les précède.

Preserving the deemed trusts under s. 37(2) of the *CCAA* does not modify the characteristics of these trusts. They continue to operate as they would have if the insolvent company had not sought *CCAA* protection. Similarly, granting Her Majesty the right to insist that a compromise or arrangement not be sanctioned by a court unless it provides for payment in full under s. 6(3) does not modify

Le fait que les fiducies réputées soient protégées par le par. 37(2) de la *LACC* ne modifie en rien les caractéristiques de ces fiducies. Elles continuent à produire leur effet comme si la compagnie insolvable n'avait pas demandé la protection de la *LACC*. De même, le fait d'accorder à Sa Majesté le droit d'insister auprès du tribunal afin qu'il refuse d'homologuer une transaction ou un arrangement the deemed trust created by s. 227(4.1) in any way. In any event, s. 6(3) comes into operation only at the end of the *CCAA* process when parties seek court approval of their arrangement or compromise.

qui ne pourvoit pas au paiement intégral prévu au par. 6(3) ne modifie d'aucune façon la fiducie présumée créée par le par. 227(4.1). Quoi qu'il en soit, le par. 6(3) ne s'applique qu'à l'issue de la procédure de la *LACC*, lorsque les parties cherchent à faire homologuer par le tribunal leur arrangement ou leur transaction.

Finally, whether Her Majesty is a "secured creditor" under the *CCAA* or not, the supervising court's power in s. 11 provides a very broad jurisdiction that is not restricted by the availability of more specific orders. Although ss. 11.2, 11.51 and 11.52 of the *CCAA* may attach only to the property of the debtor's company, there is no such restriction in s. 11. That said, courts should still recognize the distinct nature of Her Majesty's interest and ensure that they grant a charge with priority over the deemed trust only when necessary.

Enfin, que Sa Majesté soit ou non un « créancier garanti » au sens de la *LACC*, la possibilité de rendre des ordonnances plus spécifiques n'a pas pour effet de restreindre le vaste pouvoir conféré au tribunal de surveillance par l'art. 11. Même si les art. 11.2, 11.51 et 11.52 de la *LACC* peuvent se rattacher uniquement aux biens de la compagnie débitrice, aucune restriction de ce genre ne figure à l'art. 11. Cela dit, les tribunaux devraient tout de même reconnaître le caractère distinct de l'intérêt de Sa Majesté et n'accorder une charge ayant priorité sur la fiducie réputée que dans les cas où c'est nécessaire.

Per Karakatsanis and Martin JJ.: There is no conflict between the *ITA* and *CCAA* provisions at issue in this appeal. The broad discretionary power under s. 11 of the *CCAA* permits a court to rank priming charges ahead of the Crown's deemed trust for unremitted source deductions.

Les juges Karakatsanis et Martin : Il n'existe aucun conflit entre les dispositions de la *LIR* et celles de la *LACC* en cause dans le présent pourvoi. Le vaste pouvoir discrétionnaire conféré par l'art. 11 de la *LACC* permet au tribunal de faire passer les charges super prioritaires devant la fiducie réputée créée en faveur de la Couronne à l'égard des retenues à la source non versées.

Section 227(4.1) of the *ITA* provides that a deemed trust attaches to property of the employer to the extent of unremitted source deductions "notwithstanding any security interest in such property" or "any other enactment of Canada". Although this provision clearly specifies that the Crown's right operates notwithstanding other security interests, the content of that right for the purposes of insolvency cannot be inferred solely from the text of the *ITA*. Section 227(4.1) states that the amount of the unremitted source deductions is "beneficially owned" by the Crown, but there is no settled doctrinal meaning of the term "beneficial ownership", and s. 227(4.1) modifies even those features of beneficial ownership that are widely associated with it under the common law.

Le paragraphe 227(4.1) de la *LIR* prévoit qu'une fiducie réputée s'attache aux biens de l'employeur jusqu'à concurrence de la valeur des retenues à la source non versées « malgré toute autre garantie sur ces biens » et « [m]algré [. . .] tout autre texte législatif fédéral ». Bien que la disposition indique clairement que le droit de la Couronne s'applique malgré toute autre garantie, la teneur de ce droit dans un contexte d'insolvabilité ne peut être déduite uniquement du texte de la *LIR*. Le paragraphe 227(4.1) précise que la Couronne a un « droit de bénéficiaire » sur le montant des retenues à la source non versées, mais ce terme n'a pas de signification établie dans la doctrine, et ce paragraphe modifie même les caractéristiques qui sont généralement associées à ce droit de bénéficiaire dans la common law.

As a creature of statute, a statutory deemed trust does not have to fulfill the ordinary requirements of trust law. In the case of the deemed trust in s. 227(4.1), there is no identifiable trust property and therefore no certainty of subject matter. Moreover, without specific property being transferred to the trust patrimony, s. 227(4.1) does not satisfy the requirements of an autonomous patrimony contemplated by the *Civil Code of Québec* in arts. 1260, 1261 and 1278. As a result, s. 227(4.1) traces the value of the unremitted source deductions, capping the Crown's

Tirant son origine de la législation, la fiducie réputée créée par la loi n'a pas à satisfaire aux exigences ordinaires du droit des fiducies. Dans le cas de la fiducie réputée au par. 227(4.1), les biens de la fiducie ne sont pas identifiables et il n'y a donc aucune certitude quant à sa matière. De plus, sans transfert de biens précis au patrimoine fiduciaire, le par. 227(4.1) ne satisfait pas aux conditions d'un patrimoine autonome prévues aux art. 1260, 1261 et 1278 du *Code civil du Québec*. Par conséquent, le par. 227(4.1) permet d'établir la valeur des retenues à la right at that value, and the specific property that constitutes the debtor's estate remains unchanged, with the debtor continuing to have control over it.

source non versées, limitant automatiquement le droit de la Couronne à cette valeur, et les biens précis qui constituent le patrimoine du débiteur ne changent pas, le débiteur en conservant la maîtrise.

The *Bankruptcy and Insolvency Act* ("*BIA*") and the *CCAA* each give the deemed trust meaning for their own purposes. The purpose of a *BIA* liquidation is to give the debtor a fresh start and pay out creditors to the extent possible. To realize these goals, the *BIA* is strictly rules-based and has a comprehensive scheme for the liquidation process. In the *BIA*, the deemed trust for unremitted source deductions appears in s. 67(3). Section 67(1)(a) excludes property held in trust by the bankrupt from property of the bankrupt that is divisible among creditors. Section 67(2) provides an exception for deemed trusts that are not true trusts. Section 67(3) provides a further exception by stating that s. 67(2) does not apply in respect of the Crown's deemed trust for unremitted source deductions under the *ITA* and other statutes. The result of this scheme is that the debtor's estate — to the extent of the unremitted source deductions — is not "property of a bankrupt divisible among his creditors", as required by s. 67(1) of the *BIA*. Section 67 therefore gives content to the Crown's right of beneficial ownership under s. 227(4.1) of the *ITA*: the amount of the unremitted source deductions is taken out of the pool of money that is distributed to creditors in a *BIA* liquidation.

La *Loi sur la faillite et l'insolvabilité* (« *LFI* ») et la *LACC* donnent chacune à la fiducie réputée le sens qui convient à leurs fins. L'objectif d'une liquidation sous le régime de la *LFI* est de permettre au débiteur de prendre un nouveau départ et de rembourser ses créanciers dans la mesure du possible. Pour réaliser ces objectifs, la *LFI* repose strictement sur des règles et elle établit un régime complet pour le processus de liquidation. Dans la *LFI*, la fiducie réputée créée à l'égard des retenues à la source non versées figure au par. 67(3). L'alinéa 67(1)a) exclut du patrimoine attribué aux créanciers du failli les biens détenus par le failli en fiducie. Le paragraphe 67(2) prévoit une exception pour les fiducies réputées qui ne sont pas des fiducies véritables. Le paragraphe 67(3) établit une autre exception en mentionnant que le par. 67(2) ne s'applique pas à la fiducie réputée créée en faveur de la Couronne à l'égard des retenues à la source non versées prévues par la *LIR* et par d'autres lois. Il en résulte que le patrimoine du débiteur — jusqu'à concurrence du montant des retenues à la source non versées — ne fait pas partie des « biens d'un failli, constituant le patrimoine attribué à ses créanciers », comme l'exige le par. 67(1) de la *LFI*. L'article 67 détermine donc la teneur du droit de bénéficiaire de la Couronne prévu au par. 227(4.1) de la *LIR* : le montant des retenues à la source non versées est soustrait des fonds qui sont distribués aux créanciers dans le cadre d'une liquidation sous le régime de la *LFI*.

In contrast, the purpose of the *CCAA* is remedial; it provides a means for companies to avoid the devastating social and economic consequences of commercial bankruptcies. Due to its remedial nature, the *CCAA* is famously skeletal in nature and there is no rigid formula for the division of assets. When a debtor's restructuring is on the table, the goal pivots, and interim financing is introduced to facilitate restructuring. Entitlements and priorities shift to accommodate the presence of the interim lender — a new and necessary player who is absent from the liquidation scheme under the *BIA*.

En revanche, la *LACC* est de nature réparatrice; elle fournit aux compagnies un moyen d'éviter les effets dévastateurs, tant sur le plan social qu'économique, d'une faillite commerciale. Étant donné son caractère réparateur, la *LACC* est notoirement schématique par nature, et il n'existe pas de formule stricte de répartition des actifs. Lorsqu'il est question de restructurer les affaires d'un débiteur, l'objectif change, et le financement temporaire est introduit pour faciliter la restructuration. Les droits et les priorités changent du fait de l'entrée en scène d'un acteur essentiel, le prêteur temporaire, lequel ne joue aucun rôle dans la liquidation aux termes de la *LFI*.

The Crown's right to unremitted source deductions in a *CCAA* restructuring is protected by both ss. 37(2) and 6(3) of the *CCAA*. Section 37(2) provides that the Crown continues to beneficially own the debtor's property equal in value to the unremitted source deductions; the unremitted source deductions "shall . . . be regarded as being held

Le droit de la Couronne sur les retenues à la source non versées dans le cadre d'une restructuration sous le régime de la *LACC* est protégé tant par le par. 37(2) que par le par. 6(3) de la *LACC*. Le paragraphe 37(2) prévoit que la Couronne conserve un droit de bénéficiaire sur les biens du débiteur jusqu'à concurrence du montant des retenues in trust for Her Majesty". Although this signals that, unlike deemed trusts captured by s. 37(1), the Crown's deemed trust continues and confers a stronger right, s. 37(2) does not explain what to do with that right for the purposes of a *CCAA* proceeding. It does not, for example, provide that trust property should be put aside, as it would be in the *BIA* context. Section 6(3) gives specific effect to the Crown's right by requiring that a plan of compromise provide for payment in full of the Crown's deemed trust claims within six months of the plan's approval. As such, the Crown can demand to be paid in full in priority to all "security interests", including priming charges. The remedial goal of the *CCAA* is at the forefront of providing flexibility in preserving the Crown's right to unremitted source deductions in s. 37(2), and in giving a concrete effect to that right in s. 6(3) of the *CCAA*. The fact that the Crown's right under s. 227(4.1) of the *ITA* is treated differently between the two statutes is consistent with the different schemes and purposes of the *BIA* and *CCAA*.

à la source non versées, lesquelles sont « assimil[ées] à des biens détenus en fiducie pour Sa Majesté ». Bien que cela indique que, contrairement aux fiducies réputées visées par le par. 37(1), la fiducie réputée de la Couronne est maintenue et confère un droit plus fort, le par. 37(2) n'explique pas quoi faire de ce droit dans le cadre d'une procédure engagée sous le régime de la *LACC*. Il ne prévoit pas, par exemple, que les biens de la fiducie devraient être écartés, comme ce serait le cas dans le contexte de la *LFI*. Le paragraphe 6(3) donne un effet précis au droit de la Couronne en exigeant que le plan de transaction prévoie le paiement intégral des créances de la Couronne visées par la fiducie réputée dans les six mois suivant l'homologation du plan. Par conséquent, la Couronne peut exiger que le plan prévoie le paiement intégral de sa créance par priorité sur toutes les « garanties », y compris les charges super prioritaires. L'objectif réparateur de la *LACC* joue un rôle de premier plan lorsqu'il s'agit de prévoir la souplesse nécessaire pour protéger le droit que le par. 37(2) confère à la Couronne sur les retenues à la source non versées et pour donner concrètement effet à ce droit prévu au par. 6(3) de la *LACC*. Le fait que les deux lois traitent différemment le droit que confère à la Couronne le par. 227(4.1) de la *LIR* est conforme aux régimes et aux objectifs différents de la *LFI* et de la *LACC*.

Sections 11.2, 11.51 and 11.52 of the *CCAA*, which allow the court to order priming charges over a company's property, do not give the court the authority to rank priming charges ahead of the Crown's deemed trust for unremitted source deductions. Instead, that authority comes from s. 11 of the *CCAA*. Section 11 allows the court to make any order that it considers appropriate in the circumstances, subject to the requirements of good faith and due diligence on the part of the applicant. It can be used to rank priming charges ahead of the Crown's deemed trust for unremitted source deductions for two reasons. First, ranking a priming charge ahead of the Crown's deemed trust does not conflict with the *ITA* provision. So long as the Crown is paid in full under a plan of compromise, the Crown's right under s. 227(4.1) remains intact "notwithstanding any security interest" in the amount of the unremitted source deductions. Second, depending on the circumstances, such an order may further the remedial objectives of the *CCAA*. Interim financing is often crucial to the restructuring process. If there is evidence that interim lending cannot be obtained without ranking the interim loan ahead of the Crown's deemed trust, such an order could further the *CCAA*'s remedial goals. In general, the court should have flexibility to order super-priority charges in favour of parties whose function is to facilitate

Les articles 11.2, 11.51 et 11.52 de la *LACC*, aux termes desquels un tribunal peut, par ordonnance, déclarer que les biens d'une compagnie sont grevés de charges super prioritaires, ne confèrent pas au tribunal le pouvoir de faire passer les charges super prioritaires devant la fiducie réputée créée en faveur de la Couronne à l'égard des retenues à la source non versées. Ce pouvoir provient plutôt de l'art. 11 de la *LACC*. L'article 11 permet au tribunal de rendre toute ordonnance qu'il estime indiquée, sous réserve du respect par le demandeur des exigences de bonne foi et de diligence voulue. Cette disposition peut, pour deux raisons, être utilisée pour faire passer toute charge super prioritaire devant la fiducie réputée créée en faveur de la Couronne à l'égard des retenues à la source non versées. Premièrement, le fait de faire passer une charge super prioritaire devant la fiducie réputée de la Couronne n'entre pas en conflit avec la disposition de la *LIR*. Dès lors que les sommes qui lui sont dues lui sont payées intégralement dans le cadre d'un plan de transaction, le droit que possède la Couronne en vertu du par. 227(4.1) demeure intact « malgré toute autre garantie » sur le montant des retenues à la source non versées. Deuxièmement, selon les circonstances, une telle ordonnance peut favoriser la réalisation des objectifs réparateurs de la *LACC*. Le financement temporaire est souvent crucial the proposal of a plan of compromise that, in any event, will be required to pay the Crown in full.

pour le processus de restructuration. S'il est démontré que le financement temporaire ne peut être obtenu sans que le prêt temporaire prenne rang devant la fiducie réputée de la Couronne, pareille ordonnance pourrait favoriser la réalisation des objectifs réparateurs de la *LACC*. En général, les tribunaux devraient disposer de la latitude nécessaire pour ordonner des charges super prioritaires en faveur des parties dont la fonction est de faciliter la proposition d'un plan de transaction qui, dans tous les cas, devra prévoir le paiement intégral des sommes dues à la Couronne.

Per Abella, Brown and Rowe JJ. (dissenting): The appeal should be allowed. The text, context, and purpose of s. 227(4.1) of the *ITA* support the conclusion that s. 227(4.1) and the related deemed trust provisions under the the *ITA*, the *CPP*, and the *EIA* (collectively, the "Fiscal Statutes") bear only one plausible interpretation: the Crown's deemed trust enjoys priority over all other claims, including priming charges granted under the *CCAA*. Parliament's intention when it amended and expanded s. 227(4) and 227(4.1) of the *ITA* was clear and unmistakable: it granted this unassailable priority by employing the unequivocal language of "notwithstanding any . . . enactment of Canada". This is a blanket paramountcy clause; it prevails over all other statutes. No similar "notwithstanding" provision appears in the *CCAA*. Indeed, it is quite the opposite: unlike most deemed trusts which are nullified in *CCAA* proceedings by the operation of s. 37(1) of the *CCAA*, s. 37(2) preserves the deemed trusts of the Fiscal Statutes.

Les juges Abella, Brown et Rowe (dissidents) : Le pourvoi devrait être accueilli. Le texte, le contexte et l'objectif du par. 227(4.1) de la *LIR* appuient la conclusion selon laquelle il n'existe qu'une seule interprétation plausible de ce paragraphe et des dispositions connexes concernant la fiducie réputée qui figurent dans la *LIR*, le *RPC* et la *LAE* (collectivement, les « lois fiscales ») : la fiducie réputée de la Couronne a préséance sur toute autre réclamation, y compris sur les charges super prioritaires accordées en vertu de la *LACC*. Lorsque le législateur a modifié les par. 227(4) et 227(4.1) de la *LIR* et élargi leur portée, son intention était claire et sans équivoque. Il a accordé cette priorité inattaquable en employant ces termes non équivoques : « [m]algré [. . .] tout autre texte législatif fédéral . . . » Il s'agit d'une disposition générale attributive de préséance; elle a préséance sur toute autre loi. Aucune disposition dérogatoire semblable ne figure dans la *LACC*. En fait, c'est tout l'inverse : contrairement à la plupart des fiducies réputées qui sont neutralisées dans le cadre de procédures engagées sous le régime de la *LACC* par l'application du par. 37(1) de la *LACC*, le par. 37(2) préserve la fiducie réputée prévue par les lois fiscales.

The Fiscal Statutes give absolute priority to the deemed trusts for source deductions over all security interests notwithstanding the *CCAA*, and the priming charges provisions in ss. 11.2(1), 11.51(1) and 11.52(1) of the *CCAA* fall under the definition of "security interest", because they are "interests in the debtor's property securing payment or performance of an obligation", i.e. the payment of the monitor, the interim lender, and directors. As the definition of "security interest" in the *ITA* includes "encumbrances of any kind, whatever, however or whenever arising, created, deemed to arise or otherwise provided for", there is no reason that the definition would preclude the inclusion of an interest that is designed to operate to the benefit of all creditors. This is sufficient to decide the appeal.

Les lois fiscales donnent à la fiducie réputée créée à l'égard des retenues à la source priorité absolue sur toute garantie malgré la *LACC*, et les dispositions relatives aux charges super prioritaires figurant aux par. 11.2(1), 11.51(1) et 11.52(1) de la *LACC* entrent dans la définition de « garantie », puisqu'elles constituent un « [i]ntérêt [. . .] sur un bien qui garantit l'exécution d'une obligation, notamment un paiement », par exemple le paiement du contrôleur, du prêteur temporaire et des dirigeants. Comme la définition de « garantie » énoncée dans la *LIR* englobe les « charges, quelle qu'en soit la nature, de quelque façon ou à quelque date qu'elles soient créées, réputées exister ou prévues par ailleurs », il n'y a aucune raison pour laquelle la définition permettrait d'exclure une garantie conçue pour fonctionner au profit de tous les créanciers. Il n'en faut pas davantage pour trancher le pourvoi.

This finding does not leave the deemed trust provisions in the Fiscal Statutes in conflict with the *CCAA*. Section 11

Cette conclusion n'a pas pour effet de créer de conflit entre les dispositions relatives à la fiducie réputée of the *CCAA* contains a grant of broad supervisory discretion and the power to "make any order that it considers appropriate in the circumstances", but that grant of authority is not unlimited. Parliament avoided any conflict between the *CCAA* and the *ITA* by imposing three restrictions that are significant here. First, although s. 37(1) of the *CCAA* provides that "property of the 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", s. 37(2) provides for the continued operation of the deemed trusts under the Fiscal Statutes in a *CCAA* proceeding. In addition, while the deemed trusts are not "true trusts" and the commingling of assets renders the money subject to the deemed trusts untraceable, tracing has no application to s. 227(4.1). Second, the unremitted source deductions are deemed not to form part of the property of the debtor's company. If there is a default in remittances, the Crown is deemed to obtain beneficial ownership in the tax debtor's property in the amount of the unremitted source deductions that it can collect "notwithstanding" any other enactment or security interest. However, priming charges can attach only to the debtor's property, so the Crown's interest under the deemed trust is not subject to the Priming Charges. Third, under the definition of "secured creditor" in s. 2 of the *CCAA*, the Crown is not a "secured creditor" in respect of its deemed trust claims under the Fiscal Statutes. That definition must be read as "secured creditor means . . . a holder of any bond of the debtor company secured by . . . a trust in respect of, all or any property of the debtor company", which makes it manifestly clear that the Crown is not a "secured creditor" in respect of its deemed trust claims under the Fiscal Statutes.

contenues dans les lois fiscales et la *LACC*. L'article 11 de la *LACC* confère au tribunal un vaste pouvoir discrétionnaire de surveillance ainsi que le pouvoir de « rendre toute ordonnance qu'il estime indiquée », mais les pouvoirs conférés ne sont pas sans limites. Le législateur a évité tout conflit entre la *LACC* et la *LIR* en imposant trois restrictions qui importent en l'espèce. Premièrement, même si le par. 37(1) de la *LACC* précise qu'« aucun des biens de la compagnie débitrice ne peut être considéré comme [un bien détenu en fiducie pour Sa Majesté] par le seul effet d'une telle disposition », le par. 37(2) prévoit le maintien en vigueur de la fiducie réputée créée par les lois fiscales dans le cadre d'une procédure engagée sous le régime de la *LACC*. Qui plus est, bien que les fiducies réputées ne soient pas des « fiducie[s] véritable[s] » et que le regroupement des biens rende non identifiable le montant assujetti à la fiducie réputée, le retraçage de l'origine du montant ne s'applique pas au par. 227(4.1). Deuxièmement, les retenues à la source non versées sont réputées ne pas faire partie des biens de la compagnie débitrice. En cas de non-versement, la Couronne est réputée obtenir un droit de bénéficiaire sur les biens du débiteur fiscal jusqu'à concurrence du montant des retenues à la source non versées, droit dont elle peut se prévaloir « malgré » tout autre texte législatif ou toute autre garantie. Toutefois, les charges super prioritaires ne peuvent se rattacher qu'aux biens du débiteur, de telle sorte que l'intérêt de la Couronne au titre de la fiducie réputée n'est pas subordonné aux charges super prioritaires. Troisièmement, selon la définition de « créancier garanti » énoncée à l'art. 2 de la *LACC*, la Couronne n'est pas un « créancier garanti » à l'égard de ses réclamations relatives à une fiducie réputée créée par les lois fiscales. Cette définition de « créancier garanti » inclut donc un « détenteur de quelque obligation d'une compagnie débitrice garantie par [. . .] une fiducie à [l'égard de l'ensemble ou d'une partie des biens de la compagnie débitrice] », ce qui indique de façon tout à fait claire que la Couronne ne peut être considérée comme tel au regard des réclamations relatives à la fiducie réputée que lui accordent les lois fiscales.

Giving effect to Parliament's clear intent to grant absolute priority to the deemed trust does not render s. 6(3) or s. 11.09 of the *CCAA* meaningless. To the contrary, s. 6(3) and s. 11.09 respect the ultimate priority of the deemed trusts by allowing for the ultimate priority of the Crown claim to persist, while not frustrating the remedial purpose of the *CCAA*. Section 6(3) of the *CCAA*, which protects the Crown's claims under the deemed trusts as well as claims not subject to the deemed trusts under the Fiscal Statutes, operates only where there is an arrangement or compromise put to the court. In contrast, the deemed trusts

Donner effet à l'intention claire du législateur d'accorder la priorité absolue à la fiducie réputée ne rend pas le par. 6(3) ou l'art. 11.09 de la *LACC* dénué de sens. Au contraire, le par. 6(3) et l'art. 11.09 respectent la priorité absolue de la fiducie réputée en permettant le maintien de la priorité absolue de la réclamation de la Couronne sans contrecarrer l'objet réparateur de la *LACC*. Le paragraphe 6(3) de la *LACC*, qui protège les réclamations de la Couronne au titre d'une fiducie réputée ainsi que les réclamations qui ne sont pas assujetties à une fiducie réputée créée par les lois fiscales, s'applique seulement si une arise immediately and operate continuously from the time the amount was deducted or withheld from employee's remuneration, and apply to only unremitted source deductions. Without s. 6(3), the Crown would be guaranteed entitlement only to unremitted source deductions when the court sanctions a compromise or arrangement, and not to its other claims under s. 224(1.2) of the *ITA*, because most of the Crown's claims rank as unsecured under s. 38 of the *CCAA*. However, s. 6(3) does not explain the survival of the deemed trust or the rights conferred on the Crown under the deemed trust. Their survival is explained by s. 37(2), which continues the operation of s. 227(4.1), or by s. 227(4.1), which provides that the proceeds of the trust property "shall be paid to the Receiver General in priority to all such security interests". Finally, s. 6(3) protects different interests than those captured by the deemed trusts, and the right not to have to compromise under s. 6(3) is a right independent of the Crown's right under deemed trusts.

transaction ou un arrangement est soumis au tribunal. En revanche, la fiducie réputée s'applique immédiatement et de façon continue à compter du moment où le montant est déduit ou retenu sur le salaire d'un employé, et elle s'applique uniquement aux retenues à la source non versées. En l'absence du par. 6(3), les réclamations de la Couronne à l'égard des retenues à la source non versées seraient garanties une fois que le tribunal aurait homologué une transaction ou un arrangement, mais pas ses autres réclamations visées par le par. 224(1.2) de la *LIR*, étant donné que la plupart des réclamations de la Couronne prennent rang comme réclamations non garanties en application de l'art. 38 de la *LACC*. Toutefois, le par. 6(3) n'explique ni la survie de la fiducie réputée ni les droits conférés à la Couronne au titre de la fiducie réputée. Leur survie s'explique par le par. 37(2), qui maintient l'application du par. 227(4.1), ou par le par. 227(4.1), lequel précise que le produit des biens de la fiducie « est payé au receveur général par priorité sur une telle garantie ». Enfin, le par. 6(3) protège des droits différents de ceux visés par la fiducie réputée, et le droit de ne pas avoir à transiger qu'accorde le par. 6(3) est indépendant du droit de la Couronne au titre de la fiducie réputée.

Section 11.09 of the *CCAA*, which permits the court to stay the Crown's enforcement of its claims under the deemed trust claims, can apply to the Crown's deemed trust claims, but it does not remove the priority granted by the deemed trusts.

L'article 11.09 de la *LACC*, qui permet au tribunal de suspendre l'exercice par la Couronne de ses droits à l'égard de ses réclamations relatives à une fiducie réputée, peut s'appliquer à ces réclamations de la Couronne, mais il n'écarte pas la priorité accordée par la fiducie réputée.

Further, no concerns regarding certainty of subject matter or autonomous patrimony arise here. The deemed trust is not a "true" trust and it does not confer an ownership interest or the rights of a beneficiary to the Crown as they are understood at common law or within the meaning of the *Civil Code of Québec*. The requirements of "true" trusts of civil and common law are irrelevant to ascertaining the operation of a statutorily deemed trust as the deemed trust is a legal fiction with *sui generis* characteristics that are described in s. 227(4) and (4.1) of the *ITA*.

En outre, il n'existe en l'espèce aucune préoccupation concernant la certitude quant à la matière ou le patrimoine autonome. La fiducie réputée n'est pas une fiducie « véritable » et elle ne confère pas à la Couronne un intérêt propriétal ou des droits de bénéficiaire tels qu'on les entend en common law ou au sens du *Code civil du Québec*. Les conditions des fiducies « véritables » en droit civil et en common law ne sont d'aucune utilité pour déterminer le fonctionnement d'une fiducie réputée créée en application de la loi, puisque la fiducie réputée est une fiction juridique assortie de caractéristiques *sui generis* décrites aux par. 227(4) et 227(4.1) de la *LIR*.

Finally, concluding that the deemed trusts under the Fiscal Statutes have priority over the priming charges would not lead to absurd consequences. The conclusion that interim financing would simply end was not supported by the record, and there are usually enough funds available to satisfy both the Crown claim and the court-ordered priming charges. Equally unfounded is the claim that confirming the priority of the deemed trusts would inject an unacceptable level of uncertainty into the insolvency

Enfin, le fait de conclure que la fiducie réputée créée par les lois fiscales a préséance sur les charges super prioritaires n'entraînerait pas de conséquences absurdes. La conclusion selon laquelle le financement temporaire prendrait tout simplement fin n'était pas étayée par le dossier, et les fonds disponibles suffisent généralement à couvrir la réclamation de la Couronne et les charges super prioritaires ordonnées par le tribunal. Est également sans fondement l'affirmation suivant laquelle le fait de process. Interim lenders can rely on the company's financial statements to evaluate the risk of providing financing.

confirmer la priorité de la fiducie réputée introduirait un niveau d'incertitude inacceptable dans le processus de faillite. Les prêteurs temporaires peuvent se fonder sur les états financiers de la compagnie pour évaluer le risque d'offrir un financement.

Per Moldaver J. (dissenting): There is substantial agreement with the analysis and conclusions of Brown and Rowe JJ. However, there are two points to be addressed. First, the question of the nature of the Crown's interest should be left to another day. This is because, properly interpreted, the relevant provisions of the *CCAA* and *ITA* work in harmony to direct that the Crown's interest under s. 227(4.1) of the *ITA* — in whatever form it takes — must be given priority over court-ordered priming charges. This conclusion is sufficient to dispose of the appeal.

Le juge Moldaver (dissident) : Il y a accord, pour l'essentiel, avec l'analyse et les conclusions des juges Brown et Rowe. Toutefois, deux points doivent être abordés. En premier lieu, l'examen de la nature du droit de la Couronne devrait être remis à une autre occasion. C'est le cas parce que, correctement interprétées, les dispositions pertinentes de la *LACC* et de la *LIR* s'harmonisent de façon à ce que l'intérêt que possède la Couronne en vertu du par. 227(4.1) de la *LIR* — quel qu'il soit — ait priorité sur les charges super prioritaires d'origine judiciaire. Cette conclusion suffit pour trancher le pourvoi.

Second, while there is agreement that s. 37(2) of the *CCAA* can be interpreted as an internal restriction on s. 11, if this interpretation is mistaken, s. 11 is nonetheless restricted by s. 227(4.1), as Parliament has expressly indicated the supremacy of s. 227(4.1) over the provisions of the *CCAA*. The Crown's deemed trust claim must thus take priority over all court-ordered priming charges, whether they arise under the specific priming charge provisions, or under the court's discretionary authority. A necessary consequence of the absolute supremacy of the Crown's deemed trust claim is that the Crown's interest under s. 227(4.1) cannot be given effect by s. 6(3) of the *CCAA*. Unlike s. 227(4.1), which is focused on ensuring the priority of the Crown's claim, s. 6(3) merely establishes a six-month timeframe for payment to the Crown in the event that the debtor company succeeds in staying viable as a going concern. Accordingly, if s. 6(3) gave effect to the Crown's interest, the Crown could be ranked last, so long as it is paid within six months of any arrangement. Such an outcome would be plainly inconsistent with the absolute priority of the Crown's claim. Further, as s. 6(3) does not apply where a liquidation occurs under the *CCAA*, the Crown would be deprived of its priority over security interests in such circumstances.

En deuxième lieu, bien qu'il y ait accord pour dire que le par. 37(2) de la *LACC* peut être interprété comme une restriction interne à l'art. 11, si cette interprétation est inexacte, la portée de l'art. 11 est néanmoins restreinte par le par. 227(4.1), étant donné que le législateur a expressément indiqué que ce paragraphe a priorité sur les dispositions de la *LACC*. La réclamation de la Couronne au titre d'une fiducie réputée a donc priorité sur toutes les charges super prioritaires d'origine judiciaire, peu importe que celles-ci aient été créées en vertu des dispositions expresses à cet effet ou en vertu du pouvoir discrétionnaire du tribunal. Une conséquence nécessaire de la primauté absolue dont jouit la réclamation de la Couronne au titre d'une fiducie présumée est que le par. 6(3) de la *LACC* ne permet pas de donner effet à l'intérêt conféré à la Couronne par le par. 227(4.1). À l'inverse du par. 227(4.1), qui vise à accorder priorité à la réclamation de la Couronne, le par. 6(3) établit simplement un délai de six mois pour payer la Couronne au cas où la compagnie débitrice parviendrait à assurer sa viabilité. Par conséquent, si le par. 6(3) donnait effet à l'intérêt de la Couronne, celle-ci pourrait être reléguée au dernier rang pourvu qu'elle soit payée dans les six mois suivant tout arrangement. Un tel résultat serait de toute évidence incompatible avec la priorité absolue accordée à la réclamation de la Couronne. De plus, puisque le par. 6(3) ne s'applique pas en cas de liquidation sous le régime de la *LACC*, la Couronne perdrait alors sa priorité au profit d'autres garanties.

It cannot be doubted that Parliament considered the potential consequences of its legislative actions, including any consequences for *CCAA* proceedings. If circumstances do arise in which the priority of the Crown's claim threatens the viability of a particular restructuring, it clearly lies with the Crown to be flexible so as to avoid

Il ne fait aucun doute que le législateur a réfléchi aux conséquences possibles de ses mesures législatives, y compris sur les procédures engagées sous le régime de la *LACC*. S'il devait arriver que la priorité accordée à la réclamation de la Couronne menace la viabilité d'une restructuration, c'est de toute évidence à la Couronne any consequences that would undermine the remedial purposes of the *CCAA*.

qu'il appartient de faire preuve de souplesse afin d'éviter toute conséquence qui compromettrait l'objet réparateur de la *LACC*.

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POURVOI contre un arrêt de la Cour d'appel de l'Alberta (les juges Rowbotham, Wakeling et Schutz), 2019 ABCA 314, 93 Alta. L.R. (6th) 29, 437 D.L.R. (4th) 122, 72 C.B.R. (6th) 161, 95 B.L.R. (5th) 222, [2019] 12 W.W.R. 635, 11 P.P.S.A.C. (4th) 157, 2019 D.T.C. 5111, [2019] A.J. No. 1154 (QL), 2019 CarswellAlta 1815 (WL Can.), qui a confirmé une décision de la juge Topolniski, 2017 ABQB 550, 60 Alta. L.R. (6th) 103, 52 C.B.R. (6th) 308, [2018] 2 W.W.R. 731, [2017] A.J. No. 930 (QL), (WL Can.). Appeal dismissed, Abella, Moldaver, Brown and Rowe JJ. dissenting.

Michael Taylor and *Louis L'Heureux*, for the appellant.

Darren R. Bieganek, *Q.C.*, and *Brad Angove*, for the respondents Canada North Group Inc., Canada North Camps Inc., Campcorp Structures Ltd., DJ Catering Ltd., 816956 Alberta Ltd., 1371047 Alberta Ltd., 1919209 Alberta Ltd. and Ernst & Young Inc. in its capacity as monitor.

Jeffrey Oliver and *Mary I. A. Buttery*, *Q.C.*, for the respondent the Business Development Bank of Canada.

Kelly J. Bourassa, for the intervener the Insolvency Institute of Canada.

Randal Van de Mosselaer, for the intervener the Canadian Association of Insolvency and Restructuring Professionals.

The reasons of Wagner C.J. and Côté and Kasirer. JJ. were delivered by

Côté J. —

I. Overview

[1] The *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), has a long and storied history. From its origins in the Great Depression to its revival and reinvention during the 1970s and 1980s, the *CCAA* has played an important role in Canada's economy. Today, the *CCAA* provides an opportunity for insolvent companies with more than $5,000,000 in liabilities to restructure their affairs through a plan of arrangement. The goal of the *CCAA* process is to avoid bankruptcy and maximize value for all stakeholders.

[2] In order to facilitate the restructuring process, courts supervising *CCAA* restructurings may

2017 CarswellAlta 1631 (WL Can.). Pourvoi rejeté, les juges Abella, Moldaver, Brown et Rowe sont dissidents.

Michael Taylor et *Louis L'Heureux*, pour l'appelante.

Darren R. Bieganek, *c.r.*, et *Brad Angove*, pour les intimées Canada North Group Inc., Canada North Camps Inc., Campcorp Structures Ltd., DJ Catering Ltd., 816956 Alberta Ltd., 1371047 Alberta Ltd., 1919209 Alberta Ltd. et Ernst & Young Inc. en sa qualité de contrôleur.

Jeffrey Oliver et *Mary I. A. Buttery*, *c.r.*, pour l'intimée la Banque de développement du Canada.

Kelly J. Bourassa, pour l'intervenant l'Institut d'insolvabilité du Canada.

Randal Van de Mosselaer, pour l'intervenante l'Association canadienne des professionnels de l'insolvabilité et de la réorganisation.

Version française des motifs du juge en chef Wagner et des juges Côté et Kasirer rendus par

La juge Côté —

I. Vue d'ensemble

[1] L'histoire de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, c. C-36 (« *LACC* »), est longue et mouvementée. Depuis ses origines, à l'époque de la Grande Dépression, jusqu'à sa renaissance et sa métamorphose dans les années 1970 et 1980, la *LACC* n'a jamais cessé de jouer un rôle important dans l'économie canadienne. De nos jours, elle offre aux compagnies insolvables dont le passif excède cinq millions de dollars la possibilité de restructurer leurs affaires au moyen d'un plan d'arrangement. Le processus qu'elle prévoit a pour but d'éviter la faillite et de maximiser la valeur pour toutes les parties prenantes.

[2] Afin de faciliter le processus de restructuration, les tribunaux chargés de le surveiller peuvent autoriser

authorize an insolvent company to incur certain critical costs associated with this process. Supervising courts may also secure payment of these costs by ordering a super-priority charge against the insolvent company's assets. Today, our Court is called upon to determine whether a supervising court may order super-priority charges over assets that are subject to a claim of Her Majesty protected by a deemed trust created by s. 227(4.1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*").

[3] The Crown raises two arguments as to why a supervising court should be unable to subordinate Her Majesty's interest to super-priority charges. First, the Crown says that s. 227(4.1) creates a proprietary interest in a debtor's assets and a court cannot attach a super-priority charge to assets subject to Her Majesty's interest. Second, the Crown says that even if s. 227(4.1) does not create a proprietary interest, it creates a security interest that has statutory priority over all other security interests, including super-priority charges.

[4] Both of these arguments must fail. As this Court has previously held, the *CCAA* generally empowers supervising judges to order super-priority charges that have priority over all other claims, including claims protected by deemed trusts. In all cases where a supervising court is faced with a deemed trust, the court must assess the nature of the interest established by the empowering enactment, and not simply rely on the title of deemed trust. In this case, when the relevant provisions of the *ITA* are examined in their entirety, it is clear that the *ITA* does not establish a proprietary interest because Her Majesty's claim does not attach to any specific asset. Further, there is no conflict between the *CCAA* order and the *ITA*, as the deemed trust created by the *ITA* has priority only over a defined set of security interests. A super-priority charge ordered under s. 11 of the *CCAA* does not fall within that definition. For the reasons that follow, I would therefore dismiss the appeal.

une compagnie insolvable à effectuer certaines dépenses importantes dans le cadre de ce processus. Ces tribunaux peuvent également garantir le paiement de ces dépenses par la constitution d'une charge super prioritaire grevant l'actif de la compagnie insolvable. Aujourd'hui, la Cour est appelée à décider si le juge surveillant peut grever de charges super prioritaires les actifs qui font l'objet d'une créance de Sa Majesté protégée par une fiducie réputée créée en vertu du par. 227(4.1) de la *Loi de l'impôt sur le revenu*, L.R.C. 1985, c. 1 (5e suppl.) (« *LIR* »).

[3] La Couronne fait valoir deux arguments en raison desquels un juge surveillant ne devrait pas pouvoir subordonner l'intérêt de Sa Majesté à des charges super prioritaires. En premier lieu, la Couronne affirme que le par. 227(4.1) crée un intérêt à titre de propriétaire dans les biens du débiteur et que le tribunal ne peut pas grever d'une charge super prioritaire les biens faisant l'objet d'un intérêt de Sa Majesté. En second lieu, la Couronne affirme que, même si le par. 227(4.1) ne crée pas d'intérêt à titre de propriétaire, il crée, en vertu de la loi, une garantie qui a priorité sur toutes les autres garanties, y compris les charges super prioritaires.

[4] Ces deux arguments doivent être rejetés. Ainsi que notre Cour l'a déjà jugé, la *LACC* habilite de façon générale les juges surveillants à ordonner des charges super prioritaires qui ont priorité sur toutes les autres créances, y compris celles qui sont protégées par des fiducies réputées. Chaque fois qu'il est en présence d'une fiducie réputée, le juge surveillant doit déterminer la nature du droit conféré par le texte de loi habilitant, et il ne peut se fonder uniquement sur cette notion de fiducie réputée. En l'espèce, lorsqu'on examine les dispositions pertinentes de la *LIR* dans leur intégralité, il est évident que la *LIR* ne crée pas d'intérêt à titre de propriétaire, parce que la créance de Sa Majesté ne se rattache à aucun bien spécifique. De plus, il n'y a pas de conflit entre la *LIR* et l'ordonnance rendue en vertu de la *LACC*, étant donné que la fiducie réputée créée en vertu de la *LIR* n'a priorité que sur un ensemble bien précis de garanties. La charge super prioritaire constituée en vertu de l'art. 11 de la *LACC* ne répond pas à cette définition. Pour les motifs qui suivent, je suis donc d'avis de rejeter le pourvoi.

II. Background

[5] Canada North Group and six related corporations ("Debtors") initiated restructuring proceedings under s. 50.4(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), but soon changed course and sought to restructure under the *CCAA*. In their initial *CCAA* application, they requested a package of relief standard to *CCAA* proceedings, including a thirty-day stay on all proceedings against them, the appointment of a monitor and the creation of three super-priority charges. The first charge they requested was an administration charge of up to $1,000,000 in favour of counsel, a monitor and a chief restructuring officer for the fees they incurred. The second was a $1,000,000 financing charge in favour of an interim lender. The third was a $150,000 directors' charge protecting their directors and officers against liabilities incurred after the commencement of the proceedings. The Debtors included in their initial motion an affidavit from one of their directors attesting to a $1,140,000 debt to Her Majesty The Queen for source deductions and Goods and Services Tax ("GST").

[6] Justice Nielsen of the Court of Queen's Bench heard the motion together with a cross-motion by the Debtors' primary lender, Canadian Western Bank, seeking the appointment of a receiver. Justice Nielsen granted an initial order in favour of the Debtors on the terms requested in the initial application, aside from a $500,000 reduction in the administration charge (Alta. Q.B., No. 1703-12327, July 5, 2017 ("Initial Order")). The terms of that order included the following with regard to priority:

Each of the Directors' Charge, Administration Charge and the Interim Lender's Charge (all as constituted and defined herein) shall constitute a charge on the Property

II. Contexte

[5] Canada North Group et six sociétés liées (« débitrices ») ont entamé, en vertu du par. 50.4(1) de la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, c. B-3 (« *LFI* »), un processus de restructuration, mais ont rapidement changé de cap pour tenter de se restructurer sous le régime de la *LACC*. Dans la demande initiale qu'elles ont présentée en vertu de la *LACC*, elles réclamaient une série de mesures habituellement demandées dans le cadre des instances introduites sous ce régime, y compris les mesures suivantes : une suspension de trente jours de toutes les procédures engagées contre elles, la désignation d'un contrôleur et la création de trois charges super prioritaires. La première charge demandée visait des frais administratifs d'un million de dollars et devait être constituée en faveur des avocats, du contrôleur et du directeur de la restructuration pour les frais qu'ils ont engagés. La deuxième était une charge de financement d'un million de dollars en faveur d'un prêteur temporaire. La troisième était une garantie de 150 000 $ constituée en faveur des administrateurs en vue de les protéger ainsi que les dirigeants contre les obligations contractées après l'introduction de l'instance. Les débitrices ont joint à leur demande initiale un affidavit de l'un de leurs administrateurs pour attester l'existence d'une dette de 1 140 000 $ envers Sa Majesté la Reine pour des retenues à la source et pour la taxe sur les produits et services (« TPS »).

[6] Le juge Nielsen, de la Cour du Banc de la Reine, a instruit la requête, ainsi que la requête incidente présentée par le principal prêteur des débitrices, la Banque canadienne de l'Ouest, en vue d'obtenir la nomination d'un séquestre. Le juge Nielsen a rendu, en faveur des débitrices, une ordonnance initiale conforme aux modalités de leur demande initiale (hormis une réduction de 500 000 $ de la charge au titre des frais administratifs) (B.R. Alb., n° 1703-12327, 5 juillet 2017 (« ordonnance initiale »)). Cette ordonnance prévoyait notamment ce qui suit au sujet de l'ordre de priorité :

[TRADUCTION] Chacune des charges relatives à l'administration, aux administrateurs et au prêteur temporaire (constituées et définies aux présentes) grèvent les biens et, and subject always to section 34(11) of the CCAA such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "Encumbrances") in favour of any Person. [Emphasis deleted; para. 44.]

Justice Nielsen further ordered that these charges "shall not otherwise be limited or impaired in any way by . . . (d) the provisions of any federal or provincial statutes" (para. 46).

[7] Three weeks after the Initial Order was granted, the Debtors sought supplementary orders extending the stay of proceedings and increasing the interim financing to $2,500,000. Canadian Western Bank again filed a motion to appoint a receiver. At the hearing of the three motions, counsel for Her Majesty appeared in order to advise that Her Majesty would be filing a motion to vary the Initial Order on the ground that the order failed to recognize Her priority interest in unremitted source deductions (the portion of remuneration that employers are required to withhold from employees and remit directly to the Canada Revenue Agency ("CRA")).

[8] The Crown filed the motion soon after. Its argument for variance was grounded in the nature of Her Majesty's interest in the Debtors' property. It argued that the nature of Her Majesty's interest is determined by s. 227(4.1) of the *ITA* and that that provision creates a proprietary interest:

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

sous réserve du paragraphe 34(11) de la LACC, toutes ces charges ont priorité sur tous les autres privilèges, garanties, fiducies, charges et sûretés, créances de créanciers garantis, d'origine législative ou autre (collectivement « les sûretés ») détenus par quiconque. [Caractères gras omis; par. 44.]

Le juge Nielsen a également précisé que les charges en question [TRADUCTION] « ne sont pas autrement limitées ou compromises de quelque façon que ce soit par [. . .] (d) les dispositions de toute loi fédérale ou provinciale » (par. 46).

[7] Trois semaines après le prononcé de l'ordonnance initiale, les débitrices ont demandé des ordonnances supplémentaires pour prolonger la suspension de l'instance et faire passer à 2,5 millions de dollars le financement temporaire. La Banque canadienne de l'Ouest a de nouveau déposé une requête en nomination d'un séquestre. Durant l'instruction de ces trois requêtes, l'avocat de Sa Majesté a comparu afin d'annoncer que celle-ci s'apprêtait à déposer une requête pour faire modifier l'ordonnance initiale au motif que cette ordonnance ne reconnaissait pas sa priorité sur les retenues à la source non versées (la partie de la rémunération que les employeurs ont l'obligation de retenir auprès de leurs employés et de remettre directement à l'Agence du revenu du Canada (« ARC »)).

[8] La Couronne a déposé sa requête peu de temps après. L'argument qu'elle invoquait pour justifier sa demande de modification de l'ordonnance initiale reposait sur la nature du droit que possédait Sa Majesté sur les biens des débitrices. Elle a fait valoir que la nature du droit de Sa Majesté était déterminée par le par. 227(4.1) de la *LIR*, qui créait un intérêt à titre de propriétaire :

(4) Toute personne qui déduit ou retient un montant en vertu de la présente loi est réputée, malgré toute autre garantie au sens du paragraphe 224(1.3) le concernant, le détenir en fiducie pour Sa Majesté, séparé de ses propres biens et des biens détenus par son créancier garanti au sens de ce paragraphe qui, en l'absence de la garantie, seraient ceux de la personne, et en vue de le verser à Sa Majesté selon les modalités et dans le délai prévus par la présente loi.

(4.1) Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person and property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for a security interest (as defined in subsection 224(1.3)) would be property of the person, equal in value to the amount so deemed to be held in trust is deemed

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

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

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

III. Judgments Below

A. *Court of Queen's Bench, 2017 ABQB 550, 60 Alta. L.R. (6th) 103*

[9] Justice Topolniski heard Her Majesty's motion to vary the Initial Order. Despite the delay between the Initial Order and the motion to vary, Topolniski J. found that she had jurisdiction to hear the motion based on the discretion and flexibility conferred by the *CCAA*. However, she dismissed the motion on the ground that s. 227(4.1) of the *ITA* creates a security interest that can be subordinated to court-ordered super-priority charges.

(4.1) Malgré les autres dispositions de la présente loi, la *Loi sur la faillite et l'insolvabilité* (sauf ses articles 81.1 et 81.2), tout autre texte législatif fédéral ou provincial ou toute règle de droit, en cas de non-versement à Sa Majesté, selon les modalités et dans le délai prévus par la présente loi, d'un montant qu'une personne est réputée par le paragraphe (4) détenir en fiducie pour Sa Majesté, les biens de la personne, et les biens détenus par son créancier garanti au sens du paragraphe 224(1.3) qui, en l'absence d'une garantie au sens du même paragraphe, seraient ceux de la personne, d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté, à compter du moment où le montant est déduit ou retenu, séparés des propres biens de la personne, qu'ils soient ou non assujettis à une telle garantie;

b) ne pas faire partie du patrimoine ou des biens de la personne à compter du moment où le montant est déduit ou retenu, que ces biens aient été ou non tenus séparés de ses propres biens ou de son patrimoine et qu'ils soient ou non assujettis à une telle garantie.

Ces biens sont des biens dans lesquels Sa Majesté a un droit de bénéficiaire malgré toute autre garantie sur ces biens ou sur le produit en découlant, et le produit découlant de ces biens est payé au receveur général par priorité sur une telle garantie.

III. Les décisions des juridictions inférieures

A. *Cour du Banc de la Reine, 2017 ABQB 550, 60 Alta. L.R. (6th) 103*

[9] La juge Topolniski a instruit la requête présentée par Sa Majesté en vue de faire modifier l'ordonnance initiale. Malgré le délai écoulé entre l'ordonnance initiale et la requête en modification, la juge Topolniski a estimé qu'elle avait compétence pour entendre la requête vu le pouvoir discrétionnaire et la marge de manœuvre que lui confère la *LACC*. Elle a toutefois rejeté la requête au motif que le par. 227(4.1) de la *LIR* créait une garantie qui pouvait être subordonnée à des charges super prioritaires d'origine judiciaire.

[10] Justice Topolniski relied upon *Temple City Housing Inc., Re*, 2007 ABQB 786, 42 C.B.R. (5th) 274, and *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720, to conclude that the deemed trust created by s. 227(4.1) of the *ITA* is not a proprietary interest. Rather, the *ITA* creates something similar to a floating charge over all the debtor's assets, which permits the debtor to alienate property subject to the deemed trust. These characteristics are inconsistent with a proprietary interest, and thus s. 227(4.1) does not create such an interest.

[10] La juge Topolniski s'est appuyée sur les arrêts *Temple City Housing Inc., Re*, 2007 ABQB 786, 42 C.B.R. (5th) 274, et *First Vancouver Finance c. M.R.N.*, 2002 CSC 49, [2002] 2 R.C.S. 720, pour conclure que la fiducie réputée créée en application du par. 227(4.1) de la *LIR* ne conférait pas d'intérêt à titre de propriétaire. Selon elle, la *LIR* crée plutôt une sorte de charge flottante sur l'ensemble des actifs du débiteur, ce qui permet à ce dernier d'aliéner ses biens sous réserve de la fiducie réputée. Ces caractéristiques sont incompatibles avec un intérêt à titre de propriétaire, de sorte que le par. 227(4.1) ne crée pas un tel intérêt.

[11] Justice Topolniski also considered whether s. 227(4.1) creates a security interest that requires Her Majesty's interest to take priority over court-ordered charges. She acknowledged that the *CCAA* preserves the operation of the deemed trust, but she found that it also authorizes the reorganization of priorities by court order. Because each of the charges included in the Initial Order was critical to the restructuring process, they were necessarily required by the *CCAA* regime.

[11] La juge Topolniski s'est également demandé si le par. 227(4.1) crée une garantie qui exige que l'intérêt détenu par Sa Majesté prenne rang devant les charges d'origine judiciaire. Elle a reconnu que la *LACC* ne fait pas obstacle à la fiducie réputée, mais elle a estimé que cette loi autorise cependant le tribunal à réaménager l'ordre de priorité par ordonnance. Étant donné que chacune des charges énumérées dans l'ordonnance initiale était essentielle au processus de restructuration, elles étaient indispensables au bon fonctionnement du régime de la *LACC*.

B. *Leave to Appeal, 2017 ABCA 363, 54 C.B.R. (6th) 5*

B. *Autorisation d'appel, 2017 ABCA 363, 54 C.B.R. (6th) 5*

[12] Following the dismissal of the Crown's motion, the Debtors determined that there were sufficient assets in the estate to satisfy both Her Majesty and the beneficiaries of the three court-ordered super-priority charges in full. However, the Crown sought and obtained leave to appeal in order to seek appellate guidance on the nature of Her Majesty's priority.

[12] Suite au rejet de la requête de la Couronne, les débitrices ont déterminé que les actifs du patrimoine étaient suffisants pour payer intégralement Sa Majesté et les bénéficiaires des trois charges super prioritaires d'origine judiciaire. Toutefois, la Couronne a demandé et obtenu l'autorisation d'interjeter appel afin d'obtenir des directives de la Cour d'appel quant à la nature de la priorité de Sa Majesté.

C. *Court of Appeal of Alberta, 2019 ABCA 314, 93 Alta. L.R. (6th) 29*

C. *Cour d'appel de l'Alberta, 2019 ABCA 314, 93 Alta. L.R. (6th) 29*

[13] The Court of Appeal dismissed the appeal. It was divided as to whether the super-priority charges had priority over Her Majesty's claim. Justice Rowbotham wrote for the majority and agreed with the motion judge that s. 227(4.1) of the *ITA* creates a security interest, in accordance with this Court's earlier finding in *First Vancouver* that the deemed

[13] La Cour d'appel a rejeté l'appel. Elle était divisée sur la question de savoir si les charges super prioritaires prenaient rang devant la créance de Sa Majesté. La juge Rowbotham a écrit au nom de la majorité et s'est dite d'accord avec le juge de première instance pour affirmer que le par. 227(4.1) de la *LIR* crée une garantie, conformément à la conclusion

trust is like a "floating charge over all of the assets of the tax debtor in the amount of the default" (*First Vancouver*, at para. 40). She found further support for this in the fact that the deemed trust also falls squarely within the *ITA*'s definition of "security interest" in s. 224(1.3).

tirée par notre Cour dans l'arrêt *First Vancouver* selon laquelle la fiducie réputée est assimilable à une « charge flottante grevant, jusqu'à concurrence du montant en souffrance, l'ensemble des éléments d'actif du débiteur fiscal » (*First Vancouver*, par. 40). Elle s'est dite confortée dans son opinion par le fait que la fiducie réputée entre carrément dans la définition que la *LIR* donne de la « garantie » au par. 224(1.3).

[14] After determining that Her Majesty's interest in the Debtors' property was a security interest, Rowbotham J.A. turned to the question of whether the deemed trust could be subordinated to the court-ordered super-priority charges. She found that "while a conflict may appear to exist at the level of the 'black letter' wording" of the *ITA* and the *CCAA*, "the presumption of statutory coherence require[d] that the provisions be read to work together" (para. 45). A deemed trust that could not be subordinated to super-priority charges would undermine both Acts' objectives because fewer restructurings could succeed and thus less tax revenue could be collected. If the Crown's position prevailed, then absurd consequences could follow. Approximately 75 percent of restructurings require interim lenders. Without the assurance that they would be repaid in priority, these lenders would not come forward, nor would monitors or directors. The reality is that all of these services are provided in reliance on super priorities. Without these priorities, *CCAA* restructurings may be severely curtailed or at least delayed until Her Majesty's exact claim could be ascertained, by which point the company might have totally collapsed.

[14] Après avoir conclu que le droit de Sa Majesté sur les biens des débitrices constituait une garantie, la juge Rowbotham s'est penchée sur la question de savoir si la fiducie réputée pouvait être subordonnée à des charges super prioritaires d'origine judiciaire. Elle a conclu que [TRADUCTION] « bien que, si l'on s'en tient rigoureusement à leur libellé respectif, il puisse sembler exister un conflit » entre la *LIR* et la *LACC*, « la présomption de cohérence entre les lois exige[ait] que l'on interprète ces dispositions en considérant qu'elles s'appliquent de concert » (par. 45). Une fiducie réputée qui ne pourrait être subordonnée à des charges super prioritaires irait à l'encontre de l'objectif des deux lois en question parce qu'il serait plus difficile de mener à bien une restructuration et que cela diminuerait par conséquent les recettes fiscales. L'acceptation de la thèse de la Couronne entraînerait selon elle des conséquences absurdes. Environ 75 p. 100 des compagnies qui se restructurent font appel à des prêteurs temporaires. Sans l'assurance d'être remboursés en priorité, ces prêteurs refuseraient de s'engager, tout comme les contrôleurs et les administrateurs. La réalité est que tous ces services sont fournis sur la foi de l'existence de super priorités. Sans elles, les restructurations effectuées sous le régime de la *LACC* risqueraient d'être fortement compromises, ou à tout le moins retardées, jusqu'à ce qu'on puisse établir le montant exact de la créance de Sa Majesté, alors que la compagnie se serait peut-être déjà totalement effondrée.

[15] Justice Wakeling dissented. In his view, none of the arguments raised by the majority could overcome the text of the *ITA*. On his reading, the text of s. 227(4.1) is clear: Her Majesty is the beneficial owner of the amounts deemed to be held separate and apart from the debtor's property, and these amounts must be paid to Her Majesty notwithstanding any

[15] Le juge Wakeling a exprimé sa dissidence. À son avis, aucun des arguments soulevés par la majorité ne permettait de faire abstraction du texte de la *LIR*. Selon lui, le libellé du par. 227(4.1) est sans équivoque : Sa Majesté a un droit de bénéficiaire sur les sommes réputées être détenues de façon distincte et séparée des biens du débiteur, et

type of security interest, including super-priority charges. In his view, nothing in the *CCAA* overrides this proprietary interest. Section 11 of the *CCAA* cannot permit discretion to be exercised without regard for s. 227(4.1) of the *ITA*, nor can ss. 11.2, 11.51 and 11.52 of the *CCAA* be used, as they only allow a court to make orders regarding "all or part of the company's property" (s. 11.2(1)). In conclusion, since no part of the *CCAA* authorizes a court to override s. 227(4.1), a court must give effect to the clear text of s. 227(4.1) and cannot subordinate Her Majesty's claims to super-priority charges.

ces sommes doivent être payées à Sa Majesté, peu importe le type de garantie, y compris les charges super prioritaires. À son avis, rien dans le libellé de la *LACC* ne permettait d'écarter cet intérêt à titre de propriétaire. L'article 11 de la *LACC* ne saurait permettre au tribunal d'exercer son pouvoir discrétionnaire sans tenir compte du par. 227(4.1) de la *LIR*, et les art. 11.2, 11.51 et 11.52 de la *LACC* ne sauraient non plus être utilisés à cette fin, car ils permettent uniquement au tribunal de rendre des ordonnances concernant « la totalité ou une partie des biens de la compagnie » (par. 11.2(1)). En conclusion, comme aucune des dispositions de la *LACC* ne lui permet d'écarter le par. 227(4.1), le tribunal doit donner effet au texte clair du par. 227(4.1) et il ne peut subordonner les créances de Sa Majesté à des charges super prioritaires.

IV. Issue

[16] The central issue in this appeal is whether the *CCAA* authorizes courts to grant super-priority charges with priority over a deemed trust created by s. 227(4.1) of the *ITA*. In order to answer this question, I proceed in three stages. First, I assess the nature of the *CCAA* regime and the power of supervising courts to order such charges. Given that supervising courts generally have the authority to order super-priority charges with priority over all other claims, I then turn to s. 227(4.1) of the *ITA* to determine whether it gives Her Majesty an interest that cannot be subordinated to super-priority charges. Here I assess the Crown's two arguments as to why s. 227(4.1) provides for an exception to the general rule, namely that Her Majesty has a proprietary or ownership interest in the insolvent company's assets and that, even if Her Majesty does not have such an interest, s. 227(4.1) provides Her with a security interest that has absolute priority over all claims. I conclude by assessing how courts should exercise their authority to order super-priority charges where Her Majesty has a claim against an insolvent company protected by a s. 227(4.1) deemed trust.

IV. Question en litige

[16] La principale question à trancher dans le présent pourvoi est celle de savoir si la *LACC* autorise les tribunaux à constituer des charges super prioritaires ayant priorité sur une fiducie réputée créée en vertu du par. 227(4.1) de la *LIR*. Pour répondre à cette question, je vais procéder en trois étapes. D'abord, je vais examiner la nature du régime de la *LACC* et le pouvoir des tribunaux de surveillance d'ordonner pareilles charges. Étant donné que les tribunaux de surveillance ont généralement le pouvoir d'ordonner des charges super prioritaires qui ont priorité sur toutes les autres créances, je vais ensuite examiner le par. 227(4.1) de la *LIR* pour déterminer s'il confère à Sa Majesté un intérêt qui ne peut être subordonné à une charge super prioritaire. Je vais passer en revue les deux arguments invoqués par la Couronne pour affirmer que le par. 227(4.1) prévoit une exception à la règle générale, à savoir que Sa Majesté possède un intérêt à titre de propriétaire dans les actifs de la compagnie insolvable et que, même si elle ne possède pas un tel intérêt, le par. 227(4.1) lui confère une garantie qui a priorité absolue sur toutes les créances. Je vais conclure mon analyse en indiquant comment les tribunaux devraient exercer leur pouvoir d'ordonner des charges super prioritaires lorsque Sa Majesté fait valoir, contre la compagnie insolvable, une réclamation protégée par une fiducie réputée créée en vertu du par. 227(4.1).

V. Analysis

[17] In order to determine whether the *CCAA* empowers a court to order super-priority charges over assets subject to a deemed trust created by s. 227(4.1) of the *ITA*, we must understand both the *CCAA* regime and the nature of the interest created by s. 227(4.1).

A. *CCAA Regime*

[18] The *CCAA* is part of Canada's system of insolvency law, which also includes the *BIA* and the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11, s. 6(1), for banks and other specified institutions. Although both the *CCAA* and the *BIA* create reorganization regimes, what distinguishes the *CCAA* regime is that it is restricted to companies with liabilities of more than $5,000,000 and "offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations" (*Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 14).

[19] The *CCAA* works by creating breathing room for an insolvent debtor to negotiate a way out of insolvency. Upon an initial application, the supervising judge makes an order that ordinarily preserves the status quo by freezing claims against the debtor while allowing it to remain in possession of its assets in order to continue carrying on business. During this time, it is hoped that the debtor will negotiate a plan of arrangement with creditors and other stakeholders. The goal is to enable the parties to reach a compromise that allows the debtor to reorganize and emerge from the *CCAA* process as a going concern (*Century Services*, at para. 18).

[20] The view underlying the entire *CCAA* regime is thus that debtor companies retain more value as going concerns than in liquidation scenarios

V. Analyse

[17] Afin de déterminer si la *LACC* habilite un tribunal à ordonner des charges super prioritaires sur des biens assujettis à une fiducie réputée au titre du par. 227(4.1) de la *LIR*, il nous faut comprendre à la fois le régime de la *LACC* et la nature du droit créé par le par. 227(4.1).

A. *Le régime de la LACC*

[18] La *LACC* fait partie de la législation canadienne en matière d'insolvabilité, qui comprend également la *LFI* et la *Loi sur les liquidations et les restructurations*, L.R.C. 1985, c. W-11, par. 6(1), laquelle s'applique aux banques et à d'autres institutions déterminées. Bien que la *LACC* et la *LFI* instaurent toutes deux un régime de réorganisation, ce qui distingue le régime de la *LACC* est le fait qu'il est réservé aux compagnies dont le passif dépasse cinq millions de dollars et qu'il « établit un mécanisme plus souple, dans lequel les tribunaux disposent d'un plus grand pouvoir discrétionnaire, ce qui rend le mécanisme mieux adapté aux réorganisations complexes » (*Century Services Inc. c. Canada (Procureur général)*, 2010 CSC 60, [2010] 3 R.C.S. 379, par. 14).

[19] La *LACC* vise à accorder au débiteur insolvable la latitude nécessaire pour négocier avec ses créanciers afin de trouver une issue à son insolvabilité. À la suite d'une demande initiale, le juge surveillant rend une ordonnance aux termes de laquelle il préserve habituellement le statu quo en suspendant les réclamations qui visent le débiteur tout en permettant à ce dernier de conserver la possession de ses actifs afin de poursuivre ses activités. Dans l'intervalle, on espère que le débiteur négociera un plan d'arrangement avec ses créanciers et les autres parties prenantes. L'objectif est de permettre aux parties de parvenir à un compromis qui donne au débiteur la possibilité de se réorganiser et de poursuivre ses activités à l'issue du processus de la *LACC* (*Century Services*, par. 18).

[20] La vision sous-jacente au régime de la *LACC* est donc qu'une compagnie débitrice possède une plus grande valeur lorsqu'elle poursuit ses

(*Century Services*, at para. 18). The survival of a going-concern business is ordinarily the result with the greatest net benefit. It often enables creditors to maximize returns while simultaneously benefiting shareholders, employees, and other firms that do business with the debtor company (para. 60). Thus, this Court recently held that the *CCAA* embraces "the simultaneous objectives of maximizing creditor recovery, preservation of going-concern value where possible, preservation of jobs and communities affected by the firm's financial distress . . . and enhancement of the credit system generally" (*9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, [2020] 1 S.C.R. 521, at para. 42, quoting J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2nd ed. 2013), at p. 14).

[21] The most important feature of the *CCAA* — and the feature that enables it to be adapted so readily to each reorganization — is the broad discretionary power it vests in the supervising court (*Callidus Capital*, at paras. 47-48). Section 11 of the *CCAA* confers jurisdiction on the supervising court to "make any order that it considers appropriate in the circumstances". This power is vast. As the Chief Justice and Moldaver J. recently observed in their joint reasons, "[o]n the plain wording of the provision, the jurisdiction granted by s. 11 is constrained only by restrictions set out in the *CCAA* itself, and the requirement that the order made be 'appropriate in the circumstances'" (*Callidus Capital*, at para. 67). Keeping in mind the centrality of judicial discretion in the *CCAA* regime, our jurisprudence has developed baseline requirements of appropriateness, good faith and due diligence in order to exercise this power. The supervising judge must be satisfied that the order is appropriate and that the applicant has acted in good faith and with due diligence (*Century Services*, at para. 69). The judge must also be satisfied as to appropriateness, which is assessed by considering whether the order would advance the policy and remedial objectives of the *CCAA* (para. 70). For instance, given that the purpose of the *CCAA* is to facilitate the survival of going concerns, when crafting an initial order, "[a] court must first of all

activités que lorsqu'elle est liquidée (*Century Services*, par. 18). La survie d'une entreprise en activité est généralement le résultat qui présente le plus grand avantage net. Elle permet souvent aux créanciers de maximiser leur rendement, tout en profitant aux actionnaires, aux employés et aux autres entreprises qui font affaire avec la compagnie débitrice (par. 60). Ainsi, notre Cour a récemment jugé que la *LACC* a « comme objectifs simultanés de maximiser le recouvrement au profit des créanciers, de préserver la valeur d'exploitation dans la mesure du possible, de protéger les emplois et les collectivités touchées par les difficultés financières de l'entreprise [. . .] et d'améliorer le système de crédit de manière générale » (*9354-9186 Québec inc. c. Callidus Capital Corp.*, 2020 CSC 10, [2020] 1 R.C.S. 521, par. 42, citant J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2e éd. 2013), p. 14).

[21] La caractéristique la plus importante de la *LACC* — et celle qui la rend assez souple pour s'adapter si aisément à chaque réorganisation — est le vaste pouvoir discrétionnaire qu'elle confère au tribunal de surveillance (*Callidus Capital*, par. 47-48). L'article 11 de la *LACC* accorde au tribunal le pouvoir de « rendre [. . .] toute ordonnance qu'il estime indiquée ». Ce pouvoir est vaste. Comme le juge en chef et le juge Moldaver l'ont récemment fait observer dans leurs motifs conjoints, « [s]elon le libellé clair de la disposition, le pouvoir conféré par l'art. 11 n'est limité que par les restrictions imposées par la *LACC* elle-même, ainsi que par l'exigence que l'ordonnance soit "indiquée" dans les circonstances » (*Callidus Capital*, par. 67). Étant donné le rôle essentiel que le pouvoir discrétionnaire judiciaire joue dans le cadre du régime de la *LACC*, notre jurisprudence a mis au point les exigences de base encadrant l'exercice de ce pouvoir : l'opportunité, la bonne foi et la diligence. Le juge doit être convaincu que l'ordonnance est indiquée et que le demandeur a agi de bonne foi et avec la diligence voulue (*Century Services*, par. 69). Le juge doit également être convaincu de l'opportunité de rendre l'ordonnance sollicitée en se demandant si elle favorisera la réalisation des objectifs réparateurs et de politique générale de la *LACC* (par. 70). Par exemple, étant donné que la *LACC* a pour objet de

provide the conditions under which the debtor can attempt to reorganize" (para. 60).

faciliter la survie des entreprises en leur permettant de poursuivre leurs activités, lorsqu'il rend son ordonnance initiale, « [l]e tribunal doit d'abord créer les conditions propres à permettre au débiteur de tenter une réorganisation » (par. 60).

[22] On review of a supervising judge's order, an appellate court should be cognizant that supervising judges have been given this broad discretion in order to fulfill their difficult role of continuously balancing conflicting and changing interests. Appellate courts should also recognize that orders are generally temporary or interim in nature and that the restructuring process is constantly evolving. These considerations require not only that supervising judges be endowed with a broad discretion, but that appellate courts exercise particular caution before interfering with orders made in accordance with that discretion (*Pacific National Lease Holding Corp., Re* (1992), 72 B.C.L.R. (2d) 368 (C.A.), at paras. 30-31).

[22] Lorsqu'une cour d'appel révise l'ordonnance d'un juge surveillant, elle ne doit pas oublier que ce vaste pouvoir discrétionnaire a été confié aux juges surveillants afin qu'ils assument le rôle difficile de concilier sans cesse des intérêts conflictuels et fluctuants. La cour d'appel doit également reconnaître que les ordonnances ont généralement un caractère temporaire ou provisoire, et que le processus de restructuration évolue constamment. Ces considérations nécessitent non seulement que les juges surveillants soient investis d'un large pouvoir discrétionnaire, mais aussi que les cours d'appel fassent preuve d'une déférence particulière avant de modifier des ordonnances rendues en vertu de ce pouvoir discrétionnaire (*Pacific National Lease Holding Corp., Re* (1992), 72 B.C.L.R. (2d) 368 (C.A.), par. 30-31).

[23] In addition to s. 11, there are more specific powers in some of the provisions following that section. They include the power to order a super-priority security or charge on all or part of a company's assets in favour of interim financiers (s. 11.2), critical suppliers (s. 11.4), the monitor and financial, legal or other experts (s. 11.52), or indemnification of directors or officers (s. 11.51). Each of these provisions empowers the court to "order that the security or charge rank in priority over the claim of any secured creditor of the company" (ss. 11.2(2), 11.4(4), 11.51(2) and 11.52(2)).

[23] En plus de l'art. 11, on trouve dans certaines des dispositions qui le suivent des pouvoirs plus spécifiques, dont celui d'ordonner une sûreté ou une charge super prioritaire grevant tout ou partie des actifs de la compagnie débitrice en faveur de prêteurs temporaires (art. 11.2), de fournisseurs essentiels (art. 11.4), du contrôleur et des experts — notamment en finance et en droit — (art. 11.52), ou afin d'indemniser les dirigeants ou administrateurs (art. 11.51). Chacune de ces dispositions habilite le tribunal à « préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la compagnie » (par. 11.2(2), 11.4(4), 11.51(2) et 11.52(2)).

[24] As this Court held in *Century Services*, at para. 70, the general language of s. 11 is not restricted by the availability of these more specific orders. In fact, courts regularly grant super-priority charges in favour of persons not specifically referred to in the aforementioned provisions, including through orders that have priority over orders made under the specific provisions. These include, for example, key employee retention plan charges (*Grant Forest Products Inc., Re* (2009), 57 C.B.R. (5th) 128 (Ont.

[24] Ainsi que notre Cour l'a jugé dans l'arrêt *Century Services*, par. 70, la possibilité pour le tribunal de rendre ces ordonnances plus spécifiques n'a pas pour effet de restreindre la portée des termes généraux employés à l'art. 11. En fait, les tribunaux constituent régulièrement des charges super prioritaires en faveur de personnes qui ne sont pas expressément mentionnées dans les dispositions susmentionnées, y compris au moyen d'ordonnances ayant préséance sur les ordonnances rendues en

S.C.J.); *Timminco Ltd., Re*, 2012 ONSC 506, 85 C.B.R. (5th) 169), and bid protection charges (*In the Matter of a Plan of Compromise or Arrangement of Green Growth Brands Inc.*, 2020 ONSC 3565, 84 C.B.R. (6th) 146).

[25] In *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271, at para. 60, quoting the amended initial order in that case, this Court confirmed that a court-ordered financing charge with priority over "all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise", had priority over a deemed trust established by the *Personal Property Security Act*, R.S.O. 1990, c. P.10 ("*PPSA*"), to protect employee pensions. Justice Deschamps wrote for a unanimous Court on this point. She found that the existence of a deemed trust did not preclude orders granting first priority to financiers: "This will be the case only if the provincial priorities provided for in s. 30(7) of the *PPSA* ensure that the claim of the Salaried Plan's members has priority over the [debtor-in-possession ("DIP")] charge" (para. 48).

[26] Justice Deschamps first assessed the supervising judge's order to determine whether it had truly been necessary to give the financing charge priority over the deemed trust. Even though the supervising judge had not specifically considered the deemed trust in the order authorizing a super-priority charge, he had found that there was no alternative but to make the order. Financing secured by a super priority was necessary if the company was to remain a going concern (para. 59). Justice Deschamps rejected the suggestion "that the DIP lenders would have accepted that their claim ranked below claims resulting from the deemed trust", because "[t]he harsh reality is that lending is governed by the commercial imperatives of the lenders, not by the interests of

vertu de ces dispositions. Songeons, par exemple, aux charges relatives aux plans de rétention des employés clés (*Grant Forest Products Inc., Re* (2009), 57 C.B.R. (5th) 128 (C.S.J. Ont.); *Timminco Ltd., Re*, 2012 ONSC 506, 85 C.B.R. (5th) 169), et aux charges relatives à la protection des offres (*In the Matter of a Plan of Compromise or Arrangement of Green Growth Brands Inc.*, 2020 ONSC 3565, 84 C.B.R. (6th) 146).

[25] Dans l'arrêt *Sun Indalex Finance, LLC c. Syndicat des Métallos*, 2013 CSC 6, [2013] 1 R.C.S. 271, par. 60, citant l'ordonnance initiale modifiée dans cette affaire, notre Cour a confirmé que la charge de financement d'origine judiciaire qui devait prendre rang devant [TRADUCTION] « toutes les autres sûretés, y compris les fiducies, privilèges, charges et grèvements, d'origine législative ou autre » prenait effectivement rang devant la fiducie réputée qui avait été établie par la *Loi sur les sûreté mobilières*, L.R.O. 1990, c. P.10 (« *LSM* »), dans le but de protéger les régimes de retraite des employés. La juge Deschamps s'est exprimée sur ce point au nom d'une Cour unanime. Elle a conclu que l'existence d'une fiducie réputée ne faisait pas obstacle au prononcé d'ordonnances accordant une priorité aux bailleurs de fonds : « Ce sera le cas seulement si la priorité de rang accordée par la province aux participants au régime des salariés, au par. 30(7) de la *LSM*, fait en sorte que leur réclamation a préséance sur la charge [débiteur-exploitant (« DE »)] » (par. 48).

[26] La juge Deschamps a tout d'abord examiné l'ordonnance du juge surveillant afin de déterminer si celle-ci était véritablement nécessaire pour que la charge de financement ait priorité sur la fiducie réputée. Même s'il ne s'était pas expressément penché sur la fiducie réputée dans l'ordonnance aux termes de laquelle il avait constitué la charge super prioritaire, le juge surveillant avait conclu qu'il n'avait d'autre choix que de rendre l'ordonnance. Le financement devait être garanti par une super priorité pour que la compagnie demeure en activité (par. 59). La juge Deschamps a rejeté l'idée « que les prêteurs DE auraient accepté que leur réclamation soit subordonnée à celles fondées sur la fiducie réputée », étant donné que « [l]a dure réalité est que l'octroi de prêts est

the plan members or the policy considerations that lead provincial governments to legislate in favour of pension fund beneficiaries" (para. 59).

[27] After determining that the order was necessary, she turned to the statute creating the deemed trust's priority. Section 30(7) of the *PPSA* provided that the deemed trust would have priority over all security interests. In her view, this created a conflict between the court-ordered super priority and the statutory priority of the claim protected by the deemed trust. The super priority therefore prevailed by virtue of federal paramountcy (para. 60).

[28] There are also practical considerations that explain why supervising judges must have the discretion to order other charges with priority over deemed trusts. Restructuring under the *CCAA* often requires the assistance of many professionals. As Wagner C.J. and Moldaver J. recently recognized for a unanimous Court, the role the monitor plays in a *CCAA* proceeding is critical: "The monitor is an independent and impartial expert, acting as 'the eyes and the ears of the court' throughout the proceedings . . . . The core of the monitor's role includes providing an advisory opinion to the court as to the fairness of any proposed plan of arrangement and on orders sought by parties, including the sale of assets and requests for interim financing" (*Callidus Capital*, at para. 52, quoting *Ernst & Young Inc. v. Essar Global Fund Ltd.*, 2017 ONCA 1014, 139 O.R. (3d) 1, at para. 109). In the words of Morawetz J. (as he then was), "[i]t is not reasonable to expect that professionals will take the risk of not being paid for their services, and that directors and officers will remain if placed in a compromised position" (*Timminco*, at para. 66).

régi par les impératifs commerciaux des prêteurs, et non par les intérêts des participants ou par les considérations de politique générale qui ont incité les législateurs provinciaux à protéger les bénéficiaires de caisses de retraite » (par. 59).

[27] Après avoir décidé que l'ordonnance était nécessaire, la juge Deschamps a examiné la loi accordant la priorité à la fiducie réputée. Le paragraphe 30(7) de la *LSM* prévoyait que la fiducie réputée prenait rang devant toutes les garanties, ce qui, à son avis, créait un conflit entre la super priorité d'origine judiciaire et la priorité légale accordée à la créance protégée par la fiducie réputée. La super priorité avait donc préséance sur la fiducie réputée en raison de la doctrine de la prépondérance fédérale (par. 60).

[28] Il existe aussi des considérations d'ordre pratique qui expliquent pourquoi les juges surveillants doivent disposer du pouvoir discrétionnaire d'ordonner des charges ayant priorité sur les fiducies réputées. Pour restructurer une compagnie sous le régime de la *LACC*, il faut souvent obtenir l'aide de nombreux professionnels. Ainsi que le juge en chef Wagner et le juge Moldaver l'ont récemment reconnu au nom d'une Cour unanime, le contrôleur joue un rôle crucial dans une instance introduite sous le régime de la *LACC* : « Le contrôleur est un expert indépendant et impartial qui agit comme [TRADUCTION] "les yeux et les oreilles du tribunal" tout au long de la procédure [. . .] Il a essentiellement pour rôle de donner au tribunal des avis consultatifs sur le caractère équitable de tout plan d'arrangement proposé et sur les ordonnances demandées par les parties, y compris celles portant sur la vente d'actifs et le financement provisoire » (*Callidus Capital*, par. 52, citant *Ernst & Young Inc. c. Essar Global Fund Ltd.*, 2017 ONCA 1014, 139 O.R. (3d) 1, par. 109). Comme l'a dit le juge Morawetz (maintenant juge en chef de la Cour supérieure de justice de l'Ontario), [TRADUCTION] « [o]n ne peut raisonnablement s'attendre à ce que des professionnels prennent le risque de ne pas être payés pour leurs services et à ce que les administrateurs et les dirigeants demeurent en poste s'ils se retrouvent dans une position délicate » (*Timminco*, par. 66).

[29] This Court has similarly found that financing is critical as "case after case has shown that 'the priming of the DIP facility is a key aspect of the debtor's ability to attempt a workout'" (*Indalex*, at para. 59, quoting J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 97). As lower courts have affirmed, "[p]rofessional services are provided, and DIP funding is advanced, in reliance on super-priorities contained in initial orders. To ensure the integrity, predictability and fairness of the *CCAA* process, certainty must accompany the granting of such super-priority charges" (*First Leaside Wealth Management Inc. (Re)*, 2012 ONSC 1299, at para. 51 (CanLII)).

[29] Notre Cour a pareillement conclu que le financement est essentiel, étant donné qu'il « a été démontré maintes et maintes fois que [TRADUCTION] "la priorité accordée au financement DE constitue un élément clé de la capacité du débiteur de tenter de conclure un arrangement" » (*Indalex*, par. 59, citant J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), p. 97). Ainsi que les juridictions inférieures l'ont affirmé, [TRADUCTION] « [l]es services professionnels sont fournis et le financement DE est avancé sur la foi des charges super prioritaires contenues dans les ordonnances initiales. Pour assurer l'intégrité, la prévisibilité et l'équité du processus de la *LACC*, la certitude doit caractériser l'octroi de ces charges super prioritaires » (*First Leaside Wealth Management Inc. (Re)*, 2012 ONSC 1299, par. 51 (CanLII)).

[30] Super-priority charges in favour of the monitor, financiers and other professionals are required to derive the most value for the stakeholders. They are beneficial to all creditors, including those whose claims are protected by a deemed trust. The fact that they require super priority is just a part of "[t]he harsh reality . . . that lending is governed by the commercial imperatives of the lenders" (*Indalex*, at para. 59). It does not make commercial sense to act when there is a high level of risk involved. For a monitor and financiers to put themselves at risk to restructure and develop assets, only to later discover that a deemed trust supersedes all claims, smacks of unfairness. As McLachlin J. (as she then was) said, granting a deemed trust absolute priority where it does not amount to a trust under general principles of law would "defy fairness and common sense" (*British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24, at p. 33).

[30] Pour que les parties prenantes bénéficient d'une valorisation maximale, il est nécessaire de constituer des charges super prioritaires en faveur du contrôleur, des bailleurs de fonds et d'autres professionnels. Ces mesures profitent à l'ensemble des créanciers, y compris ceux dont les créances sont protégées par une fiducie réputée. Le fait qu'ils aient besoin d'une super priorité n'est qu'un des aspects de « [l]a dure réalité [. . .] que l'octroi de prêts est régi par les impératifs commerciaux des prêteurs » (*Indalex*, par. 59). Il n'est pas sensé, au plan commercial, de s'engager en présence d'un risque élevé. Il n'y a rien d'équitable dans la situation où, pour aider une entreprise à se restructurer et à se développer, un contrôleur et des prêteurs s'exposent à des risques, et découvrent par la suite qu'une fiducie réputée prévaut sur l'ensemble des créances. Comme la juge McLachlin (plus tard juge en chef) l'a dit, accorder la priorité absolue à une fiducie réputée — alors qu'elle ne constitue pas une fiducie selon les principes généraux du droit — serait « contrair[e] à l'équité et au bon sens » (*Colombie-Britannique c. Henfrey Samson Belair Ltd.*, [1989] 2 R.C.S. 24, p. 33).

[31] It is therefore clear that, in general, courts supervising a *CCAA* reorganization have the authority to order super-priority charges to facilitate the restructuring process. Similarly, courts have ensured that the *CCAA* is given a liberal construction to

[31] Il est donc évident qu'en général, les tribunaux chargés de surveiller les restructurations sous le régime de la *LACC* ont le pouvoir d'ordonner des charges super prioritaires afin de faciliter le processus de restructuration. Dans la même veine, les

fulfill its broad purpose and to prevent this purpose from being neutralized by other statutes: [TRANSLATION] "As the courts have ruled time and again, the purpose of the *CCAA* and orders made under it cannot be affected or neutralized by another [Act], whether of public order or not" (*Triton Électronique inc. (Arrangement relatif à)*, 2009 QCCS 1202, at para. 35 (CanLII)). "This case is not so much about the rights of employees as creditors, but the right of the court under the [*CCAA*] to serve not the special interests of the directors and officers of the company but the broader constituency referred to in *Chef Ready Foods Ltd.* [*v. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84 (C.A.)] . . . Such a decision may inevitably conflict with provincial legislation, but the broad purposes of the [*CCAA*] must be served" (*Pacific National Lease Holding*, at para. 28). Courts have been particularly cautious when interpreting security interests so as to ensure that the *CCAA*'s important purpose can be fulfilled. For instance, in *Chef Ready Foods*, Gibbs J.A. observed that if a bank's rights under the *Bank Act*, S.C. 1991, c. 46, were to be interpreted as being immune from the provisions of the *CCAA*, then the benefits of *CCAA* proceedings would be "largely illusory" (p. 92). "There will be two classes of debtor companies: those for whom there are prospects for recovery under the [*CCAA*]; and those for whom the [*CCAA*] may be irrelevant dependent upon the whim of the [creditor]" (p. 92). It is important to keep in mind that *CCAA* proceedings operate for the benefit of the creditors as a group and not for the benefit of a single creditor. Without clear and direct instruction from Parliament, we cannot countenance the possibility that it intended to create a security interest that would limit or eliminate the prospect of reorganization and recovery under the *CCAA* for some companies. To do so would turn the *CCAA* into a dead letter. With this in mind, I turn to the specific provision at issue in this appeal.

tribunaux se sont assurés que la *LACC* reçoive une interprétation libérale pour être capable d'en réaliser l'objectif général tout en évitant que cet objectif ne soit neutralisé par d'autres lois : « Ce que les tribunaux ont décidé à maintes reprises, c'est que la finalité de la *LACC* et les ordonnances qui en découlent ne sauraient être affectées, ni neutralisées par une autre loi, fut-elle d'ordre public ou non » (*Triton Électronique inc. (Arrangement relatif à)*, 2009 QCCS 1202, par. 35 (CanLII)). [TRADUCTION] « L'affaire qui nous occupe concerne moins les droits des employés en tant que créanciers que le droit accordé par la [*LACC*] au tribunal de servir non pas les intérêts spéciaux des dirigeants et administrateurs de la compagnie, mais l'ensemble plus large d'intéressés dont il est question dans *Chef Ready Foods Ltd.* [*c. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84 (C.A.)] [. . .] Pareille décision risque d'entrer en conflit avec la législation provinciale, mais il faut atteindre les objectifs généraux de la [*LACC*] » (*Pacific National Lease Holding*, par. 28). Les tribunaux se sont montrés particulièrement vigilants au moment d'interpréter les garanties, pour veiller à ce que l'important objectif de la *LACC* puisse être réalisé. Par exemple, dans l'arrêt *Chef Ready Foods*, le juge d'appel Gibbs a fait remarquer que, s'il fallait considérer que les droits conférés à une banque par la *Loi sur les banques*, L.C. 1991, c. 46, étaient à l'abri des dispositions de la *LACC*, les avantages des procédures intentées sous le régime de cette loi seraient [TRADUCTION] « en grande partie illusoires » (p. 92). « Il y aura deux groupes de compagnies débitrices : celles qui peuvent se rétablir sous le régime de la [*LACC*], et celles à l'égard de qui la pertinence de la [*LACC*] varierait selon le caprice du [créancier] » (p. 92). Il importe de garder à l'esprit que ces procédures sont engagées au bénéfice de l'ensemble des créanciers, et non au bénéfice d'un seul d'entre eux. En l'absence de directives claires et expresses, nous ne saurions supposer que le Parlement ait voulu créer une garantie de nature à suggérer que, sous le régime de la *LACC*, la perspective de réorganisation et de rétablissement de certaines compagnies sera limitée, voire inexistante. La *LACC* deviendrait alors lettre morte. En gardant ces principes à l'esprit, je me tourne à présent vers la disposition en litige dans la présente affaire.

B. *Nature of the Interest Created by Section 227(4.1) of the ITA*

[32] The Crown argues that, despite the authority a supervising court may have to order super-priority charges, Her Majesty's claim to unremitted source deductions is protected by a deemed trust, and that ordering charges with priority over the deemed trust is contrary to s. 227(4.1) of the *ITA*. To determine whether this is true, we must begin by understanding how the deemed trust comes about.

[33] Section 153(1) of the *ITA* requires employers to withhold income tax from employees' gross pay and forward the amounts withheld to the CRA. When an employer withholds income tax from its employees in accordance with the *ITA*, it assumes its employees' liability for those amounts (s. 227(9.4)). As a result, Her Majesty cannot have recourse to the employees if the employer fails to remit the withheld amounts. Instead, Her Majesty's interest is protected by a deemed trust. Section 227(4) of the *ITA* provides that amounts withheld are deemed to be held separate and apart from the employer's assets and in trust for Her Majesty. If an employer fails to remit the amounts withheld in the manner provided by the *ITA*, s. 227(4.1) extends the trust to all of the employer's assets. In this case, the Debtors failed to remit the amounts withheld to the CRA, bringing s. 227(4.1) into operation.

[34] When a company seeks protection under the *CCAA*, s. 37(1) of the *CCAA* provides that most of Her Majesty's deemed trusts are nullified (unless the property in question would be regarded as held in trust in the absence of the statutory provision creating the deemed trust). However, s. 37(2) of the *CCAA* exempts the deemed trusts created by s. 227(4) and (4.1) of the *ITA* from the nullification provided for in s. 37(1). These deemed trusts continue to operate throughout the *CCAA* process (*Century Services*, at para. 45). In my view, this preservation by the *CCAA* of the deemed trusts created by the *ITA* does not modify the characteristics of these trusts. They

B. *Nature de l'intérêt créé par le paragraphe 227(4.1) de la LIR*

[32] La Couronne soutient que, même si le tribunal de surveillance peut ordonner des charges super prioritaires, la créance de Sa Majesté sur les retenues à la source non versées est protégée par une fiducie réputée, et que la constitution de charges prenant rang devant la fiducie réputée va à l'encontre du par. 227(4.1) de la *LIR*. Pour déterminer le bien-fondé de cette position, il faut d'abord comprendre l'origine de la fiducie réputée.

[33] Le paragraphe 153(1) de la *LIR* oblige les employeurs à retenir l'impôt sur le salaire brut de leurs employés et à transmettre les sommes retenues à l'ARC. L'employeur qui retient l'impôt sur le revenu de ses employés conformément à la *LIR* devient responsable des sommes dues à ce titre par ses employés (par. 227(9.4)). Par conséquent, Sa Majesté ne peut exercer de recours contre les employés si l'employeur fait défaut de verser les montants qu'il a retenus. L'intérêt de Sa Majesté est protégé par une fiducie réputée. Le paragraphe 227(4) de la *LIR* prévoit que les montants retenus sont réputés détenus en fiducie pour Sa Majesté, séparément des propres biens de l'employeur. Si l'employeur fait défaut de verser les retenues conformément aux modalités prévues par la *LIR*, le par. 227(4.1) étend la fiducie à l'ensemble des biens de l'employeur. En l'espèce, les débitrices ont fait défaut de verser les retenues à l'ARC, ce qui a entraîné l'application du par. 227(4.1).

[34] Lorsqu'une compagnie cherche à se prévaloir de la protection de la *LACC*, le par. 37(1) de cette loi prévoit que la plupart des fiducies réputées de Sa Majesté sont annulées (à moins que les biens en question eussent été assimilés à des biens détenus en fiducie même en l'absence de la disposition législative créant la fiducie réputée). Toutefois, le par. 37(2) de la *LACC* soustrait les fiducies réputées créées en vertu des par. 227(4) et (4.1) de la *LIR* à l'annulation prévue au par. 37(1). Ces fiducies réputées continuent de produire leur effet tout au long du processus de la *LACC* (*Century Services*, par. 45). À mon avis, le fait que la *LACC* permet aux fiducies

continue to operate as they would have if the insolvent company had not sought *CCAA* protection. Therefore, the Crown's arguments must be assessed by reviewing the nature of the interest created by s. 227(4.1) of the *ITA*.

[35] Before doing so, and while it is not strictly speaking required of me given the reasons I set out below, I pause here to clarify the role of s. 6(3) of the *CCAA*, which provides as follows:

(3) Unless Her Majesty agrees otherwise, the court may sanction a compromise or arrangement only if the compromise or arrangement provides for the payment in full to Her Majesty in right of Canada or a province, within six months after court sanction of the compromise or arrangement, of all amounts that were outstanding at the time of the application for an order under section 11 or 11.02 and that are of a kind that could be subject to a demand under

(a) subsection 224(1.2) of the *Income Tax Act* . . . .

[36] Section 6(3) merely grants Her Majesty the right to insist that a compromise or arrangement not be sanctioned by a court unless it provides for payment in full to Her Majesty of certain claims within six months after court sanction. Section 6(3) does not say that it modifies the deemed trust created by s. 227(4.1) of the *ITA* in any way, and it comes into operation only at the end of the *CCAA* process when parties seek court approval of their arrangement or compromise. Section 6(3) also applies to numerous claims that are not protected by the deemed trust, including penalties, interest, withholdings on non-resident dispositions and certain retirement contributions (see ss. 224(1.2) and 227(10.1) of the *ITA*, the latter of which refers to amounts payable under ss. 116, 227(9), (9.2), (9.3), (9.4) and (10.2), Part XII.5 and Part XIII). Equating the deemed trust with the right under s. 6(3) renders s. 37(2) of the *CCAA* and the deemed trust meaningless. I therefore proceed, as this Court did in *Indalex*, by assessing

réputées créées par la *LIR* de continuer à produire leurs effets ne modifie en rien les caractéristiques de ces fiducies. Elles continuent à produire leur effet comme si la compagnie insolvable n'avait pas demandé la protection de la *LACC*. Par conséquent, il faut examiner les arguments de la Couronne en tenant compte de la nature du droit découlant du par. 227(4.1) de la *LIR*.

[35] Mais avant de procéder à cet examen, et bien que cela ne soit pas à proprement parler nécessaire vu les motifs que j'expose ci-dessous, j'ouvre une parenthèse pour clarifier le rôle du par. 6(3) de la *LACC*, dont voici le texte :

(3) Le tribunal ne peut, sans le consentement de Sa Majesté, homologuer la transaction ou l'arrangement qui ne prévoit pas le paiement intégral à Sa Majesté du chef du Canada ou d'une province, dans les six mois suivant l'homologation, de toutes les sommes qui étaient dues lors de la demande d'ordonnance visée aux articles 11 ou 11.02 et qui pourraient, de par leur nature, faire l'objet d'une demande aux termes d'une des dispositions suivantes :

a) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* . . .

[36] Le paragraphe 6(3) accorde simplement à Sa Majesté le droit d'insister auprès du tribunal afin qu'il refuse d'homologuer la transaction ou l'arrangement qui ne prévoit pas le paiement intégral de certaines créances de Sa Majesté dans un délai de six mois suivant l'homologation. Le paragraphe 6(3) ne dit pas qu'il modifie la fiducie présumée créée par le par. 227(4.1) de la *LIR* de quelque façon que ce soit, et il ne s'applique qu'à l'issue de la procédure de la *LACC* lorsque les parties cherchent à faire homologuer par le tribunal leur arrangement ou leur transaction. Le paragraphe 6(3) s'applique également à de nombreuses créances qui ne sont pas protégées par la fiducie réputée, y compris les pénalités, les intérêts, les retenues sur les dispositions relatives aux non-résidents et certaines cotisations de retraite (voir les par. 224(1.2) et 227(10.1) de la *LIR*, le deuxième faisant état des sommes payables en application de l'art. 116 et des par. 227(9), (9.2), (9.3), (9.4) et (10.2), à la partie XII.5 et à la partie XIII). Assimiler

the interest created by s. 227(4.1) of the *ITA* without regard to the *CCAA* (*Indalex*, at para. 48).

[37] Section 227(4.1) provides:

(4.1) Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person and property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for a security interest (as defined in subsection 224(1.3)) would be property of the person, equal in value to the amount so deemed to be held in trust is deemed

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

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

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

(1) Does Section 227(4.1) of the *ITA* Create a Proprietary or Ownership Interest in the Debtor's Assets?

[38] This appeal — like previous appeals to this Court — does not require the Court to exhaustively

la fiducie réputée au droit prévu au par. 6(3) vide de leur sens le par. 37(2) de la *LACC* et la fiducie présumée. La démarche que je vais suivre consiste donc, à l'instar de celle suivie par notre Cour dans l'affaire *Indalex*, à évaluer l'intérêt créé par le par. 227(4.1) de la *LIR* en faisant abstraction de la *LACC* (*Indalex*, par. 48).

[37] Le paragraphe 227(4.1) dispose :

(4.1) Malgré les autres dispositions de la présente loi, la *Loi sur la faillite et l'insolvabilité* (sauf ses articles 81.1 et 81.2), tout autre texte législatif fédéral ou provincial ou toute règle de droit, en cas de non-versement à Sa Majesté, selon les modalités et dans le délai prévus par la présente loi, d'un montant qu'une personne est réputée par le paragraphe (4) détenir en fiducie pour Sa Majesté, les biens de la personne, et les biens détenus par son créancier garanti au sens du paragraphe 224(1.3) qui, en l'absence d'une garantie au sens du même paragraphe, seraient ceux de la personne, d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté, à compter du moment où le montant est déduit ou retenu, séparés des propres biens de la personne, qu'ils soient ou non assujettis à une telle garantie;

b) ne pas faire partie du patrimoine ou des biens de la personne à compter du moment où le montant est déduit ou retenu, que ces biens aient été ou non tenus séparés de ses propres biens ou de son patrimoine et qu'ils soient ou non assujettis à une telle garantie.

Ces biens sont des biens dans lesquels Sa Majesté a un droit de bénéficiaire malgré toute autre garantie sur ces biens ou sur le produit en découlant, et le produit découlant de ces biens est payé au receveur général par priorité sur une telle garantie.

(1) Le paragraphe 227(4.1) de la *LIR* crée-t-il un intérêt à titre de propriétaire dans l'actif du débiteur?

[38] Le présent pourvoi — comme certains pourvois précédents devant notre Cour — n'oblige pas

define the nature and content of the interest created by s. 227(4.1) of the *ITA* (*Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411, and *First Vancouver*). All that is necessary is to determine whether s. 227(4.1) confers upon Her Majesty an interest in the debtor's property that precludes a court from ordering charges with priority over Her Majesty's claim. The Crown argues that s. 227(4.1) does so by giving Her Majesty a proprietary interest in the debtor's assets, which "causes those assets to become the property of the Crown" (A.F., at para. 46). The Crown rests this argument on the wording of the section. First, it says that property equal in value to the amount deemed to be held in trust by a person is deemed to be held "separate and apart from the property of the person". Second, it says that the property deemed to be held in trust is deemed "to form no part of the estate or property of the person". Third, it says that the property deemed to be held in trust "is property beneficially owned by Her Majesty notwithstanding any security interest in such property". The Crown submits that, as a result of Her Majesty's proprietary interest, amounts subject to the deemed trust cannot be considered assets of the debtor in *CCAA* proceedings.

la Cour à définir de façon exhaustive la nature et le contenu de l'intérêt créé par le par. 227(4.1) de la *LIR* (*Banque Royale du Canada c. Sparrow Electric Corp.*, [1997] 1 R.C.S. 411, et *First Vancouver*). Il suffit de déterminer si le par. 227(4.1) confère à Sa Majesté un intérêt dans les actifs du débiteur de nature à empêcher un tribunal d'ordonner des charges ayant priorité sur la réclamation de Sa Majesté. La Couronne soutient que c'est ce que fait le par. 227(4.1) en accordant à Sa Majesté un intérêt à titre de propriétaire dans les actifs du débiteur, de sorte que [TRADUCTION] « ces actifs deviennent des biens de la Couronne » (m.a., par. 46). L'argument de la Couronne repose sur le libellé de la disposition. Premièrement, elle affirme que des biens d'une valeur égale au montant réputé détenu en fiducie par une personne sont réputés détenus « séparés des propres biens de la personne ». Deuxièmement, elle affirme que les biens qui sont réputés détenus en fiducie sont réputés « ne pas faire partie du patrimoine ou des biens de la personne ». Troisièmement, elle fait valoir que les biens qui sont réputés détenus en fiducie « sont des biens dans lesquels Sa Majesté a un droit de bénéficiaire malgré toute autre garantie sur ces biens ». La Couronne soutient qu'en raison de l'intérêt que possède Sa Majesté à titre de propriétaire, les montants assujettis à la fiducie réputée ne peuvent être considérés comme des actifs du débiteur dans le cadre de procédures intentées sous le régime de la *LACC*.

[39] In order to determine whether s. 227(4.1) confers a proprietary or ownership interest upon Her Majesty, we must look at the nature of the rights afforded to Her Majesty by the deemed trust and compare them to the rights ordinarily afforded to an owner. To begin with, it is clear that the statute does not purport to transfer legal title to any property to Her Majesty. Instead, the Crown's argument places considerable weight on the common law meaning of the words "beneficially owned by Her Majesty" and "in trust". Trusts and beneficial ownership are equitable concepts that are part of the common law. As in all cases of statutory interpretation, the meaning of these words is a question of parliamentary intent. In the interpretation of a federal statute that uses concepts of property and civil rights, reference

[39] Afin de déterminer si le par. 227(4.1) confère à Sa Majesté un intérêt à titre de propriétaire, il nous faut examiner la nature des droits que la fiducie réputée confère à Sa Majesté et comparer ces droits à ceux habituellement accordés à un propriétaire. D'entrée de jeu, il est évident que la loi ne vise pas à transférer à Sa Majesté le titre en common law de quelque bien que ce soit. Au soutien de sa thèse, la Couronne table beaucoup sur le sens que la common law donne aux termes « biens dans lesquels Sa Majesté a un droit de bénéficiaire » et « en fiducie ». La fiducie et la propriété bénéficiaire sont des concepts d'equity qui font partie de la common law. Comme pour tous les cas d'interprétation des lois, le sens de ces termes dépend de l'intention du législateur. Dans l'interprétation d'une loi fédérale

must be had to ss. 8.1 and 8.2 of the *Interpretation Act*, R.S.C. 1985, c. I-21. These sections provide:

> **8.1** Both the common law and the civil law are equally authoritative and recognized sources of the law of property and civil rights in Canada and, unless otherwise provided by law, if in interpreting an enactment it is necessary to refer to a province's rules, principles or concepts forming part of the law of property and civil rights, reference must be made to the rules, principles and concepts in force in the province at the time the enactment is being applied.

> **8.2** Unless otherwise provided by law, when an enactment contains both civil law and common law terminology, or terminology that has a different meaning in the civil law and the common law, the civil law terminology or meaning is to be adopted in the Province of Quebec and the common law terminology or meaning is to be adopted in the other provinces.

[40] In other words, where Parliament uses a private law expression and is silent as to its meaning, courts must refer to the applicable provincial private law. This is known as the principle of complementarity. However, as both these sections also make clear, Parliament is free to derogate from provincial private law and create a uniform rule across all provinces (see R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at pp. 158-59).

[41] In this case, Parliament has expressly chosen to dissociate itself from provincial private law. Section 227(4.1) says that it operates "[n]otwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law". In *Caisse populaire Desjardins de l'Est de Drummond v. Canada*, 2009 SCC 29, [2009] 2 S.C.R. 94, the majority found that, through these words, Parliament has created a standalone scheme of uniform application across all provinces (paras. 11-13). The nature of the deemed trust created by s. 227(4.1) must thus be understood on its own terms.

qui fait appel à des notions de propriété et de droits civils, il faut se référer aux art. 8.1 et 8.2 de la *Loi d'interprétation*, L.R.C. 1985, c. I-21. Ces articles sont ainsi libellés :

> **8.1** Le droit civil et la common law font pareillement autorité et sont tous deux sources de droit en matière de propriété et de droits civils au Canada et, s'il est nécessaire de recourir à des règles, principes ou notions appartenant au domaine de la propriété et des droits civils en vue d'assurer l'application d'un texte dans une province, il faut, sauf règle de droit s'y opposant, avoir recours aux règles, principes et notions en vigueur dans cette province au moment de l'application du texte.

> **8.2** Sauf règle de droit s'y opposant, est entendu dans un sens compatible avec le système juridique de la province d'application le texte qui emploie à la fois des termes propres au droit civil de la province de Québec et des termes propres à la common law des autres provinces, ou qui emploie des termes qui ont un sens différent dans l'un et l'autre de ces systèmes.

[40] En d'autres termes, lorsque le législateur utilise une expression de droit privé et qu'il n'en précise pas le sens, les tribunaux doivent se référer au droit privé provincial applicable. C'est ce qu'on appelle le principe de complémentarité. Toutefois, comme ces deux articles l'indiquent clairement, il est loisible au législateur de déroger au droit privé provincial et de créer une règle uniforme applicable dans toutes les provinces (voir R. Sullivan, *Sullivan on the Construction of Statutes* (6e éd. 2014), p. 158-159).

[41] En l'espèce, le législateur a délibérément choisi de se dissocier du droit privé provincial. Le paragraphe 227(4.1) indique qu'il s'applique « [m]algré les autres dispositions de la présente loi, la *Loi sur la faillite et l'insolvabilité* (sauf ses articles 81.1 et 81.2), tout autre texte législatif fédéral ou provincial ou toute règle de droit ». Dans l'arrêt *Caisse populaire Desjardins de l'Est de Drummond c. Canada*, 2009 CSC 29, [2009] 2 R.C.S. 94, la majorité a conclu que, par ces termes, le législateur a créé un régime autonome d'application uniforme dans toutes les provinces (par. 11-13). La nature de la fiducie réputée créée par le par. 227(4.1) doit donc être comprise d'après les termes de cette disposition.

[42] With that said, it is also clear that Parliament has chosen to use terms with established legal meanings in constructing the deemed trust. While the meaning of these terms is not to be based on their precise meaning under Alberta common law, it is difficult to attempt to understand s. 227(4.1) without any reference to how these concepts generally operate. Despite the protestations of my colleagues Justices Brown and Rowe, I do not see how we could begin to understand the meaning of the words "deemed trust", "held in trust" or "beneficially owned" without reference to the civil law or common law. The law of trusts in both civil law and common law thus provides critical context for understanding Parliament's intent. From a civil law perspective, some courts have found it awkward to apply the idea of beneficial ownership under s. 227(4.1) in Quebec "on the ground that it is a concept that is obviously derived from the common law" (*Canada (Attorney General) v. Caisse populaire d'Amos*, 2004 FCA 92, 324 N.R. 31, at para. 48). I agree with the following observation by Noël J.A. (as he then was):

It is not the task of the judiciary to determine whether it is appropriate for Parliament to use common law concepts in Quebec (or to use civil law concepts elsewhere in Canada) for the purpose of giving effect to federal legislation. The task of the courts is limited to discovering Parliament's intention and giving effect to it. [para. 49]

[43] Under Quebec civil law, it is clear that s. 227(4.1) does not establish a trust within the meaning of the *Civil Code of Québec* ("*C.C.Q.*"). Articles 1260 and 1261 *C.C.Q.* provide the following:

1260. A trust results from an act whereby a person, the settlor, transfers property from his patrimony to another patrimony constituted by him which he appropriates to a particular purpose and which a trustee undertakes, by his acceptance, to hold and administer.

1261. The trust patrimony, consisting of the property transferred in trust, constitutes a patrimony by appropriation, autonomous and distinct from that of the settlor, trustee or beneficiary and in which none of them has any real right.

[42] Cela dit, il est également clair que le législateur a choisi d'employer des termes qui possèdent une signification juridique bien établie pour constituer la fiducie réputée. Bien que le sens de ces termes ne doive pas être fondé sur le sens précis qu'ils ont selon la common law de l'Alberta, on peut difficilement analyser le par. 227(4.1) sans tenir compte de la façon dont ces concepts opèrent généralement. Malgré les protestations de mes collègues les juges Brown et Rowe, je ne vois pas comment l'on pourrait chercher à comprendre le sens des mots « fiducie réputée », « détenus en fiducie » ou « droit de bénéficiaire » sans tenir compte du droit civil ou de la common law. Le droit des fiducies tant en droit civil qu'en common law fournit donc un contexte essentiel pour comprendre la volonté de législateur. Du point de vue du droit civil, certains tribunaux ont trouvé difficile d'appliquer au Québec le concept de « droit de bénéficiaire » énoncé au par. 227(4.1), « au motif qu'il s'agit d'un concept évidemment issu de la common law » (*Canada (Procureur général) c. Caisse populaire d'Amos*, 2004 CAF 92, 324 N.R. 31, par. 48). Je souscris à la remarque suivante du juge Noël (maintenant juge en chef) :

La question de savoir s'il est opportun pour le législateur fédéral d'utiliser au Québec des concepts de common law (ou d'utiliser ailleurs au Canada des concepts de droit civil) pour donner effet aux lois fédérales ne relève pas du pouvoir judiciaire. La tâche des tribunaux se limite à déceler l'intention du législateur et [à] y donner effet. [par. 49]

[43] En droit civil québécois, il est clair que le par. 227(4.1) ne crée pas de fiducie au sens du *Code civil du Québec* (« *C.c.Q.* »). Les articles 1260 et 1261 *C.c.Q.* prévoient ce qui suit :

1260. La fiducie résulte d'un acte par lequel une personne, le constituant, transfère de son patrimoine à un autre patrimoine qu'il constitue, des biens qu'il affecte à une fin particulière et qu'un fiduciaire s'oblige, par le fait de son acceptation, à détenir et à administrer.

1261. Le patrimoine fiduciaire, formé des biens transférés en fiducie, constitue un patrimoine d'affectation autonome et distinct de celui du constituant, du fiduciaire ou du bénéficiaire, sur lequel aucun d'entre eux n'a de droit réel.

As this Court held in *Bank of Nova Scotia v. Thibault*, 2004 SCC 29, [2004] 1 S.C.R. 758, at para. 31, "[t]hree requirements must therefore be met in order for a trust to be constituted [under Quebec civil law]: property must be transferred from an individual's patrimony to another patrimony by appropriation; the property must be appropriated to a particular purpose; and the trustee must accept the property."

[44] Under s. 227(4.1) of the *ITA*, however, no specific property is transferred to a trust patrimony. Indeterminacy remains as to which assets are subject to the deemed trust, *ergo*, as to which assets left the settlor's patrimony and entered the trust's patrimony. Although s. 227(4.1) provides that the assets are deemed to be held "separate and apart from the property of the person" and "to form no part of the estate or property of the person", this is not sufficient to constitute an autonomous patrimony such as the one contemplated by the civilian trust regime. It flows from the autonomous nature of the trust patrimony that assets held in trust must be property in which none of the settlor, trustee or beneficiary has any property right. But this runs afoul of the interest created by s. 227(4.1), because nothing in that provision deprives the person whose assets are subject to a deemed trust of property rights in these assets. Therefore, the main element of a civilian trust is absent in the deemed trust established by s. 227(4.1): there is no autonomous patrimony to which specific property is transferred.

[45] Furthermore, under s. 227(4.1), the person whose assets are subject to the deemed trust would act as trustee. Again, this is inconsistent with the definition of a trustee in civil law. The person whose assets are subject to a deemed trust pursuant to s. 227(4.1) does not "undertak[e], by his acceptance, to hold and administer" a trust patrimony (art. 1260 *C.C.Q.*). But most importantly, the fact that assets subject to the deemed trust are indeterminate makes the trustee's role effectively impossible to play. The *C.C.Q.* provides that the trustee "has the control and the exclusive administration of the trust patrimony" and "acts as the administrator of the property of others charged with full administration" (art. 1278).

Comme l'a statué notre Cour dans *Banque de Nouvelle-Écosse c. Thibault*, 2004 CSC 29, [2004] 1 R.C.S. 758, par. 31, « [t]rois conditions sont donc nécessaires pour la constitution d'une fiducie [en droit civil québécois] : le transfert de biens du patrimoine d'une personne à un patrimoine d'affectation, l'affectation des biens à une fin particulière et l'acceptation par un fiduciaire. »

[44] Toutefois, selon le par. 227(4.1) de la *LIR*, aucun bien précis n'est transféré au patrimoine fiduciaire. L'incertitude demeure quant aux biens assujettis à la fiducie réputée et, partant, quant aux actifs qui ont quitté le patrimoine du constituant pour entrer dans celui de la fiducie. Bien que le par. 227(4.1) dispose que les biens soient réputés détenus « séparés des propres biens de la personne » et « ne pas faire partie du patrimoine ou des biens de la personne », cela ne suffit pas pour constituer un patrimoine autonome tel que celui envisagé par le régime civiliste de fiducie. Il découle du caractère autonome du patrimoine fiduciaire que les actifs détenus en fiducie doivent être des biens sur lesquels ni le constituant, ni le fiduciaire, ni le bénéficiaire n'a de droit de propriété. Cela va toutefois à l'encontre de l'intérêt créé en vertu du par. 227(4.1), parce que rien dans cette disposition ne prive la personne dont les actifs sont sujets à une fiducie réputée de droits de propriété sur ces actifs. Par conséquent, on ne retrouve pas l'élément principal d'une fiducie civiliste dans la fiducie réputée créée en application du par. 227(4.1) : il n'existe aucun patrimoine autonome auquel sont transférés des biens précis.

[45] En outre, selon le par. 227(4.1), la personne dont les actifs sont assujettis à la fiducie réputée agirait comme fiduciaire. Là encore, cela ne cadre pas avec la définition d'un fiduciaire en droit civil. La personne dont les actifs sont assujettis à une fiducie réputée en application du par. 227(4.1) ne « s'oblige [pas], par le fait de son acceptation, à détenir et à administrer » le patrimoine fiduciaire (art. 1260 *C.c.Q.*). Mais plus important encore, le fait que les actifs assujettis à la fiducie réputée sont indéterminés empêche carrément le fiduciaire de jouer son rôle. Aux termes du *C.c.Q.*, celui-ci « a la maîtrise et l'administration exclusive du patrimoine fiduciaire » et « exerce tous les droits afférents au

Thus, the trustee under s. 227(4.1) would be required to administer its own property — or at least an indefinite part of it — in the interest of Her Majesty (art. 1306 *C.C.Q.*). The trustee would be subject to obligations impossible to fulfill, such as the obligation not to mingle the administered property with its own (art. 1313 *C.C.Q.*). Obviously, one cannot act as an administrator of the property of others with respect to one's own property. It is therefore clear that the interest created by s. 227(4.1) has little, if anything, in common with the trust in civil law.

[46] In the common law, a trust arises when legal ownership and beneficial ownership of a particular property are separated (see *Valard Construction Ltd. v. Bird Construction Co.*, 2018 SCC 8, [2018] 1 S.C.R. 224, at para. 18). "Because a trust divides legal and beneficial title to property between a trustee and a beneficiary, respectively, the 'hallmark' characteristic of a trust is the fiduciary relationship existing between the trustee and the beneficiary, by which the trustee is to hold the trust property solely for the beneficiary's enjoyment" (para. 17 (footnote omitted)). As Rothstein J. wrote, because of this fiduciary relationship, "[t]he beneficial owner of property has been described as 'the real owner of property even though it is in someone else's name'" (*Pecore v. Pecore*, 2007 SCC 17, [2007] 1 S.C.R. 795, at para. 4, quoting *Csak v. Aumon* (1990), 69 D.L.R. (4th) 567 (Ont. H.C.J.), at p. 570).

[47] While the precise rights given to a beneficial owner may vary according to the terms of the trust and the principles of equity, I agree with the Crown that, where this type of interest exists, it will generally be inappropriate for the supervising judge to order a super-priority charge over the property subject to the interest, although the broad power conferred on the court by s. 11 of the *CCAA* would enable it to do so. Property held in trust cannot be said to belong to the trustee because "in equity, it belongs to another person" (*Henfrey*, at p. 31). However, a close

patrimoine et peut prendre toute mesure propre à en assurer l'affectation » (art. 1278). Ainsi, le fiduciaire visé au par. 227(4.1) serait tenu d'administrer ses propres biens — ou à tout le moins une partie indéterminée de ceux-ci — dans l'intérêt de Sa Majesté (art. 1306 *C.c.Q.*). Le fiduciaire serait assujetti à des obligations impossibles à remplir, comme celle de ne pas confondre les biens administrés avec ses propres biens (art. 1313 *C.c.Q.*). De toute évidence, une personne ne saurait agir en tant qu'administrateur des biens d'autrui à l'égard de ses propres biens. Il est donc clair que l'intérêt créé en vertu du par. 227(4.1) n'a pas grand-chose, sinon rien, en commun avec la fiducie en droit civil.

[46] En common law, une fiducie est constituée lorsque la propriété en common law et la propriété bénéficiaire d'un bien en particulier sont dissociées (voir *Valard Construction Ltd. c. Bird Construction Co.*, 2018 CSC 8, [2018] 1 R.C.S. 224, par. 18). « Étant donné que la fiducie divise le titre de propriété en common law et le titre bénéficiaire sur un bien entre un fiduciaire et un bénéficiaire, respectivement, la caractéristique [TRADUCTION] "distinctive" d'une fiducie réside dans la relation fiduciaire qui existe entre le fiduciaire et le bénéficiaire et suivant laquelle le premier doit détenir les biens en fiducie uniquement pour que le second puisse en jouir » (par. 17 (note en bas de page omise)). Ainsi que le juge Rothstein l'a écrit, du fait de cette relation fiduciaire, « [l]e propriétaire bénéficiaire d'un bien est [TRADUCTION] "le véritable propriétaire du bien même si ce dernier n'est pas à son nom" » (*Pecore c. Pecore*, 2007 CSC 17, [2007] 1 R.C.S. 795, par. 4, citant *Csak c. Aumon* (1990), 69 D.L.R. (4th) 567 (H.C.J. Ont.), p. 570).

[47] Bien que les droits précis conférés au propriétaire bénéficiaire puissent varier selon les modalités de la fiducie et les principes d'equity, je suis d'accord avec la Couronne pour dire que, lorsque la propriété bénéficiaire existe, il n'est généralement pas indiqué que le juge surveillant grève d'une charge super prioritaire les biens faisant l'objet de l'intérêt, encore que le vaste pouvoir conféré au tribunal par l'art. 11 de la *LACC* lui permettrait de le faire. On ne peut pas dire que les biens détenus en fiducie appartiennent au fiduciaire parce qu'« en *equity*, ils appartiennent

examination of the nature of the interest created by s. 227(4.1) of the *ITA* reveals that it does not create this type of interest because "[t]he employer is not actually required to hold the money separate and apart, the usual fiduciary obligations of a trustee are absent, and the trust exists without a *res*. The law of tracing is similarly corrupted" (R. J. Wood and R. T. G. Reeson, "The Continuing Saga of the Statutory Deemed Trust: *Royal Bank v. Tuxedo Transportation Ltd.*" (2000), 15 *B.F.L.R.* 515, at p. 532). In other words, the key attributes that allow the common law to refer to beneficial ownership as being a proprietary interest are missing.

à une autre personne » (*Henfrey*, p. 31). Toutefois, un examen attentif de la nature de l'intérêt créé par le par. 227(4.1) de la *LIR* révèle que ce dernier ne crée pas de propriété bénéficiaire parce que [TRADUCTION] « [l]'employeur n'est pas réellement tenu de détenir l'argent séparément, les obligations fiduciaires habituelles d'un fiduciaire sont absentes et la fiducie n'est associée à aucun bien spécifique. Le droit de retraçage s'en trouve lui aussi vicié » (R. J. Wood et R. T. G. Reeson, « The Continuing Saga of the Statutory Deemed Trust : *Royal Bank v. Tuxedo Transportation Ltd.* » (2000), 15 *B.F.L.R.* 515, p. 532). En d'autres termes, on ne retrouve pas les caractéristiques essentielles qui permettent en common law de qualifier la propriété bénéficiaire d'intérêt à titre de propriétaire.

[48] According to the common law understanding of a trust, the legal owner or trustee owes a fiduciary duty to the equitable owner or beneficiary. The fiduciary relationship impresses the office of trustee with three fundamental duties: the trustee must act honestly and with reasonable skill and prudence, the trustee cannot delegate the office, and the trustee cannot personally profit from its dealings with the trust property or its beneficiaries (see *Valard*, at para. 17). This severely restricts what the trustee may do with trust property and creates a relationship significantly different from the one between a debtor and a creditor. For instance, while a debtor may attempt to reduce its debt or reach a compromise, a trustee cannot, since it must always act in the best interest of the beneficiary and cannot consider its own interests. Similarly, while a debtor is liable to a creditor until the debt is repaid, a trustee is not liable to a beneficial owner where property is lost, unless it was lost through a breach of the standard of care owed (see E. E. Gillese, *The Law of Trusts* (3rd ed. 2014), at p. 14). In the case of the deemed trust, however, Parliament did not create such a fiduciary relationship. Parliament expressly contemplated a potential compromise between Her Majesty and the debtor in s. 6(3) of the *CCAA*. In addition, the terms of the *ITA* do not require that the debtor actually keep the property subject to the deemed trust separate and use it solely for the benefit of Her Majesty. In fact, Her Majesty does not enjoy the benefit of Her interest in the property while the property is held by

[48] Selon la conception que l'on se fait de la fiducie en common law, le propriétaire en common law ou le fiduciaire a une obligation fiduciaire envers le propriétaire en equity ou envers le propriétaire bénéficiaire. La relation fiduciaire attribue à la charge de fiduciaire trois devoirs fondamentaux : le fiduciaire doit agir honnêtement et de façon habile et prudente; le fiduciaire ne peut déléguer sa charge à autrui et le fiduciaire ne peut tirer un avantage personnel des opérations qu'il mène à l'égard des biens de la fiducie ou de ses rapports avec ses bénéficiaires (voir *Valard*, par. 17). Cela limite considérablement la marge de manœuvre du fiduciaire à l'égard des biens visés par la fiducie et crée une relation très différente de celle qui existe entre un débiteur et un créancier. Par exemple, si un débiteur peut chercher à réduire sa dette ou à trouver un compromis, un fiduciaire doit toujours agir dans l'intérêt supérieur du bénéficiaire et ne peut tenir compte de ses propres intérêts. De même, alors que le débiteur est redevable envers le créancier tant qu'il n'a pas remboursé sa dette, le fiduciaire n'est pas redevable envers le propriétaire bénéficiaire en cas de perte des biens, à moins que cette perte ne soit attribuable à l'inobservation de la norme de diligence à laquelle il était tenu (voir E. E. Gillese, *The Law of Trusts* (3e éd. 2014), p. 14). Dans le cas de la fiducie réputée, cependant, le législateur n'a pas créé une telle relation fiduciaire. Il a expressément envisagé un compromis potentiel entre Sa Majesté et le débiteur au par. 6(3) de la *LACC*. En outre, le libellé de la *LIR* n'oblige pas le débiteur à

the debtor. Instead, Parliament contemplated that the debtor would continue to use and dispose of the property subject to the trust for its own business purposes (see *First Vancouver*, at paras. 42-46).

scinder effectivement les biens assujettis à la fiducie réputée et à les utiliser uniquement au profit de Sa Majesté. En fait, Sa Majesté ne bénéficie pas de l'intérêt qu'elle possède dans le bien tant que celui-ci est détenu par le débiteur. Le législateur a plutôt envisagé que le débiteur continuerait à utiliser et à aliéner les biens assujettis à la fiducie à ses propres fins commerciales (voir *First Vancouver*, par. 42-46).

[49] Another core attribute of beneficial ownership is certainty as to the property that is subject to the trust (see Gillese, at p. 39). Many deemed trusts fail to provide for certainty of subject matter. For instance, in *Henfrey*, the Court considered the deemed trust created by the British Columbia *Social Service Tax Act*, R.S.B.C. 1979, c. 388. Like s. 227(4.1) of the *ITA*, the *Social Service Tax Act* provided that tax collected but not remitted was deemed to be held in trust for Her Majesty. It further provided that unremitted amounts were deemed to be held separate and apart from and form no part of the assets or estate of the tax collector. While McLachlin J. found that the property was identifiable at the time the tax was collected, she noted that "[t]he difficulty in this, as in most cases, is that trust property soon ceases to be identifiable. The tax money is mingled" (p. 34). Therefore, she concluded that there was no trust under general principles of equity. The legislature's attempt to resolve this problem by deeming the amounts to be separate from and form no part of the tax debtor's property was merely a tacit acknowledgment that "the reality is that after conversion the statutory trust bears little resemblance to a true trust. There is no property which can be regarded as being impressed with a trust" (p. 34).

[49] Une autre caractéristique essentielle de la propriété bénéficiaire est la certitude quant aux biens assujettis à la fiducie (voir Gillese, p. 39). Bon nombre de fiducies réputées ne satisfont pas au critère de la certitude quant à l'objet. Par exemple, dans l'affaire *Henfrey*, la Cour examinait une fiducie réputée créée en vertu de la *Social Service Tax Act*, R.S.B.C. 1979, c. 388, de la Colombie-Britannique. À l'instar du par. 227(4.1) de la *LIR*, la *Social Service Tax Act* prévoyait que l'impôt perçu, mais non versé, était réputé détenu en fiducie pour Sa Majesté. Elle prévoyait également que les montants non versés étaient réputés détenus séparément et ne pas faire partie du patrimoine ou des biens du percepteur d'impôt. Bien que la juge McLachlin ait conclu que le bien en fiducie était identifiable au moment de la perception de la taxe, elle a souligné que « [l]a difficulté que présente l'espèce, qui est la même que dans la plupart des autres cas, vient de ce que le bien en fiducie cesse bientôt d'être identifiable. Le montant de la taxe est confondu avec d'autres sommes » (p. 34). Elle a donc conclu qu'il n'y avait pas de fiducie selon les principes généraux de l'equity. La tentative de la législature de résoudre ce problème en déclarant que ce montant serait réputé détenu séparément du patrimoine du débiteur fiscal n'était qu'une reconnaissance tacite du fait qu'« en réalité, après l'affectation de la somme, la fiducie légale ressemble peu à une fiducie véritable. Il n'y a pas de bien qu'on puisse considérer comme sujet à la fiducie » (p. 34).

[50] In *First Vancouver*, this Court examined the nature of the interest created by s. 227(4.1) of the *ITA*. Writing for the Court, Iacobucci J. held that this provision creates a charge which "is in principle similar to a floating charge over all the assets of the tax debtor in the amount of the default" (para. 40). He concluded that Parliament specifically intended to create a charge with fluidity, a charge that could

[50] Dans l'affaire *First Vancouver*, notre Cour s'est penchée sur la nature de l'intérêt créé par le par. 227(4.1) de la *LIR*. S'exprimant au nom de la Cour, le juge Iacobucci a conclu que cette disposition crée une charge « s'apparentant, sur le plan des principes, à une charge flottante grevant, jusqu'à concurrence du montant en souffrance, l'ensemble des éléments d'actif du débiteur fiscal » (par. 40). Il

readily float over all of the debtor's assets rather than attach to a particular one (para. 33). Parliament's intention was to capture any property that comes into the possession of the tax debtor whilst simultaneously allowing any asset to be alienated and the proceeds of disposition to be captured (para. 5).

a conclu que le législateur souhaitait expressément créer une charge qui se caractériserait par une certaine fluidité et qui grèverait d'emblée la totalité des biens du débiteur plutôt qu'un bien en particulier (par. 33). L'intention du législateur était de viser tout bien se retrouvant en la possession du débiteur fiscal tout en permettant à ce dernier de se départir de tout bien et d'assujettir à la fiducie réputée le produit de la disposition de ce bien (par. 5).

[51] This lack of certainty as to the subject matter of the trust is even starker in the present case than in *Henfrey* or in *Sparrow Electric*, where there was certainty as to the assets until they were mingled. Section 227(4.1) purports to bring all assets owned by the debtor within its reach. Despite the wording of the section, this interest — one of the same nature as a "floating charge" — has no particular property to which it attaches. Without certainty of subject matter, equity cannot know which property the debtor has a fiduciary obligation to maintain in the beneficiary's interest and thus "[t]he notion of a trust without a *res* simply cannot be made sensible or coherent" (Wood and Reeson, at pp. 532-33 (footnote omitted); see also *Sparrow Electric*, at para. 31).

[51] Cette incertitude quant à l'objet de la fiducie est encore plus frappante en l'espèce que dans l'affaire *Henfrey* ou dans l'affaire *Sparrow Electric*, où il y avait certitude quant aux biens jusqu'au moment où ils avaient été confondus avec d'autres biens. Le paragraphe 227(4.1) a vocation de faire entrer dans son champ d'application tous les biens appartenant au débiteur. Malgré le libellé de la disposition, cet intérêt — qui participe de la nature d'une « charge flottante » — n'est associé à aucun bien spécifique. Sans certitude quant à l'objet, l'equity ne peut savoir sur quels biens porte l'obligation fiduciaire du débiteur stipulée au profit du bénéficiaire, de sorte qu'on [TRADUCTION] « ne peut tout simplement pas justifier l'idée d'une fiducie qui n'est associée à aucun bien précis » (Wood et Reeson, p. 532-533 (note en bas de page omise); voir aussi *Sparrow Electric*, par. 31).

[52] Parliament's decision to avoid certainty of subject matter was an intentional modification to the deemed trust following this Court's decision in *Dauphin Plains Credit Union Ltd. v. Xyloid Industries Ltd.*, [1980] 1 S.C.R. 1182. In *Dauphin Plains*, the Court refused to enforce Her Majesty's claim because the Crown had failed to establish that the moneys purported to be deducted actually existed or were kept in such a way as to be traceable (p. 1197). Traceability is another key aspect of a beneficial interest, since it allows the beneficial owner to enjoy the benefits of ownership, such as income from the property. It also ensures that the beneficial owner is responsible for the costs of ownership. By choosing not to attach Her Majesty's claim to any particular asset, Parliament has protected Her Majesty from the risks associated with asset ownership, including damage, depreciation and loss. I agree with Gonthier J., who, speaking of the predecessor to s. 227(4.1) (albeit in dissent), said

[52] La décision du législateur de dispenser de l'obligation de démontrer la certitude quant à l'objet est une modification intentionnelle qu'il a apportée à la fiducie réputée à la suite de la décision rendue par notre Cour dans *Dauphin Plains Credit Union Ltd. c. Xyloid Industries Ltd.*, [1980] 1 R.C.S. 1182. Dans l'arrêt *Dauphin Plains*, la Cour a refusé de rendre exécutoire la réclamation de Sa Majesté parce que la Couronne n'avait pas établi que les sommes censées être retenues existaient bel et bien ou qu'elles avaient été conservées de façon à pouvoir être retracées (p. 1197). La possibilité de retracer l'origine des biens est un autre aspect essentiel de l'intérêt bénéficiaire puisqu'elle permet au propriétaire bénéficiaire de profiter des avantages de la propriété, comme les revenus tirés du bien. Elle garantit également que le propriétaire bénéficiaire est responsable des coûts de la propriété. En décidant de n'associer la créance de Sa Majesté à aucun bien en particulier, le législateur a protégé Sa Majesté des risques que comporte la

that "this subsection is antithetical to tracing in the traditional sense, to the extent that it requires no link at all between the subject matter of the trust and the fund or asset which the subject matter is being traced into" (*Sparrow Electric*, at para. 37). Had Parliament wanted to confer a beneficial ownership interest upon Her Majesty, it would have had to impose these associated risks as well.

propriété d'un bien, y compris l'endommagement, la dépréciation et la perte. Je suis d'accord avec le juge Gonthier, qui (même s'il était dissident), déclarait au sujet du prédécesseur du par. 227(4.1) : « . . . ce paragraphe est à l'opposé du sens traditionnel du mot "retracer", dans la mesure où il ne nécessite aucun lien entre l'objet de la fiducie et le fonds ou l'actif auquel on rattache cet objet . . . » (*Sparrow Electric*, par. 37). Mais, si le législateur avait voulu conférer un intérêt de propriété bénéficiaire à Sa Majesté, il lui aurait fallu aussi faire supporter à cette dernière les risques qui y sont associés.

[53] For the same reason as in *Henfrey*, the statement that property is deemed to be removed from the debtor's estate is equally ineffective at preventing a judge from ordering super priorities over the debtor's property. Because the deemed trust does not attach to specific property and the debtor remains free to alienate any of its assets, no property is actually removed from the debtor's estate.

[53] Pour la même raison que dans l'affaire *Henfrey*, l'énoncé selon lequel des biens sont réputés soustraits au patrimoine du débiteur est tout aussi inefficace pour empêcher un juge de grever les biens du débiteur de charges super prioritaires. Puisque la fiducie réputée n'est associée à aucun bien spécifique, et que le débiteur reste libre d'aliéner n'importe lequel de ses biens, aucun bien n'est soustrait en fait de son patrimoine.

[54] This interpretation is supported by the existence of s. 227(4.2) of the *ITA*, which specifically anticipates other interests taking priority over the deemed trust (something that would be impossible if there were an ownership interest). It states that "[f]or the purposes of subsections 227(4) and 227(4.1), a security interest does not include a prescribed security interest". In the *Income Tax Regulations*, C.R.C., c. 945, s. 2201(1), the Governor in Council has defined "prescribed security interest" as a registered mortgage "that encumbers land or a building, where the mortgage is registered . . . before the time the amount is deemed to be held in trust by the person". Therefore, in certain situations, mortgage holders take priority over Her Majesty.

[54] Cette interprétation est appuyée par l'existence du par. 227(4.2) de la *LIR*, qui prévoit expressément que d'autres intérêts prennent rang devant la fiducie réputée (ce qui serait impossible s'il existait un intérêt à titre de propriétaire). Il dispose que « [p]our l'application des paragraphes (4) et (4.1), n'est pas une garantie celle qui est visée par règlement ». Dans le *Règlement de l'impôt sur le revenu*, C.R.C., c. 945, par. 2201(1), le gouverneur en conseil a défini comme suit la garantie visée par règlement : « . . . hypothèque garantissant l'exécution d'une obligation de la personne qui grève un fonds de terre ou un bâtiment, à condition que l'hypothèque soit enregistrée [. . .] avant le moment où la personne est réputée détenir le montant en fiducie ». Par conséquent, dans certaines situations, les créanciers hypothécaires ont priorité sur Sa Majesté.

[55] I reiterate that, without specific property to attach to, there can be no trust. The fact that s. 227(4.1) specifically anticipates that the character of assets will change over time and automatically releases any assets that the debtor chooses to alienate from the deemed trust means that Parliament had in mind something different from beneficial ownership in the

[55] Je répète qu'il ne peut y avoir de fiducie si aucun bien précis n'y est associé. Le fait que le par. 227(4.1) prévoit expressément que la nature des biens change avec le temps, et ce, indépendamment des biens que le débiteur choisit de soustraire à la fiducie réputée, démontre que le législateur avait autre chose en tête que la propriété bénéficiaire au sens où

common law sense of the word. I tend to agree with Noël J.A.'s assessment of s. 227(4.1): "The deemed trust mechanism, whether applied in Quebec or elsewhere, effectively creates in favour of the Crown a security interest . . ." (*Caisse populaire d'Amos*, at para. 46).

l'entend la common law. Je suis portée à souscrire à l'avis du juge Noël sur le par. 227(4.1) : « Le mécanisme de la fiducie réputée, qu'il soit appliqué au Québec ou ailleurs, a comme effet de créer en faveur de la Couronne une garantie . . . » (*Caisse populaire d'Amos*, par. 46).

[56] Other scholars agree that s. 227(4.1) "merely secures payment or performance of an obligation" (R. J. Wood, "Irresistible Force Meets Immovable Object: *Canada v. Canada North Group Inc.*" (2020), 63 *Can. Bus. L.J.* 85, at p. 95; see also A. Duggan and J. Ziegel, "Justice Iacobucci and the Canadian Law of Deemed Trusts and Chattel Security" (2007), 57 *U.T.L.J.* 227, at pp. 245-46). Wood and Reeson reach the particularly damning conclusion that "[t]he concept of a trust is used in the legislation, but in virtually every respect the characteristics of a trust are lacking" and thus "the use of inappropriate legal concepts" has led to the creation of a "statutory provision [that] is deeply flawed" (pp. 531-32). They "suspec[t] that the intention of the drafters was that Revenue Canada should obtain a charge on all the assets of the debtor", and they state that "the statutory deemed trust is nothing more than a legislative mechanism that is intended to create a non-consensual security interest in the assets of the employer" (p. 533).

[56] D'autres universitaires sont d'accord pour dire que le par. 227(4.1) [TRADUCTION] « garantit simplement le paiement ou l'exécution d'une obligation » (R. J. Wood, « Irresistible Force Meets Immovable Object : *Canada v. Canada North Group Inc.* » (2020), 63 *Rev. can. dr. comm.* 85, p. 95; voir aussi A. Duggan et J. Ziegel, « Justice Iacobucci and the Canadian Law of Deemed Trusts and Chattel Security » (2007), 57 *U.T.L.J.* 227, p. 245-246). Wood et Reeson en arrivent à la conclusion particulièrement accablante que [TRADUCTION] « [l]a loi utilise le concept de fiducie, mais à presque tous les égards, les caractéristiques de la fiducie sont absentes », de sorte que « le recours à des concepts juridiques inadaptés » a mené à la création d'une « disposition législative profondément déficiente » (p. 531-532). Ils [TRADUCTION] « soupçonne[nt] que l'intention des rédacteurs était que Revenu Canada se voit conférer une charge grevant l'ensemble du patrimoine du débiteur », et ajoutent que « la fiducie réputée créée par la loi n'est rien de plus qu'un mécanisme législatif visant à créer une garantie non consensuelle grevant les biens de l'employeur » (p. 533).

[57] Nonetheless, for our purposes it is not necessary to conclusively determine whether the interest created by s. 227(4.1) should be characterized as a security interest. What is clear is that s. 227(4.1) does not create a beneficial interest that can be considered a proprietary interest. Like the deemed trust at issue in *Henfrey*, it "does not give [the Crown] the same property interest a common law trust would" (p. 35). Without attaching to specific property, creating the usual right to the enjoyment of property or the fiduciary obligations of a trustee, the interest created by s. 227(4.1) lacks the qualities that allow a court to refer to a beneficiary as a beneficial owner. Therefore, I do not accept the Crown's argument that Her Majesty has a proprietary interest in a debtor's property that is adequate to prevent the exercise of a

[57] Néanmoins, pour nos besoins, il n'est pas nécessaire de trancher de façon définitive la question de savoir si l'intérêt créé par le par. 227(4.1) doit être qualifié de garantie. Ce qui est clair, en revanche, c'est que le par. 227(4.1) ne crée pas un droit de bénéficiaire qui peut être considéré comme un intérêt à titre de propriétaire. À l'instar de la fiducie réputée dont il était question dans l'affaire *Henfrey*, le par. 227(4.1) « ne confère pas [à la Couronne] le même droit de propriété qu'une fiducie de *common law* » (p. 35-36). N'étant associé à aucun bien précis, ce qui conférerait à son titulaire le droit habituel à la jouissance du bien ou imposerait les obligations d'un fiduciaire, l'intérêt créé par le par. 227(4.1) ne possède pas les attributs qui permettent à un tribunal de qualifier le bénéficiaire de propriétaire bénéficiaire.

supervising judge's discretion to order super-priority charges under s. 11 of the *CCAA* or any of the sections that follow it.

Par conséquent, je n'accepte pas l'argument de la Couronne selon lequel Sa Majesté a un intérêt à titre de propriétaire dans les biens du débiteur qui suffit à empêcher le juge surveillant d'ordonner des charges super prioritaires en vertu du pouvoir discrétionnaire que lui confère l'art. 11 de la *LACC* ou l'un ou l'autre des articles qui le suivent.

(2) Does Section 227(4.1) of the *ITA* Create a Super Priority That Conflicts With a Court-Ordered Super-Priority Charge?

(2) Le paragraphe 227(4.1) de la *LIR* crée-t-il une super priorité qui entre en conflit avec une charge super prioritaire d'origine judiciaire?

[58] The Crown also refers to the part of s. 227(4.1) which states that the Receiver General shall be paid the proceeds of a debtor's property "in priority to all such security interests", as defined in s. 224(1.3). In the Crown's view, court-ordered super-priority charges under s. 11 of the *CCAA* or any of the sections that follow it are security interests within the meaning of s. 224(1.3) and therefore Her Majesty's interest has priority over them.

[58] La Couronne s'appuie également sur la partie du par. 227(4.1) suivant laquelle le receveur général reçoit le produit découlant des biens du débiteur « par priorité sur une telle garantie », au sens du par. 224(1.3). De l'avis de la Couronne, les charges super prioritaires ordonnées par le tribunal en vertu de l'art. 11 de la *LACC* ou de l'un ou l'autre des articles qui le suivent sont des garanties au sens du par. 224(1.3) et, partant, l'intérêt de Sa Majesté a priorité sur elles.

[59] My colleagues Justices Brown and Rowe point to the legislative history of s. 227(4.1) as evidence that Parliament intended Her Majesty's deemed trust to have "absolute priority" over all other security interests (para. 201). In particular, they rely upon Justice Iacobucci's comment in *Sparrow Electric* that "it is open to Parliament to step in and assign absolute priority to the deemed trust" by using the words "shall be paid to the Receiver General in priority to any such security interest" (para. 202, citing *Sparrow Electric*, at para. 112). They further rely upon the press release accompanying the amendments, which stated that the deemed trust was to have absolute priority.

[59] Mes collègues les juges Brown et Rowe invoquent l'historique législatif du par. 227(4.1) comme preuve que le législateur voulait que la fiducie réputée de Sa Majesté ait une « priorité absolue » sur toutes les autres garanties (par. 201). Ils s'appuient en particulier sur le commentaire du juge Iacobucci dans l'arrêt *Sparrow Electric* selon lequel « il est loisible au législateur d'intervenir et d'accorder la priorité absolue à la fiducie réputée » en employant les mots « doi[vent] être payée[s] au receveur général par priorité sur toute autre garantie au titre de ce[s] somme[s] » (par. 202, citant *Sparrow Electric*, par. 112). Ils s'appuient également sur le communiqué de presse accompagnant les modifications qui indiquait que la fiducie réputée devait avoir priorité absolue.

[60] With respect, I disagree with this reasoning. *Sparrow Electric* dealt with a type of interest very different from the one before us now. In *Sparrow Electric*, this Court held that a fixed and specific charge over the tax debtor's inventory had priority over Her Majesty's deemed trust created by the *ITA*. Thus the purpose of the amendments was to "clarify that the deemed trusts for unremitted source

[60] Avec égards, je ne suis pas d'accord avec ce raisonnement. L'affaire *Sparrow Electric* portait sur un type d'intérêt très différent de celui dont nous avons à traiter aujourd'hui. Dans l'arrêt *Sparrow Electric*, notre Cour a jugé qu'une charge fixe et spécifique grevant les stocks du débiteur fiscal avait priorité sur la fiducie réputée que la *LIR* constitue en faveur de Sa Majesté. Les modifications cherchaient

deductions and GST apply whether or not other security interests have been granted in respect of the inventory or trade receivables of a business" (Department of Finance Canada, *Unremitted Source Deductions and Unpaid GST* (April 7, 1997), at p. 2). If Parliament had intended that the deemed trust have absolute priority, it would not have enacted s. 227(4.2) at the same time. As noted above, s. 227(4.2) provides that "a security interest does not include a prescribed security interest", and thus specifically envisions that the deemed trust will not have absolute priority. In my view, by using the words "in priority to all such security interests" in s. 227(4.1), Parliament intended that the priority be absolute not over all possible interests, but only over security interests as defined in s. 224(1.3). What must therefore be determined is whether a court-ordered super-priority charge under the *CCAA* falls within that definition.

[61] Section 224(1.3) reads as follows:

security interest means any interest in, or for civil law any right in, property that secures payment or performance of an obligation and includes an interest, or for civil law a right, created by or arising out of a debenture, mortgage, hypothec, lien, pledge, charge, deemed or actual trust, assignment or encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for . . . .

[62] This definition is expansive. However, the list of illustrative security interests makes it clear that a super-priority charge created under the *CCAA* cannot fall within its meaning. Court-ordered super-priority charges are utterly different from any of the interests listed. These super-priority charges are granted, not for the sole benefit of the holder of the charge, but to facilitate restructuring in furtherance of the interests of all stakeholders. In this way, they benefit the creditors as a group. The fact that Parliament chose to provide a list of examples whose nature is so unlike that of a court-ordered super-priority charge demonstrates that it must have had a very different type of interest in mind when drafting s. 224(1.3). I

donc à « préciser que les fiducies [réputées] relatives aux retenues à la source non versées et à la TPS impayée s'appliquent indépendamment du fait que d'autres garanties aient été consenties à l'égard des stocks ou des comptes clients d'une entreprise » (Ministère des Finances du Canada, *Retenues à la source non versées et TPS impayée* (7 avril 1997), p. 2). Si le législateur avait voulu que la fiducie réputée ait priorité absolue, il n'aurait pas adopté simultanément le par. 227(4.2). Comme je l'ai mentionné plus haut, le par. 227(4.2) prévoit que « n'est pas une garantie celle qui est visée par règlement », et il envisage donc expressément que la fiducie réputée ne bénéficie pas d'une priorité absolue. À mon avis, en utilisant les mots « par priorité sur une telle garantie » au par. 227(4.1), le législateur voulait que la priorité soit absolue non pas sur toutes les garanties possibles, mais seulement sur les garanties au sens où on l'entend au par. 224(1.3). Il faut donc déterminer si une charge super prioritaire ordonnée par le tribunal en vertu de la *LACC* répond à cette définition.

[61] Voici la version anglaise du par. 224(1.3) :

security interest *means any interest in, or for civil law any right in, property that secures payment or performance of an obligation and includes an interest, or for civil law a right, created by or arising out of a debenture, mortgage, hypothec, lien, pledge, charge, deemed or actual trust, assignment or encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for* . . .

[62] Cette définition est large. Il ressort toutefois de la liste d'exemples de garanties qu'une charge super prioritaire créée en vertu de la *LACC* n'y répond pas. Les charges super prioritaires d'origine judiciaire sont radicalement différentes de n'importe quel des intérêts énumérés. Ces charges super prioritaires sont constituées non pas au seul bénéfice de leur détenteur, mais pour faciliter la restructuration dans l'intérêt de toutes les parties prenantes. Elles bénéficient ainsi à l'ensemble des créanciers. Le fait que le législateur a choisi de dresser une liste d'exemples de nature tellement différente d'une charge super prioritaire démontre qu'il avait sûrement à l'esprit une garantie fort différente au moment où il a rédigé

could not agree more with Professor Wood about the limited class of interests that Parliament had in mind:

> [Court-ordered super-priority charges] are fundamentally different in nature from security interests that arise by way of agreement between the parties and from non-consensual security interests that arise by operation of law. Court-ordered charges are unlike conventional consensual and non-consensual security interests in that they are integrally connected to insolvency proceedings that operate for the benefit of the creditors as a group. Given the fundamentally different character of court-ordered charges, it would be reasonable to expect that they would be specifically mentioned in the ITA definition of a security interest if they were to be included. [Emphasis added; p. 98.]

[63] My colleagues Brown and Rowe JJ. allege that this interpretation of s. 224(1.3) is contrary to our Court's decision in *Caisse populaire Desjardins de l'Est de Drummond*, where Rothstein J. wrote that the provided examples "do not diminish the broad scope of the words 'any interest in property'" (para. 15; see also para. 14). With respect, I disagree with my colleagues. As Justice Rothstein explained at para. 40, his comments were made in response to the argument that the list of examples of security interests was exhaustive. I agree with him that the list of examples provided is not exhaustive. However, the examples remain illustrative of the types of interests that Parliament had in mind and are clearly united by a common theme or class because Parliament employed a compound "means . . . and includes" structure to establish its definition: "*security interest* means any interest in, or for civil law any right in, property that secures payment or performance of an obligation and includes . . . ". In my view, this structure evidences Parliament's intent that the list have limiting effect, such that only the instruments enumerated and instruments that are similar in nature fall within the definition. The critical difference between the listed security interests and super-priority charges ordered under s. 11 of the *CCAA* or any of the sections that follow it explains both why the latter are excluded from the list of specific instruments and why there can be no suggestion that they may be included in the broader term "encumbrance" at

le par. 224(1.3). Je suis tout à fait d'accord avec le professeur Wood au sujet du nombre limité de garanties qu'avait en tête le législateur :

> [TRADUCTION] [Les charges super prioritaires d'origine judiciaire] sont d'une nature radicalement différente de celle des garanties résultant de l'accord intervenu entre les parties ou des garanties non consensuelles découlant de l'application de la loi. Elles se distinguent des garanties consensuelles et non consensuelles classiques en ce qu'elles sont intimement liées aux procédures d'insolvabilité qui se déroulent au profit de l'ensemble des créanciers. Étant donné le caractère radicalement différent des charges d'origine judiciaire, il serait raisonnable de s'attendre à ce qu'elles soient expressément mentionnées dans la définition de « garantie » qui figure dans la LIR si elles devaient en faire partie. [Je souligne; p. 98.]

[63] Mes collègues les juges Brown et Rowe soutiennent que l'interprétation exposée ci-dessus du par. 224(1.3) va à l'encontre de l'arrêt *Caisse populaire Desjardins de l'Est de Drummond* de notre Cour, où le juge Rothstein a écrit que les exemples donnés « n'[ont] pas pour effet de limiter la portée générale de l'expression "[d]roit sur un bien" » (par. 15; voir aussi par. 14). Avec égards, je ne suis pas d'accord avec mes collègues. Comme l'a expliqué le juge Rothstein au par. 40, il a fait ses commentaires en réponse à l'argument selon lequel la liste des exemples de garanties était exhaustive. Je conviens avec lui que la liste des exemples fournis ne l'était pas. Cependant, les exemples illustrent toujours les types de garantie qu'avait à l'esprit le législateur et celles-ci sont clairement unies par une catégorie ou un thème commun parce que, dans la version anglaise du texte de loi, le législateur a structuré sa définition autour des termes « *means* [. . .] *and includes* » : « *security interest means any interest in, or for civil law any right in, property that secures payment or performance of an obligation and includes* . . . » À mon avis, cette formulation témoigne de l'intention du législateur de restreindre la portée de l'énumération, si bien que seuls les instruments énumérés ou les instruments de nature similaire répondent à la définition. La différence essentielle entre les garanties énumérées et les charges super prioritaires constituées en vertu de l'art. 11 de la *LACC* ou de l'un ou l'autre des articles qui le suivent explique

the end of that list. The *ejusdem generis* principle supports this position by limiting the generality of the final words on the basis of the narrow enumeration that precedes them (*National Bank of Greece (Canada) v. Katsikonouris*, [1990] 2 S.C.R. 1029, at p. 1040). All of the other instruments arise by agreement or by operation of law. Therefore, court-ordered super-priority charges under s. 11 or any of the sections that follow it are different in kind from anything on the list.

[64] Using the list of specific examples to ascertain Parliament's intent in this case is also consistent with the presumption against tautology. In *McDiarmid Lumber Ltd. v. God's Lake First Nation*, 2006 SCC 58, [2006] 2 S.C.R. 846, McLachlin C.J. defined this presumption in the following way:

> It is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain: Sullivan, at p. 158. Thus, "[e]very word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose" (p. 158). This principle is often invoked by courts to resolve ambiguity or to determine the scope of general words.

(Para. 36, quoting R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 158; see also *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20, [2006] 1 S.C.R. 715, at para. 45.)

[65] The *ITA* contains two definitions of "security interest", in s. 224(1.3) and s. 18(5). For the purposes of computing taxpayer income, Parliament chose to define "security interest" in s. 18(5) in nearly the same manner as in s. 224(1.3), but without listing the ten specific security instruments: "*security interest*, in respect of a property, means an interest in, or for civil law a right in, the property that secures payment of an obligation". The presumption

à la fois leur exclusion de la liste des instruments spécifiques et le fait qu'elles ne sauraient être visées par la définition plus large du terme « charge » à la fin de cette liste. La règle *ejusdem generis* appuie cette position en limitant la portée générale des derniers termes sur la base de l'énumération des exemples précis qui les précède (*Banque nationale de Grèce (Canada) c. Katsikonouris*, [1990] 2 R.C.S. 1029, p. 1040). Tous les autres instruments sont le résultat d'un accord ou de l'application de la loi. Par conséquent, les charges super prioritaires ordonnées par un tribunal en vertu de l'art. 11 ou de l'un ou l'autre des articles qui le suivent sont d'un type différent de toutes les garanties figurant dans l'énumération.

[64] Recourir à la liste d'exemples précis pour établir l'intention du législateur en l'espèce s'accorde aussi avec la présomption d'absence de tautologie. Dans l'arrêt *McDiarmid Lumber Ltd. c. Première Nation de God's Lake*, 2006 CSC 58, [2006] 2 R.C.S. 846, la juge en chef McLachlin définit ainsi cette présomption :

> Le législateur est présumé ne pas utiliser de mots superflus ou dénués de sens, ne pas se répéter inutilement ni s'exprimer en vain : Sullivan, p. 158. Partant, [TRADUCTION] « [c]haque mot d'une loi est présumé avoir un sens et jouer un rôle précis dans la réalisation de l'objectif du législateur » (p. 158). Les tribunaux recourent souvent à ce principe pour résoudre une ambiguïté ou déterminer la portée d'un terme général.

(Par. 36, citant R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4e éd. 2002), p. 158; voir aussi *Placer Dome Canada Ltd. c. Ontario (Ministre des Finances)*, 2006 CSC 20, [2006] 1 R.C.S. 715, par. 45.)

[65] On retrouve dans la *LIR* deux définitions du terme « garantie », au par. 224(1.3) et au par. 18(5). Pour les besoins du calcul des revenus des contribuables, le législateur a choisi de définir au par. 18(5) le mot « garantie » d'une manière presque identique qu'au par. 224(1.3), sans toutefois énumérer les dix mêmes instruments de garantie spécifiques : « *garantie* Est une garantie relative à un bien tout intérêt ou, pour l'application du droit civil, tout droit sur le bien

against tautology means that we must presume that Parliament included the specific additional words in s. 224(1.3) because they "have a specific role to play in advancing the legislative purpose" (*Placer Dome*, at para. 45, quoting R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 159). Applying the presumption against tautology demonstrates that Parliament intended interpretive weight to be placed on the examples.

[66] To come back to *Caisse populaire Desjardins de l'Est de Drummond*, I agree with Rothstein J. that the definition of "security interest" in s. 224(1.3) of the *ITA* is expansive such that it "does not require that the agreement between the creditor and debtor take any particular form" (para. 15). However, I am of the view that there is a key restriction in this expansive definition. The definition focuses on interests created either by consensual agreement or by operation of law, and these types of interests are usually designed to protect the rights of a single creditor, usually to the detriment of other creditors. In that case, the Court was considering whether a right to compensation conferred on a single creditor by a contract entered into between that creditor and the debtor was a security interest within the meaning of s. 224(1.3). The situation at issue in that case was completely different than the one at issue in the present case. Indeed, in the present case, the interest of the participants in the restructuring is created by a court order, not by an agreement or by operation of law. As I have said above, when a judge orders a super-priority charge in *CCAA* proceedings, it is quite a different type of interest as the *CCAA* restructuring process benefits all creditors and not one in particular.

[67] Finally, if Parliament had wanted to include court-ordered super-priority charges in the definition of "security interest", it would have said so specifically. Parliament must be taken to have legislated with the operation of the *CCAA* in mind. In the words of Professor Sullivan, "[t]he legislature is presumed to know its own statute book and to draft

qui garantit le paiement d'une obligation ». Selon la présomption d'absence de tautologie, il nous faut présumer que le législateur a inséré certains termes précis au par. 224(1.3) parce qu'ils « joue[nt] un rôle précis dans la réalisation de l'objectif du législateur » (*Placer Dome*, par. 45, citant R. Sullivan, *Driedger on the Construction of Statutes* (3e éd. 1994), p. 159). L'application de la présomption d'absence de tautologie démontre que le législateur voulait que l'on attribue une valeur interprétative aux exemples.

[66] Pour revenir à l'arrêt *Caisse populaire Desjardins de l'Est de Drummond*, je conviens avec le juge Rothstein que la définition de « garantie » figurant au par. 224(1.3) de la *LIR* est large de sorte qu'elle « n'exige pas que l'entente entre le créancier et le débiteur revête une forme particulière » (par. 15). Mais si large soit-elle, elle contient à mon sens une limite importante. La définition est axée sur les intérêts créés par accord consensuel ou par application de la loi, et ces types d'intérêts visent habituellement à protéger les droits d'un seul créancier, en général au détriment des autres créanciers. Dans cette affaire, la Cour se demandait si un droit de compensation accordé à un seul créancier au moyen d'une convention intervenue entre ce créancier et la débitrice était une garantie au sens du par. 224(1.3). La situation en cause dans cette affaire était tout à fait différente de celle en l'espèce. En effet, dans la présente affaire, l'intérêt des participants à la restructuration est créé par ordonnance judiciaire, et non par accord ou par application de la loi. Comme je l'ai dit précédemment, lorsqu'un juge ordonne une charge super prioritaire dans une procédure intentée sous le régime de la *LACC*, il s'agit d'un type d'intérêt très différent, car le processus de restructuration prévu par cette loi bénéficie à tous les créanciers, et non à un seul en particulier.

[67] Enfin, si le législateur avait voulu inclure les charges super prioritaires d'origine judiciaire dans la définition de « garantie », il l'aurait dit expressément. Il faut tenir pour acquis que le législateur a légiféré en tenant compte de l'application de la *LACC*. Pour citer la professeure Sullivan, [TRADUCTION] « [l]e législateur est présumé connaître ses propres lois et

each new provision with regard to the structures, conventions, and habits of expression as well as the substantive law embodied in existing legislation" (Sullivan (2014), at p. 422 (footnote omitted)). Given that, in *Indalex*, this Court has already found that granting super-priority charges is critical as "a key aspect of the debtor's ability to attempt a workout", one would expect Parliament to use clearer language where such a definition could jeopardize the operation of another one of its Acts. I am therefore in total disagreement with my colleagues Justices Brown and Rowe that "nothing in the definition of security interest in the *ITA* precludes the inclusion of an interest that is designed to operate to the benefit of all creditors" (para. 210). To the contrary, everything hints at priming charges being excluded from the definition of security interest.

rédiger chaque nouvelle disposition en tenant compte des structures, des conventions et des formules d'expression, de même que du droit substantif exprimé dans la législation existante » (Sullivan (2014), p. 422 (note en bas de page omise)). Puisque, dans l'arrêt *Indalex*, notre Cour a déjà statué que l'octroi d'une charge super prioritaire « constitue un élément clé de la capacité du débiteur de tenter de conclure un arrangement », on s'attendrait à ce que le législateur utilise des termes plus clairs dans les cas où une telle définition pourrait compromettre l'application d'une autre de ses propres lois. Je suis donc en total désaccord avec mes collègues les juges Brown et Rowe quand ils affirment que « rien dans la définition de "garantie" qui figure dans la *LIR* ne permet d'exclure une garantie conçue pour fonctionner au profit de tous les créanciers » (par. 210). Au contraire, tout tend à démontrer que les charges super prioritaires sont exclues de la définition de « garantie ».

[68] In conclusion, a court-ordered super-priority charge under the *CCAA* is not a security interest within the meaning of s. 224(1.3) of the *ITA*. As a result, there is no conflict between s. 227(4.1) of the *ITA* and the Initial Order made in this case. I therefore respectfully disagree with my colleague Justice Moldaver's suggestion that there may be a conflict between s. 11 of the *CCAA* and the *ITA* (para. 258). The Initial Order's super-priority charges prevail over the deemed trust.

[68] En conclusion, une charge super prioritaire ordonnée par un tribunal en vertu de la *LACC* n'est pas une garantie au sens du par. 224(1.3) de la *LIR*. Il n'y a donc pas de conflit entre le par. 227(4.1) de la *LIR* et l'ordonnance initiale rendue en l'espèce. Avec égards, je ne souscris pas à l'idée de mon collègue le juge Moldaver suivant laquelle il y a peut-être un conflit entre l'art. 11 de la *LACC* et la *LIR* (par. 258). Les charges super prioritaires constituées aux termes de l'ordonnance initiale l'emportent sur la fiducie réputée.

C. *Was It Necessary for the Initial Order to Subordinate Her Majesty's Claim Protected by a Deemed Trust in This Case?*

C. *Était-il nécessaire que l'ordonnance initiale subordonne la réclamation de Sa Majesté protégée par une fiducie réputée en l'espèce?*

[69] Finally, I must now identify the provision in which the Initial Order here should be grounded. While the initial order under consideration in *Indalex* was based on the court's equitable jurisdiction, in most instances, orders in *CCAA* proceedings should be considered an exercise of statutory power (*Century Services*, at paras. 65-66).

[69] Enfin, je dois maintenant déterminer sur quelle disposition l'ordonnance initiale devrait reposer. Bien que l'ordonnance examinée dans l'arrêt *Indalex* était fondée sur la compétence du tribunal en equity, dans la plupart des cas, les ordonnances rendues dans le cadre des procédures engagées sous le régime de la *LACC* devraient être considérées comme découlant de l'exercice d'un pouvoir conféré par la loi (*Century Services*, par. 65-66).

[70] As discussed above, a supervising court's authority to order super-priority charges is grounded

[70] Comme nous l'avons vu plus haut, le pouvoir du tribunal de surveillance d'ordonner des charges

in its broad discretionary power under s. 11 of the *CCAA* and also in the more specific grants of authority under ss. 11.2, 11.4, 11.51 and 11.52. Those provisions authorize the court to grant certain priming charges that rank ahead of the claims of "any secured creditor". While I have already concluded that Her Majesty does not have a proprietary interest as a result of Her deemed trust, it is less certain whether Her Majesty is a "secured creditor" under the *CCAA*. Professor Wood is of the view that Her Majesty is not a "secured creditor" under the *CCAA* by virtue of Her deemed trust interest; rather, ss. 37 to 39 of the *CCAA* create "two distinct approaches — one that applies to a deemed trust, the other that applies when a statute gives the Crown the status of a secured creditor" (p. 96). Therefore, the ranking of a priming charge ahead of the deemed trust would fall outside the scope of the express priming charge provisions. I do not need to definitively determine if Her Majesty falls within the definition of "secured creditor" under the *CCAA* by virtue of Her trust. Instead, I would ground the supervising court's power in s. 11, which "permits courts to create priming charges that are not specifically provided for in the *CCAA*" (p. 98). I respectfully disagree with the suggestion of my colleagues Brown and Rowe JJ. that Professor Wood or any other author has suggested that s. 11 is limited by the specific provisions that follow it (para. 228). To the contrary, this Court said in *Century Services*, at paras. 68-70, that s. 11 provides a very broad jurisdiction that is not restricted by the availability of more specific orders.

super prioritaires est fondé sur le vaste pouvoir discrétionnaire que lui confère l'art. 11 de la *LACC*, ainsi que sur les pouvoirs plus spécifiques que lui accordent les art. 11.2, 11.4, 11.51 et 11.52. Ces dispositions autorisent le tribunal à accorder certaines charges prioritaires qui prennent rang devant les créances de « tout créancier garanti ». Bien que j'aie déjà conclu que Sa Majesté ne possède pas d'intérêt à titre de propriétaire du fait de sa fiducie présumée, il est moins sûr qu'elle soit un « créancier garanti » au sens de la *LACC*. Selon le professeur Wood, la fiducie présumée dont bénéficie Sa Majesté ne lui confère pas la qualité de « créancier garanti » au sens de la *LACC*. Les articles 37 à 39 de la *LACC* créent plutôt [TRADUCTION] « deux approches distinctes : l'une qui s'applique à la fiducie réputée, l'autre qui entre en jeu lorsque la loi reconnaît à la Couronne la qualité de "créancier garanti" » (p. 96). Par conséquent, le fait de faire passer une charge prioritaire devant la fiducie réputée déborderait le cadre des dispositions portant expressément sur les charges prioritaires. Je n'ai pas à trancher de façon définitive la question de savoir si Sa Majesté répond à la définition de « créancier garanti » au sens de la *LACC* du fait de sa fiducie. Je ferais plutôt reposer le pouvoir du tribunal de surveillance sur l'art. 11, qui « permet aux tribunaux de constituer des charges prioritaires qui ne sont pas expressément prévues par la *LACC* » (p. 98). Avec égards, je ne suis pas d'accord avec la suggestion de mes collègues les juges Brown et Rowe suivant laquelle le professeur Wood ou d'autres auteurs auraient laissé entendre que la portée de l'art. 11 est limitée par les dispositions spécifiques qui le suivent (par. 228). Au contraire, notre Cour a déclaré aux par. 68-70 de l'arrêt *Century Services* que la possibilité pour le tribunal de rendre des ordonnances plus spécifiques n'avait pas pour effet de restreindre le vaste pouvoir conféré par l'art. 11.

[71] My colleagues Brown and Rowe JJ. also argue that "priming charges cannot supersede the Crown's deemed trust claim because they may attach *only* to *the property of the debtor's company*" (para. 223 (emphasis in original)). With respect, this argument cannot stand because, although ss. 11.2, 11.51 and 11.52 of the *CCAA* contain this restriction, there is

[71] Mes collègues les juges Brown et Rowe affirment également que « les charges super prioritaires ne peuvent pas prendre rang devant la réclamation de la Couronne au titre de la fiducie réputée puisqu'elles peuvent se rattacher *uniquement* aux *biens de la compagnie débitrice* » (par. 223 (en italiques dans l'original)). Avec égards, cet argument ne peut être retenu,

no such restriction in s. 11. As Lalonde J. recognized, [TRANSLATION] "[i]n exercising the authority conferred by the *CCAA*, including inherent powers, the courts have not hesitated to use this jurisdiction to intervene in contractual relationships between a debtor and its creditors, even to make orders affecting the rights of third parties" (*Triton Électronique*, at para. 31). There may be circumstances where it is appropriate for a court to attach charges to property that does not belong to the debtor — if, for instance, this deemed trust were to be equivalent to a proprietary interest. However, that circumstance does not arise in this case because the property subject to Her Majesty's deemed trust remains the property of the debtor, as the deemed trust does not create a proprietary interest. My colleagues' reliance on s. 37(2) of the *CCAA* is similarly ill-founded. As I said earlier, s. 37(2) simply preserves the status quo. It does not alter Her Majesty's interest. It merely continues that interest and excludes it from the operation of s. 37(1), which would otherwise downgrade it to the interest of an ordinary creditor.

[72] That said, courts should still recognize the distinct nature of Her Majesty's interest and ensure that they grant a charge with priority over the deemed trust only when necessary. In creating a super-priority charge, a supervising judge must always consider whether the order will achieve the objectives of the *CCAA*. When there is the spectre of a claim by Her Majesty protected by a deemed trust, the judge must also consider whether a super priority is necessary. The record before us contains no reasons for the Initial Order, so this is difficult to determine in this case. Given that Her Majesty has been paid and that the case is in fact moot, it is not critical for us to determine whether the supervising judge believed it was necessary to subordinate Her Majesty's claim to the super-priority charges. Based on Justice Topolniski's reasons for denying the Crown's motion to vary the Initial Order, it is clear that she would have found that the super-priority charges deserved priority over Her Majesty's interest (paras. 100-104). However, I wish to say a few words on when it may be necessary for a supervising

car, bien que les art. 11.2, 11.51 et 11.52 de la *LACC* renferment cette restriction, aucune restriction de ce genre ne figure à l'art. 11. Tel que l'a reconnu le juge Lalonde, « [e]n exerçant l'autorité conférée par la *LACC*, incluant les pouvoirs inhérents, les tribunaux n'ont pas hésité à faire usage de cette compétence pour intervenir dans les rapports contractuels entre une débitrice et ses créanciers, voire à rendre des ordonnances ayant pour effet d'affecter les droits de tiers » (*Triton Électronique*, par. 31). Il peut exister des circonstances dans lesquelles il convient pour le tribunal de grever de charges des biens qui n'appartiennent pas au débiteur si, par exemple, cette fiducie réputée équivalait à un intérêt à titre de propriétaire. Toutefois, ce n'est pas le cas en l'espèce, car les biens visés par la fiducie réputée de Sa Majesté demeurent la propriété du débiteur, étant donné que la fiducie réputée ne crée pas d'intérêt à titre de propriétaire. Le recours de mes collègues au par. 37(2) de la *LACC* est également mal fondé. Comme je l'ai déjà expliqué, le par. 37(2) préserve simplement le statu quo. Il ne modifie pas l'intérêt de Sa Majesté. Il ne fait que le maintenir et le soustraire à l'application du par. 37(1), qui ramènerait sinon l'intérêt de la Couronne à celui d'un simple créancier chirographaire.

[72] Cela dit, les tribunaux devraient tout de même reconnaître le caractère distinct de l'intérêt de Sa Majesté et n'accorder une charge ayant priorité sur la fiducie réputée que dans les cas où c'est nécessaire. Lorsqu'il s'agit de constituer une charge super prioritaire, le juge surveillant doit toujours se demander si cette mesure favorisera la réalisation des objectifs de la *LACC*. Lorsqu'il est possible qu'une créance de Sa Majesté soit protégée par une fiducie réputée, le juge doit également se demander s'il est nécessaire d'accorder une super priorité. Le dossier dont nous disposons ne nous permet pas de connaître les motifs à l'appui de l'ordonnance initiale et il est donc difficile de répondre à la question en l'espèce. Puisque Sa Majesté a été payée et que l'affaire est en fait devenue théorique, il n'est pas essentiel de nous prononcer sur la question de savoir si le juge surveillant croyait qu'il était nécessaire de subordonner la créance de Sa Majesté à des charges super prioritaires. Si l'on se reporte aux motifs exposés par la juge Topolniski pour rejeter la requête présentée par la Couronne en vue de faire modifier l'ordonnance

judge to subordinate Her Majesty's interest to super-priority charges.

[73] It may be necessary to subordinate Her Majesty's deemed trust where the supervising judge believes that, without a super-priority charge, a particular professional or lender would not act. This may often be the case. On the other hand, I agree with Professor Wood that, although subordinating super-priority charges to Her Majesty's claim will often increase the costs and complexity of restructuring, there will be times when it will not. For instance, when Her Majesty's claim is small or known with a high degree of certainty, commercial parties will be able to manage their risks and will not need a super priority. After all, there is an order of priority even amongst super-priority charges, and therefore it is clear that these parties are willing to have their claims subordinated to some fixed claims. A further example of where different considerations may be in play is in so-called liquidating *CCAA* proceedings. As this Court recently recognized, *CCAA* proceedings whose fundamental objective is to liquidate — rather than to rescue a going concern — have a legitimate place in the *CCAA* regime and have been accepted by Parliament through the enactment of s. 36 (*Callidus Capital*, at paras. 42-45). Liquidating *CCAA* proceedings often aim to maximize returns for creditors, and thus the subordination of Her Majesty's interest has less justification beyond potential unjust enrichment arguments.

VI. Disposition

[74] I would dismiss the appeal with costs in this Court in accordance with the tariff of fees and

initiale, il est évident qu'elle aurait conclu que les charges super prioritaires méritaient d'avoir priorité sur l'intérêt de Sa Majesté (par. 100-104). Je tiens toutefois à dire quelques mots au sujet des cas où il peut s'avérer nécessaire pour le juge surveillant de subordonner l'intérêt de Sa Majesté à des charges super prioritaires.

[73] Il peut s'avérer nécessaire de subordonner la fiducie réputée de Sa Majesté à d'autres charges lorsque le juge surveillant estime que, sans la charge super prioritaire, un professionnel ou un prêteur donné refuserait de s'engager, ce qui peut se produire assez souvent. Par contre, je suis d'accord avec le professeur Wood pour dire que, même si la subordination des charges super prioritaires à la créance de Sa Majesté aura souvent pour effet d'augmenter les coûts et la complexité de la restructuration, il existe des situations où ce ne sera pas le cas. Par exemple, lorsque la créance de Sa Majesté est peu élevée ou qu'elle est connue avec une grande certitude, les entités commerciales pourront gérer leurs risques et n'auront pas besoin d'une super priorité. Après tout, il existe un ordre de collocation même parmi les charges super prioritaires et il est donc évident que ces créanciers sont disposés à ce que leurs créances soient assujetties à certains plafonds fixes. Un autre exemple où des considérations différentes peuvent entrer en jeu est celui de la procédure dite de liquidation prévue par la *LACC*. Ainsi que notre Cour l'a récemment reconnu, les procédures prévues par la *LACC* dont l'objectif fondamental est la liquidation — et non de porter secours à une entreprise en exploitation — occupent une place légitime au sein du régime de la *LACC* et ont été acceptées par le législateur par l'adoption de l'art. 36 (*Callidus Capital*, par. 42-45). Les procédures de liquidation prévues par la *LACC* visent souvent à maximiser le rendement au profit des créanciers, de sorte que la subordination de l'intérêt de Sa Majesté s'en trouve moins justifiée, hormis les cas de présumé enrichissement sans cause.

VI. Dispositif

[74] Je suis d'avis de rejeter le pourvoi avec dépens devant notre Cour, selon le tarif des honoraires

disbursements set out in Schedule B of the *Rules of the Supreme Court of Canada*, SOR/2002-156.

The reasons of Karakatsanis and Martin JJ. were delivered by

Karakatsanis J. —

I. Overview

[75] When a company seeks to restructure its affairs in order to avoid bankruptcy, the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (*CCAA*), allows the court to order charges in favour of parties that are necessary to the restructuring process: lenders who provide interim financing, the monitor who administers the company's restructuring, and directors and officers who captain the sinking ship (among others). These charges, often referred to as "priming charges", are meant to encourage investment in the company as it undergoes reorganization. A company's reorganization, as an alternative to the devastating effects of bankruptcy, serves the public interest by benefitting creditors, employees, and the health of the economy more generally.

[76] In this case, the *CCAA* judge ordered priming charges over the estates of Canada North Group and six related companies (Debtor Companies) in favour of an interim lender, the monitor, and directors. Property of two of the Debtor Companies, however, was also subject to a deemed trust in favour of the Crown, under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (*ITA*), for unremitted source deductions consisting of employees' income tax, Canada Pension Plan contributions, and employment insurance premiums. While this appeal is moot because there are sufficient assets to satisfy both the Crown's deemed trust claim and the priming charges, this Court is asked to determine which has priority in the restructuring: the priming charges under the *CCAA* or the deemed trust under the *ITA*.

et débours fixé à l'annexe B des *Règles de la Cour suprême du Canada*, DORS/2002-156.

Version française des motifs des juges Karakatsanis et Martin rendus par

La juge Karakatsanis —

I. Aperçu

[75] Lorsqu'une compagnie cherche à restructurer ses affaires afin d'éviter la faillite, la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, c. C-36 (*LACC*), permet au tribunal d'ordonner des charges en faveur des parties qui sont nécessaires au processus de restructuration : les prêteurs qui fournissent un financement temporaire, le contrôleur qui administre la restructuration de la compagnie, et les dirigeants et administrateurs qui gèrent la compagnie en déroute (entre autres). Ces charges, souvent appelées « charges super prioritaires », visent à encourager les investissements dans la compagnie alors qu'elle procède à sa restructuration. La restructuration d'une compagnie — une solution de rechange aux effets dévastateurs d'une faillite — sert l'intérêt public puisqu'elle profite aux créanciers, aux employés et à la santé de l'économie en général.

[76] En l'espèce, le juge chargé d'appliquer la *LACC* a grevé le patrimoine de Canada North Group et de six compagnies apparentées (compagnies débitrices) de charges super prioritaires en faveur d'un prêteur temporaire, du contrôleur et des administrateurs. Toutefois, les biens de deux des compagnies débitrices étaient aussi assujettis à une fiducie réputée créée en faveur de la Couronne, en vertu de la *Loi de l'impôt sur le revenu*, L.R.C. 1985, c. 1 (5e suppl.) (« *LIR* »), à cause du non-versement de retenues à la source (impôt sur le revenu des employés, cotisations au Régime de pensions du Canada et cotisations d'assurance-emploi). Bien que le présent pourvoi soit théorique du fait que les actifs sont suffisants pour couvrir à la fois la réclamation de la Couronne au titre de la fiducie réputée et les charges super prioritaires, notre Cour est appelée à déterminer ce qui est prioritaire dans la restructuration : les charges super prioritaires établies sous le régime de la *LACC* ou la fiducie réputée établie sous le régime de la *LIR*.

[77] Section 227(4.1) of the *ITA* provides that, when an employer fails to remit source deductions to the Crown, a deemed trust attaches to the property of the employer to the extent of the unremitted source deductions. The deemed trust operates "notwithstanding any security interest in such property" and "[n]otwithstanding . . . any other enactment of Canada". Sections 11.2, 11.51 and 11.52 of the *CCAA* give the court authority to order priming charges over a company's property in favour of interim lenders, directors and officers, and estate administrators. Priming charges can rank ahead of any other secured claim. Read on their own, these provisions appear to give different parties super-priority in an insolvency. This issue of statutory interpretation has been described as the collision of an unstoppable force with an immoveable object (R. J. Wood, "Irresistible Force Meets Immovable Object: *Canada v. Canada North Group Inc.*" (2020), 63 *Can. Bus. L.J.* 85).

[77] Le paragraphe 227(4.1) de la *LIR* prévoit que, lorsqu'un employeur omet de verser des retenues à la source à la Couronne, une fiducie réputée s'attache aux biens de l'employeur jusqu'à concurrence de la valeur des retenues à la source non versées. La fiducie réputée fonctionne « malgré toute autre garantie sur ces biens » et « [m]algré [. . .] tout autre texte législatif fédéral ». Aux termes des art. 11.2, 11.51 et 11.52 de la *LACC*, un tribunal peut, par ordonnance, déclarer que les biens d'une compagnie sont grevés de charges super prioritaires en faveur de prêteurs temporaires, de dirigeants et d'administrateurs, et d'administrateurs de patrimoine. Les charges super prioritaires peuvent avoir priorité sur toute autre réclamation garantie. Prises individuellement, ces dispositions semblent accorder une super priorité à différentes parties en cas d'insolvabilité. Cette question d'interprétation législative a été décrite comme le choc entre une force irrésistible et un objet inamovible (R. J. Wood, « Irresistible Force Meets Immovable Object : *Canada v. Canada North Group Inc.* » (2020), 63 *Rev. can. dr. comm.* 85).

[78] The appellant, the Crown, argues that s. 227(4.1) of the *ITA* creates a proprietary right in the Crown because, through the mechanism of a deemed trust, it gives the Crown beneficial ownership of the amount of the unremitted source deductions. In other words, that *amount* is the Crown's property and a *CCAA* judge cannot, therefore, order a charge over it; it should be taken out of the estate and can play no role in the restructuring process.

[78] L'appelante, la Couronne, soutient que le par. 227(4.1) de la *LIR* lui confère un droit propriétal puisque, par le mécanisme d'une fiducie réputée, il accorde à la Couronne un droit de bénéficiaire sur le montant des retenues à la source non versées. Autrement dit, ce *montant* est la propriété de la Couronne, et un juge chargé d'appliquer la *LACC* ne peut donc pas grever ce montant d'une charge; il devrait être soustrait du patrimoine et il ne peut jouer aucun rôle dans le processus de restructuration.

[79] In contrast, the respondents argue that s. 227(4.1) creates a security interest in the Crown squarely contemplated by ss. 11.2, 11.51 and 11.52 of the *CCAA*. They further submit that there is no conflict between the relevant provisions because the policies underlying both Acts can be harmonized in favour of giving effect to the *CCAA* provisions.

[79] En revanche, les intimées affirment que le par. 227(4.1) confère à la Couronne une garantie nettement visée par les art. 11.2, 11.51 et 11.52 de la *LACC*. Elles ajoutent qu'il n'existe aucun conflit entre les dispositions en cause parce que les politiques qui sous-tendent les deux lois peuvent être harmonisées en faveur de l'application des dispositions de la *LACC*.

[80] For the reasons below, I conclude that there is no conflict between the *ITA* and *CCAA* provisions. The right that attaches to "beneficial ownership" under s. 227(4.1) of the *ITA* must be interpreted in the specific statutory context in which it arises. Here,

[80] Pour les raisons exposées ci-dessous, je conclus qu'il n'existe aucun conflit entre les dispositions de la *LIR* et celles de la *LACC*. Le « droit de bénéficiaire » prévu au par. 227(4.1) de la *LIR* doit être interprété dans le contexte législatif précis où il

the Crown's right to unremitted source deductions in a *CCAA* restructuring is protected by the requirement that the plan of compromise pay the Crown in full. Because I do not conclude that the Crown's interest fits within the relevant statutory definition of "secured creditor" under the *CCAA*, it is not captured by the court's authority to order priming charges under ss. 11.2, 11.51 and 11.52 of the *CCAA*. However, in my view, the broad discretionary power under s. 11 of the *CCAA* permits a court to rank priming charges ahead of the Crown's deemed trust for unremitted source deductions. This conclusion harmonizes the purposes of both federal statutes. I would dismiss the appeal.

se manifeste. En l'espèce, le droit de la Couronne sur des retenues à la source non versées dans le cadre d'une restructuration sous le régime de la *LACC* est protégé par l'exigence qu'un plan de transaction prévoie le paiement intégral à la Couronne. Puisque je ne conclus pas que l'intérêt de la Couronne entre dans la définition applicable de « créancier garanti » contenue dans la *LACC*, il ne relève pas du pouvoir du tribunal d'ordonner des charges super prioritaires en vertu des art. 11.2, 11.51 et 11.52 de la *LACC*. Cependant, je suis d'avis que le vaste pouvoir discrétionnaire conféré par l'art. 11 de la *LACC* permet au tribunal de faire passer les charges super prioritaires devant la fiducie réputée créée en faveur de la Couronne à l'égard des retenues à la source non versées. Cette conclusion harmonise les objectifs des deux lois fédérales. Je rejetterais le pourvoi.

II. Facts

[81] In July 2017, the Court of Queen's Bench of Alberta issued an order granting the Debtor Companies protection under the *CCAA* (Alta. Q.B., No. 1703-12327, July 5, 2017 (Initial Order)). The Initial Order provided for priming charges in the following order of priority: (1) an Administration Charge of $500,000 in favour of the court-appointed Monitor, Ernst & Young Inc.; (2) an Interim Lender's Charge of $1,000,000 in favour of the interim lender, Business Development Bank of Canada (BDBC); and (3) a Directors' Charge of $150,000 (together, Priming Charges). The Interim Lender's Charge was later increased to $3,500,000 and the Administration Charge to $950,000.

[82] Paragraph 44 of the Initial Order provided that the Priming Charges have priority over the claims of secured creditors:

> Each of the Directors' Charge, Administration Charge and the Interim Lender's Charge . . . shall constitute a charge on the Property and subject always to section 34(11) of the CCAA such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise . . . in favour of any Person.

II. Faits

[81] En juillet 2017, la Cour du Banc de la Reine de l'Alberta a rendu une ordonnance accordant aux compagnies débitrices la protection de la *LACC* (B.R. Alb., n^{o} 1703-12327, 5 juillet 2017 (ordonnance initiale)). L'ordonnance initiale établissait les charges super prioritaires selon l'ordre de priorité suivant : (1) une charge administrative de 500 000 $ en faveur du contrôleur nommé par le tribunal, Ernst & Young Inc.; (2) une charge de 1 000 000 $ en faveur du prêteur temporaire, la Banque de développement du Canada (BDC); (3) une charge de 150 000 $ en faveur des administrateurs (collectivement, les charges super prioritaires). La charge en faveur du prêteur temporaire a par la suite été portée à 3 500 000 $ et la charge administrative, à 950 000 $.

[82] Le paragraphe 44 de l'ordonnance initiale indiquait que les charges super prioritaires prenaient rang devant les réclamations des créanciers garantis :

> [TRADUCTION] Chacune des charges relatives à l'administration, aux administrateurs et au prêteur temporaire [. . .] grèvent les biens et, sous réserve du paragraphe 34(11) de la LACC, toutes ces charges ont priorité sur tous les autres privilèges, garanties, fiducies, charges et sûretés, créances de créanciers garantis, d'origine législative ou autre [. . .] détenus par quiconque.

[83] Paragraph 46 of the Initial Order provided that the Priming Charges "shall not otherwise be limited or impaired in any way by . . . (d) the provisions of any federal or provincial statutes".

[83] Le paragraphe 46 de l'ordonnance initiale indiquait que les charges super prioritaires [TRADUCTION] « ne sont pas autrement limitées ou compromises de quelque façon que ce soit par [. . .] (d) les dispositions de toute loi fédérale ou provinciale ».

[84] At the time of the Initial Order, two of the Debtor Companies had failed to remit source deductions and owed the Crown $685,542.93. The Crown applied to vary the Priming Charges in the Initial Order on the basis that paras. 44 and 46(d) failed to recognize the Crown's legislated interest in unremitted source deductions. The Crown argued that s. 227(4.1) of the *ITA*, s. 23(4) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (*CPP*), and s. 86(2.1) of the *Employment Insurance Act*, S.C. 1996, c. 23 (*EIA*), require the Crown's claims for unremitted source deductions to have priority over the claims of all other creditors of a debtor, notwithstanding any other federal statute, including the *CCAA*. In these reasons, I will only refer to s. 227(4.1) of the *ITA* as the relevant *ITA*, *CPP* and *EIA* provisions are identical and the latter two statutes cross-reference the *ITA*.

[84] Au moment où a été rendue l'ordonnance initiale, deux des compagnies débitrices avaient omis de verser les retenues à la source et devaient à la Couronne 685 542,93 $. La Couronne a présenté une demande visant à faire modifier les charges super prioritaires établies dans l'ordonnance initiale au motif que les par. 44 et 46d) ne reconnaissaient pas l'intérêt accordé par la loi à la Couronne dans les retenues à la source non versées. La Couronne a soutenu que le par. 227(4.1) de la *LIR*, le par. 23(4) du *Régime de pensions du Canada*, L.R.C. 1985, c. C-8 (*RPC*), et le par. 86(2.1) de la *Loi sur l'assurance-emploi*, L.C. 1996, c. 23 (*LAE*), exigent que les réclamations de la Couronne à l'égard des retenues à la source non versées prennent rang devant les réclamations de tout autre créancier d'un débiteur, malgré toute autre loi fédérale, y compris la *LACC*. Dans les présents motifs, je me reporterai uniquement au par. 227(4.1) de la *LIR* parce que les dispositions pertinentes de la *LIR*, du *RPC* et de la *LAE* sont identiques et que le *RPC* et la *LAE* renvoient à la *LIR*.

III. Decisions Below

A. *Court of Queen's Bench of Alberta, 2017 ABQB 550, 60 Alta. L.R. (6th) 103 (Topolniski J.)*

III. Décisions des juridictions inférieures

A. *Cour du Banc de la Reine de l'Alberta, 2017 ABQB 550, 60 Alta. L.R. (6th) 103 (la juge Topolniski)*

[85] The application judge held that court-ordered priming charges under ss. 11.2, 11.51 and 11.52 of the *CCAA* have priority over the Crown's deemed trust for unremitted source deductions. First, she concluded that the Crown's deemed trust under s. 227(4.1) of the *ITA* creates a security interest rather than a proprietary interest because the definition of "security interest" in the *ITA* includes an interest created by a deemed or actual trust, and it would be inconsistent to interpret the Crown's interest under s. 227(4.1) contrary to its enabling statute. She also reasoned that the deemed trust is a security interest

[85] La juge de première instance a déclaré que les charges super prioritaires ordonnées par le tribunal en vertu des art. 11.2, 11.51 et 11.52 de la *LACC* ont priorité sur la fiducie réputée créée en faveur de la Couronne à l'égard des retenues à la source non versées. En premier lieu, la juge a conclu que la fiducie réputée créée en faveur de la Couronne en vertu du par. 227(4.1) de la *LIR* créait une garantie plutôt qu'un intérêt propriétal puisque la définition de « garantie » contenue dans la *LIR* comprend tout intérêt créé par une fiducie réputée ou véritable, et qu'il serait incohérent d'interpréter l'intérêt de la

because it lacks certainty of subject matter and is therefore not a true trust.

Couronne au titre du par. 227(4.1) à l'encontre de sa loi habilitante. Elle a également opiné que la fiducie réputée constituait une garantie en raison de l'absence de certitude quant à sa matière; elle ne constituait donc pas une fiducie véritable.

[86] Second, the application judge concluded that s. 227(4.1) of the *ITA* and ss. 11.2, 11.51 and 11.52 of the *CCAA* are not inconsistent because any conflict can be avoided by interpretation. She reasoned that the policy objectives of both Acts have to be respected because they were enacted by the same government. On the one hand, the collection of source deductions is at the heart of the *ITA*. On the other, the *CCAA* aims to facilitate business survival. The application judge concluded that, without the court's ability to order priming charges, interim lending "would simply end", along with "the hope of positive *CCAA* outcomes" (para. 102). The goals of both Acts can therefore only be achieved if priority is given "to those charges necessary for restructuring", while the deemed trust ranks in priority to all other secured creditors (para. 112).

[86] En second lieu, la juge de première instance a conclu que le par. 227(4.1) de la *LIR* ainsi que les art. 11.2, 11.51 et 11.52 de la *LACC* ne sont pas incompatibles puisque tout conflit peut être évité par l'interprétation. Elle a expliqué que les objectifs de politique générale des deux lois doivent être respectés puisque ces dernières ont été édictées par le même gouvernement. D'une part, la perception des retenues à la source sont au cœur de la *LIR*. D'autre part, la *LACC* vise à favoriser la survie des entreprises. La juge de première instance a conclu que, si les tribunaux n'avaient pas la capacité d'ordonner des charges super prioritaires, les prêts temporaires [TRADUCTION] « disparaîtraient tout simplement », de même que « l'espoir de voir des résultats positifs découler de la *LACC* » (par. 102). Les objectifs des deux lois ne peuvent toutefois être atteints que si la priorité est accordée [TRADUCTION] « aux charges nécessaires à la restructuration », alors que la fiducie réputée prend rang devant toutes les autres réclamations garanties (par. 112).

B. *Court of Appeal of Alberta, 2019 ABCA 314, 93 Alta. L.R. (6th) 29 (Rowbotham and Schutz JJ.A., Wakeling J.A. Dissenting)*

B. *Cour d'appel de l'Alberta, 2019 ABCA 314, 93 Alta. L.R. (6th) 29 (les juges Rowbotham et Schutz, le juge Wakeling, dissident)*

[87] A majority of the Court of Appeal dismissed the Crown's appeal. It agreed with the application judge that the Crown's deemed trust under s. 227(4.1) of the *ITA* creates a security interest rather than a proprietary interest. It also agreed that the Crown's position failed to reconcile the objectives of the *ITA* and *CCAA*, and given the importance of interim lending, concluded that absurd consequences could follow if the Crown's position prevailed.

[87] La Cour d'appel a rejeté, à la majorité, l'appel de la Couronne. Tout comme la juge de première instance, elle a jugé que la fiducie réputée créée en faveur de la Couronne en vertu du par. 227(4.1) de la *LIR* créait une garantie plutôt qu'un intérêt propriétal. Elle a aussi convenu que la position de la Couronne ne conciliait pas les objectifs de la *LIR* et de la *LACC*. Enfin, compte tenu de l'importance du financement temporaire, elle a conclu que retenir la thèse de la Couronne pourrait entraîner des conséquences absurdes.

[88] Wakeling J.A. disagreed. He concluded that s. 227(4.1) of the *ITA* makes two unequivocal statements: first, that the Crown is the beneficial owner of the debtor's property to the extent of the unremitted

[88] Le juge Wakeling n'était pas de cet avis. Il a conclu que le par. 227(4.1) de la *LIR* contenait deux déclarations sans équivoque : premièrement, la Couronne a un droit de bénéficiaire sur les biens

source deductions; and second, that this amount must be paid to the Crown notwithstanding the security interests of any other secured creditors, including, in his opinion, the holders of a priming charge. As a result, it was unnecessary to reconcile policy objectives. In his view, the notwithstanding clause in s. 227(4.1) was conclusive because the relevant *CCAA* provisions lacked the same language. As a result, there was "no need to look beyond the four corners of s. 227(4.1) to determine the scope of the unassailable priority it creates" (para. 135). Finally, Wakeling J.A. noted that there is perfect correlation between the purpose of the *ITA* and the plain meaning of s. 227(4.1).

du débiteur jusqu'à concurrence du montant des retenues à la source non versées; deuxièmement, ce montant doit être payé à la Couronne malgré les garanties accordées à tout autre créancier garanti, y compris, selon lui, les titulaires d'une charge super prioritaire. Par conséquent, il n'était pas nécessaire de concilier les objectifs de politique générale. À son avis, la disposition de dérogation du par. 227(4.1) était concluante puisque les dispositions pertinentes de la *LACC* ne contenaient pas le même libellé. Il n'était donc [TRADUCTION] « pas nécessaire d'aller au-delà des contours du par. 227(4.1) pour déterminer la portée de la priorité inattaquable qu'il établit » (par. 135). Enfin, le juge Wakeling a souligné qu'il existait une corrélation parfaite entre l'objectif de la *LIR* et le sens ordinaire du par. 227(4.1).

IV. Parties' Submissions

A. *The Appellant the Crown*

[89] The Crown's submissions before this Court echo the dissent at the Court of Appeal: the text of s. 227(4.1) unequivocally states that unremitted source deductions become the property of the Crown. The Crown argues that the plain meaning of s. 227(4.1) aligns with its purpose, which is to protect the largest source of government revenue.

[90] The Crown makes two principal submissions. First, it submits that the Crown's interest under s. 227(4.1) of the *ITA* is a proprietary interest rather than a security interest because the text of s. 227(4.1) causes the unremitted source deductions to become the property of the Crown. There is no need to rely on the "notwithstanding clause" in s. 227(4.1) because the *ITA* and *CCAA* provisions work harmoniously; the priming charges can only attach to a company's property and s. 227(4.1) provides that the unremitted source deductions are beneficially owned by the Crown.

[91] Second, the Crown submits in the alternative that, even if its interest is a security interest, it ranks ahead of the priming charges. This is because

IV. Observations des parties

A. *L'appelante, la Couronne*

[89] Les arguments présentés par la Couronne devant notre Cour font écho à l'opinion dissidente exprimée en Cour d'appel : le texte du par. 227(4.1) indique sans équivoque que les retenues à la source non versées deviennent la propriété de la Couronne. La Couronne soutient que le sens ordinaire du par. 227(4.1) s'aligne avec son objectif, qui est de protéger la plus grande source de revenus du gouvernement.

[90] La Couronne avance deux arguments principaux. Premièrement, elle affirme que l'intérêt de la Couronne au titre du par. 227(4.1) de la *LIR* est un intérêt propriétal plutôt qu'une garantie puisque, selon ce paragraphe, les retenues à la source non versées deviennent la propriété de la Couronne. Il n'est pas nécessaire de recourir à la « disposition de dérogation » du par. 227(4.1) puisque les dispositions de la *LIR* et de la *LACC* s'appliquent de façon harmonieuse; les charges super prioritaires ne peuvent se rattacher qu'aux biens d'une compagnie, et le par. 227(4.1) prévoit que la Couronne a un droit de bénéficiaire sur les retenues à la source non versées.

[91] Deuxièmement, la Couronne soutient à titre subsidiaire que même si son intérêt est une garantie, il prend rang devant les charges super prioritaires

a priming charge under the *CCAA* is a security interest within the meaning of the *ITA*, and s. 227(4.1) specifically states that the deemed trust ranks ahead of all other security interests.

du fait qu'une charge super prioritaire visée par la *LACC* est une garantie au sens de la *LIR* et que le par. 227(4.1) prévoit expressément que la fiducie réputée prend rang devant toutes les autres garanties.

B. *The Respondent Business Development Bank of Canada*

B. *L'intimée la Banque de développement du Canada*

[92] The respondent BDBC, urges this Court to follow the approach taken by the courts below. It submits that the Crown's interest under the deemed trust is a security interest because (1) the enabling statute, the *ITA*, defines a deemed trust as a security interest; (2) this Court, in *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720, characterized the deemed trust as a "floating charge", which is a security interest; and (3) the opposite conclusion, that it is a proprietary interest, would be at odds with commercial reality. As the definition of "secured creditor" in the *CCAA* includes the holder of a deemed trust, that Act contemplates that a priming charge can rank ahead of the Crown's deemed trust. Thus, ss. 11.2, 11.51 and 11.52 of the *CCAA* contemplate that a priming charge can rank ahead of the Crown's deemed trust.

[92] L'intimée BDC exhorte notre Cour à suivre l'approche adoptée par les tribunaux d'instance inférieure. Elle soutient que l'intérêt de la Couronne au titre de la fiducie réputée est une garantie puisque (1) la loi habilitante, la *LIR*, définit une fiducie réputée comme une garantie; (2) dans l'arrêt *First Vancouver Finance c. M.R.N.*, 2002 CSC 49, [2002] 2 R.C.S. 720, notre Cour a qualifié la fiducie réputée de « charge flottante », qui est une garantie; (3) la conclusion opposée, à savoir qu'il s'agit d'un intérêt propriétal, serait incompatible avec la réalité commerciale. Comme la définition de « créancier garanti » figurant dans la *LACC* englobe le détenteur d'une fiducie réputée, la *LACC* prévoit qu'une charge super prioritaire peut prendre rang devant la fiducie réputée créée en faveur de la Couronne. Ainsi, les art. 11.2, 11.51 et 11.52 de la *LACC* prévoient qu'une charge super prioritaire peut prendre rang devant la fiducie réputée créée en faveur de la Couronne.

C. *The Respondent Ernst & Young, in its Capacity as Monitor*

C. *L'intimée Ernst & Young, en sa qualité de contrôleur*

[93] Both BDBC and Ernst & Young (together, Respondents) submit that the Crown's deemed trust is a security interest and that the statutes can be interpreted harmoniously to avoid a conflict. The Monitor submits that a court-ordered priming charge is not a security interest within the meaning of s. 227(4.1) of the *ITA* because it is not specifically listed in the definition of security interest under the *ITA*, and as a taxing statute, the *ITA* requires a strict, textual approach to interpretation.

[93] Tant la BDC qu'Ernst & Young (collectivement, les intimées) font valoir que la fiducie réputée créée en faveur de la Couronne est une garantie et que l'on peut interpréter les lois de façon harmonieuse afin d'éviter un conflit. Le contrôleur soutient qu'une charge super prioritaire d'origine judiciaire n'est pas une garantie au sens du par. 227(4.1) de la *LIR* puisqu'elle n'est pas expressément mentionnée dans la définition de garantie contenue dans la *LIR*, et qu'à titre de loi fiscale, la *LIR* commande une méthode d'interprétation stricte et textuelle.

[94] The Monitor also highlights that the Crown is a unique creditor because it has immediate information available to it respecting remittance and can certify and pursue amounts owing immediately.

[94] De plus, le contrôleur souligne que la Couronne est un créancier unique puisqu'elle dispose d'un accès immédiat aux renseignements concernant les remises et qu'elle peut certifier et percevoir les montants dus immédiatement.

V. Issue

[95] The issue on appeal is whether court-ordered priming charges under the *CCAA* can rank ahead of the Crown's deemed trust for unremitted source deductions, as created by s. 227(4.1) of the *ITA* and related provisions of the *CPP* and *EIA*. It is clear from the wording of s. 227(4.1) of the *ITA* that, if there is any conflict with a provision from another Act, s. 227(4.1) is to prevail. Accordingly, this appeal turns on whether, and to what extent, the *CCAA* regime conflicts with s. 227(4.1) of the *ITA*. In answering that question, I proceed in four steps:

1. What rights does s. 227(4.1) of the *ITA* confer on the Crown in respect of unremitted source deductions?
2. How is the Crown's deemed trust for unremitted source deductions treated in Parliament's insolvency regime?
3. Do ss. 11.2, 11.51 and 11.52 of the *CCAA* permit the court to rank priming charges ahead of the Crown's deemed trust for unremitted source deductions?
4. If not, does s. 11 of the *CCAA* allow the court to rank priming charges ahead of the Crown's deemed trust for unremitted source deductions?

VI. Analysis

A. *What Rights Does Section 227(4.1) of the ITA Confer on the Crown in Respect of Unremitted Source Deductions?*

(1) General Scheme and Background of Sections 227(4) and 227(4.1) of the *ITA*

[96] Section 153(1) of the *ITA* requires employers to deduct and withhold amounts from their

V. Question en litige

[95] La question qui fait l'objet du pourvoi est celle de savoir si les charges super prioritaires ordonnées par un tribunal en vertu de la *LACC* peuvent prendre rang devant la fiducie réputée créée en faveur de la Couronne à l'égard des retenues à la source non versées, laquelle fiducie est établie en application du par. 227(4.1) de la *LIR* et des dispositions connexes du *RPC* et de la *LAE*. Il ressort clairement du libellé du par. 227(4.1) de la *LIR* qu'en cas de conflit avec une disposition d'une autre loi, le par. 227(4.1) prévaut. En conséquence, le présent pourvoi porte sur la question de savoir si, et dans quelle mesure, le régime de la *LACC* entre en conflit avec le par. 227(4.1) de la *LIR*. Pour répondre à cette question, je procéderai en quatre étapes :

1. Quel droit le par. 227(4.1) de la *LIR* confère-t-il à la Couronne relativement aux retenues à la source non versées?
2. De quelle façon la fiducie réputée créée en faveur de la Couronne à l'égard des retenues à la source non versées est-elle traitée dans le régime d'insolvabilité du législateur?
3. Les articles 11.2, 11.51 et 11.52 de la *LACC* permettent-ils au tribunal de faire passer les charges super prioritaires devant la fiducie réputée créée en faveur de la Couronne à l'égard des retenues à la source non versées?
4. Dans la négative, l'art. 11 de la *LACC* autorise-t-il le tribunal à faire passer les charges super prioritaires devant la fiducie réputée créée en faveur de la Couronne à l'égard des retenues à la source non versées?

VI. Analyse

A. *Quels droits le par. 227(4.1) de la LIR confère-t-il à la Couronne relativement aux retenues à la source non versées?*

(1) Économie générale et contexte des par. 227(4) et 227(4.1) de la *LIR*

[96] Le paragraphe 153(1) de la *LIR* exige qu'un employeur déduise ou retienne des montants sur les

employees' wages (source deductions) and remit those amounts to the Receiver General by a specified due date. When source deductions are made, s. 227(4) deems that they are held separate and apart from the property of the employer and from property held by any secured creditor of the employer, notwithstanding any security interest in that property. Source deductions are deemed to be held in trust for Her Majesty for payment by the specified due date.

[97] If source deductions are not paid by the specified due date, s. 227(4.1) extends the trust in s. 227(4). It deems that a trust attaches to the employer's property to the extent of any unremitted source deductions; that the trust existed from the moment the source deductions were made; and that the trust did not form part of the estate or property of the employer from the moment the source deductions were made (all regardless of whether the employer's property is subject to a security interest). It also deems that, to the extent of any unremitted source deductions, the employer's property is property "beneficially owned" by the Crown, notwithstanding any security interest in the employer's property:

(4.1) Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person and property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for a security interest (as defined in subsection 224(1.3)) would be property of the person, equal in value to the amount so deemed to be held in trust is deemed

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

(b) to form no part of the estate or property of the person from the time the amount was so deducted or

salaires qu'il verse à ses employés (retenues à la source) et qu'il remette ces montants au receveur général au moment fixé par règlement. Une fois les retenues à la source faites, elles sont réputées être détenues, aux termes du par. 227(4), séparées des biens de l'employeur et des biens détenus par son créancier garanti, et ce, malgré toute autre garantie sur ces biens. Les retenues à la source sont réputées être détenues en fiducie pour Sa Majesté en vue de lui être versées au moment fixé par règlement.

[97] Si les retenues à la source ne sont pas versées au moment fixé par règlement, le par. 227(4.1) élargit la portée de la fiducie visée au par. 227(4). Une fiducie est réputée s'appliquer aux biens de l'employeur jusqu'à concurrence de la valeur des retenues à la source non versées. Cette fiducie est réputée exister depuis le moment où les retenues à la source ont été faites et n'avoir pas fait partie du patrimoine ou des biens de l'employeur depuis le moment où les retenues à la source ont été faites (peu importe si les biens de l'employeur sont assujettis à une garantie). Les biens de l'employeur jusqu'à concurrence de la valeur des retenues à la source non versées sont aussi réputés être des biens dans lesquels la Couronne a un « droit de bénéficiaire » malgré toute autre garantie sur ces biens :

(4.1) Malgré les autres dispositions de la présente loi, la *Loi sur la faillite et l'insolvabilité* (sauf ses articles 81.1 et 81.2), tout autre texte législatif fédéral ou provincial ou toute règle de droit, en cas de non-versement à Sa Majesté, selon les modalités et dans le délai prévus par la présente loi, d'un montant qu'une personne est réputée par le paragraphe (4) détenir en fiducie pour Sa Majesté, les biens de la personne, et les biens détenus par son créancier garanti au sens du paragraphe 224(1.3) qui, en l'absence d'une garantie au sens du même paragraphe, seraient ceux de la personne, d'une valeur égale à ce montant sont réputés :

(a) être détenus en fiducie pour Sa Majesté, à compter du moment où le montant est déduit ou retenu, séparés des propres biens de la personne, qu'ils soient ou non assujettis à une telle garantie;

(b) ne pas faire partie du patrimoine ou des biens de la personne à compter du moment où le montant est withheld, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to such a security interest

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

[98] The *ITA* defines "security interest" in s. 224(1.3):

security interest means any interest in, or for civil law any right in, property that secures payment or performance of an obligation and includes an interest, or for civil law a right, created by or arising out of a debenture, mortgage, hypothec, lien, pledge, charge, deemed or actual trust, assignment or encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for . . . .

[99] As emphasized by the Crown, ss. 227(4) and 227(4.1) were amended to their current form — excerpted above — to reverse the effect of this Court's decision in *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411. The Crown submits that, in explicitly reversing *Sparrow Electric*'s result, Parliament meant to always give the Crown super-priority in an insolvency. I do not agree that such a broad conclusion can be drawn from this legislative history. In *Sparrow Electric*, the issue was who, between a lending bank and the Crown, had priority in the debtor's bankruptcy. The bank had a general security agreement over all of the debtor's property, which it entered into several months before successfully petitioning the debtor into bankruptcy. While the debtor also owed the Crown $625,990.86 in unremitted source deductions at the time of the bankruptcy, the first instance of non-remittance to the Crown was *after* the bank entered its general security agreement.

déduit ou retenu, que ces biens aient été ou non tenus séparés de ses propres biens ou de son patrimoine et qu'ils soient ou non assujettis à une telle garantie.

Ces biens sont des biens dans lesquels Sa Majesté a un droit de bénéficiaire malgré toute autre garantie sur ces biens ou sur le produit en découlant, et le produit découlant de ces biens est payé au receveur général par priorité sur une telle garantie.

[98] Le paragraphe 224(1.3) de la *LIR* définit « garantie » ainsi :

garantie Intérêt ou, pour l'application du droit civil, droit sur un bien qui garantit l'exécution d'une obligation, notamment un paiement. Sont en particulier des garanties les intérêts ou, pour l'application du droit civil, les droits nés ou découlant de débentures, hypothèques, privilèges, nantissements, sûretés, fiducies réputées ou réelles, cessions et charges, quelle qu'en soit la nature, de quelque façon ou à quelque date qu'elles soient créées, réputées exister ou prévues par ailleurs.

[99] Comme l'a souligné la Couronne, les par. 227(4) et 227(4.1) ont été modifiés en leur version actuelle — extraits précités — afin d'annuler l'effet de l'arrêt de notre Cour *Banque Royale du Canada c. Sparrow Electric Corp.*, [1997] 1 R.C.S. 411. La Couronne soutient qu'en infirmant expressément l'arrêt *Sparrow Electric*, le législateur voulait toujours accorder à la Couronne une super priorité dans un cas d'insolvabilité. Je ne suis pas d'avis qu'une conclusion aussi générale puisse être tirée de cet historique législatif. Dans l'arrêt *Sparrow Electric*, la question était de savoir qui, de la banque prêteuse ou de la Couronne, avait la priorité dans le cadre de la faillite de la débitrice. La banque bénéficiait d'une convention de garantie générale portant sur tous les biens de la débitrice, convention que la banque avait signée plusieurs mois avant que sa requête en faillite contre la débitrice soit accueillie. Si la débitrice devait également à la Couronne 625 990,86 $ en retenues à la source non versées au moment de sa faillite, le premier défaut de versement à la Couronne ne s'était produit qu'*après* que la banque eut signé sa convention de garantie générale.

[100] Iacobucci J., writing for a majority of the Court, held in favour of the bank. At that time, the deemed trust was worded differently, triggering only upon an event of "liquidation, assignment, receivership or bankruptcy", and the amount of the unremitted source deductions was only deemed to be held "separate from and form no part of the estate in liquidation, assignment, receivership or bankruptcy" (para. 13 (emphasis added)). The majority therefore concluded that the deemed trust did not attach to the debtor's property because, at the relevant time, that property was already "legally the [bank's]" (para. 98). Because the bank had a fixed and specific charge over all of the debtor's property, there was nothing left for the trust to attach to. The trust could not be effective unless there was some unencumbered asset in the bankruptcy out of which the trust could be deemed (para. 99).

[101] After *Sparrow Electric*, Parliament amended the deemed trust to ensure that, in a case like *Sparrow Electric*, the deemed trust attached notwithstanding any security interest held in the debtor's property (*First Vancouver*, at para. 27). As Iacobucci J. explained in *First Vancouver*, Parliament intended "to grant priority to the deemed trust in respect of property that is also subject to a security interest regardless of when the security interest arose in relation to the time the source deductions were made or when the deemed trust takes effect" (para. 28).[1]

[102] In this appeal, the Crown argues that a court-ordered priming charge under the *CCAA* is a security interest for the purposes of the Crown's deemed

[1] It bears noting, however, that ss. 227(4) and 227(4.1) of the *ITA* do not give the Crown priority over all creditors. They explicitly carve out an exception for the rights of unpaid suppliers (*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 81.1) and the rights of farmers, fisherman, and aquaculturists (s. 81.2). In addition, s. 227(4.2) of the *ITA* carves out an exception for a prescribed security interest, defined in the *Income Tax Regulations*, C.R.C., c. 945, s. 2201. Broadly, a prescribed security interest is a mortgage in land or a building which is registered before the failure to remit the source deductions at issue (Regulatory Impact Analysis Statement, SOR/99-322, *Canada Gazette*, Part II, vol. 133, No. 17, August 18, 1999, at pp. 2041-42).

[100] Le juge Iacobucci, s'exprimant au nom de la majorité de la Cour, a tranché en faveur de la banque. À ce moment-là, les dispositions relatives à la fiducie réputée étaient formulées différemment, ne s'appliquant qu'en cas de « liquidation, cession, mise sous séquestre ou faillite », et le montant des retenues à la source non versées était seulement considéré comme tenu « séparé et ne formant pas partie du patrimoine visé par la liquidation, cession, mise sous séquestre ou faillite » (par. 13 (je souligne)). La majorité a donc conclu que la fiducie réputée ne s'attachait pas aux biens de la débitrice puisqu'au moment visé, ces biens appartenaient déjà « légalement à [la banque] » (par. 98). Étant donné que la banque bénéficiait d'un privilège fixe et spécifique sur tous les biens de la débitrice, la fiducie ne pouvait s'attacher à rien. La fiducie ne pouvait s'appliquer que s'il existait des éléments d'actifs libres de toute charge qui auraient pu faire l'objet d'une fiducie réputée (par. 99).

[101] À la suite de l'arrêt *Sparrow Electric*, le législateur a modifié les dispositions relatives à la fiducie réputée de sorte que, dans une affaire comme *Sparrow Electric*, la fiducie réputée s'applique malgré toute autre garantie grevant les biens du débiteur (*First Vancouver*, par. 27). Comme l'a expliqué le juge Iacobucci dans l'arrêt *First Vancouver*, le législateur voulait accorder « la priorité de rang à la fiducie réputée lorsque les biens sont par ailleurs grevés d'une garantie, que celle-ci ait pris effet avant ou après les retenues à la source ou l'application de la fiducie réputée » (par. 28)[1].

[102] Dans le présent pourvoi, la Couronne affirme qu'une charge super prioritaire ordonnée par un tribunal en vertu de la *LACC* constitue une garantie

[1] Il convient toutefois de noter que les par. 227(4) et 227(4.1) de la *LIR* n'accordent pas à la Couronne la priorité sur tous les créanciers. Ils prévoient explicitement une exception pour les droits des fournisseurs impayés (*Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, c. B-3, art. 81.1) et les droits des agriculteurs, des pêcheurs et des aquiculteurs (art. 81.2). En outre, le par. 227(4.2) de la *LIR* prévoit une exception pour les garanties visées par règlement, définies dans le *Règlement de l'impôt sur le revenu*, C.R.C., c. 945, art. 2201. De façon générale, est une garantie visée par règlement une hypothèque qui grève un fond de terre ou un bâtiment, à condition que l'hypothèque ait été enregistrée avant le non-versement des retenues à la source en cause (Résumé de l'étude d'impact de la réglementation, DORS/99-322, *Gazette du Canada*, partie II, vol. 133, n° 17, 18 août 1999, p. 2041-2042).

trust. I agree that the definition of "security interest" in s. 224(1.3) of the *ITA* is broad, capturing "any interest in . . . property that secures payment or performance of an obligation and includes an interest . . . created by or arising out of a . . . charge . . ., however or whenever arising, created, deemed to arise or otherwise provided for". However, Wood makes the observation that court-ordered charges are fundamentally different in nature from the security interests that arise by consensual agreement or by operation of law enumerated in s. 224(1.3) because "they are integrally connected to insolvency proceedings that operate for the benefit of the creditors as a group" (Wood (2020), at p. 98). As a result, he reasons that "it would be reasonable to expect that they would be specifically mentioned in the ITA definition of security interest if they were to be included" (p. 98).

pour les besoins de la fiducie réputée créée en faveur de la Couronne. Je conviens que la définition du terme « garantie » figurant au par. 224(1.3) de la *LIR* est large et assimile « [un] intérêt sur un bien qui garantit l'exécution d'une obligation, notamment un paiement » et en précisant que « [s]ont en particulier des garanties les intérêts [. . .] droits nés ou découlant de charges, quelle qu'en soit la nature, de quelque façon ou à quelque date qu'elles soient créées, réputées exister ou prévues par ailleurs ». Cependant, Wood fait remarquer avec justesse que les charges constituées par un tribunal diffèrent fondamentalement des garanties énumérées au par. 224(1.3) qui prennent leur source dans un accord consensuel ou l'application de la loi, car [TRADUCTION] « elles sont intimement liées aux procédures d'insolvabilité qui fonctionnent au profit de l'ensemble des créanciers » (Wood (2020), p. 98). Par conséquent, il opine qu'« il serait raisonnable de s'attendre à ce qu'elles soient expressément mentionnées dans la définition de garantie qui figure dans la LIR si elles devaient en faire partie » (p. 98).

[103] While s. 227(4.1) undeniably operates notwithstanding any security interest — and priming charge — over the debtor's property, the legislative history post-*Sparrow Electric* says nothing about the Crown's specific right to unremitted source deductions, pursuant to the deemed trust, when a company undergoes restructuring under the *CCAA*. Even if, as the Crown insists, a priming charge under the *CCAA* is a security interest for the purposes of the Crown's deemed trust (and I do not settle that debate in these reasons), that does not define what *rights* the Crown has, in a *CCAA* restructuring, pursuant to its deemed trust. This Court has never considered how s. 227(4.1) of the *ITA* interacts with the *CCAA* regime in light of the seminal insolvency decisions in *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, and *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271. This appeal calls on this Court to do so.

[103] Bien que le par. 227(4.1) s'applique indéniablement en dépit de l'existence de toute garantie — ou charge super prioritaire — grevant les biens du débiteur, l'évolution des textes législatifs depuis le prononcé de l'arrêt *Sparrow Electric* est muette à propos du droit spécifique de la Couronne sur les retenues à la source non versées, au titre de la fiducie réputée, lorsqu'une entreprise fait l'objet d'une restructuration sous le régime de la *LACC*. Même si, comme l'affirme avec insistance la Couronne, une charge super prioritaire au titre de la *LACC* est une garantie pour les besoins de la fiducie réputée créée en faveur de la Couronne (et je ne tranche pas cette question dans les présents motifs), cela ne définit pas les *droits* de la Couronne au titre de la fiducie réputée dans le cadre d'une restructuration sous le régime de la *LACC*. Notre Cour ne s'est jamais penchée sur la façon dont le par. 227(4.1) de la *LIR* interagit avec le régime de la *LACC* à la lumière des arrêts de principe en matière d'insolvabilité *Century Services Inc. c. Canada (Procureur général)*, 2010 CSC 60, [2010] 3 R.C.S. 379, et *Sun Indalex Finance, LLC c. Syndicat des Métallos*, 2013 CSC 6, [2013] 1 R.C.S. 271. Le présent pourvoi appelle notre Cour à le faire.

(2) The Right of Beneficial Ownership in Section 227(4.1) of the *ITA*

[104] The Crown argues that s. 227(4.1) creates a proprietary right in the Crown because it gives the Crown beneficial ownership of the amount of the unremitted source deductions. Because this is an *ownership* right, the amount of the unremitted source deductions is taken out of the debtor's estate, effectively giving the Crown super-priority. In other words, the Crown agrees with the dissent in the Court of Appeal: that property is the Crown's property and a *CCAA* judge cannot order a charge over it. The Respondents, in line with the Court of Appeal majority, submit that s. 227(4.1) creates a security interest and can therefore be subordinated to a priming charge under the *CCAA*.

[105] These submissions rely heavily on characterizing the Crown's interest as either a "security interest" or as "proprietary" in nature. However, in my view, defining an entitlement as one or the other does not resolve the issues on appeal because neither characterization has essential features in the abstract. Rather, a statutory entitlement takes its character from the statutory provision. General concepts of "proprietary right" and "security interest" — or of "property," "trust" and "beneficial ownership" — are of limited assistance in this analysis.

[106] This Court has noted that property is often understood as a "bundle of rights" and obligations (*Saulnier v. Royal Bank of Canada*, 2008 SCC 58, [2008] 3 S.C.R. 166, at para. 43). Depending on which rights someone holds, their "bundle of rights" can be viewed as a weak or robust proprietary interest. For this reason, the holder of a security interest has been described as having a proprietary right in its security. In *Sparrow Electric*, for example, both Iacobucci J., writing for the majority, and Gonthier J., writing for the dissent, explained the secured creditor in that case as having a proprietary right in, and effectively owning, the debtor's property that secured its debt (paras. 42 and 98).

(2) Le droit de bénéficiaire prévu au par. 227(4.1) de la *LIR*

[104] La Couronne soutient que le par. 227(4.1) lui confère un droit propriétal puisqu'il lui accorde un droit de bénéficiaire sur le montant des retenues à la source non versées. Puisqu'il s'agit d'un droit *propriétal*, le montant des retenues à la source non versées est soustrait du patrimoine du débiteur, accordant ainsi à la Couronne une super priorité. Autrement dit, la Couronne souscrit à l'opinion dissidente exprimée en Cour d'appel : le bien est la propriété de la Couronne, et un juge chargé d'appliquer la *LACC* ne peut ordonner aucune charge sur ce bien. Les intimées, à l'instar des juges majoritaires de la Cour d'appel, font valoir que le par. 227(4.1) crée une garantie et que celle-ci peut donc être subordonnée à une charge super prioritaire au titre de la *LACC*.

[105] Ces prétentions sont fondées en grande partie sur la nature de l'intérêt de la Couronne, à savoir « garantie » ou « droit propriétal ». Cependant, je suis d'avis que le fait de qualifier le droit de l'une ou l'autre façon ne permet pas de résoudre les questions en litige dans le pourvoi étant donné que ni l'une ni l'autre des qualifications ne possède de caractéristiques essentielles dans l'abstrait. La nature d'un droit est définie par la disposition législative qui le prévoit. Les concepts généraux de « droit propriétal » et de « garantie » — ou de « bien », de « fiducie » et de « droit de bénéficiaire » — ne sont pas d'une grande utilité dans la présente analyse.

[106] Notre Cour a souligné qu'un bien est souvent interprété comme un « faisceau de droits » et d'obligations (*Saulnier c. Banque Royale du Canada*, 2008 CSC 58, [2008] 3 R.C.S. 166, par. 43). Selon les droits qu'a une personne, son « faisceau de droits » peut être considéré comme un « intérêt propriétal » faible ou fort. Pour cette raison, on a dit que le titulaire d'une garantie a un droit propriétal sur cette garantie. Dans l'arrêt *Sparrow Electric*, par exemple, le juge Iacobucci, au nom de la majorité, et le juge Gonthier, au nom des juges dissidents, ont expliqué que, dans cette affaire, le créancier garanti avait un droit propriétal sur les biens de la débitrice qui servaient à garantir sa dette et qu'il était effectivement propriétaire de ces biens (par. 42 et 98).

[107] Similarly, Ronald C. C. Cuming, Catherine Walsh and Roderick J. Wood state that, in the context of personal property security legislation, a secured creditor holds a proprietary right in collateral. This is because, for these authors, "[t]he defining characteristic of a proprietary right . . . is that it is . . . enforceable against the world", and the right of a secured creditor with a perfected security interest is enforceable against the world (*Personal Property Security Law* (2nd ed. 2012), at p. 613). Without an explanation for what the terms mean in a particular context, it is difficult to draw any conclusion from characterizing something as one or the other. (While there is a clear difference between a right *in rem* (available against the world at large) and a right *in personam* (available against a determinate set of individuals), whether the term "proprietary right" means a "right *in rem*" or the term "security interest" means a "right *in personam*" depends upon the statutory context. In any event, the submissions before this Court were not framed in these terms).

[107] Dans le même ordre d'idées, Ronald C. C. Cuming, Catherine Walsh et Roderick J. Wood affirment que, dans le contexte des lois en matière de sûretés mobilières, un créancier garanti possède un droit propriétal sur les biens donnés en garantie. La raison en est que, pour ces auteurs, [TRADUCTION] « [l]a caractéristique déterminante d'un droit propriétal est [. . .] qu'il est [. . .] opposable à tous », et le droit d'un créancier garanti ayant une sûreté parfaite est opposable à tous (*Personal Property Security Law* (2e éd. 2012), p. 613). Sans une explication de ce que signifient les termes dans un contexte donné, il est difficile de tirer quelque conclusion que ce soit de la qualification. (Bien qu'il existe une nette différence entre un droit réel (opposable à tous) et un droit personnel (opposable à un ensemble déterminé de personnes), la question de savoir si le terme « droit propriétal » s'entend d'un « droit réel » ou si le terme « garantie » s'entend d'un « droit personnel » dépend du contexte législatif. Quoi qu'il en soit, les observations présentées devant notre Cour n'étaient pas formulées en ces termes).

[108] This Court explained in *Saulnier* that, when analyzing the definition of property under a statute, there is little use in considering property in the abstract or even under the common law because "Parliament can and does create its own lexicon" for particular purposes (para. 16; see also *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny*, 2009 SCC 49, [2009] 3 S.C.R. 286, at paras. 11-12). Indeed, "interests unknown to the common law may be created by statute" (*Wotherspoon v. Canadian Pacific Ltd.*, [1987] 1 S.C.R. 952, at p. 999, citing Ross J. in *Town of Lunenburg v. Municipality of Lunenburg*, [1932] 1 D.L.R. 386 (N.S.S.C.), at p. 390). As a result, caution is required before importing definitions from other contexts, relying on statements or description from cases out of context, and employing general concepts like "proprietary right" and "security interest". It is crucial in this appeal to stay within the bounds of the statutory provisions being interpreted.

[108] Dans l'arrêt *Saulnier*, notre Cour a expliqué qu'au moment d'analyser la définition d'un bien contenue dans une loi, il n'est pas utile d'examiner la notion de « bien » dans l'abstrait, ni même dans la common law parce que « le législateur peut, à des fins particulières, créer sa propre nomenclature, et il lui arrive effectivement de le faire » (par. 16; voir aussi *Québec (Revenu) c. Caisse populaire Desjardins de Montmagny*, 2009 CSC 49, [2009] 3 R.C.S. 286, par. 11-12). En effet, « des droits étrangers à la *common law* peuvent naître d'une loi » (*Wotherspoon c. Canadien Pacifique Ltée*, [1987] 1 R.C.S. 952, p. 999, citant le juge Ross dans *Town of Lunenburg c. Municipality of Lunenburg*, [1932] 1 D.L.R. 386 (C.S. N.-É.), p. 390). Par conséquent, une certaine prudence s'impose avant d'utiliser des définitions tirées d'autres contextes, de s'appuyer sur des déclarations ou des descriptions tirées d'affaires hors contexte et d'employer des concepts généraux comme le « droit propriétal » et la « garantie ». Il est essentiel, dans le présent pourvoi, de ne pas déborder du cadre des dispositions législatives à interpréter.

[109] Section 227(4.1) states that the amount of the unremitted source deductions is "beneficially

[109] Aux termes du par. 227(4.1), la Couronne a un « droit de bénéficiaire » sur le montant des

owned" by the Crown. However, it does not follow that this right of beneficial ownership is absolute or that the term imports specific rights that flow from it. This is not a case where Parliament has used a term with an established legal meaning — leading to an inference that Parliament has given the term that meaning in the statute in question (*R. v. D.L.W.*, 2016 SCC 22, [2016] 1 S.C.R. 402, at para. 20). The concept of beneficial ownership does not have a precise doctrinal meaning in the common law of Canada, and it does not exist in the civil law of Quebec. It is also not used consistently in the *ITA*. The meaning of "beneficially owned" in s. 227(4.1) can only be understood in the specific, relevant statutory context in which it arises. To that end, while s. 227(4.1) uses the mechanism of a trust and confers some type of beneficial ownership on the Crown, it modifies even those features of beneficial ownership that are widely associated with it under the common law.

retenues à la source non versées. Il ne s'ensuit toutefois pas que ce droit de bénéficiaire est absolu ni qu'il découle de ce terme des droits particuliers. Il ne s'agit pas en l'espèce d'un cas où le législateur a utilisé un terme ayant une signification juridique bien établie — menant à une inférence selon laquelle le législateur a donné cette signification précise au terme dans la loi en question (*R. c. D.L.W.*, 2016 CSC 22, [2016] 1 R.C.S. 402, par. 20). Le concept du droit de bénéficiaire n'a pas de signification doctrinale précise dans la common law canadienne, et il n'existe pas dans le droit civil québécois. Il n'est pas non plus utilisé de façon uniforme dans la *LIR*. Le sens du terme « droit de bénéficiaire » utilisé au par. 227(4.1) ne peut être saisi que dans le contexte législatif précis et pertinent où il est employé. À cet égard, bien que le par. 227(4.1) prévoit un mécanisme de fiducie et qu'il confère un certain droit de bénéficiaire à la Couronne, il modifie les caractéristiques qui sont généralement associées à ce droit de bénéficiaire dans la common law.

[110] As a federal statute with national application, the *ITA* rests on the private law of the provinces. This relationship of complementarity is codified in s. 8.1 of the *Interpretation Act*, R.S.C. 1985, c. I-21. However, the federal statute can derogate and dissociate itself from the private law when it legislates on a matter that falls within its jurisdiction: see M. Lamoureux, "*The Harmonization of Tax Legislation Dissociation: A Mechanism of Exception Part III*" (online). As I shall explain, the trust created by s. 227(4.1) disassociates itself from the requirements of a trust in both the provincial common law and civil law.

[110] En tant que loi fédérale d'application nationale, la *LIR* repose sur le droit privé des provinces. Ce rapport de complémentarité est établi à l'art. 8.1 de la *Loi d'interprétation*, L.R.C. 1985, c. I-21. La loi fédérale peut cependant déroger au droit privé et s'en dissocier lorsqu'elle porte sur une matière qui relève de sa compétence : voir M. Lamoureux, « *L'harmonisation des lois fiscales — La dissociation : Un mécanisme d'exception Partie III* » (en ligne). Comme je l'expliquerai, la fiducie créée en vertu du par. 227(4.1) se dissocie des conditions d'une fiducie tant en common law provinciale qu'en droit civil.

[111] I proceed as follows: (1) there is no settled doctrinal meaning of the term beneficial ownership; and (2) s. 227(4.1) does not create a true trust because there is no certainty of subject matter. A lack of certainty of subject matters means that the Crown cannot, through tracing, claim appreciation of trust value and the trustee (tax debtor) is free to dispose of trust property. These features render the Crown's beneficial ownership weaker than generally understood at common law. The result is an interest "unknown to the common [or civil] law". We cannot, therefore, look at s. 227(4.1) in isolation to define

[111] Voici de quelle manière je vais procéder : (1) le terme « droit de bénéficiaire » n'a pas de signification établie dans la doctrine et (2) le par. 227(4.1) ne crée pas une fiducie véritable puisqu'il n'existe aucune certitude quant à sa matière. L'absence de certitude à cet égard signifie que la Couronne ne peut pas, au moyen du retraçage de l'origine des biens, réclamer l'appréciation de la valeur de la fiducie, et le fiduciaire (débiteur fiscal) est libre de disposer des biens de la fiducie. Ces caractéristiques font du droit de bénéficiaire de la Couronne un droit plus faible que le sens qui lui est généralement donné en

the way in which the Crown's "beneficially owned" property under s. 227(4.1) should be treated in an insolvency — that clarification must come from, and indeed does come from, Parliament's insolvency legislation.

(a) *No Settled Doctrinal Meaning*

[112] Beneficial ownership is most commonly used in the law of trusts to broadly distinguish between who has legal title to property (the trustee) and who has beneficial enjoyment of that property (the beneficiary). *Black's Law Dictionary* (11th ed. 2019), for example, defines a "beneficial owner" as "[o]ne recognized in equity as the owner of something because use and title belong to that person, even though legal title may belong to someone else, esp. one for whom property is held in trust" (p. 1331).

[113] Despite this common usage, there is no clear definition of the rights flowing from the term "beneficial ownership" under the common law (see, e.g., C. Brown, "Beneficial Ownership and the Income Tax Act" (2003), 51 *Can. Tax J.* 401; M. D. Brender, "Beneficial Ownership in Canadian Income Tax Law: Required Reform and Impact on Harmonization of Quebec Civil Law and Federal Legislation" (2003), 51 *Can. Tax J.* 311, at p. 316). As well, the *Civil Code of Québec* does not have a concept of beneficial ownership (see *Canada (Attorney General) v. Caisse populaire d'Amos*, 2004 FCA 92, 324 N.R. 31, at paras. 48-49).

[114] The term itself is also contentious within the academy, giving rise to a heated debate about whether a trust beneficiary should be thought of as an *owner* at all (see, e.g., D. W. M. Waters, "The Nature of the Trust Beneficiary's Interest" (1967), 45 *Can. Bar Rev.* 219; L. D. Smith, "Trust and Patrimony" (2008), 38 *R.G.D.* 379; B. McFarlane and R. Stevens,

common law. Il en résulte un droit « étrang[er] à la *common law* [ou au droit civil] ». Nous ne pouvons donc pas nous fier au seul par. 227(4.1) pour définir de quelle façon les biens dans lesquels la Couronne a un « droit de bénéficiaire » au titre du par. 227(4.1) devraient être traités en cas d'insolvabilité — cette précision doit venir, et elle vient effectivement, de la législation du Parlement en matière d'insolvabilité.

a) *Aucune signification établie dans la doctrine*

[112] Le concept du droit de bénéficiaire est plus couramment utilisé dans le domaine du droit des fiducies afin d'établir une distinction générale entre celui qui possède un titre en common law sur un bien (le fiduciaire) et celui qui a la jouissance de ce bien (le bénéficiaire). Selon le *Black's Law Dictionary* (11e éd. 2019), par exemple, le « *beneficial owner* » (propriétaire bénéficiaire) est défini comme [TRADUCTION] « [l]a personne reconnue en equity comme le propriétaire d'une chose parce que l'utilisation et le titre lui appartiennent, même si le titre juridique appartient peut-être à quelqu'un d'autre, surtout une personne pour qui des biens sont détenus en fiducie » (p. 1331).

[113] Malgré ce sens couramment donné, il n'existe pas de définition claire des droits qui découlent du « droit de bénéficiaire » en common law (voir, p. ex., C. Brown, « Propriété effective et Loi de l'impôt sur le revenu » (2003), 51 *Rev. fisc. can.* 454; M. D. Brender, « Propriété effective dans la législation fiscale canadienne : Réforme nécessaire et incidences sur l'harmonisation de la législation fédérale avec le droit civil du Québec » (2003), 51 *Rev. fisc. can.* 355, p. 360). En outre, le concept de « droit de bénéficiaire » ne figure pas dans le *Code civil du Québec* (voir *Canada (Procureur général) c. Caisse populaire d'Amos*, 2004 CAF 92, 324 N.R. 31, par. 48-49).

[114] Également sujet à controverse dans le milieu universitaire, le terme est à l'origine d'un débat houleux sur la question de savoir si le bénéficiaire d'une fiducie devrait être considéré comme un *propriétaire* (voir. p. ex., D. W. M. Waters, « The Nature of the Trust Beneficiary's Interest » (1967), 45 *R. du B. can.* 219; L. D. Smith, « Trust and Patrimony » (2008),

"The nature of equitable property" (2010), 4 *J. Eq.* 1; J. E. Penner, "The (True) Nature of a Beneficiary's Equitable Proprietary Interest under a Trust" (2014), 27 *Can. J.L. & Jur.* 473; Brender, at p. 316). The conventional view is that a trust beneficiary only has a right *in personam* against the trustee to enforce the terms of the trust, which is not a proprietary right in the trust property. A different view is that a trust beneficiary has equitable ownership of trust property, despite the existence of an intermediary with legal title (Brown, at pp. 413-14). Some suggest that there is a midway approach in Canada: depending on the context, a beneficiary's right is either a personal right against the trustee or a proprietary right in trust property (Brender, at p. 316).

38 *R. G. D.* 379; B. McFarlane et R. Stevens, « The nature of equitable property » (2010), 4 *J. Eq.* 1; J. E. Penner, « The (True) Nature of a Beneficiary's Equitable Proprietary Interest under a Trust » (2014), 27 *Can. J.L. & Jur.* 473; Brender, p. 360). On estime d'ordinaire que le bénéficiaire d'une fiducie n'a que le droit personnel d'exiger du fiduciaire qu'il exécute les conditions de la fiducie, lequel droit ne constitue pas un droit de propriété sur les biens de la fiducie. Un autre avis est que le bénéficiaire d'une fiducie a un droit de propriété en equity sur les biens de la fiducie, malgré l'existence d'un intermédiaire détenant un titre légal (Brown, p. 468-469). Certains suggèrent qu'il existe une approche intermédiaire au Canada : selon le contexte, le droit d'un bénéficiaire est soit un droit personnel à l'encontre du fiduciaire, soit un droit de propriété sur les biens de la fiducie (Brender, p. 360).

[115] In "Beneficial Ownership and the Income Tax Act", Brown notes the debate in the academy and analyzes how the terms "beneficial ownership", "beneficial owner", and "beneficially owned" are used in the *ITA*. After examining 26 provisions invoking beneficial ownership in the *ITA*, she concludes that its meaning is "no longer obvious" (p. 452).

[115] Dans « Propriété effective et Loi de l'impôt sur le revenu », Brown souligne le débat qui divise les spécialistes du domaine et elle analyse la façon dont les termes « *beneficial ownership* », « *beneficial owner* » et « *beneficially owned* » (« droit de bénéficiaire » et « propriétaire bénéficiaire ») sont utilisés dans la *LIR*. Après avoir étudié 26 dispositions de la *LIR* contenant « *beneficial ownership* », elle en arrive à la conclusion que son sens « n'est plus aussi évident » (p. 512).

[116] This Court need not resolve the ongoing debate. However, it serves to highlight that "the real question is what is the nature of a beneficiary's interest in a trust when considered in the context of the legislation that is sought to be applied" (Brown, at p. 419). In the *ITA* context, Brown concludes that "the matter of what 'beneficial ownership' means for tax purposes must be settled within the structure of the ITA" (p. 435). Further, whether the beneficiary's rights within the *ITA* are *in rem* or *in personam* will often depend on a combination of factors, like the wording of the deeming provision, private law concepts, case law, and tax policy (see pp. 435-36).

[116] Notre Cour n'a pas à résoudre le débat en cours. Toutefois, ce débat fait ressortir que « la vraie question est la suivante : quelle est la nature de l'intérêt du bénéficiaire à l'égard d'une fiducie dans le contexte de la loi applicable [. . .]? » (Brown, p. 474). Dans le contexte de la *LIR*, Brown conclut que « le sens du concept de propriété effective aux fins d'impôt doit être établi dans le contexte de la LIR » (p. 493). En outre, la question de savoir si les droits d'un bénéficiaire prévus par la *LIR* sont réels ou personnels (*in rem* ou *in personam*) dépendra souvent d'une combinaison de facteurs, comme le libellé des dispositions déterminatives, les concepts de droit privé, la jurisprudence et les politiques fiscales (voir p. 493-494).

[117] In my view, the works cited above belie the notion that s. 227(4.1) of the *ITA*, and its use of the

[117] À mon avis, les ouvrages précités contredisent l'idée que le par. 227(4.1) de la *LIR*, et son

concept of beneficial ownership, is unequivocal in meaning. Not only is there no settled definition of beneficial ownership under the common law, there also appears to be no consistent meaning of the term in the *ITA*. And the concept does not exist in Quebec civil law. The meaning of beneficial ownership when used in a statute must always be construed within the context of the particular provision in which it occurs. What is necessary is careful scrutiny of s. 227(4.1), and specifically, the right of beneficial ownership it gives the Crown, particularly in the context of a statutory deemed trust with no specific subject matter.

recours au concept de droit de bénéficiaire, a un sens sans équivoque. Non seulement il n'existe aucune définition établie du « droit de bénéficiaire » dans la common law, mais il appert également que la *LIR* ne lui donne pas un sens uniforme. En outre, le concept n'existe pas en droit civil québécois. Le sens du terme « droit de bénéficiaire », lorsqu'il est employé dans une loi, doit toujours être interprété dans le contexte de la disposition où il figure. Il est nécessaire de procéder à un examen minutieux du par. 227(4.1) et, plus particulièrement, du droit de bénéficiaire qu'il confère à la Couronne, notamment dans le cas d'une fiducie réputée créée par la loi sans certitude quant à sa matière.

(b) *Section 227(4.1) Does Not Create a "True" Trust*

b) *Le paragraphe 227(4.1) ne crée pas une fiducie « véritable »*

[118] A statutory deemed trust is a unique legal vehicle. Unlike an express trust, which can be created by contract, will, or oral and written declarations, and unlike a trust that arises by operation of law, a statutory deemed trust "is a trust that legislation brings into existence by constituting certain property as trust property and a certain person as the trustee of that property" (*Guarantee Company of North America v. Royal Bank of Canada*, 2019 ONCA 9, 144 O.R. (3d) 225, at para. 18; see also A. Grenon, "Common Law and Statutory Trusts: In Search of Missing Links" (1995), 15 *Est. & Tr. J.* 109, at p. 110).

[118] Une fiducie réputée créée par la loi est un mécanisme juridique unique. Contrairement à une fiducie expresse, qui peut être établie par contrat, par testament ou par déclaration orale ou écrite, et contrairement à une fiducie qui découle de l'application de la loi, une fiducie réputée créée par la loi [TRADUCTION] « est une fiducie que crée la loi en constituant certains biens en biens de fiducie et en désignant une certaine personne comme fiduciaire de ces biens » (*Guarantee Company of North America c. Royal Bank of Canada*, 2019 ONCA 9, 144 O.R. (3d) 225, par. 18; voir aussi A. Grenon, « Common Law and Statutory Trusts : In Search of Missing Links » (1995), 15 *Est. & Tr. J.* 109, p. 110).

[119] Being a creature of statute, a statutory deemed trust does not have to fulfill the ordinary requirements of trust law, namely, certainty of intention, certainty of subject matter, and certainty of object (*British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24; see also *Friends of Toronto Public Cemeteries Inc. v. Public Guardian and Trustee*, 2020 ONCA 282, 59 E.T.R. (4th) 174, at para. 163).

[119] Tirant son origine de la législation, la fiducie réputée créée par la loi n'a pas à satisfaire aux exigences ordinaires du droit des fiducies, soit la certitude quant à l'intention, la certitude quant à la matière et la certitude quant à l'objet (*Colombie-Britannique c. Henfrey Samson Belair Ltd.*, [1989] 2 R.C.S. 24; voir aussi *Friends of Toronto Public Cemeteries Inc. c. Public Guardian and Trustee*, 2020 ONCA 282, 59 E.T.R. (4th) 174, par. 163).

[120] Section 227(4.1), for example, does not fulfill the ordinary requirements of the common law of trusts (see R. J. Wood and R. T. G. Reeson, "The Continuing Saga of the Statutory Deemed Trust: *Royal Bank v. Tuxedo Transportation Ltd.*" (2000),

[120] Le paragraphe 227(4.1), par exemple, ne satisfait pas aux exigences ordinaires de la common law en matière de fiducies (voir R. J. Wood et R. T. G. Reeson, « The Continuing Saga of the Statutory Deemed Trust : *Royal Bank v. Tuxedo Transportation*

15 *B.F.L.R.* 515, at pp. 522-24). There is no identifiable trust property and therefore no certainty of subject matter (*Henfrey*, at p. 35). To use the terminology in *Henfrey*, s. 227(4.1) is not a "true" trust (p. 34). Moreover, without specific property being transferred to the trust patrimony, s. 227(4.1) does not satisfy the requirements of an autonomous patrimony contemplated by the *Civil Code of Québec* in arts. 1260, 1261 and 1278: see *Bank of Nova Scotia v. Thibault*, 2004 SCC 29, [2004] 1 S.C.R. 758, at para. 31.

[121] This departure from a standard requirement of trust formation — certainty of subject matter — results in at least two features of s. 227(4.1) that are at odds with the operation of ordinary trusts. First, through equitable tracing, the beneficiary of a trust can claim appreciation in trust value, but this advantage is impossible without identifiable trust property (*Rawluk v. Rawluk*, [1990] 1 S.C.R. 70, at pp. 79 and 92-93; *Foskett v. McKeown*, [2001] 1 A.C. 102 (H.L.), at pp. 129-31; L. D. Smith, *The Law of Tracing* (1997), at pp. 347-48). The tracing mechanism in s. 227(4.1) provides that the value of any unremitted source deductions continues to survive in the assets remaining in the tax debtor's hands. Section 227(4.1) traces the *value* of the unremitted source deductions, necessarily capping the Crown's right at that value. In *Sparrow Electric*, Gonthier J. explained that such a tracing mechanism is "antithetical to tracing in the traditional sense, to the extent that it requires no link at all between the subject matter of the trust and the fund or asset which the subject matter is being traced into" (para. 37; see also Wood and Reeson, at p. 518; Smith (1997), at pp. 310-20 and 347-48; R. J. Wood, "The Floating Charge in Canada" (1989), 27 *Alta. L. Rev.* 191, at p. 221).

[122] While s. 227(4.1) gives the Crown beneficial ownership in the value of unremitted source deductions, it does not allow the Crown to claim more than the value of the source deductions. In other words, it gives the Crown the right of beneficial ownership

Ltd. » (2000), 15 *B.F.L.R.* 515, p. 522-524). Les biens de la fiducie ne sont pas identifiables, et il n'y a donc aucune certitude quant à sa matière (*Henfrey*, p. 35). Pour reprendre la terminologie utilisée dans l'arrêt *Henfrey*, le par. 227(4.1) ne crée pas une fiducie « véritable » (p. 34). De plus, sans transfert de biens précis au patrimoine fiduciaire, le par. 227(4.1) ne satisfait pas aux conditions d'un patrimoine autonome prévues aux art. 1260, 1261 et 1278 du *Code civil du Québec* : voir *Banque de Nouvelle-Écosse c. Thibault*, 2004 CSC 29, [2004] 1 R.C.S. 758, par. 31.

[121] Cette dérogation à une exigence normale de la constitution d'une fiducie — la certitude quant à la matière — fait en sorte qu'au moins deux caractéristiques du par. 227(4.1) ne cadrent pas avec le fonctionnement des fiducies ordinaires. Premièrement, grâce aux règles de retraçage des biens en equity, le bénéficiaire d'une fiducie peut réclamer l'appréciation de la valeur de la fiducie, mais cet avantage ne représente rien si les biens de la fiducie ne sont pas identifiables (*Rawluk c. Rawluk*, [1990] 1 R.C.S. 70, p. 79 et 92-93; *Foskett c. McKeown*, [2001] 1 A.C. 102 (H.L.), p. 129-131; L. D. Smith, *The Law of Tracing* (1997), p. 347-348). Le mécanisme de retraçage exposé au par. 227(4.1) prévoit que la valeur des retenues à la source non versées subsiste dans les actifs qui demeurent en la possession du débiteur fiscal. Le paragraphe 227(4.1) permet d'établir la *valeur* des retenues à la source non versées, limitant automatiquement le droit de la Couronne à cette valeur. Dans l'arrêt *Sparrow Electric*, le juge Gonthier a expliqué qu'un tel mécanisme permettant de retracer l'origine d'un bien était « à l'opposé du sens traditionnel du mot "retracer", dans la mesure où il ne nécessite aucun lien entre l'objet de la fiducie et le fonds ou l'actif auquel on rattache cet objet » (par. 37; voir aussi Wood et Reeson, p. 518; Smith (1997), p. 310-320 et 347-348; R. J. Wood, « The Floating Charge in Canada » (1989), 27 *Alta. L. Rev.* 191, p. 221).

[122] Si le par. 227(4.1) confère à la Couronne un droit de bénéficiaire sur la valeur des retenues à la source non versées, il ne permet pas à la Couronne de réclamer davantage que la valeur de ces retenues. Autrement dit, il confère à la Couronne un droit de

without at least some of the advantages that beneficial ownership often entails.

[123] Second, a trustee cannot normally dispose of trust property in the ordinary course of the trustee's business. Section 227(4.1), however, allows the tax debtor to dispose of its property, conveying clear title to property subject to the trust.

[124] This was the point made by Iacobucci J. in *First Vancouver* when he likened the deemed trust in s. 227(4.1) to a floating charge. Because a floating charge is a security interest, the Respondents rely on Iacobucci J.'s analogy to argue that s. 227(4.1) only creates a security interest as opposed to a proprietary right. I disagree with the Respondents' submission — the limited analogy to a floating charge in that context cannot be relied on in this case to liken the Crown's interest to a security interest for the purposes of the *CCAA*.

[125] One of the issues in *First Vancouver* was whether the deemed trust in s. 227(4.1) continued to attach to property that had been sold by the tax debtor to a third-party purchaser for value. The Court concluded that, in the event of a sale to a third party, "the trust property is replaced by the proceeds of sale of such property" (para. 40). This is because the deemed trust "does not attach specifically to any particular assets of the tax debtor so as to prevent their sale" and the tax debtor is thereby "free to alienate its property in the ordinary course" (para. 40). In this way, "the deemed trust is in principle similar to a floating charge over all the assets of the tax debtor" (para. 40). As a result, the deemed trust in s. 227(4.1) would not override the rights of third-party purchasers for value (para. 44).

[126] In short, the deemed trust in s. 227(4.1) clearly "anticipate[s] that the character of the tax debtor's property will change over time" (*First Vancouver*, at para. 41). In making these statements, Iacobucci J. did not, however, equate the

bénéficiaire sans certains des avantages qui y sont souvent rattachés.

[123] Deuxièmement, un fiduciaire ne peut généralement pas disposer des biens de la fiducie dans le cours normal de ses activités. Le paragraphe 227(4.1) permet toutefois au débiteur fiscal de disposer de ses biens, traduisant un titre de propriété incontestable sur les biens assujettis à la fiducie.

[124] C'est le raisonnement qu'a exprimé le juge Iacobucci dans l'arrêt *First Vancouver* quand il a comparé la fiducie réputée prévue au par. 227(4.1) à une charge flottante. Puisqu'une charge flottante est une garantie, les intimées s'appuient sur l'analogie du juge Iacobucci pour soutenir que le par. 227(4.1) crée seulement une garantie et non un droit propriétal. Je ne souscris pas à l'affirmation des intimées — la comparaison restreinte avec une charge flottante faite dans ce contexte ne peut pas être invoquée en l'espèce pour assimiler le droit de la Couronne à une garantie pour l'application de la *LACC*.

[125] Une des questions soulevées dans l'arrêt *First Vancouver* était celle de savoir si la fiducie réputée prévue au par. 227(4.1) s'attachait toujours aux biens vendus à titre onéreux à un tiers par le débiteur fiscal. La Cour a conclu que, si le bien est vendu à un tiers, « ce bien [est] alors remplacé par le produit de la vente » (par. 40). Il en est ainsi parce que la fiducie réputée « ne vise pas certains biens en particulier du débiteur fiscal de façon à en empêcher la vente », le débiteur est donc « libre de se départir d'un bien détenu en fiducie dans le cadre normal de ses activités » (par. 40). De cette façon, la fiducie réputée « s'apparent[e], sur le plan des principes, à une charge flottante grevant [. . .] l'ensemble des éléments d'actif du débiteur fiscal » (par. 40). Par conséquent, la fiducie réputée prévue au par. 227(4.1) ne l'emporterait pas sur le respect des droits de l'acquéreur à titre onéreux (par. 44).

[126] En résumé, dans le cas d'une fiducie réputée prévue au par. 227(4.1), « il est [clairement] à prévoir que la nature des biens du débiteur fiscal changera avec le temps » (*First Vancouver*, par. 41). Le juge Iacobucci n'a toutefois pas assimilé la fiducie réputée

deemed trust in s. 227(4.1) to a floating charge for all purposes. Otherwise, the trust would not attach until an event of crystallization, and s. 227(4.1) clearly contemplates that the trust attaches from the moment source deductions are made or withheld (see s. 227(4.1)(a) and (b); see also A. Duggan and J. Ziegel, "Justice Iacobucci and the Canadian Law of Deemed Trusts and Chattel Security" (2007), 57 *U.T.L.J.* 227, at p. 246; Wood (1989), at p. 195).

prévue au par. 227(4.1) à une charge flottante à toutes les fins. Sinon, la fiducie ne s'appliquerait pas avant la cristallisation du droit, et le par. 227(4.1) indique clairement que la fiducie s'applique dès le moment où les retenues à la source sont faites ou détenues (voir les al. 227(4.1)a) et b); voir aussi A. Duggan et J. Ziegel, « Justice Iacobucci and the Canadian Law of Deemed Trusts and Chattel Security » (2007), 57 *U.T.L.J.* 227, p. 246; Wood (1989), p. 195).

[127] The Court's limited analogy to a floating charge in *First Vancouver* helps explain why "beneficial ownership" in s. 227(4.1) again means something narrower than it does outside of that statutory context. The Crown's right of beneficial ownership does not prevent the trustee from disposing of trust property until the Canada Revenue Agency (CRA) enforces the deemed trust (Canada Revenue Agency, *Tax collections policies* (online); see also *ITA*, ss. 222, 223(1) to (3), (5) and (6) and 224(1)). Freely disposing of trust property, including for one's own business purposes, is obviously not something a trustee can do under the common law.

[127] L'analogie restreinte avec une charge flottante faite par la Cour dans l'arrêt *First Vancouver* aide à expliquer pourquoi le « droit de bénéficiaire » prévu au par. 227(4.1) a une signification plus étroite dans son contexte législatif qu'en dehors de celui-ci. Le droit de bénéficiaire de la Couronne n'empêche pas le fiduciaire de disposer des biens de la fiducie jusqu'à ce que l'Agence du revenu du Canada (ARC) fasse exécuter la fiducie réputée (Agence du revenu du Canada, *Politiques de recouvrement de l'impôt* (en ligne); voir aussi la *LIR*, art. 222 et par. 223(1) à (3), par. 223 (5) et (6) et par. 224(1)). Disposer librement des biens d'une fiducie, y compris pour ses propres activités commerciales, n'est manifestement pas une chose qu'un fiduciaire peut faire selon les règles de la common law.

[128] The Crown's reliance on s. 227(4.1)(b) of the *ITA* is misplaced for similar reasons. That clause specifies that the amount of the unremitted source deductions is deemed to "form no part of the estate or property of the person from the time the amount was so deducted or withheld". The Crown argues that this is further clarification that a *CCAA* judge cannot order a charge over that amount. Again, the deeming words of s. 227(4.1)(b) must be interpreted in the context of a trust without certainty of subject matter. To say that a certain *amount* does not form part of the debtor's estate or property reiterates that the Crown has an interest in that amount; it also clarifies that the debtor's interest in its estate is reduced by that amount. However, it does not change the *makeup* of the estate itself — it does not change the specific property that constitutes the debtor's estate. So long as the thing that is deemed not to form part of the debtor's estate or property is an amount or value of money rather than property with a specific subject

[128] C'est à tort, pour des raisons semblables, que la Couronne s'appuie sur l'al. 227(4.1)b) de la *LIR*. Cette disposition précise que le montant des retenues à la source non versées est réputé « ne pas faire partie du patrimoine ou des biens de la personne à compter du moment où le montant est déduit ou retenu ». La Couronne plaide que cette disposition vient renforcer la thèse selon laquelle le juge chargé d'appliquer la *LACC* ne peut pas ordonner de charge sur ce montant. Une fois de plus, la disposition déterminative de l'al. 227(4.1)b) doit être interprétée dans le contexte d'une fiducie créée sans certitude quant à sa matière. Dire qu'un certain *montant* ne fait pas partie du patrimoine ou des biens d'un débiteur confirme que la Couronne a un intérêt à l'égard de ce montant; cela confirme également que ce montant est soustrait de l'intérêt du débiteur dans son patrimoine. Cependant, cela ne change rien à la *constitution* du patrimoine lui-même — les biens précis qui font partie du patrimoine du débiteur ne changent pas. Tant que ce

matter, the debtor's estate remains unchanged and the debtor continues to have control over it.

[129] To conclude, beneficial ownership under s. 227(4.1) is a manipulation of the concept of beneficial ownership under ordinary principles of trust law. The logical incoherence of s. 227(4.1) has prompted some scholars to criticize the provision as using inappropriate legal concepts. For example, Wood and Reeson state:

> . . . we believe that the design of [s. 227(4.1) of the *ITA*] is deeply flawed. . . . In large measure, the difficulties have as their source the use of inappropriate legal concepts. The concept of a trust is used in the legislation, but in virtually every respect the characteristics of a trust are lacking. The employer is not actually required to hold the money separate and apart, the usual fiduciary obligations of a trustee are absent, and the trust exists without a *res*. The law of tracing is similarly corrupted. The tracing exercise does not seek to identify a chain of substitutions, and a proprietary claim is available without the need for a proprietary base.
>
> . . .
>
> The misuse of the trust concept and the perversion of conventional tracing principles empty these concepts of meaning and will pose a threat to the rationality of the law. [Footnote omitted; pp. 531-33.]

[130] Others have similarly commented that, in substance, s. 227(4.1) only creates a security interest (J. S. Ziegel, "Crown Priorities, Deemed Trusts and Floating Charges: *First Vancouver Finance v. Minister of National Revenue*" (2004), 45 C.B.R. (4th) 244, at p. 248; Duggan and Ziegel, at pp. 239 and 245-46; M. J. Hanlon, V. Tickle and E. Csiszar, "Conflicting Case Law, Competing Statutes, and the Confounding Priority Battle of the Interim Financing Charge and the Crown's Deemed Trust for Source

qui est réputé ne pas faire partie du patrimoine ou des biens du débiteur est un montant d'argent — et non des biens qui ont une matière précise — le patrimoine du débiteur demeure inchangé et le débiteur en conserve la maîtrise.

[129] En conclusion, le droit de bénéficiaire prévu au par. 227(4.1) constitue une manipulation du concept du droit de bénéficiaire selon les principes ordinaires du droit des fiducies. L'incohérence logique du par. 227(4.1) a mené certains auteurs à critiquer la disposition, faisant valoir qu'elle emploie des concepts juridiques inappropriés. Par exemple, Wood et Reeson affirment ce qui suit :

> [TRADUCTION] . . . nous croyons que la conception du [par. 227(4.1) de la *LIR*] comporte de graves lacunes. [. . .] Dans une large mesure, les lacunes découlent de l'emploi de concepts juridiques inappropriés. On recourt au concept de fiducie, mais à pratiquement tous les égards, les caractéristiques d'une fiducie ne sont pas présentes. L'employeur n'est, en réalité, pas tenu de détenir l'argent séparément de ses propres biens, les obligations qui incombent généralement à un fiduciaire sont absentes, et la fiducie existe sans certitude quant à la matière. En outre, les règles de retraçage des biens ne sont pas respectées. Le retraçage des biens ne vise pas à déterminer une chaîne de substitutions, et une réclamation fondée sur un droit de propriété est possible sans qu'il soit nécessaire qu'il y ait droit de propriété.
>
> . . .
>
> Le recours erroné au concept de fiducie et le détournement des principes ordinaires d'établissement de l'origine des biens vident ces concepts de leur sens et compromettent la rationalité du droit. [Note en bas de page omise; p. 531-533.]

[130] D'autres ont également dit qu'en substance, le par. 227(4.1) crée uniquement une garantie (J. S. Ziegel, « Crown Priorities, Deemed Trusts and Floating Charges : *First Vancouver Finance v. Minister of National Revenue* » (2004), 45 C.B.R. (4e) 244, p. 248; Duggan et Ziegel, p. 239 et 245-246; M. J. Hanlon, V. Tickle et E. Csiszar, « Conflicting Case Law, Competing Statutes, and the Confounding Priority Battle of the Interim Financing Charge and the Crown's Deemed Trust for Source Deductions »,

Deductions", in J. P. Sarra et al., eds., *Annual Review of Insolvency Law 2018* (2019), 897).

[131] Similarly, in *Caisse populaire Desjardins de Montmagny*, this Court rejected the Crown's argument that s. 222(3) of the *Excise Tax Act*, R.S.C. 1985, c. E-15 (*ETA*), which is nearly identical to s. 227(4.1) of the *ITA*, created a proprietary right in the Crown (paras. 20-27). In that case, the debtor companies owed goods and services tax (GST) at the time of their respective bankruptcies. As the Crown's GST claims are unsecured in bankruptcy, the tax authorities took the position that amounts owing up to the date of the bankruptcy were the Crown's property. This Court unanimously disagreed with that position, concluding that the manner and mechanism of collecting GST was not consistent with a proprietary right (paras. 21-23).

[132] In any event, treating s. 227(4.1) as only effectively creating a security interest would not resolve the issues in this appeal without reference to how the Crown's interest arises under the *CCAA*. As noted above, broad general characterizations do not help in defining the specific attributes of this deemed trust. This Court must grapple with the fact that s. 227(4.1) is both structured as a security interest, like a charge, but also uses the mechanism of a deemed trust.

[133] The takeaway for this appeal is that the structure of s. 227(4.1), on its own, does not shed light on what to do with the Crown's beneficial ownership of unremitted source deductions in the insolvency regimes. Although the provision is clear that the Crown's right operates notwithstanding other security interests, the content of that right for the purposes of insolvency cannot be inferred solely from the text of the *ITA*. The unique statutory device manipulates private law concepts and cannot be carried through to a logical conclusion for the purposes of insolvency. For this reason, it is not surprising that the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (*BIA*) and the *CCAA* specifically articulate

dans J. P. Sarra et autres, dir., *Annual Review of Insolvency Law 2018* (2019), 897).

[131] De la même façon, dans l'arrêt *Caisse populaire Desjardins de Montmagny*, notre Cour a rejeté l'argument de la Couronne selon lequel le par. 222(3) de la *Loi sur la taxe d'accise*, L.R.C. 1985, c. E-15 (*LTA*), quasi identique au par. 227(4.1) de la *LIR*, conférait à la Couronne un droit propriétal (par. 20-27). Dans cette affaire, les compagnies débitrices devaient des montants de taxe sur les produits et services (TPS) au moment de leurs faillites respectives. Puisque les réclamations de la Couronne à l'égard de la TPS ne sont pas garanties en cas de faillite, les autorités fiscales ont soutenu que les montants dus à la date de la faillite appartenaient à la Couronne. Notre Cour a rejeté à l'unanimité cet argument, concluant que le mode et le mécanisme de perception de la TPS ne concordaient pas avec un droit de propriété (par. 21-23).

[132] Quoi qu'il en soit, considérer que le par. 227(4.1) ne crée en réalité qu'une garantie, sans examiner la façon dont l'intérêt de la Couronne découle de la *LACC*, ne résoudrait pas les questions en litige dans le présent pourvoi. Comme je l'ai mentionné précédemment, les qualifications générales n'aident pas à définir les attributs précis de la fiducie réputée en cause. Notre Cour doit composer avec le fait que le par. 227(4.1) est structuré comme une garantie (p. ex., une charge), mais qu'il utilise également le mécanisme d'une fiducie réputée.

[133] Ce qu'il faut retenir pour le présent pourvoi, c'est que la structure du par. 227(4.1) ne permet pas à elle seule de faire la lumière sur ce qu'il convient de faire, dans le cadre des régimes d'insolvabilité, avec le droit de bénéficiaire que détient la Couronne sur les retenues à la source non versées. Bien que la disposition indique clairement que le droit de la Couronne s'applique malgré toute autre garantie, la teneur de ce droit dans un contexte d'insolvabilité ne peut être déduite uniquement du texte de la *LIR*. Le mécanisme unique créé par la loi adapte les concepts de droit privé et ne peut mener à une conclusion logique dans un contexte d'insolvabilité. Pour cette raison, il n'est pas étonnant que la *Loi sur la faillite*

how the deemed trust for unremitted source deductions should be treated.

[134] I now turn to that half of the equation: Parliament's insolvency regime.

B. *How Is the Crown's Deemed Trust for Unremitted Source Deductions Treated in Parliament's Insolvency Regime?*

(1) Parliament's Insolvency Regime

[135] There are three main statutes in Parliament's insolvency regime: the *CCAA*, which is at issue in this appeal, the *BIA* and the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11 (*WURA*). (The *WURA* covers insolvencies of financial institutions and certain other corporations, like insurance companies, and is not relevant to this appeal (s. 6(1); *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, [2020] 1 S.C.R. 521, at para. 39)). In *Century Services*, Deschamps J., writing for the majority, described insolvency as

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

[136] The *BIA* contains both a liquidation regime and a restructuring regime (*Century Services*, at paras. 13 and 78). The liquidation regime provides a detailed statutory scheme of distribution whereby the debtor's assets are liquidated and distributed to creditors. In contrast, the restructuring regime allows

et l'insolvabilité, L.R.C. 1985, c. B-3 (*LFI*), et la *LACC* énoncent précisément la façon dont la fiducie réputée créée à l'égard des retenues à la source non versées devrait être traitée.

[134] Je passe maintenant à cette autre moitié de l'équation : le régime d'insolvabilité du législateur.

B. *De quelle façon la fiducie réputée créée en faveur de la Couronne à l'égard des retenues à la source non versées est-elle traitée dans le régime d'insolvabilité du législateur?*

(1) Régime d'insolvabilité du législateur

[135] Le régime d'insolvabilité du législateur comporte trois lois principales : la *LACC*, qui est en cause dans le présent pourvoi, la *LFI* et la *Loi sur les liquidations et les restructurations*, L.R.C. 1985, c. W-11 (*LLR*). (La *LLR* porte sur l'insolvabilité d'institutions financières et d'autres sociétés en particulier, telles les compagnies d'assurance, et elle n'est pas pertinente en l'espèce (par. 6(1); *9354-9186 Québec inc. c. Callidus Capital Corp.*, 2020 CSC 10, [2020] 1 R.C.S. 521, par. 39)). Dans l'arrêt *Century Services*, la juge Deschamps, se prononçant au nom de la majorité, a décrit l'insolvabilité ainsi :

> . . . la situation de fait qui se présente quand un débiteur n'est pas en mesure de payer ses créanciers [. . .] Certaines procédures judiciaires peuvent être intentées en cas d'insolvabilité. Ainsi, le débiteur peut généralement obtenir une ordonnance judiciaire ayant pour effet de suspendre les mesures d'exécution de ses créanciers, puis tenter de conclure avec eux une transaction à caractère exécutoire contenant des conditions de paiement plus réalistes. Ou alors, les biens du débiteur sont liquidés et ses dettes sont remboursées sur le produit de cette liquidation, selon les règles de priorité établies par la loi. Dans le premier cas, on emploie habituellement les termes de réorganisation ou de restructuration, alors que dans le second, on parle de liquidation. [par. 12]

[136] La *LFI* comporte à la fois un régime de liquidation et un régime de restructuration (*Century Services*, par. 13 et 78). Le régime de liquidation contient des dispositions législatives détaillées en matière de distribution selon lesquelles l'actif du débiteur est liquidé et le produit de la liquidation

debtors to make proposals to their creditors for the adjustment and reorganization of debt. The *BIA* is available to debtors, either natural or legal persons, owing $1,000 or more (s. 43(1)).

[137] The *CCAA* is predominantly a restructuring statute and access is restricted to companies with liabilities in excess of $5 million (s. 3(1)). As Deschamps J. explained in *Century Services*, the purpose of the *CCAA* is remedial; it provides a means for companies to avoid the devastating social and economic consequences of commercial bankruptcies (paras. 15 and 59, quoting *Elan Corp. v. Comiskey* (1990), 1 O.R. (3d) 289 (C.A.), at p. 306, per Doherty J.A., dissenting). Liquidations do not only harm creditors, but employees and other stakeholders as well. The *CCAA* permits companies to continue to operate, "preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all" (*Century Services*, at para. 77). In enacting a restructuring statute, Parliament recognized that companies have more value as going concerns, especially since they are "key elements in a complex web of interdependent economic relationships" (para. 18).

[138] Due to its remedial nature, the *CCAA* is famously skeletal in nature (*Century Services*, at paras. 57-62). It does not "contain a comprehensive code that lays out all that is permitted or barred" (para. 57, quoting *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, at para. 44, per Blair J.A.). Under s. 11, for example, the court may make any order that it considers appropriate in the circumstances, subject to the restrictions set out in the Act. Section 11 has been described as "the engine that drives this broad and flexible statutory scheme" (*Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), at para. 36; see also *9354-9186 Québec inc.*, at para. 48). Deschamps J. observed in *Century Services* that these discretionary grants of jurisdiction to the courts have been key in allowing the *CCAA* to adapt and evolve to meet contemporary

est distribué aux créanciers. À l'inverse, le régime de restructuration permet au débiteur de présenter à ses créanciers des propositions de rajustement et de réorganisation des dettes. Les débiteurs — personnes physiques ou personnes morales — qui doivent 1 000 $ ou plus peuvent recourir à la *LFI* (par. 43(1)).

[137] La *LACC* est avant tout une loi de restructuration, et seules les compagnies dont le passif dépasse cinq millions de dollars peuvent s'en prévaloir (par. 3(1)). Comme l'a expliqué la juge Deschamps dans l'arrêt *Century Services*, la *LACC* est de nature réparatrice; elle fournit aux compagnies un moyen d'éviter les effets dévastateurs, tant sur le plan social qu'économique, d'une faillite commerciale (par. 15 et 59, citant *Elan Corp. c. Comiskey* (1990), 1 O.R. (3d) 289 (C.A.), p. 306, le juge Doherty, dissident). Les liquidations nuisent non seulement aux créanciers, mais aussi aux employés et aux autres intéressés. La *LACC* permet aux compagnies de continuer à exercer leurs activités et de « préserver le statu quo pendant qu'on tente de trouver un terrain d'entente entre les intéressés en vue d'une réorganisation qui soit juste pour tout le monde » (*Century Services*, par. 77). En édictant une loi de restructuration, le législateur a reconnu que la valeur des compagnies demeure plus grande lorsque celles-ci peuvent poursuivre leurs activités, surtout puisqu'elles constituent « des volets essentiels d'un réseau complexe de rapports économiques interdépendants » (par. 18).

[138] Étant donné son caractère réparateur, la *LACC* est notoirement schématique par nature (*Century Services*, par. 57-62). Elle ne « contient pas un code complet énonçant tout ce qui est permis et tout ce qui est interdit » (par. 57, citant *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, par. 44, le juge Blair). En vertu de l'art. 11, par exemple, le tribunal peut rendre toute ordonnance qu'il estime indiquée, sous réserve des restrictions prévues par la *LACC*. L'article 11 a été décrit comme étant [TRADUCTION] « le moteur de ce régime législatif large et souple » (*Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), par. 36; voir aussi *9354-9186 Québec inc.*, par. 48). Dans l'arrêt *Century Services*, la juge Deschamps a fait observer que l'exercice discrétionnaire de ces pouvoirs par les tribunaux a permis à la *LACC*

business and social needs. Although judicial discretion must always be exercised in furtherance of the *CCAA*'s remedial purpose, it takes many forms and has proven to be flexible, innovative, and necessary (paras. 58-61; *U.S. Steel Canada Inc., Re*, 2016 ONCA 662, 402 D.L.R. (4th) 450, at para. 102).

[139] This is in contrast to the liquidation regime in the *BIA*, which has slightly different purposes. In *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, Gonthier J. explained that bankruptcy serves two goals: it "ensure[s] the equitable distribution of a bankrupt debtor's assets among the estate's creditors *inter se* [and it ensures] the financial rehabilitation of insolvent individuals" (para. 7; see also *9354-9186 Québec inc.*, at para. 46). Similarly, Sarra and Houlden and Morawetz JJ. describe the purposes of the *BIA* as permitting both "an honest debtor, who has been unfortunate, to secure a discharge so that he or she can make a fresh start and resume his or her place in the business community" and "the orderly and fair distribution of the property of a bankrupt among his or her creditors on a *pari passu* basis" (*The 2020-2021 Annotated Bankruptcy And Insolvency Act* (2020), at p. 2).

[140] To realize its goals, the *BIA* is strictly rules-based and has a comprehensive scheme for the liquidation process (*Century Services*, at para. 13; *Husky Oil*, at para. 85). It "provide[s] an orderly mechanism for the distribution of a debtor's assets to satisfy creditor claims according to predetermined priority rules" (*Century Services*, at para. 15). The *BIA*'s comprehensive nature ensures, among other things, that there is a single proceeding in which creditors are placed on an equal footing and know their rights. It also ensures that, post-discharge, the bankrupt will have enough to live on and can have a fresh start (*Canada (Superintendent of Bankruptcy) v. 407 ETR Concession Company Ltd.*, 2013 ONCA 769, 118 O.R. (3d) 161, at para. 41). While proposals under the *BIA*'s restructuring regime similarly serve a remedial purpose, "this is achieved through

d'évoluer et de s'adapter aux besoins commerciaux et sociaux contemporains. Bien que l'exercice du pouvoir discrétionnaire du tribunal doive toujours tendre vers la réalisation de l'objectif réparateur de la *LACC*, il peut prendre plusieurs formes et il s'est avéré souple, novateur et nécessaire (par. 58-61; *U.S. Steel Canada Inc., Re*, 2016 ONCA 662, 402 D.L.R. (4th) 450, par. 102).

[139] Ce régime contraste avec le régime de liquidation prévu par la *LFI*, dont les objectifs diffèrent légèrement. Dans *Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453, le juge Gonthier a expliqué que le régime de faillite a deux objectifs : il « assur[e] un partage équitable des biens du débiteur failli entre les créanciers de l'actif [et il assure] la réhabilitation financière de la personne insolvable » (par. 7; voir aussi *9354-9186 Québec inc.*, par. 46). Dans le même ordre d'idées, les juges Houlden et Morawetz de même que la professeure Sarra écrivent que la *LFI* vise à la fois à permettre [TRADUCTION] « à l'honnête débiteur, frappé de malchance, de se libérer de toute responsabilité afin de pouvoir prendre un nouveau départ et de réintégrer le milieu des affaires [ainsi qu'à permettre] une distribution ordonnée et équitable des biens du failli entre ses créanciers, *pari passu* » (*The 2020-2021 Annotated Bankruptcy and Insolvency Act* (2020), p. 2).

[140] Pour réaliser ses objectifs, la *LFI* repose strictement sur des règles et elle établit un régime complet pour le processus de liquidation (*Century Services*, par. 13; *Husky Oil*, par. 85). Elle « peut être appliqué[e] pour répartir de manière ordonnée les biens du débiteur entre les créanciers, en fonction des règles de priorité qui y sont établies » (*Century Services*, par. 15). Le caractère exhaustif de la *LFI* garantit, entre autres choses, qu'il existe une procédure unique dans le cadre de laquelle les créanciers sont placés sur un pied d'égalité et connaissent leurs droits. Elle garantit également qu'après la libération, le failli disposera de ressources suffisantes pour subvenir à ses besoins et qu'il pourra prendre un nouveau départ (*Canada (Superintendent of Bankruptcy) c. 407 ETR Concession Company Ltd.*, 2013 ONCA 769, 118 O.R. (3d) 161, par. 41). Les propositions

a rules-based mechanism that offers less flexibility" (*Century Services*, at para. 15).

[141] Importantly, the specific goals of restructuring in the *CCAA*, in contrast to liquidation, result in the introduction of a key player: the interim lender. Interim financing, previously referred to as debtor-in-possession financing, is a judicially-supervised mechanism whereby an insolvent company is loaned funds for use during and for the purposes of the restructuring process. Before the 2009 amendments, there were no statutory provisions on interim financing in the *CCAA*, but the institution was well-established in the jurisprudence (L. W. Houlden, G. B. Morawetz and J. Sarra, *Bankruptcy and Insolvency Law of Canada* (4th ed. rev. (loose-leaf)), vol. 4, at N§93; see also *Century Services*, at para. 62). The 2009 amendments codified much of the existing jurisprudence, and I discuss the statutory provisions in detail below.

[142] Interim financing is crucial to the restructuring process. It allows the debtor to continue to operate on a day-to-day basis while a workout solution is being arranged. A plan of compromise would be futile if, in the interim six months, the debtor was forced to close its doors. For this reason, Farley J., in *Royal Oak Mines Inc., Re* (1999), 7 C.B.R. (4th) 293 (Ont. C.J. (Gen. Div.)), at para. 1, quoting *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314 (Ont. C.J. (Gen. Div.)), at para. 24, observed that interim financing helps "keep the lights . . . on". Similarly, in *Indalex*, Deschamps J. explained that giving interim lenders super-priority "is a key aspect of the debtor's ability to attempt a workout" (para. 59, quoting J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 97). Without interim financing and the ability to prime (i.e., to give it priority) the interim lender's loan, the remedial purposes of the *CCAA* can be frustrated (para. 58).

faites en vertu du régime de restructuration de la *LFI* répondent elles aussi à un objectif réparateur, « mais au moyen d'un mécanisme fondé sur des règles et offrant moins de souplesse » (*Century Services*, par. 15).

[141] Fait important, les objectifs de restructuration propres à la *LACC*, contrairement à la liquidation, permettent l'entrée en scène d'un acteur essentiel : le prêteur temporaire. Le financement temporaire, que l'on appelait auparavant le financement du débiteur-exploitant, est un mécanisme sous supervision judiciaire par lequel des fonds sont prêtés à une compagnie insolvable afin d'être utilisés au cours du processus de restructuration et pour les besoins de celui-ci. Avant les modifications de 2009, il n'existait pas de dispositions législatives sur le financement temporaire dans la *LACC*, mais le concept était bien établi dans la jurisprudence (L. W. Houlden, G. B. Morawetz et J. Sarra, *Bankruptcy and Insolvency Law of Canada* (4e éd. rév. (feuilles mobiles)), vol. 4, N§93; voir aussi *Century Services*, par. 62). Les modifications apportées en 2009 ont codifié l'essentiel de la jurisprudence existante, et j'examinerai les dispositions législatives en détail ci-dessous.

[142] Le financement temporaire est essentiel au processus de restructuration. Il permet au débiteur de continuer à exercer ses activités au quotidien pendant qu'un arrangement est mis en place. Un plan de transaction serait vain si, dans les six mois suivants, le débiteur était forcé de cesser ses activités. Pour cette raison, le juge Farley a fait observer dans *Royal Oak Mines Inc., Re* (1999), 7 C.B.R. (4th) 293 (C.J. Ont. (Div. gén.)), par. 1, citant *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314 (C.J. Ont. (Div. gén.)), par. 24, que le financement temporaire aide à [TRADUCTION] « payer les frais courants ». De même, dans l'arrêt *Indalex*, la juge Deschamps a expliqué que le fait d'accorder une super priorité aux prêteurs temporaires constituait [TRADUCTION] « un élément clé de la capacité du débiteur de tenter de conclure un arrangement » (par. 59, citant J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), p. 97). Sans le financement temporaire et la capacité d'accorder la priorité au prêt du prêteur temporaire, la réalisation des objectifs réparateurs de la *LACC* pourrait être compromise (par. 58).

[143] With this background in mind, I turn now to consider the treatment of the Crown's deemed trust for unremitted source deductions in Parliament's insolvency regime.

(2) The Deemed Trust for Unremitted Source Deductions in the *BIA* and *CCAA*

[144] The statutes in this case are all federal statutes. The *ITA*, *BIA*, and *CCAA* make up a co-existing and harmonious statutory scheme, enacted by one level of government (see, e.g., R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at p. 337, on the presumption of coherence). An example of this co-existence is when, in the insolvency regime, Parliament modifies entitlements that it otherwise grants the Crown outside of insolvency. For example, through s. 222(3) of the *ETA*, Parliament provides for a statutory deemed trust in favour of the Crown for unremitted GST. Parliament also renders that deemed trust, which is nearly identical in language to s. 227(4.1) of the *ITA*, ineffective in the *BIA* and *CCAA* (*BIA*, ss. 67(2) and 86(3); *CCAA*, s. 37(1); *Century Services*, at paras. 51-56). As I shall explain, Parliament also deals specifically with the deemed trust in s. 227(4.1) of the *ITA* in the *BIA* and *CCAA*, albeit in different ways.

[145] In the *BIA*, the deemed trust for unremitted source deductions appears in s. 67(3). Section 67 is under the heading "Property of the Bankrupt". Section 67(1)(a) excludes property held in trust by the bankrupt from property of the bankrupt that is divisible among creditors. Section 67(2) provides that any provincial or federal deemed trust in favour of the Crown does not qualify as a trust under s. 67(1)(a) unless it would qualify as a trust absent the deeming provision (in other words, unless it would qualify as a common law or true trust) (see *Caisse populaire Desjardins de Montmagny*, at para. 15; *Urbancorp Cumberland 2 GP Inc. (Re)*, 2020 ONCA 197, 444 D.L.R. (4th) 273, at paras. 32-33). Section 67(3) states that s. 67(2) does not apply in respect of the Crown's deemed trust for unremitted

[143] Ayant ce contexte à l'esprit, je me pencherai maintenant sur le traitement de la fiducie réputée créée en faveur de la Couronne à l'égard des retenues à la source non versées dans le cadre du régime d'insolvabilité du législateur.

(2) La fiducie réputée créée à l'égard des retenues à la source non versées — *LFI* et *LACC*

[144] Les lois en cause dans la présente affaire sont toutes fédérales. La *LIR*, la *LFI* et la *LACC* coexistent au sein d'un régime législatif harmonieux, édicté par un seul ordre de gouvernement (voir, p. ex., R. Sullivan, *Sullivan on the Construction of Statutes* (6e éd. 2014), p. 337, sur la présomption de cohérence). Cette coexistence se manifeste par exemple lorsque, dans le régime d'insolvabilité, le législateur modifie les droits qu'il accorde autrement à la Couronne en dehors de ce régime. Par exemple, au moyen du par. 222(3) de la *LTA*, le législateur prévoit la création d'une fiducie réputée en faveur de la Couronne à l'égard de la TPS non versée. Le législateur rend aussi cette fiducie réputée, qui est quasi identique à celle prévue au par. 227(4.1) de la *LIR*, inopérante sous les régimes de la *LFI* et de la *LACC* (*LFI*, par. 67(2) et 86(3); *LACC*, par. 37(1); *Century Services*, par. 51-56). Comme je l'expliquerai, dans la *LFI* et la *LACC*, le législateur traite aussi expressément de la fiducie réputée prévue au par. 227(4.1) de la *LIR*, quoique de manière différente.

[145] Dans la *LFI*, la fiducie réputée créée à l'égard des retenues à la source non versées figure au par. 67(3). L'article 67 figure sous la rubrique « Biens du failli ». L'alinéa 67(1)a) exclut du patrimoine attribué aux créanciers du failli les biens détenus par le failli en fiducie. Le paragraphe 67(2) prévoit que toute fiducie réputée créée en faveur de la Couronne en vertu d'une disposition législative fédérale ou provinciale ne peut être considérée comme une fiducie au sens de l'al. 67(1)a), si elle ne le serait pas en l'absence de la disposition législative en question (autrement dit, à moins qu'elle puisse être considérée comme une fiducie de common law ou une fiducie véritable) (voir *Caisse populaire Desjardins de Montmagny*, par. 15; *Urbancorp Cumberland 2 GP Inc. (Re)*, 2020 ONCA 197, 444 D.L.R. (4th) 273,

source deductions under the *ITA*, *CPP* or *EIA*. Thus, while s. 67(2) provides in general terms an exception to s. 67(1)(a), that exception does not apply to the Crown's deemed trust for unremitted source deductions by virtue of s. 67(3).

par. 32-33). Le paragraphe 67(3) mentionne que le par. 67(2) ne s'applique pas à la fiducie réputée créée en faveur de la Couronne à l'égard des retenues à la source non versées en vertu de la *LIR*, du *RPC* ou de la *LAE*. Par conséquent, même si le par. 67(2) prescrit en termes généraux une exception à l'al. 67(1)a), cette exception ne s'applique pas à la fiducie réputée créée en faveur de la Couronne à l'égard des retenues à la source non versées par application du par. 67(3).

[146] The result of this scheme is that the debtor's estate — to the extent of the unremitted source deductions — is not "property of a bankrupt divisible among his creditors" (*BIA*, s. 67(1)). For the purposes of the *BIA*'s liquidation regime, it is effectively the Crown's *property*. Together, ss. 67(1)(a) and 67(3) give content to the Crown's right of beneficial ownership under s. 227(4.1) of the *ITA*: the amount of the unremitted source deductions is taken out of the pool of money that is distributed to creditors in a *BIA* liquidation.

[146] Il en résulte que le patrimoine du débiteur — jusqu'à concurrence du montant des retenues à la source non versées — ne fait pas partie des « biens d'un failli, constituant le patrimoine attribué à ses créanciers » (*LFI*, par. 67(1)). Pour les besoins du régime de liquidation prévu par la *LFI*, ce sont effectivement des *biens* de la Couronne. Ensemble, l'al. 67(1)a) et le par. 67(3) déterminent la teneur du droit de bénéficiaire de la Couronne prévu au par. 227(4.1) de la *LIR* : le montant des retenues à la source non versées est soustrait des fonds qui sont distribués aux créanciers dans le cadre d'une liquidation sous le régime de la *LFI*.

[147] In the *CCAA*, the Crown's deemed trust appears in ss. 37(2) and 6(3), alongside other deemed trusts and devices. Section 37(2) explicitly preserves the operation of s. 227(4.1) in *CCAA* proceedings:

[147] Dans la *LACC*, il est question de la fiducie réputée de la Couronne aux par. 37(2) et 6(3), qui traitent également d'autres fiducies réputées et d'autres mécanismes. Le paragraphe 37(2) protège explicitement l'application du par. 227(4.1) dans le cadre de procédures engagées sous le régime de la *LACC* :

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

(2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision"), nor does it apply in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her

37 (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme tel par le seul effet d'une telle disposition.

(2) Le paragraphe (1) ne s'applique pas à l'égard des sommes réputées détenues en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* (chacun étant appelé « disposition fédérale » au présent paragraphe) ou à l'égard des sommes réputées détenues en fiducie aux termes de toute loi d'une province créant une fiducie présumée dans le seul but

Majesty in right of the province of amounts deducted or withheld under a law of the province if

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a province providing a comprehensive pension plan as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a provincial pension plan as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

[148] Due to this language, the Court in *Century Services* variously described the s. 227(4.1) trust as "surviv[ing]", "continu[ing]", and "remain[ing] effective" in the *CCCA* (see paras. 38, 45, 49, 53 and 79). The Crown relies on these observations to argue that the deemed trust remains fully intact in the *CCAA*, conferring a proprietary right on the Crown that cannot be subordinated to any other party.

[149] In my view, the Crown's submission overextends the analysis in *Century Services*. The issue in that case was whether the deemed trust under s. 222(3) of the *ETA* for unremitted GST was effective in the *CCAA*. As mentioned, s. 222(3) is almost identical in wording to s. 227(4.1) of the *ITA*, providing that the deemed trust extends to property of the tax debtor equal in value to the amount of the unremitted GST and extends to property otherwise held by a secured creditor pursuant to a security interest.

d'assurer à Sa Majesté du chef de cette province la remise de sommes déduites ou retenues aux termes d'une loi de cette province, si, dans ce dernier cas, se réalise l'une des conditions suivantes :

a) la loi de cette province prévoit un impôt semblable, de par sa nature, à celui prévu par la *Loi de l'impôt sur le revenu*, et les sommes déduites ou retenues au titre de cette loi provinciale sont de même nature que celles visées aux paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*;

b) cette province est une *province instituant un régime général de pensions* au sens du paragraphe 3(1) du *Régime de pensions du Canada*, la loi de cette province institue un *régime provincial de pensions* au sens de ce paragraphe, et les sommes déduites ou retenues au titre de cette loi provinciale sont de même nature que celles visées aux paragraphes 23(3) ou (4) du *Régime de pensions du Canada*.

Pour l'application du présent paragraphe, toute disposition de la loi provinciale qui crée une fiducie présumée est réputée avoir, à l'encontre de tout créancier de la compagnie et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que la disposition fédérale correspondante, quelle que soit la garantie dont bénéficie le créancier.

[148] Compte tenu de ce libellé, la Cour, dans l'arrêt *Century Services*, a notamment dit des fiducies établies en application du par. 227(4.1) qu'elles « survivent » et qu'elles « continuent de s'appliquer » sous le régime de la *LACC* (voir les par. 38, 45, 49, 53 et 79). La Couronne s'appuie sur ces observations pour faire valoir que la fiducie réputée demeure parfaitement intacte sous le régime de la *LACC*, ce qui lui confère un droit propriétal ne pouvant être subordonné à aucun autre droit.

[149] À mon avis, la prétention de la Couronne déborde l'analyse faite dans l'arrêt *Century Services*. Dans cette affaire, la question en litige était celle de savoir si la fiducie réputée créée en vertu du par. 222(3) de la *LTA* à l'égard de la TPS non versée s'appliquait sous le régime de la *LACC*. Comme je l'ai mentionné, le libellé du par. 222(3), quasi identique à celui du par. 227(4.1) de la *LIR*, prévoit que la fiducie réputée s'étend aux biens du débiteur fiscal jusqu'à concurrence du montant de la TPS

Section 222(3) of the *ETA* also provides that the deemed trust operates despite any other enactment of Canada, except the *BIA*. Thus, under the *BIA*, the Crown priority for unremitted GST is lost. However, under the *CCAA*, s. 37(1) provides that statutory deemed trusts in favour of the Crown should not be regarded as trusts unless they would qualify as trusts absent the deeming language. The Court in *Century Services* grappled with the apparent conflict between s. 222(3) of the *ETA* and s. 37(1) (then s. 18.3(1)) of the *CCAA*.

non versée et aux biens détenus, par ailleurs, par un créancier garanti en vertu d'une garantie. Le paragraphe 222(3) de la *LTA* prévoit également que la fiducie réputée s'applique malgré tout autre texte législatif fédéral, sauf la *LFI*. Par conséquent, sous le régime de la *LFI*, la priorité de la Couronne à l'égard de la TPS non versée n'existe plus. Cependant, sous le régime de la *LACC*, le par. 37(1) prévoit que les fiducies réputées établies par la loi en faveur de la Couronne ne devraient pas être considérées comme des fiducies à moins qu'elles le soient en l'absence des dispositions déterminatives. Dans l'arrêt *Century Services*, la Cour s'est attaquée au conflit apparent entre le par. 222(3) de la *LTA* et le par. 37(1) (alors le par. 18.3(1)) de la *LACC*.

[150] A majority of the Court reasoned that, through statutory interpretation, the apparent conflict could be resolved in favour of the *CCAA* (*Century Services*, at para. 44). Parliament had shown a tendency to move away from asserting Crown priority in insolvency. Under both the *BIA* and *CCAA*, it had enacted a general rule that deemed trusts in favour of the Crown are ineffective in insolvency. It had also explicitly carved out an exception to that general rule for unremitted source deductions. The logic of the *CCAA* suggested that only the deemed trust for unremitted source deductions survived (paras. 45-46).

[150] À la majorité, la Cour a estimé, par une interprétation législative, que le conflit apparent pouvait être résolu en faveur de la *LACC* (*Century Services*, par. 44). Le législateur avait tendance à ne pas faire valoir la priorité accordée à la Couronne en situation d'insolvabilité. À la fois dans la *LFI* et dans la *LACC*, il avait adopté une règle générale selon laquelle les fiducies réputées créées en faveur de la Couronne ne s'appliquaient pas en situation d'insolvabilité. Il avait aussi explicitement établi une exception à cette règle générale pour les retenues à la source non versées. La logique de la *LACC* tendait à indiquer que seules les fiducies réputées visant les retenues à la source non versées continuaient de produire leurs effets (par. 45-46).

[151] Thus, while the Court emphasized that the deemed trust in s. 227(4.1) "survives" in the *CCAA*, it did not comment on *how* it survives. This Court has never considered the scope of the deemed trust under the *CCAA*, especially in light of the purposes of the *CCAA* and the equivocal nature of the beneficial ownership conferred through the deeming provision. For this appeal, it is necessary to probe into ss. 37(2) and 6(3) to determine *how* the *CCAA* construes the Crown's right to unremitted source deductions.

[151] Donc, si la Cour a souligné que la fiducie réputée prévue au par. 227(4.1) « survit » sous le régime de la *LACC*, elle n'a pas précisé *comment* elle survit. Notre Cour n'a jamais examiné la portée de la fiducie réputée sous le régime de la *LACC*, plus particulièrement à la lumière des objectifs de la *LACC* et de la nature équivoque du droit de bénéficiaire conféré au moyen de la disposition déterminative. Pour les besoins du présent pourvoi, il est nécessaire de se pencher sur les par. 37(2) et 6(3) pour déterminer *de quelle façon* la *LACC* interprète le droit de la Couronne sur les retenues à la source non versées.

[152] To that end, although s. 37(2) of the *CCAA* is almost identical to s. 67(3) of the *BIA*, it does not have the same effect because it is not nested under

[152] À cette fin, bien que le par. 37(2) de la *LACC* soit quasi identique au par. 67(3) de la *LFI*, il n'a pas le même effet puisqu'il n'est pas subordonné à une

a provision like s. 67(1)(a). Section 37(2) of the *CCAA* carves out an exception to s. 37(1), which is different from s. 67(1)(a). While s. 67(1)(a) excludes trust property from property of the bankrupt divisible among creditors, s. 37(1) only provides that "property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision". Unlike the *BIA*, the *CCAA* is silent on how trust property should be treated and silent on what constitutes property of the debtor in a restructuring context — indeed, there is no definition of property in the *CCAA* at all. This is in keeping with the *CCAA*'s comparatively skeletal nature.

disposition comme l'al. 67(1)a). Le paragraphe 37(2) de la *LACC* établit une exception au par. 37(1), une disposition différente de l'al. 67(1)a). Alors que cet alinéa exclut les biens de la fiducie du patrimoine d'un failli, constituant le patrimoine attribué à ses créanciers, le par. 37(1) prévoit seulement qu'« aucun des biens de la compagnie débitrice ne peut être considéré comme [un bien détenu en fiducie pour Sa Majesté] par le seul effet d'une telle disposition ». Contrairement à la *LFI*, la *LACC* est muette à propos de la façon dont les biens de la fiducie devraient être traités de même qu'au sujet de ce qui fait partie des biens du débiteur dans un contexte de restructuration. En effet, la *LACC* ne contient aucune définition du terme « bien », ce qui est conforme à sa nature plutôt schématique.

[153] The result is that s. 37(2) provides that the Crown continues to beneficially own the debtor's property equal in value to the unremitted source deductions; the unremitted source deductions "shall . . . be regarded as being held in trust for Her Majesty". However, although this signals that, unlike deemed trusts captured by s. 37(1), the Crown's deemed trust continues and confers a stronger right, s. 37(2) does not explain what to do with that right for the purposes of a *CCAA* proceeding. It does not, for example, provide that trust property should be put aside, as it would be in the *BIA* context. In keeping with the *CCAA*'s flexibility, s. 37(2) says little about what the Crown's unique right of beneficial ownership under s. 227(4.1) of the *ITA* requires. But as I shall explain, s. 11 gives the court broad discretion to consider and give effect to the Crown's interest recognized in s. 37(2).

[153] Ainsi, le par. 37(2) prévoit que la Couronne conserve un droit de bénéficiaire sur les biens du débiteur jusqu'à concurrence du montant des retenues à la source non versées, lesquelles sont « assimil[ées] [. . .] à des biens détenus en fiducie pour Sa Majesté ». Toutefois, bien que cela indique que, contrairement aux fiducies réputées visées par le par. 37(1), la fiducie réputée de la Couronne est maintenue et confère un droit plus fort, le par. 37(2) n'explique pas quoi faire de ce droit dans le cadre d'une procédure engagée sous le régime de la *LACC*. Il ne prévoit pas, par exemple, que les biens de la fiducie devraient être écartés, comme ce serait le cas dans le contexte de la *LFI*. Conformément à la souplesse qui caractérise la *LACC*, le par. 37(2) est peu loquace quant à ce que requiert le droit de bénéficiaire unique que confère à la Couronne le par. 227(4.1) de la *LIR*. Mais comme je vais l'expliquer, l'art. 11 confère au tribunal un vaste pouvoir discrétionnaire pour examiner l'intérêt reconnu à la Couronne par le par. 37(2) et lui donner effet.

[154] In addition, s. 6(3) of the *CCAA* gives specific effect to the Crown's right under the deemed trust. Under that provision, the court cannot sanction a plan of compromise unless it pays the Crown in full for unremitted source deductions within six months of the plan's sanction (assuming the Crown does not agree otherwise):

[154] En outre, le par. 6(3) de la *LACC* donne explicitement effet au droit que possède la Couronne en vertu de la fiducie réputée. Aux termes de cette disposition, le tribunal ne peut homologuer un plan de transaction qui ne prévoit pas le paiement intégral à la Couronne des retenues à la source non versées dans les six mois suivant l'homologation (à supposer que la Couronne n'en ait pas convenu autrement) :

(3) Unless Her Majesty agrees otherwise, the court may sanction a compromise or arrangement only if the compromise or arrangement provides for the payment in full to Her Majesty in right of Canada or a province, within six months after court sanction of the compromise or arrangement, of all amounts that were outstanding at the time of the application for an order under section 11 or 11.02 and that are of a kind that could be subject to a demand under

(a) subsection 224(1.2) of the *Income Tax Act* . . . .

[155] Pursuant to s. 6(3), then, the Crown's right under s. 227(4.1) includes a right *not to have to compromise*. The Crown can demand to be paid in full under the plan "in priority to all . . . security interests". The right is therefore different in kind than a security interest. While there may be some risk to the Crown that the plan may fail, and the Crown may not be paid in full if the restructuring dissolves into liquidation and the estate is depleted in the interim, the *CCAA* recognizes that there is societal value in helping a company remain a going concern. This remedial goal is at the forefront of providing flexibility in preserving the Crown's right to unremitted source deductions in s. 37(2), and in giving a concrete effect to that right in s. 6(3) of the *CCAA*.

[156] In my view, the reason for this difference between the *BIA* and *CCAA* is straightforward. The purpose of a *BIA* liquidation is to give the debtor a fresh start and pay out creditors to the extent possible. The debtor's property has to be divided according to the statute's rigid priority scheme. To begin the process of distribution, it is necessary to pool together the debtor's funds and determine what is, and is not, available for creditors. A comprehensive definition of property of the debtor is necessary, and no flexibility is needed in the regime to facilitate the liquidation process. There is also no other overarching goal, like facilitating the debtor's restructuring, that requires an institution like interim financing or requires modifying entitlements.

(3) Le tribunal ne peut, sans le consentement de Sa Majesté, homologuer la transaction ou l'arrangement qui ne prévoit pas le paiement intégral à Sa Majesté du chef du Canada ou d'une province, dans les six mois suivant l'homologation, de toutes les sommes qui étaient dues lors de la demande d'ordonnance visée aux articles 11 ou 11.02 et qui pourraient, de par leur nature, faire l'objet d'une demande aux termes d'une des dispositions suivantes :

a) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* . . .

[155] Donc, selon le par. 6(3), le droit que possède la Couronne en vertu du par. 227(4.1) inclut le droit de *ne pas avoir à transiger*. La Couronne peut exiger que le plan prévoie le paiement intégral de sa créance « par priorité sur [les] garantie[s] ». Ce droit diffère donc d'une garantie par sa nature. Il y a peut-être un risque que le plan échoue et que la Couronne ne soit pas payée intégralement si la restructuration se solde par une liquidation et que le patrimoine a été épuisé en cours de route, mais la *LACC* reconnaît qu'il est bénéfique pour la société d'aider une compagnie à poursuivre ses activités. Cet objectif réparateur joue un rôle de premier plan lorsqu'il s'agit de prévoir la souplesse nécessaire pour protéger le droit que le par. 37(2) confère à la Couronne sur les retenues à la source non versées et pour donner concrètement effet à ce droit au par. 6(3) de la *LACC*.

[156] À mon avis, la raison de cette différence entre la *LFI* et la *LACC* est simple. L'objectif d'une liquidation sous le régime de la *LFI* est de permettre au débiteur de prendre un nouveau départ et de rembourser ses créanciers dans la mesure du possible. Les biens du débiteur doivent être répartis en fonction de l'ordre de priorité strict établi par la loi. Pour commencer le processus de répartition, il est nécessaire de regrouper les fonds du débiteur et de déterminer ce qui peut, ou ne peut pas, être attribué aux créanciers. Une énumération complète des biens du débiteur est nécessaire, et aucune souplesse n'est requise dans le régime pour faciliter le processus de liquidation. Il n'y a pas non plus d'autre objectif général — comme faciliter la restructuration des activités du débiteur — qui nécessite, par exemple, un financement temporaire ou une modification des droits.

[157] In a restructuring proceeding under the *CCAA*, however, there is no rigid formula for the division of assets. Certain debt might be restructured; other debt might be paid out. When a debtor's restructuring is on the table, the goal pivots, and interim financing is introduced to facilitate the restructuring. Entitlements and priorities shift to accommodate the presence of the interim lender — a new and necessary player who is absent from the liquidation scene.

[157] Cependant, dans le cadre d'une restructuration sous le régime de la *LACC*, il n'existe pas de formule stricte de répartition des actifs. Certaines dettes peuvent être restructurées, d'autres peuvent être remboursées. Lorsqu'il est question de restructurer les affaires d'un débiteur, l'objectif change, et le financement temporaire est introduit pour faciliter la restructuration. Les droits et les priorités changent du fait de l'entrée en scène d'un acteur essentiel, le prêteur temporaire, lequel ne joue aucun rôle dans la liquidation.

[158] The fact that the Crown's right under s. 227(4.1) of the *ITA* is treated differently between the two statutes is therefore consistent with the different schemes and purposes of the Acts. This is not a circumstance where Parliament attempted to harmonize entitlements across the regimes (see, e.g., *Indalex*, at para. 51, per Deschamps J.). The *CCAA* gives the deemed trust meaning for its purposes. The concrete meaning given is that a plan of compromise must pay the Crown in full within six months of approval.

[158] Le fait que les deux lois traitent différemment le droit que confère à la Couronne le par. 227(4.1) de la *LIR* est donc conforme aux régimes et aux objectifs différents de celles-ci. Il ne s'agit pas d'un cas où le législateur a tenté d'harmoniser les droits conférés par les différents régimes (voir, p. ex., *Indalex*, par. 51, la juge Deschamps). La *LACC* donne à la fiducie réputée le sens qui convient à ses fins. Le sens concret donné est qu'un plan de transaction doit prévoir le paiement intégral des sommes dues à la Couronne dans les six mois suivant l'homologation du plan.

C. *Do Sections 11.2, 11.51 and 11.52 of the CCAA Permit the Court to Rank Priming Charges Ahead of the Crown's Deemed Trust for Unremitted Source Deductions?*

C. *Les articles 11.2, 11.51 et 11.52 de la LACC confèrent-ils au tribunal le pouvoir de faire passer les charges super prioritaires devant la fiducie réputée créée en faveur de la Couronne à l'égard des retenues à la source non versées?*

[159] In this case, the Initial Order subordinated the Crown's deemed trust to the Priming Charges. The courts below found that this authority is derived from ss. 11.2, 11.51 and 11.52 of the *CCAA*, which allow the court to order priming charges over a company's property in favour of interim lenders, directors and officers, and estate administrators. Priming charges can rank ahead of any other secured claim. For example, the relevant portions of s. 11.2, which are substantially similar to the relevant portions of ss. 11.51 and 11.52, read as follows:

[159] En l'espèce, l'ordonnance initiale subordonnait la fiducie réputée de la Couronne aux charges super prioritaires. Les tribunaux d'instance inférieure ont conclu que ce pouvoir découlait des art. 11.2, 11.51 et 11.52 de la *LACC*, aux termes desquels un tribunal peut, par ordonnance, déclarer que les biens d'une compagnie sont grevés de charges super prioritaires en faveur de prêteurs temporaires, de dirigeants et d'administrateurs, et d'administrateurs de patrimoine. Les charges super prioritaires peuvent avoir préséance sur toute réclamation garantie. Par exemple, les passages pertinents de l'art. 11.2, qui sont à peu près semblables aux passages pertinents des art. 11.51 et 11.52, sont ainsi rédigés :

11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order

11.2 (1) Sur demande de la compagnie débitrice, le tribunal peut par ordonnance, sur préavis de la demande aux créanciers garantis qui seront vraisemblablement touchés declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[160] As priming charges can "rank in priority over the claim of any secured creditor", the definition of "secured creditor" in s. 2(1) is key:

secured creditor means a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company, or a holder of any bond of a debtor company secured by a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, or a trust in respect of, all or any property of the debtor company, whether the holder or beneficiary is resident or domiciled within or outside Canada, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds . . . .

[161] The Respondents submit, in line with the courts below, that the Crown is a "secured creditor" under the *CCAA* in respect of its interest in unremitted source deductions because the enabling statute, the *ITA*, itself defines the holder of a deemed trust as holding a "security interest" (see *Temple City Housing Inc., Re*, 2007 ABQB 786, 42 C.B.R. (5th) 274). The Respondents also rely on the analogy in *First Vancouver* likening the Crown's deemed trust to a floating charge (which is a security interest). Accordingly, the Respondents argue that ss. 11.2, 11.51 and 11.52 give the court authority to rank priming charges ahead of the Crown's deemed trust.

par la charge ou sûreté, déclarer que tout ou partie des biens de la compagnie sont grevés d'une charge ou sûreté — d'un montant qu'il estime indiqué — en faveur de la personne nommée dans l'ordonnance qui accepte de prêter à la compagnie la somme qu'il approuve compte tenu de l'état de l'évolution de l'encaisse et des besoins de celle-ci. La charge ou sûreté ne peut garantir qu'une obligation postérieure au prononcé de l'ordonnance.

(2) Le tribunal peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la compagnie.

[160] Comme les charges super prioritaires peuvent avoir « priorité sur toute réclamation des créanciers garantis », la définition de « créancier garanti » au par. 2(1) est primordiale :

créancier garanti Détenteur d'hypothèque, de gage, charge, nantissement ou privilège sur ou contre l'ensemble ou une partie des biens d'une compagnie débitrice, ou tout transport, cession ou transfert de la totalité ou d'une partie de ces biens, à titre de garantie d'une dette de la compagnie débitrice, ou un détenteur de quelque obligation d'une compagnie débitrice garantie par hypothèque, gage, charge, nantissement ou privilège sur ou contre l'ensemble ou une partie des biens de la compagnie débitrice, ou un transport, une cession ou un transfert de tout ou partie de ces biens, ou une fiducie à leur égard, que ce détenteur ou bénéficiaire réside ou soit domicilié au Canada ou à l'étranger. Un fiduciaire en vertu de tout acte de fiducie ou autre instrument garantissant ces obligations est réputé un créancier garanti pour toutes les fins de la présente loi sauf la votation à une assemblée de créanciers relativement à ces obligations…

[161] Les intimées soutiennent, à l'instar des tribunaux d'instance inférieure, que la Couronne est un « créancier garanti » au sens de la *LACC* à l'égard de son intérêt sur les retenues à la source non versées puisque la loi habilitante, la *LIR*, dit elle-même que le détenteur d'une fiducie réputée détient une « garantie » (voir *Temple City Housing Inc., Re*, 2007 ABQB 786, 42 C.B.R. (5th) 274). En outre, les intimées s'appuient sur l'analogie faite dans l'arrêt *First Vancouver*, où la fiducie réputée de la Couronne est assimilée à une charge flottante (qui constitue une garantie). Les intimées affirment donc que les art. 11.2, 11.51 et 11.52 confèrent au tribunal le pouvoir de faire passer les charges super prioritaires devant la fiducie réputée de la Couronne.

[162] The Crown, like the dissent at the Court of Appeal, argues that the Crown is not a "secured creditor" because the definition of "secured creditor" in the *CCAA* does not list the holder of a deemed trust and because ss. 37 to 39 of the *CCAA* clearly draw a distinction between the Crown's deemed trust for unremitted source deductions, on the one hand, and the Crown's secured and unsecured claims on the other. Accordingly, the Crown argues that ss. 11.2, 11.51 and 11.52 do *not* give the court authority to rank priming charges ahead of the Crown's deemed trust.

[162] La Couronne, à l'instar du juge dissident de la Cour d'appel, soutient qu'elle n'est pas un « créancier garanti » étant donné que la définition de ce terme contenue dans la *LACC* ne fait pas mention du détenteur d'une fiducie réputée et que les art. 37 à 39 de la *LACC* établissent clairement une distinction entre la fiducie réputée créée en faveur de la Couronne à l'égard des retenues à la source non versées, d'une part, et les réclamations garanties et non garanties de la Couronne, d'autre part. Par conséquent, la Couronne affirme que les art. 11.2, 11.51 et 11.52 *ne* confèrent *pas* au tribunal le pouvoir de faire passer les charges super prioritaires devant la fiducie réputée de la Couronne.

[163] As I shall detail, I conclude that ss. 11.2, 11.51 and 11.52 do not give the court the authority to rank priming charges ahead of the Crown's deemed trust for unremitted source deductions.

[163] Comme je l'explique en détail ci-dessous, je conclus que les art. 11.2, 11.51 et 11.52 ne confèrent pas au tribunal le pouvoir de faire passer les charges super prioritaires devant la fiducie réputée créée en faveur de la Couronne à l'égard des retenues à la source non versées.

[164] First, I agree with the Respondents that the general definition of security interest under the *ITA* includes the holder of a deemed or actual trust (s. 224(1.3)). However the reference to security interest in s. 227(4.1) is not to the Crown's interest but to others' interest in the debtor's property. In my view, any definition of security interest in the *ITA* is not relevant to defining the Crown's interest since it serves an entirely different purpose. What matters is whether the *CCAA* provisions give the court authority to rank priming charges ahead of the Crown's deemed trust for unremitted source deductions. This is determined by interpreting the words of the *CCAA* and how the *CCAA* defines secured creditor.

[164] En premier lieu, je conviens avec les intimées que la définition générale du terme « garantie » contenue dans la *LIR* comprend le détenteur d'une fiducie réputée ou réelle (par. 224(1.3)). Cependant, le renvoi à une garantie fait au par. 227(4.1) ne concerne pas l'intérêt de la Couronne, mais plutôt l'intérêt d'autres parties à l'égard des biens du débiteur. À mon avis, aucune des définitions du terme « garantie » contenues dans la *LIR* n'est pertinente pour définir l'intérêt de la Couronne puisqu'elles servent un objectif tout à fait différent. L'important est de savoir si les dispositions de la *LACC* confèrent au tribunal le pouvoir de faire passer les charges super prioritaires devant la fiducie réputée créée en faveur de la Couronne à l'égard des retenues à la source non versées. On peut répondre à cette question en interprétant le libellé de la *LACC* et la façon dont la *LACC* définit créancier garanti.

[165] I also agree with the Crown that the definition of "secured creditor" in the *CCAA* does not specifically list the holder of a deemed or actual trust. In addition, the Crown's interest cannot simply be called a "charge". As explained above, although the Crown's deemed trust has some parallels with a floating charge, the provision also employs some

[165] En deuxième lieu, je conviens avec la Couronne que la définition de « créancier garanti » contenue dans la *LACC* ne mentionne pas expressément le détenteur d'une fiducie réputée ou réelle. En outre, l'intérêt de la Couronne ne peut pas simplement être qualifié de « charge ». Comme je l'ai expliqué précédemment, bien que la fiducie réputée

aspects of beneficial ownership. I would also hesitate to draw analogies with any of the other terms listed in the *CCAA* definition. The holders of several of these instruments are often described as having proprietary rights in their security. It was a legislative choice to define them as secured creditors for the purposes of the *CCAA*. It is difficult to shoehorn the Crown's deemed trust into the definition of "secured creditor" in the *CCAA*, particularly as the *CCAA* specifically refers to the deemed trust in s. 37(2).

[166] Moreover, I agree with the Crown that ss. 37 to 39 of the *CCAA* treat the Crown's deemed trust and the Crown's secured claims as distinct interests. After s. 37 of the *CCAA*, dealing with deemed trusts, s. 38(1) provides a general rule that secured claims of the Crown rank as unsecured claims. Section 38(2) contains an exemption from s. 38(1) for consensual security interests that are granted to the Crown. Section 38(3) contains an exemption for the CRA's enhanced requirement to pay. Finally, s. 39(1) preserves the Crown's secured creditor status if it registers before the commencement of a *CCAA* proceeding, and s. 39(2) subordinates a Crown security or charge to prior perfected security interests.

[167] As Wood notes, "[t]hese provisions adopt two distinct approaches — one that applies to a deemed trust, the other that applies when a statute gives the Crown the status of a secured creditor" (Wood (2020), at p. 96). If s. 227(4.1) of the *ITA* gave the Crown the status of a secured creditor, then the CRA would presumably need to comply with ss. 38 and 39 by registering its security interest. No one suggests that the Crown has to register its claim for unremitted source deductions. In my view, ss. 37 to 39 draw a distinction between deemed trusts on the one hand and secured and unsecured claims on the other, and the Crown is not, therefore, a "secured

de la Couronne ait des points communs avec une charge flottante, la disposition renvoie aussi à certains aspects du droit de bénéficiaire. J'hésiterais à établir des analogies avec les autres termes énoncés dans la définition contenue dans la *LACC*. Les détenteurs de plusieurs de ces instruments sont souvent décrits comme détenant un droit propriétal sur leur garantie. La décision de les assimiler à des créanciers garantis pour l'application de la *LACC* était celle du législateur. Il est difficile de faire cadrer la fiducie réputée de la Couronne dans la définition de « créancier garanti » contenue dans la *LACC*, d'autant plus que la *LACC* fait précisément mention de la fiducie réputée au par. 37(2).

[166] Enfin, je conviens avec la Couronne que les art. 37 à 39 de la *LACC* traitent la fiducie réputée de la Couronne et les réclamations garanties de la Couronne comme des intérêts distincts. Après l'art. 37 de la *LACC*, qui porte sur les fiducies réputées, le par. 38(1) prévoit une règle générale selon laquelle les réclamations garanties de la Couronne prennent rang comme réclamations non garanties. Le paragraphe 38(2) soustrait à l'application du par. 38(1) les garanties consensuelles accordées à la Couronne. Le paragraphe 38(3) prévoit une exception pour les demandes péremptoires de paiement renforcées de l'ARC. Enfin, le par. 39(1) protège les réclamations garanties de la Couronne si elles ont été enregistrées avant l'introduction d'une procédure intentée sous le régime de la *LACC*, et le par. 39(2) subordonne une garantie ou une charge de la Couronne aux garanties parfaites antérieures.

[167] Comme le fait remarquer Wood, [TRADUCTION] « [c]es dispositions adoptent deux approches différentes — l'une s'applique à la fiducie réputée, l'autre s'applique lorsqu'une loi donne à la Couronne le statut de créancier garanti » (Wood (2020), p. 96). Si le par. 227(4.1) de la *LIR* donnait à la Couronne le statut de créancier garanti, l'ARC devrait vraisemblablement se conformer aux art. 38 et 39 en enregistrant sa garantie. Personne ne laisse entendre que la Couronne doit enregistrer sa réclamation à l'égard des retenues à la source non versées. À mon avis, les art. 37 à 39 établissent une distinction entre les fiducies réputées, d'une part, et les réclamations

creditor" under the *CCAA* for its right to unremitted source deductions.

[168] This is dispositive for the purposes of ss. 11.2, 11.51 and 11.52 of the *CCAA*. These sections do not give the court the authority to rank priming charges ahead of the Crown's deemed trust for unremitted source deductions.

D. *Does Section 11 of the CCAA Allow the Court to Rank Priming Charges Ahead of the Crown's Deemed Trust for Unremitted Source Deductions?*

[169] The remaining issue is whether another provision in the *CCAA*, namely s. 11, confers that jurisdiction. As noted above, s. 11 allows the court to make any order that it considers appropriate in the circumstances, subject to the restrictions set out in the Act:

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

[170] In *9354-9186 Québec inc.*, this Court explained that the discretionary authority in s. 11 is broad, but not boundless (para. 49). There are three "baseline considerations": (1) the order sought must be appropriate; (2) the applicant must be acting in good faith; and (3) the applicant must demonstrate due diligence (*Century Services*, at para. 70; *9354-9186 Québec inc.*, at para. 49). Appropriateness is assessed by inquiring whether the order sought advances the remedial objectives of the *CCAA*. The general language of s. 11 should not, however, be "restricted by the availability of more specific orders" (*Century Services*, at para. 70).

garanties et non garanties, d'autre part. La Couronne n'est donc pas un « créancier garanti » au sens de la *LACC* pour ce qui est de son droit sur les retenues à la source non versées.

[168] Cela est décisif pour l'application des art. 11.2, 11.51 et 11.52 de la *LACC*. Ces articles ne confèrent pas au tribunal le pouvoir de faire passer les charges super prioritaires devant la fiducie réputée créée en faveur de la Couronne à l'égard des retenues à la source non versées.

D. *L'article 11 de la LACC confère-t-il au tribunal le pouvoir de faire passer les charges super prioritaires devant la fiducie réputée créée en faveur de la Couronne à l'égard des retenues à la source non versées?*

[169] Il reste à décider si une autre disposition de la *LACC*, à savoir l'art. 11, confère ce pouvoir. Comme je l'ai mentionné plus haut, l'art. 11 permet au tribunal de rendre toute ordonnance qu'il estime indiquée, sous réserve des restrictions prévues par la loi :

> **11** Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*, le tribunal peut, dans le cas de toute demande sous le régime de la présente loi à l'égard d'une compagnie débitrice, rendre, sur demande d'un intéressé, mais sous réserve des restrictions prévues par la présente loi et avec ou sans avis, toute ordonnance qu'il estime indiquée.

[170] Dans l'arrêt *9354-9186 Québec inc.*, notre Cour a expliqué que le pouvoir discrétionnaire prévu à l'art. 11 est vaste, mais non sans limites (par. 49). Il y a trois « considérations de base » qu'il faut garder à l'esprit : (1) l'ordonnance demandée doit être indiquée; (2) le demandeur doit agir de bonne foi; (3) le demandeur doit faire preuve de la diligence voulue (*Century Services*, par. 70; *9354-9186 Québec inc.*, par. 49). L'opportunité de l'ordonnance demandée est évaluée en déterminant si elle favorisera la réalisation des objectifs réparateurs de la *LACC*. Cependant, « [l]a possibilité [. . .] de rendre des ordonnances plus spécifiques n'a pas pour effet de restreindre » la portée des termes généraux utilisés à l'art. 11 (*Century Services*, par. 70).

[171] In keeping with its broad language, s. 11 of the *CCAA* has been used to make a wide array of orders. Most recently, for example, this Court clarified that it can be used to bar a creditor from voting on a plan where the creditor has acted for an improper purpose (*9354-9186 Québec inc.*, at paras. 56 and 66).

[172] The issue in this case is whether s. 11 can be used to rank an interim lender's loan, or other priming charge, ahead of the Crown's deemed trust for unremitted source deductions. In my view, it can, for two reasons.

[173] First, given my conclusion about the content of the Crown's right under s. 227(4.1) of the *ITA* for the purposes of the *CCAA* (requiring that it at least be paid in full under a plan of compromise), ranking a priming charge ahead of the Crown's deemed trust does not conflict with the *ITA* provision. So long as the Crown is paid in full under a plan of compromise, the Crown's right under s. 227(4.1) remains intact "notwithstanding any security interest" in the amount of the unremitted source deductions. For this reason, it is irrelevant whether a priming charge under ss. 11, 11.2, 11.51 or 11.52 of the *CCAA* is a "security interest" within the meaning of s. 227(4) and (4.1) of the *ITA*. The analysis above does not depend on finding that a priming charge is not captured within the *ITA* definition.

[174] In addition, depending on the circumstances, such an order may further the remedial objectives of the *CCAA*. For example, interim financing is often crucial to the restructuring process. If there is evidence that interim lending cannot be obtained without ranking the interim loan ahead of the Crown's deemed trust, such an order could, again depending on the circumstances, further the remedial objectives of the *CCAA*. In general, the court should have flexibility to order super-priority charges in favour of parties whose function is to facilitate the proposal

[171] Conformément à la portée large de son libellé, l'art. 11 de la *LACC* a été utilisé pour rendre un vaste éventail d'ordonnances. Plus récemment, par exemple, notre Cour a précisé qu'il pouvait être utilisé pour empêcher un créancier de voter sur un plan d'arrangement lorsqu'il agit dans un but illégitime (*9354-9186 Québec inc.*, par. 56 et 66).

[172] En l'espèce, la question est de savoir si l'art. 11 peut être utilisé pour faire passer le prêt d'un prêteur temporaire, ou toute autre charge super prioritaire, devant la fiducie réputée créée en faveur de la Couronne à l'égard des retenues à la source non versées. À mon avis, il peut l'être, et ce, pour deux raisons.

[173] Premièrement, étant donné ma conclusion quant à la teneur du droit que confère le par. 227(4.1) de la *LIR* à la Couronne pour l'application de la *LACC* (le droit d'exiger que le plan de transaction prévoie à tout le moins le paiement intégral des sommes dues), le fait de faire passer une charge super prioritaire devant la fiducie réputée de la Couronne n'entre pas en conflit avec la disposition de la *LIR*. Dès lors que les sommes qui lui sont dues lui sont payées intégralement dans le cadre d'un plan de transaction, le droit que possède la Couronne en vertu du par. 227(4.1) demeure intact « malgré toute autre garantie » sur le montant des retenues à la source non versées. Pour cette raison, il importe peu de savoir si une charge super prioritaire constituée en vertu des art. 11, 11.2, 11.51 ou 11.52 de la *LACC* est une « garantie » au sens des par. 227(4) et (4.1) de la *LIR*. L'analyse qui précède n'est pas tributaire de la conclusion selon laquelle une charge super prioritaire n'est pas visée par la définition contenue dans la *LIR*.

[174] En outre, selon les circonstances, une telle ordonnance peut favoriser la réalisation des objectifs réparateurs de la *LACC*. Par exemple, le financement temporaire est souvent crucial pour le processus de restructuration. S'il est démontré que le financement temporaire ne peut être obtenu sans que le prêt temporaire prenne rang devant la fiducie réputée de la Couronne, pareille ordonnance pourrait, là encore selon les circonstances, favoriser la réalisation des objectifs réparateurs de la *LACC*. En général, les tribunaux devraient disposer de la latitude nécessaire

of a plan of compromise that, in any event, will be required to pay the Crown in full.

[175] Second, I do not accept the Crown's argument that s. 11 is unavailable because other *CCAA* provisions, namely ss. 11.2, 11.51 and 11.52, confer more specific jurisdiction (see *9354-9186 Québec inc.*, at paras. 67-68).

[176] While I agree that s. 11 is restricted by the provisions set out in the *CCAA* and cannot be used to violate specific provisions in the Act, s. 11 is not "restricted by the availability of more specific orders". The fact that specific provisions of the *CCAA* allow the court to rank priming charges ahead of a secured creditor does not mean that the court can *only* rank priming charges ahead of a secured creditor. Such an interpretation would amount to reading words into ss. 11.2, 11.51 and 11.52 that do not exist. An order that ranks a priming charge ahead of the beneficiary of the deemed trust is different in kind than the orders contemplated by ss. 11.2, 11.51 and 11.52, which contemplate the subordination of secured creditors. There is no provision in the *CCAA* stipulating what the court can do with trust property and no provision in the *CCAA* conferring more specific jurisdiction on whether a priming charge can rank ahead of the beneficiary of a deemed trust. So long as the order does not conflict with other provisions in the Act, namely ss. 37(2) and 6(3), and so long as it fulfills the "baseline considerations" of appropriateness, good faith, and due diligence, an order ranking a priming charge ahead of the Crown's deemed trust would fall under the jurisdiction conferred by s. 11 (*Century Services*, at para. 70; *9354-9186 Québec inc.*, at para. 49). As explained above, there would be no conflict with ss. 37(2) and 6(3) of the *CCAA*.

pour ordonner des charges super prioritaires en faveur des parties dont la fonction est de faciliter la proposition d'un plan de transaction qui, dans tous les cas, devra prévoir le paiement intégral des sommes dues à la Couronne.

[175] Deuxièmement, je n'accepte pas l'argument de la Couronne selon lequel il est impossible de recourir à l'art. 11 parce que d'autres dispositions de la *LACC*, à savoir les art. 11.2, 11.51 et 11.52, confèrent plus précisément compétence (voir *9354-9186 Québec inc.*, par. 67-68).

[176] Bien que je convienne que la portée de l'art. 11 soit limitée par les dispositions énoncées dans la *LACC* et que cet article ne puisse être utilisé en contravention d'autres dispositions précises de cette loi, « [l]a possibilité [. . .] de rendre des ordonnances plus spécifiques n'a pas pour effet de restreindre » la portée de l'art. 11. Le fait que des dispositions précises de la *LACC* permettent au tribunal de faire passer des charges super prioritaires devant les réclamations des créanciers garantis ne signifie pas que le tribunal peut *seulement* faire passer des charges super prioritaires devant les réclamations des créanciers garantis. Une telle interprétation reviendrait à ajouter aux art. 11.2, 11.51 et 11.52 des mots qui n'existent pas. Une ordonnance accordant à une charge super prioritaire la préséance sur le bénéficiaire de la fiducie réputée est, par sa nature, différente des ordonnances visées par les art. 11.2, 11.51 et 11.52, qui prévoient la subordination des réclamations des créanciers garantis. Aucune disposition de la *LACC* n'indique ce que le tribunal peut faire avec les biens de la fiducie et aucune disposition de la *LACC* ne confère plus précisément compétence pour décider si une charge super prioritaire peut prendre rang devant le bénéficiaire de la fiducie réputée. Tant qu'elle n'entre pas en conflit avec d'autres dispositions de la *LACC*, à savoir les par. 37(2) et 6(3), et tant qu'elle respecte les « considérations de base » que sont l'opportunité, la bonne foi et la diligence voulue, une ordonnance faisant passer une charge super prioritaire devant la fiducie réputée de la Couronne relèverait du pouvoir conféré par l'art. 11 (*Century Services*, par. 70; *9354-9186 Québec inc.*, par. 49). Comme je l'ai expliqué précédemment, il n'y aurait aucun conflit avec les par. 37(2) et 6(3) de la *LACC*.

[177] Both parties invoked policy concerns to assist in the interpretative exercise. I do not find it necessary to resort to such arguments. However, it is far from evident that interim lending would simply end if the Crown's deemed trust had super-priority in an appropriate case. It is also far from evident that the Crown would suffer significantly if the priming charges had super-priority in an appropriate case, given the existence of s. 6(3) of the *CCAA* requiring full payment, and the Crown's favourable treatment in the *BIA* liquidation regime in the event the restructuring failed. What is clear is that interim lending is crucial to the restructuring process, and the Crown's deemed trust for unremitted source deductions is crucial to tax collection. It will be up to the *CCAA* judge to weigh and balance the moving pieces.

[177] Les deux parties ont invoqué des considérations de politique pour faciliter l'exercice d'interprétation. Je n'estime pas nécessaire de recourir à de tels arguments. Cependant, il est loin d'être évident que le financement temporaire prendrait tout simplement fin si une super priorité était accordée à la fiducie réputée de la Couronne dans une affaire qui s'y prête. Il est également loin d'être évident que la Couronne subirait un préjudice important si la préséance était accordée aux charges super prioritaires dans une affaire donnée, compte tenu de l'existence du par. 6(3) de la *LACC* exigeant le paiement intégral des sommes dues et du traitement favorable de la Couronne dans le régime de liquidation de la *LFI* en cas d'échec de la restructuration. Chose certaine, le financement temporaire est crucial pour le processus de restructuration, et la fiducie réputée créée en faveur de la Couronne à l'égard des retenues à la source non versées est cruciale pour le recouvrement des créances fiscales. Il reviendra au juge chargé d'appliquer la *LACC* de soupeser et de pondérer les différents facteurs.

[178] To that end, s. 11 of the *CCAA* gives the court discretion and flexibility to weigh several considerations in ranking a priming charge ahead of the Crown's deemed trust for unremitted source deductions. It requires the court to take a focused look at the specific facts of a case to determine whether such an order is necessary and appropriate. Where relevant, the court will consider the Crown's interest in the deemed trust as a result of s. 37(2). Courts may no doubt look to the factors already listed in s. 11.2(4) — the likely duration of *CCAA* proceedings, plans for managing the company during those proceedings, views of the company's major creditors and the monitor, and the company's ability to benefit from interim financing, among others — for guidance. Section 11.2(4) of the *CCAA* states:

[178] À cette fin, l'art. 11 de la *LACC* donne au tribunal le pouvoir discrétionnaire et la latitude nécessaires pour soupeser les diverses considérations pour se prononcer sur l'opportunité de faire passer une charge super prioritaire devant la fiducie réputée créée en faveur de la Couronne à l'égard des retenues à la source non versées. Le tribunal doit examiner attentivement les faits propres à l'affaire pour décider si une telle ordonnance est nécessaire et appropriée. Le cas échéant, le tribunal tient compte de l'intérêt que possède la Couronne dans la fiducie réputée en raison du par. 37(2). Pour ce faire, le tribunal peut sans aucun doute s'appuyer, entre autres, sur les facteurs déjà énoncés au par. 11.2(4) — la durée probable des procédures intentées sous le régime de la *LACC*, les plans d'administration de la compagnie au cours de ces procédures, les opinions des créanciers les plus importants de la compagnie et du contrôleur et la capacité de la compagnie d'obtenir un financement temporaire. Le paragraphe 11.2(4) de la *LACC* dispose :

(4) In deciding whether to make an order, the court is to consider, among other things,

(4) Pour décider s'il rend l'ordonnance, le tribunal prend en considération, entre autres, les facteurs suivants :

(a) the period during which the company is expected to be subject to proceedings under this Act;

(b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report referred to in paragraph 23(1)(b), if any.

[179] In addition, it seems to me that courts may consider:

- whether the interim lender has indicated, in good faith, that it will not lend to the debtor without ranking ahead of the Crown's deemed trust;
- the relative amounts of the interim loan and the unremitted source deductions (if the amount of the unremitted source deductions is a small fraction of the amount of the interim loan, the interim lender may not be significantly prejudiced without super-priority);
- whether, and for how long, the Crown allowed source deductions to go unremitted without taking action (see, e.g., Hanlon, Tickle and Csiszar); and
- finally, the prospects of success of a restructuring; and whether the *CCAA* is likely to be used to sell the debtor's assets.

[180] Finally, different considerations will apply if a court is considering ranking a different party's

a) la durée prévue des procédures intentées à l'égard de la compagnie sous le régime de la présente loi;

b) la façon dont les affaires financières et autres de la compagnie seront gérées au cours de ces procédures;

c) la question de savoir si ses dirigeants ont la confiance de ses créanciers les plus importants;

d) la question de savoir si le prêt favorisera la conclusion d'une transaction ou d'un arrangement viable à l'égard de la compagnie;

e) la nature et la valeur des biens de la compagnie;

f) la question de savoir si la charge ou sûreté causera un préjudice sérieux à l'un ou l'autre des créanciers de la compagnie;

g) le rapport du contrôleur visé à l'alinéa 23(1)b).

[179] De plus, je suis d'avis que le tribunal peut également tenir compte de ce qui suit :

- la question de savoir si le prêteur temporaire a indiqué, de bonne foi, qu'il n'accordera pas de prêt au débiteur à moins que ce prêt prenne rang devant la fiducie réputée de la Couronne;
- les montants relatifs du prêt temporaire et des retenues à la source non versées (si le montant des retenues à la source non versées ne représente qu'une petite fraction du montant du prêt temporaire, le prêteur temporaire ne subirait pas nécessairement de préjudice important si une super priorité ne lui était pas accordée);
- la question de savoir si, et pendant combien de temps, la Couronne a permis le non-versement des retenues à la source sans prendre de mesures (voir, p. ex., Hanlon, Tickle et Csiszar);
- enfin, les probabilités de succès d'une restructuration et la question de savoir si la *LACC* est susceptible d'être invoquée pour liquider les actifs du débiteur.

[180] Enfin, différentes considérations entreront en jeu si un tribunal envisage de faire passer la charge

charge, like the Monitor's or Directors' Charge, ahead of the Crown's deemed trust.

VII. Conclusion

[181] I would dismiss the appeal and clarify that the authority to rank priming charges ahead of the Crown's deemed trust for unremitted source deductions is derived from s. 11 of the *CCAA* rather than ss. 11.2, 11.51 and 11.52. The Crown's interest under s. 227(4.1) of the *ITA* is a deemed trust interest, but beneficial ownership of deemed trust property is a manipulation of private law concepts, without settled meaning. Accordingly, the specific nature of beneficial ownership of deemed trust property must be determined in the relevant context in which it is asserted. Here, the Crown's right to unremitted source deductions in a *CCAA* restructuring is protected by both ss. 37(2) and 6(3). The former is flexible, requiring the Crown's deemed trust property to be considered when appropriate under the Act; the latter specifically requires that a plan of compromise provide for payment in full of the Crown's deemed trust claims within six months of the plan's approval. The Crown's right differs under the *BIA*, in keeping with the different goals and schemes of liquidation and restructuring. Given the content of the Crown's right to unremitted source deductions in a *CCAA* restructuring, there is no conflict between s. 227(4.1) of the *ITA* and s. 11 of the *CCAA*. The schemes of both federal Acts can be harmonized and the objectives of both statutes furthered.

[182] The Respondents will have their costs in accordance with the tariff of fees and disbursements set out in Schedule B of the *Rules of the Supreme Court of Canada*, SOR/2002-156.

d'une autre partie, comme la charge du contrôleur ou des dirigeants, devant la fiducie réputée de la Couronne.

VII. Conclusion

[181] Je suis d'avis de rejeter le pourvoi et je précise que le pouvoir de faire passer des charges super prioritaires devant la fiducie réputée créée en faveur de la Couronne à l'égard des retenues à la source non versées découle de l'art. 11 de la *LACC* plutôt que des art. 11.2, 11.51 et 11.52. L'intérêt de la Couronne au titre du par. 227(4.1) de la *LIR* est une fiducie réputée, mais le droit de bénéficiaire sur les biens d'une fiducie réputée constitue une adaptation de concepts de droit privé sans signification établie. Par conséquent, la nature particulière du droit de bénéficiaire sur les biens de la fiducie réputée doit être déterminée dans le contexte pertinent où il est invoqué. En l'espèce, le droit de la Couronne sur les retenues à la source non versées dans le cadre d'une restructuration sous le régime de la *LACC* est protégé tant par le par. 37(2) que par le par. 6(3). Le premier est souple et exige que l'on tienne compte des biens réputés détenus en fiducie par la Couronne lorsque cela est approprié dans le cadre de la loi; le deuxième exige spécifiquement que le plan de transaction prévoie le paiement intégral des créances de la Couronne visées par la fiducie réputée dans les six mois suivant l'homologation du plan. Le droit de la Couronne diffère sous le régime de la *LFI*, conformément aux objectifs et aux régimes différents de la liquidation et de la restructuration. Étant donné la teneur du droit de la Couronne sur les retenues à la source non versées dans le cadre d'une restructuration sous le régime de la *LACC*, il n'y a pas de conflit entre le par. 227(4.1) de la *LIR* et l'art. 11 de la *LACC*. Les régimes des deux lois fédérales peuvent être harmonisés et leurs objectifs, réalisés.

[182] Les intimées ont droit à leurs dépens selon le tarif des honoraires et débours fixé à l'annexe B des *Règles de la Cour suprême du Canada*, DORS/2002-156.

The reasons of Abella, Brown and Rowe JJ. were delivered by

Brown and Rowe JJ. (dissenting) —

I. Overview

[183] At issue in this appeal is whether the Crown's deemed trust claim for unremitted source deductions under s. 227(4) and (4.1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"), s. 23(3) and (4) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8 ("*CPP*"), and ss. 23(4) and 86(2) and (2.1) of the *Employment Insurance Act*, S.C. 1996, c. 23 ("*EIA*") (collectively, the "Fiscal Statutes"), have priority over court-ordered priming charges under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*").

[184] The present iteration of the deemed trust provision, s. 227(4.1) of the *ITA*, was the result of a 1997 amendment enacted by Parliament directly in response to this Court's interpretation of the provision's predecessor in *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (Department of Finance Canada, *Unremitted Source Deductions and Unpaid GST* (April 7, 1997)). That provision was itself the result of several amendments, beginning in 1942, with the amendment introducing the deemed trust in s. 92(6) and (7) of the *Income War Tax Act*, R.S.C. 1927, c. 97 (previously S.C. 1917, c. 28) (*An Act to amend the Income War Tax Act*, S.C. 1942-43, c. 28, s. 31). The provision and the historical amendments demonstrate Parliament's intention to safeguard its ability to collect employee source deductions under the relevant statutes, in priority to all other claims against a debtor's property.

[185] The Crown appeals from the decision of the Court of Appeal of Alberta which, like the chambers judge, held that the *CCAA* court could subordinate the deemed trust claims under the Fiscal Statutes

Version française des motifs des juges Abella, Brown et Rowe rendus par

Les juges Brown et Rowe (dissidents) —

I. Aperçu

[183] Dans le présent pourvoi, la question est de savoir si la réclamation de la Couronne au titre de la fiducie réputée créée à l'égard des retenues à la source non versées en vertu des par. 227(4) et (4.1) de la *Loi de l'impôt sur le revenu*, L.R.C. 1985, c. 1 (5e suppl.) (« *LIR* »), des par. 23(3) et (4) du *Régime de pensions du Canada*, L.R.C. 1985, c. C-8 (« *RPC* »), et des par. 23(4) et 86(2) et (2.1) de la *Loi sur l'assurance-emploi*, L.C. 1996, c. 23 (« *LAE* ») (collectivement, les « lois fiscales »), a préséance sur les charges super prioritaires ordonnées par un tribunal en vertu de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, c. C-36 (« *LACC* »).

[184] La version actuelle de la disposition concernant la fiducie réputée, soit le par. 227(4.1) de la *LIR*, est le résultat d'une modification adoptée en 1997 par le législateur en réponse directe à l'interprétation faite par notre Cour de la version antérieure de la disposition dans l'arrêt *Banque Royale du Canada c. Sparrow Electric Corp.*, [1997] 1 R.C.S. 411 (Ministère des Finances Canada, *Retenues à la source non versées et TPS impayée* (7 avril 1997)). Cette disposition était elle-même le résultat de plusieurs modifications, à commencer, en 1942, par celle qui a introduit la fiducie réputée aux par. 92(6) et (7) de la *Loi de l'impôt de guerre sur le revenu*, S.R.C. 1927, c. 97 (auparavant S.C. 1917, c. 28) (*Loi modifiant la Loi de l'impôt de guerre sur le revenu*, L.C. 1942-1943, c. 28, art. 31). La disposition et l'historique des modifications démontrent l'intention du législateur de protéger sa capacité de percevoir les retenues à la source en vertu des lois applicables, par priorité sur toute autre réclamation visant les biens d'un débiteur.

[185] La Couronne se pourvoit contre la décision de la Cour d'appel de l'Alberta qui, comme le juge en cabinet, a conclu que le tribunal chargé d'appliquer la *LACC* avait le pouvoir de subordonner les

to the priming charges (2019 ABCA 314, 93 Alta. L.R. 29, aff'g 2017 ABQB 550, 60 Alta. L.R. (6th) 103). Having examined the pertinent provisions of the Fiscal Statutes, and for the reasons that follow, we find ourselves in respectful disagreement with that conclusion, and prefer the view of the dissenting judge, Wakeling J.A. The Crown's deemed trust claims under the Fiscal Statutes have ultimate priority and cannot be subordinated by priming charges.

[186] In our view, the text of the impugned provisions in the Fiscal Statutes is clear: the Crown's deemed trust operates "[n]otwithstanding . . . any other enactment of Canada" (*ITA*, s. 227(4.1)).[2] Parliament used unequivocal language — indeed, *the very language suggested by this Court* in *Sparrow Electric* — to give ultimate priority to the Crown's claim. Further, and again in clear and unequivocal text, Parliament imposed limits on the broad grant of authority by which a court can prioritize priming charges, thereby making plain the superiority of deemed trust claims. Finally, no provision of the *CCAA* is rendered meaningless by this interpretation. Unlike in other contexts such as the legislative scheme governing the GST/HST, Parliament has left no room for subordinating the deemed trusts under the Fiscal Statutes in pursuit of other legislative objectives. We would, therefore, allow the appeal.

II. Analysis

A. *General Comments on the Nature of the Deemed Trusts Under the Fiscal Statutes*

[187] The deemed trust created by the *ITA* is an essential instrument to collect source deductions (*First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002]

[2] The wording of the deemed trust provisions in the relevant provisions of the Fiscal Statutes is materially identical. This decision focuses on the deemed trusts in s. 227(4) and (4.1) of the *ITA*. The reasoning herein, however, applies with equal force to each of the other statutes.

réclamations relatives à une fiducie réputée créée par les lois fiscales aux charges super prioritaires (2019 ABCA 314, 93 Alta. L.R. 29, conf. 2017 ABQB 550, 60 Alta. L.R. (6th) 103). Après avoir examiné les dispositions applicables des lois fiscales, et pour les motifs qui suivent, nous ne partageons pas ce point de vue et nous nous rangeons plutôt à l'avis du juge dissident, le juge Wakeling. Les réclamations de la Couronne relatives à une fiducie réputée créée par les lois fiscales ont priorité absolue et ne peuvent pas être subordonnées aux charges super prioritaires.

[186] À notre avis, le libellé des dispositions contestées des lois fiscales est clair : la fiducie réputée de la Couronne produit ses effets « [m]algré [. . .] tout autre texte législatif fédéral » (*LIR*, par. 227(4.1))[2]. Le législateur a employé des termes non équivoques — *les termes mêmes proposés par notre Cour* dans l'arrêt *Sparrow Electric* — pour accorder une priorité absolue à la réclamation de la Couronne. En outre, toujours dans un langage clair et non équivoque, le législateur a imposé des limites aux larges pouvoirs par lesquels un tribunal peut accorder la priorité à des charges super prioritaires, établissant ainsi clairement la supériorité des réclamations relatives à une fiducie réputée. Enfin, cette interprétation ne fait perdre son sens à aucune des dispositions de la *LACC*. Contrairement à d'autres contextes, comme dans celui du régime législatif régissant la TPS/TVH, le législateur n'a pas ouvert la porte à la subordination de la fiducie réputée créée par les lois fiscales en vue de réaliser d'autres objectifs législatifs. Nous sommes donc d'avis d'accueillir le pourvoi.

II. Analyse

A. *Observations générales sur la nature de la fiducie réputée créée par les lois fiscales*

[187] La fiducie réputée créée par la *LIR* est un instrument essentiel à la perception des retenues à la source (*First Vancouver Finance c. M.R.N.*, 2002

[2] Les dispositions pertinentes des lois fiscales en matière de fiducie réputée ont un libellé sensiblement identique. La présente décision met l'accent sur les fiducies réputées prévues aux par. 227(4) et (4.1) de la *LIR*. Le raisonnement exposé ici vaut cependant tout autant pour chacune des autres lois.

2 S.C.R. 720, at para. 22). The *ITA* grants special priority to the Crown to collect unremitted source deductions, reflecting its status as an "involuntary creditor" (*First Vancouver*, at para. 23).

[188] Section 227(4) and (4.1) of the *ITA* reads:

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

(4.1) Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person and property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for a security interest (as defined in subsection 224(1.3)) would be property of the person, equal in value to the amount so deemed to be held in trust is deemed

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

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

and is property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property

CSC 49, [2002] 2 R.C.S. 720, par. 22). La *LIR* accorde à la Couronne la priorité de rang pour la perception des retenues à la source non versées, étant donné son statut de « créancier involontaire » (*First Vancouver*, par. 23).

[188] Les paragraphes 227(4) et (4.1) de la *LIR* prévoient ce qui suit :

(4) Toute personne qui déduit ou retient un montant en vertu de la présente loi est réputée, malgré toute autre garantie au sens du paragraphe 224(1.3) le concernant, le détenir en fiducie pour Sa Majesté, séparé de ses propres biens et des biens détenus par son créancier garanti au sens de ce paragraphe qui, en l'absence de la garantie, seraient ceux de la personne, et en vue de le verser à Sa Majesté selon les modalités et dans le délai prévus par la présente loi.

(4.1) Malgré les autres dispositions de la présente loi, la *Loi sur la faillite et l'insolvabilité* (sauf ses articles 81.1 et 81.2), tout autre texte législatif fédéral ou provincial ou toute règle de droit, en cas de non-versement à Sa Majesté, selon les modalités et dans le délai prévus par la présente loi, d'un montant qu'une personne est réputée par le paragraphe (4) détenir en fiducie pour Sa Majesté, les biens de la personne, et les biens détenus par son créancier garanti au sens du paragraphe 224(1.3) qui, en l'absence d'une garantie au sens du même paragraphe, seraient ceux de la personne, d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté, à compter du moment où le montant est déduit ou retenu, séparés des propres biens de la personne, qu'ils soient ou non assujettis à une telle garantie;

b) ne pas faire partie du patrimoine ou des biens de la personne à compter du moment où le montant est déduit ou retenu, que ces biens aient été ou non tenus séparés de ses propres biens ou de son patrimoine et qu'ils soient ou non assujettis à une telle garantie.

Ces biens sont des biens dans lesquels Sa Majesté a un droit de bénéficiaire malgré toute autre garantie sur ces biens ou sur le produit en découlant, et le produit découlant shall be paid to the Receiver General in priority to all such security interests.

[189] These sections describe two relevant events. First, at the time of the deduction, a trust is deemed in favour of the Crown, binding every person (the "tax debtor") who collects source deductions in the amount withheld until the person remits the source deductions (*ITA*, s. 227(4)). Section 227(4) deems the tax debtor to hold the source deductions "separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person".

[190] The second event occurs where the tax debtor has failed to remit the source deductions in accordance with the manner and time provided by the *ITA*. Section 227(4.1) extends the deemed trust to all "property of the person and property held by any secured creditor . . . equal in value to the amount so deemed to be held in trust". This is achieved by deeming the source deductions to be held "in trust for Her Majesty" from the moment the amount was "deducted or withheld by the person, separate and apart from the property of the person". Parliament further provided that the unremitted source deductions under the Fiscal Statutes "form no part of the estate or property of the person" from the time of deduction or withholding, and is "property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests".

[191] This Court has held that the deemed trust is a "creatur[e] of statute" and "is not in truth a real [trust], as the subject matter of the trust cannot be identified from the date of creation of the trust" (*Sparrow Electric*, at para. 31, per Gonthier J., citing D. W. M. Waters, *Law of Trusts in Canada* (2nd ed. 1984), at p. 117, and adopted in *First Vancouver*, at para. 37). This statement fuelled a debate in this appeal about whether the deemed trust is a security interest or a proprietary interest, with the respondents arguing that the Crown cannot hold a proprietary

de ces biens est payé au receveur général par priorité sur une telle garantie.

[189] Ces paragraphes décrivent deux événements pertinents. Premièrement, dès le moment où le montant est retenu, une fiducie réputée est créée en faveur de la Couronne, contraignant chaque personne (le « débiteur fiscal ») qui effectue des retenues à la source à retenir le montant en vue de le verser à Sa Majesté (*LIR*, par. 227(4)). Aux termes du par. 227(4), le débiteur fiscal est réputé détenir le montant des retenues à la source « séparé de ses propres biens et des biens détenus par son créancier garanti au sens [du paragraphe 224(1.3)] ».

[190] Le deuxième événement se produit lorsque le débiteur fiscal fait défaut de verser les retenues à la source selon les modalités et dans le délai prévus par la *LIR*. Le paragraphe 227(4.1) étend la fiducie réputée à tous « les biens de la personne, et les biens détenus par son créancier garanti [. . .] d'une valeur égale [au montant réputé être détenu en fiducie] ». Ainsi, les retenues à la source sont réputées être détenues « en fiducie pour Sa Majesté » à compter du moment où le montant est « déduit ou retenu », « sépar[ées] des propres biens de la personne ». Le législateur a également prévu que les retenues à la source non versées au titre des lois fiscales sont réputées « ne pas faire partie du patrimoine ou des biens de la personne » à compter du moment où le montant est déduit ou retenu, et qu'elles constituent des « biens dans lesquels Sa Majesté a un droit de bénéficiaire malgré toute autre garantie sur ces biens ou sur le produit en découlant, et le produit découlant de ces biens est payé au receveur général par priorité sur une telle garantie ».

[191] Notre Cour a jugé que la fiducie réputée « tire son origine de la législation » et qu'elle « n'est pas réelle, étant donné que son objet ne peut être identifié à compter de la date de création de la fiducie » (*Sparrow Electric*, par. 31, le juge Gonthier, citant D. W. M. Waters, *Law of Trusts in Canada* (2e éd. 1984), p. 117, et adopté dans *First Vancouver*, par. 37). Cette déclaration a donné lieu, dans le cadre du présent pourvoi, à un débat sur la question de savoir si la fiducie réputée crée une garantie ou un intérêt propriétal. Les intimées soutiennent que la

interest in the debtor's property because there is a lack of certainty in the subject matter.

[192] We agree with each of our colleagues Justices Karakatsanis and Côté that the deemed trust is not a "true" trust and that it does not confer an ownership interest or the rights of a beneficiary on the Crown as they are understood at common law or within the meaning of the *Civil Code of Québec* (Karakatsanis J.'s reasons, at paras. 119-20; Côté J.'s reasons, at paras. 43 and 49). Respectfully, however, our colleagues miss the point of the *deemed* quality of the trust. The matters of a property interest, certainty of subject matter and autonomous patrimony that arise from attempts to describe the operation of the deemed trust are entirely irrelevant and do not assist in deciding this appeal, nor in understanding Parliament's intent. The deemed trust is a legal fiction, with *sui generis* characteristics that are described in s. 227(4) and (4.1) of the *ITA*. As noted in *First Vancouver*, at para. 34, "it is open to Parliament to characterize the trust in whatever way it chooses; it is not bound by restraints imposed by ordinary principles of trust law". While *First Vancouver* considered the contrast between a statutory trust and a common law trust, the same applies to our colleague Côté J.'s reference to the *Civil Code* (*Canada (Attorney General) v. Caisse populaire d'Amos*, 2004 FCA 92, 324 N.R. 31, at para. 49). What matters here is not *the characterization* of the deemed trust that is at issue, but its *operation*. And as we explain, it *operates* to give the Crown a statutory right of access to the debtor's property to the extent of its *corpus* and a right to be paid in priority to all security interests.

[193] Further, no concerns regarding certainty of subject matter or autonomous patrimony arise here. It is of course true that, in common law Canada, for a trust to come into existence there must be certainty of intention, certainty of subject matter, and certainty of object (D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (4th ed. 2012), at p. 140; E. E. Gillese, *The Law of Trusts*

Couronne ne peut pas détenir un intérêt propriétal sur les biens des débitrices en raison de l'incertitude quant aux biens sujets à la fiducie.

[192] Nous convenons avec chacune de nos collègues les juges Karakatsanis et Côté que la fiducie réputée n'est pas une fiducie « véritable » et qu'elle ne confère pas à la Couronne un intérêt propriétal ou des droits de bénéficiaire tel qu'on les entend en common law ou au sens du *Code civil du Québec* (motifs de la juge Karakatsanis, par. 119-120; motifs de la juge Côté, par. 43 et 49). En tout respect, cependant, nos collègues ne saisissent pas le caractère *réputé* de la fiducie. Les questions de l'intérêt propriétal, de la certitude quant aux biens sujets à la fiducie et du patrimoine autonome qui découlent des tentatives d'expliquer le fonctionnement de la fiducie réputée sont dénuées de toute pertinence et n'aident pas à trancher le présent pourvoi, ni à comprendre l'intention du législateur. La fiducie réputée est une fiction juridique assortie de caractéristiques *sui generis* décrites aux par. 227(4) et 227(4.1) de la *LIR*. Comme il a été souligné au par. 34 de l'arrêt *First Vancouver*, « le législateur peut qualifier la fiducie comme il l'entend; il n'est pas lié par les contraintes découlant des principes habituels du droit des fiducies ». Bien que l'arrêt *First Vancouver* ait traité du contraste entre une fiducie créée en vertu de la loi et une fiducie en common law, ses enseignements valent pour le renvoi de notre collègue la juge Côté au *Code civil* (*Canada (Procureur général) c. Caisse populaire d'Amos*, 2004 CAF 92, 324 N.R. 31, par. 49). Ce qui importe en l'espèce n'est pas *la qualification* de la fiducie réputée en cause, mais son *fonctionnement*. Comme nous l'expliquerons, elle *a pour effet* de conférer à la Couronne un droit d'accès aux biens du débiteur jusqu'à concurrence de la masse fiduciaire ainsi que le droit d'être payée par priorité sur toute garantie.

[193] En outre, il n'existe aucune préoccupation concernant la certitude quant à la matière ou le patrimoine autonome en l'espèce. Certes, il est vrai qu'en common law au Canada, la certitude quant à l'intention de créer une fiducie, la certitude quant aux biens sujets à la fiducie et la certitude quant à l'objet sont nécessaires pour qu'une fiducie prenne naissance (D. W. M. Waters, M. R. Gillen et L. D.

(3rd ed. 2014), at p. 41). Similarly, under the Quebec civil law, "[t]hree requirements must . . . be met in order for a trust to be constituted: property must be transferred from an individual's patrimony to another patrimony by appropriation; the property must be appropriated to a particular purpose; and the trustee must accept the property" (*Bank of Nova Scotia v. Thibault*, 2004 SCC 29, [2004] 1 S.C.R. 758, at para. 31). And, again, it is also true that the subject matter of the deemed trust under s. 227(4.1) cannot be identified from the date of creation of the trust and does not constitute an autonomous patrimony to which specific property is transferred.

[194] But again, none of this remotely matters here. Statutory text, not ordinary principles of trust law, determines the nature of, and rights conferred by, deemed trusts (*First Vancouver*, at para. 34). And this Court has recognized that Parliament, through the trust deemed by s. 227(4.1) of the *ITA*, has "revitaliz[ed] the trust whose subject matter has lost all identity" (*Sparrow Electric*, at para. 31, per Gonthier J., adopted in *First Vancouver*, at para. 37). This is because the subject matter of the deemed trust is ascertained *ex post facto*, corresponding to the property of the tax debtor and property held by any secured creditor equal in value to the amount deemed to be held in trust by s. 227(4) that, but for the security interest, would be property of the tax debtor. In short, the subject matter is whatever assets the employer then has from which to realize the original trust debt. Hence Iacobucci J.'s description in *First Vancouver* of the operation of s. 227(4.1) as "similar in principle to a floating charge" (para. 4). Parliament also circumvented the traditional requirements of the *Civil Code* for constituting a trust by requiring the amount of the unremitted source deductions to be held "separate and apart from the property of the [debtor]" and to "form no part of the estate [*patrimoine*, in the French version] or property of the [debtor]" (s. 227(4.1)).

Smith, dir., *Waters' Law of Trusts in Canada* (4e éd. 2012), p. 140; E. E. Gillese, *The Law of Trusts* (3e éd. 2014), p. 41). De même, en droit civil québécois, « [t]rois conditions sont [. . .] nécessaires pour la constitution d'une fiducie : le transfert de biens du patrimoine d'une personne à un patrimoine d'affectation, l'affectation des biens à une fin particulière et l'acceptation par un fiduciaire » (*Banque de Nouvelle-Écosse c. Thibault*, 2004 CSC 29, [2004] 1 R.C.S. 758, par. 31). Par ailleurs, il est également vrai que la matière de la fiducie réputée créée par le par. 227(4.1) ne peut être identifiée à compter de la date de création de la fiducie et qu'elle ne constitue pas un patrimoine autonome auquel sont transférés des biens en particulier.

[194] Mais là encore, rien de ce qui précède n'est d'une quelconque pertinence en l'espèce. C'est le texte législatif, et non les principes habituels du droit des fiducies, qui détermine la nature des fiducies réputées et les droits qu'elles confèrent (*First Vancouver*, par. 34). De plus, notre Cour a reconnu que le législateur avait, au moyen de la fiducie réputée prévue au par. 227(4.1) de la *LIR*, « revitalis[é] la fiducie dont l'objet a perdu toute identité » (*Sparrow Electric*, par. 31, le juge Gonthier, adopté dans *First Vancouver*, par. 37). Il en est ainsi parce que les biens sujets à la fiducie réputée sont établis après coup; ils correspondent aux biens du débiteur fiscal et aux biens détenus par un créancier garanti d'une valeur équivalente au montant réputé être détenu en fiducie en vertu du par. 227(4) qui, en l'absence de la garantie, seraient ceux du débiteur fiscal. Bref, les biens sujets à la fiducie correspondent à tous les biens, quels qu'ils soient, que l'employeur possède alors et au moyen desquels la fiducie initiale peut être réalisée. C'est pourquoi le juge Iacobucci, dans l'arrêt *First Vancouver*, a déclaré que la fiducie réputée prévue au par. 227(4.1) « s'apparent[ait] sur le plan des principes à une charge flottante » (par. 4). Le législateur a aussi contourné les conditions classiques établies dans le *Code civil* pour la constitution d'une fiducie en exigeant que le montant des retenues à la source non versées soit détenu « sépar[é] des propres biens d[u] débiteur » et « ne [fasse pas] partie du patrimoine ou des biens d[u] débiteur » (par. 227(4.1)).

[195] In short, the requirements of "true" trusts of civil and common law are irrelevant to ascertaining the operation of a statutorily deemed trust. Parliament did not legislate a "true" trust. Instead, it legislated a deeming provision which "artificially imports into a word or an expression an additional meaning which they would not otherwise convey beside the normal meaning which they retain where they are used" (*R. v. Verrette*, [1978] 2 S.C.R. 838, at p. 845).

[195] En somme, les conditions des fiducies « véritables » en droit civil et en common law ne sont d'aucune utilité pour déterminer le fonctionnement d'une fiducie réputée créée en application de la loi. Le législateur n'a pas créé une fiducie « véritable ». Il a plutôt adopté une disposition déterminative qui « donne à un mot ou à une expression un sens autre que celui qu'on leur reconnaît habituellement et qu'il conserve là où on l'utilise » (*R. c. Verrette*, [1978] 2 R.C.S. 838, p. 845).

[196] On this point, and contrary to the view of the majority at the Court of Appeal, Iacobucci J. *did not* hold that the deemed trust *is* a floating charge — nor that it was "of the same nature" (Côté J.'s reasons, at para. 51) — but rather that it operated *similarly*, by permitting a debtor in the interim to alienate property in the normal course of business. They are distinct legal concepts; whereas the deemed trust takes "priority over existing and future security interests", a floating charge would be overridden by a subsequent fixed charge (*Toronto-Dominion Bank v. Canada*, 2020 FCA 80, [2020] 3 F.C.R. 201, at para. 62; see also *First Vancouver*, at para. 28).

[196] Sur ce point, et contrairement à l'avis des juges majoritaires de la Cour d'appel, le juge Iacobucci *n'a pas* jugé que la fiducie réputée *constituait* une charge flottante — ni qu'elle [TRADUCTION] « particip[ait] de la nature d'une "charge flottante" » (motifs de la juge Côté, par. 51) — mais plutôt qu'elle fonctionnait de manière *semblable* en permettant à un débiteur, dans l'intervalle, de se départir d'un bien détenu en fiducie dans le cadre normal de ses activités. Ce sont là des concepts juridiques distincts; alors que la fiducie réputée a la « priorité de rang sur les garanties actuelles et futures », une charge flottante serait supplantée par une sûreté ultérieure (*Banque Toronto-Dominion c. Canada*, 2020 CAF 80, [2020] 3 R.C.F. 201, par. 62; voir aussi *First Vancouver*, par. 28).

[197] Significantly, the s. 227(4.1) deemed trust does not encompass the whole of the tax debtor's interest in property, but only the amount deemed to be held in trust by s. 227(4). But this does not mean the Crown cannot have a property interest in the debtor's property. It merely limits that interest to the extent of the unremitted source deductions. This makes sense. The Crown may collect only what it is owed.

[197] Fait important à signaler, la fiducie réputée prévue au par. 227(4.1) ne comprend pas l'ensemble des biens du débiteur fiscal, mais seulement les biens d'une valeur équivalente au montant réputé être détenu en fiducie en vertu du par. 227(4). Cela ne signifie pas que la Couronne ne peut pas détenir un intérêt propriétal sur les biens du débiteur, mais seulement que cet intérêt se limite à la valeur des retenues à la source non versées, ce qui est logique. La Couronne ne peut percevoir que ce qui lui est dû.

B. *The Deemed Trust Under the Fiscal Statutes Have Absolute Priority Over All Other Claims in CCAA Proceedings*

B. *La fiducie réputée créée par les lois fiscales a priorité absolue sur toutes les autres réclamations dans le cadre de procédures engagées sous le régime de la LACC*

[198] The text, context, and purpose of s. 227(4.1) of the *ITA* support the conclusion that s. 227(4.1) of the *ITA* and the related deemed trust provisions under the Fiscal Statutes bear only one plausible

[198] Le texte, le contexte et l'objectif du par. 227(4.1) de la *LIR* appuient la conclusion selon laquelle il n'existe qu'une seule interprétation plausible de ce paragraphe et des dispositions connexes

interpretation: the Crown's deemed trust enjoys priority over all other claims, including priming charges granted under the *CCAA*. Parliament's intention when it amended and expanded s. 227(4) and (4.1) of the *ITA* was clear and unmistakable.

concernant la fiducie réputée qui figurent dans les lois fiscales : la fiducie réputée de la Couronne a préséance sur toute autre réclamation, y compris sur les charges super prioritaires accordées en vertu de la *LACC*. Lorsque le législateur a modifié les par. 227(4) et (4.1) de la *LIR* et élargi leur portée, son intention était claire et sans équivoque.

(1) The Deemed Trusts Apply Notwithstanding the Provisions of the *CCAA*

(1) La fiducie réputée s'applique malgré les dispositions de la *LACC*

(a) *Text of the Fiscal Statutes*

a) *Texte des lois fiscales*

[199] The text of s. 227(4.1) of the *ITA* is determinative: the Crown's deemed trust claim enjoys superior priority over all "security interests", including priming charges under the *CCAA*. The amount subject to the deemed trusts is deemed "to be held . . . separate and apart from the property of the person" and "to form no part of the estate or property of the person". It is "beneficially owned by Her Majesty", and the "proceeds of such property shall be paid . . . in priority to all such security interests". The Crown's right pursuant to its deemed trust is clear: it is a right to be paid in priority to all security interests.

[199] Le libellé du par. 227(4.1) de la *LIR* est déterminant : la fiducie réputée de la Couronne a priorité absolue sur toutes les « garanties », y compris sur les charges super prioritaires créées sous le régime de la *LACC*. Le montant sujet à la fiducie réputée est réputé « être déten[u] [. . .] sépar[é] des propres biens de la personne » et « ne pas faire partie du patrimoine ou des biens de la personne ». « Sa Majesté a un droit de bénéficiaire » sur ce montant et « le produit découlant de ces biens est payé [. . .] par priorité sur [toute autre] garantie ». Le droit conféré à la Couronne par la fiducie réputée créée en sa faveur est clair : il s'agit du droit d'être payée par priorité sur toute garantie.

[200] Parliament granted this unassailable priority by employing the unequivocal language of "[n]otwithstanding any . . . enactment of Canada". This is a "blanket paramountcy clause"; it prevails over all other statutes (P. Salembier, *Legal and Legislative Drafting* (2nd ed. 2018), at p. 385). No similar "notwithstanding" provision appears in the *CCAA*, subordinating the claims under the deemed trusts of the Fiscal Statues to priming charges. Indeed, it is quite the opposite: unlike most deemed trusts which are nullified in *CCAA* proceedings by the operation of s. 37(1) of the *CCAA*, s. 37(2) *preserves* the deemed trusts of the Fiscal Statutes. This distinguishes the deemed trust at issue here from those discussed in *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, which were nullified by the operation of what is now s. 37(1). Deschamps J. repeatedly contrasted the different deemed trusts and specified that "the Crown's deemed trust and corresponding priority in source deductions remain effective both in reorganization

[200] Le législateur a accordé cette priorité inattaquable en employant ces termes non équivoques : « [m]algré [. . .] tout autre texte législatif fédéral . . . » Il s'agit d'une [TRADUCTION] « disposition générale attributive de préséance »; elle a préséance sur toute autre loi (P. Salembier, *Legal and Legislative Drafting* (2e éd. 2018), p. 385). Il ne figure dans la *LACC* aucune disposition dérogatoire semblable (« malgré »), subordonnant aux charges super prioritaires les réclamations relatives à une fiducie réputée créée par les lois fiscales. En fait, c'est tout l'inverse : contrairement à la plupart des fiducies réputées qui sont neutralisées dans le cadre de procédures engagées sous le régime de la *LACC* par l'application du par. 37(1) de la *LACC*, le par. 37(2) *préserve* la fiducie réputée prévue par les lois fiscales. Cela distingue la fiducie réputée en litige dans la présente affaire de celles dont il était question dans l'arrêt *Century Services Inc. c. Canada (Procureur général)*, 2010 CSC 60, [2010] 3 R.C.S. 379, qui ont été neutralisées par l'application de ce qui est maintenant le par. 37(1).

and in bankruptcy" (para. 38). The *ITA* and *CCAA* thus operate without conflict.

La juge Deschamps a maintes fois comparé les différentes fiducies réputées et précisé que « la fiducie réputée établie en faveur de la Couronne et la priorité dont celle-ci jouit de ce fait sur les retenues à la source continuent de s'appliquer autant pendant la réorganisation que pendant la faillite » (par. 38). La *LIR* et la *LACC* n'entrent donc pas en conflit.

(b) *Legislative Predecessor Provisions*

b) *Dispositions législatives antérieures*

[201] The predecessor provisions of a statutory provision form part of the "entire context" in which it must be interpreted (*Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*, 2005 SCC 70, [2005] 3 S.C.R. 425, at para. 28). And here, it confirms that, by enacting s. 227(4.1) of the *ITA*, Parliament intended for the deemed trusts arising from the Fiscal Statutes to have absolute priority over all secured creditors, as defined in s. 224(1.3) of the *ITA*.

[201] Les versions antérieures d'une disposition législative font partie du « contexte global » dans lequel cette disposition doit être interprétée (*Merk c. Association internationale des travailleurs en ponts, en fer structural, ornemental et d'armature, section locale 771*, 2005 CSC 70, [2005] 3 R.C.S. 425, par. 28). En l'espèce, le contexte confirme qu'en édictant le par. 227(4.1) de la *LIR*, le législateur voulait que la fiducie réputée créée par les lois fiscales jouisse d'une priorité absolue sur tous les créanciers garantis, au sens du par. 224(1.3) de la *LIR*.

[202] As already noted, Parliament amended s. 227(4.1) of the *ITA* to its current form in response to this Court's decision in *Sparrow Electric*. In *Sparrow Electric*, both Royal Bank and the Minister claimed priority to the proceeds from the tax debtor's property. This Court held that the Bank had priority since the inventory was subject to the Bank's security before the deemed trust arose. In reaching this conclusion, Iacobucci J. invited Parliament to grant absolute priority to the Crown, and showed how this could be achieved:

[202] Comme il a déjà été souligné, le législateur a modifié le par. 227(4.1) de la *LIR* pour adopter son libellé actuel en réponse à l'arrêt *Sparrow Electric* de notre Cour. Dans l'affaire *Sparrow Electric*, tant la Banque Royale que Sa Majesté revendiquaient la priorité de rang relativement au produit de la vente des biens de la débitrice fiscale. Notre Cour a jugé que la priorité de rang revenait à la Banque puisque les biens figurant dans l'inventaire étaient assujettis à la garantie de la Banque avant que la fiducie réputée n'ait pris naissance. En tirant cette conclusion, le juge Iacobucci a invité le législateur à accorder la priorité absolue à la Couronne et lui a montré comment y arriver :

> I wish to emphasize that it is open to Parliament to step in and assign absolute priority to the deemed trust. A clear illustration of how this might be done is afforded by s. 224(1.2) *ITA*, which vests certain moneys in the Crown "notwithstanding any security interest in those moneys" and provides that they "shall be paid to the Receiver General in priority to any such security interest". All that is needed to effect the desired result is clear language of that kind. In the absence of such clear language, judicial innovation is undesirable, both because the issue is policy charged and because a legislative mandate is apt to be clearer than a rule whose precise bounds will become

> . . . je tiens à souligner qu'il est loisible au législateur d'intervenir et d'accorder la priorité absolue à la fiducie réputée. Le paragraphe 224(1.2) *LIR* illustre clairement comment cela pourrait se faire. Cette disposition attribue à Sa Majesté certaines sommes « malgré toute autre garantie au titre de ce[s] somme[s] », et prévoit qu'elles « doi[vent] être payée[s] au receveur général par priorité sur toute autre garantie au titre de ce[s] somme[s] ». Pour obtenir le résultat souhaité, il suffit d'utiliser des termes aussi clairs. En l'absence de pareils termes, l'innovation judiciaire n'est pas souhaitable parce qu'il s'agit d'une question qui regorge de considérations de principe et parce qu'une

fixed only as a result of expensive and lengthy litigation. [Emphasis added; para. 112.]

prescription du législateur est plus susceptible d'être claire qu'une règle dont les limites précises ne seront établies que par suite d'une longue et coûteuse série de poursuites. [Nous soulignons; par. 112.]

[203] Parliament proceeded to do just that. It amended the Fiscal Statutes to reinforce its priority. The press release accompanying the amendments stated that the objective of the amendments was to "assert the absolute priority of the Crown's claim [for] unremitted source deductions [and to] ensure that tax revenue losses are minimised and that delinquent taxpayers and their secured creditors do not benefit from failures to remit source deductions and GST at the expense of the Crown" (Department of Finance Canada, at p. 1 (emphasis added)).

[203] C'est exactement ce que le législateur a fait. Il a modifié les lois fiscales afin de renforcer sa priorité. Le communiqué qui accompagnait les modifications mentionnait que celles-ci avaient pour objectif d'« établir la priorité absolue des droits de l'État [à l'égard des] retenues à la source non versées [et de] minimiser les pertes de recettes fiscales et empêch[er] les contribuables contrevenants et leurs créanciers garantis de tirer profit du non-versement de retenues à la source et de TPS au détriment de l'État » (Ministère des Finances du Canada, p. 1 (nous soulignons)).

[204] The purpose of these amendments was described by Iacobucci J. for this Court in *First Vancouver*. It was, he recognized, to grant priority to the deemed trusts and ensure the Crown's claim prevails over secured creditors, irrespective of when the security interest arose (paras. 28-29). "It is evident from these changes" he added, "that Parliament has made a concerted effort to broaden and strengthen the deemed trust in order to facilitate the collection efforts of the Minister" (para. 29). Parliament's intention could not have been clearer.

[204] L'objectif de ces modifications a été décrit par le juge Iacobucci au nom de notre Cour dans l'arrêt *First Vancouver*. Comme il l'a reconnu, l'objectif était d'accorder la priorité de rang à la fiducie réputée et de faire en sorte que la créance de la Couronne ait préséance sur celles des créanciers garantis, peu importe le moment où la garantie a pris naissance (par. 28-29). « Ces modifications révèlent que le législateur a manifestement voulu consolider la fiducie réputée et en accroître la portée afin de faciliter les opérations de recouvrement du ministre », a-t-il ajouté (par. 29). L'intention du législateur n'aurait pas pu être plus claire.

[205] Indeed, our colleagues' view to the contrary leaves us wondering: if the all-encompassing scope of the notwithstanding clause of s. 227(4.1) of the *ITA* is *insufficient* to prevail over the priming charges, what language would possibly be *sufficient*? Courts must give proper effect to Parliament's plain statutory direction, and not strain to subvert it on the basis that Parliament's categorical language or "basket clause" did not itemize a particular security interest.

[205] En fait, l'opinion contraire de nos collègues nous amène à nous questionner : si la portée englobante de la disposition de dérogation du par. 227(4.1) de la *LIR ne suffit pas* à garantir la priorité de rang sur les charges super prioritaires, quel libellé imaginable aurait *suffi*? Les tribunaux doivent donner dûment effet aux directives législatives claires du législateur et ne pas s'efforcer de les renverser au motif que le libellé sans équivoque ou la « clause omnibus » du législateur ne mentionne pas expressément une garantie en particulier.

(2) The Priming Charges Are "Security Interests" Within the Meaning of the Fiscal Statutes

(2) Les charges super prioritaires constituent une « garantie » au sens des lois fiscales

[206] The priming charge provisions in ss. 11.2(1), 11.51(1) and 11.52(1) of the *CCAA* allow the

[206] Selon les dispositions relatives aux charges super prioritaires figurant aux par. 11.2(1), 11.51(1)

supervising court to "make an order declaring that all or part of the company's property is subject to a security or charge" ("*charge ou sûreté*" in the French version). This does not, however, prevail over the deemed trust created by s. 227(4.1) of the *ITA*, which provides that the unpaid amounts of the deemed trust for source deductions have priority over all "security interests". That term is defined by s. 224(1.3) of the *ITA* as follows:

security interest means any interest in, or for civil law any right in, property that secures payment or performance of an obligation and includes an interest, or for civil law a right, created by or arising out of a debenture, mortgage, hypothec, lien, pledge, charge, deemed or actual trust, assignment or encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for; *(garantie)*

This makes clear that a "security interest" includes a "charge" (a "*sûreté*" in the French version). Further, ss. 11.2(1), 11.51(1) and 11.52(1) of the *CCAA* describe the priming charges as a "security or charge". There can be no doubt, therefore, that priming charges under the *CCAA* are security interests under the *ITA*.

[207] Even were this insufficient, the definition of "security interest" in s. 224(1.3) of the *ITA* is sufficiently expansive to capture *CCAA* priming charges. The word "includes", and the categorical language of "encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for" could not be any more expansive. As Professor Sullivan explains, "[t]he purpose of a list of examples following the word 'including' is normally to emphasize the broad range of general language and to ensure that it is not inappropriately read down so as to exclude something that is meant to be included" (*Sullivan on the Construction of Statutes* (6th ed. 2014), at para. 4.39).

[208] This Court has already recognized, in *Caisse populaire Desjardins de l'Est de Drummond v.*

et 11.52(1) de la *LACC*, un juge surveillant « peut par ordonnance [. . .] déclarer que tout ou partie des biens de la compagnie sont grevés d'une charge ou sûreté ». Cette charge ou sûreté n'a toutefois pas préséance sur la fiducie réputée créée par le par. 227(4.1) de la *LIR*, lequel prévoit que le montant des retenues à la source non versées réputé être détenu en fiducie a priorité sur toute autre « garantie ». Ce terme est ainsi défini au par. 224(1.3) de la *LIR* :

garantie Intérêt ou, pour l'application du droit civil, droit sur un bien qui garantit l'exécution d'une obligation, notamment un paiement. Sont en particulier des garanties les intérêts ou, pour l'application du droit civil, les droits nés ou découlant de débentures, hypothèques, privilèges, nantissements, sûretés, fiducies réputées ou réelles, cessions et charges, quelle qu'en soit la nature, de quelque façon ou à quelque date qu'elles soient créées, réputées exister ou prévues par ailleurs. (*security interest*)

Il est donc clair qu'une « garantie » englobe une « sûreté » et une « charge ». En outre, les par. 11.2(1), 11.51(1) et 11.52(1) de la *LACC* décrivent les charges super prioritaires comme une « charge ou sûreté ». Par conséquent, il ne fait aucun doute que les charges super prioritaires créées sous le régime de la *LACC* sont des garanties au sens de la *LIR*.

[207] Même si cela ne suffisait pas, la définition de « garantie » énoncée au par. 224(1.3) de la *LIR* est assez large pour comprendre les charges super prioritaires prévues sous le régime de la *LACC*. La portée de l'expression « sont en particulier » et du passage catégorique « charges, quelle qu'en soit la nature, de quelque façon ou à quelque date qu'elles soient créées, réputées exister ou prévues par ailleurs » ne pourrait pas être plus large. Comme l'explique la professeure Sullivan, [TRADUCTION] « [u]ne liste d'exemples introduite par le terme "notamment" [ou "sont en particulier" dans le paragraphe qui nous occupe] a généralement pour objectif de souligner la vaste portée des termes généraux et de veiller à ce qu'elle ne soit pas mal interprétée de façon à exclure un élément qui ne doit pas l'être » (*Sullivan on the Construction of Statutes* (6e éd. 2014), par. 4.39).

[208] Notre Cour a déjà reconnu, dans l'arrêt *Caisse populaire Desjardins de l'Est de Drummond*

Canada, 2009 SCC 29, [2009] 2 S.C.R. 94, that Parliament chose "an expansive definition of 'security interest' . . . in order to enable maximum recovery by the Crown" (para. 14), such that it captures any interest in the property of the debtor that secures payment or performance of an obligation:

> In order to constitute a security interest for the purposes of s. 227(4.1) *ITA* and s. 86(2.1) *EIA*, the creditor must hold "any interest in property that secures payment or performance of an obligation". The definition of "security interest" in s. 224(1.3) *ITA* does not require that the agreement between the creditor and debtor take any particular form, nor is any particular form expressly excluded. So long as the creditor's interest in the debtor's property secures payment or performance of an obligation, there is a "security interest" within the meaning of this section. While Parliament has provided a list of "included" examples, these examples do not diminish the broad scope of the words "any interest in property" . . . . [Emphasis added; para. 15.]

In that case, Rothstein J. held for the Court that a contract providing a right to compensation (or set-off at common law) could constitute a "security interest" under s. 224(1.3) of the *ITA*, *despite that it was not enumerated in the definition* and that it is *not traditionally understood as such* (paras. 37-40).

[209] For all these reasons, the priming charges fall under the definition of "security interest", because they are "interest[s] in the debtor's property [that] secur[e] payment or performance of an obligation", i.e. the payment of the monitor, the interim lender, and directors. Consequently, the Crown's interest under the trust deemed created by s. 227(4.1) of the *ITA* enjoys priority over the priming charges.

[210] Our colleague Côté J., however, sees the matter differently. In our respectful view, she disregards this Court's authoritative statement of the law in *Caisse populaire Desjardins de l'Est de Drummond*. Specifically, she concludes that priming charges are not "security interests" under the *ITA* because "[c]ourt-ordered charges are unlike conventional consensual and non-consensual security interests in that they are integrally connected to insolvency

c. Canada, 2009 CSC 29, [2009] 2 R.C.S. 94, que le législateur a opté pour « une définition large de la "garantie" afin de maximiser le recouvrement par Sa Majesté » (par. 14), qui englobe tout intérêt sur un bien qui garantit l'exécution d'une obligation, notamment un paiement :

> Il y a garantie aux fins des par. 227(4.1) *LIR* et 86(2.1) *LAE* lorsque le créancier détient un « [d]roit sur un bien qui garantit l'exécution d'une obligation, notamment un paiement ». La définition de « garantie » au par. 224(1.3) *LIR* n'exige pas que l'entente entre le créancier et le débiteur revête une forme particulière et elle n'en exclut aucune expressément. Dès lors que le droit du créancier sur le bien du débiteur garantit l'exécution d'une obligation, notamment un paiement, il y a « garantie » au sens de cette disposition. L'énumération d'exemples dans la définition légale n'a pas pour effet de limiter la portée générale de l'expression « [d]roit sur un bien » . . . [Nous soulignons; par. 15.]

Dans ce cas, le juge Rothstein, s'exprimant au nom de la Cour, a déclaré qu'un contrat conférant un droit de compensation pouvait constituer une « garantie » au sens du par. 224(1.3) de la *LIR même si la compensation n'est pas énumérée dans la définition* et même si elle *n'est ordinairement pas considérée comme telle* (par. 37-40).

[209] Pour toutes ces raisons, les charges super prioritaires entrent dans la définition de « garantie » puisqu'elles constituent un « intérêt [. . .] sur un bien qui garantit l'exécution d'une obligation, notamment un paiement », par exemple le paiement du contrôleur, du prêteur temporaire et des dirigeants. Par conséquent, l'intérêt de la Couronne au titre de la fiducie réputée créée par le par. 227(4.1) de la *LIR* prend rang devant les charges super prioritaires.

[210] Notre collègue la juge Côté voit toutefois les choses différemment, mais à notre humble avis, elle fait abstraction de l'exposé du droit faisant autorité de notre Cour dans *Caisse populaire Desjardins de l'Est de Drummond*. Plus précisément, elle conclut que les charges super prioritaires ne sont pas des « garanties » au sens de la *LIR* parce que « [les charges super prioritaires d'origine judiciaire] se distinguent des garanties consensuelles et non consensuelles

proceedings that operate for the benefit of the creditors as a group" (Côté J.'s reasons, at para. 62 (emphasis deleted), quoting R. J. Wood, "Irresistible Force Meets Immovable Object: *Canada v. Canada North Group Inc.*" (2020), 63 *Can. Bus. L.J.* 85, at p. 98). With respect, nothing in the definition of security interest in the *ITA* precludes the inclusion of an interest that is designed to operate to the benefit of all creditors.

[211] Further, and irrespective of the nature of *CCAA* proceedings, our colleague's conclusion is irreconcilable with this Court's holding in *Caisse populaire Desjardins de l'Est de Drummond* and with the "expansive definition" Parliament adopted to maximize recovery (*Caisse populaire Desjardins de l'Est de Drummond*, at para. 14). The fact that the instrument is court-ordered and is for the presumed benefit of all creditors is irrelevant. It does not affect *the nature* of the priming charges — to secure the payment of an obligation — which is the only relevant criterion (para. 15). As for the express inclusion of "priming charges" in the definition and their creation by court order, we reiterate that "*sûreté*" and "*charge*" are explicitly included "<u>however</u> or whenever arising, <u>created</u>, deemed to arise or provided for" (*ITA*, s. 224(1.3)).

[212] Nor is Professor Wood's commentary, and by extension, the reasoning in *DaimlerChrysler Financial Services (Debis) Canada Inc. v. Mega Pets Ltd.*, 2002 BCCA 242, 1 B.C.L.R. (4th) 237, and *Minister of National Revenue v. Schwab Construction Ltd.*, 2002 SKCA 6, 213 Sask. R. 278, of any avail to our colleague Karakatsanis J. (para. 102; see also Wood, at p. 98, fns. 51-52). While those judgments held that finance leases and conditional sales agreements did not fall under the definition of s. 224(1.3) of the *ITA* because they were not specifically listed, that reasoning was later squarely rejected in *Caisse populaire de l'Est de Drummond*. And, were that not enough, *Mega Pets* and *Schwab*, unlike the instant case, dealt with situations where property was not

classiques en ce qu'elles sont intimement liées aux procédures d'insolvabilité qui se déroulent au profit de l'ensemble des créanciers » (motifs de la juge Côté, par. 62 (soulignement omis), citant R. J. Wood, « Irresistible Force Meets Immovable Object : *Canada v. Canada North Group Inc.* » (2020), 63 *Rev. can. dr. comm.* 85, p. 98). Avec égards, rien dans la définition de garantie qui figure dans la *LIR* ne permet d'exclure une garantie conçue pour fonctionner au profit de tous les créanciers.

[211] Une fois de plus, et quelle que soit la nature des procédures intentées sous le régime de la *LACC*, la conclusion de notre collègue est inconciliable avec celle de notre Cour dans l'arrêt *Caisse populaire Desjardins de l'Est de Drummond* de même qu'avec la « définition large » retenue par le législateur pour maximiser le recouvrement (*Caisse populaire Desjardins de l'Est de Drummond*, par. 14). Le fait que l'instrument est constitué par un tribunal et qu'il est présumé bénéficier à tous les créanciers n'a aucune importance. Il n'a aucune incidence sur *la nature* des charges super prioritaires — soit garantir l'exécution d'une obligation, notamment un paiement — qui constitue le seul critère pertinent (par. 15). En ce qui concerne l'inclusion expresse des « charges super prioritaires » dans la définition et leur constitution par ordonnance judiciaire, nous réitérons que les « sûretés » et « charges » sont explicitement incluses « <u>de quelque façon</u> ou à quelque date qu'elles soient <u>créées</u>, réputées exister ou prévues par ailleurs » (*LIR*, par. 224(1.3)).

[212] De plus, ni l'observation du professeur Wood ni, par extension, le raisonnement avancé dans *DaimlerChrysler Financial Services (Debis) Canada Inc. c. Mega Pets Ltd.*, 2002 BCCA 242, 1 B.C.L.R. (4th) 237, et *Minister of National Revenue c. Schwab Construction Ltd.*, 2002 SKCA 6, 213 Sask. R. 278, ne sont d'une quelconque utilité pour notre collègue la juge Karakatsanis (par. 102; voir aussi Wood, p. 98, n. 51-52). Bien qu'il ait été conclu dans ces jugements que les contrats de location-financement et les contrats de vente conditionnelle n'entraient pas dans la définition énoncée au par. 224(1.3) de la *LIR* parce qu'ils n'y étaient pas précisément mentionnés, ce raisonnement a par la suite été rejeté sans ambages dans l'arrêt *Caisse populaire de l'Est de Drummond*.

transferred to the debtor, which facts were treated as determinatively supporting the conclusion that the instruments in those cases were not "security interests". For example, under a conditional sales agreement, the seller does not have an interest in the debtor's property because ownership rests with the seller until performance of the obligation (*Mega Pets*, at para. 32). By contrast, the priming charges secure payment out of property that remains the debtor's.

Comme si ce n'était pas suffisant, les affaires *Mega Pets* et *Schwab*, contrairement à l'affaire en l'espèce, concernaient des situations où les biens n'avaient pas été transférés au débiteur, lequel fait avait été considéré comme déterminant et avait mené à la conclusion que les instruments en question dans ces affaires ne constituaient pas des « garanties ». Par exemple, aux termes d'un contrat de vente conditionnelle, le vendeur ne dispose d'aucun intérêt sur les biens du débiteur puisque le vendeur demeure propriétaire jusqu'à l'exécution de l'obligation (*Mega Pets*, par. 32). À l'inverse, les charges super prioritaires garantissent le paiement à partir des biens qui appartiennent toujours au débiteur.

[213] Finally, this Court's interpretation of "security interest" in *Caisse populaire de l'Est de Drummond* is confirmed by the French version of the text. "*Sont* <u>*en particulier*</u> *des garanties*" is illustrative, not limitative. *Le Robert* (online) defines "*en particulier*" (in particular) as [TRANSLATION] "<u>particularly</u>, <u>among others</u>, especially, above all" (emphasis added). Unsurprisingly, the French version of s. 224(1.3) has been described as being [TRANSLATION] "as broadly worded as possible" (R. P. Simard, "Priorités et droits spéciaux de la couronne", in *JurisClasseur Québec — Collection droit civil — Sûretés* (loose-leaf), vol. 1, by P.-C. Lafond, ed., fasc. 4, at para. 20). There is no discordance between both versions of the text. The French version conforms perfectly to the English text's use of the verb "includes", and confirms the plain reading of the English version.

[213] Enfin, l'interprétation que notre Cour donne au terme « garantie » dans *Caisse populaire de l'Est de Drummond* est confirmée par la version française du texte. « Sont <u>en particulier</u> des garanties » est un passage illustratif, et non limitatif. *Le Robert* (en ligne) définit « en particulier » comme suit : « <u>particulièrement</u>, <u>notamment</u>, spécialement, surtout » (nous soulignons). Sans surprise, la version française du par. 224(1.3) a été qualifiée d'« aussi large qu'il est possible de l'écrire » (R. P. Simard, « Priorités et droits spéciaux de la couronne », dans *JurisClasseur Québec — Collection de droit civil — Sûretés* (feuilles mobiles), vol. 1, par P.-C. Lafond, dir., fasc. 4, par. 20). Il n'y a aucune discordance entre les deux versions du texte. La version française correspond parfaitement à l'emploi du verbe « *includes* » dans le texte anglais, et confirme le sens clair de la version anglaise.

[214] Respectfully, our colleagues Côté and Karakatsanis JJ. frustrate the clear will of Parliament. Clear, all-inclusive language should be treated as such, and not circumvented by straining to draw distinctions of no legal significance whatsoever or by searching for what is not specifically mentioned in order to avoid the otherwise inescapable conclusion that Parliament granted absolute priority to the deemed trusts.

[214] Avec égards, nos collègues les juges Côté et Karakatsanis contrecarrent la volonté claire du législateur. Un langage clair et englobant devrait être traité comme tel et ne pas être contourné en tentant désespérément de faire des distinctions dénuées de de toute importance sur le plan juridique ou en cherchant ce qui n'est pas expressément mentionné dans le but d'éviter la conclusion, autrement inéluctable, selon laquelle le législateur voulait accorder la priorité absolue à la fiducie réputée.

(3) <u>Conclusion</u>

(3) <u>Conclusion</u>

[215] It is this simple:

[215] La conclusion est simple :

1. the Fiscal Statutes give absolute priority to the deemed trusts for source deductions over all security interests notwithstanding the *CCAA*;
2. the priming charges are "security interests" within the meaning of the Fiscal Statutes; and
3. the *CCAA* does not subordinate the claims under the deemed trusts of the Fiscal Statutes to the priming charges.

[216] This is sufficient to decide the appeal: the deemed trusts of the Fiscal Statutes have priority over the priming charges. However, in view of the respondents' submissions that such a finding leaves the deemed trust provisions in the Fiscal Statutes in conflict with the *CCAA*, and that recognizing the ultimate priority of the Crown's deemed trust renders certain provisions of the *CCAA* meaningless, we are compelled to explain why this is not so.

C. *The CCAA and the Fiscal Statutes Operate Harmoniously*

(1) <u>The Broad Grant of Authority Under Section 11 of the *CCAA* Is Not Unlimited</u>

[217] It is not disputed that s. 11 of the *CCAA* contains a grant of broad supervisory discretion and the power to "make any order that it considers appropriate in the circumstances" to give effect to that supervisory role (see J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2nd ed. 2013), at pp. 18-19). What is in dispute, however, are the limits to this broad power.

[218] A supervising judge's authority to grant priming charges was not always contained in the *CCAA*. Prior to the 2009 amendments, it was derived from the courts' inherent jurisdiction (*Temple City Housing Inc., Re*, 2007 ABQB 786, 42 C.B.R. (5th) 274, at para. 14; Q.B. reasons, at para. 105). While the amendments in some respects represented a codification of the past practice, they clarified how priming charges operated (*CCAA*, ss. 11.2, 11.51 and 11.52). Despite being "the engine driving the statutory scheme", s. 11's exercise was expressly stated

1. les lois fiscales donnent à la fiducie réputée créée à l'égard des retenues à la source priorité absolue sur toute garantie malgré la *LACC*;
2. les charges super prioritaires sont des « garanties » au sens des lois fiscales;
3. la *LACC* n'accorde pas aux charges super prioritaires préséance sur une réclamation au titre d'une fiducie réputée créée par les lois fiscales.

[216] Il n'en faut pas davantage pour trancher le pourvoi : la fiducie réputée créée par les lois fiscales a préséance sur les charges super prioritaires. Cependant, comme les intimées soutiennent que cette conclusion ferait en sorte que les dispositions relatives à la fiducie réputée contenues dans les lois fiscales entrent en conflit avec la *LACC* et ferait perdre leur sens à certaines dispositions de la *LACC*, nous nous devons d'expliquer pourquoi ce n'est pas le cas.

C. *La LACC et les lois fiscales s'appliquent de façon harmonieuse*

(1) <u>Les larges pouvoirs conférés par l'art. 11 de la *LACC* ne sont pas sans limites</u>

[217] Il n'est pas contesté que l'art. 11 de la *LACC* confère au tribunal un vaste pouvoir discrétionnaire de surveillance ainsi que le pouvoir de « rendre toute ordonnance qu'il estime indiquée » afin de donner effet à ce rôle de surveillance (voir J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2e éd. 2013), p. 18-19). Ce sont plutôt les limites de ce vaste pouvoir qui sont contestées.

[218] La *LACC* n'a pas toujours conféré à un juge surveillant le pouvoir d'accorder des charges super prioritaires. Avant les modifications de 2009, ce pouvoir découlait de la compétence inhérente du tribunal (*Temple City Housing Inc., Re*, 2007 ABQB 786, 42 C.B.R. (5th) 274, par. 14; motifs de la C.B.R., par. 105). Les modifications visaient, à certains égards, à codifier les pratiques antérieures, mais elles visaient aussi à clarifier le fonctionnement des charges super prioritaires (*LACC*, art. 11.2, 11.51 et 11.52). Bien que l'art. 11 ait été qualifié de « moteur

by Parliament to be "subject to the restrictions set out in this Act" (see *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, [2020] 1 S.C.R. 521, at paras. 48-49, citing *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), at para. 36). Three such restrictions are significant here.

(a) *The Continued Operation of the Deemed Trusts for Unremitted Source Deductions (Section 37(2))*

[219] The first restriction on the authority to grant priming charges is found in s. 37(2) of the *CCAA*. This provides for the continued operation of the deemed trusts under the Fiscal Statutes in a *CCAA* proceeding — a point this Court *repeatedly* highlighted in *Century Services*, at paras. 78-81. At the hearing of this appeal, the respondents argued that s. 37(1) nullifies the Crown's priority in respect of all deemed trusts under the *CCAA*, and that s. 37(2) acts merely to reincorporate the deemed trusts under the Fiscal Statutes into *CCAA* proceedings without their absolute priority. This tortured interpretation misconceives the effect of s. 37(1).

[220] Section 37(1) provides that, despite any deemed trust provision in federal or provincial legislation, "property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision", but it is expressly made "[s]ubject to subsection (2)". Through s. 37(2), Parliament also preserved the operation of the deemed trusts under the Fiscal Statutes within *CCAA* proceedings by providing that "[s]ubsection (1) does not apply in respect of amounts deemed to be held in trust under [the Fiscal Statutes]". In the face of Parliament's clear direction that the deemed trusts operate "notwithstanding" any other enactment, and the express preservation of the deemed trusts in the *CCAA*, there is simply no basis whatsoever for reading s. 37 as

du régime législatif », le législateur a expressément déclaré que le pouvoir qu'il confère doit être exercé « sous réserve des restrictions prévues par la présente loi » (voir *9354-9186 Québec inc. c. Callidus Capital Corp.*, 2020 CSC 10, [2020] 1 R.C.S. 521, par. 48-49, citant *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), par. 36). Trois restrictions de ce genre importent en l'espèce.

a) *Le fonctionnement continu des fiducies réputées créées à l'égard des retenues à la source non versées (par. 37(2))*

[219] La première restriction imposée au pouvoir d'accorder des charges super prioritaires est énoncée au par. 37(2) de la *LACC*, lequel prévoit le maintien en vigueur de la fiducie réputée créée par les lois fiscales dans le cadre d'une procédure engagée sous le régime de la *LACC* — un point que notre Cour a souligné *maintes fois* dans l'arrêt *Century Services*, par. 78 à 81. À l'audition du présent pourvoi, les intimées ont soutenu que le par. 37(1) a pour effet de neutraliser la priorité de la Couronne en regard de toutes les fiducies réputées sous le régime de la *LACC* et que le par. 37(2) vise simplement à réintégrer les fiducies réputées créées par les lois fiscales dans les procédures engagées sous le régime de la *LACC*, mais sans leur priorité absolue. Cette interprétation tortueuse se méprend sur l'effet du par. 37(1).

[220] Le paragraphe 37(1) prévoit que, par dérogation à toute disposition législative fédérale ou provinciale en matière de fiducie réputée, « aucun des biens de la compagnie débitrice ne peut être considéré comme [un bien détenu en fiducie pour Sa Majesté] par le seul effet d'une telle disposition ». Toutefois, cela ne s'applique que « [s]ous réserve du paragraphe (2) ». Au moyen du par. 37(2), le législateur a également protégé l'application de la fiducie réputée créée par les lois fiscales dans le cadre de procédures engagées sous le régime de la *LACC* en disposant que « [l]e paragraphe (1) ne s'applique pas à l'égard des sommes réputées détenues en fiducie aux termes des [lois fiscales] ». Étant donné la directive claire du législateur voulant que la fiducie réputée s'applique « malgré » tout autre

invalidating the deemed trust provisions under the Fiscal Statutes only to revive them with a conveniently lesser priority. Such an interpretation finds no support in the text, context, or purpose of the statutory schemes. Rather, all those considerations support the view that the deemed trusts under the Fiscal Statutes are preserved in *CCAA* proceedings in both form and substance, along with their absolute priority.

texte législatif, ainsi que la protection de la fiducie réputée expressément prévue par la *LACC*, il n'y a tout simplement aucune raison d'interpréter l'art. 37 comme s'il avait pour effet d'invalider les dispositions relatives à la fiducie réputée contenues dans les lois fiscales pour ensuite les rétablir, comme par hasard, avec une priorité de rang inférieure. Une telle interprétation ne trouve aucun appui dans le libellé, le contexte ou l'objectif des régimes législatifs. Tous ces éléments appuient plutôt la thèse selon laquelle, dans le cadre de procédures engagées sous le régime de la *LACC*, la fiducie réputée créée par les lois fiscales est préservée, autant dans la forme que sur le fond, tout comme sa priorité absolue.

[221] Before turning to the second restriction, we note each of our colleagues Karakatsanis J. and Côté J. fail to give effect to Parliament's decision, expressed in clear statutory text, to "preser[ve] deemed trusts and asser[t] Crown priority only in respect of source deductions" under the *CCAA* (*Century Services*, at para. 45). For the same reason, the reliance they place on *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24, is misconceived. There, the Court held that the deemed trust created by provincial legislation was not a "true trust" so as to fall outside the debtor's property under what is now s. 67(1)(a) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). That is not this case. Unlike the deemed trust in *Henfrey*, the deemed trusts of the Fiscal Statutes receive a particular treatment in bankruptcy and insolvency proceeding because they are preserved by s. 37(2) of the *CCAA* and s. 67(3) of the *BIA*. Further, while the Court in *Henfrey* concluded that the deemed trust was ineffective in bankruptcy because the commingling of assets rendered the money subject to the deemed trusts untraceable, this rationale has no application to s. 227(4.1). In *First Vancouver*, this Court noted that "by deeming the trust to be effective 'at any time' the debtor is in default, the amendments serve to strengthen the conclusion that the Minister is not required to trace its interest to assets which belonged to the tax debtor at the time the source deductions were made" (para. 37). Again, no conclusions regarding the nature of the deemed trusts flow from the fact that tracing is irrelevant under s. 227(4.1):

[221] Avant de nous pencher sur la deuxième restriction, nous soulignons qu'aucune de nos collègues les juges Karakatsanis et Côté ne donne effet à la décision du législateur, exprimée dans un texte législatif clair, de « préserv[er] les fiducies réputées et [d']établi[r] la priorité de la Couronne seulement à l'égard des retenues à la source » sous le régime de la *LACC* (*Century Services*, par. 45). Pour la même raison, l'importance qu'elles accordent à l'arrêt *Colombie-Britannique c. Henfrey Samson Belair Ltd.*, [1989] 2 R.C.S. 24, est mal fondée. Dans cet arrêt, la Cour a conclu que la fiducie réputée créée par la loi provinciale n'était pas une « fiducie véritable » exclue du patrimoine de la débitrice en vertu de ce qui est maintenant l'al. 67(1)a) de la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, c. B-3 (« *LFI* »). La présente espèce est différente. Contrairement à la fiducie réputée en question dans l'arrêt *Henfrey*, la fiducie réputée créée par les lois fiscales reçoit un traitement particulier dans le cadre d'une procédure en matière de faillite et d'insolvabilité parce qu'elle est préservée par le par. 37(2) de la *LACC* et le par. 67(3) de la *LFI*. En outre, bien que la Cour ait conclu dans *Henfrey* que la fiducie réputée était inopérante en cas de faillite du fait que le regroupement des biens rendait non identifiable le montant assujetti à la fiducie réputée, ce raisonnement ne s'applique pas au par. 227(4.1). Dans *First Vancouver*, notre Cour a souligné que « comme elles prévoient l'application de la fiducie réputée en cas de défaut du débiteur (en anglais, « *at any time* »), les modifications appuient la conclusion que le ministre n'a pas à rattacher

the deemed trusts are statutory instruments and the question is one of operation, *not* characterization.

son droit aux biens qui appartenaient au débiteur fiscal lorsque les retenues à la source ont été faites » (par. 37). Encore une fois, aucune conclusion quant à la nature de la fiducie réputée ne découle du fait que l'origine du montant qui y est assujetti n'est pas pertinente au regard du par. 227(4.1) : la fiducie réputée est un instrument législatif et la question qui se pose concerne son fonctionnement, *non* sa qualification.

(b) *Priming Charges Attach Only to the Property of the Debtor Company*

b) *Les charges super prioritaires ne grèvent que les biens de la compagnie débitrice*

[222] The second restriction on the *CCAA*'s broad authority to grant priming charges is that the *CCAA* requires priming charges to attach only to "all or part" of the property of the debtor's company (s. 11.2(1); see also ss. 11.51(1) and 11.52(1)). Here, Parliament evinces a clear intent to preserve the ultimate priority it afforded the deemed trusts under the Fiscal Statutes. This is because, by operation of s. 227(4.1) of the *ITA* and s. 37(2) of the *CCAA*, the unremitted source deductions are deemed *not* to form part of the property of the debtor's company.

[222] La deuxième restriction imposée au vaste pouvoir de constituer des charges super prioritaires que confère la *LACC* est que celle-ci prévoit que les charges super prioritaires ne peuvent se rattacher qu'à « tout ou partie » des biens de la compagnie débitrice (par. 11.2(1); voir aussi les par. 11.51(1) et 11.52(1)). Le législateur exprime ainsi l'intention claire de préserver la priorité absolue accordée à la fiducie réputée créée par les lois fiscales. Effectivement, par application du par. 227(4.1) de la *LIR* et du par. 37(2) de la *LACC*, les retenues à la source non versées sont réputées *ne pas* faire partie des biens de la compagnie débitrice.

[223] Parliament could not have been more explicit: the source deductions are deemed never to form part of the company's property and, if there is a default in remittances, the Crown is deemed to obtain beneficial ownership in the tax debtor's property in the amount of the unremitted source deductions that it can collect "notwithstanding" any other enactment or security interest. Whether this is a true ownership interest is irrelevant to this appeal as the legislation *deems* the Crown to obtain beneficial ownership for these purposes. It follows that the priming charges cannot supersede the Crown's deemed trust claim because they may attach *only* to *the property of the debtor's company*, of which Parliament took great care to ensure the source deductions were deemed to form no part. As Michael J. Hanlon explains:

[223] Le législateur n'aurait pas pu être plus clair : les retenues à la source sont réputées ne jamais faire partie des biens de la compagnie et, en cas de non-versement, la Couronne est réputée obtenir un droit de bénéficiaire sur les biens du débiteur fiscal jusqu'à concurrence du montant des retenues à la source non versées, droit dont elle peut se prévaloir « malgré » tout autre texte législatif ou toute autre garantie. Qu'il s'agisse ou non d'un véritable intérêt propriétal, cela importe peu en l'espèce, car selon la législation, la Couronne est *réputée* détenir un droit de bénéficiaire à ces fins. Il s'ensuit que les charges super prioritaires ne peuvent pas prendre rang devant la réclamation de la Couronne au titre de la fiducie réputée puisqu'elles peuvent se rattacher *uniquement* aux *biens de la compagnie débitrice*, dont les retenues à la source sont réputées ne pas faire partie comme s'en est assuré avec soin le législateur. Comme l'explique Michael J. Hanlon :

While it has been held that an interim financing charge may rank ahead of the deemed trusts existing in favour

[TRADUCTION] Bien qu'il ait été jugé qu'une charge en faveur d'un prêteur temporaire peut prendre rang devant of the Canada Revenue Agency with respect to amounts owing on account of unremitted source deductions, this appears to be incorrect. Property deemed to be held in trust pursuant to the provisions creating the deemed trust are deemed not to form part of the debtor's estate, and given that those deemed trusts with respect to source deductions, are preserved in a *CCAA* context, the interim financing charge would not attach to those assets. [Emphasis added; footnotes omitted.]

(*Halsbury's Laws of Canada — Bankruptcy and Insolvency* (2017 Reissue), at HBI-376)

(c) *The Definition of "Secured Creditor" (Section 2)*

[224] The third restriction on the *CCAA*'s broad authority to grant priming charges is that the court "may order that the security or charge rank in priority over the claim of any secured creditor of the company" (ss. 11.2(2), 11.51(2) and 11.52(2)). Also, the definition of "secured creditor" in s. 2(1) of the *CCAA* makes it manifestly clear that the Crown is not a "secured creditor" in respect of its deemed trust claims under the Fiscal Statutes:

secured creditor means a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company, or a holder of any bond of a debtor company secured by a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, or a trust in respect of, all or any property of the debtor company, whether the holder or beneficiary is resident or domiciled within or outside Canada, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds;

This definition highlights two relevant considerations. First, the definition should be read as

une fiducie réputée créée en faveur de l'Agence du revenu du Canada à l'égard d'un montant dû au titre de retenues à la source non versées, cette conclusion semble incorrecte. Les biens réputés être détenus en fiducie en vertu des dispositions créant la fiducie réputée sont considérés comme ne faisant pas partie du patrimoine du débiteur, et puisque la fiducie réputée créée à l'égard des retenues à la source est préservée sous le régime de la *LACC*, la charge en faveur d'un prêteur temporaire ne se rattacherait pas à ces biens. [Nous soulignons; notes en bas de page omises.]

(*Halsbury's Laws of Canada — Bankruptcy and Insolvency* (réédition 2017), HBI-376)

c) *La définition de « créancier garanti » (art. 2)*

[224] La troisième restriction imposée au vaste pouvoir de constituer des charges super prioritaires que confère la *LACC* est que le tribunal « peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la compagnie » (par. 11.2(2), 11.51(2) et 11.52(2)). De plus, selon la définition de « créancier garanti » énoncée au par. 2(1) de la *LACC*, il est tout à fait clair que la Couronne ne peut être considérée comme tel au regard des réclamations relatives à la fiducie réputée que lui accordent les lois fiscales :

créancier garanti Détenteur d'hypothèque, de gage, charge, nantissement ou privilège sur ou contre l'ensemble ou une partie des biens d'une compagnie débitrice, ou tout transport, cession ou transfert de la totalité ou d'une partie de ces biens, à titre de garantie d'une dette de la compagnie débitrice, ou un détenteur de quelque obligation d'une compagnie débitrice garantie par hypothèque, gage, charge, nantissement ou privilège sur ou contre l'ensemble ou une partie des biens de la compagnie débitrice, ou un transport, une cession ou un transfert de tout ou partie de ces biens, ou une fiducie à leur égard, que ce détenteur ou bénéficiaire réside ou soit domicilié au Canada ou à l'étranger. Un fiduciaire en vertu de tout acte de fiducie ou autre instrument garantissant ces obligations est réputé un créancier garanti pour toutes les fins de la présente loi sauf la votation à une assemblée de créanciers relativement à ces obligations.

Cette définition fait ressortir deux considérations pertinentes. Premièrement, la définition devrait être encompassing two classes of creditors. And second, the use of the word "trust" must be given legal significance.

[225] As to the first consideration, we accept the Crown's submission that the proper reading of the definition of secured creditor references only two classes of secured creditors: (i) holders of direct security, and (ii) holders of secured bonds. So understood, a secured creditor means either

a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company,

or

a holder of any bond of a debtor company secured by a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, or **a trust in respect of, all or any property of the debtor company** . . . .

The reference to "trust" appears only in relation to an instrument securing a bond of the debtor company. The definition must be read as "secured creditor means . . . a holder of any bond of a debtor company secured by . . . a trust in respect of, all or any property of the debtor company". Accordingly, holders of an interest under a deemed trust are not a third class of creditors (A. Prévost, "Que reste-t-il de la fiducie réputée en matière de régimes de retraite?" (2016), 75 *R. du B.* 23, at p. 58).

[226] While finding this interpretation "initially attractive", the majority of the Court of Appeal ultimately rejected this reading. It did so because, irrespective of whether the definition needs a third reference to a "holder of a trust" drafted in parallel to the first two classes of creditors, the Crown's interest could be classified as a "charge" and is therefore captured by the first class of secured creditors

interprétée comme englobant deux catégories de créanciers. Deuxièmement, il faut attribuer de l'importance, sur le plan juridique, à l'emploi du mot « fiducie ».

[225] En ce qui concerne la première considération, nous acceptons l'argument de la Couronne selon lequel la juste interprétation de la définition de créancier garanti ne renvoie qu'à deux catégories de créanciers garantis : (i) les détenteurs de garanties directes; (ii) les détenteurs d'obligations garanties. Par conséquent, on entend par créancier garanti :

un détenteur d'hypothèque, de gage, charge, nantissement ou privilège sur ou contre l'ensemble ou une partie des biens d'une compagnie débitrice, ou tout transport, cession ou transfert de la totalité ou d'une partie de ces biens à titre de garantie d'une dette de la compagnie débitrice

ou

un détenteur de quelque obligation d'une compagnie débitrice garantie par hypothèque, gage, charge, nantissement ou privilège sur ou contre l'ensemble ou une partie des biens de la compagnie débitrice, ou un transport, une cession ou un transfert de tout ou partie de ces biens, ou **une fiducie à leur égard** . . .

Le renvoi à la « fiducie » n'est lié qu'à un instrument garantissant une obligation de la compagnie débitrice. La définition de « créancier garanti » inclut donc un « détenteur de quelque obligation d'une compagnie débitrice garantie par [. . .] une fiducie à [l'égard de l'ensemble ou d'une partie des biens de la compagnie débitrice] ». En conséquence, les détenteurs d'un intérêt en vertu d'une fiducie réputée ne forment pas une troisième catégorie de créanciers (A. Prévost, « Que reste-t-il de la fiducie réputée en matière de régimes de retraite? » (2016), 75 *R. du B.* 23, p. 58).

[226] Bien qu'ils aient trouvé cette interprétation [TRADUCTION] « intéressante à première vue », les juges majoritaires de la Cour d'appel l'ont ultimement rejetée. Selon eux, indépendamment de la question de savoir si la définition devrait faire mention des « détenteurs de fiducie » comme troisième catégorie, le droit de la Couronne pourrait être qualifié de « charge », faisant ainsi d'elle un membre de la

(C.A. reasons, at paras. 42-43). Respectfully, this is incorrect. Deemed trusts are not covered by the word "charge". To conclude that the word "charge" encompasses "deemed trusts" under the first class of secured creditors when "charge" and "trust" are listed distinctly under the second class of secured creditors (holders of secured bonds) would be incoherent and run contrary to legislative presumptions in statutory interpretation. Why would Parliament include a specific reference to *trusts* if they are already covered by *charge*? Parliament is presumed to avoid "superfluous or meaningless words, [and] phrases" (*Bristol-Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26, [2005] 1 S.C.R. 533, at para. 178). The deliberate and distinct text of "trust" and "charge" shows that it was not Parliament's intention to have holders of deemed trusts subsumed under "charge" such that the Crown in this circumstance would become a secured creditor.

première catégorie des créanciers garantis (motifs de la C.A., par. 42-43). Avec égards, ce raisonnement est erroné. Le terme « charge » ne vise pas la fiducie réputée. En ce qui concerne la première catégorie de créanciers garantis, conclure que le terme « charge » englobe la « fiducie réputée » alors que les termes « charge » et « fiducie » sont indiqués séparément pour la deuxième catégorie de créanciers garantis (détenteurs d'obligations garanties) serait incohérent et irait à l'encontre des présomptions en matière d'interprétation législative. Pourquoi le législateur ferait-il expressément mention des *fiducies* si celles-ci sont déjà visées par les *charges*? Le législateur est censé éviter « les termes [et] les phrases [. . .] superflus et dénués de sens » (*Bristol-Myers Squibb Co. c. Canada (Procureur général)*, 2005 CSC 26, [2005] 1 R.C.S. 533, par. 178). L'emploi délibéré et distinct des termes « fiducie » et « charge » montre que le législateur ne voulait pas que les fiducies réputées soient visées par le terme « charge » et que la Couronne puisse, à titre de détentrice d'une fiducie réputée, être considérée comme un créancier garanti dans cette situation.

[227] In any case, if there were only one class of creditor, the Crown would not be a secured creditor with respect to the deemed trust claim under the Fiscal Statutes. While Parliament distinguished between "deemed or actual trust[s]" in s. 224(1.3) of the *ITA*, it made no such distinction in the definition of secured creditor. Parliament is presumed to legislate with intent and chose its words carefully. Our role as a court with respect to legislation is interpretation, not drafting. We must ascribe legal significance to Parliament's choice of text — that is, to the words Parliament chose and *did not* choose.

[227] De toute façon, s'il n'y avait qu'une seule catégorie de créanciers, la Couronne ne serait pas un créancier garanti au regard de la réclamation relative à la fiducie réputée créée par les lois fiscales. Alors que le législateur a établi une distinction entre les « fiducies réputées ou réelles » au par. 224(1.3) de la *LIR*, il n'a pas établi la même distinction dans la définition de créancier garanti. Le législateur est présumé légiférer sciemment et choisir ses mots soigneusement. En tant que tribunal, notre rôle en ce qui concerne la législation en est un d'interprétation et non de rédaction. Nous devons attribuer de l'importance, sur le plan juridique, au libellé choisi par le législateur — c'est-à-dire aux termes que le législateur a et à ceux qu'il *n'a pas* choisis.

(d) *"Restrictions" Under Section 11 of the CCAA*

d) *Les « restrictions » visées à l'art. 11 de la LACC*

[228] Our colleague Karakatsanis J. agrees with our analysis of the priming charge provisions, but she does not seem to view them as "restrictions" within the meaning of s. 11 because "[t]he general language of s. 11 should not . . . be 'restricted by the

[228] Notre collègue la juge Karakatsanis souscrit à notre analyse des dispositions relatives aux charges super prioritaires, mais elle ne semble pas les considérer comme des « restrictions » au sens de l'article 11 parce que « "[l]a possibilité [. . .] de rendre

availability of more specific orders'" (Karakatsanis J.'s reasons, at para. 170, citing *Century Services*, at para. 70). With respect, as a matter of law and statutory interpretation this view is simply unavailable to our colleague. Neither s. 11 nor the court's inherent jurisdiction can "empower a judge . . . to make an order negating the unambiguous expression of the legislative will" (*Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.*, [1976] 2 S.C.R. 475, at p. 480; see also *R. v. Caron*, 2011 SCC 5, [2011] 1 S.C.R. 78, at para. 32). Parliament has imposed clear restrictions on the courts' power to give priority to priming charges. It is one thing to rely on s. 11 as a source of general authority even when other specific orders are available; it is another to misconstrue s. 11 as a source of unfettered authority to circumvent such unambiguous restrictions. While courts may use their general s. 11 power to create priming charges for purposes other than those that are specifically enumerated (see Wood, at pp. 90-91), Parliament has clearly expressed its intention to restrict any such charge in a critical way — it cannot take priority over the Crown's deemed trust.

des ordonnances plus spécifiques n'a pas pour effet de restreindre" la portée des termes généraux utilisés à l'art. 11 » (motifs de la juge Karakatsanis, par. 170, citant *Century Services*, par. 70). À notre humble avis, sur le plan du droit et de l'interprétation législative, notre collègue ne peut tout simplement pas faire valoir ce point de vue. Ni l'art. 11 ni la compétence inhérente du tribunal « n'autorise [un juge] à rendre une ordonnance qui va à l'encontre de la volonté clairement exprimée du législateur » (*Baxter Student Housing Ltd. c. College Housing Co-operative Ltd.*, [1976] 2 R.C.S. 475, p. 480; voir aussi *R. c. Caron*, 2011 CSC 5, [2011] 1 R.C.S. 78, par. 32). Le législateur a imposé des restrictions claires au pouvoir des tribunaux d'accorder préséance à des charges super prioritaires. C'est une chose que de se fonder sur l'art. 11 en guise de source de pouvoir général même lorsque d'autres ordonnances plus spécifiques peuvent être rendues; c'en est une autre que d'interpréter l'art. 11, à tort, comme une source de pouvoir absolu de façon à contourner des restrictions sans équivoque. Bien que les tribunaux puissent utiliser le pouvoir général que leur confère l'art. 11 afin de créer des charges super prioritaires à d'autres fins que celles expressément énumérées (voir Wood, p. 90-91), le législateur a clairement manifesté son intention de restreindre cette charge de manière importante — elle ne peut avoir préséance sur la fiducie réputée de la Couronne.

[229] For the same reason, we respectfully find untenable our colleague Justice Moldaver's suggestion that it is unclear whether there are restrictions *internal* to the *CCAA* itself that would prevent a court from using its power under s. 11 to order a priming charge in priority to the Crown's deemed trust claim. This statement does not account for Parliament's clear intention, recorded in s. 37(2), to preserve the Crown's right to be paid in absolute priority over all secured creditors in *CCAA* proceedings. It also renders superfluous the restrictions on the court's authority to prioritize priming charges under ss. 11.2(2), 11.51(2) and 11.52(2) of the *CCAA*.

[229] Pour la même raison, nous jugeons, avec égards, insoutenable la proposition de notre collègue le juge Moldaver selon laquelle on ne saurait dire s'il existe des restrictions *internes* à la *LACC* elle-même qui empêcherait un tribunal d'user du pouvoir que lui accorde l'art. 11 pour ordonner qu'une charge super prioritaire ait préséance sur la réclamation de la Couronne au titre d'une fiducie réputée. Cette affirmation ne tient pas compte de l'intention claire du législateur, consignée au par. 37(2), de préserver le droit de la Couronne d'être payée en priorité absolue aux dépens de tous les créanciers garantis dans une procédure intentée sous le régime de la *LACC*. Elle rend en outre superflue la limitation du pouvoir du tribunal de primer les charges super prioritaires en vertu des par. 11.2(2), 11.51(2) et 11.52(2) de la *LACC*.

[230] Further, our colleague Moldaver J. says it is unnecessary to "define the particular nature or operation of the" deemed trust under the *ITA* (para. 255), and relies on the "notwithstanding" language of s. 227(4.1) of the *ITA* to determine whether the Crown's claim can have priority over priming charges. This interpretation effectively reads in a conflict in the statutory schemes, despite this Court's clear direction that "an interpretation which results in conflict should be eschewed unless it is unavoidable" (*Lévis (City) v. Fraternité des policiers de Lévis Inc.*, 2007 SCC 14, [2007] 1 S.C.R. 591, at para. 47). In any event, this is not an *unavoidable* conflict: there is simply *no* conflict. Parliament *avoided* any conflict between the *CCAA* and the *ITA* by imposing restrictions upon the court's authority under s. 11 of the *CCAA*.

(e) *Structure of Crown Claims Under the CCAA*

[231] Finally, while not a "restrictio[n] set out in [the *CCAA*]", as specified in s. 11, the cogency of the statutory scheme as a whole depends on an interpretation where the Crown cannot be a secured creditor. This is so because classifying the Crown as "secured creditor" would disrupt the structure of Crown claims that the *CCAA* clearly defines at ss. 37 to 39 (Wood, at p. 98). Section 37 applies to deemed trust claims, with s. 37(1) providing that deemed trusts in favour of the Crown are ineffective under the *CCAA*, as a general rule, and s. 37(2) providing an exemption for the deemed trust for source deductions. Section 38(1) sets out the general rule that the Crown's secured claims rank as unsecured claims, with specific exemptions at s. 38(2) and (3). Finally, s. 39(1) preserves the Crown's secured creditor status if it registers before the commencement of the *CCAA* proceedings but, under s. 39(2), that security is subordinate to prior perfected security interests.

[230] De plus, notre collègue le juge Moldaver mentionne qu'il n'est pas nécessaire de « définir la nature ou le fonctionnement particulier » de la fiducie réputée sous le régime de la *LIR* (par. 255), et il s'appuie sur la disposition de dérogation au par. 227(4.1) de la *LIR* pour décider si la réclamation de la Couronne peut prendre rang devant des charges super prioritaires. Cette interprétation a pour effet de créer un conflit dans les régimes législatifs, en dépit de la directive claire de notre Cour selon laquelle « une interprétation qui donne lieu à un conflit devrait être évitée dans la mesure du possible » (*Lévis (Ville) c. Fraternité des policiers de Lévis Inc.*, 2007 CSC 14, [2007] 1 R.C.S. 591, par. 47). Quoi qu'il en soit, ce n'est pas un conflit *inévitable* : il n'y a tout simplement *aucun* conflit. Le législateur a *évité* tout conflit entre la *LACC* et la *LIR* en restreignant le pouvoir dont le tribunal est investi par l'art. 11 de la *LACC*.

e) *Structure des réclamations de la Couronne sous le régime de la LACC*

[231] Enfin, bien qu'il ne s'agisse pas d'une « restrictio[n] prévu[e] par la [*LACC*] », comme le précise l'art. 11, la cohérence du régime législatif dans son ensemble dépend d'une interprétation selon laquelle la Couronne n'est pas un créancier garanti. De fait, qualifier la Couronne de « créancier garanti » aurait pour effet de perturber la structure des réclamations de la Couronne que la *LACC* définit de façon claire aux art. 37 à 39 (Wood, p. 98). L'article 37 s'applique aux réclamations au titre d'une fiducie réputée. Le paragraphe 37(1) prévoit que les fiducies réputées créées en faveur de la Couronne sont inopérantes sous le régime de la *LACC*, de façon générale, et le par. 37(2) prévoit une exemption pour les fiducies réputées créées à l'égard des retenues à la source. Le paragraphe 38(1) établit la règle générale selon laquelle les réclamations garanties de la Couronne prennent rang comme réclamations non garanties, sous réserve des exceptions énoncées aux par. 38(2) et (3). Enfin, le par. 39(1) protège la réclamation garantie de la Couronne si elle a été enregistrée avant l'introduction d'une procédure intentée sous le régime de la *LACC*, mais, suivant le par. 39(2), cette réclamation garantie est subordonnée aux garanties opposables antérieures.

[232] This leads us to question why Parliament would expressly "preserve" the deemed trusts of the Fiscal Statutes by operation of s. 37(2), only then to rank the Crown as an unsecured creditor by the operation of s. 38(1). Unlike the interpretation that affords the deemed trusts ultimate priority, allowing the Crown to be reduced to an unsecured creditor in respect of its deemed trust claims would render s. 37(2) almost meaningless. Further, this interpretation would require the Crown to register its claim under s. 39(1) to preserve its status because the deemed trust is not afforded the exemption under s. 38. It would be illogical for Parliament to confer greater protection on secured claims afforded an exemption under s. 38(2) or (3) than it conferred on deemed trusts for source deductions, when the clear objective was to confer "absolute priority" on the latter (*First Vancouver*, at paras. 26-28).

[232] Ce qui précède nous amène à nous demander pourquoi le législateur aurait expressément « protégé » les fiducies réputées créées par les lois fiscales par l'application du par. 37(2), pour ensuite faire de la Couronne un créancier non garanti par l'application du par. 38(1). Contrairement à l'interprétation qui accorde la priorité absolue à la fiducie réputée, le fait de traiter la Couronne comme un créancier non garanti à l'égard de ses réclamations au titre d'une fiducie réputée ferait perdre presque tout son sens au par. 37(2). En outre, cette interprétation exigerait de la Couronne qu'elle enregistre sa réclamation aux termes du par. 39(1) pour protéger son rang puisque la fiducie réputée n'est pas visée par l'exception prévue à l'art. 38. Il serait illogique que le législateur ait accordé aux réclamations garanties visées par les exceptions prévues aux par. 38(2) ou (3) une protection plus grande que celle accordée à la fiducie réputée créée à l'égard des retenues à la source, alors que l'objectif manifeste était de conférer une « priorité absolue » à la fiducie réputée (*First Vancouver*, par. 26-28).

[233] We note that Professor Wood is not alone in recognizing that "sections 38 and 39 of the CCAA govern the conditions upon which a Crown claim can be viewed as 'secured' for the purposes of the CCAA" (F. L. Lamer, *Priority of Crown Claims in Insolvency* (loose-leaf), at §79.2). Since the deemed trusts for unremitted source deductions under the Fiscal Statutes do not meet the conditions of these sections, it follows that the Crown's claim is not "secured".

[233] Nous soulignons que le professeur Wood n'est pas seul à reconnaître que les [TRADUCTION] « articles 38 et 39 de la LACC régissent les conditions dans lesquelles une réclamation de la Couronne peut être considérée comme étant "garantie" pour l'application de la LACC » (F. L. Lamer, *Priority of Crown Claims in Insolvency* (feuilles mobiles), §79.2). Puisque la fiducie réputée créée par les lois fiscales à l'égard des retenues à la source non versées ne satisfait pas aux conditions de ces articles, la réclamation de la Couronne n'est pas « garantie ».

[234] In our view, a plain reading of the definition of secured creditor within the context of the broader statutory scheme results in a single inescapable conclusion. That is, there are three classes of Crown claims under the *CCAA*: (1) claims pursuant to deemed trusts continued under the *CCAA*; (2) secured claims; and (3) unsecured claims. The claims for unremitted source deductions fall under the first type: claims pursuant to deemed trusts continued under the *CCAA*.

[234] À notre avis, le sens ordinaire de la définition de créancier garanti dans le contexte du régime législatif général ne peut donner lieu qu'à une seule conclusion inéluctable, à savoir qu'il existe trois catégories de réclamations de la Couronne en vertu de la *LACC* : (1) les réclamations au titre d'une fiducie réputée maintenue en vigueur sous le régime de la *LACC*; (2) les réclamations garanties; (3) les réclamations non garanties. Les réclamations à l'égard des retenues à la source non versées entrent dans la première catégorie, soit les réclamations au titre d'une fiducie réputée maintenue sous le régime de la *LACC*.

(2) Recognizing the Ultimate Priority of the Crown's Deemed Trust Does Not Defeat the Purpose of any Provision of the *CCAA*

[235] For two further and related reasons, the majority at the Court of Appeal and the respondents resist the conclusion that the Crown's deemed trust enjoys absolute priority.

(a) *Protection of Crown Claims Under Section 6(3)*

[236] First, the majority held that granting ultimate priority to the deemed trusts would render s. 6(3) of the *CCAA* meaningless. This provision prohibits the court from sanctioning a compromise or arrangement unless it provides for payment in full to the Crown, within six months of the sanction of the plan, of all amounts due to the Crown. The majority reasoned that if the Crown is always paid first for its deemed trust claims under the Fiscal Statutes, there would be no need to protect the Crown claims under s. 6(3).

[237] Respectfully, this conclusion is erroneous. A review of the purpose and scope of s. 6(3) of the *CCAA* is clear: it operates only where there is an arrangement or compromise put to the court, and it protects the entirety of the Crown claim pursuant to s. 224(1.2) of the *ITA* and similar provisions of the Fiscal Statutes. This includes claims *not* subject to the deemed trusts under the Fiscal Statutes, such as income tax withholdings, employer contributions to employment insurance and CPP, interest and penalties. In contrast, the deemed trusts arise immediately and operate continuously "from the time the amount was deducted or withheld" from the employee's remuneration, and apply to *only those* deductions. It follows, then, that, without s. 6(3), the Crown would be guaranteed entitlement only to unremitted source deductions when the court sanctions a compromise or arrangement, and not to its other claims under s. 224(1.2) of the *ITA*. This is because most of the

(2) Reconnaître la priorité absolue de la fiducie réputée de la Couronne ne va à l'encontre de l'objectif d'aucune disposition de la *LACC*

[235] Pour deux autres raisons connexes, les juges majoritaires de la Cour d'appel et les intimées refusent de conclure que la fiducie réputée de la Couronne bénéficie d'une priorité absolue.

a) *Protection des réclamations de la Couronne en application du par. 6(3)*

[236] Premièrement, les juges majoritaires ont statué que le fait d'accorder une priorité absolue à la fiducie réputée ferait perdre son sens au par. 6(3) de la *LACC*. Cette disposition interdit au tribunal d'homologuer une transaction ou un arrangement qui ne prévoit pas le paiement intégral à la Couronne, dans les six mois suivant l'homologation, de toutes les sommes qui lui sont dues. Les juges majoritaires ont estimé que si les réclamations de la Couronne au titre d'une fiducie réputée créée par les lois fiscales sont toujours payées en priorité, il n'y a pas lieu de protéger les réclamations de la Couronne visées par le par. 6(3).

[237] Avec égards, cette conclusion est erronée. L'examen de l'objectif et de la portée du par. 6(3) de la *LACC* est sans équivoque : ce paragraphe s'applique seulement si une transaction ou un arrangement est soumis au tribunal, et il protège l'intégralité de la réclamation de la Couronne au titre du par. 224(1.2) de la *LIR* et des dispositions semblables des lois fiscales. Sont comprises les réclamations qui *ne sont pas* assujetties à une fiducie réputée créée par les lois fiscales, comme les retenues d'impôt, les cotisations d'un employeur à l'assurance-emploi et au RPC, les intérêts et les pénalités. En revanche, la fiducie réputée s'applique immédiatement et de façon continue « à compter du moment où le montant est déduit ou retenu » sur le salaire d'un employé, et elle s'applique *uniquement à ces* retenues. Par conséquent, en l'absence du par. 6(3), les réclamations de la Couronne à l'égard des retenues à la source non versées seraient garanties une fois que le tribunal

Crown's claims rank as unsecured under s. 38 of the *CCAA*.

[238] It bears emphasizing that s. 6(3) does *not* apply where no arrangement is proposed or to *CCAA* proceedings which involve the liquidation of the debtor's assets. Such "liquidating CCAAs" are "now commonplace in the *CCAA* landscape" (*Callidus Capital Corp.*, at para. 42). The absolute priority of the deemed trusts under the Fiscal Statutes, continued by s. 37(2) of the *CCAA*, provides protection to the Crown's claim for unremitted source deductions in liquidating CCAAs. Each of our colleagues Côté and Karakatsanis JJ. deprive the Crown of its guaranteed entitlements in such cases, despite Parliament having unambiguously granted "absolute priority" to claims for unremitted source deductions (Department of Finance Canada).

[239] We note that our colleague Karakatsanis J. does not conclude that s. 6(3) is rendered nugatory by our interpretation; rather, she says that, since the term "beneficial ownership" as it is used in the deemed trusts does not have the same meaning at common law, we must look to the *CCAA* to ascertain the Crown's rights. This "manipulation of private law concepts, without settled meaning", she further says, raises the question of *how* the deemed trust survives under the *CCAA* (para. 181). And the answer, she finds, is furnished by s. 6(3).

[240] This is wrong for three reasons. First, there is no question as to how the deemed trust survives. Section 37(2) operates to exempt the deemed trusts under the Fiscal Statutes from any change in form or substance under the *CCAA*; this continues the operation of s. 227(4.1), which confers absolute priority on the Crown's claim to the deemed trusts under the Fiscal Statutes. In other words, the deemed trust

aurait homologué une transaction ou un arrangement, mais pas ses autres réclamations visées par le par. 224(1.2) de la *LIR*. En effet, la plupart des réclamations de la Couronne prennent rang comme réclamations non garanties en application de l'art. 38 de la *LACC*.

[238] Il importe de souligner que le par. 6(3) *ne* s'applique *pas* si aucun arrangement n'est proposé ni dans le cadre d'une procédure engagée sous le régime de la *LACC* qui comprend la liquidation des actifs du débiteur. De telles « procédures de liquidation sous le régime de la *LACC* » sont « maintenant couran[tes] dans le contexte de la *LACC* » (*Callidus Capital Corp.*, par. 42). La priorité absolue de la fiducie réputée créée par les lois fiscales, et maintenue par le par. 37(2) de la *LACC*, protège la réclamation de la Couronne à l'égard des retenues à la source non versées dans le cadre de procédures de liquidation sous le régime de la *LACC*. Nos collègues les juges Karakatsanis et Côté privent toutes deux la Couronne de son droit garanti en pareils cas, alors que le législateur a pourtant clairement accordé la « priorité absolue » aux réclamations à l'égard des retenues à la source non versées (Ministère des Finances du Canada).

[239] Nous soulignons que notre collègue la juge Karakatsanis ne conclut pas que le par. 6(3) est rendu inopérant par notre interprétation. Elle affirme plutôt que, comme le terme « droit de bénéficiaire » utilisé dans le contexte de la fiducie réputée n'a pas la même signification en common law, nous devons nous tourner vers la *LACC* pour déterminer les droits de la Couronne. Elle ajoute que cette « adaptation de concepts de droit privé sans signification établie » soulève la question de savoir *comment* la fiducie réputée survit sous le régime de la *LACC* (par. 181). À son avis, la réponse réside dans le par. 6(3).

[240] Cette conclusion est erronée pour trois raisons. Premièrement, aucune question ne se pose quant à la façon dont la fiducie réputée survit. Le paragraphe 37(2) s'applique de façon à soustraire la fiducie réputée créée par les lois fiscales à tout changement de forme ou de fond sous le régime de la *LACC*; est ainsi maintenue l'application du par. 227(4.1), lequel confère une priorité absolue à

survives as it was under the Fiscal Statutes. It is unsurprising, therefore, that this Court did not opine on *how* the trust "survives" in *CCAA* proceedings in *Century Services*: it is, with respect, plain and obvious.

la réclamation de la Couronne au titre d'une fiducie réputée créée par les lois fiscales. En d'autres mots, la fiducie réputée survit telle qu'elle était en application des lois fiscales. Il n'est donc pas étonnant que notre Cour ne se soit pas prononcée sur la *façon* dont la fiducie « survit » dans le cadre de procédures engagées sous le régime de la *LACC* dans l'arrêt *Century Services* : la réponse est, avec égards, évidente et manifeste.

[241] Secondly, our colleague Karakatsanis J.'s suggestion that the understanding of the rights conferred on the Crown under the deemed trust must arise from reading s. 6(3) of the *CCAA* entirely bypasses the text of the *ITA* which specifically sets out those rights. After providing that the Crown has "beneficial ownership" of the value of the unremitted source deduction, the *ITA* continues: ". . . the proceeds of such property shall be paid to the Receiver General in priority to all such security interests" (s. 227(4.1)). This is the right of the Crown under the deemed trust, and our colleague fails to give effect to this right.

[241] Deuxièmement, la proposition de notre collègue la juge Karakatsanis, selon laquelle les droits conférés à la Couronne au titre de la fiducie réputée doivent découler de la lecture du par. 6(3) de la *LACC* passe complètement à côté du texte de la *LIR* qui énonce expressément ces droits. Après avoir disposé que la Couronne détient un « droit de bénéficiaire » sur la valeur des retenues à la source non versées, la *LIR* ajoute ce qui suit : « . . . le produit découlant de ces biens est payé au receveur général par priorité sur une telle garantie » (par. 227(4.1)). Voilà le droit qui revient à la Couronne au titre de la fiducie réputée, et notre collègue ne donne pas effet à ce droit.

[242] Finally, as we have discussed, s. 6(3) protects different interests than those captured by the deemed trusts. If s. 6(3) were to exhaust the Crown's rights under the *CCAA*, our colleague Karakatsanis J. correctly observes that "there may be some risk to the Crown that the plan [under s. 6(3)] may fail, and the Crown <u>may not be paid in full</u> if the restructuring dissolves into liquidation and the estate is depleted in the interim" (para. 155 (emphasis added)). This, however, only supports our interpretation. The right "not to have to compromise" under s. 6(3) is a right independent of the Crown's right under deemed trusts (para. 155 (emphasis deleted)).

[242] Enfin, comme nous l'avons vu, le par. 6(3) protège des droits différents de ceux visés par la fiducie réputée. Si le par. 6(3) évacue les droits de la Couronne sous le régime de la *LACC*, notre collègue la juge Karakatsanis fait remarquer à juste titre qu'il « y a peut-être un risque que le plan échoue et que la Couronne <u>ne soit pas payée intégralement</u> si la restructuration se solde par une liquidation et que le patrimoine a été épuisé en cours de route » (par. 155 (nous soulignons)). Toutefois, cette observation ne fait qu'appuyer notre interprétation. Le droit « de ne pas avoir à transiger » qu'accorde le par. 6(3) est indépendant du droit de la Couronne au titre de la fiducie réputée (par. 155 (italique omis)).

(b) *Power to Stay the Crown's Garnishment Right (Section 11.09)*

b) *Pouvoir de suspendre l'exercice, par la Couronne, de son droit de saisie-arrêt (art. 11.09)*

[243] Secondly, the majority at the Court of Appeal and the respondents say that giving effect to the clear statutory wording would be contrary to the purpose of s. 11.09 of the *CCAA*, which grants courts the power to stay the Crown's garnishment right under

[243] Ensuite, les juges majoritaires de la Cour d'appel et les intimées soutiennent que donner effet au texte législatif clair irait à l'encontre de l'objectif de l'art. 11.09 de la *LACC*, lequel confère au tribunal le pouvoir de suspendre le droit de saisie-arrêt de

the *ITA* (C.A. reasons, at para. 54). This demonstrates, the argument goes, Parliament's intent to have the court exercise control over the Crown's interests while monitoring the restructuring proceedings. On this view, granting absolute priority to the deemed trusts under the Fiscal Statutes necessarily implies that s. 11.09 of the *CCAA* does not apply to the deemed trust claim.

la Couronne en vertu de la *LIR* (motifs de la C.A., par. 54). Si l'on en croit cet argument, le législateur voulait permettre au tribunal d'exercer un contrôle sur les droits de la Couronne tout en surveillant le processus de restructuration. Dans cette optique, accorder la priorité absolue à la fiducie réputée créée par les lois fiscales signifie nécessairement que l'art. 11.09 de la *LACC* ne s'applique pas à la réclamation relative à une fiducie réputée.

[244] Again respectfully, this is not so. A court-ordered stay of garnishments under s. 11.09 of the *CCAA can* apply to the Crown's deemed trust claims under the Fiscal Statutes because the deemed trust provisions and s. 11.09 each serve different purposes: the deemed trusts grant a priority to the Crown, while s. 11.09 imposes conditions on when and how the Crown can enforce its garnishment rights under s. 224(1.2) of the *ITA*. In other words, s. 11.09 permits the Court to stay the Crown's ability to enforce its claims under the deemed trusts, but it does not remove its priority.

[244] Encore avec égards, ce n'est pas le cas. Une ordonnance de suspension de la saisie-arrêt en vertu de l'art. 11.09 de la *LACC peut* s'appliquer aux réclamations de la Couronne relatives à la fiducie réputée créée par les lois fiscales, parce que les dispositions en matière de fiducie réputée et l'art. 11.09 servent des fins différentes : la fiducie réputée accorde une priorité à la Couronne, tandis que l'art. 11.09 impose des conditions quant au moment et à la façon dont la Couronne peut exercer son droit de saisie-arrêt au titre du par. 224(1.2) de la *LIR*. En d'autres mots, l'art. 11.09 permet au tribunal de suspendre la faculté de la Couronne d'exécuter ses réclamations relatives à une fiducie réputée, mais il n'écarte pas la priorité de la Couronne.

[245] The critical point is this: giving effect to Parliament's clear intent to grant absolute priority to the deemed trust does not render s. 6(3) or s. 11.09 meaningless. To the contrary, s. 6(3) and s. 11.09 respect the ultimate priority of the deemed trusts under the Fiscal Statutes by allowing for the ultimate priority of the Crown claim to persist, while not frustrating the remedial purpose of the *CCAA*.

[245] Le point crucial est le suivant : donner effet à l'intention claire du législateur d'accorder la priorité absolue à la fiducie réputée ne rend pas le par. 6(3) ou l'art. 11.09 dénué de sens. Au contraire, le par. 6(3) et l'art. 11.09 respectent la priorité absolue de la fiducie réputée créée par les lois fiscales en permettant le maintien de la priorité absolue de la réclamation de la Couronne sans contrecarrer l'objet réparateur de la *LACC*.

(3) Conclusion

[246] As with our discussion of the deemed trust's absolute priority, the harmonious operation of the *CCAA* and the Fiscal Statutes can be summarized as follows:

1. the *CCAA* preserves the Crown's right to be paid in priority to all security interests for its claims for source deductions under the Fiscal Statutes;

(3) Conclusion

[246] Comme nous l'avons mentionné au sujet de la priorité absolue de la fiducie réputée, l'application harmonieuse de la *LACC* et des lois fiscales peut se résumer ainsi :

1. la *LACC* protège le droit de la Couronne d'être payée par priorité sur toute garantie pour ses réclamations à l'égard de retenues à la source en vertu des lois fiscales;

2. under the *CCAA*, the Crown is not a "secured creditor" in respect of its deemed trust claims under the Fiscal Statutes;

3. as priming charges can attach only to the debtor's property, and as Parliament has made it clear that unremitted source deductions form no part of the debtor's property, the Crown's interest under the deemed trust is not subject to the priming charges;

4. section 6(3) of the *CCAA*, which operates only where there is an arrangement or compromise put to the court, protects the entirety of the Crown claim under s. 224(1.2) of the *ITA* and similar provisions of the Fiscal Statutes; and

5. the deemed trust's grant of priority to the Crown is unaffected by s. 11.09, which instead imposes conditions on when and how the Crown can enforce its garnishment rights under s. 224(1.2) of the *ITA*.

D. *Policy Reasons Do Not Support a Different Interpretation*

[247] The majority of the Court of Appeal and the respondents place significant weight on what they view as the potentially "absurd consequences" that would result from concluding that the deemed trusts under the Fiscal Statutes have priority over the priming charges. The same point implicitly underlies our colleague Côté J.'s reasons. Indeed, the majority at the Court of Appeal went as far as to warn that, under this interpretation, interim financing would "simply end", an assertion that "almost certainly goes too far" (C.A. reasons, at para. 50; Wood, at p. 99). It added that it would lead to more business failures and, in turn, undermine tax collection (paras. 48 and 50). We disagree.

2. sous le régime de la *LACC*, la Couronne n'est pas un « créancier garanti » à l'égard de ses réclamations relatives à une fiducie réputée créée par les lois fiscales;

3. comme les charges super prioritaires ne peuvent se rattacher qu'aux biens du débiteur, et le législateur a indiqué clairement que les retenues à la source non versées ne font pas partie des biens du débiteur, l'intérêt de la Couronne au titre de la fiducie réputée n'est pas subordonné aux charges super prioritaires;

4. le paragraphe 6(3) de la *LACC*, qui s'applique seulement si une transaction ou un arrangement a été soumis au tribunal, protège l'intégralité de la réclamation de la Couronne visée par le par. 224(1.2) de la *LIR* et les dispositions semblables des lois fiscales;

5. la priorité accordée à la Couronne au titre de la fiducie réputée n'est pas touchée par l'art. 11.09, qui impose plutôt des conditions quant au moment et à la façon dont la Couronne peut exercer son droit de saisie-arrêt en vertu du par. 224(1.2) de la *LIR*.

D. *Des considérations de politique générale n'appuient pas une interprétation différente*

[247] Les juges majoritaires de la Cour d'appel et les intimées accordent une grande importance aux conséquences, qu'ils jugent potentiellement [TRADUCTION] « absurdes », qu'aurait le fait de conclure que la fiducie réputée créée par les lois fiscales a préséance sur les charges super prioritaires. Le même avis sous-tend implicitement les motifs de notre collègue la juge Côté. En effet, les juges majoritaires de la Cour d'appel sont allés jusqu'à affirmer que, suivant cette interprétation, le financement temporaire [TRADUCTION] « prendrait tout simplement fin », une affirmation qui « est presque assurément exagérée » (motifs de la C.A., par. 50; Wood, p. 99). Ils ont ajouté que cette interprétation mènerait à davantage de faillites d'entreprises et, partant, nuirait à la perception des impôts (par. 48 et 50). Nous sommes en désaccord.

[248] The "absurd consequences" identified by the majority at the Court of Appeal rest on faulty premises. The conclusion that interim financing would "simply end" was not supported by the record. The majority extrapolated from admittedly incomplete and dated data about interim financing drawn from a textbook which does not indicate the presence of a deemed trust claim. This sweeping statement elides cases where there is no interim lending and cases, such as this one, where the debtor's assets are sufficient to satisfy both the interim lending and the Crown's deemed trust claim. This is an omission that cannot be readily ignored as there are usually enough funds available to satisfy both the Crown claim *and* the court-ordered priming charges (Wood, at p. 100). Equally unfounded is the majority's claim that confirming the priority of the deemed trusts of the Fiscal Statutes would "inject an unacceptable level of uncertainty into the insolvency process" (C.A. reasons, at para. 51). A company applying under the *CCAA* is required to provide its financial statements (s. 10(2)(c)), which include the source deductions owed to the Crown. Interim lenders can rely on this information to evaluate the risk of providing financing.

[248] Les [TRADUCTION] « conséquences absurdes » dont parlent les juges majoritaires de la Cour d'appel reposent sur de fausses prémisses. La conclusion selon laquelle le financement temporaire « prendrait tout simplement fin » n'était pas étayée par le dossier. Les juges majoritaires ont extrapolé à partir de données incomplètes et désuètes sur le financement temporaire tirées d'un ouvrage qui ne fait aucune mention de réclamations relatives à une fiducie réputée. Il s'agit d'une affirmation péremptoire qui élude les cas dans lesquels le débiteur ne reçoit aucun financement temporaire et les cas, comme en l'espèce, dans lesquels les actifs du débiteur sont suffisants pour couvrir à la fois le financement temporaire et la réclamation de la Couronne relative à la fiducie réputée. Cette omission ne peut être facilement ignorée puisque les fonds disponibles suffisent généralement à couvrir la réclamation de la Couronne *et* les charges super prioritaires ordonnées par le tribunal (Wood, p. 100). Est également sans fondement l'affirmation des juges majoritaires selon laquelle le fait de confirmer la priorité de la fiducie réputée créée par les lois fiscales [TRADUCTION] « introduirait un niveau d'incertitude inacceptable dans le processus de faillite » (motifs de la C.A., par. 51). Une compagnie qui présente une demande sous le régime de la *LACC* est tenue de fournir ses états financiers (al. 10(2)c)) indiquant les retenues à la source dues à la Couronne. Les prêteurs temporaires peuvent se fonder sur ces renseignements pour évaluer le risque d'offrir un financement.

[249] Moreover, the majority at the Court of Appeal did not consider that Parliament can, and did, choose to prioritize the integrity of the tax system over the interests of secured creditors. Indeed, and with respect, the majority's own interpretation arguably itself produces absurd results, whereby employees' gross remuneration are conscripted as a subsidy to secure interim financing and the services of insolvency professionals.

[249] De plus, les juges majoritaires de la Cour d'appel n'ont pas tenu compte du fait que le législateur peut choisir, et a choisi, d'accorder à l'intégrité du régime fiscal la priorité sur les droits des créanciers garantis. En effet, avec égards, on pourrait soutenir que l'interprétation des juges majoritaires produit elle-même des résultats absurdes, à savoir que le salaire brut des employés est utilisé comme subvention pour obtenir le financement temporaire et les services des professionnels de l'insolvabilité.

[250] We therefore do not remotely see the consequences of our interpretation as rising to the level of absurdity. And Parliament has unambiguously struck

[250] Par conséquent, nous ne croyons absolument pas que les conséquences de notre interprétation constituent une absurdité. Le législateur a, de

the balance it considered appropriate in pursuit of the dual objectives of collecting unremitted source deductions, which are not the property of the debtor, and avoiding the "devastating social and economic effects of bankruptcy" (*Century Services*, at para. 59, quoting *Elan Corp. v. Comiskey* (1990), 1 O.R. (3d) 289 (C.A.), at p. 306, per Doherty J.A., dissenting). Whether s. 227(4.1) of the *ITA* is an effective means to protect the fiscal base or whether "the Crown is biting off the hand that feeds it" are not questions that this Court has the competence or legitimacy to answer (C.A. reasons, at para. 48).

façon non équivoque, établi l'équilibre qu'il estimait juste au regard du double objectif de recouvrer les retenues à la source non versées, qui ne font pas partie des biens du débiteur, et d'éviter les [TRADUCTION] « effets dévastateurs, — tant sur le plan social qu'économique — de la faillite » (*Century Services*, par. 59, citant *Elan Corp. c. Comiskey* (1990), 1 O.R. (3d) 289 (C.A.), p. 306, le juge Doherty, dissident). Notre Cour ne dispose ni de la compétence ni de la légitimité nécessaires pour trancher les questions de savoir si le par. 227(4.1) de la *LIR* constitue un moyen efficace de protéger l'assiette fiscale ou de savoir si [TRADUCTION] « la Couronne mord la main qui la nourrit » (motifs de la C.A., par. 48).

[251] In any event, even were there evidence that giving priority to the deemed trusts under the Fiscal Statutes over the priming charges produced absurd results, our conclusion would be no different. The presumption against absurdity is exactly that: a presumption. Nothing more. Illogical consequences flowing from the application of a statute do not give rein to courts to disregard clear legislative intent. As Lamer C.J. noted in *R. v. McIntosh*, [1995] 1 S.C.R. 686, at para. 41, "Parliament . . . has the right to legislate illogically (assuming that this does not raise constitutional concerns). And if Parliament is not satisfied with the judicial application of its illogical enactments, then Parliament may amend them accordingly."

[251] De toute façon, même si des éléments de preuve démontraient que la préséance de la fiducie réputée créée par les lois fiscales sur les charges super prioritaires donnait des résultats absurdes, notre conclusion ne serait pas différente. La présomption contre l'absurdité n'est rien de plus qu'une présomption. Des conséquences illogiques découlant de l'application d'une loi ne permettent pas aux tribunaux de faire fi de l'intention claire du législateur. Comme le juge en chef Lamer l'a souligné dans *R. c. McIntosh*, [1995] 1 R.C.S. 686, par. 41, « le législateur a le droit de légiférer de façon illogique (pourvu que cela ne soulève pas de préoccupations d'ordre constitutionnel). Si le législateur n'est pas satisfait de l'application que les tribunaux accordent aux textes législatifs illogiques, il peut les modifier en conséquence. »

[252] Here, Parliament's intention to give absolute priority to the deemed trust of the Fiscal Statutes is unequivocal. Our role is to give effect to this intention.

[252] En l'espèce, l'intention du législateur d'accorder la priorité absolue à la fiducie réputée créée par les lois fiscales est sans équivoque. Notre rôle est de donner effet à cette intention.

III. Disposition

III. Dispositif

[253] We would allow the appeal. The respondents should be entitled to costs in accordance with "Schedule B" to the regulations (*Rules of the Supreme Court of Canada*, SOR/2002-156). There are no exceptional circumstances that would justify enhanced costs. Despite the appeal being moot, it was not improper for the Crown to seek the correct interpretation of the Fiscal Statutes.

[253] Nous sommes d'avis d'accueillir le pourvoi. Les intimées ont droit aux dépens conformément à l'annexe B du règlement (*Règles de la Cour suprême du Canada*, DORS/2002-156). Il n'y a aucune circonstance exceptionnelle qui justifierait des dépens majorés. Malgré le caractère théorique du pourvoi, la Couronne a, à bon droit, sollicité une interprétation juste des lois fiscales.

The following are the reasons delivered by

[254] MOLDAVER J. (dissenting) — I have had the benefit of reading the reasons of my colleagues, Justice Côté, Justice Karakatsanis, and Justices Brown and Rowe. While I substantially agree with the analysis and conclusions of Brown and Rowe JJ., there are two points that I wish to address.

[255] First, unlike Brown and Rowe JJ., I see no reason to define the particular nature or operation of the Crown's interest under s. 227(4.1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"), in the context of proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). While a future appeal may require this Court to determine exactly how the Crown's interest under s. 227(4.1) "survives", and whether it amounts to some form of ownership interest in the debtor's property, as Brown and Rowe JJ. maintain, some form of security interest in that property, or something else entirely (e.g., a right not to have to compromise, as Karakatsanis J. maintains), such an inquiry is not necessary in this case. Properly interpreted, the relevant provisions of the *CCAA* and *ITA* work in harmony to direct that the Crown's interest — in whatever form it takes — must be given priority over court-ordered priming charges. This conclusion is sufficient to dispose of the appeal.

[256] In my view, to the extent that Brown and Rowe JJ. conclude that the Crown's interest under s. 227(4.1) affords the Crown beneficial ownership over the source deductions such that "the source deductions are deemed never to form part of the company's property", they have effectively decided the appeal by two paths — first, by way of the Crown's absolute priority under s. 227(4.1), and second, by way of the Crown's beneficial ownership over any unremitted source deductions (para. 223). As they note, if the Crown's interest amounts to an ownership interest and unremitted source deductions do not

Version française des motifs rendus par

[254] LE JUGE MOLDAVER (dissident) — J'ai pris connaissance des motifs de mes collègues, soit ceux de la juge Côté, ceux la juge Karakatsanis, ainsi que ceux des juges Brown et Rowe. Bien que je souscrive pour l'essentiel à l'analyse et aux conclusions des juges Brown et Rowe, il y a deux points que je tiens à aborder.

[255] En premier lieu, contrairement aux juges Brown et Rowe, je ne vois aucune raison de définir la nature ou le fonctionnement particulier du droit que le par. 227(4.1) de la *Loi de l'impôt sur le revenu*, L.R.C. 1985, c. 1 (5e suppl.) (« *LIR* »), confère à la Couronne dans le cadre des procédures intentées sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, c. C-36 (« *LACC* »). Bien qu'un futur pourvoi puisse nécessiter que notre Cour précise les circonstances exactes dans lesquelles les intérêts conférés à la Couronne en vertu du par. 227(4.1) « survivent » et s'ils peuvent être assimilés à une certaine forme d'intérêt propriétal sur les biens du débiteur, comme l'affirment les juges Brown et Rowe, à une certaine forme de garantie sur ces biens, ou à quelque chose de complètement différent (p. ex., un droit de ne pas avoir à transiger, comme l'affirme la juge Karakatsanis), une telle analyse n'est pas nécessaire en l'espèce. Correctement interprétées, les dispositions pertinentes de la *LACC* et de la *LIR* s'harmonisent de façon à ce que l'intérêt de la Couronne — quel qu'il soit — ait priorité sur les charges super prioritaires d'origine judiciaire. Cette conclusion suffit pour trancher le pourvoi.

[256] À mon avis, dans la mesure où ils estiment que l'intérêt que possède la Couronne en vertu du par. 227(4.1) lui confère un droit de bénéficiaire sur les retenues à la source, de sorte que « les retenues à la source sont réputées ne jamais faire partie des biens de la compagnie », les juges Brown et Rowe ont effectivement tranché le pourvoi par deux voies distinctes : tout d'abord en reconnaissant la priorité absolue dont bénéficie la Couronne en vertu du par. 227(4.1), et, ensuite, en reconnaissant le droit de bénéficiaire qu'elle possède sur les retenues à la source non versées (par. 223). Comme ils le font

form part of the debtor company's property, priming charges could never attach to those source deductions, whether ordered under the specific priming charge provisions or the court's broad power under s. 11 of the *CCAA* (paras. 222-23). If this is indeed the case, it is not clear that the issue of competing priority between the Crown's interest and court-ordered priming charges ever arises, as the source deductions would be simply inaccessible to anyone other than the Crown. As I am not necessarily convinced that the Crown's interest under s. 227(4.1) amounts to an ownership interest, and as the Crown's absolute priority does not depend on this conclusion, I would leave the question of the nature of the Crown's interest to another day.

observer, si l'intérêt de la Couronne équivaut à un intérêt propriétal et les retenues à la source non versées ne font pas partie des biens de l'entreprise débitrice, les charges super prioritaires ne peuvent en aucun cas grever les retenues à la source, qu'elles soient constituées en vertu des dispositions spécifiques relatives aux charges super prioritaires ou en vertu du pouvoir général conféré au tribunal par l'art. 11 de la *LACC* (par. 222-223). Si c'est effectivement le cas, il n'est pas évident que se soulève même un problème de priorités concurrentes entre l'intérêt de la Couronne et la charge super prioritaire d'origine judiciaire, puisque personne d'autre que la Couronne n'a accès aux retenues à la source. Comme je ne suis pas nécessairement convaincu que l'intérêt que possède la Couronne en vertu du par. 227(4.1) équivaut à un intérêt propriétal, et comme la priorité absolue de la Couronne ne dépend pas de cette conclusion, je remettrais à une autre occasion l'examen de la nature du droit de la Couronne.

[257] Second, while I agree with Brown and Rowe JJ. that s. 37(2) of the *CCAA* can be interpreted as an internal restriction on s. 11, I hesitate to accept this conclusion, as it strikes me that in order to give proper effect to Parliament's intention for s. 11 to serve as the "engine" that drives the *CCAA* and empowers supervising judges to further its remedial objectives, any restrictions on that discretionary power should be explicit and unambiguous (*9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, [2020] 1 S.C.R. 521, at para. 48, citing *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), at para. 36). With respect, s. 37(2) does not amount to such an explicit and unambiguous restriction. Rather, s. 37(2) is a simple exception to s. 37(1), which serves to nullify the effect of any statutory provision that deems property to be held in favour of the Crown:

[257] En deuxième lieu, bien que je convienne avec les juges Brown et Rowe que le par. 37(2) de la *LACC* peut être interprété comme une restriction interne à l'art. 11, j'hésite à accepter cette conclusion, car il me semble que, pour donner un effet approprié à l'intention du législateur de faire de l'art. 11 le « moteur » de la *LACC* qui confère aux juges surveillants le pouvoir de favoriser la réalisation des objectifs réparateurs de cette loi, toute restriction à ce pouvoir discrétionnaire devrait être explicite et non équivoque (*9354-9186 Québec inc. c. Callidus Capital Corp.*, 2020 CSC 10, [2020] 1 R.C.S. 521, par. 48, citant *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), par. 36). Avec égards, le par. 37(2) ne constitue pas une restriction explicite et non équivoque. Le paragraphe 37(2) est plutôt une simple exception au par. 37(1), qui vise à annuler l'effet de toute disposition législative selon laquelle les biens sont réputés être détenus en faveur de la Couronne :

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.

37(1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme tel par le seul effet d'une telle disposition.

(2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act* . . . .

[258] In effect, then, the function of s. 37(2) is merely to preserve the Crown's deemed trust under s. 227(4.1) from extinguishment under s. 37(1). In preserving the Crown's interest, however, "s. 37(2) does not explain what to do with that right for the purposes of a *CCAA* proceeding", nor does it say anything that would limit the court's power under s. 11 to order priming charges in priority to the Crown's deemed trust claim (Karakatsanis J.'s reasons, at para. 153). Indeed, as Karakatsanis J. notes, "[t]here is no provision in the *CCAA* stipulating what the court can do with trust property and no provision in the *CCAA* conferring more specific jurisdiction on whether a priming charge can rank ahead of the beneficiary of a deemed trust" (para. 176). Rather, it is only when one looks to s. 227(4.1) that the absolute priority of the Crown's interest — and the resulting limitations on s. 11 — become apparent. It is thus not entirely clear that interpreting s. 37(2) as an internal restriction accords with the function of s. 37(2) or the leeway that Parliament intended for the scope of powers under s. 11. In other words, the relationship between ss. 11 and 37(2) may not be as clear-cut as my colleagues seem to suggest. Accordingly, while I ultimately agree with Brown and Rowe JJ. that s. 37(2) can be interpreted as an internal restriction so as to avoid a conflict between the *CCAA* and *ITA*, I feel it important to explain that, if this interpretation is mistaken, s. 11 is nonetheless restricted by the external text of s. 227(4.1).

[259] If s. 37(2) does not amount to an internal restriction on s. 11, using s. 11 to prioritize priming charges over the Crown's deemed trust claim would put the provision in direct conflict with s. 227(4.1) which, as my colleagues Brown and Rowe JJ. have

(2) Le paragraphe (1) ne s'applique pas à l'égard des sommes réputées détenues en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu* . . .

[258] En réalité, le par. 37(2) vise simplement à empêcher que la fiducie réputée de la Couronne en vertu du par. 227(4.1) soit éteinte par application du par. 37(1). Toutefois, bien qu'il vise à protéger l'intérêt de la Couronne, « le par. 37(2) n'explique pas quoi faire de ce droit dans le cadre d'une procédure engagée sous le régime de la *LACC* », et il ne renferme aucune disposition qui limiterait le pouvoir que possède le tribunal en vertu de l'art. 11 d'ordonner que des charges super prioritaires prennent rang devant la fiducie réputée de la Couronne (motifs de la juge Karakatsanis, par. 153). D'ailleurs, comme le signale la juge Karakatsanis, « [a]ucune disposition de la *LACC* n'indique ce que le tribunal peut faire avec les biens de la fiducie et aucune disposition de la *LACC* ne confère plus précisément compétence pour décider si une charge super prioritaire peut prendre rang devant le bénéficiaire de la fiducie réputée » (par. 176). Au contraire, ce n'est en fait que lorsqu'on examine le par. 227(4.1) que la priorité absolue de l'intérêt de la Couronne — et les limites qui découlent de l'art. 11 — deviennent apparentes. Il n'est donc pas parfaitement clair que le fait d'interpréter le par. 37(2) comme une restriction interne s'accorde avec le rôle que joue le par. 37(2) ou avec la latitude que le législateur souhaitait donner au tribunal dans l'exercice des pouvoirs que lui confère l'art. 11. En d'autres termes, le lien entre l'art. 11 et le par. 37(2) n'est peut-être pas aussi évident que semblent le suggérer mes collègues. Par conséquent, même si je conviens en fin de compte avec les juges Brown et Rowe que le par. 37(2) peut être interprété comme une restriction interne afin d'éviter un conflit entre la *LACC* et la *LIR*, je juge important d'expliquer que, si cette interprétation est inexacte, la portée de l'art. 11 est néanmoins restreinte par le libellé externe du par. 227(4.1).

[259] Si le par. 37(2) n'équivaut pas à une restriction interne à l'art. 11, recourir à l'art. 11 pour faire passer une charge super prioritaire devant la réclamation de la Couronne au titre d'une fiducie réputée entrerait en conflit direct avec le par. 227(4.1),

explained, requires that the Crown's claim be ranked in priority to all security interests, including priming charges. The direct conflict would trigger the "[n]otwithstanding" language in s. 227(4.1), which states that "[n]otwithstanding . . . any other enactment of Canada", the Crown's claim is to have priority. This language thus imposes an external restriction on the court's power under s. 11. Indeed, the supremacy of s. 227(4.1) is implicitly acknowledged by the text of s. 11 as, unlike s. 227(4.1), which operates despite "any other enactment of Canada", s. 11 only operates "[d]espite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*", but not despite anything in the *ITA*. Accordingly, while the court's discretionary authority under s. 11 could, in theory, empower a court to subordinate the Crown's interest in unremitted source deductions, that power is ultimately stopped short by the express language of s. 227(4.1).

ce qui, comme mes collègues les juges Brown et Rowe l'expliquent, exige que la réclamation de la Couronne prenne rang avant toutes les garanties, y compris les charges super prioritaires. Ce conflit direct entraînerait l'application de la disposition restrictive du par. 227(4.1), à savoir que « [m]algré [. . .] tout autre texte législatif fédéral », la réclamation de la Couronne doit avoir priorité. Cette disposition impose donc une limite externe au pouvoir que l'art. 11 confère au tribunal. En fait, la primauté du par. 227(4.1) est implicitement reconnue par le texte de l'art. 11 car, contrairement au par. 227(4.1), qui s'applique « [m]algré [. . .] tout autre texte législatif fédéral », l'art. 11 ne s'applique que « [m]algré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations* », mais non malgré toute disposition de la *LIR*. Par conséquent, bien que le pouvoir discrétionnaire conféré par l'art. 11 au tribunal permette en théorie à celui-ci de subordonner l'intérêt de la Couronne dans les retenues à la source non versées à d'autres intérêts, ce pouvoir est en définitive restreint par les termes exprès du par. 227(4.1).

[260] In outlining this position, I consider it important to contextualize this Court's statement in *Callidus* that "the jurisdiction granted by s. 11 is constrained only by restrictions set out in the *CCAA* itself, and the requirement that the order made be 'appropriate in the circumstances'" (para. 67). The focus in *Callidus* was on the discretionary authority of supervising *CCAA* judges within the confines of the *CCAA* itself; it was not on addressing the question of the authority of *CCAA* judges to apply s. 11 in the face of overriding federal legislation. Respectfully, where, as here, Parliament has expressly indicated the supremacy of a statute over the provisions of the *CCAA*, the court's power under s. 11 is correspondingly restricted.

[260] En exposant cette position, j'estime important de situer dans son contexte l'affirmation de notre Cour dans l'arrêt *Callidus* selon laquelle « le pouvoir conféré par l'art. 11 n'est limité que par les restrictions imposées par la *LACC* elle-même, ainsi que par l'exigence que l'ordonnance soit "indiquée" dans les circonstances » (par. 67). L'arrêt *Callidus* mettait l'accent sur l'exercice du pouvoir discrétionnaire du juge surveillant nommé sous le régime de la *LACC* à l'intérieur des limites imposées par la *LACC* elle-même, et non pas sur la question du pouvoir du juge d'appliquer l'art. 11 malgré une loi fédérale prépondérante. Avec égards, lorsque, comme en l'espèce, le législateur prévoit expressément qu'une loi a priorité sur les dispositions de la *LACC*, le pouvoir conféré par l'art. 11 au tribunal est restreint en conséquence.

[261] The Crown's deemed trust claim must thus take priority over all court-ordered priming charges, whether they arise under the specific priming charge provisions, or under the court's discretionary authority.

[261] La réclamation de la Couronne au titre d'une fiducie réputée a donc priorité sur toutes les charges super prioritaires d'origine judiciaire, peu importe que celles-ci aient été créées en vertu des dispositions expresses à cet effet ou en vertu du pouvoir discrétionnaire du tribunal.

[262] A necessary consequence of the absolute supremacy of the Crown's deemed trust claim over court-ordered priming charges is that the Crown's interest under s. 227(4.1) cannot be given effect by s. 6(3) of the *CCAA*. Section 6(3) of the *CCAA* provides that

> [u]nless Her Majesty agrees otherwise, the court may sanction a compromise or arrangement only if the compromise or arrangement provides for the payment in full to Her Majesty in right of Canada or a province, within six months after court sanction of the compromise or arrangement, of all amounts that were outstanding at the time of the application for an order under section 11 or 11.02 and that are of a kind that could be subject to a demand under
>
> **(a)** subsection 224(1.2) of the *Income Tax Act* . . . .

[263] In my view, there are two reasons why s. 6(3) cannot represent the Crown's interest under s. 227(4.1). First, the focus of s. 6(3) is to establish a timeframe for payment to the Crown of certain outstanding debts in the event that the debtor company succeeds in staying viable as a going concern. By contrast, s. 227(4.1) is focused on ensuring the *priority* of the Crown's claim. The key point of distinction here is that, under s. 6(3), the Crown could be ranked last, so long as it is paid within six months of any arrangement. Such an outcome would be plainly inconsistent with the absolute priority of the Crown's claim, as established by the *CCAA* and *ITA*. Second, as s. 6(3) applies only where a compromise or plan of arrangement is reached, the Crown's deemed trust claim would not operate in the event that a liquidation occurred under the *CCAA*, thereby depriving the Crown of its priority over security interests in such circumstances. Again, this potential consequence would be at odds with the clear intention of the *CCAA* and *ITA*.

[264] Before concluding, I would note that it cannot be doubted that Parliament considered the potential consequences of its legislative actions, including any consequences for *CCAA* proceedings. If

[262] Une conséquence nécessaire de la primauté absolue dont jouit la réclamation de la Couronne au titre d'une fiducie présumée sur les charges super prioritaires d'origine judiciaire est que le par. 6(3) de la *LACC* ne permet pas de donner effet à l'intérêt conféré à la Couronne par le par. 227(4.1). Le paragraphe 6(3) de la *LACC* prévoit ce qui suit :

> Le tribunal ne peut, sans le consentement de Sa Majesté, homologuer la transaction ou l'arrangement qui ne prévoit pas le paiement intégral à Sa Majesté du chef du Canada ou d'une province, dans les six mois suivant l'homologation, de toutes les sommes qui étaient dues lors de la demande d'ordonnance visée aux articles 11 ou 11.02 et qui pourraient, de par leur nature, faire l'objet d'une demande aux termes d'une des dispositions suivantes :
>
> **a)** le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* . . .

[263] À mon avis, deux raisons expliquent pourquoi le par. 6(3) ne s'applique pas à l'intérêt conféré à la Couronne par le par. 227(4.1). Premièrement, le par. 6(3) vise à établir un délai pour le paiement de certaines créances de la Couronne en souffrance au cas où la compagnie débitrice parviendrait à assurer sa viabilité. À l'inverse, le par. 227(4.1) vise à accorder *priorité* à la réclamation de la Couronne. La différence essentielle ici est que, par application du par. 6(3), la Couronne pourrait être reléguée au dernier rang à la condition qu'elle soit payée dans les six mois suivant tout arrangement. Un tel résultat serait de toute évidence incompatible avec la priorité absolue que la *LACC* et la *LIR* accordent à la réclamation de la Couronne. Deuxièmement, comme le par. 6(3) ne s'applique que si les parties concluent une transaction ou parviennent à un arrangement, la réclamation de la Couronne au titre d'une fiducie réputée ne serait pas opposable en cas de liquidation sous le régime de la *LACC*; la Couronne perdrait alors sa priorité au profit d'autres garanties. Là encore, cette conséquence possible irait à l'encontre de l'objectif clair de la *LACC* et de la *LIR*.

[264] Avant de conclure, je ferai remarquer qu'il ne fait aucun doute que le législateur a réfléchi aux conséquences possibles de ses mesures législatives, y compris sur les procédures engagées sous le régime

circumstances do arise in which the priority of the Crown's claim threatens the viability of a particular restructuring, it clearly lies with the Crown to be flexible so as to avoid any consequences that would undermine the remedial purposes of the *CCAA*.

de la *LACC*. S'il devait arriver que la priorité accordée à la réclamation de la Couronne menace la viabilité d'une restructuration, c'est de toute évidence à la Couronne qu'il appartient de faire preuve de souplesse afin d'éviter toute conséquence qui compromettrait l'objet réparateur de la *LACC*.

[265] I would, therefore, allow the appeal. The respondents are entitled to costs in this Court in accordance with Schedule B of the *Rules of the Supreme Court of Canada*, SOR/2002-156.

[265] Je suis donc d'avis d'accueillir le pourvoi. Les intimées ont droit aux dépens devant notre Cour conformément à l'annexe B des *Règles de la Cour suprême du Canada*, DORS/2002-156.

Appeal dismissed with costs, Abella, Moldaver, Brown *and* Rowe JJ. *dissenting.*

Pourvoi rejeté avec dépens, les juges Abella, Moldaver, Brown *et* Rowe *sont dissidents.*

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

Procureur de l'appelante : Procureur général du Canada, Vancouver.

Solicitors for the respondents Canada North Group Inc., Canada North Camps Inc., Campcorp Structures Ltd., DJ Catering Ltd., 816956 Alberta Ltd., 1371047 Alberta Ltd., 1919209 Alberta Ltd. and Ernst & Young Inc. in its capacity as monitor: Duncan Craig, Edmonton.

Procureurs des intimées Canada North Group Inc., Canada North Camps Inc., Campcorp Structures Ltd., DJ Catering Ltd., 816956 Alberta Ltd., 1371047 Alberta Ltd., 1919209 Alberta Ltd. et Ernst & Young Inc. en sa qualité de contrôleur : Duncan Craig, Edmonton.

Solicitors for the respondent the Business Development Bank of Canada: Cassels Brock & Blackwell, Calgary.

Procureurs de l'intimée la Banque de développement du Canada : Cassels Brock & Blackwell, Calgary.

Solicitors for the intervener the Insolvency Institute of Canada: Blake, Cassels & Graydon, Calgary.

Procureurs de l'intervenant l'Institut d'insolvabilité du Canada : Blake, Cassels & Graydon, Calgary.

Solicitors for the intervener the Canadian Association of Insolvency and Restructuring Professionals: Osler, Hoskin & Harcourt, Calgary.

Procureurs de l'intervenante l'Association canadienne des professionnels de l'insolvabilité et de la réorganisation : Osler, Hoskin & Harcourt, Calgary.

Re Canadian Airlines Corporation, 2000 ABQB 442

Date: 20000627

See para. 95

Action No. 0001-05071

IN THE COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL DISTRICT OF CALGARY

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

AND IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT* (ALBERTA) S.A. 1981, c. B-15, AS AMENDED, SECTION 185

AND IN THE MATTER OF CANADIAN AIRLINES CORPORATION AND CANADIAN AIRLINES INTERNATIONAL LTD.

REASONS FOR DECISION

of the

HONOURABLE MADAM JUSTICE M. S. PAPERNY

I. INTRODUCTION

[1] After a decade of searching for a permanent solution to its ongoing, significant financial problems, Canadian Airlines Corporation ("CAC") and Canadian Airlines International Ltd. ("CAIL") seek the court's sanction to a plan of arrangement filed under the ***Companies' Creditors Arrangement Act*** ("CCAA") and sponsored by its historic rival, Air Canada Corporation ("Air Canada"). To Canadian, this represents its last choice and its only chance for survival. To Air Canada, it is an opportunity to lead the restructuring of the Canadian airline industry, an exercise many suggest is long overdue. To over 16,000 employees of Canadian, it means continued employment. Canadian Airlines will operate as a separate entity and continue to provide domestic and international air service to Canadians. Tickets of the flying public will be honoured and their frequent flyer points maintained. Long term business relationships with trade creditors and suppliers will continue.

[2] The proposed restructuring comes at a cost. Secured and unsecured creditors are being asked to accept significant compromises and shareholders of CAC are being asked to accept that their shares have no value. Certain unsecured creditors oppose the plan, alleging it is oppressive and unfair. They assert that Air Canada has appropriated the key assets of Canadian to itself. Minority shareholders of CAC, on the other hand, argue that Air Canada's financial support to Canadian, before and during this restructuring process, has increased the value of Canadian and in turn their shares. These two positions are irreconcilable, but do reflect the perception by some that this plan asks them to sacrifice too much.

[3] Canadian has asked this court to sanction its plan under s. 6 of the CCAA. The court's role on a sanction hearing is to consider whether the plan fairly balances the interests of all the stakeholders. Faced with an insolvent organization, its role is to look forward and ask: does this plan represent a fair and reasonable compromise that will permit a viable commercial entity to emerge? It is also an exercise in assessing current reality by comparing available commercial alternatives to what is offered in the proposed plan.

II. BACKGROUND

Canadian Airlines and its Subsidiaries

[4] CAC and CAIL are corporations incorporated or continued under the ***Business Corporations Act*** of Alberta, S.A. 1981, c. B-15 ("ABCA"). 82% of CAC's shares are held by 853350 Alberta Ltd.("853350") and the remaining 18% are held publicly. CAC, directly or indirectly, owns the majority of voting shares in and controls the other Petitioner, CAIL and these shares represent CAC's principal asset. CAIL owns or has an interest in a number of other corporations directly engaged in the airline industry or other businesses related to the airline industry, including Canadian Regional Airlines Limited ("CRAL"). Where the context requires, I will refer to CAC and CAIL jointly as "Canadian" in these reasons.

[5] In the past fifteen years, CAIL has grown from a regional carrier operating under the name Pacific Western Airlines ("PWA") to one of Canada's two major airlines. By mid-1986, Canadian Pacific Air Lines Limited ("CP Air"), had acquired the regional carriers Nordair Inc. ("Nordair") and Eastern Provincial Airways ("Eastern"). In February, 1987, PWA completed its purchase of CP Air from Canadian Pacific Limited. PWA then merged the four predecessor carriers (CP Air, Eastern, Nordair, and PWA) to form one airline, "Canadian Airlines International Ltd.", which was launched in April, 1987.

[6] By April, 1989, CAIL had acquired substantially all of the common shares of Wardair Inc. and completed the integration of CAIL and Wardair Inc. in 1990.

[7] CAIL and its subsidiaries provide international and domestic scheduled and charter air transportation for passengers and cargo. CAIL provides scheduled services to approximately 30 destinations in 11 countries. Its subsidiary, Canadian Regional Airlines (1998) Ltd. (“CRAL 98") provides scheduled services to approximately 35 destinations in Canada and the United States. Through code share agreements and marketing alliances with leading carriers, CAIL and its subsidiaries provide service to approximately 225 destinations worldwide. CAIL is also engaged in charter and cargo services and the provision of services to third parties, including aircraft overhaul and maintenance, passenger and cargo handling, flight simulator and equipment rentals, employee training programs and the sale of Canadian Plus frequent flyer points. As at December 31, 1999, CAIL operated approximately 79 aircraft.

[8] CAIL directly and indirectly employs over 16,000 persons, substantially all of whom are located in Canada. The balance of the employees are located in the United States, Europe, Asia, Australia, South America and Mexico. Approximately 88% of the active employees of CAIL are subject to collective bargaining agreements.

Events Leading up to the CCAA Proceedings

[9] Canadian’s financial difficulties significantly predate these proceedings.

[10] In the early 1990s, Canadian experienced significant losses from operations and deteriorating liquidity. It completed a financial restructuring in 1994 (the "1994 Restructuring") which involved employees contributing $200,000,000 in new equity in return for receipt of entitlements to common shares. In addition, Aurora Airline Investments, Inc. ("Aurora"), a subsidiary of AMR Corporation ("AMR"), subscribed for $246,000,000 in preferred shares of CAIL. Other AMR subsidiaries entered into comprehensive services and marketing arrangements with CAIL. The governments of Canada, British Columbia and Alberta provided an aggregate of $120,000,000 in loan guarantees. Senior creditors, junior creditors and shareholders of CAC and CAIL and its subsidiaries converted approximately $712,000,000 of obligations into common shares of CAC or convertible notes issued jointly by CAC and CAIL and/or received warrants entitling the holder to purchase common shares.

[11] In the latter half of 1994, Canadian built on the improved balance sheet provided by the 1994 Restructuring, focussing on strict cost controls, capacity management and aircraft utilization. The initial results were encouraging. However, a number of factors including higher than expected fuel costs, rising interest rates, decline of the Canadian dollar, a strike by

pilots of Time Air and the temporary grounding of Inter-Canadien's ATR-42 fleet undermined this improved operational performance. In 1995, in response to additional capacity added by emerging charter carriers and Air Canada on key transcontinental routes, CAIL added additional aircraft to its fleet in an effort to regain market share. However, the addition of capacity coincided with the slow-down in the Canadian economy leading to traffic levels that were significantly below expectations. Additionally, key international routes of CAIL failed to produce anticipated results. The cumulative losses of CAIL from 1994 to 1999 totalled $771 million and from January 31, 1995 to August 12, 1999, the day prior to the issuance by the Government of Canada of an Order under Section 47 of the *Canada Transportation Act* (relaxing certain rules under the *Competition Act* to facilitate a restructuring of the airline industry and described further below), the trading price of Canadian's common shares declined from $7.90 to $1.55.

[12] Canadian's losses incurred since the 1994 Restructuring severely eroded its liquidity position. In 1996, Canadian faced an environment where the domestic air travel market saw increased capacity and aggressive price competition by two new discount carriers based in western Canada. While Canadian's traffic and load factor increased indicating a positive response to Canadian's post-restructuring business plan, yields declined. Attempts by Canadian to reduce domestic capacity were offset by additional capacity being introduced by the new discount carriers and Air Canada.

[13] The continued lack of sufficient funds from operations made it evident by late fall of 1996 that Canadian needed to take action to avoid a cash shortfall in the spring of 1997. In November 1996, Canadian announced an operational restructuring plan (the "1996 Restructuring") aimed at returning Canadian to profitability and subsequently implemented a payment deferral plan which involved a temporary moratorium on payments to certain lenders and aircraft operating lessors to provide a cash bridge until the benefits of the operational restructuring were fully implemented. Canadian was able successfully to obtain the support of its lenders and operating lessors such that the moratorium and payment deferral plan was able to proceed on a consensual basis without the requirement for any court proceedings.

[14] The objective of the 1996 Restructuring was to transform Canadian into a sustainable entity by focussing on controllable factors which targeted earnings improvements over four years. Three major initiatives were adopted: network enhancements, wage concessions as supplemented by fuel tax reductions/rebates, and overhead cost reductions.

[15] The benefits of the 1996 Restructuring were reflected in Canadian's 1997 financial results when Canadian and its subsidiaries reported a consolidated net income of $5.4 million, the best results in 9 years.

[16] In early 1998, building on its 1997 results, Canadian took advantage of a strong market for U.S. public debt financing in the first half of 1998 by issuing U.S. $175,000,000 of senior secured notes in April, 1998 (“Senior Secured Notes”) and U.S. $100,000,000 of unsecured notes in August, 1998 (“Unsecured Notes”).

[17] The benefits of the 1996 Restructuring continued in 1998 but were not sufficient to offset a number of new factors which had a significant negative impact on financial

performance, particularly in the fourth quarter. Canadian's eroded capital base gave it limited capacity to withstand negative effects on traffic and revenue. These factors included lower than expected operating revenues resulting from a continued weakness of the Asian economies, vigorous competition in Canadian's key western Canada and the western U.S. transborder markets, significant price discounting in most domestic markets following a labour disruption at Air Canada and CAIL's temporary loss of the ability to code-share with American Airlines on certain transborder flights due to a pilot dispute at American Airlines. Canadian also had increased operating expenses primarily due to the deterioration of the value of the Canadian dollar and additional airport and navigational fees imposed by NAV Canada which were not recoverable by Canadian through fare increases because of competitive pressures. This resulted in Canadian and its subsidiaries reporting a consolidated loss of $137.6 million for 1998.

[18] As a result of these continuing weak financial results, Canadian undertook a number of additional strategic initiatives including entering the **oneworldTM** Alliance, the introduction of its new "Proud Wings" corporate image, a restructuring of CAIL 's Vancouver hub, the sale and leaseback of certain aircraft, expanded code sharing arrangements and the implementation of a service charge in an effort to recover a portion of the costs relating to NAV Canada fees.

[19] Beginning in late 1998 and continuing into 1999, Canadian tried to access equity markets to strengthen its balance sheet. In January, 1999, the Board of Directors of CAC determined that while Canadian needed to obtain additional equity capital, an equity infusion alone would not address the fundamental structural problems in the domestic air transportation market.

[20] Canadian believes that its financial performance was and is reflective of structural problems in the Canadian airline industry, most significantly, over capacity in the domestic air transportation market. It is the view of Canadian and Air Canada that Canada's relatively small population and the geographic distribution of that population is unable to support the overlapping networks of two full service national carriers. As described further below, the Government of Canada has recognized this fundamental problem and has been instrumental in attempts to develop a solution.

Initial Discussions with Air Canada

[21] Accordingly, in January, 1999, CAC's Board of Directors directed management to explore all strategic alternatives available to Canadian, including discussions regarding a possible merger or other transaction involving Air Canada.

[22] Canadian had discussions with Air Canada in early 1999. AMR also participated in those discussions. While several alternative merger transactions were considered in the course of these discussions, Canadian, AMR and Air Canada were unable to reach agreement.

[23] Following the termination of merger discussions between Canadian and Air Canada, senior management of Canadian, at the direction of the Board and with the support of AMR, renewed its efforts to secure financial partners with the objective of obtaining either an equity

investment and support for an eventual merger with Air Canada or immediate financial support for a merger with Air Canada.

Offer by Onex

[24] In early May, the discussions with Air Canada having failed, Canadian focussed its efforts on discussions with Onex Corporation ("Onex") and AMR concerning the basis upon which a merger of Canadian and Air Canada could be accomplished.

[25] On August 23, 1999, Canadian entered into an Arrangement Agreement with Onex, AMR and Airline Industry Revitalization Co. Inc. ("AirCo") (a company owned jointly by Onex and AMR and controlled by Onex). The Arrangement Agreement set out the terms of a Plan of Arrangement providing for the purchase by AirCo of all of the outstanding common and non-voting shares of CAC. The Arrangement Agreement was conditional upon, among other things, the successful completion of a simultaneous offer by AirCo for all of the voting and non-voting shares of Air Canada. On August 24, 1999, AirCo announced its offers to purchase the shares of both CAC and Air Canada and to subsequently merge the operations of the two airlines to create one international carrier in Canada.

[26] On or about September 20, 1999 the Board of Directors of Air Canada recommended against the AirCo offer. On or about October 19, 1999, Air Canada announced its own proposal to its shareholders to repurchase shares of Air Canada. Air Canada's announcement also indicated Air Canada's intention to make a bid for CAC and to proceed to complete a merger with Canadian subject to a restructuring of Canadian's debt.

[27] There were several rounds of offers and counter-offers between AirCo and Air Canada. On November 5, 1999, the Quebec Superior Court ruled that the AirCo offer for Air Canada violated the provisions of the *Air Canada Public Participation Act*. AirCo immediately withdrew its offers. At that time, Air Canada indicated its intention to proceed with its offer for CAC.

[28] Following the withdrawal of the AirCo offer to purchase CAC, and notwithstanding Air Canada's stated intention to proceed with its offer, there was a renewed uncertainty about Canadian's future which adversely affected operations. As described further below, Canadian lost significant forward bookings which further reduced the company's remaining liquidity.

Offer by 853350

[29] On November 11, 1999, 853350 (a corporation financed by Air Canada and owned as to 10% by Air Canada) made a formal offer for all of the common and non-voting shares of CAC. Air Canada indicated that the involvement of 853350 in the take-over bid was necessary in order to protect Air Canada from the potential adverse effects of a restructuring of Canadian's debt and that Air Canada would only complete a merger with Canadian after the completion of a debt restructuring transaction. The offer by 853350 was conditional upon, among other things, a satisfactory resolution of AMR's claims in respect of Canadian and a satisfactory resolution of certain regulatory issues arising from the announcement made on

October 26, 1999 by the Government of Canada regarding its intentions to alter the regime governing the airline industry.

[30] As noted above, AMR and its subsidiaries and affiliates had certain agreements with Canadian arising from AMR's investment (through its wholly owned subsidiary, Aurora Airline Investments, Inc.) in CAIL during the 1994 Restructuring. In particular, the Services Agreement by which AMR and its subsidiaries and affiliates provided certain reservations, scheduling and other airline related services to Canadian provided for a termination fee of approximately $500 million (as at December 31, 1999) while the terms governing the preferred shares issued to Aurora provided for exchange rights which were only retractable by Canadian upon payment of a redemption fee in excess of $500 million (as at December 31, 1999). Unless such provisions were amended or waived, it was practically impossible for Canadian to complete a merger with Air Canada since the cost of proceeding without AMR's consent was simply too high.

[31] Canadian had continued its efforts to seek out all possible solutions to its structural problems following the withdrawal of the AirCo offer on November 5, 1999. While AMR indicated its willingness to provide a measure of support by allowing a deferral of some of the fees payable to AMR under the Services Agreement, Canadian was unable to find any investor willing to provide the liquidity necessary to keep Canadian operating while alternative solutions were sought.

[32] After 853350 made its offer, 853350 and Air Canada entered into discussions with AMR regarding the purchase by 853350 of AMR's shareholding in CAIL as well as other matters regarding code sharing agreements and various services provided to Canadian by AMR and its subsidiaries and affiliates. The parties reached an agreement on November 22, 1999 pursuant to which AMR agreed to reduce its potential damages claim for termination of the Services Agreement by approximately 88%.

[33] On December 4, 1999, CAC's Board recommended acceptance of 853350's offer to its shareholders and on December 21, 1999, two days before the offer closed, 853350 received approval for the offer from the Competition Bureau as well as clarification from the Government of Canada on the proposed regulatory framework for the Canadian airline industry.

[34] As noted above, Canadian's financial condition deteriorated further after the collapse of the AirCo Arrangement transaction. In particular:

> a) the doubts which were publicly raised as to Canadian's ability to survive made Canadian's efforts to secure additional financing through various sale-leaseback transactions more difficult;
> b) sales for future air travel were down by approximately 10% compared to 1998;
> c) CAIL's liquidity position, which stood at approximately $84 million (consolidated cash and available credit) as at September 30, 1999, reached a critical point in late December, 1999 when it was about to go negative.

[35] In late December, 1999, Air Canada agreed to enter into certain transactions designed to ensure that Canadian would have enough liquidity to continue operating until the scheduled completion of the 853350 take-over bid on January 4, 2000. Air Canada agreed to purchase rights to the Toronto-Tokyo route for $25 million and to a sale-leaseback arrangement involving certain unencumbered aircraft and a flight simulator for total proceeds of approximately $20 million. These transactions gave Canadian sufficient liquidity to continue operations through the holiday period.

[36] If Air Canada had not provided the approximate $45 million injection in December 1999, Canadian would likely have had to file for bankruptcy and cease all operations before the end of the holiday travel season.

[37] On January 4, 2000, with all conditions of its offer having been satisfied or waived, 853350 purchased approximately 82% of the outstanding shares of CAC. On January 5, 1999, 853350 completed the purchase of the preferred shares of CAIL owned by Aurora. In connection with that acquisition, Canadian agreed to certain amendments to the Services Agreement reducing the amounts payable to AMR in the event of a termination of such agreement and, in addition, the unanimous shareholders agreement which gave AMR the right to require Canadian to purchase the CAIL preferred shares under certain circumstances was terminated. These arrangements had the effect of substantially reducing the obstacles to a restructuring of Canadian’s debt and lease obligations and also significantly reduced the claims that AMR would be entitled to advance in such a restructuring.

[38] Despite the $45 million provided by Air Canada, Canadian's liquidity position remained poor. With January being a traditionally slow month in the airline industry, further bridge financing was required in order to ensure that Canadian would be able to operate while a debt restructuring transaction was being negotiated with creditors. Air Canada negotiated an arrangement with the Royal Bank of Canada (“Royal Bank”) to purchase a participation interest in the operating credit facility made available to Canadian. As a result of this agreement, Royal Bank agreed to extend Canadian’s operating credit facility from $70 million to $120 million in January, 2000 and then to $145 million in March, 2000. Canadian agreed to supplement the assignment of accounts receivable security originally securing Royal’s $70 million facility with a further Security Agreement securing certain unencumbered assets of Canadian in consideration for this increased credit availability. Without the support of Air Canada or another financially sound entity, this increase in credit would not have been possible.

[39] Air Canada has stated publicly that it ultimately wishes to merge the operations of Canadian and Air Canada, subject to Canadian completing a financial restructuring so as to permit Air Canada to complete the acquisition on a financially sound basis. This pre-condition has been emphasized by Air Canada since the fall of 1999.

[40] Prior to the acquisition of majority control of CAC by 853350, Canadian’s management, Board of Directors and financial advisors had considered every possible alternative for restoring Canadian to a sound financial footing. Based upon Canadian's extensive efforts over the past year in particular, but also the efforts since 1992 described

above, Canadian came to the conclusion that it must complete a debt restructuring to permit the completion of a full merger between Canadian and Air Canada.

[41] On February 1, 2000, Canadian announced a moratorium on payments to lessors and lenders. As a result of this moratorium Canadian defaulted on the payments due under its various credit facilities and aircraft leases. Absent the assistance provided by this moratorium, in addition to Air Canada's support, Canadian would not have had sufficient liquidity to continue operating until the completion of a debt restructuring.

[42] Following implementation of the moratorium, Canadian with Air Canada embarked on efforts to restructure significant obligations by consent. The further damage to public confidence which a CCAA filing could produce required Canadian to secure a substantial measure of creditor support in advance of any public filing for court protection.

[43] Before the Petitioners started these CCAA proceedings, Air Canada, CAIL and lessors of 59 aircraft in its fleet had reached agreement in principle on the restructuring plan.

[44] Canadian and Air Canada have also been able to reach agreement with the remaining affected secured creditors, being the holders of the U.S. $175 million Senior Secured Notes, due 2005, (the "Senior Secured Noteholders") and with several major unsecured creditors in addition to AMR, such as Loyalty Management Group Canada Inc.

[45] On March 24, 2000, faced with threatened proceedings by secured creditors, Canadian petitioned under the CCAA and obtained a stay of proceedings and related interim relief by Order of the Honourable Chief Justice Moore on that same date. Pursuant to that Order, PricewaterhouseCoopers, Inc. was appointed as the Monitor, and companion proceedings in the United States were authorized to be commenced.

[46] Since that time, due to the assistance of Air Canada, Canadian has been able to complete the restructuring of the remaining financial obligations governing all aircraft to be retained by Canadian for future operations. These arrangements were approved by this Honourable Court in its Orders dated April 14, 2000 and May 10, 2000, as described in further detail below under the heading "The Restructuring Plan".

[47] On April 7, 2000, this court granted an Order giving directions with respect to the filing of the plan, the calling and holding of meetings of affected creditors and related matters.

[48] On April 25, 2000 in accordance with the said Order, Canadian filed and served the plan (in its original form) and the related notices and materials.

[49] The plan was amended, in accordance with its terms, on several occasions, the form of Plan voted upon at the Creditors' Meetings on May 26, 2000 having been filed and served on May 25, 2000 (the "Plan").

The Restructuring Plan

[50] The Plan has three principal aims described by Canadian:

(a) provide near term liquidity so that Canadian can sustain operations;
(b) allow for the return of aircraft not required by Canadian; and
(c) permanently adjust Canadian's debt structure and lease facilities to reflect the current market for asset values and carrying costs in return for Air Canada providing a guarantee of the restructured obligations.

[51] The proposed treatment of stakeholders is as follows:

1. Unaffected Secured Creditors- Royal Bank, CAIL's operating lender, is an unaffected creditor with respect to its operating credit facility. Royal Bank holds security over CAIL's accounts receivable and most of CAIL's operating assets not specifically secured by aircraft financiers or the Senior Secured Noteholders. As noted above, arrangements entered into between Air Canada and Royal Bank have provided CAIL with liquidity necessary for it to continue operations since January 2000.

Also unaffected by the Plan are those aircraft lessors, conditional vendors and secured creditors holding security over CAIL's aircraft who have entered into agreements with CAIL and/or Air Canada with respect to the restructuring of CAIL's obligations. A number of such agreements, which were initially contained in the form of letters of intent ("LOIs"), were entered into prior to the commencement of the CCAA proceedings, while a total of 17 LOIs were completed after that date. In its Second and Fourth Reports the Monitor reported to the court on these agreements. The LOIs entered into after the proceedings commenced were reviewed and approved by the court on April 14, 2000 and May 10, 2000.

The basis of the LOIs with aircraft lessors was that the operating lease rates were reduced to fair market lease rates or less, and the obligations of CAIL under the leases were either assumed or guaranteed by Air Canada. Where the aircraft was subject to conditional sale agreements or other secured indebtedness, the value of the secured debt was reduced to the fair market value of the aircraft, and the interest rate payable was reduced to current market rates reflecting Air Canada's credit. CAIL's obligations under those agreements have also been assumed or guaranteed by Air Canada. The claims of these creditors for reduced principal and interest amounts, or reduced lease payments, are Affected Unsecured Claims under the Plan. In a number of cases these claims have been assigned to Air Canada and Air Canada disclosed that it would vote those claims in favour of the Plan.

2. Affected Secured Creditors- The Affected Secured Creditors under the Plan are the Senior Secured Noteholders with a claim in the amount of US$175,000,000. The Senior Secured Noteholders are secured by a diverse package of Canadian's assets, including its inventory of aircraft spare parts, ground equipment, spare engines, flight simulators, leasehold interests at Toronto, Vancouver and Calgary airports, the shares in CRAL 98 and a $53 million note payable by CRAL to CAIL.

The Plan offers the Senior Secured Noteholders payment of 97 cents on the dollar. The deficiency is included in the Affected Unsecured Creditor class and the Senior Secured Noteholders advised the court they would be voting the deficiency in favour of the Plan.

3. Unaffected Unsecured Creditors-In the circular accompanying the November 11, 1999 853350 offer it was stated that:

> The Offeror intends to conduct the Debt Restructuring in such a manner as to seek to ensure that the unionized employees of Canadian, the suppliers of new credit (including trade credit) and the members of the flying public are left unaffected.
> The Offeror is of the view that the pursuit of these three principles is essential in order to ensure that the long term value of Canadian is preserved.

Canadian's employees, customers and suppliers of goods and services are unaffected by the CCAA Order and Plan.
Also unaffected are parties to those contracts or agreements with Canadian which are not being terminated by Canadian pursuant to the terms of the March 24, 2000 Order.

4. Affected Unsecured Creditors- CAIL has identified unsecured creditors who do not fall into the above three groups and listed these as Affected Unsecured Creditors under the Plan. They are offered 14 cents on the dollar on their claims. Air Canada would fund this payment.

The Affected Unsecured Creditors fall into the following categories:

a. Claims of holders of or related to the Unsecured Notes (the "Unsecured Noteholders");
b. Claims in respect of certain outstanding or threatened litigation involving Canadian;
c. Claims arising from the termination, breach or repudiation of certain contracts, leases or agreements to which Canadian is a party other than aircraft financing or lease arrangements;
d. Claims in respect of deficiencies arising from the termination or re-negotiation of aircraft financing or lease arrangements;
e. Claims of tax authorities against Canadian; and
f. Claims in respect of the under-secured or unsecured portion of amounts due to the Senior Secured Noteholders.

[52] There are over $700 million of proven unsecured claims. Some unsecured creditors have disputed the amounts of their claims for distribution purposes. These are in the process of determination by the court-appointed Claims Officer and subject to further appeal to the court. If the Claims Officer were to allow all of the disputed claims in full and this were confirmed by the court, the aggregate of unsecured claims would be approximately $1.059 million.

[53] The Monitor has concluded that if the Plan is not approved and implemented, Canadian will not be able to continue as a going concern and in that event, the only foreseeable

alternative would be a liquidation of Canadian's assets by a receiver and/or a trustee in bankruptcy. Under the Plan, Canadian's obligations to parties essential to ongoing operations, including employees, customers, travel agents, fuel, maintenance and equipment suppliers, and airport authorities are in most cases to be treated as unaffected and paid in full. In the event of a liquidation, those parties would not, in most cases, be paid in full and, except for specific lien rights and statutory priorities, would rank as ordinary unsecured creditors. The Monitor estimates that the additional unsecured claims which would arise if Canadian were to cease operations as a going concern and be forced into liquidation would be in excess of $1.1 billion.

[54] In connection with its assessment of the Plan, the Monitor performed a liquidation analysis of CAIL as at March 31, 2000 in order to estimate the amounts that might be recovered by CAIL's creditors and shareholders in the event of disposition of CAIL's assets by a receiver or trustee. The Monitor concluded that a liquidation would result in a shortfall to certain secured creditors, including the Senior Secured Noteholders, a recovery by ordinary unsecured creditors of between one cent and three cents on the dollar, and no recovery by shareholders.

[55] There are two vociferous opponents of the Plan, Resurgence Asset Management LLC ("Resurgence") who acts on behalf of its and/or its affiliate client accounts and four shareholders of CAC. Resurgence is incorporated pursuant to the laws of New York, U.S.A. and has its head office in White Plains, New York. It conducts an investment business specializing in high yield distressed debt. Through a series of purchases of the Unsecured Notes commencing in April 1999, Resurgence clients hold $58,200,000 of the face value of or 58.2% of the notes issued. Resurgence purchased 7.9 million units in April 1999. From November 3, 1999 to December 9, 1999 it purchased an additional 20,850,000 units. From January 4, 2000 to February 3, 2000 Resurgence purchased an additional 29,450,000 units.

[56] Resurgence seeks declarations that: the actions of Canadian, Air Canada and 853350 constitute an amalgamation, consolidation or merger with or into Air Canada or a conveyance or transfer of all or substantially all of Canadian's assets to Air Canada; that any plan of arrangement involving Canadian will not affect Resurgence and directing the repurchase of their notes pursuant to the provisions of their trust indenture and that the actions of Canadian, Air Canada and 853350 are oppressive and unfairly prejudicial to it pursuant to section 234 of the Business Corporations Act.

[57] Four shareholders of CAC also oppose the plan. Neil Baker, a Toronto resident, acquired 132,500 common shares at a cost of $83,475.00 on or about May 5, 2000. Mr. Baker sought to commence proceedings to "remedy an injustice to the minority holders of the common shares". Roger Midiaty, Michael Salter and Hal Metheral are individual shareholders who were added as parties at their request during the proceedings. Mr. Midiaty resides in Calgary, Alberta and holds 827 CAC shares which he has held since 1994. Mr. Metheral is also a Calgary resident and holds approximately 14,900 CAC shares in his RRSP and has held them since approximately 1994 or 1995. Mr. Salter is a resident of Scottsdale, Arizona and is the beneficial owner of 250 shares of CAC and is a joint beneficial owner of 250 shares with his wife. These shareholders will be referred in the Decision throughout as the "Minority Shareholders".

[58] The Minority Shareholders oppose the portion of the Plan that relates to the reorganization of CAIL, pursuant to section 185 of the ***Alberta Business Corporations Act*** ("ABCA"). They characterize the transaction as a cancellation of issued shares unauthorized by section 167 of the ABCA or alternatively is a violation of section 183 of the ABCA. They submit the application for the order of reorganization should be denied as being unlawful, unfair and not supported by the evidence.

III. ANALYSIS

[59] Section 6 of the CCAA provides that:

> 6. Where a majority in number representing two-thirds in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding
>
> (a) on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company; and
> (b) in the case of a company that has made an authorized assignment or against which a receiving order has been made under the Bankruptcy and Insolvency Act or is in the course of being wound up under the Winding-up and Restructuring Act, on the trustee in bankruptcy or liquidator and contributories of the company.

[60] Prior to sanctioning a plan under the CCAA, the court must be satisfied in regard to each of the following criteria:

> (1) there must be compliance with all statutory requirements;
> (2) all material filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the CCAA; and
> (3) the plan must be fair and reasonable.

[61] A leading articulation of this three-part test appears in ***Re Northland Properties Ltd.*** (1988), 73 C.B.R. (N.S.) 175 (B.C.S.C.) at 182-3, aff'd (1989), 73 C.B.R. (N.S.) 195 (B.C.C.A.) and has been regularly followed, see for example ***Re Sammi Atlas Inc***. (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div.) at 172 and ***Re T. Eaton Co.***, [1999] O.J. No. 5322 (Ont. Sup. Ct.) at paragraph 7. Each of these criteria are reviewed in turn below.

1. Statutory Requirements

[62] Some of the matters that may be considered by the court on an application for approval of a plan of compromise and arrangement include:

> (a) the applicant comes within the definition of "debtor company" in section 2 of the CCAA;

(b) the applicant or affiliated debtor companies have total claims within the meaning of section 12 of the CCAA in excess of $5,000,000;
(c) the notice calling the meeting was sent in accordance with the order of the court;
(d) the creditors were properly classified;
(e) the meetings of creditors were properly constituted;
(f) the voting was properly carried out; and
(g) the plan was approved by the requisite double majority or majorities.

[63] I find that the Petitioners have complied with all applicable statutory requirements. Specifically:

(a) CAC and CAIL are insolvent and thus each is a "debtor company" within the meaning of section 2 of the CCAA. This was established in the affidavit evidence of Douglas Carty, Senior Vice President and Chief Financial Officer of Canadian, and so declared in the March 24, 2000 Order in these proceedings and confirmed in the testimony given by Mr. Carty at this hearing.

(b) CAC and CAIL have total claims that would be claims provable in bankruptcy within the meaning of section 12 of the CCAA in excess of $5,000,000.

(c) In accordance with the April 7, 2000 Order of this court, a Notice of Meeting and a disclosure statement (which included copies of the Plan and the March 24th and April 7th Orders of this court) were sent to the Affected Creditors, the directors and officers of the Petitioners, the Monitor and persons who had served a Notice of Appearance, on April 25, 2000.

(d) As confirmed by the May 12, 2000 ruling of this court (leave to appeal denied May 29, 2000), the creditors have been properly classified.

(e) Further, as detailed in the Monitor's Fifth Report to the Court and confirmed by the June 14, 2000 decision of this court in respect of a challenge by Resurgence Asset Management LLC ("Resurgence"), the meetings of creditors were properly constituted, the voting was properly carried out and the Plan was approved by the requisite double majorities in each class. The composition of the majority of the unsecured creditor class is addressed below under the heading "Fair and Reasonable".

2. Matters Unauthorized

[64] This criterion has not been widely discussed in the reported cases. As recognized by Blair J. in ***Olympia & York Developments Ltd.* v. *Royal Trust Co.*** (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.) and Farley J. in ***Cadillac Fairview (Re)*** (1995), 53 A.C.W.S. (3d) 305 (Ont. Gen. Div.), within the CCAA process the court must rely on the reports of the Monitor as well as the parties in ensuring nothing contrary to the CCAA has occurred or is contemplated by the plan.

[65] In this proceeding, the dissenting groups have raised two matters which in their view are unauthorized by the CCAA: firstly, the Minority Shareholders of CAC suggested the proposed share capital reorganization of CAIL is illegal under the ABCA and Ontario

Securities Commission Policy 9.1, and as such cannot be authorized under the CCAA and secondly, certain unsecured creditors suggested that the form of release contained in the Plan goes beyond the scope of release permitted under the CCAA.

a. Legality of proposed share capital reorganization

[66] Subsection 185(2) of the ABCA provides:

> (2) If a corporation is subject to an order for reorganization, its articles may be amended by the order to effect any change that might lawfully be made by an amendment under section 167.

[67] Sections 6.1(2)(d) and (e) and Schedule “D” of the Plan contemplate that:

> a. All CAIL common shares held by CAC will be converted into a single retractable share, which will then be retracted by CAIL for $1.00; and
> b. All CAIL preferred shares held by 853350 will be converted into CAIL common shares.

[68] The Articles of Reorganization in Schedule “D” to the Plan provide for the following amendments to CAIL’s Articles of Incorporation to effect the proposed reorganization:

> (a) consolidating all of the issued and outstanding common shares into one common share;
> (b) redesignating the existing common shares as “Retractable Shares” and changing the rights, privileges, restrictions and conditions attaching to the Retractable Shares so that the Retractable Shares shall have attached thereto the rights, privileges, restrictions and conditions as set out in the Schedule of Share Capital;
> (c) cancelling the Non-Voting Shares in the capital of the corporation, none of which are currently issued and outstanding, so that the corporation is no longer authorized to issue Non-Voting Shares;
> (d) changing all of the issued and outstanding Class B Preferred Shares of the corporation into Class A Preferred Shares, on the basis of one (1) Class A Preferred Share for each one (1) Class B Preferred Share presently issued and outstanding;
> (e) redesignating the existing Class A Preferred Shares as “Common Shares” and changing the rights, privileges, restrictions and conditions attaching to the Common Shares so that the Common Shares shall have attached thereto the rights, privileges, restrictions and conditions as set out in the Schedule of Share Capital; and
> (f) cancelling the Class B Preferred Shares in the capital of the corporation, none of which are issued and outstanding after the change in paragraph (d) above, so that the corporation is no longer authorized to issue Class B Preferred Shares;

Section 167 of the ABCA

[69] Reorganizations under section 185 of the ABCA are subject to two preconditions:

a. The corporation must be “subject to an order for re-organization”; and
b. The proposed amendments must otherwise be permitted under section 167 of the ABCA.

[70] The parties agreed that an order of this court sanctioning the Plan would satisfy the first condition.

[71] The relevant portions of section 167 provide as follows:

> 167(1) Subject to sections 170 and 171, the articles of a corporation may by special resolution be amended to
> (e) change the designation of all or any of its shares, and add, change or remove any rights, privileges, restrictions and conditions, including rights to accrued dividends, in respect of all or any of its shares, whether issued or unissued,
> (f) change the shares of any class or series, whether issued or unissued, into a different number of shares of the same class or series into the same or a different number of shares of other classes or series,
> (g.1) cancel a class or series of shares where there are no issued or outstanding shares of that class or series,

[72] Each change in the proposed CAIL Articles of Reorganization corresponds to changes permitted under s. 167(1) of the ABCA, as follows:

Proposed Amendment in Schedule "D"	Subsection 167(1), ABCA
(a) – consolidation of Common Shares	167(1)(f)
(b) – change of designation and rights	167(1)(e)
(c) – cancellation	167(1)(g.1)
(d) – change in shares	167(1)(f)
(e) – change of designation and rights	167(1)(e)
(f) – cancellation	167(1)(g.1)

[73] The Minority Shareholders suggested that the proposed reorganization effectively cancels their shares in CAC. As the above review of the proposed reorganization demonstrates, that is not the case. Rather, the shares of CAIL are being consolidated, altered and then retracted, as permitted under section 167 of the ABCA. I find the proposed reorganization of CAIL's share capital under the Plan does not violate section 167.

[74] In R. Dickerson et al, ***Proposals for a New Business Corporation Law for Canada***, Vol.1: Commentary (the "Dickerson Report") regarding the then proposed Canada Business Corporations Act, the identical section to section 185 is described as having been inserted with the object of enabling the "court to effect any necessary amendment of the articles of the corporation in order to achieve the objective of the reorganization without having to comply with the formalities of the Draft Act, particularly shareholder approval of the proposed amendment".

[75] The architects of the business corporation act model which the ABCA follows, expressly contemplated reorganizations in which the insolvent corporation would eliminate the interest of common shareholders. The example given in the Dickerson Report of a reorganization is very similar to that proposed in the Plan:

> For example, the reorganization of an insolvent corporation may require the following steps: first, reduction or even elimination of the interest of the common shareholders; second, relegation of the preferred shareholders to the status of common shareholders; and third, relegation of the secured debenture holders to the status of either unsecured Noteholders or preferred shareholders.

[76] The rationale for allowing such a reorganization appears plain; the corporation is insolvent, which means that on liquidation the shareholders would get nothing. In those circumstances, as described further below under the heading “Fair and Reasonable”, there is nothing unfair or unreasonable in the court effecting changes in such situations without shareholder approval. Indeed, it would be unfair to the creditors and other stakeholders to permit the shareholders (whose interest has the lowest priority) to have any ability to block a reorganization.

[77] The Petitioners were unable to provide any case law addressing the use of section 185 as proposed under the Plan. They relied upon the decisions of ***Royal Oak Mines Inc.***, [1999] O.J. No. 4848 and ***Re T Eaton Co.,*** *supra* in which Farley J.of the Ontario Superior Court of Justice emphasized that shareholders are at the bottom of the hierarchy of interests in liquidation or liquidation related scenarios.

[78] Section 185 provides for amendment to articles by court order. I see no requirement in that section for a meeting or vote of shareholders of CAIL, quite apart from shareholders of CAC. Further, dissent and appraisal rights are expressly removed in subsection (7). To require a meeting and vote of shareholders and to grant dissent and appraisal rights in circumstances of insolvency would frustrate the object of section 185 as described in the Dickerson Report.

[79] In the circumstances of this case, where the majority shareholder holds 82% of the shares, the requirement of a special resolution is meaningless. To require a vote suggests the shares have value. They do not. The formalities of the ABCA serve no useful purpose other than to frustrate the reorganization to the detriment of all stakeholders, contrary to the CCAA.

Section 183 of the ABCA

[80] The Minority Shareholders argued in the alternative that if the proposed share reorganization of CAIL were not a cancellation of their shares in CAC and therefore allowed under section 167 of the ABCA, it constituted a “sale, lease, or exchange of substantially all the property” of CAC and thus required the approval of CAC shareholders pursuant to section 183 of the ABCA. The Minority Shareholders suggested that the common shares in CAIL were substantially all of the assets of CAC and that all of those shares were being “exchanged” for $1.00.

[81] I disagree with this creative characterization. The proposed transaction is a reorganization as contemplated by section 185 of the ABCA. As recognized in ***Savage v.***

Amoco Acquisition Company Ltd, [1988] A.J. No. 68 (Q.B.), aff'd, 68 C.B.R. (3d) 154 (Alta. C.A.), the fact that the same end might be achieved under another section does not exclude the section to be relied on. A statute may well offer several alternatives to achieve a similar end.

Ontario Securities Commission Policy 9.1

[82] The Minority Shareholders also submitted the proposed reorganization constitutes a "related party transaction" under Policy 9.1 of the Ontario Securities Commission. Under the Policy, transactions are subject to disclosure, minority approval and formal valuation requirements which have not been followed here. The Minority Shareholders suggested that the Petitioners were therefore in breach of the Policy unless and until such time as the court is advised of the relevant requirements of the Policy and grants its approval as provided by the Policy.

[83] These shareholders asserted that in the absence of evidence of the going concern value of CAIL so as to determine whether that value exceeds the rights of the Preferred Shares of CAIL, the Court should not waive compliance with the Policy.

[84] To the extent that this reorganization can be considered a "related party transaction", I have found, for the reasons discussed below under the heading "Fair and Reasonable", that the Plan, including the proposed reorganization, is fair and reasonable and accordingly I would waive the requirements of Policy 9.1.

b. Release

[85] Resurgence argued that the release of directors and other third parties contained in the Plan does not comply with the provisions of the CCAA.

[86] The release is contained in section 6.2(2)(ii) of the Plan and states as follows:

> As of the Effective Date, each of the Affected Creditors will be deemed to forever release, waive and discharge all claims, obligations, suits, judgments, damages, demands, debts, rights, causes of action and liabilities...that are based in whole or in part on any act, omission, transaction, event or other occurrence taking place on or prior to the Effective Date in any way relating to the Applicants and Subsidiaries, the CCAA Proceedings, or the Plan against:(i) The Applicants and Subsidiaries; (ii) The Directors, Officers and employees of the Applicants or Subsidiaries in each case as of the date of filing (and in addition, those who became Officers and/or Directors thereafter but prior to the Effective Date); (iii) The former Directors, Officers and employees of the Applicants or Subsidiaries, or (iv) the respective current and former professionals of the entities in subclauses (1) to (3) of this s.6.2(2) (including, for greater certainty, the Monitor, its counsel and its current Officers and Directors, and current and former Officers, Directors, employees, shareholders and professionals of the released parties) acting in such capacity.

[87] Prior to 1997, the CCAA did not provide for compromises of claims against anyone other than the petitioning company. In 1997, section 5.1 was added to the CCAA. Section 5.1 states:

5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

(2) A provision for the compromise of claims against directors may not include claims that:

(a) relate to contractual rights of one or more creditors; or

(b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

(3) The Court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

[88] Resurgence argued that the form of release does not comply with section 5.1 of the CCAA insofar as it applies to individuals beyond directors and to a broad spectrum of claims beyond obligations of the Petitioners for which their directors are "by law liable". Resurgence submitted that the addition of section 5.1 to the CCAA constituted an exception to a long standing principle and urged the court to therefore interpret s. 5.1 cautiously, if not narrowly. Resurgence relied on ***Barrette v. Crabtree Estate,*** [1993], 1 S.C.R. 1027 at 1044 and ***Bruce Agra Foods Limited v. Proposal of Everfresh Beverages Inc. (Receiver of)*** (1996), 45 C.B.R. (3d) 169 (Ont. Gen. Div.) at para. 5 in this regard.

[89] With respect to Resurgence's complaint regarding the breadth of the claims covered by the release, the Petitioners asserted that the release is not intended to override section 5.1(2). Canadian suggested this can be expressly incorporated into the form of release by adding the words **"excluding the claims excepted by s. 5.1(2) of the CCAA"** immediately prior to subsection (iii) and clarifying the language in Section 5.1 of the Plan. Canadian also acknowledged, in response to a concern raised by Canada Customs and Revenue Agency, that in accordance with s. 5.1(1) of the CCAA, directors of CAC and CAIL could only be released from liability arising before March 24, 2000, the date these proceedings commenced. Canadian suggested this was also addressed in the proposed amendment. Canadian did not address the propriety of including individuals in addition to directors in the form of release.

[90] In my view it is appropriate to amend the proposed release to expressly comply with section 5. 1(2) of the CCAA and to clarify Section 5.1 of the Plan as Canadian suggested in its brief. The additional language suggested by Canadian to achieve this result shall be included in the form of order. Canada Customs and Revenue Agency is apparently satisfied with the Petitioners' acknowledgement that claims against directors can only be released to the date of commencement of proceedings under the CCAA, having appeared at this hearing to strongly support the sanctioning of the Plan, so I will not address this concern further.

[91] Resurgence argued that its claims fell within the categories of excepted claims in section 5.1(2) of the CCAA and accordingly, its concern in this regard is removed by this amendment. Unsecured creditors JHHD Aircraft Leasing No. 1 and No. 2 suggested there may be possible wrongdoing in the acts of the directors during the restructuring process which should not be immune from scrutiny and in my view this complaint would also be caught by the exception captured in the amendment.

[92] While it is true that section 5.2 of the CCAA does not authorize a release of claims against third parties other than directors, it does not prohibit such releases either. The amended terms of the release will not prevent claims from which the CCAA expressly prohibits release. Aside from the complaints of Resurgence, which by their own submissions are addressed in the amendment I have directed, and the complaints of JHHD Aircraft Leasing No. 1 and No. 2, which would also be addressed in the amendment, the terms of the release have been accepted by the requisite majority of creditors and I am loathe to further disturb the terms of the Plan, with one exception.

[93] Amex Bank of Canada submitted that the form of release appeared overly broad and might compromise unaffected claims of affected creditors. For further clarification, Amex Bank of Canada's potential claim for defamation is unaffected by the Plan and I am prepared to order Section 6.2(2)(ii) be amended to reflect this specific exception.

3. Fair and Reasonable

[94] In determining whether to sanction a plan of arrangement under the CCAA, the court is guided by two fundamental concepts: "fairness" and "reasonableness". While these concepts are always at the heart of the court's exercise of its discretion, their meanings are necessarily shaped by the unique circumstances of each case, within the context of the Act and accordingly can be difficult to distill and challenging to apply. Blair J. described these concepts in ***Olympia and York Dev. Ltd. v. Royal Trust Co.***, *supra*, at page 9:

> "Fairness" and "reasonableness" are, in my opinion, the two keynote concepts underscoring the philosophy and workings of the Companies' Creditors Arrangement Act. Fairness is the quintessential expression of the court's equitable jurisdiction - although the jurisdiction is statutory, the broad discretionary powers given to the judiciary by the legislation which make its exercise an exercise in equity - and "reasonableness" is what lends objectivity to the process.

[95] The legislation, while conferring broad discretion on the court, offers little guidance. However, the court is assisted in the exercise of its discretion by the purpose of the CCAA: to facilitate the reorganization of a debtor company for the benefit of the company, its creditors, shareholders, employees and, in many instances, a much broader constituency of affected persons. Parliament has recognized that reorganization, if commercially feasible, is in most cases preferable, economically and socially, to liquidation: ***Norcen Energy Resources Ltd.* v. *Oakwood Petroleums Ltd.***, [1989] 2 W.W.R. 566 at 574 (Alta.Q.B.); ***Northland Properties Ltd.* v. *Excelsior Life Insurance Co. of Canada***, [1989] 3 W.W.R. 363 at 368 (B.C.C.A.).

[96] The sanction of the court of a creditor-approved plan is not to be considered as a rubber stamp process. Although the majority vote that brings the plan to a sanction hearing plays a significant role in the court's assessment, the court will consider other matters as are appropriate in light of its discretion. In the unique circumstances of this case, it is appropriate to consider a number of additional matters:

a. The composition of the unsecured vote;
b. What creditors would receive on liquidation or bankruptcy as compared to the Plan;
c. Alternatives available to the Plan and bankruptcy;
d. Oppression;
e. Unfairness to Shareholders of CAC; and
f. The public interest.

a. Composition of the unsecured vote

[97] As noted above, an important measure of whether a plan is fair and reasonable is the parties' approval and the degree to which it has been given. Creditor support creates an inference that the plan is fair and reasonable because the assenting creditors believe that their interests are treated equitably under the plan. Moreover, it creates an inference that the arrangement is economically feasible and therefore reasonable because the creditors are in a better position then the courts to gauge business risk. As stated by Blair J. at page 11 of ***Olympia & York Developments Ltd.,*** *supra:*

> As other courts have done, I observe that it is not my function to second guess the business people with respect to the "business" aspect of the Plan or descending into the negotiating arena or substituting my own view of what is a fair and reasonable compromise or arrangement for that of the business judgment of the participants. The parties themselves know best what is in their interests in those areas.

[98] However, given the manner of voting under the CCAA, the court must be cognizant of the treatment of minorities within a class: see for example ***Quintette Coal Ltd.,*** (1992) 13 C.B.R. (3rd) 14 (B.C.S.C) and ***Re Alabama, New Orleans, Texas and Pacific Junction Railway Co.*** (1890) 60 L.J. Ch. 221 (C.A.). The court can address this by ensuring creditors' claims are properly classified. As well, it is sometimes appropriate to tabulate the vote of a particular class so the results can be assessed from a fairness perspective. In this case, the classification was challenged by Resurgence and I dismissed that application. The vote was also tabulated in this case and the results demonstrate that the votes of Air Canada and the Senior Secured Noteholders, who voted their deficiency in the unsecured class, were decisive.

[99] The results of the unsecured vote, as reported by the Monitor, are:

1. For the resolution to approve the Plan: 73 votes (65% in number) representing $494,762,304 in claims (76% in value);
2. Against the resolution: 39 votes (35% in number) representing $156,360,363 in claims (24% in value); and
3. Abstentions: 15 representing $968,036 in value.

[100] The voting results as reported by the Monitor were challenged by Resurgence. That application was dismissed.

[101] The members of each class that vote in favour of a plan must do so in good faith and the majority within a class must act without coercion in their conduct toward the minority. When asked to assess fairness of an approved plan, the court will not countenance secret agreements to vote in favour of a plan secured by advantages to the creditor: see for example, ***Hochberger v. Rittenberg*** (1916), 36 D.L.R. 450 (S.C.C.)

[102] ***In Northland Properties Ltd. (Re)*** (1988), 73 C.B.R. (N.S.) 175 at 192-3 (B.C.S.C) aff'd 73 C.B.R. (N.S.) 195 (B.C.C.A.), dissenting priority mortgagees argued the plan violated the principle of equality due to an agreement between the debtor company and another priority mortgagee which essentially amounted to a preference in exchange for voting in favour of the plan. Trainor J. found that the agreement was freely disclosed and commercially reasonable and went on to approve the plan, using the three part test. The British Columbia Court of Appeal upheld this result and in commenting on the minority complaint McEachern J.A. stated at page 206:

> In my view, the obvious benefits of settling rights and keeping the enterprise together as a going concern far outweigh the deprivation of the appellants' wholly illusory rights. In this connection, the learned chambers judge said at p.29:
>
> > I turn to the question of the right to hold the property after an order absolute and whether or not this is a denial of something of that significance that it should affect these proceedings. There is in the material before me some evidence of values. There are the principles to which I have referred, as well as to the rights of majorities and the rights of minorities.
> > Certainly, those minority rights are there, but it would seem to me that in view of the overall plan, in view of the speculative nature of holding property in the light of appraisals which have been given as to value, that this right is something which should be subsumed to the benefit of the majority.

[103] Resurgence submitted that Air Canada manipulated the indebtedness of CAIL to assure itself of an affirmative vote. I disagree. I previously ruled on the validity of the deficiency when approving the LOIs and found the deficiency to be valid. I found there was consideration for the assignment of the deficiency claims of the various aircraft financiers to Air Canada, namely the provision of an Air Canada guarantee which would otherwise not have been available until plan sanction. The Monitor reviewed the calculations of the deficiencies and determined they were calculated in a reasonable manner. As such, the court approved those transactions. If the deficiency had instead remained with the aircraft financiers, it is reasonable to assume those claims would have been voted in favour of the plan. Further, it would have been entirely appropriate under the circumstances for the aircraft financiers to have retained the deficiency and agreed to vote in favour of the Plan, with the same result to Resurgence. That the financiers did not choose this method was explained by the testimony of Mr. Carty and Robert Peterson, Chief Financial Officer for Air Canada; quite simply it amounted to a desire on behalf of these creditors to shift the "deal risk" associated with the Plan to Air Canada. The agreement reached with the Senior Secured Noteholders was also disclosed and the challenge by Resurgence regarding their vote in the unsecured class was dismissed There

is nothing inappropriate in the voting of the deficiency claims of Air Canada or the Senior Secured Noteholders in the unsecured class. There is no evidence of secret vote buying such as discussed in ***Northland Properties Ltd. (Re)***.

[104] If the Plan is approved, Air Canada stands to profit in its operation. I do not accept that the deficiency claims were devised to dominate the vote of the unsecured creditor class, however, Air Canada, as funder of the Plan is more motivated than Resurgence to support it. This divergence of views on its own does not amount to bad faith on the part of Air Canada. Resurgence submitted that only the Unsecured Noteholders received 14 cents on the dollar. That is not accurate, as demonstrated by the list of affected unsecured creditors included earlier in these Reasons. The Senior Secured Noteholders did receive other consideration under the Plan, but to suggest they were differently motivated suggests that those creditors did not ascribe any value to their unsecured claims. There is no evidence to support this submission.

[105] The good faith of Resurgence in its vote must also be considered. Resurgence acquired a substantial amount of its claim after the failure of the Onex bid, when it was aware that Canadian's financial condition was rapidly deteriorating. Thereafter, Resurgence continued to purchase a substantial amount of this highly distressed debt. While Mr. Symington maintained that he bought because he thought the bonds were a good investment, he also acknowledged that one basis for purchasing was the hope of obtaining a blocking position sufficient to veto a plan in the proposed debt restructuring. This was an obvious ploy for leverage with the Plan proponents

[106] The authorities which address minority creditors' complaints speak of "substantial injustice" (***Keddy Motor Inns Ltd. (Re)*** (1992) 13 C.B.R. (3d) 245 (N.S.C.A.), "confiscation" of rights (***Campeau Corp. (Re)*** (1992), 10 C.B.R. (3d) 104 (Ont. Ct. (Gen.Div.); ***Skydome Corp. (Re)*** (1999), 87 A.C.W.S (3d) 421 (Ont. Ct. Gen. Div.)) and majorities "feasting upon" the rights of the minority (***Quintette Coal Ltd. (Re)***, (1992), 13 C.B.R.(3d) 146 (B.C.S.C.). Although it cannot be disputed that the group of Unsecured Noteholders represented by Resurgence are being asked to accept a significant reduction of their claims, as are all of the affected unsecured creditors, I do not see a "substantial injustice", nor view their rights as having been "confiscated" or "feasted upon" by being required to succumb to the wishes of the majority in their class. No bad faith has been demonstrated in this case. Rather, the treatment of Resurgence, along with all other affected unsecured creditors, represents a reasonable balancing of interests. While the court is directed to consider whether there is an injustice being worked within a class, it must also determine whether there is an injustice with respect the stakeholders as a whole. Even if a plan might at first blush appear to have that effect, when viewed in relation to all other parties, it may nonetheless be considered appropriate and be approved: ***Algoma Steel Corp.* v. *Royal Bank*** (1992), 11 C.B.R. (3d) 1 (Ont. Gen. Div.)and ***Northland Properties (Re)***, *supra* at 9.

[107] Further, to the extent that greater or discrete motivation to support a Plan may be seen as a conflict, the Court should take this same approach and look at the creditors as a whole and to the objecting creditors specifically and determine if their rights are compromised in an attempt to balance interests and have the pain of compromise borne equally.

[108] Resurgence represents 58.2% of the Unsecured Noteholders or $96 million in claims. The total claim of the Unsecured Noteholders ranges from $146 million to $161 million. The

affected unsecured class, excluding aircraft financing, tax claims, the noteholders and claims under $50,000, ranges from $116.3 million to $449.7 million depending on the resolutions of certain claims by the Claims Officer. Resurgence represents between 15.7% - 35% of that portion of the class.

[109] The total affected unsecured claims, excluding tax claims, but including aircraft financing and noteholder claims including the unsecured portion of the Senior Secured Notes, ranges from $673 million to $1,007 million. Resurgence represents between 9.5% - 14.3% of the total affected unsecured creditor pool. These percentages indicate that at its very highest in a class excluding Air Canada's assigned claims and Senior Secured's deficiency, Resurgence would only represent a maximum of 35% of the class. In the larger class of affected unsecured it is significantly less. Viewed in relation to the class as a whole, there is no injustice being worked against Resurgence.

[110] The thrust of the Resurgence submissions suggests a mistaken belief that they will get more than 14 cents on liquidation. This is not borne out by the evidence and is not reasonable in the context of the overall Plan.

b. Receipts on liquidation or bankruptcy

[111] As noted above, the Monitor prepared and circulated a report on the Plan which contained a summary of a liquidation analysis outlining the Monitor's projected realizations upon a liquidation of CAIL ("Liquidation Analysis").

[112] The Liquidation Analysis was based on: (1) the draft unaudited financial statements of Canadian at March 31, 2000; (2) the distress values reported in independent appraisals of aircraft and aircraft related assets obtained by CAIL in January, 2000; (3) a review of CAIL's aircraft leasing and financing documents; and (4) discussions with CAIL Management.

[113] Prior to and during the application for sanction, the Monitor responded to various requests for information by parties involved. In particular, the Monitor provided a copy of the Liquidation Analysis to those who requested it. Certain of the parties involved requested the opportunity to question the Monitor further, particularly in respect to the Liquidation Analysis and this court directed a process for the posing of those questions.

[114] While there were numerous questions to which the Monitor was asked to respond, there were several areas in which Resurgence and the Minority Shareholders took particular issue: pension plan surplus, CRAL, international routes and tax pools. The dissenting groups asserted that these assets represented overlooked value to the company on a liquidation basis or on a going concern basis.

Pension Plan Surplus

[115] The Monitor did not attribute any value to pension plan surplus when it prepared the Liquidation Analysis, for the following reasons:

1) The summaries of the solvency surplus/deficit positions indicated a cumulative net deficit position for the seven registered plans, after consideration of contingent liabilities;
2) The possibility, based on the previous splitting out of the seven plans from a single plan in 1988, that the plans could be held to be consolidated for financial purposes, which would remove any potential solvency surplus since the total estimated contingent liabilities exceeded the total estimated solvency surplus;
3) The actual calculations were prepared by CAIL's actuaries and actuaries representing the unions could conclude liabilities were greater; and
4) CAIL did not have a legal opinion confirming that surpluses belonged to CAIL.

[116] The Monitor concluded that the entitlement question would most probably have to be settled by negotiation and/or litigation by the parties. For those reasons, the Monitor took a conservative view and did not attribute an asset value to pension plans in the Liquidation Analysis. The Monitor also did not include in the Liquidation Analysis any amount in respect of the claim that could be made by members of the plan where there is an apparent deficit after deducting contingent liabilities.

[117] The issues in connection with possible pension surplus are: (1) the true amount of any of the available surplus; and (2) the entitlement of Canadian to any such amount.

[118] It is acknowledged that surplus prior to termination can be accessed through employer contribution holidays, which Canadian has taken to the full extent permitted. However, there is no basis that has been established for any surplus being available to be withdrawn from an ongoing pension plan. On a pension plan termination, the amount available as a solvency surplus would first have to be further reduced by various amounts to determine whether there was in fact any true surplus available for distribution. Such reductions include contingent benefits payable in accordance with the provisions of each respective pension plan, any extraordinary plan wind up cost, the amounts of any contribution holidays taken which have not been reflected, and any litigation costs.

[119] Counsel for all of Canadian's unionized employees confirmed on the record that the respective union representatives can be expected to dispute all of these calculations as well as to dispute entitlement.

[120] There is a suggestion that there might be a total of $40 million of surplus remaining from all pension plans after such reductions are taken into account. Apart from the issue of entitlement, this assumes that the plans can be treated separately, that a surplus could in fact be realized on liquidation and that the Towers Perrin calculations are not challenged. With total pension plan assets of over $2 billion, a surplus of $40 million could quickly disappear with relatively minor changes in the market value of the securities held or calculation of liabilities. In the circumstances, given all the variables, I find that the existence of any surplus is doubtful at best and I am satisfied that the Monitor's Liquidation Analysis ascribing it zero value is reasonable in this circumstances.

CRAL

[121] The Monitor's liquidation analysis as at March 31, 2000 of CRAL determined that in a distress situation, after payments were made to its creditors, there would be a deficiency of approximately $30 million to pay Canadian Regional's unsecured creditors, which include a claim of approximately $56.5 million due to Canadian. In arriving at this conclusion, the Monitor reviewed internally prepared unaudited financial statements of CRAL as of March 31, 2000, the Houlihan Lokey Howard and Zukin, distress valuation dated January 21, 2000 and the Simat Helliesen and Eichner valuation of selected CAIL assets dated January 31, 2000 for certain aircraft related materials and engines, rotables and spares. The Avitas Inc., and Avmark Inc. reports were used for the distress values on CRAL's aircraft and the CRAL aircraft lease documentation. The Monitor also performed its own analysis of CRAL's liquidation value, which involved analysis of the reports provided and details of its analysis were outlined in the Liquidation Analysis.

[122] For the purpose of the Liquidation Analysis, the Monitor did not consider other airlines as comparable for evaluation purposes, as the Monitor's valuation was performed on a distressed sale basis. The Monitor further assumed that without CAIL's national and international network to feed traffic into and a source of standby financing, and considering the inevitable negative publicity which a failure of CAIL would produce, CRAL would immediately stop operations as well.

[123] Mr. Peterson testified that CRAL was worth $260 million to Air Canada, based on Air Canada being a special buyer who could integrate CRAL, on a going concern basis, into its network. The Liquidation Analysis assumed the windup of each of CRAL and CAIL, a completely different scenario.

[124] There is no evidence that there was a potential purchaser for CRAL who would be prepared to acquire CRAL or the operations of CRAL 98 for any significant sum or at all. CRAL has value to CAIL, and in turn, could provide value to Air Canada, but this value is attributable to its ability to feed traffic to and take traffic from the national and international service operated by CAIL. In my view, the Monitor was aware of these features and properly considered these factors in assessing the value of CRAL on a liquidation of CAIL.

[125] If CAIL were to cease operations, the evidence is clear that CRAL would be obliged to do so as well immediately. The travelling public, shippers, trade suppliers, and others would make no distinction between CAIL and CRAL and there would be no going concern for Air Canada to acquire.

International Routes

[126] The Monitor ascribed no value to Canadian's international routes in the Liquidation Analysis. In discussions with CAIL management and experts available in its aviation group, the Monitor was advised that international routes are unassignable licenses and not property rights. They do not appear as assets in CAIL's financials. Mr. Carty and Mr. Peterson explained that routes and slots are <u>not</u> treated as assets by airlines, but rather as rights in the control of the Government of Canada. In the event of bankruptcy/receivership of CAIL, CAIL's trustee/receiver could not sell them and accordingly they are of no value to CAIL.

[127] Evidence was led that on June 23, 1999 Air Canada made an offer to purchase CAIL's international routes for $400 million cash plus $125 million for aircraft spares and inventory, along with the assumption of certain debt and lease obligations for the aircraft required for the international routes. CAIL evaluated the Air Canada offer and concluded that the proposed purchase price was insufficient to permit it to continue carrying on business in the absence of its international routes. Mr. Carty testified that something in the range of $2 billion would be required.

[128] CAIL was in desperate need of cash in mid December, 1999. CAIL agreed to sell its Toronto - Tokyo route for $25 million. The evidence, however, indicated that the price for the Toronto - Tokyo route was not derived from a valuation, but rather was what CAIL asked for, based on its then-current cash flow requirements. Air Canada and CAIL obtained Government approval for the transfer on December 21, 2000.

[129] Resurgence complained that despite this evidence of offers for purchase and actual sales of international routes and other evidence of sales of slots, the Monitor did not include Canadian's international routes in the Liquidation Analysis and only attributed a total of $66 million for all intangibles of Canadian. There is some evidence that slots at some foreign airports may be bought or sold in some fashion. However, there is insufficient evidence to attribute any value to other slots which CAIL has at foreign airports. It would appear given the regulation of the airline industry, in particular, the ***Aeronautics Act*** and the ***Canada Transportation Act***, that international routes for a Canadian air carrier only have full value to the extent of federal government support for the transfer or sale, and its preparedness to allow the then-current license holder to sell rather than act unilaterally to change the designation. The federal government was prepared to allow CAIL to sell its Toronto - Tokyo route to Air Canada in light of CAIL's severe financial difficulty and the certainty of cessation of operations during the Christmas holiday season in the absence of such a sale.

[130] Further, statements made by CAIL in mid-1999 as to the value of its international routes and operations in response to an offer by Air Canada, reflected the amount CAIL needed to sustain liquidity without its international routes and was not a representation of market value of what could realistically be obtained from an arms length purchaser. The Monitor concluded on its investigation that CAIL's Narida and Heathrow slots had a realizable value of $66 million , which it included in the Liquidation Analysis. I find that this conclusion is supportable and that the Monitor properly concluded that there were no other rights which ought to have been assigned value.

Tax Pools

[131] There are four tax pools identified by Resurgence and the Minority Shareholders that are material: capital losses at the CAC level, undepreciated capital cost pools, operating losses incurred by Canadian and potential for losses to be reinstated upon repayment of fuel tax rebates by CAIL.

Capital Loss Pools

[132] The capital loss pools at CAC will not be available to Air Canada since CAC is to be left out of the corporate reorganization and will be severed from CAIL. Those capital losses

can essentially only be used to absorb a portion of the debt forgiveness liability associated with the restructuring. CAC, who has virtually all of its senior debt compromised in the plan, receives compensation for this small advantage, which cost them nothing.

Undepreciated capital cost ("UCC")

[133] There is no benefit to Air Canada in the pools of UCC unless it were established that the UCC pools are in excess of the fair market value of the relevant assets, since Air Canada could create the same pools by simply buying the assets on a liquidation at fair market value. Mr. Peterson understood this pool of UCC to be approximately $700 million . There is no evidence that the UCC pool, however, could be considered to be a source of benefit. There is no evidence that this amount is any greater than fair market value.

Operating Losses

[134] The third tax pool complained of is the operating losses. The debt forgiven as a result of the Plan will erase any operating losses from prior years to the extent of such forgiven debt.

Fuel tax rebates

[135] The fourth tax pool relates to the fuel tax rebates system taken advantage of by CAIL in past years. The evidence is that on a consolidated basis the total potential amount of this pool is $297 million. According to Mr. Carty's testimony, CAIL has not been taxable in his ten years as Chief Financial Officer. The losses which it has generated for tax purposes have been sold on a 10 - 1 basis to the government in order to receive rebates of excise tax paid for fuel. The losses can be restored retroactively if the rebates are repaid, but the losses can only be carried forward for a maximum of seven years. The evidence of Mr. Peterson indicates that Air Canada has no plan to use those alleged losses and in order for them to be useful to Air Canada, Air Canada would have to complete a legal merger with CAIL, which is not provided for in the plan and is not contemplated by Air Canada until some uncertain future date. In my view, the Monitor's conclusion that there was no value to any tax pools in the Liquidation Analysis is sound.

[136] Those opposed to the Plan have raised the spectre that there may be value unaccounted for in this liquidation analysis or otherwise. Given the findings above, this is merely speculation and is unsupported by any concrete evidence.

c. Alternatives to the Plan

[137] When presented with a plan, affected stakeholders must weigh their options in the light of commercial reality. Those options are typically liquidation measured against the plan proposed. If not put forward, a hope for a different or more favourable plan is not an option and no basis upon which to assess fairness. On a purposive approach to the CCAA, what is fair and reasonable must be assessed against the effect of the Plan on the creditors and their various claims, in the context of their response to the plan. Stakeholders are expected to decide their fate based on realistic, commercially viable alternatives (generally seen as the prime motivating factor in any business decision) and not on speculative desires or hope for the

future. As Farley J. stated in ***Re T. Eaton Co.*** (1999) O.J. No. 4216 (Ont. Sup. Ct.) at paragraph 6:

> One has to be cognizant of the function of a balancing of their prejudices. Positions must be realistically assessed and weighed, all in the light of what an alternative to a successful plan would be. Wishes are not a firm foundation on which to build a plan; nor are ransom demands.

[138] The evidence is overwhelming that all other options have been exhausted and have resulted in failure. The concern of those opposed suggests that there is a better plan that Air Canada can put forward. I note that significant enhancements were made to the plan during the process. In any case, this is the Plan that has been voted on. The evidence makes it clear that there is not another plan forthcoming. As noted by Farley J. in ***T. Eaton Co,*** *supra*, "no one presented an alternative plan for the interested parties to vote on" (para. 8).

d. Oppression

Oppression and the CCAA

[139] Resurgence and the Minority Shareholders originally claimed that the Plan proponents, CAC and CAIL and the Plan supporters 853350 and Air Canada had oppressed, unfairly disregarded or unfairly prejudiced their interests, under Section 234 of the ABCA. The Minority Shareholders (for reasons that will appear obvious) have abandoned that position.

[140] Section 234 gives the court wide discretion to remedy corporate conduct that is unfair. As remedial legislation, it attempts to balance the interests of shareholders, creditors and management to ensure adequate investor protection and maximum management flexibility. The Act requires the court to judge the conduct of the company and the majority in the context of equity and fairness: ***First Edmonton Place Ltd. v. 315888 Alberta Ltd.***, (1988) 40 B.L.R.28 (Alta. Q.B.). Equity and fairness are measured against or considered in the context of the rights, interests or reasonable expectations of the complainants: ***Re Diligenti v. RWMD Operations Kelowna*** (1976), 1 B.C.L.R. 36 (S.C).

[141] The starting point in any determination of oppression requires an understanding as to what the rights, interests, and reasonable expectations are and what the damaging or detrimental effect is on them. MacDonald J. stated in ***First Edmonton Place,*** *supra* at 57***:***

> In deciding what is unfair, the history and nature of the corporation, the essential nature of the relationship between the corporation and the creditor, the type of rights affected in general commercial practice should all be material. More concretely, the test of unfair prejudice or unfair disregard should encompass the following considerations: The protection of the underlying expectation of a creditor in the arrangement with the corporation, the extent to which the acts complained of were unforeseeable where the creditor could not reasonably have protected itself from such acts and the detriment to the interests of the creditor.

[142] While expectations vary considerably with the size, structure, and value of the corporation, all expectations must be reasonably and objectively assessed: ***Pente Investment Management Ltd. v. Schneider Corp.*** (1998), 42 O.R. (3d) 177 (C.A.).

[143] Where a company is insolvent, only the creditors maintain a meaningful stake in its assets. Through the mechanism of liquidation or insolvency legislation, the interests of shareholders are pushed to the bottom rung of the priority ladder. The expectations of creditors and shareholders must be viewed and measured against an altered financial and legal landscape. Shareholders cannot reasonably expect to maintain a financial interest in an insolvent company where creditors' claims are not being paid in full. It is through the lens of insolvency that the court must consider whether the acts of the company are in fact oppressive, unfairly prejudicial or unfairly disregarded. CCAA proceedings have recognized that shareholders may not have "a true interest to be protected" because there is no reasonable prospect of economic value to be realized by the shareholders given the existing financial misfortunes of the company: ***Re Royal Oak Mines Ltd.***, *supra*, para. 4., ***Re Cadillac Fairview***, [1995] O.J. 707 (Ont. Sup. Ct), and ***Re T. Eaton Company,*** *supra*.

[144] To avail itself of the protection of the CCAA, a company must be insolvent. The CCAA considers the hierarchy of interests and assesses fairness and reasonableness in that context. The court's mandate not to sanction a plan in the absence of fairness necessitates the determination as to whether the complaints of dissenting creditors and shareholders are legitimate, bearing in mind the company's financial state. The articulated purpose of the Act and the jurisprudence interpreting it, "widens the lens" to balance a broader range of interests that includes creditors and shareholders and beyond to the company, the employees and the public, and tests the fairness of the plan with reference to its impact on all of the constituents.

[145] It is through the lens of insolvency legislation that the rights and interests of both shareholders and creditors must be considered. The reduction or elimination of rights of both groups is a function of the insolvency and not of oppressive conduct in the operation of the CCAA. The antithesis of oppression is fairness, the guiding test for judicial sanction. If a plan unfairly disregards or is unfairly prejudicial it will not be approved. However, the court retains the power to compromise or prejudice rights to effect a broader purpose, the restructuring of an insolvent company, provided that the plan does so in a fair manner.

Oppression allegations by Resurgence

[146] Resurgence alleges that it has been oppressed or had its rights disregarded because the Petitioners and Air Canada disregarded the specific provisions of their trust indenture, that Air Canada and 853350 dealt with other creditors outside of the CCAA, refusing to negotiate with Resurgence and that they are generally being treated inequitably under the Plan.

[147] The trust indenture under which the Unsecured Notes were issued required that upon a "change of control", 101% of the principal owing thereunder, plus interest would be immediately due and payable. Resurgence alleges that Air Canada, through 853350, caused CAC and CAIL to purposely fail to honour this term. Canadian acknowledges that the trust indenture was breached. On February 1, 2000, Canadian announced a moratorium on payments to lessors and lenders, including the Unsecured Noteholders. As a result of this

moratorium, Canadian defaulted on the payments due under its various credit facilities and aircraft leases.

[148] The moratorium was not directed solely at the Unsecured Noteholders. It had the same impact on other creditors, secured and unsecured. Canadian, as a result of the moratorium, breached other contractual relationships with various creditors. The breach of contract is not sufficient to found a claim for oppression in this case. Given Canadian's insolvency, which Resurgence recognized, it cannot be said that there was a reasonable expectation that it would be paid in full under the terms of the trust indenture, particularly when Canadian had ceased making payments to other creditors as well.

[149] It is asserted that because the Plan proponents engaged in a restructuring of Canadian's debt before the filing under the CCAA, that its use of the Act for only a small group of creditors, which includes Resurgence is somehow oppressive.

[150] At the outset, it cannot be overlooked that the CCAA does not require that a compromise be proposed to <u>all</u> creditors of an insolvent company. The CCAA is a flexible, remedial statute which recognizes the unique circumstances that lead to and away from insolvency.

[151] Next, Air Canada made it clear beginning in the fall of 1999 that Canadian would have to complete a financial restructuring so as to permit Air Canada to acquire CAIL on a financially sound basis and as a wholly owned subsidiary. Following the implementation of the moratorium, absent which Canadian could not have continued to operate, Canadian and Air Canada commenced efforts to restructure significant obligations by consent. They perceived that further damage to public confidence that a CCAA filing could produce, required Canadian to secure a substantial measure of creditor support in advance of any public filing for court protection. Before the Petitioners started the CCAA proceedings on March 24, 2000, Air Canada, CAIL and lessors of 59 aircraft in its fleet had reached agreement in principle on the restructuring plan.

[152] The purpose of the CCAA is to create an environment for negotiations and compromise. Often it is the stay of proceedings that creates the necessary stability for that process to unfold. Negotiations with certain key creditors in advance of the CCAA filing, rather than being oppressive or conspiratorial, are to be encouraged as a matter of principle if their impact is to provide a firm foundation for a restructuring. Certainly in this case, they were of critical importance, staving off liquidation, preserving cash flow and allowing the Plan to proceed. Rather than being detrimental or prejudicial to the interests of the other stakeholders, including Resurgence, it was beneficial to Canadian and all of its stakeholders.

[153] Resurgence complained that certain transfers of assets to Air Canada and its actions in consolidating the operations of the two entities prior to the initiation of the CCAA proceedings were unfairly prejudicial to it.

[154] The evidence demonstrates that the sales of the Toronto - Tokyo route, the Dash 8s and the simulators were at the suggestion of Canadian, who was in desperate need of operating cash. Air Canada paid what Canadian asked, based on its cash flow requirements. The

evidence established that absent the injection of cash at that critical juncture, Canadian would have ceased operations. It is for that reason that the Government of Canada willingly provided the approval for the transfer on December 21, 2000.

[155] Similarly, the renegotiation of CAIL's aircraft leases to reflect market rates supported by Air Canada covenant or guarantee has been previously dealt with by this court and found to have been in the best interest of Canadian, not to its detriment. The evidence establishes that the financial support and corporate integration that has been provided by Air Canada was not only in Canadian's best interest, but its only option for survival. The suggestion that the renegotiations of these leases, various sales and the operational realignment represents an assumption of a benefit by Air Canada to the detriment of Canadian is not supported by the evidence.

[156] I find the transactions predating the CCAA proceedings, were in fact Canadian's life blood in ensuring some degree of liquidity and stability within which to conduct an orderly restructuring of its debt. There was no detriment to Canadian or to its creditors, including its unsecured creditors. That Air Canada and Canadian were so successful in negotiating agreements with their major creditors, including aircraft financiers, without resorting to a stay under the CCAA underscores the serious distress Canadian was in and its lenders recognition of the viability of the proposed Plan.

[157] Resurgence complained that other significant groups held negotiations with Canadian. The evidence indicates that a meeting was held with Mr. Symington, Managing Director of Resurgence, in Toronto in March 2000. It was made clear to Resurgence that the pool of unsecured creditors would be somewhere between $500 and $700 million and that Resurgence would be included within that class. To the extent that the versions of this meeting differ, I prefer and accept the evidence of Mr. Carty. Resurgence wished to play a significant role in the debt restructuring and indicated it was prepared to utilize the litigation process to achieve a satisfactory result for itself. It is therefore understandable that no further negotiations took place. Nevertheless, the original offer to affected unsecured creditors has been enhanced since the filing of the plan on April 25, 2000. The enhancements to unsecured claims involved the removal of the cap on the unsecured pool and an increase from 12 to 14 cents on the dollar.

[158] The findings of the Commissioner of Competition establishes beyond doubt that absent the financial support provided by Air Canada, Canadian would have failed in December 1999. I am unable to find on the evidence that Resurgence has been oppressed. The complaint that Air Canada has plundered Canadian and robbed it of its assets is not supported but contradicted by the evidence. As described above, the alternative is liquidation and in that event the Unsecured Noteholders would receive between one and three cents on the dollar. The Monitor's conclusions in this regard are supportable and I accept them.

e. Unfairness to Shareholders

[159] The Minority Shareholders essentially complained that they were being unfairly stripped of their only asset in CAC - the shares of CAIL. They suggested they were being squeezed out by the new CAC majority shareholder 853350, without any compensation or any

vote. When the reorganization is completed as contemplated by the Plan , their shares will remain in CAC but CAC will be a bare shell.

[160] They further submitted that Air Canada's cash infusion, the covenants and guarantees it has offered to aircraft financiers, and the operational changes (including integration of schedules, "quick win" strategies, and code sharing) have all added significant value to CAIL to the benefit of its stakeholders, including the Minority Shareholders. They argued that they should be entitled to continue to participate into the future and that such an expectation is legitimate and consistent with the statements and actions of Air Canada in regard to integration. By acting to realign the airlines before a corporate reorganization, the Minority Shareholders asserted that Air Canada has created the expectation that it is prepared to consolidate the airlines with the participation of a minority. The Minority Shareholders take no position with respect to the debt restructuring under the CCAA, but ask the court to sever the corporate reorganization provisions contained in the Plan.

[161] Finally, they asserted that CAIL has increased in value due to Air Canada's financial contributions and operational changes and that accordingly, before authorizing the transfer of the CAIL shares to 853350, the current holders of the CAIL Preferred Shares, the court must have evidence before it to justify a transfer of 100% of the equity of CAIL to the Preferred Shares.

[162] That CAC will have its shareholding in CAIL extinguished and emerge a bare shell is acknowledged. However, the evidence makes it abundantly clear that those shares, CAC's "only asset", have no value. That the Minority Shareholders are content to have the debt restructuring proceed suggests by implication that they do not dispute the insolvency of both Petitioners, CAC and CAIL.

[163] The Minority Shareholders base their expectation to remain as shareholders on the actions of Air Canada in acquiring only 82% of the CAC shares before integrating certain of the airlines' operations. Mr. Baker (who purchased <u>after</u> the Plan was filed with the Court and almost six months after the take over bid by Air Canada) suggested that the contents of the bid circular misrepresented Air Canada's future intentions to its shareholders. The two dollar price offered and paid per share in the bid must be viewed somewhat skeptically and in the context in which the bid arose. It does not support the speculative view that some shareholders hold, that somehow, despite insolvency, their shares have some value on a going concern basis. In any event, any claim for misrepresentation that Minority Shareholders might have arising from the take over bid circular against Air Canada or 853350 , if any, is unaffected by the Plan and may be pursued after the stay is lifted.

[164] In considering Resurgence's claim of oppression I have already found that the financial support of Air Canada during this restructuring period has benefited Canadian and its stakeholders. Air Canada's financial support and the integration of the two airlines has been critical to keeping Canadian afloat. The evidence makes it abundantly clear that without this support Canadian would have ceased operations. However it has not transformed CAIL or CAC into solvent companies.

[165] The Minority Shareholders raise concerns about assets that are ascribed limited or no value in the Monitor’s report as does Resurgence (although to support an opposite proposition). Considerable argument was directed to the future operational savings and profitability forecasted for Air Canada, its subsidiaries and CAIL and its subsidiaries. Mr. Peterson estimated it to be in the order of $650 to $800 million on an annual basis, commencing in 2001. The Minority Shareholders point to the tax pools of a restructured company that they submit will be of great value once CAIL becomes profitable as anticipated. They point to a pension surplus that at the very least has value by virtue of the contribution holidays that it affords. They also look to the value of the compromised claims of the restructuring itself which they submit are in the order of $449 million. They submit these cumulative benefits add value, currently or at least realizable in the future. In sharp contrast to the Resurgence position that these acts constitute oppressive behaviour, the Minority Shareholders view them as enhancing the value of their shares. They go so far as to suggest that there may well be a current going concern value of the CAC shares that has been conveniently ignored or unquantified and that the Petitioners must put evidence before the court as to what that value is.

[166] These arguments overlook several important facts, the most significant being that CAC and CAIL are insolvent and will remain insolvent until the debt restructuring is fully implemented. These companies are not just technically or temporarily insolvent, they are massively insolvent. Air Canada will have invested upward of $3 billion to complete the restructuring, while the Minority Shareholders have contributed nothing. Further, it was a fundamental condition of Air Canada’s support of this Plan that it become the sole owner of CAIL. It has been suggested by some that Air Canada’s share purchase at two dollars per share in December 1999 was unfairly prejudicial to CAC and CAIL’s creditors. Objectively, any expectation by Minority Shareholders that they should be able to participate in a restructured CAIL is not reasonable.

[167] The Minority Shareholders asserted the plan is unfair because the effect of the reorganization is to extinguish the common shares of CAIL held by CAC and to convert the voting and non-voting Preferred Shares of CAIL into common shares of CAIL. They submit there is no expert valuation or other evidence to justify the transfer of CAIL’s equity to the Preferred Shares. There is no equity in the CAIL shares to transfer. The year end financials show CAIL’s shareholder equity at a deficit of $790 million. The Preferred Shares have a liquidation preference of $347 million. There is no evidence to suggest that Air Canada’s interim support has rendered either of these companies solvent, it has simply permitted operations to continue. In fact, the unaudited consolidated financial statements of CAC for the quarter ended March 31, 2000 show total shareholders equity went from a deficit of $790 million to a deficit of $1.214 million, an erosion of $424 million.

[168] The Minority Shareholders’ submission attempts to compare and contrast the rights and expectations of the CAIL preferred shares as against the CAC common shares. This is not a meaningful exercise; the Petitioners are not submitting that the Preferred Shares have value and the evidence demonstrates unequivocally that they do not. The Preferred Shares are merely being utilized as a corporate vehicle to allow CAIL to become a wholly owned subsidiary of Air Canada. For example, the same result could have been achieved by issuing new shares rather than changing the designation of 853350's Preferred Shares in CAIL.

[169] The Minority Shareholders have asked the court to sever the reorganization from the debt restructuring, to permit them to participate in whatever future benefit might be derived from the restructured CAIL. However, a fundamental condition of this Plan and the expressed intention of Air Canada on numerous occasions is that CAIL become a wholly owned subsidiary. To suggest the court ought to sever this reorganization from the debt restructuring fails to account for the fact that it is not two plans but an integral part of a single plan. To accede to this request would create an injustice to creditors whose claims are being seriously compromised, and doom the entire Plan to failure. Quite simply, the Plan's funder will not support a severed plan.

[170] Finally, the future profits to be derived by Air Canada are not a relevant consideration. While the object of any plan under the CCAA is to create a viable emerging entity, the germane issue is what a prospective purchaser is prepared to pay in the circumstances. Here, we have the one and only offer on the table, Canadian's last and only chance. The evidence demonstrates this offer is preferable to those who have a remaining interest to a liquidation. Where secured creditors have compromised their claims and unsecured creditors are accepting 14 cents on the dollar in a potential pool of unsecured claims totalling possibly in excess of $1 billion , it is not unfair that shareholders receive nothing.

e. The Public Interest

[171] In this case, the court cannot limit its assessment of fairness to how the Plan affects the direct participants. The business of the Petitioners as a national and international airline employing over 16,000 people must be taken into account.

[172] In his often cited article, ***Reorganizations Under the Companies' Creditors Arrangement Act*** (1947), 25 Can.Bar R.ev. 587 at 593 Stanley Edwards stated:

> Another reason which is usually operative in favour of reorganization is the interest of the public in the continuation of the enterprise, particularly if the company supplies commodities or services that are necessary or desirable to large numbers of consumers, or if it employs large numbers of workers who would be thrown out of employment by its liquidation. This public interest may be reflected in the decisions of the creditors and shareholders of the company and is undoubtedly a factor which a court would wish to consider in deciding whether to sanction an arrangement under the C.C.A.A.

[173] In ***Re Repap British Columbia Inc.*** (1998), 1 C.B.R. 449 (B.C.S.C.) the court noted that the fairness of the plan must be measured against the overall economic and business environment and against the interests of the citizens of British Columbia who are affected as "shareholders" of the company, and creditors, of suppliers, employees and competitors of the company. The court approved the plan even though it was unable to conclude that it was necessarily fair and reasonable. In ***Re Quintette Coal Ltd.,*** *supra*, Thackray J. acknowledged the significance of the coal mine to the British Columbia economy, its importance to the people who lived and worked in the region and to the employees of the company and their families. Other cases in which the court considered the public interest in determining whether to sanction a plan under the CCAA include ***Canadian Red Cross Society (Re)***, (1998),5

C.B.R.(4th) (Ont. Gen. Div.) and ***Algoma Steel Corp. v. Royal Bank of Canada (Trustee of***), [1992] O.J. No. 795 (Ont. Gen. Div.)

[174] The economic and social impacts of a plan are important and legitimate considerations. Even in insolvency, companies are more than just assets and liabilities. The fate of a company is inextricably tied to those who depend on it in various ways. It is difficult to imagine a case where the economic and social impacts of a liquidation could be more catastrophic. It would undoubtedly be felt by Canadian air travellers across the country. The effect would not be a mere ripple, but more akin to a tidal wave from coast to coast that would result in chaos to the Canadian transportation system.

[175] More than sixteen thousand unionized employees of CAIL and CRAL appeared through counsel. The unions and their membership strongly support the Plan. The unions represented included the Airline Pilots Association International, the International Association of Machinists and Aerospace Workers, Transportation District 104, Canadian Union of Public Employees, and the Canadian Auto Workers Union. They represent pilots, ground workers and cabin personnel. The unions submit that it is essential that the employee protections arising from the current restructuring of Canadian not be jeopardized by a bankruptcy, receivership or other liquidation. Liquidation would be devastating to the employees and also to the local and national economies. The unions emphasize that the Plan safeguards the employment and job dignity protection negotiated by the unions for their members. Further, the court was reminded that the unions and their members have played a key role over the last fifteen years or more in working with Canadian and responsible governments to ensure that Canadian survived and jobs were maintained.

[176] The Calgary and Edmonton Airport authorities, which are not for profit corporations, also supported the Plan. CAIL's obligations to the airport authorities are not being compromised under the Plan. However, in a liquidation scenario, the airport authorities submitted that a liquidation would have severe financial consequences to them and have potential for severe disruption in the operation of the airports.

[177] The representations of the Government of Canada are also compelling. Approximately one year ago, CAIL approached the Transport Department to inquire as to what solution could be found to salvage their ailing company. The Government saw fit to issue an order in council, pursuant to section 47 of the ***Transportation Act*** , which allowed an opportunity for CAIL to approach other entities to see if a permanent solution could be found. A standing committee in the House of Commons reviewed a framework for the restructuring of the airline industry, recommendations were made and undertakings were given by Air Canada. The Government was driven by a mandate to protect consumers and promote competition. It submitted that the Plan is a major component of the industry restructuring. Bill C-26, which addresses the restructuring of the industry, has passed through the House of Commons and is presently before the Senate. The Competition Bureau has accepted that Air Canada has the only offer on the table and has worked very closely with the parties to ensure that the interests of consumers, employees, small carriers, and smaller communities will be protected.

[178] In summary, in assessing whether a plan is fair and reasonable, courts have emphasized that perfection is not required: see for example ***Wandlyn Inns Ltd. (Re)*** (1992), 15 C.B.R. (3d)

316 (N.BQ.B), ***Quintette Coal***, *supra* and ***Repap***, *supra*. Rather, various rights and remedies must be sacrificed to varying degrees to result in a reasonable, viable compromise for all concerned. The court is required to view the "big picture" of the plan and assess its impact as a whole. I return to ***Algoma Steel v. Royal Bank of Canada***., *supra* at 9 in which Farley J. endorsed this approach:

> What might appear on the surface to be unfair to one party when viewed in relation to all other parties may be considered to be quite appropriate.

[179] Fairness and reasonableness are not abstract notions, but must be measured against the available commercial alternatives. The triggering of the statute, namely insolvency, recognizes a fundamental flaw within the company. In these imperfect circumstances there can never be a perfect plan, but rather only one that is supportable. As stated in ***Re Sammi Atlas Inc***., (1998), 3C.B.R. (4th) 171 at 173 (Ont. Sup. Ct.) at 173:

> A plan under the CCAA is a compromise; it cannot be expected to be perfect. It should be approved if it is fair, reasonable and equitable. Equitable treatment is not necessarily equal treatment. Equal treatment may be contrary to equitable treatment.

[180] I find that in all the circumstances, the Plan is fair and reasonable.

IV. CONCLUSION

[181] The Plan has obtained the support of many affected creditors, including virtually all aircraft financiers, holders of executory contracts, AMR, Loyalty Group and the Senior Secured Noteholders.

[182] Use of these proceedings has avoided triggering more than $1.2 billion of incremental claims. These include claims of passengers with pre-paid tickets, employees, landlords and other parties with ongoing executory contracts, trade creditors and suppliers.

[183] This Plan represents a solid chance for the continued existence of Canadian. It preserves CAIL as a business entity. It maintains over 16,000 jobs. Suppliers and trade creditors are kept whole. It protects consumers and preserves the integrity of our national transportation system while we move towards a new regulatory framework. The extensive efforts by Canadian and Air Canada, the compromises made by stakeholders both within and without the proceedings and the commitment of the Government of Canada inspire confidence in a positive result.

[184] I agree with the opposing parties that the Plan is not perfect, but it is neither illegal nor oppressive. Beyond its fair and reasonable balancing of interests, the Plan is a result of bona fide efforts by all concerned and indeed is the only alternative to bankruptcy as ten years of struggle and creative attempts at restructuring by Canadian clearly demonstrate. This Plan is one step toward a new era of airline profitability that hopefully will protect consumers by promoting affordable and accessible air travel to all Canadians.

[185] The Plan deserves the sanction of this court and it is hereby granted. The application pursuant to section 185 of the ABCA is granted. The application for declarations sought by Resurgence are dismissed. The application of the Minority Shareholders is dismissed.

HEARD on the 5th day of June to the 19th day of June, 2000.
DATED at Calgary, Alberta this 27th day of June, 2000.

____
J.C.Q.B.A.

APPEARANCES:

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Alberta Court of Queen's Bench
Canadian Airlines Corp. (Re)
Date: 2000-05-12

See paras. 18, 31

A.L. Friend, Q.C., H.M. Kay, Q.C., and R.B. Low, Q.C., for Canadian Airlines.

V.P. Lalonde and Ms M. Lalonde, for AMR Corporation.

S. Dunphy, for Air Canada.

P.T. McCarthy, Q.C., for PricewaterhouseCoopers.

D. Nishimura, for Resurgence Asset Management LLC.

E. Halt, for Claims Officer.

A.J. McConnell, for Bank of Nova Scotia Trust Company of New York and Montreal Trust Co. of Canada.

(Calgary No. 0001-05071)

May 12, 2000.

[1] PAPERNY J. (orally): — Resurgence Asset Management LLC "Resurgence" appeared on behalf of holders of approximately 60 percent of the unsecured notes issued by Canadian Airlines Corporation in the total amount of $100 million U.S. These unsecured note holders are proposed to be classified as unsecured creditors in the plan that is the subject of these proceedings.

[2] Resurgence applied for the following relief:

1. An order lifting the stay of proceedings against Canadian Airlines Corporation and Canadian Airlines International Ltd. (respectively "CAC" and "CAIL" and collectively called "Canadian") to permit Resurgence to commence and proceed with an oppression action against Canadian, Air Canada and others.

2. Further, and in the alternative, Resurgence sought the same relief described in item one above in the context of the C.C.A.A. proceedings.

3. An order that any and all unsecured claims held or controlled, directly or indirectly by Air Canada shall be placed in a separate class and either not allowed to be voted at all, or, alternatively, allowed to be voted in separate class from all other affected unsecured claims.

4. An order that there be a separation in class between creditors of CAC and CAIL

5. An order striking Section 6.2(2)(ii) of the plan on the basis that it is contrary to the C.C.A.A.

[3] Resurgence abandoned the application described in item 1 above, and the application in item 2 was addressed in my ruling given May 8, 2000, in these proceedings.

Standing

[4] Prior to dealing with the remaining issues of classification, voting and Section 6.2(2)(ii) of the plan, the issue of standing needs to be addressed. This was a matter of some debate, largely in the context of the first two applications. Canadian argued that Resurgence was only a fund manager and did not hold the unsecured notes, beneficially or otherwise, and, accordingly, did not have standing to make any of the applications. The evidence establishes that Resurgence is not the legal owner and the evidence of beneficial ownership is equivocal.

[5] Canadian has not raised this issue on any of the previous occasions on which Resurgence has been before the court in these proceedings. There has been a consent order involving Resurgence and Canadian.

[6] In my view, it is not appropriate now for Canadian to suggest that Resurgence does not represent the interests of the holders of 60 percent of the unsecured notes and essentially seek a declaration that Resurgence is a stranger to these proceedings.

[7] I am not prepared to dismiss the applications of Resurgence on classification, voting and amending the plan out of hand on the basis of standing.

[8] Resurgence was also supported in these applications by the senior secured note holders. For the purposes of these applications, I accept that Resurgence is representing the interests of 60 percent of the unsecured note holders.

Classification of Air Canada's Unsecured Claim

[9] By my April 14, 2000 order in these proceedings, I approved transactions involving CAIL, a large number of aircraft lessors and Air Canada, which achieved approximately $200 million worth of concessions for CAIL. In exchange for granting the concession, each creditor received a guarantee from Air Canada and the assurance that the creditor would immediately cease to be affected by the C.C.A.A. proceedings.

[10] These concessions or deficiency claims were quantified and reflected in promissory notes which were assigned to Air Canada in exchange for its guarantee of the aircraft leases. The monitor approved the method of quantifying these claims and recognized the value of the concessions to Canadian. In that order I reserved the issue of classification and voting to be determined at some later date. The plan provides for two classes of creditors, secured and unsecured.

[11] The unsecured class is composed of a number of types of unsecured claims, including aircraft financings, executory contracts, unsecured notes, litigation claims, real estate leases and the deficiencies, if any, of the senior secured note holders.

[12] In one portion of the application, Resurgence seeks to have Air Canada vote the promissory notes in separate class and relied on several factors to distinguish the claims of other Affected, Unsecured Creditors from Air Canada's unsecured claim, including the following:

1. The Air Canada appointed board caused Canadian to enter into these C.C.A.A. proceedings under which Air Canada stands to gain substantial benefits in its own operations and in the merged operations and ownership contemplated after the compromise of debts under the plan.

2. Air Canada is providing the fund of money to be distributed to the Affected Unsecured Creditors and will, therefore, end up paying itself a portion of that money if it is included in the Affected Unsecured Creditors' class and permitted to vote.

3. Air Canada gave no real consideration in acquiring the deficiency claims and manufactured them only to secure a 'yes' vote.

[13] Air Canada and Canadian argue that the legal right associated with Air Canada's unsecured promissory notes and with the other Affected, Unsecured Claims, are the same and that the matters raised by Resurgence, as relating to classification, are really matters of fairness, more appropriately dealt with at the fairness hearing. Air Canada and Canadian emphasized that classification must be determined according to the rights of the creditors, not their personalities.

[14] The starting point in determining classification is the statute under which the parties are operating and from which the court obtains its jurisdiction. The primary purpose of the C.C.A.A. is to facilitate the re-organization of insolvent companies, and this goal must be given proper consideration at every stage of the C.C.A.A. process, including classification of claims; see, for example, *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 20 (Alta. Q.B.)

[15] Beyond identifying secured and unsecured classes, the C.C.A.A. does not offer any guidance to the classification of claims. The process, instead, has developed in the case law.

[16] A frequently cited description of the method of classification of creditors for the purposes of voting on a plan, under the C.C.A.A., is *Sovereign Life Assurance Co. v Dodd* (1891), [1892] 2 Q.B. 573 (Eng. C.A.).

[17] At page 583 (Q.B.), Bowen, L.J. stated:

> The word 'class' is vague and to find out what is meant by it, we must look at the scope of the section which is a section enabling the court to order a meeting of a class of creditors to be called. It seems plain that we must give such a meaning to the term 'class' as will prevent the section being so worked as to result in confiscation and injustice, and that it must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with the view to their common interest.

This test has been described as the "commonality of interest" test. All counsel agree that this is the test to apply in classification of claims under the C.C.A.A. However, there is a dispute on the types of interests that are to be considered in determining commonality.

[18] Generally, the cases hold that classification is a fact-driven determination unique to the circumstances of every case, upon which the court should be loathe to impose rules for universal application, particularly in light of the flexible and remedial jurisdiction involved; see, for example, *Re Fairview Industries Ltd.* (1991), 11 C.B.R. (3d) 71 (N.S. T.D.)

[19] The majority of the cases presented to me, held that commonality of the interest is to be determined by the rights the creditor has vis-a-vis the debtor. Courts have also found it helpful to consider the context of the proposed plan and treatment of creditors under a liquidation scenario. In the absence of bad faith, motivation for supporting or rejecting a plan is not a classification issue in the authorities.

[20] In considering what interests are included in the commonality of interest test, Forsyth J., in *Norcen Energy Resources Ltd.* (Supra) had to determine whether all the secured creditors of the company ought to be included in one class. The creditors all had first-charge security and the same method of valuation was applied to each secured claim in order to determine security value under the plan. The distinguishing features were submitted to be based on the difference in the security held, including ease of marketability and realization potential. In holding that a separate class was not necessary, Forsyth J., said at page 29:

> Different security positioning and changing security values are a fact of life in the world of secured financing. To accept this argument would again result in a different class of creditor for each secured lender.

In doing so, Forsyth J. rejected the "identity of the interest" approach in which creditors in a class must have identical interests.

[21] It was also submitted in *Norcen Energy Resources Ltd.* that since the purchaser under the plan had made financing arrangements with the Royal Bank, the bank had an interest not shared by the other secured creditors. Forsyth J., held that in the absence of any allegation that the Royal Bank was not acting bona fide in considering the benefit of the plan, the secured creditors could not be heard to criticize the presence of the Royal Bank in their class.

[22] Forsyth J., also emphasized in *Norcen Energy Resources Ltd.* that the commonality test cannot be considered without also considering the underlying purpose of the C.C.A.A., which is to facilitate reorganizations of insolvent companies. To that end, the court should not approve a classification scheme which would make a reorganization difficult, if not impossible, to achieve. At the same time, while the C.C.A.A. grants the court the authority to alter the legal rights of parties other than the debtor company without their consent, the court will not permit a confiscation of rights or an injustice to occur.

[23] The *Norcen Energy Resources Ltd.* approach was specifically adopted in British Columbia in *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada* (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.), where it was held that various mortgagees with different mortgages against different properties were included in the same class.

[24] In *Savage v. Amoco Acquisition Co.* (1988), 68 C.B.R. (N.S.) 154 (Alta. C.A.) the Alberta Court of Appeal rejected the argument that shareholders who have private arrangements with the applicant or who are brokers or officers or otherwise in a special position vis-a-vis the debtor company, should be put in a special category.

[25] At page 158 the court stated in regard to the test applied to classification:

> We do not think that this rule justifies the division of shareholders into separate classes on the basis of their presumed prior commitment to a point of view. The state of facts, common to all, is that they are all offered this proposal, face as an alternative the break-up of this apparently insolvent company and hold shares that appear to be worthless on break-up. In any event, any attempt to divide them on the basis suggested, would be futile. One would have as many groups as there are shareholders.

The commonality of interest test was addressed by the British, Columbia Supreme Court in *Re Woodward's Ltd.* (1993), 84 B.C.L.R. (2d) 206 (B.C. S.C.). Tysoe J. rejected the identity of interest approach and held that it was permissible to include creditors with different legal rights in the same class, so long as their legal rights were not so dissimilar that it was still possible for them to vote with a common interest.

[26] Tysoe J. went on to find that legal interests should be considered in the context of the proposed plan and that it was also necessary to examine the legal rights of creditors in the context of the possible failure of the plan.

[27] In other words, "interest" for the purpose of classification does not include the personality or identity of the creditor, and the interests it may have in the broader commercial sphere that might influence its decision or predispose it to vote in a particular way; rather, "interest" involves the entitlement of the debt holder viewed within the context of the provisions of the proposed plan. In that regard, see *Woodward's Ltd.* at page 212.

[28] In *Fairview Industries Ltd.*, the court held that in classification there need not be a commonality of interest of debts involved, so long as the legal interests were the same. Justice Glube (as she then was) stated that it did not automatically follow that those with different commercial interests, for example, those with security on "quick" assets, are necessarily in conflict with those with security on "fixed" assets. She stated that just saying there is a conflict is insufficient to warrant separation.

[29] In *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 86 D.L.R. (4th) 621 (Ont. Gen. Div.) at 626 like *Norcen Energy Resources Ltd.,* the "identity of interests" approach was rejected. The court preserved a class of creditors which included debenture holders, terminated employees, realty lessors and equipment lessors.

[30] Borins J. held that not every difference in the nature of the debt warrants a separate class and that in placing a broad and purposive interpretation on the C.C.A.A., the court should "take care to resist approaches which would potentially jeopardize a potentially viable plan." He observed that "excessive fragmentation is counterproductive to the legislative intent to facilitate corporate reorganization" and that it would be "improper to create a special class simply for the benefit of an opposing creditor which would give that creditor the potential to exercise an unwarranted degree of power." (p. 627).

[31] In summary, the cases establish the following principles applicable to assessing commonality of interest:

1. Commonality of interest should be viewed on the basis of the non-fragmentation test, not on an identity of interest test;

2. The interests to be considered are the legal interests the creditor holds qua creditor in relationship to the debtor company, prior to and under the plan as well as on liquidation;

3. The commonality of these interests are to be viewed purposively, bearing in mind the object of the C.C.A.A., namely to facilitate reorganizations if at all possible;

4. In placing a broad and purposive interpretation on the C.C.A.A., the court should be careful to resist classification approaches which would potentially jeopardize potentially viable plans.

5. Absent bad faith, the motivations of the creditors to approve or disapprove are irrelevant.

6. The requirement of creditors being able to consult together means being able to assess their legal entitlement *as creditors* before or after the plan in a similar manner.

[32] With this background, I will make several observations relating to the reasons asserted by Resurgence that distinguish Air Canada from the rest of the Affected Unsecured Creditors.

[33] The first two reasons given relate to interests of Air Canada extraneous to its legal rights as a unsecured creditor. The third reason relates largely to the further assertion that Air Canada should not be allowed to vote at all. The matter of voting is addressed more specifically later in these reasons.

[34] The factors described by Resurgence distinguish between Air Canada and other unsecured creditors relate largely to the fact that Air Canada is the assignee of the unsecured debt. In my view, that approach is to be discouraged at the classification stage. To require the court to consider who holds the claim, as distinct from what they hold, at that point would be untenable. I note that Mr. Edwards recognizes in 1947 in his article, *"Reorganizations under the Companies Creditors Arrangement Act",* (1947), 25 Cdn. Bar Rev. 587, and observe this concern is heightened in the current commercial reality of debt trading.

[35] Resurgence also asserted that a court should avoid placing creditors with a potential conflict of interest in the same class and relies on *Re NsC Diesel Power Inc.* (1990), 79 C.B.R. (N.S.) 1 (N.S. T.D.), a case in which the court considered a potential conflict of interest between subcontractors and direct contractors. To the extent this case can be seen as decided on the basis of the distinct legal rights of the creditors, I agree with the result. To the extent that the case determined that a class could be separated based

on a conflict of interest not based on legal right, I disagree. In my view, this would be the sort of issue the court should consider at the fairness hearing.

[36] Resurgence also relied on the decisions of the British Columbia Supreme Court in *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 166 (B.C. S.C.), a case decided prior to *Norcen Energy Resources Ltd..* In that case the court held that a subsidiary wholly owned by Northland Bank was incorporated to purchase certain bonds from Northland in exchange for preferred shares and was not entitled to vote. The court found that would be tantamount to Northland Bank voting in its own reorganization and relied on *Re Wellington Building Corp.,* [1934] O.R. 653, 16 C.B.R. 48 (Ont. S.C.) In this regard. I would note that the passage relied upon at page 5 in that case, in *Wellington Building Corp* (Supra) dealt with whether the scheme, as proposed, was unfair.

[37] All creditors proposed to be included in the class of Affected, Unsecured Creditors, are all unsecured and are treated the same under the plan. All would be treat similarly under the BIA. The plan provides that they will receive 12 cents on the dollar. The Monitor opined that in liquidation unsecured creditors would realize a maximum of 3 cents on the dollar. Their legal interests are essentially the same. Issue is taken with the presence of Air Canada, supporter and funder of the plan, also having taken an assignment of a substantial, unsecured claim. However, absent bad faith, who creditors are is not relevant. Air Canada's mere presence in the class does not in and of itself constitute bad faith.

[38] Further, all of these methods of distinguishing Air Canada's unsecured claim at their core are fundamentally issues of fairness which will be addressed by the Court at the fairness hearing on June 5, 2000. I am prepared to give serious consideration to these matters at that time and direct that there be a separate tabulation of the votes cast by Air Canada arising from any assignments of promissory notes they have taken, so that there is an evidentiary record to assist me in assessing the fairness of the vote when and if I am called upon to sanction the plan. This approach was taken by Justice Forsyth in *Norcen Energy Resources Ltd.,* and in my view is consistent with the underlying purpose of the C.C.A.A. I wish to emphasize that the concerns raised by Resurgence will form part of the assessment of the overall fairness of the plan.

[39] Permitting the classification to remain intact for voting purposes will not result in a confiscation of rights of or injustice to the unsecured note holders. Their treatment does not at this point depart from any other Affected Unsecured Creditors and recognizes the similarity of legal rights. Although based on different legal instruments, the legal rights of

the unsecured note holders and Air Canada are essentially the same. Neither has security, nor specific entitlement to assets. Further, the ability of all of the Affected Unsecured Creditors to realize their claims against the debtor companies, depend in significant part, on the company's ability to continue as a going concern.

[40] The separate tabulation of votes will allow the "voice" of unsecured creditors to be heard, while at the same time, permit rather than rule out the possibility that a plan might proceed.

[41] It is important to preserve this possibility in the interests of facilitating the aim of the C.C.A.A. and protecting interests of all constituents. To fracture the class prior to the vote, may have the effect of denying the court jurisdiction to consider sanctioning a plan which may pass the fairness test but which has been rejected by one creditor. This would be contrary to the purpose of the C.C.A.A.

Separating the Claims Against CAC and CAIL

[42] Resurgence briefly argued that since Air Canada's debt is owed by CAIL only, it could only look to CAIL's assets in a bankruptcy and would not be able to look to any CAC assets. In contrast, Resurgence suggested that the unsecured note holders are creditors of both CAIL under a guarantee, and CAC under the notes. Resurgence submitted that the resulting difference in legal rights destroys the commonality of interests.

[43] There is insufficient evidence to suggest that the unsecured note holders are also creditors of CAIL. Counsel referred only to a statement made by Mr. Carty on cross-examination that there was an "unsecured guarantee". However, no documents have been brought to my attention that would support this statement and, in of itself, the statement is not determinative. In any case, I do not have sufficient evidence before me to conclude that there would be a meaningful difference in recoveries for unsecured creditors of CAC and CAIL in the event of bankruptcy. I, therefore, cannot conclude on this basis that rights are being confiscated, unlike Tysoe J.'s ability to do so in *Re Woodward's Ltd.* Simply looking to different assets or pools of assets will not alone fracture a class; some unique additional legal right of value in liquidation going unrecognized in a plan and not balanced by others losing rights as well is needed on the analysis of Tysoe J.

[44] I recognize the struggle between the unsecured note holders, represented by Resurgence on one side, and Air Canada and Canadian on the other. Resurgence fears the inclusion of Air Canada and the Affected Unsecured Creditors' class will swamp the vote. Air Canada and Canadian fear that exclusion of Air Canada will result in the voting down of a plan which, in their view, otherwise stands a realistic chance of approval. As

unsecured creditors, they do share similar legal rights. As supporters or opponents of the plan, they may well have distinctly different financial or strategic interests. I believe that in the circumstances of this case, these other interests and their impact on the plan, are best addressed as matters of fairness at the June 5, 2000 hearing, and in this way, the concerns will be heard by the court without necessarily putting an end to the entire process.

Voting

[45] Although my decision on classification makes it clear that I will permit Air Canada to vote on the plan, I wish to comment further on this issue. Air Canada submitted that it should be entitled to vote the face value of the promissory notes which represent deficiency claims assigned to it from aircraft lessors in the same fashion as any other creditor who has acquired the claims by assignment. All parties accept that deficiency claims such as these would normally be included and voted upon in an unsecured claims class. The request by Resurgence to deny them a vote would have the effect of varying rights associated with those notes.

[46] The concessions achieved in the re-negotiation of the aircraft leases, represent value to CAIL. The methodology of calculation of the claims and their valuation was reviewed by the Monitor and this is not being challenged. Rather, it is because it is Air Canada that now holds them, that it is objectionable to Resurgence. Resurgence asserts that Air Canada manufactured the assignment so it could preserve a 'yes' vote. This, in my view, is a matter going to fairness. Is it fair for Air Canada to vote to share in the pool of cash funded by it for the benefit of unsecured creditors? That matter is best resolved at the fairness hearing.

[47] Resurgence relied on *Northland Properties Ltd.* in which a wholly owned subsidiary of the debtor company was not allowed to vote because to do so would amount to the debtor company voting in its own reorganization. The corporate relationship between Air Canada and CAIL can be distinguished from the parent and wholly owned subsidiary in *Northland Properties Ltd.*. Air Canada is not CAIL's parent and owns 10 percent of a numbered company which owns 82 percent of CAIL. Further, as noted above, the court in *Northland Properties Ltd.* apparently relied on the passage from *Wellington Building Corp* which indicated in that case the court was being asked to approve a plan as fair. Again, the basis on which Resurgence seeks to deprive Air Canada of its vote is really an issue of fairness.

Section 6(2)(2) of the Plan

[48] Resurgence wishes me to strike out Section 6(2)(2) of the plan, which essentially purports to provide a release by affected creditors of all claims based in whole or in part on any act, omission transaction, event or occurrence that took place prior to the effective date in any way relating to the debtor companies and subsidiaries, the C.C.A.A. proceeding or the plan against:

1. The debtor companies and its subsidiaries;

2. The directors, officers and employees;

3. The former directors, officers and employees of the debtor companies and its subsidiaries; or

4. The respective current and former professionals of the entities, including the Monitor, its counsel and its current officers and directors, et cetera. Resurgence submits that this provision constitutes a wholesale release of directors and others which is beyond that permitted by Section 5.1 of the C.C.A.A. CAIL and CAC submit that the proposed release was not intended to preclude rights expressly preserved by the statute and are prepared to amend the plan to state this.

[49] Section 5.1(3) of the C.C.A.A. provides that the court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

[50] In this application of Resurgence, the court must deal with two issues: One, what releases are permitted under the statute; and, two, what releases ought to be permitted, if any, under the plan.

[51] In my view, I will be in a better position to assess the fairness of the proposed compromise of claims which is drafted in extremely broad terms, when I consider the other issues of fairness raised by Resurgence. Accordingly, I leave that matter to the fairness hearing as well.

[52] In summary, the application contained in paragraph (d) of the Resurgence Notice of Motion is dismissed. The application in paragraph (e) is adjourned to June 5, 2000.

Application dismissed.

See para. 45

Ontario Supreme Court
Canadian Red Cross Society/Société canadienne de la Croix-Rouge, Re
Date: 1998-08-19

In the matter of the Companies' Creditors Arrangement Act, R.S.C. 1985 c. C-36

In the matter of a plan of compromise or arrangement of the Canadian Red Cross Society/La Société canadienne de la Croix-Rouge

Ontario Court of Justice, General Division [Commercial List] Blair J.

Judgment: August 19, 1998[1]

Docket: 98-CL-002970

B. Zarnett, B. Empey and J. Latham, for Canadian Red Cross.

E.B. Leonard, S.J. Page and D.S. Ward, for Provinces except Que. and for the Canadian Blood Services.

Jeffrey Carhart, for Héma - Québec and for the Government of Québec.

Marlene Thomas and John Spencer, for the Attorney General of Canada.

Pierre R. Lavigne and Frank Bennett, for Quebec .'86-90 Hepatitis C Claimants.

Pamela Huff and Bonnie Tough, for the 1986-1990 Haemophiliac Hepatitis C Claimants.

Harvin Pitch and Kenneth Arenson, for the 1986-1990 Hepatitis C Class Action Claimants.

Aubrey Kaufman and David Harvey, for the Pre 86/Post 90 Hepatitis C Class Action Claimants.

Bruce Lemer, for B.C. 1986-90 Class Action.

Donna Ring, for HIV Claimants.

David A. Klein, for B.C. Pre-86/Post-90 Hepatitis C Claimants.

David Thompson - Agent for Quebec Pre-86/Post 90 Hepatitis C Claimants.

Michael Kainer, for Service Employees International Union.

I.V.B. Nordheimer, for Bayer Corporation.

R.N. Robertson, Q.C., and S.E. Seigel, for T.D. Bank.

James H. Smellie, for the Canadian Blood Agency.

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[1] Additional reasons at (1998), 5 C.B.R. (4th) 319 (Ont. Gen. Div. [Commercial List]); further additional reasons at (1998), 5 C.B.R. (4th) 321 (Ont. Gen. Div. [Commercial List]).

W.V. Sasso, for the Province of British Columbia.

Justin R. Fogarty, for Raytheon Engineers.

Nancy Spies, for Central Hospital et al (*Co-D*).

M. Thomson, for various physicians.

C.H. Freeman, for Blood Trac System.

***Blair J.*:**

Background and Genesis of the Proceedings

[1] The Canadian Red Cross Society/La Société Canadienne de la Croix Rouge has sought and obtained the insolvency protection and supervision of the Court under the *Companies' Creditors Arrangement Act* ("CCAA"). It has done so with a view to putting forward a Plan to compromise its obligations to creditors and also as part of a national process in which responsibility for the Canadian blood supply is to be transferred from the Red Cross to two new agencies which are to form a new national blood authority to take control of the Canadian Blood Program.

[2] The Red Cross finds itself in this predicament primarily as a result of some $8 billion of tort claims being asserted against it (and others, including governments and hospitals) by a large number of people who have suffered tragic harm from diseases contacted as a result of a blood contamination problem that has haunted the Canadian blood system since at least the early 1980's. Following upon the revelations forthcoming from the wide-ranging and seminal Krever Commission Inquiry on the Blood System in Canada, and the concern about the safety of that system—and indeed alarm—in the general population as a result of those revelations, the federal, provincial and territorial governments decided to transfer responsibility for the Canadian Blood Supply to a new national authority. This new national authority consists of two agencies, the Canadian Blood Service and Héma-Québec.

The Motions

[3] The primary matters for consideration in these Reasons deal with a Motion by the Red Cross for approval of the sale and transfer of its blood supply assets and operations to the two agencies and a cross-Motion on behalf of one of the Groups of Transfusion Claimants for

an order dismissing that Motion and directing the holding of a meeting of creditors to consider a counter-proposal which would see the Red Cross continue to operate the blood system for a period of time and attempt to generate sufficient revenues on a fee-for-blood-service basis to create a compensation fund for victims.

[4] There are other Motions as well, dealing with such things as the appointment of additional Representative Counsel and their funding, and with certain procedural matters pertaining generally to the CCAA proceedings. I will return to these less central motions at the end of these Reasons.

Operation of the Canadian Blood System and Evolution of the Acquisition Agreement

[5] Transfer of responsibility for the operation of the Canadian blood supply system to a new authority will mark the first time that responsibility for a nationally co-ordinated blood system has not been in the hands of the Canadian Red Cross. Its first blood donor clinic was held in January, 1940 - when a national approach to the provision of a blood supply was first developed. Since 1977, the Red Cross has operated the Blood Program furnishing the Canadian health system with a variety of blood and blood products, with funding from the provincial and territorial governments. In 1981, the Canadian Blood Committee, composed of representatives of the governments, was created to oversee the Blood Program on behalf of the Governments. In 1991 this Committee was replaced by the Canadian Blood Agency—whose members are the Ministers of Health for the provinces and territories—as funder and co-ordinator of the Blood Program. The Canadian Blood Agency, together with the federal government’s regulatory agency known as BBR (The Bureau of Biologics and Radiopharmaceuticals) and the Red Cross, are the principal components of the organizational structure of the current Blood Supply System.

[6] In the contemplated new regime, The Canadian Blood Service has been designated as the vehicle by which the Governments in Canada will deliver to Canadians (in all provinces and territories except Quebec) a new fully integrated and accountable Blood Supply System. Quebec has established Héma-Québec as its own blood service within its own health care system, but subject to federal standards and regulations. The two agencies have agreed to work together, and are working in a co-ordinated fashion, to ensure all Canadians have access to safe, secure and adequate supplies of blood, blood products and their alternatives. The scheduled date for the transfer of the Canadian blood supply operations from the Red

Cross to the new agencies was originally September 1, 1998. Following the adjournment of these proceedings on July 31st to today's date, the closing has been postponed. It is presently contemplated to take place shortly after September 18, 1998 if the transaction is approved by the Court.

[7] The assets owned and controlled by the Red Cross are important to the continued viability of the blood supply operations, and to the seamless transfer of those operations in the interests of public health and safety. They also have value. In fact, they are the source of the principal value in the Red Cross's assets which might be available to satisfy the claims of creditors. Their sale was therefore seen by those involved in attempting to structure a resolution to all of these political, social and personal problems, as providing the main opportunity to develop a pool of funds to go towards satisfying the Red Cross's obligations regarding the claims of what are generally referred to in these proceedings as the "Transfusion Claimants". It appears, through, that the Transfusion Claimants did not have much, if any, involvement in the structuring of the proposed resolution.

[8] Everyone recognizes, I think, that the projected pool of funds will not be sufficient to satisfy such claims in full, but it is thought—by the Red Cross and the Governments, in any event—that the proceeds of sale from the transfer of the Society's blood supply assets represent the best hope of maximizing the return on the Society's assets and thus of maximizing the funds available from it to meet its obligations to the Transfusion Claimants.

[9] This umbrella approach—namely, that the blood supply operations must be transferred to a new authority, but that the proceeds generated from that transfer should provide the pool of funds from which the Transfusion Claimants can, and should, be satisfied, so that the Red Cross may avoid bankruptcy and continue its other humanitarian operations—is what led to the marriage of these CCAA proceedings and the transfer of responsibility for the Blood System. The Acquisition Agreement which has been carefully and hotly negotiated over the past 9 months, and the sale from the Red Cross to the new agencies is—at the insistence of the Governments—subject to the approval of the Court, and they are as well conditional upon the Red Cross making an application to restructure pursuant to the CCAA.

[10] The Initial Order was made in these proceedings under the CCAA on July 20th.

The Sale and Transfer Transaction

[11] The Acquisition Agreement provides for the transfer of the operation of the Blood Program from the Red Cross to the Canadian Blood Service and Héma-Québéc, together with employees, donor and patient records and assets relating to the operation of the Program on September 1, 1998. Court approval of the Agreement, together with certain orders to ensure the transfer of clear title to the Purchasers, are conditions of closing.

[12] The sale is expected to generate about $169 million in all, before various deductions. That sum is comprised of a purchase price for the blood supply assets of $132.9 million plus an estimated $36 million to be paid for inventory. Significant portions of these funds are to be held in escrow pending the resolution of different issues; but, in the end, after payment of the balance of the outstanding indebtedness to the T-D Bank (which has advanced a secured line of credit to fund the transfer and re-structuring) and the payment of certain creditors, it is anticipated that a pool of funds amounting to between $70 million and $100 million may be available to be applied against the Transfusion Claims.

[13] In substance, the new agencies are to acquire all fixed assets, inventory, equipment, contracts and leases associated with the Red Cross Blood Program, including intellectual property, information systems, data, software, licences, operating procedures and the very important donor and patient records. There is no doubt that the sale represents the transfer of the bulk of the significant and valuable assets of the Red Cross.

[14] A vesting order is sought as part of the relief to be granted. Such an order, if made, will have the effect of extinguishing realty encumbrances against and security interest in those assets. I am satisfied for these purposes that appropriate notification has been given to registered encumbrancers and other security interest holders to permit such an order to be made. I am also satisfied, for purposes of notification warranting a vesting order, that adequate notification of a direct and public nature has been given to all of those who may have a claim against the assets. The CCAA proceedings themselves, and the general natural of the Plan to be advanced by the Red Cross—including the prior sale of the blood supply assets—has received wide coverage in the media. Specific notification has been published in principal newspapers across the country. A document room containing relevant information regarding the proposed transaction, and relevant financial information, was set up in Toronto and most, if not all, claimants have taken advantage of access to that room. Richter & Partners were appointed by the Court to provide independent financial advice to the

Transfusion Claimants, and they have done so. Accordingly, I am satisfied in terms of notification and service that the proper foundation for the granting of the Order sought has been laid.

[15] What is proposed, to satisfy the need to protect encumbrancers and holders of personal security interests is,

a) that generally speaking, prior registered interests and encumbrances against the Red Cross's lands and buildings will not be affected-i.e., the transfer and sale will take place subject to those interests, or they will be paid off on closing; and,

b) that registered personal property interests will either be assumed by the Purchasers or paid off from the proceeds of closing in accordance with their legal entitlement.

Whether the Purchase Price is Fair and Reasonable

[16] The central question for determination on this Motion is whether the proposed Purchase Price for the Red Cross's blood supply related assets is fair and reasonable in the circumstances, and a price that is as close to the maximum as is reasonably likely to be obtained for such assets. If the answer to this question is "Yes", then there can be little quarrel—it seems to me-with the conversion of those assets into cash and their replacement with that cash as the asset source available to satisfy the claims of creditors, including the Transfusion claimants. It matters not to creditors and Claimants whether the source of their recovery is a pool of cash or a pool of real/personal/intangible assets. Indeed, it may well be advantageous to have the assets already crystallised into a cash fund, readily available and earning interest. What is important is that the value of that recovery pool is as high as possible.

[17] On behalf of the 1986-1990 Québec Hepatitis C Claimants Mr. Lavigne and Mr. Bennett argue, however, that the purchase price is *not* high enough. Mr. Lavigne has put forward a counter-proposal which he submits will enhance the value of the Red Cross's blood supply assets by giving greater play to the value of its exclusive licence to be the national supplier of blood, and which will accordingly result in a much greater return for Claimants. This proposal has been referred to as the "Lavigne Proposal" or the "No-Fault Plan of Arrangement". I shall return to it shortly; but first I propose to deal with the submissions of the Red Cross and of those who support its Motion for approval, that the proposed price is fair and reasonable.

Those parties include the Governments, the proposed Purchasers—the Canadian Blood Service and Héma-Québec—and several (but not all) of the other Transfusion Claimant Groups.

[18] As I have indicated, the gross purchase price under the Acquisition Agreement is $132.9 million, plus an additional amount to be paid for inventory on closing which will generate a total purchase price of approximately $169 million. Out of that amount, the Bank indebtedness is to be paid and the claims of certain other creditors defrayed. It is estimated that a fund of between $70 million and $100 million will be available to constitute the trust fund to be set aside to satisfy Transfusion Claims.

[19] This price is based upon a Valuation prepared jointly by Deloitte & Touche (financial advisor to the Governments) and Ernst & Young (financial advisor to the Red Cross and the present Monitor appointed under the Initial CCAA Order). These two financial advisors retained and relied upon independent appraisal experts to appraise the realty (Royal LePage), the machinery and equipment and intangible assets (American Appraisal Canada Inc.) and the laboratories (Pellemon Inc.). The experience, expertise and qualifications of these various experts to conduct such appraisals cannot be questioned. At the same time, it must be acknowledged that neither Deloitte & Touche nor Ernst & Young are completely "independent" in this exercise, given the source of their retainers. It was at least partly for this reason that the Court was open to the suggestion that Richter & Partners be appointed to advise the 1986-1990 Ontario Class Action Claimants (and through them to provide independent advice and information to the other groups of Transfusion Claimants). The evidence and submissions indicate that Richter & Partners have met with the Monitor and with representatives of Deloitte & Touche, and that all enquiries have been responded to.

[20] Richter & Partners were appointed at the instance of the 1986-1990 Ontario Hepatitis C Claimants Richter & Partners, with a mandate to share their information and recommendations with the other Groups of Transfusion Claimants. Mr. Pitch advises on behalf of that Group that as a result of their due diligence enquiries his clients are prepared to agree to the approval of the Acquisition Agreement, and, indeed urge that it be approved quickly. A significant number of the other Transfusion Claimant groups—but by no means all—have taken similar positions, although subject in some cases to certain caveats, none of which pertain to the adequacy of the purchase price. On behalf of the 1986-1990 Hemophiliac

Claimants, for instance, Ms. Huff does not oppose the transfer approval, although she raises certain concerns about certain terms of the Acquisition Agreement which may impinge upon the amount of monies that will be available to Claimants on closing, and she would like to see these issues addressed in any Order, if approval is granted. Mr. Lemer, on behalf of the British Columbia 1986-1990 Hepatitis C Class Action Claimants, takes the same position as Ms. Huff, but advises that his clients' further due diligence has satisfied them that the price is fair and reasonable. While Mr. Kaufman, on behalf of Pre 86/Post 90 Hepatitis C Claimants, advances a number of jurisdictional arguments against approval, his clients do not otherwise oppose the transfer (but they would like certain caveats applied) and they do not question the price which has been negotiated for the Red Cross's blood supply assets. Mr. Kainer for the Service Employees Union (which represents approximately 1,000 Red Cross employees) also supports the Red Cross Motion, as does, very eloquently, Ms. Donna Ring who is counsel for Ms. Janet Conners and other secondarily infected spouses and children with HIV.

[21] Thus, there is broad support amongst a large segment of the Transfusion Claimants for approval of the sale and transfer of the blood supply assets as proposed.

[22] Some of these supporting Claimants, at least, have relied upon the due diligence information received through Richter & Partners, in assessing their rights and determining what position to take. This independent source of due diligence therefore provides some comfort as to the adequacy of the purchase price. It does not necessarily carry the day, however, if the Lavigne Proposal offers a solution that may reasonably practically generate a higher value for the blood supply assets in particular and the Red Cross assets in general. I turn to that Proposal now.

The Lavigne Proposal

[23] Mr. Lavigne is Representative Counsel for the 1986-1990 Québec Hepatitis C Claimants. His cross-motion asks for various types of relief, including for the purposes of the main Motion,

> a) an order dismissing the Red Cross motion for court approval of the sale of the blood supply assets;
>
> b) an order directing the Monitor to review the feasibility of the Lavigne Proposal's plan of arrangement (the "No-Fault Plan of Arrangement") which has now been filed with the Court of behalf of his group of "creditors"; and,

c) an order scheduling a meeting of creditors within 6 weeks of the end of this month for the purpose of voting on the No-Fault Plan of Arrangement.

[24] This cross-motion is supported by a group of British Columbia Pre 86/Post 90 Hepatitis C Claimants who are formally represented at the moment by Mr. Kaufman but for whom Mr. Klein now seeks to be appointed Representative Counsel. It is also supported by Mr. Lauzon who seeks to be appointed Representative Counsel for a group of Québec Pre 86/Post 90 Hepatitis C Claimants. I shall return to these "Representation" Motions at the end of these Reasons. Suffice it to say at this stage that counsel strongly endorsed the Lavigne Proposal.

[25] The Lavigne Proposal can be summarized in essence in the following four principals, namely:

1. Court approval of a no-fault plan of compensation for all Transfusion Claimants, known or unknown;

2. Immediate termination by the Court of the Master Agreement presently governing the relationship between the Red Cross and the Canadian Blood Agency, and the funding of the former, which Agreement requires a one-year notice period for termination;

3. Payment in full of the claims of all creditors of the Red Cross; and,

4. No disruption of the Canadian Blood Supply.

[26] The key assumptions and premises underlying these notions are,

• that the Red Cross has a form of monopoly in the sense that it is the only blood supplier licensed by Government in Canada to supply blood to hospitals;

• that, accordingly, this license has "value", which has not been recognized in the Valuation prepared by Deloitte & Touche and by Ernst & Young, and which can be exploited and enhanced by the Red Cross continuing to operate the Blood Supply and charging hospitals directly on a fully funded cost recovery basis for its blood services;

• that Government will not remove this monopoly from the Red Cross for fear of disrupting the Blood Supply in Canada;

• that the Red Cross would be able to charge hospitals sufficient amounts not only to cover its costs of operation (without any public funding such as that now coming from the Canadian Blood Agency under the Master Agreement), but also to pay all of its creditors ***and*** to establish a fund which would allow for compensation over time to all of the Transfusion Claimants; and, finally,

• that the no-fault proposal is simply an introduction of the Krever Commission recommendations for a scheme of no-fault compensation for all transfusion claimants, for the funding of the blood supply program as through direct cost recovery from hospitals, and for the inclusion of a

component for a compensation fund in the fee for service delivery charge.

[27] In his careful argument in support of his proposal Mr. Lavigne was more inclined to couch his rationale for the No-fault Plan in political terms rather than in terms of the potential value created by the Red Cross monopoly licence and arising from the prospect of utilizing that monopoly licence to raise revenue on a fee-for-blood-service basis, thus leading—arguably—to an enhanced "value" of the blood supply operations and assets. He seemed to me to be suggesting, in essence, that because there are significant Transfusion Claims outstanding against the Red Cross, Government as the indirect purchaser of the assets should recognize this and incorporate into the purchase price an element reflecting the value of those claims. It was submitted that because the Red Cross has (or, at least, will have had) a monopoly licence regarding the supply of blood products in Canada, and because it *could* charge a fee-for-blood-service to hospitals for those services and products, and because other regimes in other countries employ such a fee for service system and build in an insurance or compensation element for claims, and because the Red Cross *might* be able to recover such an element in the regime he proposes for it, then the purchase price *must* reflect the value of those outstanding claims in some fashion. I am not able to understand, in market terms, however, why the value of a debtor's assets is necessarily reflective in any way of the value of the claims against those assets. In fact, it is the stuff of the everyday insolvency world that exactly the opposite is the case. In my view, the argument is more appropriately put—for the purposes of the commercial and restructuring considerations which are what govern the Court's decisions in these types of CCAA proceedings—on the basis of the potential increase in value from the revenue generating capacity of the monopoly licence itself. In fairness, that is the way in which Mr. Lavigne's Proposal is developed and justified in the written materials filed.

[28] After careful consideration of it, however, I have concluded that the Lavigne Proposal cannot withstand scrutiny, in the context of these present proceedings.

[29] Farley Cohen—a forensic a principal in the expert forensic investigative and accounting firm of Linquist Avery Macdonald Baskerville Company—has testified that in his opinion the Red Cross operating licence "provides the potential opportunity and ability for the Red Cross to satisfy its current and future liabilities as discussed below". Mr. Cohen then proceeds in his affidavit to set out the basis and underlying assumptions for that opinion in the following paragraphs, which I quote in their entirety:

1. In my opinion, if the Red Cross can continue as a sole and exclusive operator of the Blood Supply Program and can amend its funding arrangements to provide for full cost recovery, including the cost of proven claims of Transfusion Claimants, and whereby the Red Cross would charge hospitals directly for the Blood Safety Program, **then there is a substantial value to the Red Cross to satisfy all the claims against it.**

2. **In my opinion, such value to the Red Cross is not reflected in the Joint Valuation Report.**

3. My opinion is based on the following assumptions: (i) the Federal Government, while having the power to issue additional licences to other Blood System operators, would not do so in the interest of public safety; (ii) the Red Cross can terminate the current funding arrangement pursuant to the terms of the Master Agreement; and (iii) the cost of blood charged to the hospitals would not be cost-prohibitive compared to alternative blood suppliers.

(highlighting in original)

[30] On his cross-examination, Mr. Cohen acknowledged that he did not know whether his assumptions could come true or not. That difficulty, it seems to me, is an indicia of the central weakness in the Lavigne Proposal. The reality of the present situation is that all 13 Governments in Canada have determined unequivocally that the Red Cross will no longer be responsible for or involved in the operation of the national blood supply in this country. That is the evidentiary bedrock underlying these proceedings. If that is the case, there is simply no realistic likelihood that any of the assumptions made by Mr. Cohen will occur. His opinion is only as sound as the assumptions on which it is based.

[31] Like all counsel—even those for the Transfusion Claimants who do not support his position—I commend Mr. Lavigne for his ingenuity and for his sincerity and perseverence in pursing his clients' general goals in relation to the blood supply program. However, after giving it careful consideration as I have said, I have come to the conclusion that the Lavigne Proposal—whatever commendation it my deserve in other contexts—does not offer a workable or practical alternative solution in the context of these CCAA proceedings. I question whether it can even be said to constitute a “Plan of Compromise and Arrangement” within the meaning of the CCAA, because it is not something which either the debtor (the Red Cross) or the creditors (the Transfusion Claimants amongst them) have control over to make happen. It is, in reality, a political and social solution which must be effected by Governments. It is not something which can be imposed by the Court in the context of a restructuring. Without deciding that issue, however, I am satisfied that the Proposal is not one which in the circumstances warrants the Court in exercising its discretion under sections 4 and 5 of the CCAA to call a meeting of creditors to vote on it.

[32] Mr. Justice Krever recommended that the Red Cross not continue in the operation of the Blood Supply System and, while he did recommend the introduction of a no-fault scheme to compensate all blood victims, it was not a scheme that would be centred around the continued involvement of the Red Cross. It was a government established statutory no-fault scheme. He said (Final Report, Vol. 3, p. 1045):

> The provinces and territories of Canada should devise statutory no-fault schemes that compensate all blood-injured persons promptly and adequately, so they do not suffer impoverishment or illness without treatment. I therefore recommend that, without delay, the provinces and territories devise statutory no-fault schemes for compensating persons who suffer serious adverse consequences as a result of the administration of blood components or blood products.

[33] Governments—which are required to make difficult choices—have chosen, for their own particular reasons, not to go down this particular socio-political road. While this may continue to be a very live issue in the social and political arena, it is not one which, as I have said, is a solution that can be imposed by the Court in proceedings such as these.

[34] I am satisfied, as well, that the Lavigne Proposal ought not to impede the present process on the basis that it is unworkable and impractical, in the present circumstances, and given the determined political decision to transfer the blood supply from the Red Cross to the new agencies, might possibly result in a disruption of the supply and raise concerns for the safety of the public if that were the case. The reasons why this is so, from an evidentiary perspective, are well articulated in the affidavit of the Secretary General of the Canadian Red Cross, Pierre Duplessis, in his affidavit sworn on August 17, 1998. I accept that evidence and the reasons articulated therein In substance Dr. Duplessis states that the assumptions underlying the Lavigne Proposal are "unrealistic, impractical and unachievable for the Red Cross in the current environment" because,

> a) the political and factual reality is that Governments have clearly decided—following the recommendation of Mr. Justice Krever—that the Red Cross will not continue to be involved in the National Blood Program, and at least with respect to Québec have indicated that they are prepared to resort to their powers of expropriation if necessary to effect a transfer;
>
> b) the delays and confusion which would result from a postponement to test the Lavigne Proposal could have detrimental effects on the blood
>
> system itself and on employees, hospitals, and other health care providers involved in it;
>
> c) the Master Agreement between the Red Cross and the Canadian Blood Agency, under which the Society currently obtains its funding, cannot be cancelled except on one year's notice, and even if it could there would be great risks in denuding the Red Cross

of all of its existing funding in exchange for the prospect of replacing that funding with fee for service revenues; and,

d) it is very unlikely that over 900 hospitals across Canada—which have hitherto not paid for their blood supply, which have no budgets contemplating that they will do so, and which are underfunded in event—will be able to pay sufficient sums to enable the Red Cross not only to cover its operating costs and to pay current bills, but also to repay the present Bank indebtedness of approximately $35 million in full, <u>and</u> to repay existing unsecured creditors in full, ***<u>and</u>*** to generate a compensation fund that will pay existing Transfusion Claimants (it is suggested) in full for their $8 billion in claims.

[35] Dr. Duplessis summarizes the risks inherent in further delays in the following passages from paragraph 17 of his affidavit sworn on August 17, 1998:

The Lavigne Proposal that the purchase price could be renegotiated to a higher price because of Red Cross' ability to operate on the terms the Lavigne Proposal envisions is not realistic, because Red Cross does not have the ability to operate on those terms. Accordingly, there is no reason to expect that CBS and H-Q would pay a higher amount than they have already agreed to pay under the Acquisition Agreement. Indeed, there is a serious risk that delays or attempts to renegotiate would result in lower amounts being paid. Delaying approval of the Acquisition Agreement to permit an experiment with the Lavigne Proposal exposes Red Cross and its stakeholders, including all Transfusion Claimants, to the following risks:

(a) continued losses in operating the National Blood Program which will reduce the amounts ultimately available to all stakeholders;

(b) Red Cross' ability to continue to operate its other activities being jeopardized;

(c) the Bank refusing to continue to support even the current level of funding and demanding repayment, thereby jeopardizing Red Cross and all of Red Cross' activities including the National Blood Program;

(d) CBS and H-Q becoming unprepared to complete an acquisition on the same financial terms given, among other things, the costs which they will incur in adjusting for later transfer dates, raising the risks of exproporiation or some other, less favourable taking of Red Cross' assets, or the Governments simply proceeding to set up the means to operate the National Blood Program without paying the Red Cross for its assets.

[36] These conclusions, and the evidentiary base underlying them, are in my view irrefutable in the context of these proceedings.

[37] Those supporting the Lavigne Proposal argued vigorously that approval of the proposed sale transaction in advance of a creditors' vote on the Red Cross Plan of Arrangment (which has not yet been filed) would strip the Lavigne Proposal of its underpinnings and, accordingly, would deprive those "creditor" Transfusion Claimants from their statutory right under the Act to put forward a Plan and to have a vote on their proposed Plan. In my opinion, however, Mr. Zarnett's response to that submission is the correct one in law. Sections 4 and 5 of the CCAA do not give the creditors *a right* to a meeting or a right to put forward a Plan and to insist on that Plan being put to a vote; they have *a right to request the Court to order a meeting,* and the Court will do so if it is in the best interests of the debtor company and the stakeholders to do so. In this case I accept the submission that the Court ought not to order a meeting for consideration of the Lavigne Proposal because the reality is that the Proposal is unworkable and unrealistic in the circumstances and I see nothing to be gained by the creditors being called to consider it. In addition, as I have pointed out earlier in these Reasons, a large number of the creditors and of the Transfusion Claimants oppose such a development. The existence of a statutory provision permitting creditors to apply for an order for the calling of a meeting does not detract from the Court's power to approve a sale of assets, assuming that the Court otherwise has that power in the circumstances.

[38] The only alternative to the sale and transfer, on the one hand, and the Lavigne Proposal, on the other hand, is a liquidation scenario for the Red Cross, and a cessation of its operations altogether. This is not in the interests of anyone, if it can reasonably be avoided. The opinion of the valuation experts is that on a liquidation basis, rather than on a "going concern" basis, as is contemplated in the sale transaction, the value of the Red Cross blood supply operations and assets varies between the mid—$30 million and about $74 million. This is quite considerable less than the $169 million (+/-) which will be generated by the sale transaction.

[39] Having rejected the Lavigne Proposal in this context, it follows from what I have earlier said that I conclude the purchase price under the Acquisition Agreement is fair and reasonable, and a price that is as close to the maximum as is reasonably likely to be obtained for the assets.

Jurisdiction Issue

[40] The issue of whether the Court has jurisdiction to make an order approving the sale of substantial assets of the debtor company before a Plan has been put forward and placed before the creditors for approval, has been raised by Mr. Bennett. I turn now to a consideration of that question.

[41] Mr. Bennett argues that the Court does not have the jurisdiction under the CCAA to make an order approving the sale of substantial assets by the Applicant Company before a Plan has even been filed and the creditors have had an opportunity to consider and vote on it. He submits that section 11 of the Act permits the Court to extend to a debtor the protection of the Court pending a restructuring attempt but only in the form of a stay of proceedings against the debtor or in the form of an order restraining or prohibiting new proceedings. There is no jurisdiction to approve a sale of assets in advance he submits, or otherwise than in the context of the sanctioning of a Plan already approved by the creditors.

[42] While Mr. Kaufman does not take the same approach to a jurisdictional argument, he submits nonetheless that although he does not oppose the transfer and approval of the sale, the Court cannot grant its approval at this stage if it involves “sanitizing” the transaction. By this, as I understand it, he means that the Court can “permit” the sale to go through—and presumably the purchase price to be paid—but that it cannot shield the assets conveyed from claims that may subsequently arise-such as fraudulent preference claims or oppression remedy claims in relation to the transaction. Apart from the fact that there is no evidence of the existence of any such claims, it seems to me that the argument is not one of “jurisdiction” but rather one of “appropriateness”. The submission is that the assets should not be freed up from further claims until at least the Red Cross has filed its Plan and the creditors have had a chance to vote on it. In other words, the approval of the sale transaction and the transfer of the blood supply assets and operations should have been made a part and parcel of the Plan of Arrangement put forward by the debtor, and the question of whether or not it is appropriate and supportable in that context debated and fought out on the voting floor, and not separately before-the-fact. These sentiments were echoed by Mr. Klein and by Mr. Thompson as well. In my view, however, the assets either have to be sold free and clear of claims against them-for a fair and reasonable price—or not sold. A purchaser cannot be expected to pay the fair and reasonable purchase price but at the same time leave it open for the assets purchased to be later attacked and, perhaps, taken back. In the context of the transfer of the Canadian blood supply operations, the prospect of such a claw back of assets sold, at a later time, has very

troubling implications for the integrity and safety of that system. I do not think, firstly, that the argument is a jurisdictional one, and secondly, that it can prevail in any event.

[43] I cannot accept the submission that the Court has no jurisdiction to make the order sought. The source of the authority is twofold: it is to be found in the power of the Court to impose terms and conditions on the granting of a stay under section 11; and it may be grounded upon the inherent jurisdiction of the Court, not to make orders which contradict a statute, but to "fill in the gaps in legislation so as to give effect to the objects of the CCAA, including the survival program of a debtor until it can present a plan": *Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List]), per Farley J., at p. 110.

[44] As Mr. Zarnett pointed out, paragraph 20 of the Initial Order granted in these proceedings on July 20, 1998, makes it a condition of the protection and stay given to the Red Cross that it not be permitted to sale or dispose of assets valued at more than $1 million without the approval of the Court. Clearly this is a condition which the Court has the jurisdiction to impose under section 11 of the Act. It is a necessary conjunction to such a condition that the debtor be entitled to come back to the Court and seek approval of a sale of such assets, if it can show it is in the best interests of the Company and its creditors as a whole that such approval be given. That is what it has done.

[45] It is very common in CCAA restructurings for the Court to approve the sale and disposition of assets during the process and before the Plan if formally tendered and voted upon. There are many examples where this had occurred, the recent Eaton's restructuring being only one of them. The CCAA is designed to be a flexible instrument, and it is that very flexibility which gives it its efficacy. As Farley J said in *Dylex Ltd.* supra (p. 111), "the history of CCAA law has been an evolution of judicial interpretation". It is not infrequently that judges are told, by those opposing a particular initiative at a particular time, that if they make a particular order that is requested it will be the first time in Canadian jurisprudence (sometimes in global jurisprudence, depending upon the level of the rhetoric) that such an order has made! Nonetheless, the orders are made, if the circumstances are appropriate and the orders can be made within the framework and in the spirit of the CCAA legislation. Mr. Justice Farley has well summarized this approach in the following passage from his decision in *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), at p. 31, which I adopt:

> The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course *or otherwise deal with their assets* so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. See the preamble to and sections 4,5,7,8 and 11 of the CCAA (a lengthy list of authorities cited here is omitted).
>
> The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating *or to otherwise deal with its assets* but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA (citations omitted)
>
> (emphasis added)

[46] In the spirit of that approach, and having regard to the circumstances of this case. I am satisfied not only that the Court has the jurisdiction to make the approval and related orders sought, but also that it should do so. There is no realistic alternative to the sale and transfer that is proposed, and the alternative is a liquidation/bankruptcy scenario which, on the evidence would yield an average of about 44% of the purchase price which the two agencies will pay. To fore go that purchase price—supported as it is by reliable expert evidence—would in the circumstances be folly, not only for the ordinary creditors but also for the Transfusion Claimants, in my view.

[47] While the authorities as to exactly what considerations a court should have in mind in approving a transaction such as this are scarce, I agree with Mr. Zarnett that an appropriate analogy may be found in cases dealing with the approval of a sale by a court-appointed receiver. In those circumstances, as the Ontario Court of Appeal has indicated in *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.), at p. 6, the Court's duties are,

> (i) to consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
>
> (ii) to consider the interests of the parties;
>
> (iii) to consider the efficacy and integrity of the process by which offers are obtained; and,
>
> (iv) to consider whether there has been unfairness in the working out of the process.

[48] I am satisfied on all such counts in the circumstances of this case.

[49] Some argument was directed towards the matter of an order under the *Bulk Sales Act.* Because of the nature and extent of the Red Cross assets being disposed of, the provisions of that Act must either be complied with, or an exemption from compliance obtained under s. 3 thereof. The circumstances warrant the granting of such an exemption in my view. While there were submissions about whether or not the sale would impair the Society's ability to pay its creditors in full. I do not believe that the sale will *impair* that ability. In fact, it may well enhance it. Even if one accepts the argument that the emphasis should be placed upon the language regarding payment "in full" rather than on "impair", the case qualifies for an exemption. It is conceded that the Transfusion claimants do not qualify as "creditors" as that term is defined under the *Bulk Sales Act;* and if the claims of the Transfusion Claimants are removed from the equation, it seems evident that other creditors could be paid from the proceeds in full.

Conclusion and Treatment of Other Motions

[50] I conclude that the Red Cross is entitled to the relief it seeks at this stage, and orders will go accordingly. In the end, I come to these conclusions having regard in particular to the public interest imperative which requires a Canadian Blood Supply with integrity and a seamless, effective and relatively early transfer of blood supply operations to the new agencies; having regard to the interests in the Red Cross in being able to put forward a Plan that may enable it to avoid bankruptcy and be able to continue on with its non-blood supply humanitarian efforts; and having regard to the interests of the Transfusion Claimants in seeing the value of the blood supply assets maximized.

[51] Accordingly an order is granted—subject to the caveat following—approving the sale and authorizing and approving the transactions contemplated in the Acquisition Agreement, granting a vesting order, and declaring that the *Bulk Sales Act* does not apply to the sale, together with the other related relief claimed in paragraphs (a) through (g) of the Red Cross's Notice of Motion herein. The caveat is that the final terms and settlement of the Order are to be negotiated and approved by the Court before the Order is issued. If the parties cannot agree on the manner in which the "Agreement Content" issues raised by Ms. Huff and Mr. Kaufman in their joint memorandum of comments submitted in argument yesterday, I will hear submissions to resolve those issues.

Other Motions

[52] The Motions by Mr. Klein and by Mr. Lauzon to be appointed Representative Counsel for the British Columbia and Québec Pre86/Post 90 Hepatitis C Claimants, respectively, are granted. It is true that Mr. Klein had earlier authorized Mr. Kaufman to accept the appointment on behalf of his British Columbia group of clients, but nonetheless it may be—because of differing settlement proposals emanating to differing groups in differing Provinces—that there are differences in interests between these groups, as well as differences in perspectives in the Canadian way. As I commented earlier, in making the original order appointing Representative Counsel, the Court endeavours to conduct a process which is both fair and *perceived* to be fair. Having regard to the nature of the claims, the circumstances in which the injuries and diseases inflicting the Transfusion Claimants have been sustained, and the place in Canadian Society at the moment for those concerns, it seems to me that those particular claimants, in those particular Provinces, are entitled if they wish to have their views put forward by those counsel who are already and normally representing them in their respective class proceedings.

[53] I accept the concerns expressed by Mr. Zarnett on behalf of the Red Cross, and by Mr. Robertson on behalf of the Bank, about the impact of funding on the Society's cash flow and position. In my earlier endorsement dealing with the appointment of Representative Counsel and funding, I alluded to the fact that if additional funding was required to defray these costs those in a position to provide such funding may have to do so. The reference, of course, was to the Governments and the Purchasers. It is the quite legitimate but nonetheless operative concerns of the Governments to ensure the effective and safe transfer of the blood supply operations to the new agencies which are driving much of what is happening here. Since the previous judicial hint was not responded to, I propose to make it a specific term and condition of the approval Order that the Purchasers, or the Governments, establish a fund—not to exceed $2,000,000 at the present time without further order—to pay the professional costs incurred by Representative Counsel and by Richter & Partners.

[54] The other Motions which were pending at the outset of yesterday's Hearing are adjourned to another date to be fixed by the Commercial List Registrar.

[55] Orders are to go in accordance with the foregoing.

Motion granted; cross-motion dismissed.

See para. 40

CITATION: Canwest Global Communications Corp., 2011 ONSC 2215
COURT FILE NO.: CV-09-8396-00CL
DATE: 20110407

ONTARIO

SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP. AND OTHER APPLICANTS

COUNSEL: *Douglas J. Wray and Jesse B. Kugler*, counsel for the Applicant, Communications, Energy and Paperworkers Union of Canada ("CEP")
David Byers and Maria Konyukhova, counsel for the Monitor

PEPALL J.

REASONS FOR DECISION

Introduction

[1] The Communications, Energy and Paperworkers Union of Canada ("CEP") requests an order lifting the stay of proceedings in respect of certain grievances and directing that they be adjudicated in accordance with the provisions of the applicable collective agreement. In the alternative, CEP requests an order amending the claims procedure order so as to permit the subject claim to be adjudicated in accordance with the provisions of the collective agreement.

Background Facts

[2] On October 6, 2009, the CMI Entities obtained an initial order pursuant to the *CCAA* staying all proceedings and claims against them. Specifically, paragraphs 15 and 16 of that order stated:

> **NO PROCEEDINGS AGAINST THE CMI ENTITIES OR THE CMI PROPERTY**

15. **THIS COURT ORDERS** that until and including November 5, 2009, or such later date as this Court may order (the “Stay Period”), no proceeding or enforcement process in any court or tribunal (each, a “Proceeding”) shall be commenced or continued against or in respect of the CMI Entities, the Monitor or the CMI CRA or affecting the CMI Business or the CMI Property, except with the written consent of the applicable CMI Entity, the Monitor and the CMI CRA (in respect of Proceedings affecting the CMI Entities, the CMI Property or the CMI Business), the CMI CRA (in respect of Proceedings affecting the CMI CRA), or with leave of this Court, and any and all Proceedings currently under way against or in respect of the CMI Entities or the CMI CRA or affecting the CMI Business or the CMI Property are hereby stayed and suspended pending further Order of this Court. In the case of the CMI CRA, no Proceeding shall be commenced against the CMI CRA or its directors and officers without prior leave of this Court on seven (7) days notice to Stonecrest Capital Inc.

NO EXERCISE OF RIGHTS OR REMEDIES

16. **THIS COURT ORDERS** that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being “Persons” and each being a “Person”) against or in respect of the CMI Entities, the Monitor and/or the CMI CRA, or affecting the CMI Business or the CMI Property, are hereby stayed and suspended except with the written consent of the applicable CMI Entity, the Monitor and the CMI CRA (in respect of rights and remedies affecting the CMI Entities, the CMI Property or the CMI Business), the CMI CRA (in respect of rights or remedies affecting the CMI CRA), or leave of this Court, provided that nothing in this Order shall (i) empower the CMI Entities to carry on any business which the CMI entities are not lawfully entitled to carry on, (ii) exempt the CMI Entities from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of claim for lien.

[3] On October 14, 2009, as part of the CCAA proceedings, I granted a claims procedure order which established a claims procedure for the identification and quantification of claims against the CMI Entities. In that order, “Claim” is defined as any right or claim of any Person against one or more of the CMI Entities in existence on the Filing Date[1] (a “Prefiling Claim”) and any right or claim of any Person against one or more of the CMI Entities arising out of the restructuring on or after the Filing Date (a “Restructuring Claim”). Claims arising prior to certain dates had to be asserted within the claims procedure failing which they were forever extinguished and barred. Pursuant to the claims procedure order, subject to the discretion of the Court, claims of any person against one or more of the CMI Entities were to be determined by a claims officer who would determine the validity and amount of the disputed claim in accordance with the claims procedure order. The Honourable Ed Saunders, The Honourable Jack Ground and The Honourable Coulter Osborne were appointed as claims officers. Other persons could also be appointed by court order or on consent of the CMI Entities and the Monitor. This order was unopposed. It was amended on November 30, 2009 and again the motion was unopposed. As at October 29, 2010, over 1,800 claims asserted against the CMI Entities had been finally resolved in accordance with and pursuant to the claims procedure order.

[4] On October 27, 2010, CEP was authorized to represent its current and former union members including pensioners employed or formerly employed by the CMI Entities to the extent, if any, that it was necessary to do so.

[5] On the date of the initial order, CEP had a number of outstanding grievances. CEP filed claims pursuant to the claims procedure order in respect of those grievances. The claim that is the subject matter of this motion is the only claim filed by CEP that has not been resolved and therefore is the only claim filed by CEP that requires adjudication. There is at least one other claim in Western Canada that may require adjudication.

[1] The Filing Date was October 6, 2009, the date of the initial order.

[6] John Bradley had been employed for 20 years by Global Television, a division of Canwest Television Limited Partnership ("CTLP"), one of the CMI Entities. Mr. Bradley is a member of CEP. On February 24, 2010, CTLP suspended Mr. Bradley for alleged misconduct. On March 8, 2010, CEP filed a grievance relating to his suspension under the applicable collective agreement. On March 25, 2010, CTLP terminated his employment. On March 26, 2010, CEP filed a grievance requesting full redress for Mr. Bradley's termination. This would include reinstatement to his employment. On June 23, 2010 a restructuring period claim was filed with respect to the Bradley grievances on the following basis:

> The Union has filed this claim in order to preserve its rights. Filing this claim is without prejudice to the Union's ability to pursue all other remedies at its disposal to enforce its rights, including any other statutory remedies available. Notwithstanding that the Union has filed the present claim, the Union does not agree that this claim is subject to compromise pursuant [to the CCAA][2]. The Union reserves its right to make further submissions in this regard.

[7] In spite of the parties' good faith attempts to resolve the Bradley grievances and the Bradley claim, no resolution was achieved.

[8] The Plan was sanctioned on July 28, 2010 and implemented on October 27, 2010. At that time, all of the operating assets of the CMI Entities were transferred to the Plan Sponsor and the CMI Entities ceased operations. The CTLP stay was also terminated. The stay with respect to the Remaining CMI Entities (as that term is defined in the Plan) was extended until May 5, 2011. Pursuant to an order dated September 27, 2010, following the Plan implementation date the Monitor shall be:

> (a) empowered and authorized to exercise all of the rights and powers of the CMI Entities under the Claims Procedure Order, including, without limitation, revise, reject, accept,

[2] The words in brackets were omitted but presumably this was the intention.

> settle and/or refer for adjudication Claims (as defined in the Claims Procedure Order) all without (i) seeking or obtaining the consent of the CMI Entities, the Chief Restructuring Advisor or any other person, and (ii) consulting with the Chief Restructuring Advisor in the CMI Entities; and
>
> (b) take such further steps and seek such amendments to the Claims Procedure Order or additional orders as the Monitor considers necessary or appropriate in order to fully determine, resolve or deal with any Claims.

[9] The Monitor has taken the position that if the Bradley matter is not resolved, the claim should be referred to a claims officer for determination. It is conceded that a claims officer would have no jurisdiction to reinstate Mr. Bradley to his employment.

[10] CEP now requests an order lifting the stay of proceedings in respect of the Bradley grievances and directing that they be adjudicated in accordance with the provisions of the collective agreement. In the alternative, CEP requests an order amending the claims procedure order so as to permit the Bradley claim to be adjudicated in accordance with the provisions of the collective agreement.

[11] For the purposes of this motion and as is obvious from the motion seeking to lift the stay, both CEP and the Monitor agree that the stay did catch the Bradley claim and that it is encompassed by the definition of claim found in the claims procedure order.

[12] Since the commencement of the *CCAA* proceedings, CEP has only sought to lift the stay in respect of one other claim, that being a claim relating to a grievance filed by CEP on behalf of Vicky Anderson. The CMI Entities consented to lifting the stay in respect of Ms. Anderson's claim because at the date of the initial order, there had already been eight days of hearing before an arbitrator, all evidence had already been called, and only one further date was scheduled for final argument. Ultimately, the arbitrator ordered that Ms. Anderson be reinstated but made no order for compensation.

[13] Pursuant to Article 12.3 of the applicable collective agreement, discharge grievances are to be heard by a single arbitrator. All other grievances are to be heard by a three person Board of

Arbitration unless the parties consent to submit the grievance to a single arbitrator. The single arbitrator is to be selected within 10 days of the notice of referral to arbitration from a list of 5 people drawn by lot. An award is to be given within 30 days of the conclusion of the hearing. The list of arbitrators was negotiated and included in the collective agreement. The arbitrator has the power to reinstate with or without compensation.

[14] The evidence before me suggests that adjudications of grievances under collective agreements are typically much more costly and time consuming than adjudications before a claims officer as the latter may determine claims in a summary manner and there is more control over scheduling. The Monitor takes the position that additional cost and delay would arise if the claims were adjudicated pursuant to the terms of the collective agreement rather than pursuant to the terms of the claims procedure order.

Issues

[15] Both parties agree that the following two issues are to be considered:

(a) Should this court lift the stay of proceedings in respect of the Bradley grievances and direct that the Bradley grievances be adjudicated in accordance with the provisions of the collective agreement?

(b) Should this court amend the claims procedure order so as to permit the Bradley claim to be adjudicated in accordance with the provisions of the collective agreement?

Positions of the Parties

[16] In brief, dealing firstly with the stay, CEP submits that the balance of convenience favours pursuit of the grievances through arbitration. CEP is seeking to compel the employer to comply with fundamental obligations that flow from the collective agreement. This includes the appointment of an arbitrator on consent who has jurisdiction to award reinstatement if he or she determines that there was no just cause to terminate Mr. Bradley’s employment. Requiring that the claim and the grievances be adjudicated in a manner that is inconsistent with the collective

agreement would have the effect of depriving the griever of some of the most fundamental rights under a collective agreement. Furthermore, permitting the grievances to proceed to arbitration would prejudice no one.

[17] Alternatively, CEP submits that the claims procedure order ought to be amended. It is in conflict with the terms of the collective agreement. Pursuant to section 33 of the *CCAA*, the collective agreement remains in force during the *CCAA* proceedings. The claims procedure order must comply with the express requirements of the *CCAA*. Lastly, orders issued under the *CCAA* should not infringe upon the right to engage in associational activities which are protected by the *Charter of Rights and Freedoms*.

[18] The Monitor opposes the relief requested. On the issue of the lifting of the stay, it submits that the *CCAA* is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. The stay of proceedings permits the *CCAA* to accomplish its legislative purpose and in particular enables continuance of the company seeking *CCAA* protection.

[19] The lifting of a stay is discretionary. Mr. Bradley is no more prejudiced than any other creditor and the claims procedure established under the order has been uniformly applied. The claims officer has the power to recognize Mr. Bradley's right to reinstatement and monetize that right. The efficacy of *CCAA* proceedings would be undermined if a debtor company was forced to participate in an arbitration outside the *CCAA* proceedings. This would place the resources of an insolvent *CCAA* debtor under strain. The Monitor submits that CEP has not satisfied the onus to demonstrate that the lifting of the stay is appropriate in this case.

[20] As for the second issue, the Monitor submits that the claims procedure order should not be amended. Courts regularly affect employee rights arising from collective agreements during *CCAA* proceedings and recent amendments to the *CCAA* do not change the existing case law in this regard. Furthermore, amending the claims procedure order would undermine the purpose of the *CCAA*. Lastly, relying on the Supreme Court of Canada's statements in *Health Services and*

Support – Facilities Subsector Bargaining Assn. v. British Columbia[3], the claims procedure order does not interfere with freedom of association.

[21] Following argument, I requested additional brief written submissions on certain issues and in particular, to what employment Mr. Bradley would be reinstated if so ordered. I have now received those submissions from both parties.

Discussion

1. Stay of Proceedings

[22] The purpose of the *CCAA* has frequently been described but bears repetition. In *Lehndorff General Partner Limited* [4], Farley J. stated:

> The *CCAA* is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both.

[23] The stay provisions in the *CCAA* are discretionary and very broad. Section 11.02 provides that:

> (1) A court may, on an initial application in respect of the 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;

[3] [2007] S.C.J. No. 27.

[4] (1993), 17 C.B.R. (3rd) 24 (Ont. Gen. Div.) at para. 6.

(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) 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.

[24] As the Court of Appeal noted in *Nortel Networks Corp.*[5], the discretion provided in section 11 is the engine that drives this broad and flexible statutory scheme. The stay of proceedings in section 11 should be broadly construed to accomplish the legislative purpose of the *CCAA* and in particular to enable continuance of the company seeking *CCAA* protection: *Lehndorff General Partner Limited* [6].

[25] Section 11 provides an insolvent company with breathing room and by doing so, preserves the status quo to assist the company in its restructuring or arrangement and prevents any particular stakeholder from obtaining an advantage over other stakeholders during the

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[5] [2009] O.J. No. 4967 at para. 33.

[6] *Supra*, note 4 at para. 10.

restructuring process. It is anticipated that one or more creditors may be prejudiced in favour of the collective whole. As stated in *Lendorff General Partner Limited* [7]:

> The possibility that one or more creditors may be prejudiced should not affect the court's exercise of its authority to grant a stay of proceedings under the *CCAA* because this effect is offset by the benefit to all creditors and to the company of facilitating a reorganization. The court's primary concerns under the *CCAA* must be for the debtor and all of the creditors.

[26] In *Canwest Global Communications Corp.*[8], I had occasion to address the issue of lifting a stay in a *CCAA* proceeding. I referred to situations in which a court had lifted a stay as described by Paperny J. (as she then was) in *Re Canadian Airlines Corp.*[9] and by Professor McLaren in his book, "*Canadian Commercial Reorganization: Preventing Bankruptcy*"[10]. They included where:

a) a plan is likely to fail;

b) the applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor);

c) the applicant shows necessity for payment;

d) the applicant would be significantly prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors;

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[7] *Ibid*, at para. 6.

[8] (2009) O.J. 5379.

[9] (2000) 19 C.B.R. (4th) 1.

[10] (Aurora: Canada Law Book, looseleaf) at para. 3.3400.

> e) it is necessary to permit the applicant to take steps to protect a right that could be lost by the passage of time;
>
> f) after the lapse of a significant period, the insolvent debtor is no closer to a proposal than at the commencement of the stay period;
>
> g) there is a real risk that a creditor's loan will become unsecured during the stay period;
>
> h) it is necessary to allow the applicant to perfect a right that existed prior to the commencement of the stay period;
>
> i) it is in the interests of justice to do so.

[27] The lifting of a stay is discretionary. As I wrote in *Canwest Global Communications Corp.*[11]:

> There are no statutory guidelines contained in the Act. According to Professor R.H. McLaren in his book "Canadian Commercial Reorganization: Preventing Bankruptcy", an opposing party faces a very heavy onus if it wishes to apply to the court for an order lifting the stay. In determining whether to lift the stay, the court should consider whether there are sound reasons for doing so consistent with the objectives of the CCAA, including a consideration of the balance of convenience, the relative prejudice to parties, and where relevant, the merits of the proposed action: *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.* (2007), 33 C.B.R. (5th) 50 (Sask. C.A.) at para. 68. That decision also indicated that the judge should consider the good faith and due diligence of the debtor company.

[28] There appears to be no real issue that the grievances are caught by the stay of proceedings. In *Luscar Ltd. v. Smoky River Coal Limited*[12], the issue was whether a judge had

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[11] *Supra*, note 8 at para. 32.

[12] [1999] A.J. No. 676.

the discretion under the *CCAA* to establish a procedure for resolving a dispute between parties who had previously agreed by contract to arbitrate their disputes. The question before the court was whether the dispute should be resolved as part of the supervised reorganization of the company under the *CCAA* or whether the court should stay the proceedings while the dispute was resolved by an arbitrator. The presiding judge was of the view that the dispute should be resolved as expeditiously as possible under the *CCAA* proceedings. The Alberta Court of Appeal upheld the decision stating:

> The above jurisprudence persuades me that "proceedings" in section 11 includes the proposed arbitration under the B.C. *Arbitration Act.* The Appellants assert that arbitration is expeditious. That is often, but not always, the case. Arbitration awards can be appealed. Indeed, this is contemplated by section 15(5) of the *Rules*. Arbitration awards, moreover, can be subject to judicial review, further lengthening and complicating the decision making process. Thus, the efficacy of *CCAA* proceedings (many of which are time sensitive) could be seriously undermined if a debtor company was forced to participate in an extra-*CCAA* arbitration. For these reasons, having taken into account the nature and purpose of the *CCAA*, I conclude that, in appropriate cases, arbitration is a "proceeding" that can be stayed under section 11 of the *CCAA*.[13]

[29] I do recognize that the *Luscar* decision did not involve a collective agreement but an agreement to arbitrate. That said, the principles described also apply to an arbitration pursuant to the terms of a collective agreement.

[30] In considering balance of convenience, CEP's primary concerns are that the claims procedure order does not accord with the rights and obligations contained in the collective agreement. Firstly, a claims officer is the adjudicator rather than an arbitrator chosen pursuant to the terms of the collective agreement and secondly, reinstatement is not an available remedy

[13] *Ibid*, at para. 33.

before a claims officer. Thirdly, an arbitration imports rules of natural justice and procedural fairness whereas the claims procedure is summary in nature.

[31] The claims officers who were identified in the claims procedure order are all former respected and experienced judges who are well suited and capable of addressing the issues arising from the Bradley claim. Furthermore, had this been a real issue, CEP could have raised it earlier and identified another claims officer for inclusion in the claims procedure order. Indeed, an additional claims officer still could be appointed but no such request was ever advanced by CEP.

[32] Should the claims officer find that CTLP did not have just cause to terminate Mr. Bradley's employment, he can recognize Mr. Bradley's right to reinstatement by monetizing that right. This was done for a multitude of other claims in the *CCAA* proceedings including claims filed by CEP on behalf of other members. I note that Mr. Bradley would not be receiving treatment different from that of any other creditor participating in the claims process.

[33] The claims process is summary in nature for a reason. It reduces delay, streamlines the process, and reduces expense and in so doing promotes the objectives of *CCAA*. Indeed, if grievances were to customarily proceed to arbitration, potential exists to significantly undermine the *CCAA* proceedings. Arbitration of all claims arising from collective agreements would place the already stretched resources of insolvent *CCAA* debtors under significant additional strain and could divert resources away from the restructuring. It is my view that generally speaking, grievances should be adjudicated along with other claims pursuant to the provisions of a claims procedure order within the context of the CCAA proceedings.

[34] That said, it seems to me that this case is unique. While the claims procedure order and the meeting order of June 23, 2010 provide that all claims against CTLP and others arising prior to certain dates must be asserted within the claims procedure failing which they are forever extinguished and barred, the stay relating to CTPL was terminated on October 27, 2010. CTLP has emerged from CCAA protection and is currently operating in the normal course having changed its name to Shaw Television Limited Partnership ("STLP"). If the grievance relating to

Mr. Bradley's termination is successful, he could be reinstated to his employment at STLP. The position of CEP, Mr. Bradley and the Monitor is that reinstatement, if ordered, would be to STLP. Counsel for CEP advised the court that notice of the motion was given to STLP and that a representative was present in court for the argument of the motion although did not appear on the record. The Monitor has also confirmed that Shaw Communications Inc., the parent of STLP, was aware of the motion and its counsel has confirmed its understanding that any reinstatement of Mr. Bradley, if ordered, would be to STLP.

[35] As mentioned, Mr. Bradley was a 20 year employee. While I do not consider the identity of the arbitrator and the natural justice arguments of CEP to be persuasive, given the stage of the CCAA proceedings, the fact that the stay relating to CTLP has been lifted, and Mr. Bradley's employment tenure, I am persuaded that he ought to be given the opportunity to pursue his claim for reinstatement rather than being compelled to have that entitlement monetized by a claims officer if so ordered. Counsel for the Monitor has confirmed that the timing of the distributions would not appear to be affected by the outcome of this motion. No meaningful prejudice would ensue to any stakeholder. It seems to me that the balance of convenience and the interests of justice favour lifting the stay to permit the grievances to proceed through arbitration rather than before the claims procedure officer. Therefore, CEP's motion to lift the stay is granted and the Bradley grievances may be adjudicated in accordance with the terms of the collective agreement.

2. Amendment of the Claims Procedure Order

[36] In light of my decision on the stay, it is not strictly necessary to consider whether the claims procedure order should be amended as requested by CEP as alternative relief. As this issue was argued, however, I will address it.

[37] Section 33 of *CCAA* was added to the statute in September, 2009. The relevant sub-sections now provide:

> 33(1) If proceedings under this Act have been commenced in respect of a debtor company, any collective agreement that the company has entered into as the employer remains in

> force, and may not be altered except as provided in this section or under the laws of the jurisdiction governing collective bargaining between the company and the bargaining agent.
>
> 33(8) For greater certainty, any collective agreement that the company and the bargaining agent have not agreed to revise remains in force, and the court shall not alter its terms.

[38] Justice Mongeon of the Québec Superior Court had occasion to address the effect of section 33 of the *CCAA* in *White Birch Paper Holding Company*[14]. He stated that the fact that a collective agreement remains in force under a *CCAA* proceeding does not have the effect of "excluding the entire collective labour relations process from the application of the *CCAA*." [15] He went on to write that:

> It would be tantamount to paralyzing the employer with respect to reducing its costs by any means at all, and to providing the union with a veto with regard to the restructuring process.[16]

[39] In *Canwest Global Communications Corp.*[17], I wrote that section 33 of the *CCAA* "maintains the terms and obligations contained in the collective agreement but does not alter priorities or status."[18] In that case when dealing with the issue of immediate payment of severance payments, I wrote:

> There are certain provisions in the amendments that expressly mandate certain employee related payments. In those

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[14] 2010, Q.C.C.S. 2590.

[15] *Ibid*, at para. 31.

[16] *Ibid*, at para. 35.

[17] [2010] O.J. No. 2544.

[18] *Ibid*, at para. 32.

> instances, section 6(5) dealing with a sanction of a plan and section 36 dealing with a sale outside the ordinary course of business being two such examples, Parliament specifically dealt with certain employee claims. If Parliament had intended to make such a significant amendment whereby severance and termination payments (and all other payments under a collective agreement) would take priority over secured creditors, it would have done so expressly.[19]

[40] I agree with the Monitor's position that if Parliament had intended to carve grievances out of the claims process, it would have done so expressly. To do so, however, would have undermined the purpose of the *CCAA* and in particular, the claims process which is designed to streamline the resolution of the multitude of claims against an insolvent debtor in the most time sensitive and cost efficient manner. It is hard to imagine that it was Parliament's intention that grievances under collective agreements be excluded from the reach of the stay provisions of section 11 of the *CCAA* or the ancillary claims process. In my view, such a result would seriously undermine the objectives of the *Act*.

[41] Furthermore, I note that over 1,800 claims have been processed and dealt with by way of the claims procedure order, many of them involving claims filed by CEP on behalf of its members. CEP was provided with notice of the motion wherein the claims procedure order and the claims officers were approved. CEP did not raise any objection to the claims procedure order, the claims officers or the inclusion of grievances in the claims procedure at the time that the order was granted. The claims procedure order was not an order made without notice and none of the prerequisites to variation of an order has been met. Had I not lifted the stay, I would not have amended the claims procedure order as requested by CEP.

[42] CEP's last argument is that the claims procedure order interferes with Mr. Bradley's freedoms under the Canadian *Charter of Rights and Freedoms*. In this regard I make the

[19] *Ibid*, at para. 33.

following observations. Firstly, this argument was not advanced when the claims procedure order was granted. Secondly, CEP is not challenging the validity of any section of the *CCAA*. Thirdly, nothing in the statute or the claims procedure inhibits the ability to collectively bargain. In *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*[20], the Supreme Court of Canada stated:

> We conclude that section 2(d) of the *Charter* protects the capacity of members of labour unions to engage, in association, in collective bargaining on fundamental workplace issues. This protection does not cover all aspects of "collective bargaining", as that term is understood in the statutory labour relations regimes that are in place across the country. Nor does it ensure a particular outcome in a labour dispute or guarantee access to any particularly statutory regime. …
>
> In our view, it is entirely possible to protect the "procedure" known as collective bargaining without mandating constitutional protection for the fruits of that bargaining process.[21]

[43] In my view, nothing in the claims procedure or the *CCAA* impacts the procedure known as collective bargaining.

<u>Conclusion</u>

[44] Under the circumstances, the request to lift the stay as requested by CEP is granted. Had it been necessary to do so, I would have dismissed the alternative relief requested.

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[20] *Supra*, note 3.

[21] *Ibid*, at at paras. 19 and 29.

Pepall J.

Released: April 7, 2011

CITATION: Canwest Global Communications Corp., 2011 ONSC 2215
COURT FILE NO.: CV-09-8396-00CL
DATE: 20110407

ONTARIO

SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP. AND OTHER APPLICANTS

REASONS FOR DECISION

Pepall J.

Released: April 7, 2011

Century Services Inc. *Appellant*

v.

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

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

2010 SCC 60

File No.: 33239.

2010: May 11; 2010: December 16.

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

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

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

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

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

Century Services Inc. *Appelante*

See para. 70

c.

Procureur général du Canada au nom de Sa Majesté la Reine du chef du Canada *Intimé*

Répertorié : Century Services Inc. *c.* Canada (Procureur général)

2010 CSC 60

N^{o} du greffe : 33239.

2010 : 11 mai; 2010 : 16 décembre.

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein et Cromwell.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Faillite et insolvabilité — Priorités — Demande de la Couronne à la société débitrice, la veille de la faillite, sollicitant le paiement au receveur général du Canada de la somme détenue en fiducie au titre de la TPS — La fiducie réputée établie par la Loi sur la taxe d'accise en faveur de la Couronne l'emporte-t-elle sur les dispositions de la Loi sur les arrangements avec les créanciers des compagnies censées neutraliser ces fiducies? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36, art. 18.3(1) — Loi sur la taxe d'accise, L.R.C. 1985, ch. E-15, art. 222(3).

Faillite et insolvabilité — Procédure — Le juge en cabinet avait-il le pouvoir, d'une part, de lever partiellement la suspension des procédures pour permettre à la compagnie débitrice de faire cession de ses biens en faillite et, d'autre part, de suspendre les mesures prises par la Couronne pour bénéficier de la fiducie réputée se rapportant à la TPS? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36, art. 11.

Fiducies — Fiducies expresses — Somme perçue au titre de la TPS mais non versée à la Couronne — Ordonnance du juge exigeant que la TPS soit détenue par le contrôleur dans son compte en fiducie — Le fait que le montant de TPS réclamé par la Couronne soit détenu séparément dans le compte du contrôleur a-t-il créé une fiducie expresse en faveur de la Couronne?

The debtor company commenced proceedings under the *Companies' Creditors Arrangement Act* ("*CCAA*"), obtaining a stay of proceedings to allow it time to reorganize its financial affairs. One of the debtor company's outstanding debts at the commencement of the reorganization was an amount of unremitted Goods and Services Tax ("GST") payable to the Crown. Section 222(3) of the *Excise Tax Act* ("*ETA*") created a deemed trust over unremitted GST, which operated despite any other enactment of Canada except the *Bankruptcy and Insolvency Act* ("*BIA*"). However, s. 18.3(1) of the *CCAA* provided that any statutory deemed trusts in favour of the Crown did not operate under the *CCAA*, subject to certain exceptions, none of which mentioned GST.

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

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

Per McLachlin C.J. and Binnie, LeBel, Deschamps, Charron, Rothstein and Cromwell JJ.: The apparent conflict between s. 222(3) of the *ETA* and s. 18.3(1) of the *CCAA* can be resolved through an interpretation that properly recognizes the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by

La compagnie débitrice a déposé une requête sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies* (« *LACC* ») et obtenu la suspension des procédures dans le but de réorganiser ses finances. Parmi les dettes de la compagnie débitrice au début de la réorganisation figurait une somme due à la Couronne, mais non versée encore, au titre de la taxe sur les produits et services (« TPS »). Le paragraphe 222(3) de la *Loi sur la taxe d'accise* (« *LTA* ») crée une fiducie réputée visant les sommes de TPS non versées. Cette fiducie s'applique malgré tout autre texte législatif du Canada sauf la *Loi sur la faillite et l'insolvabilité* (« *LFI* »). Toutefois, le par. 18.3(1) de la *LACC* prévoyait que, sous réserve de certaines exceptions, dont aucune ne concerne la TPS, les fiducies réputées établies par la loi en faveur de la Couronne ne s'appliquaient pas sous son régime.

Le juge siégeant en son cabinet chargé d'appliquer la *LACC* a approuvé par ordonnance le paiement à Century Services, le principal créancier garanti du débiteur, d'une somme d'au plus cinq millions de dollars. Toutefois, il a également ordonné à la compagnie débitrice de retenir un montant égal aux sommes de TPS non versées et de le déposer séparément dans le compte en fiducie du contrôleur jusqu'à l'issue de la réorganisation. Ayant conclu que la réorganisation n'était pas possible, la compagnie débitrice a demandé au tribunal de lever partiellement la suspension des procédures pour lui permettre de faire cession de ses biens en vertu de la *LFI*. La Couronne a demandé par requête le paiement immédiat au receveur général des sommes de TPS non versées. Le juge siégeant en son cabinet a rejeté la requête de la Couronne et autorisé la cession des biens. La Cour d'appel a accueilli l'appel pour deux raisons. Premièrement, elle a conclu que, après que la tentative de réorganisation eut échoué, le juge siégeant en son cabinet était tenu, en raison de la priorité établie par la *LTA*, d'autoriser le paiement à la Couronne des sommes qui lui étaient dues au titre de la TPS, et que l'art. 11 de la *LACC* ne lui conférait pas le pouvoir discrétionnaire de maintenir la suspension de la demande de la Couronne. Deuxièmement, la Cour d'appel a conclu que, en ordonnant la ségrégation des sommes de TPS dans le compte en fiducie du contrôleur, le juge siégeant en son cabinet avait créé une fiducie expresse en faveur de la Couronne.

Arrêt (la juge Abella est dissidente) : Le pourvoi est accueilli.

La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Charron, Rothstein et Cromwell : Il est possible de résoudre le conflit apparent entre le par. 222(3) de la *LTA* et le par. 18.3(1) de la *LACC* en les interprétant d'une manière qui tienne compte adéquatement de l'historique de la *LACC*, de la fonction de cette loi parmi

Parliament and the principles for interpreting the *CCAA* that have been recognized in the jurisprudence. The history of the *CCAA* distinguishes it from the *BIA* because although these statutes share the same remedial purpose of avoiding the social and economic costs of liquidating a debtor's assets, the *CCAA* offers more flexibility and greater judicial discretion than the rules-based mechanism under the *BIA*, making the former more responsive to complex reorganizations. Because the *CCAA* is silent on what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily provides the backdrop against which creditors assess their priority in the event of bankruptcy. The contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the *CCAA* and the *BIA*, and one of its important features has been a cutback in Crown priorities. Accordingly, the *CCAA* and the *BIA* both contain provisions nullifying statutory deemed trusts in favour of the Crown, and both contain explicit exceptions exempting source deductions deemed trusts from this general rule. Meanwhile, both Acts are harmonious in treating other Crown claims as unsecured. No such clear and express language exists in those Acts carving out an exception for GST claims.

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

l'ensemble des textes adoptés par le législateur fédéral en matière d'insolvabilité et des principes d'interprétation de la *LACC* reconnus dans la jurisprudence. L'historique de la *LACC* permet de distinguer celle-ci de la *LFI* en ce sens que, bien que ces lois aient pour objet d'éviter les coûts sociaux et économiques liés à la liquidation de l'actif d'un débiteur, la *LACC* offre plus de souplesse et accorde aux tribunaux un plus grand pouvoir discrétionnaire que le mécanisme fondé sur des règles de la *LFI*, ce qui rend la première mieux adaptée aux réorganisations complexes. Comme la *LACC* ne précise pas ce qui arrive en cas d'échec de la réorganisation, la *LFI* fournit la norme de référence permettant aux créanciers de savoir s'ils ont la priorité dans l'éventualité d'une faillite. Le travail de réforme législative contemporain a principalement visé à harmoniser les aspects communs à la *LACC* et à la *LFI*, et l'une des caractéristiques importantes de cette réforme est la réduction des priorités dont jouit la Couronne. Par conséquent, la *LACC* et la *LFI* contiennent toutes deux des dispositions neutralisant les fiducies réputées établies en vertu d'un texte législatif en faveur de la Couronne, et toutes deux comportent des exceptions expresses à la règle générale qui concernent les fiducies réputées établies à l'égard des retenues à la source. Par ailleurs, ces deux lois considèrent les autres créances de la Couronne comme des créances non garanties. Ces lois ne comportent pas de dispositions claires et expresses établissant une exception pour les créances relatives à la TPS.

Les tribunaux appelés à résoudre le conflit apparent entre le par. 222(3) de la *LTA* et le par. 18.3(1) de la *LACC* ont été enclins à appliquer l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* et à trancher en faveur de la *LTA*. Il ne convient pas de suivre cet arrêt. C'est plutôt la *LACC* qui énonce la règle applicable. Le paragraphe 222(3) de la *LTA* ne révèle aucune intention explicite du législateur d'abroger l'art. 18.3 de la *LACC*. Quand le législateur a voulu protéger certaines créances de la Couronne au moyen de fiducies réputées et voulu que celles-ci continuent de s'appliquer en situation d'insolvabilité, il l'a indiqué de manière explicite et minutieuse. En revanche, il n'existe aucune disposition législative expresse permettant de conclure que les créances relatives à la TPS bénéficient d'un traitement préférentiel sous le régime de la *LACC* ou de la *LFI*. Il semble découler de la logique interne de la *LACC* que la fiducie réputée établie à l'égard de la TPS est visée par la renonciation du législateur à sa priorité. Il y aurait une étrange asymétrie si l'on concluait que la *LACC* ne traite pas les fiducies réputées à l'égard de la TPS de la même manière que la *LFI*, car cela encouragerait les créanciers à recourir à la loi la plus favorable, minerait les objectifs réparateurs de la *LACC* et risquerait de favoriser les maux sociaux que l'édiction de ce texte législatif visait justement à recent amendments to the *CCAA* in 2005 resulted in s. 18.3 of the Act being renumbered and reformulated, making it the later in time provision. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*. The conflict between the *ETA* and the *CCAA* is more apparent than real.

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

prévenir. Le paragraphe 222(3) de la *LTA*, une disposition plus récente et générale que le par. 18.3(1) de la *LACC*, n'exige pas l'application de la doctrine de l'abrogation implicite dans les circonstances de la présente affaire. En tout état de cause, par suite des modifications apportées récemment à la *LACC* en 2005, l'art. 18.3 a été reformulé et renuméroté, ce qui en fait la disposition postérieure. Cette constatation confirme que c'est dans la *LACC* qu'est exprimée l'intention du législateur en ce qui a trait aux fiducies réputées visant la TPS. Le conflit entre la *LTA* et la *LACC* est plus apparent que réel.

L'exercice par les tribunaux de leurs pouvoirs discrétionnaires a fait en sorte que la *LACC* a évolué et s'est adaptée aux besoins commerciaux et sociaux contemporains. Comme les réorganisations deviennent très complexes, les tribunaux chargés d'appliquer la *LACC* ont été appelés à innover. Les tribunaux doivent d'abord interpréter les dispositions de la *LACC* avant d'invoquer leur compétence inhérente ou leur compétence en equity pour établir leur pouvoir de prendre des mesures dans le cadre d'une procédure fondée sur la *LACC*. À cet égard, il faut souligner que le texte de la *LACC* peut être interprété très largement. La possibilité pour le tribunal de rendre des ordonnances plus spécifiques n'a pas pour effet de restreindre la portée des termes généraux utilisés dans la *LACC*. L'opportunité, la bonne foi et la diligence sont des considérations de base que le tribunal devrait toujours garder à l'esprit lorsqu'il exerce les pouvoirs conférés par la *LACC*. Il s'agit de savoir si l'ordonnance contribuera utilement à la réalisation de l'objectif d'éviter les pertes sociales et économiques résultant de la liquidation d'une compagnie insolvable. Ce critère s'applique non seulement à l'objectif de l'ordonnance, mais aussi aux moyens utilisés. En l'espèce, l'ordonnance du juge siégeant en son cabinet qui a suspendu l'exécution des mesures de recouvrement de la Couronne à l'égard de la TPS contribuait à la réalisation des objectifs de la *LACC*, parce qu'elle avait pour effet de dissuader les créanciers d'entraver une liquidation ordonnée et favorisait une transition harmonieuse entre la *LACC* et la *LFI*, répondant ainsi à l'objectif — commun aux deux lois — qui consiste à avoir une seule procédure. Le passage de la *LACC* à la *LFI* peut exiger la levée partielle d'une suspension de procédures ordonnée en vertu de la *LACC*, de façon à permettre l'engagement des procédures fondées sur la *LFI*, mais il n'existe aucun hiatus entre ces lois étant donné qu'elles s'appliquent de concert et que, dans les deux cas, les créanciers examinent le régime de distribution prévu par la *LFI* pour connaître la situation qui serait la leur en cas d'échec de la réorganisation. L'ampleur du pouvoir discrétionnaire conféré au tribunal par la *LACC* suffit pour établir une passerelle vers une liquidation opérée sous le régime de la *LFI*. Le juge siégeant en son cabinet pouvait donc rendre l'ordonnance qu'il a prononcée.

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

L'ordonnance du juge siégeant en son cabinet n'a pas créé de fiducie expresse en l'espèce, car aucune certitude d'objet ne peut être inférée de cette ordonnance. La création d'une fiducie expresse exige la présence de certitudes quant à l'intention, à la matière et à l'objet. Lorsque le juge siégeant en son cabinet a accepté la proposition que les sommes soient détenues séparément dans le compte en fiducie du contrôleur, il n'existait aucune certitude que la Couronne serait le bénéficiaire ou l'objet de la fiducie, car il y avait un doute quant à la question de savoir qui au juste pourrait toucher l'argent en fin de compte. De toute façon, suivant l'interprétation du par. 18.3(1) de la *LACC* dégagée précédemment, aucun différend ne saurait même exister quant à l'argent, étant donné que la priorité accordée aux réclamations de la Couronne fondées sur la fiducie réputée visant la TPS ne s'applique pas sous le régime de la *LACC* et que la Couronne est reléguée au rang de créancier non garanti à l'égard des sommes en question.

Per Fish J.: The GST monies collected by the debtor are not subject to a deemed trust or priority in favour of the Crown. In recent years, Parliament has given detailed consideration to the Canadian insolvency scheme but has declined to amend the provisions at issue in this case, a deliberate exercise of legislative discretion. On the other hand, in upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, courts have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In the context of the Canadian insolvency regime, deemed trusts exist only where there is a statutory provision creating the trust and a *CCAA* or *BIA* provision explicitly confirming its effective operation. The *Income Tax Act*, the *Canada Pension Plan* and the *Employment Insurance Act* all contain deemed trust provisions that are strikingly similar to that in s. 222 of the *ETA* but they are all also confirmed in s. 37 of the *CCAA* and in s. 67(3) of the *BIA* in clear and unmistakeable terms. The same is not true of the deemed trust created under the *ETA*. Although Parliament created a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it did not confirm the continued operation of the trust in either the *BIA* or the *CCAA*, reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

Le juge Fish : Les sommes perçues par la débitrice au titre de la TPS ne font l'objet d'aucune fiducie réputée ou priorité en faveur de la Couronne. Au cours des dernières années, le législateur fédéral a procédé à un examen approfondi du régime canadien d'insolvabilité, mais il a refusé de modifier les dispositions qui sont en cause dans la présente affaire. Il s'agit d'un exercice délibéré du pouvoir discrétionnaire de légiférer. Par contre, en maintenant, malgré l'existence des procédures d'insolvabilité, la validité de fiducies réputées créées en vertu de la *LTA*, les tribunaux ont protégé indûment des droits de la Couronne que le Parlement avait lui-même choisi de subordonner à d'autres créances prioritaires. Dans le contexte du régime canadien d'insolvabilité, il existe une fiducie réputée uniquement lorsqu'une disposition législative crée la fiducie et qu'une disposition de la *LACC* ou de la *LFI* confirme explicitement l'existence de la fiducie. La *Loi de l'impôt sur le revenu*, le *Régime de pensions du Canada* et la *Loi sur l'assurance-emploi* renferment toutes des dispositions relatives aux fiducies réputées dont le libellé offre une ressemblance frappante avec celui de l'art. 222 de la *LTA*, mais le maintien en vigueur des fiducies réputées créées en vertu de ces dispositions est confirmé à l'art. 37 de la *LACC* et au par. 67(3) de la *LFI* en termes clairs et explicites. La situation est différente dans le cas de la fiducie réputée créée par la *LTA*. Bien que le législateur crée en faveur de la Couronne une fiducie réputée dans laquelle seront conservées les sommes recueillies au titre de la TPS mais non encore versées, et bien qu'il prétende maintenir cette fiducie en vigueur malgré les dispositions à l'effet contraire de toute loi fédérale ou provinciale, il ne confirme pas l'existence de la fiducie dans la *LFI* ou la *LACC*, ce qui témoigne de son intention de laisser la fiducie réputée devenir caduque au moment de l'introduction de la procédure d'insolvabilité.

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

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

La juge Abella (dissidente) : Le paragraphe 222(3) de la *LTA* donne préséance, dans le cadre d'une procédure relevant de la *LACC*, à la fiducie réputée qui est établie en faveur de la Couronne à l'égard de la TPS non versée. Cette disposition définit sans équivoque sa portée dans des termes on ne peut plus clairs et n'exclut que la *LFI* de son champ d'application. Les termes employés révèlent l'intention claire du législateur que le par. 222(3) l'emporte en cas de conflit avec toute autre loi sauf la *LFI*. Cette opinion est confortée par le fait que des modifications ont été apportées à la *LACC* après l'édiction du par. 222(3) et que, malgré les demandes répétées de divers groupes, le par. 18.3(1) n'a pas été modifié pour aligner l'ordre de priorité établi par la *LACC* sur celui de la *LFI*. Cela indique que le législateur a délibérément choisi de soustraire la fiducie réputée établie au par. 222(3) à l'application du par. 18.3(1) de la *LACC*.

Cette conclusion est renforcée par l'application d'autres principes d'interprétation. Une disposition spécifique antérieure peut être supplantée par une loi ultérieure de portée générale si le législateur, par les mots qu'il a employés, a exprimé l'intention de faire prévaloir la loi générale. Le paragraphe 222(3) accomplit cela de par son libellé, lequel précise que la disposition l'emporte sur tout autre texte législatif fédéral, tout texte législatif provincial ou « toute autre règle de droit » sauf la *LFI*. Le paragraphe 18.3(1) de la *LACC* est par conséquent rendu inopérant aux fins d'application du par. 222(3). Selon l'alinéa 44*f*) de la *Loi d'interprétation*, le fait que le par. 18.3(1) soit devenu le par. 37(1) à la suite de l'édiction du par. 222(3) de la *LTA* n'a aucune incidence sur l'ordre chronologique du point de vue de l'interprétation, et le par. 222(3) de la *LTA* demeure la disposition « postérieure ». Il s'ensuit que la disposition créant une fiducie réputée que l'on trouve au par. 222(3) de la *LTA* l'emporte sur le par. 18.3(1) dans le cadre d'une procédure fondée sur la *LACC*. Bien que l'art. 11 accorde au tribunal le pouvoir discrétionnaire de rendre des ordonnances malgré les dispositions de la *LFI* et de la *Loi sur les liquidations*, ce pouvoir discrétionnaire demeure assujetti à l'application de toute autre loi fédérale. L'exercice de ce pouvoir discrétionnaire est donc circonscrit par les limites imposées par toute loi autre que la *LFI* et la *Loi sur les liquidations*, et donc par la *LTA*. En l'espèce, le juge siégeant en son cabinet était donc tenu de respecter le régime de priorités établi au par. 222(3) de la *LTA*. Ni le par. 18.3(1), ni l'art. 11 de la *LACC* ne l'autorisaient à en faire abstraction. Par conséquent, 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*.

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

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

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

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

[1] DESCHAMPS J. — For the first time this Court is called upon to directly interpret the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). In that respect, two questions are raised. The first requires reconciliation of provisions of the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), which lower courts have held to be in conflict with one another. The second concerns the scope of a court's discretion when supervising reorganization. The relevant statutory provisions are reproduced in the Appendix. On the first question, having considered the evolution of Crown priorities in the context of insolvency and the wording of the various statutes creating Crown priorities, I conclude that it is the *CCAA* and not the *ETA* that provides the rule. On the second question, I conclude that the broad discretionary jurisdiction conferred on the supervising judge must be interpreted having regard to the remedial nature of the *CCAA* and insolvency legislation generally. Consequently, the court had the discretion to partially lift a stay of proceedings to allow the debtor to make an assignment under the *Bankruptcy and Insolvency*

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (les juges Newbury, Tysoe et Smith), 2009 BCCA 205, 98 B.C.L.R. (4th) 242, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, [2009] G.S.T.C. 79, [2009] B.C.J. No. 918 (QL), 2009 CarswellBC 1195, qui a infirmé une décision du juge en chef Brenner, 2008 BCSC 1805, [2008] G.S.T.C. 221, [2008] B.C.J. No. 2611 (QL), 2008 CarswellBC 2895, qui a rejeté la demande de la Couronne sollicitant le paiement de la TPS. Pourvoi accueilli, la juge Abella est dissidente.

Mary I. A. Buttery, *Owen J. James* et *Matthew J. G. Curtis*, pour l'appelante.

Gordon Bourgard, *David Jacyk* et *Michael J. Lema*, pour l'intimé.

Version française du jugement de la juge en chef McLachlin et des juges Binnie, LeBel, Deschamps, Charron, Rothstein et Cromwell rendu par

[1] LA JUGE DESCHAMPS — C'est la première fois que la Cour est appelée à interpréter directement les dispositions de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« *LACC* »). À cet égard, deux questions sont soulevées. La première requiert la conciliation d'une disposition de la *LACC* et d'une disposition de la *Loi sur la taxe d'accise*, L.R.C. 1985, ch. E-15 (« *LTA* »), qui, selon des juridictions inférieures, sont en conflit l'une avec l'autre. La deuxième concerne la portée du pouvoir discrétionnaire du tribunal qui surveille une réorganisation. Les dispositions législatives pertinentes sont reproduites en annexe. Pour ce qui est de la première question, après avoir examiné l'évolution des priorités de la Couronne en matière d'insolvabilité et le libellé des diverses lois qui établissent ces priorités, j'arrive à la conclusion que c'est la *LACC*, et non la *LTA*, qui énonce la règle applicable. Pour ce qui est de la seconde question, je conclus qu'il faut interpréter les larges pouvoirs discrétionnaires conférés au juge en tenant compte de la nature réparatrice de la *LACC* et de la législation sur l'insolvabilité en général. Par conséquent, le tribunal avait le pouvoir

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.

discrétionnaire de lever partiellement la suspension des procédures pour permettre au débiteur de faire cession de ses biens en vertu de la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* »). Je suis d'avis d'accueillir le pourvoi.

1. Faits et décisions des juridictions inférieures

[2] Le 13 décembre 2007, Ted LeRoy Trucking Ltd. (« LeRoy Trucking ») a déposé une requête sous le régime de la *LACC* devant la Cour suprême de la Colombie-Britannique et obtenu la suspension des procédures dans le but de réorganiser ses finances. L'entreprise a vendu certains éléments d'actif excédentaires, comme l'y autorisait l'ordonnance.

[3] Parmi les dettes de LeRoy Trucking figurait une somme perçue par celle-ci au titre de la taxe sur les produits et services (« TPS ») mais non versée à la Couronne. La *LTA* crée en faveur de la Couronne une fiducie réputée visant les sommes perçues au titre de la TPS. Cette fiducie réputée s'applique à tout bien ou toute recette détenue par la personne qui perçoit la TPS et à tout bien de cette personne détenu par un créancier garanti, et le produit découlant de ces biens doit être payé à la Couronne par priorité sur tout droit en garantie. Aux termes de la *LTA*, la fiducie réputée s'applique malgré tout autre texte législatif du Canada sauf la *LFI*. Cependant, la *LACC* prévoit également que, sous réserve de certaines exceptions, dont aucune ne concerne la TPS, ne s'appliquent pas sous son régime les fiducies réputées qui existent en faveur de la Couronne. Par conséquent, pour ce qui est de la TPS, la Couronne est un créancier non garanti dans le cadre de cette loi. Néanmoins, à l'époque où LeRoy Trucking a débuté ses procédures en vertu de la *LACC*, la jurisprudence dominante indiquait que la *LTA* l'emportait sur la *LACC*, la Couronne jouissant ainsi d'un droit prioritaire à l'égard des créances relatives à la TPS dans le cadre de la *LACC*, malgré le fait qu'elle aurait perdu cette priorité en vertu de la *LFI*. La *LACC* a fait l'objet de modifications substantielles en 2005, et certaines des dispositions en cause dans le présent pourvoi ont alors été renumérotées et reformulées (L.C. 2005, ch. 47). Mais ces modifications ne sont entrées en vigueur que le 18 septembre 2009. Je ne me reporterai aux dispositions modifiées que lorsqu'il sera utile de le faire.

[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.

[4] Le 29 avril 2008, le juge en chef Brenner de la Cour suprême de la Colombie-Britannique, dans le contexte des procédures intentées en vertu de la *LACC*, a approuvé le paiement à Century Services, le principal créancier garanti du débiteur, d'une somme d'au plus cinq millions de dollars, soit le produit de la vente d'éléments d'actif excédentaires. LeRoy Trucking a proposé de retenir un montant égal aux sommes perçues au titre de la TPS mais non versées à la Couronne et de le déposer dans le compte en fiducie du contrôleur jusqu'à ce que l'issue de la réorganisation soit connue. Afin de maintenir le statu quo, en raison du succès incertain de la réorganisation, le juge en chef Brenner a accepté la proposition et ordonné qu'une somme de 305 202,30 $ soit détenue par le contrôleur dans son compte en fiducie.

[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).

[5] Le 3 septembre 2008, ayant conclu que la réorganisation n'était pas possible, LeRoy Trucking a demandé à la Cour suprême de la Colombie-Britannique l'autorisation de faire cession de ses biens en vertu de la *LFI*. Pour sa part, la Couronne a demandé au tribunal d'ordonner le paiement au receveur général du Canada de la somme détenue par le contrôleur au titre de la TPS. Le juge en chef Brenner a rejeté cette dernière demande. Selon lui, comme la détention des fonds dans le compte en fiducie du contrôleur visait à [TRADUCTION] « faciliter le paiement final des sommes de TPS qui étaient dues avant que l'entreprise ne débute les procédures, mais seulement si un plan viable était proposé », l'impossibilité de procéder à une telle réorganisation, suivie d'une cession de biens, signifiait que la Couronne perdrait sa priorité sous le régime de la *LFI* (2008 BCSC 1805, [2008] G.S.T.C. 221).

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

[6] La Cour d'appel de la Colombie-Britannique a accueilli l'appel interjeté par la Couronne (2009 BCCA 205, 270 B.C.A.C. 167). Rédigeant l'arrêt unanime de la cour, le juge Tysoe a invoqué deux raisons distinctes pour y faire droit.

[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

[7] Premièrement, le juge d'appel Tysoe a conclu que le pouvoir conféré au tribunal par l'art. 11 de la *LACC* n'autorisait pas ce dernier à rejeter la demande de la Couronne sollicitant le paiement immédiat des sommes de TPS faisant l'objet de la fiducie réputée,

that bankruptcy was inevitable. As restructuring was no longer a possibility, staying the Crown's claim to the GST funds no longer served a purpose under the *CCAA* and the court was bound under the priority scheme provided by the *ETA* to allow payment to the Crown. In so holding, Tysoe J.A. adopted the reasoning in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), which found that the *ETA* deemed trust for GST established Crown priority over secured creditors under the *CCAA*.

après qu'il fut devenu clair que la tentative de réorganisation avait échoué et que la faillite était inévitable. Comme la restructuration n'était plus une possibilité, il ne servait plus à rien, dans le cadre de la *LACC*, de suspendre le paiement à la Couronne des sommes de TPS et le tribunal était tenu, en raison de la priorité établie par la *LTA*, d'en autoriser le versement à la Couronne. Ce faisant, le juge Tysoe a adopté le raisonnement énoncé dans l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), suivant lequel la fiducie réputée que crée la *LTA* à l'égard des sommes dues au titre de la TPS établissait la priorité de la Couronne sur les créanciers garantis dans le cadre de la *LACC*.

[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.

[8] Deuxièmement, le juge Tysoe a conclu que, en ordonnant la ségrégation des sommes de TPS dans le compte en fiducie du contrôleur le 29 avril 2008, le tribunal avait créé une fiducie expresse en faveur de la Couronne, et que les sommes visées ne pouvaient être utilisées à quelque autre fin que ce soit. En conséquence, la Cour d'appel a ordonné que les sommes détenues par le contrôleur en fiducie pour la Couronne soient versées au receveur général.

2. Issues

2. Questions en litige

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

[9] Le pourvoi soulève trois grandes questions que j'examinerai à tour de rôle :

(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*?

(1) Le paragraphe 222(3) de la *LTA* l'emporte-t-il sur le par. 18.3(1) de la *LACC* et donne-t-il priorité à la fiducie réputée qui est établie par la *LTA* en faveur de la Couronne pendant des procédures régies par la *LACC*, comme il a été décidé dans l'arrêt *Ottawa Senators*?

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

(2) Le tribunal a-t-il outrepassé les pouvoirs qui lui étaient conférés par la *LACC* en levant la suspension des procédures dans le but de permettre au débiteur de faire cession de ses biens?

(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) L'ordonnance du tribunal datée du 29 avril 2008 exigeant que le montant de TPS réclamé par la Couronne soit détenu séparément dans le compte en fiducie du contrôleur a-t-elle créé une fiducie expresse en faveur de la Couronne à l'égard des fonds en question?

3. Analysis

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

[11] In order to properly interpret the provisions, it is necessary to examine the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by Parliament, and the principles that have been recognized in the jurisprudence. It will be seen that Crown priorities in the insolvency context have been significantly pared down. The resolution of the second issue is also rooted in the context of the *CCAA*, but its purpose and the manner in which it has been interpreted in the case law are also key. After examining the first two issues in this case, I will address Tysoe J.A.'s conclusion that an express trust in favour of the Crown was created by the court's order of April 29, 2008.

3.1 *Purpose and Scope of Insolvency Law*

[12] Insolvency is the factual situation that arises when a debtor is unable to pay creditors (see generally, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), at p. 16). Certain legal proceedings become available upon insolvency, which typically allow a debtor to obtain a court order staying its creditors' enforcement actions and attempt to obtain

3. Analyse

[10] La première question porte sur les priorités de la Couronne dans le contexte de l'insolvabilité. Comme nous le verrons, la *LTA* crée en faveur de la Couronne une fiducie réputée à l'égard de la TPS due par un débiteur « [m]algré [. . .] tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*) » (par. 222(3)), alors que selon la disposition de la *LACC* en vigueur à l'époque, « par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme [tel] » (par. 18.3(1)). Il est difficile d'imaginer deux dispositions législatives plus contradictoires en apparence. Cependant, comme c'est souvent le cas, le conflit apparent peut être résolu au moyen des principes d'interprétation législative.

[11] Pour interpréter correctement ces dispositions, il faut examiner l'historique de la *LACC*, la fonction de cette loi parmi l'ensemble des textes adoptés par le législateur fédéral en matière d'insolvabilité et les principes reconnus dans la jurisprudence. Nous verrons que les priorités de la Couronne en matière d'insolvabilité ont été restreintes de façon appréciable. La réponse à la deuxième question repose aussi sur le contexte de la *LACC*, mais l'objectif de cette loi et l'interprétation qu'en a donnée la jurisprudence jouent également un rôle essentiel. Après avoir examiné les deux premières questions soulevées en l'espèce, j'aborderai la conclusion du juge Tysoe selon laquelle l'ordonnance rendue par le tribunal le 29 avril 2008 a eu pour effet de créer une fiducie expresse en faveur de la Couronne.

3.1 *Objectif et portée du droit relatif à l'insolvabilité*

[12] L'insolvabilité est la situation de fait qui se présente quand un débiteur n'est pas en mesure de payer ses créanciers (voir, généralement, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), p. 16). Certaines procédures judiciaires peuvent être intentées en cas d'insolvabilité. Ainsi, le débiteur peut généralement obtenir une ordonnance judiciaire

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.

ayant pour effet de suspendre les mesures d'exécution de ses créanciers, puis tenter de conclure avec eux une transaction à caractère exécutoire contenant des conditions de paiement plus réalistes. Ou alors, les biens du débiteur sont liquidés et ses dettes sont remboursées sur le produit de cette liquidation, selon les règles de priorité établies par la loi. Dans le premier cas, on emploie habituellement les termes de réorganisation ou de restructuration, alors que dans le second, on parle de 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.

[13] Le droit canadien en matière d'insolvabilité commerciale n'est pas codifié dans une seule loi exhaustive. En effet, le législateur a plutôt adopté plusieurs lois sur l'insolvabilité, la principale étant la *LFI*. Cette dernière établit un régime juridique autonome qui concerne à la fois la réorganisation et la liquidation. Bien qu'il existe depuis longtemps des mesures législatives relatives à la faillite, la *LFI* elle-même est une loi assez récente — elle a été adoptée en 1992. Ses procédures se caractérisent par une approche fondée sur des règles préétablies. Les débiteurs insolvables — personnes physiques ou personnes morales — qui doivent 1 000 $ ou plus peuvent recourir à la *LFI*. Celle-ci comporte des mécanismes permettant au débiteur de présenter à ses créanciers une proposition de rajustement des dettes. Si la proposition est rejetée, la *LFI* établit la démarche aboutissant à la faillite : les biens du débiteur sont liquidés et le produit de cette liquidation est versé aux créanciers conformément à la répartition prévue par la loi.

[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

[14] La possibilité de recourir à la *LACC* est plus restreinte. Le débiteur doit être une compagnie dont les dettes dépassent cinq millions de dollars. Contrairement à la *LFI*, la *LACC* ne contient aucune disposition relative à la liquidation de l'actif d'un débiteur en cas d'échec de la réorganisation. Une procédure engagée sous le régime de la *LACC* peut se terminer de trois façons différentes. Le scénario idéal survient dans les cas où la suspension des recours donne au débiteur un répit lui permettant de rétablir sa solvabilité et où le processus régi par la *LACC* prend fin sans qu'une réorganisation soit nécessaire. Le deuxième scénario le plus souhaitable est le cas où la transaction ou l'arrangement proposé par le débiteur est

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.

accepté par ses créanciers et où la compagnie réorganisée poursuit ses activités au terme de la procédure engagée en vertu de la *LACC*. Enfin, dans le dernier scénario, la transaction ou l'arrangement échoue et la compagnie ou ses créanciers cherchent habituellement à obtenir la liquidation des biens en vertu des dispositions applicables de la *LFI* ou la mise sous séquestre du débiteur. Comme nous le verrons, la principale différence entre les régimes de réorganisation prévus par la *LFI* et la *LACC* est que le second établit un mécanisme plus souple, dans lequel les tribunaux disposent d'un plus grand pouvoir discrétionnaire, ce qui rend le mécanisme mieux adapté aux réorganisations complexes.

[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.

[15] Comme je vais le préciser davantage plus loin, la *LACC* — la première loi canadienne régissant la réorganisation — a pour objectif de permettre au débiteur de continuer d'exercer ses activités et, dans les cas où cela est possible, d'éviter les coûts sociaux et économiques liés à la liquidation de son actif. Les propositions faites aux créanciers en vertu de la *LFI* répondent au même objectif, mais au moyen d'un mécanisme fondé sur des règles et offrant moins de souplesse. Quand la réorganisation s'avère impossible, les dispositions de la *LFI* peuvent être appliquées pour répartir de manière ordonnée les biens du débiteur entre les créanciers, en fonction des règles de priorité qui y sont établies.

[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*

[16] Avant l'adoption de la *LACC* en 1933 (S.C. 1932-33, ch. 36), la liquidation de la compagnie débitrice constituait la pratique la plus courante en vertu de la législation existante en matière d'insolvabilité commerciale (J. Sarra, *Creditor Rights and the Public Interest : Restructuring Insolvent Corporations* (2003), p. 12). Les ravages de la Grande Dépression sur les entreprises canadiennes et l'absence d'un mécanisme efficace susceptible de permettre aux débiteurs et aux créanciers d'arriver à des compromis afin d'éviter la liquidation commandaient une solution législative. La *LACC* a innové en permettant au débiteur insolvable de tenter une réorganisation sous surveillance judiciaire, hors du cadre de la législation existante en matière d'insolvabilité qui, une fois entrée en jeu,

Arrangement Act, [1934] S.C.R. 659, at pp. 660-61; Sarra, *Creditor Rights*, at pp. 12-13).

aboutissait presque invariablement à la liquidation (*Reference re Companies' Creditors Arrangement Act*, [1934] R.C.S. 659, p. 660-661; Sarra, *Creditor Rights*, p. 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).

[17] Le législateur comprenait, lorsqu'il a adopté la *LACC*, que la liquidation d'une compagnie insolvable causait préjudice à la plupart des personnes touchées — notamment les créanciers et les employés — et que la meilleure solution consistait dans un arrangement permettant à la compagnie de survivre (Sarra, *Creditor Rights*, p. 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.

[18] Les premières analyses et décisions judiciaires à cet égard ont également entériné les objectifs réparateurs de la *LACC*. On y reconnaissait que la valeur de la compagnie demeurait plus grande lorsque celle-ci pouvait poursuivre ses activités, tout en soulignant les pertes intangibles découlant d'une liquidation, par exemple la disparition de la clientèle (S. E. Edwards, « Reorganizations Under the Companies' Creditors Arrangement Act » (1947), 25 *R. du B. can.* 587, p. 592). La réorganisation sert l'intérêt public en permettant la survie de compagnies qui fournissent des biens ou des services essentiels à la santé de l'économie ou en préservant un grand nombre d'emplois (*ibid.*, p. 593). Les effets de l'insolvabilité pouvaient même toucher d'autres intéressés que les seuls créanciers et employés. Ces arguments se font entendre encore aujourd'hui sous une forme un peu différente, lorsqu'on justifie la réorganisation par la nécessité de remettre sur pied des compagnies qui constituent des volets essentiels d'un réseau complexe de rapports économiques interdépendants, dans le but d'éviter les effets négatifs de la 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

[19] La *LACC* est tombée en désuétude au cours des décennies qui ont suivi, vraisemblablement parce que des modifications apportées en 1953 ont restreint son application aux compagnies émettant des obligations (S.C. 1952-53, ch. 3). Pendant la récession du début des années 1980, obligés de s'adapter au nombre grandissant d'entreprises en difficulté, les avocats travaillant dans le domaine de l'insolvabilité ainsi que les tribunaux ont redécouvert cette loi et s'en sont servis pour relever les nouveaux défis de l'économie. Les participants aux

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.

procédures en sont peu à peu venus à reconnaître et à apprécier la caractéristique propre de la loi : l'attribution, au tribunal chargé de surveiller le processus, d'une grande latitude lui permettant de rendre les ordonnances nécessaires pour faciliter la réorganisation du débiteur et réaliser les objectifs de la *LACC*. Nous verrons plus loin comment les tribunaux ont utilisé de façon de plus en plus souple et créative les pouvoirs qui leur sont conférés par la *LACC*.

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

[20] Ce ne sont pas seulement les tribunaux qui se sont employés à faire évoluer le droit de l'insolvabilité pendant cette période. En 1970, un comité constitué par le gouvernement a mené une étude approfondie au terme de laquelle il a recommandé une réforme majeure, mais le législateur n'a rien fait (voir *Faillite et insolvabilité : Rapport du comité d'étude sur la législation en matière de faillite et d'insolvabilité* (1970)). En 1986, un autre comité d'experts a formulé des recommandations de portée plus restreinte, qui ont finalement conduit à l'adoption de la *Loi sur la faillite et l'insolvabilité* de 1992 (L.C. 1992, ch. 27) (voir *Propositions d'amendements à la Loi sur la faillite : Rapport du Comité consultatif en matière de faillite et d'insolvabilité* (1986)). Des dispositions à caractère plus général concernant la réorganisation des débiteurs insolvables ont alors été ajoutées à la loi canadienne relative à la faillite. Malgré l'absence de recommandations spécifiques au sujet de la *LACC* dans les rapports de 1970 et 1986, le comité de la Chambre des communes qui s'est penché sur le projet de loi C-22 à l'origine de la *LFI* a semblé accepter le témoignage d'un expert selon lequel le nouveau régime de réorganisation de la *LFI* supplanterait rapidement la *LACC*, laquelle pourrait alors être abrogée et l'insolvabilité commerciale et la faillite seraient ainsi régies par un seul texte législatif (*Procès-verbaux et témoignages du Comité permanent des Consommateurs et Sociétés et Administration gouvernementale*, fascicule nº 15, 3e sess., 34e lég., 3 octobre 1991, 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

[21] En rétrospective, cette conclusion du comité de la Chambre des communes ne correspondait pas à la réalité. Elle ne tenait pas compte de la nouvelle vitalité de la *LACC* dans la pratique contemporaine,

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

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

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

The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing,

ni des avantages qu'offrait, en présence de réorganisations de plus en plus complexes, un processus souple de réorganisation sous surveillance judiciaire par rapport au régime plus rigide de la *LFI*, fondé sur des règles préétablies. La « souplesse de la LACC [était considérée comme offrant] de grands avantages car elle permet de prendre des décisions créatives et efficaces » (Industrie Canada, Direction générale des politiques-cadres du marché, *Rapport sur la mise en application de la Loi sur la faillite et l'insolvabilité et de la Loi sur les arrangements avec les créanciers des compagnies* (2002), p. 50). Au cours des trois dernières décennies, la résurrection de la *LACC* a donc été le moteur d'un processus grâce auquel, selon un auteur, [TRADUCTION] « le régime juridique canadien de restructuration en cas d'insolvabilité — qui était au départ un instrument plutôt rudimentaire — a évolué pour devenir un des systèmes les plus sophistiqués du monde développé » (R. B. Jones, « The Evolution of Canadian Restructuring : Challenges for the Rule of Law », dans J. P. Sarra, dir., *Annual Review of Insolvency Law 2005* (2006), 481, p. 481).

[22] Si les instances en matière d'insolvabilité peuvent être régies par des régimes législatifs différents, elles n'en présentent pas moins certains points communs, dont le plus frappant réside dans le modèle de la procédure unique. Le professeur Wood a décrit ainsi la nature et l'objectif de ce modèle dans *Bankruptcy and Insolvency Law* :

> [TRADUCTION] Elles prévoient toutes une procédure collective qui remplace la procédure civile habituelle dont peuvent se prévaloir les créanciers pour faire valoir leurs droits. Les recours des créanciers sont collectivisés afin d'éviter l'anarchie qui régnerait si ceux-ci pouvaient exercer leurs recours individuellement. En l'absence d'un processus collectif, chaque créancier sait que faute d'agir de façon rapide et déterminée pour saisir les biens du débiteur, il sera devancé par les autres créanciers. [p. 2-3]

Le modèle de la procédure unique vise à faire échec à l'inefficacité et au chaos qui résulteraient de l'insolvabilité si chaque créancier engageait sa propre procédure dans le but de recouvrer sa créance. La réunion — en une seule instance relevant d'un même tribunal — de toutes les actions possibles contre le débiteur a pour effet de faciliter la négociation avec 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.

les créanciers en les mettant tous sur le même pied. Cela évite le risque de voir un créancier plus combatif obtenir le paiement de ses créances sur l'actif limité du débiteur pendant que les autres créanciers tentent d'arriver à une transaction. La *LACC* et la *LFI* autorisent toutes deux pour cette raison le tribunal à ordonner la suspension de toutes les actions intentées contre le débiteur pendant qu'on cherche à conclure une transaction.

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

[23] Un autre point de convergence entre la *LACC* et la *LFI* concerne les priorités. Comme la *LACC* ne précise pas ce qui arrive en cas d'échec de la réorganisation, la *LFI* fournit la norme de référence pour ce qui se produira dans une telle situation. De plus, l'une des caractéristiques importantes de la réforme dont ces deux lois ont fait l'objet depuis 1992 est la réduction des priorités de la Couronne (L.C. 1992, ch. 27, art. 39; L.C. 1997, ch. 12, art. 73 et 125; L.C. 2000, ch. 30, art. 148; L.C. 2005, ch. 47, art. 69 et 131; L.C. 2009, ch. 33, art. 25; voir aussi *Québec (Revenu) c. Caisse populaire Desjardins de Montmagny*, 2009 CSC 49, [2009] 3 R.C.S. 286; *Sous-ministre du Revenu c. Rainville*, [1980] 1 R.C.S. 35; *Propositions d'amendements à la Loi sur la faillite : Rapport du Comité consultatif en matière de faillite et d'insolvabilité*).

[24] With parallel *CCAA* and *BIA* restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation (see *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, 30 Alta. L.R. (4th) 192, at para. 19).

[24] Comme les régimes de restructuration parallèles de la *LACC* et de la *LFI* constituent désormais une caractéristique reconnue dans le domaine du droit de l'insolvabilité, le travail de réforme législative contemporain a principalement visé à harmoniser, dans la mesure du possible, les aspects communs aux deux régimes et à privilégier la réorganisation plutôt que la liquidation (voir la *Loi édictant la Loi sur le Programme de protection des salariés et modifiant la Loi sur la faillite et l'insolvabilité, la Loi sur les arrangements avec les créanciers des compagnies et d'autres lois en conséquence*, L.C. 2005, ch. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, 30 Alta L.R. (4th) 192, par. 19).

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

[25] Ayant à l'esprit le contexte historique de la *LACC* et de la *LFI*, je vais maintenant aborder la première question en litige.

3.2 *GST Deemed Trust Under the CCAA*

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

[27] The Crown relies heavily on the decision of the Ontario Court of Appeal in *Ottawa Senators* and argues that the later in time provision of the *ETA* creating the GST deemed trust trumps the provision of the *CCAA* purporting to nullify most statutory deemed trusts. The Court of Appeal in this case accepted this reasoning but not all provincial courts follow it (see, e.g., *Komunik Corp. (Arrangement relatif à)*, 2009 QCCS 6332 (CanLII), leave to appeal granted, 2010 QCCA 183 (CanLII)). Century Services relied, in its written submissions to this Court, on the argument that the court had authority under the *CCAA* to continue the stay against the Crown's claim for unremitted GST. In oral argument, the question of whether *Ottawa Senators* was correctly decided nonetheless arose. After the hearing, the parties were asked to make further written submissions on this point. As appears evident from the reasons of my colleague Abella J., this issue has become prominent before this Court. In those circumstances, this Court needs to determine the correctness of the reasoning in *Ottawa Senators*.

[28] The policy backdrop to this question involves the Crown's priority as a creditor in insolvency situations which, as I mentioned above, has evolved considerably. Prior to the 1990s, Crown claims

3.2 *Fiducie réputée se rapportant à la TPS dans le cadre de la LACC*

[26] La Cour d'appel a estimé que la *LTA* empêchait le tribunal de suspendre les mesures prises par la Couronne pour bénéficier de la fiducie réputée se rapportant à la TPS, lorsqu'il a partiellement levé la suspension des procédures engagées contre le débiteur afin de permettre à celui-ci de faire cession de ses biens. Ce faisant, la cour a adopté un raisonnement qui s'insère dans un courant jurisprudentiel dominé par l'arrêt *Ottawa Senators*, suivant lequel il demeure possible de demander le bénéfice d'une fiducie réputée établie par la *LTA* pendant une réorganisation opérée en vertu de la *LACC*, et ce, malgré les dispositions de la *LACC* qui semblent dire le contraire.

[27] S'appuyant largement sur l'arrêt *Ottawa Senators* de la Cour d'appel de l'Ontario, la Couronne plaide que la disposition postérieure de la *LTA* créant la fiducie réputée visant la TPS l'emporte sur la disposition de la *LACC* censée neutraliser la plupart des fiducies réputées qui sont créées par des dispositions législatives. Si la Cour d'appel a accepté ce raisonnement dans la présente affaire, les tribunaux provinciaux ne l'ont pas tous adopté (voir, p. ex., *Komunik Corp. (Arrangement relatif à)*, 2009 QCCS 6332 (CanLII), autorisation d'appel accordée, 2010 QCCA 183 (CanLII)). Dans ses observations écrites adressées à la Cour, Century Services s'est fondée sur l'argument suivant lequel le tribunal pouvait, en vertu de la *LACC*, maintenir la suspension de la demande de la Couronne visant le paiement de la TPS non versée. Au cours des plaidoiries, la question de savoir si l'arrêt *Ottawa Senators* était bien fondé a néanmoins été soulevée. Après l'audience, la Cour a demandé aux parties de présenter des observations écrites supplémentaires à ce sujet. Comme il ressort clairement des motifs de ma collègue la juge Abella, cette question a pris une grande importance devant notre Cour. Dans ces circonstances, la Cour doit statuer sur le bien-fondé du raisonnement adopté dans l'arrêt *Ottawa Senators*.

[28] Le contexte général dans lequel s'inscrit cette question concerne l'évolution considérable, signalée plus haut, de la priorité dont jouit la Couronne en tant que créancier en cas d'insolvabilité. Avant les

largely enjoyed priority in insolvency. This was widely seen as unsatisfactory as shown by both the 1970 and 1986 insolvency reform proposals, which recommended that Crown claims receive no preferential treatment. A closely related matter was whether the *CCAA* was binding at all upon the Crown. Amendments to the *CCAA* in 1997 confirmed that it did indeed bind the Crown (see *CCAA*, s. 21, as added by S.C. 1997, c. 12, s. 126).

années 1990, les créances de la Couronne bénéficiaient dans une large mesure d'une priorité en cas d'insolvabilité. Cette situation avantageuse suscitait une grande controverse. Les propositions de réforme du droit de l'insolvabilité de 1970 et de 1986 en témoignent — elles recommandaient que les créances de la Couronne ne fassent l'objet d'aucun traitement préférentiel. Une question connexe se posait : celle de savoir si la Couronne était même assujettie à la *LACC*. Les modifications apportées à la *LACC* en 1997 ont confirmé qu'elle l'était bel et bien (voir *LACC*, art. 21, ajouté par L.C. 1997, ch. 12, art. 126).

[29] Claims of priority by the state in insolvency situations receive different treatment across jurisdictions worldwide. For example, in Germany and Australia, the state is given no priority at all, while the state enjoys wide priority in the United States and France (see B. K. Morgan, "Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy" (2000), 74 *Am. Bankr. L.J.* 461, at p. 500). Canada adopted a middle course through legislative reform of Crown priority initiated in 1992. The Crown retained priority for source deductions of income tax, Employment Insurance ("EI") and Canada Pension Plan ("CPP") premiums, but ranks as an ordinary unsecured creditor for most other claims.

[29] Les revendications de priorité par l'État en cas d'insolvabilité sont abordées de différentes façons selon les pays. Par exemple, en Allemagne et en Australie, l'État ne bénéficie d'aucune priorité, alors qu'aux États-Unis et en France il jouit au contraire d'une large priorité (voir B. K. Morgan, « Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy » (2000), 74 *Am. Bankr. L.J.* 461, p. 500). Le Canada a choisi une voie intermédiaire dans le cadre d'une réforme législative amorcée en 1992 : la Couronne a conservé sa priorité pour les sommes retenues à la source au titre de l'impôt sur le revenu et des cotisations à l'assurance-emploi (« AE ») et au Régime de pensions du Canada (« RPC »), mais elle est un créancier ordinaire non garanti pour la plupart des autres sommes qui lui sont dues.

[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).

[30] Le législateur a fréquemment adopté des mécanismes visant à protéger les créances de la Couronne et à permettre leur exécution. Les deux plus courants sont les fiducies présumées et les pouvoirs de saisie-arrêt (voir F. L. Lamer, *Priority of Crown Claims in Insolvency* (feuilles mobiles), §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

[31] Pour ce qui est des sommes de TPS perçues, le législateur a établi une fiducie réputée. La *LTA* précise que la personne qui perçoit une somme au titre de la TPS est réputée la détenir en fiducie pour la Couronne (par. 222(1)). La fiducie réputée s'applique aux autres biens de la personne qui perçoit la taxe, pour une valeur égale à la somme réputée détenue en fiducie, si la somme en question n'a pas été versée en conformité avec la *LTA*. La fiducie réputée vise

held by a secured creditor that, but for the security interest, would be property of the person collecting the tax (s. 222(3)).

[32] Parliament has created similar deemed trusts using almost identical language in respect of source deductions of income tax, EI premiums and CPP premiums (see s. 227(4) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"), ss. 86(2) and (2.1) of the *Employment Insurance Act*, S.C. 1996, c. 23, and ss. 23(3) and (4) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8). I will refer to income tax, EI and CPP deductions as "source deductions".

[33] In *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411, this Court addressed a priority dispute between a deemed trust for source deductions under the *ITA* and security interests taken under both the *Bank Act*, S.C. 1991, c. 46, and the Alberta *Personal Property Security Act*, S.A. 1988, c. P-4.05 ("*PPSA*"). As then worded, an *ITA* deemed trust over the debtor's property equivalent to the amount owing in respect of income tax became effective at the time of liquidation, receivership, or assignment in bankruptcy. *Sparrow Electric* held that the *ITA* deemed trust could not prevail over the security interests because, being fixed charges, the latter attached as soon as the debtor acquired rights in the property such that the *ITA* deemed trust had no property on which to attach when it subsequently arose. Later, in *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720, this Court observed that Parliament had legislated to strengthen the statutory deemed trust in the *ITA* by deeming it to operate from the moment the deductions were not paid to the Crown as required by the *ITA*, and by granting the Crown priority over all security interests (paras. 27-29) (the "*Sparrow Electric* amendment").

également les biens détenus par un créancier garanti qui, si ce n'était de la sûreté, seraient les biens de la personne qui perçoit la taxe (par. 222(3)).

[32] Utilisant pratiquement les mêmes termes, le législateur a créé de semblables fiducies réputées à l'égard des retenues à la source relatives à l'impôt sur le revenu et aux cotisations à l'AE et au RPC (voir par. 227(4) de la *Loi de l'impôt sur le revenu*, L.R.C. 1985, ch. 1 (5e suppl.) (« *LIR* »), par. 86(2) et (2.1) de la *Loi sur l'assurance-emploi*, L.C. 1996, ch. 23, et par. 23(3) et (4) du *Régime de pensions du Canada*, L.R.C. 1985, ch. C-8). J'emploierai ci-après le terme « retenues à la source » pour désigner les retenues relatives à l'impôt sur le revenu et aux cotisations à l'AE et au RPC.

[33] Dans *Banque Royale du Canada c. Sparrow Electric Corp.*, [1997] 1 R.C.S. 411, la Cour était saisie d'un litige portant sur la priorité de rang entre, d'une part, une fiducie réputée établie en vertu de la *LIR* à l'égard des retenues à la source, et, d'autre part, des sûretés constituées en vertu de la *Loi sur les banques*, L.C. 1991, ch. 46, et de la loi de l'Alberta intitulée *Personal Property Security Act*, S.A. 1988, ch. P-4.05 (« *PPSA* »). D'après les dispositions alors en vigueur, une fiducie réputée — établie en vertu de la *LIR* à l'égard des biens du débiteur pour une valeur égale à la somme due au titre de l'impôt sur le revenu — commençait à s'appliquer au moment de la liquidation, de la mise sous séquestre ou de la cession de biens. Dans *Sparrow Electric*, la Cour a conclu que la fiducie réputée de la *LIR* ne pouvait pas l'emporter sur les sûretés, au motif que, comme celles-ci constituaient des privilèges fixes grevant les biens dès que le débiteur acquérait des droits sur eux, il n'existait pas de biens susceptibles d'être visés par la fiducie réputée de la *LIR* lorsqu'elle prenait naissance par la suite. Ultérieurement, dans *First Vancouver Finance c. M.R.N.*, 2002 CSC 49, [2002] 2 R.C.S. 720, la Cour a souligné que le législateur était intervenu pour renforcer la fiducie réputée de la *LIR* en précisant qu'elle est réputée s'appliquer dès le moment où les retenues ne sont pas versées à la Couronne conformément aux exigences de la *LIR*, et en donnant à la Couronne la priorité sur toute autre garantie (par. 27-29) (la « modification découlant de l'arrêt *Sparrow Electric* »).

[34] The amended text of s. 227(4.1) of the *ITA* and concordant source deductions deemed trusts in the *Canada Pension Plan* and the *Employment Insurance Act* state that the deemed trust operates notwithstanding any other enactment of Canada, except ss. 81.1 and 81.2 of the *BIA*. The *ETA* deemed trust at issue in this case is similarly worded, but it excepts the *BIA* in its entirety. The provision reads as follows:

222. . . .

. . .

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

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

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

[37] Through a 1997 amendment to the *CCAA* (S.C. 1997, c. 12, s. 125), Parliament appears to have,

[34] Selon le texte modifié du par. 227(4.1) de la *LIR* et celui des fiducies réputées correspondantes établies dans le *Régime de pensions du Canada* et la *Loi sur l'assurance-emploi* à l'égard des retenues à la source, la fiducie réputée s'applique malgré tout autre texte législatif fédéral sauf les art. 81.1 et 81.2 de la *LFI*. La fiducie réputée de la *LTA* qui est en cause en l'espèce est formulée en des termes semblables sauf que la limite à son application vise la *LFI* dans son entier. Voici le texte de la disposition pertinente :

222. . . .

. . .

(3) Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés . . .

[35] La Couronne soutient que la modification découlant de l'arrêt *Sparrow Electric*, qui a été ajoutée à la *LTA* par le législateur en 2000, visait à maintenir la priorité de Sa Majesté sous le régime de la *LACC* à l'égard du montant de TPS perçu, tout en reléguant celle-ci au rang de créancier non garanti à l'égard de ce montant sous le régime de la *LFI* uniquement. De l'avis de la Couronne, il en est ainsi parce que, selon la *LTA*, la fiducie réputée visant la TPS demeure en vigueur « malgré » tout autre texte législatif sauf la *LFI*.

[36] Les termes utilisés dans la *LTA* pour établir la fiducie réputée à l'égard de la TPS créent un conflit apparent avec la *LACC*, laquelle précise que, sous réserve de certaines exceptions, les biens qui sont réputés selon un texte législatif être détenus en fiducie pour la Couronne ne doivent pas être considérés comme tels.

[37] Par une modification apportée à la *LACC* en 1997 (L.C. 1997, ch. 12, art. 125), le législateur

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.

semble, sous réserve d'exceptions spécifiques, avoir neutralisé les fiducies réputées créées en faveur de la Couronne lorsque des procédures de réorganisation sont engagées sous le régime de cette loi. La disposition pertinente, à l'époque le par. 18.3(1), était libellée ainsi :

> **18.3** (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

Cette neutralisation des fiducies réputées a été maintenue dans des modifications apportées à la *LACC* en 2005 (L.C. 2005, ch. 47), où le par. 18.3(1) a été reformulé et renuméroté, devenant le par. 37(1) :

> **37.** (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme tel par le seul effet d'une telle disposition.

[38] La *LFI* comporte une disposition analogue, qui — sous réserve des mêmes exceptions spécifiques — neutralise les fiducies réputées établies en vertu d'un texte législatif et fait en sorte que les biens du failli qui autrement seraient visés par une telle fiducie font partie de l'actif du débiteur et sont à la disposition des créanciers (L.C. 1992, ch. 27, art. 39; L.C. 1997, ch. 12, art. 73; *LFI*, par. 67(2)). Il convient de souligner que, tant dans la *LACC* que dans la *LFI*, les exceptions visent les retenues à la source (*LACC*, par. 18.3(2); *LFI*, par. 67(3)). Voici la disposition pertinente de la *LACC* :

> **18.3** . . .
>
> (2) Le paragraphe (1) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* . . .

Par conséquent, la fiducie réputée établie en faveur de la Couronne et la priorité dont celle-ci jouit de ce fait sur les retenues à la source continuent de s'appliquer autant pendant la réorganisation que pendant la faillite.

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

18.4 . . .

. . .

(3) Subsection (1) [Crown ranking as unsecured creditor] does not affect the operation of

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

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

Therefore, not only does the *CCAA* provide that Crown claims do not enjoy priority over the claims of other creditors (s. 18.3(1)), but the exceptions to this rule (i.e., that Crown priority is maintained for source deductions) are repeatedly stated in the statute.

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

[39] Par ailleurs, les autres créances de la Couronne sont considérées par la *LACC* et la *LFI* comme des créances non garanties (*LACC*, par. 18.4(1); *LFI*, par. 86(1)). Ces dispositions faisant de la Couronne un créancier non garanti comportent une exception expresse concernant les fiducies réputées établies par un texte législatif à l'égard des retenues à la source (*LACC*, par. 18.4(3); *LFI*, par. 86(3)). Voici la disposition de la *LACC* :

18.4 . . .

. . .

(3) Le paragraphe (1) [suivant lequel la Couronne a le rang de créancier non garanti] n'a pas pour effet de porter atteinte à l'application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation . . .

Par conséquent, non seulement la *LACC* précise que les créances de la Couronne ne bénéficient pas d'une priorité par rapport à celles des autres créanciers (par. 18.3(1)), mais les exceptions à cette règle (maintien de la priorité de la Couronne dans le cas des retenues à la source) sont mentionnées à plusieurs reprises dans la Loi.

[40] Le conflit apparent qui existe dans la présente affaire fait qu'on doit se demander si la règle de la *LTA* adoptée en 2000, selon laquelle les fiducies réputées visant la TPS s'appliquent malgré tout autre texte législatif fédéral sauf la *LFI*, l'emporte sur la règle énoncée dans la *LACC* — qui a d'abord été édictée en 1997 à l'art. 18.3 — suivant laquelle, sous réserve de certaines exceptions explicites, les fiducies réputées établies par une disposition législative sont sans effet dans le cadre de la *LACC*. Avec égards pour l'opinion contraire exprimée par mon collègue le juge Fish, je ne crois pas qu'on puisse résoudre ce conflit apparent

conflicts, apparent or real, and resolve them when possible.

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

[42] The Ontario Court of Appeal in *Ottawa Senators* rested its conclusion on two considerations. First, it was persuaded that by explicitly mentioning the *BIA* in *ETA* s. 222(3), but not the *CCAA*, Parliament made a deliberate choice. In the words of MacPherson J.A.:

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

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

en niant son existence et en créant une règle qui exige à la fois une disposition législative établissant la fiducie présumée et une autre la confirmant. Une telle règle est inconnue en droit. Les tribunaux doivent reconnaître les conflits, apparents ou réels, et les résoudre lorsque la chose est possible.

[41] Un courant jurisprudentiel pancanadien a résolu le conflit apparent en faveur de la *LTA*, confirmant ainsi la validité des fiducies réputées à l'égard de la TPS dans le cadre de la *LACC*. Dans l'arrêt déterminant à ce sujet, *Ottawa Senators*, la Cour d'appel de l'Ontario a invoqué la doctrine de l'abrogation implicite et conclu que la disposition postérieure de la *LTA* devait avoir préséance sur la *LACC* (voir aussi *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4th) 219 (B.R. Alb.); *Gauntlet*).

[42] Dans *Ottawa Senators*, la Cour d'appel de l'Ontario a fondé sa conclusion sur deux considérations. Premièrement, elle était convaincue qu'en mentionnant explicitement la *LFI* — mais pas la *LACC* — au par. 222(3) de la *LTA*, le législateur a fait un choix délibéré. Je cite le juge MacPherson :

> [TRADUCTION] La *LFI* et la *LACC* sont des lois fédérales étroitement liées entre elles. Je ne puis concevoir que le législateur ait pu mentionner expressément la *LFI* à titre d'exception, mais ait involontairement omis de considérer la *LACC* comme une deuxième exception possible. À mon avis, le fait que la *LACC* ne soit pas mentionnée au par. 222(3) de la *LTA* était presque assurément une omission mûrement réfléchie de la part du législateur. [par. 43]

[43] Deuxièmement, la Cour d'appel de l'Ontario a comparé le conflit entre la *LTA* et la *LACC* à celui dont a été saisie la Cour dans *Doré c. Verdun (Ville)*, [1997] 2 R.C.S. 862, et les a jugés [TRADUCTION] « identiques » (par. 46). Elle s'estimait donc tenue de suivre l'arrêt *Doré* (par. 49). Dans cet arrêt, la Cour a conclu qu'une disposition d'une loi de nature plus générale et récemment adoptée établissant un délai de prescription — le *Code civil du Québec*, L.Q. 1991, ch. 64 (« *C.c.Q.* ») — avait eu pour effet d'abroger une disposition plus spécifique

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).

d'un texte de loi antérieur, la *Loi sur les cités et villes* du Québec, L.R.Q., ch. C-19, avec laquelle elle entrait en conflit. Par analogie, la Cour d'appel de l'Ontario a conclu que le par. 222(3) de la *LTA*, une disposition plus récente et plus générale, abrogeait implicitement la disposition antérieure plus spécifique, à savoir le par. 18.3(1) de la *LACC* (par. 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.

[44] En examinant la question dans tout son contexte, je suis amenée à conclure, pour plusieurs raisons, que ni le raisonnement ni le résultat de l'arrêt *Ottawa Senators* ne peuvent être adoptés. Bien qu'il puisse exister un conflit entre le libellé des textes de loi, une analyse téléologique et contextuelle visant à déterminer la véritable intention du législateur conduit à la conclusion que ce dernier ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la *LACC*, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a apporté à la *LTA*, en 2000, la modification découlant de l'arrêt *Sparrow Electric*.

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

[45] Je rappelle d'abord que le législateur a manifesté sa volonté de mettre un terme à la priorité accordée aux créances de la Couronne dans le cadre du droit de l'insolvabilité. Selon le par. 18.3(1) de la *LACC* (sous réserve des exceptions prévues au par. 18.3(2)), les fiducies réputées de la Couronne n'ont aucun effet sous le régime de cette loi. Quand le législateur a voulu protéger certaines créances de la Couronne au moyen de fiducies réputées et voulu que celles-ci continuent de s'appliquer en situation d'insolvabilité, il l'a indiqué de manière explicite et minutieuse. Par exemple, le par. 18.3(2) de la *LACC* et le par. 67(3) de la *LFI* énoncent expressément que les fiducies réputées visant les retenues à la source continuent de produire leurs effets en cas d'insolvabilité. Le législateur a donc clairement établi des exceptions à la règle générale selon laquelle les fiducies réputées n'ont plus d'effet dans un contexte d'insolvabilité. La *LACC* et la *LFI* sont en harmonie : elles préservent les fiducies réputées et établissent la priorité de la Couronne seulement à l'égard des retenues à la source. En revanche, il n'existe aucune disposition législative expresse permettant de conclure que les créances relatives à la

in those Acts carving out an exception for GST claims.

TPS bénéficient d'un traitement préférentiel sous le régime de la *LACC* ou de la *LFI*. Alors que les retenues à la source font l'objet de dispositions explicites dans ces deux lois concernant l'insolvabilité, celles-ci ne comportent pas de dispositions claires et expresses analogues établissant une exception pour les créances relatives à la TPS.

[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).

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

[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.

[47] De plus, il y aurait une étrange asymétrie si l'interprétation faisant primer la *LTA* sur la *LACC* préconisée par la Couronne était retenue en l'espèce : les créances de la Couronne relatives à la TPS conserveraient leur priorité de rang pendant les procédures fondées sur la *LACC*, mais pas en cas de faillite. Comme certains tribunaux l'ont bien vu, cela ne pourrait qu'encourager les créanciers à recourir à la loi la plus favorable dans les cas où, comme en l'espèce, l'actif du débiteur n'est pas suffisant pour permettre à la fois le paiement des créanciers garantis et le paiement des créances de la Couronne (*Gauntlet*, par. 21). Or, si les réclamations des créanciers étaient mieux protégées par la liquidation sous le régime de la *LFI*, les créanciers seraient très fortement incités à éviter les procédures prévues par la *LACC* et les risques d'échec d'une réorganisation. Le fait de donner à un acteur clé de telles raisons de s'opposer aux procédures de réorganisation fondées sur la *LACC* dans toute situation d'insolvabilité ne peut que miner les objectifs réparateurs de ce texte législatif et risque au contraire de favoriser les maux sociaux que son édiction visait justement à prévenir.

[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*.

[48] Peut-être l'effet de l'arrêt *Ottawa Senators* est-il atténué si la restructuration est tentée en vertu de la *LFI* au lieu de la *LACC*, mais il subsiste néanmoins. Si l'on suivait cet arrêt, la priorité de la créance de la Couronne relative à la TPS différerait selon le régime — *LACC* ou *LFI* — sous lequel la restructuration a lieu. L'anomalie de ce résultat ressort clairement du fait que les compagnies seraient ainsi privées de la possibilité de se restructurer sous le régime plus souple et mieux adapté de la *LACC*, régime privilégié en cas de réorganisations complexes.

[49] Les indications selon lesquelles le législateur voulait que les créances relatives à la TPS soient traitées différemment dans les cas de réorganisations et de faillites sont rares, voire inexistantes. Le paragraphe 222(3) de la *LTA* a été adopté dans le cadre d'un projet de loi d'exécution du budget de nature générale en 2000. Le sommaire accompagnant ce projet de loi n'indique pas que, dans le cadre de la *LACC*, le législateur entendait élever la priorité de la créance de la Couronne à l'égard de la TPS au même rang que les créances relatives aux retenues à la source ou encore à un rang supérieur à celles-ci. En fait, le sommaire mentionne simplement, en ce qui concerne les fiducies réputées, que les modifications apportées aux dispositions existantes visent à « faire en sorte que les cotisations à l'assurance-emploi et au Régime de pensions du Canada qu'un employeur est tenu de verser soient pleinement recouvrables par la Couronne en cas de faillite de l'employeur » (Sommaire de la L.C. 2000, ch. 30, p. 4a). Le libellé de la disposition créant une fiducie réputée à l'égard de la TPS ressemble à celui des dispositions créant de telles fiducies relatives aux retenues à la source et il comporte la même formule dérogatoire et la même mention de la *LFI*. Cependant, comme il a été souligné précédemment, le législateur a expressément précisé que seules les fiducies réputées visant les retenues à la source demeurent en vigueur. Une exception concernant la *LFI* dans la disposition créant les fiducies réputées à l'égard des retenues à la source est sans grande conséquence, car le texte explicite de la *LFI* elle-même (et celui de la *LACC*) établit ces fiducies et maintient leur effet. Il convient toutefois de souligner que ni la *LFI* ni la *LACC* ne comportent de disposition équivalente assurant le maintien en vigueur des fiducies réputées visant la TPS.

[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.

[50] Il semble plus probable qu'en adoptant, pour créer dans la *LTA* les fiducies réputées visant la TPS, le même libellé que celui utilisé pour les fiducies réputées visant les retenues à la source, et en omettant d'inclure au par. 222(3) de la *LTA* une exception à l'égard de la *LACC* en plus de celle établie pour la *LFI*, le législateur ait par inadvertance commis une anomalie rédactionnelle. En raison d'une lacune législative dans la *LTA*, il serait possible de considérer que la fiducie réputée visant la TPS continue de produire ses effets dans le cadre de la *LACC*, tout en cessant de le faire dans le cas de la *LFI*, ce qui entraînerait un conflit apparent avec le libellé de la *LACC*. Il faut cependant voir ce conflit comme il est : un conflit apparent seulement, que l'on peut résoudre en considérant l'approche générale adoptée envers les créances prioritaires de la Couronne et en donnant préséance au texte de l'art. 18.3 de la *LACC* d'une manière qui ne produit pas un résultat insolite.

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

[51] Le paragraphe 222(3) de la *LTA* ne révèle aucune intention explicite du législateur d'abroger l'art. 18.3 de la *LACC*. Il crée simplement un conflit apparent qui doit être résolu par voie d'interprétation législative. L'intention du législateur était donc loin d'être dépourvue d'ambiguïté quand il a adopté le par. 222(3) de la *LTA*. S'il avait voulu donner priorité aux créances de la Couronne relatives à la TPS dans le cadre de la *LACC*, il aurait pu le faire de manière aussi explicite qu'il l'a fait pour les retenues à la source. Or, au lieu de cela, on se trouve réduit à inférer du texte du par. 222(3) de la *LTA* que le législateur entendait que la fiducie réputée visant la TPS produise ses effets dans les procédures fondées sur la *LACC*.

[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

[52] Je ne suis pas convaincue que le raisonnement adopté dans *Doré* exige l'application de la doctrine de l'abrogation implicite dans les circonstances de la présente affaire. La question principale dans *Doré* était celle de l'impact de l'adoption du *C.c.Q.* sur les règles de droit administratif relatives aux municipalités. Bien que le juge Gonthier ait conclu, dans cet arrêt, que le délai de prescription établi à l'art. 2930 du *C.c.Q.* avait eu pour effet d'abroger implicitement une disposition de la *Loi sur les cités et villes* portant sur la prescription, sa conclusion n'était pas

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.

fondée seulement sur une analyse textuelle. Il a en effet procédé à une analyse contextuelle approfondie des deux textes, y compris de l'historique législatif pertinent (par. 31-41). Par conséquent, les circonstances du cas dont était saisie la Cour dans *Doré* sont loin d'être « identiques » à celles du présent pourvoi, tant sur le plan du texte que sur celui du contexte et de l'historique législatif. On ne peut donc pas dire que l'arrêt *Doré* commande l'application automatique d'une règle d'abrogation implicite.

[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*.

[53] Un bon indice de l'intention générale du législateur peut être tiré du fait qu'il n'a pas, dans les modifications subséquentes, écarté la règle énoncée dans la *LACC*. D'ailleurs, par suite des modifications apportées à cette loi en 2005, la règle figurant initialement à l'art. 18.3 a, comme nous l'avons vu plus tôt, été reprise sous une formulation différente à l'art. 37. Par conséquent, dans la mesure où l'interprétation selon laquelle la fiducie réputée visant la TPS demeurerait en vigueur dans le contexte de procédures en vertu de la *LACC* repose sur le fait que le par. 222(3) de la *LTA* constitue la disposition postérieure et a eu pour effet d'abroger implicitement le par. 18.3(1) de la *LACC*, nous revenons au point de départ. Comme le législateur a reformulé et renuméroté la disposition de la *LACC* précisant que, sous réserve des exceptions relatives aux retenues à la source, les fiducies réputées ne survivent pas à l'engagement de procédures fondées sur la *LACC*, c'est cette loi qui se trouve maintenant à être le texte postérieur. Cette constatation confirme que c'est dans la *LACC* qu'est exprimée l'intention du législateur en ce qui a trait aux fiducies réputées visant la TPS.

[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

[54] Je ne suis pas d'accord avec ma collègue la juge Abella pour dire que l'al. 44*f*) de la *Loi d'interprétation*, L.R.C. 1985, ch. I-21, permet d'interpréter les modifications de 2005 comme n'ayant aucun effet. La nouvelle loi peut difficilement être considérée comme une simple refonte de la loi antérieure. De fait, la *LACC* a fait l'objet d'un examen approfondi en 2005. En particulier, conformément à son objectif qui consiste à faire concorder l'approche de la *LFI* et celle de la *LACC* à l'égard de l'insolvabilité, le législateur a apporté aux deux textes des modifications allant dans le même sens en ce qui concerne les

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.

propositions présentées par les entreprises. De plus, de nouvelles dispositions ont été ajoutées au sujet des contrats, des conventions collectives, du financement temporaire et des accords de gouvernance. Des clarifications ont aussi été apportées quant à la nomination et au rôle du contrôleur. Il convient par ailleurs de souligner les limites imposées par l'art. 11.09 de la *LACC* au pouvoir discrétionnaire du tribunal d'ordonner la suspension de l'effet des fiducies réputées créées en faveur de la Couronne relativement aux retenues à la source, limites qui étaient auparavant énoncées à l'art. 11.4. Il n'est fait aucune mention des fiducies réputées visant la TPS (voir le Sommaire de la L.C. 2005, ch. 47). Dans le cadre de cet examen, le législateur est allé jusqu'à se pencher sur les termes mêmes utilisés dans la loi pour écarter l'application des fiducies réputées. Les commentaires cités par ma collègue ne font que souligner l'intention manifeste du législateur de maintenir sa politique générale suivant laquelle seules les fiducies réputées visant les retenues à la source survivent en cas de procédures fondées sur la *LACC*.

[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.

[55] En l'espèce, le contexte législatif aide à déterminer l'intention du législateur et conforte la conclusion selon laquelle le par. 222(3) de la *LTA* ne visait pas à restreindre la portée de la disposition de la *LACC* écartant l'application des fiducies réputées. Eu égard au contexte dans son ensemble, le conflit entre la *LTA* et la *LACC* est plus apparent que réel. Je n'adopterais donc pas le raisonnement de l'arrêt *Ottawa Senators* et je confirmerais que l'art. 18.3 de la *LACC* a continué de produire ses effets.

[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.

[56] Ma conclusion est renforcée par l'objectif de la *LACC* en tant que composante du régime réparateur instauré la législation canadienne en matière d'insolvabilité. Comme cet aspect est particulièrement pertinent à propos de la deuxième question, je vais maintenant examiner la façon dont les tribunaux ont interprété l'étendue des pouvoirs discrétionnaires dont ils disposent lorsqu'ils surveillent une réorganisation fondée sur la *LACC*, ainsi que la façon dont le législateur a dans une large mesure entériné cette interprétation. L'interprétation de la *LACC* par les tribunaux aide en fait à comprendre comment celle-ci en est venue à jouer un rôle si important dans le droit canadien de l'insolvabilité.

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

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

[58] *CCAA* decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly describes as "the hothouse of real-time litigation" has been the primary method by which the *CCAA* has been adapted and has evolved to meet contemporary business and social needs (see Jones, at p. 484).

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

> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.

(*Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282, at para. 57, *per* Doherty J.A., dissenting)

[60] Judicial decision making under the *CCAA* takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by

3.3 *Pouvoirs discrétionnaires du tribunal chargé de surveiller une réorganisation fondée sur la LACC*

[57] Les tribunaux font souvent remarquer que [TRADUCTION] « [l]a *LACC* est par nature schématique » et ne « contient pas un code complet énonçant tout ce qui est permis et tout ce qui est interdit » (*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, par. 44, le juge Blair). Par conséquent, [TRADUCTION] « [l]'histoire du droit relatif à la LACC correspond à l'évolution de ce droit au fil de son interprétation par les tribunaux » (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (C. Ont. (Div. gén.)), par. 10, le juge Farley).

[58] Les décisions prises en vertu de la *LACC* découlent souvent de l'exercice discrétionnaire de certains pouvoirs. C'est principalement au fil de l'exercice par les juridictions commerciales de leurs pouvoirs discrétionnaires, et ce, dans des conditions décrites avec justesse par un praticien comme constituant [TRADUCTION] « la pépinière du contentieux en temps réel », que la *LACC* a évolué de façon graduelle et s'est adaptée aux besoins commerciaux et sociaux contemporains (voir Jones, p. 484).

[59] L'exercice par les tribunaux de leurs pouvoirs discrétionnaires doit évidemment tendre à la réalisation des objectifs de la *LACC*. Le caractère réparateur dont j'ai fait état dans mon aperçu historique de la Loi a à maintes reprises été reconnu dans la jurisprudence. Voici l'un des premiers exemples :

> [TRADUCTION] La loi est réparatrice au sens le plus pur du terme, en ce qu'elle fournit un moyen d'éviter les effets dévastateurs, — tant sur le plan social qu'économique — de la faillite ou de l'arrêt des activités d'une entreprise, à l'initiation des créanciers, pendant que des efforts sont déployés, sous la surveillance du tribunal, en vue de réorganiser la situation financière de la compagnie débitrice.

(*Elan Corp. c. Comiskey* (1990), 41 O.A.C. 282, par. 57, le juge Doherty, dissident)

[60] Le processus décisionnel des tribunaux sous le régime de la *LACC* comporte plusieurs aspects. Le tribunal doit d'abord créer les conditions propres à permettre au débiteur de tenter une réorganisation.

staying enforcement actions by creditors to allow the debtor's business to continue, preserving the *status quo* while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed (see, e.g., *Chef Ready Foods Ltd. v. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84 (C.A.), at pp. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134, at para. 27). In doing so, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company (see, e.g., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9, at para. 144, *per* Paperny J. (as she then was); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J.), at para. 3; *Air Canada, Re*, 2003 CanLII 49366 (Ont. S.C.J.), at para. 13, *per* Farley J.; Sarra, *Creditor Rights*, at pp. 181-92 and 217-26). In addition, courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed (see, e.g., *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (Ont. S.C.J.), at para. 2, *per* Blair J. (as he then was); Sarra, *Creditor Rights*, at pp. 195-214).

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

Il peut à cette fin suspendre les mesures d'exécution prises par les créanciers afin que le débiteur puisse continuer d'exploiter son entreprise, préserver le statu quo pendant que le débiteur prépare la transaction ou l'arrangement qu'il présentera aux créanciers et surveiller le processus et le mener jusqu'au point où il sera possible de dire s'il aboutira (voir, p. ex., *Chef Ready Foods Ltd. c. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84 (C.A.), p. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134, par. 27). Ce faisant, le tribunal doit souvent déterminer les divers intérêts en jeu dans la réorganisation, lesquels peuvent fort bien ne pas se limiter aux seuls intérêts du débiteur et des créanciers, mais englober aussi ceux des employés, des administrateurs, des actionnaires et même de tiers qui font affaire avec la compagnie insolvable (voir, p. ex., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9, par. 144, la juge Paperny (maintenant juge de la Cour d'appel); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (C.S.J. Ont.), par. 3; *Air Canada, Re*, 2003 CanLII 49366 (C.S.J. Ont.), par. 13, le juge Farley; Sarra, *Creditor Rights*, p. 181-192 et 217-226). En outre, les tribunaux doivent reconnaître que, à l'occasion, certains aspects de la réorganisation concernent l'intérêt public et qu'il pourrait s'agir d'un facteur devant être pris en compte afin de décider s'il y a lieu d'autoriser une mesure donnée (voir, p. ex., *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (C.S.J. Ont.), par. 2, le juge Blair (maintenant juge de la Cour d'appel); Sarra, *Creditor Rights*, p. 195-214).

[61] Quand de grandes entreprises éprouvent des difficultés, les réorganisations deviennent très complexes. Les tribunaux chargés d'appliquer la *LACC* ont ainsi été appelés à innover dans l'exercice de leur compétence et ne se sont pas limités à suspendre les procédures engagées contre le débiteur afin de lui permettre de procéder à une réorganisation. On leur a demandé de sanctionner des mesures non expressément prévues par la *LACC*. Sans dresser la liste complète des diverses mesures qui ont été prises par des tribunaux en vertu de la *LACC*, il est néanmoins utile d'en donner brièvement quelques exemples, pour bien illustrer la marge de manœuvre que la loi accorde à ceux-ci.

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

[62] L'utilisation la plus créative des pouvoirs conférés par la *LACC* est sans doute le fait que les tribunaux se montrent de plus en plus disposés à autoriser, après le dépôt des procédures, la constitution de sûretés pour financer le débiteur demeuré en possession des biens ou encore la constitution de charges super-prioritaires grevant l'actif du débiteur lorsque cela est nécessaire pour que ce dernier puisse continuer d'exploiter son entreprise pendant la réorganisation (voir, p. ex., *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118 (C. Ont. (Div. gén.)); *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96, conf. (1999), 12 C.B.R. (4th) 144 (C.S.); et, d'une manière générale, J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), p. 93-115). La *LACC* a aussi été utilisée pour libérer des tiers des actions susceptibles d'être intentées contre eux, dans le cadre de l'approbation d'un plan global d'arrangement et de transaction, malgré les objections de certains créanciers dissidents (voir *Metcalfe & Mansfield*). Au départ, la nomination d'un contrôleur chargé de surveiller la réorganisation était elle aussi une mesure prise en vertu du pouvoir de surveillance conféré par la *LACC*, mais le législateur est intervenu et a modifié la loi pour rendre cette mesure obligatoire.

[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?

[63] L'esprit d'innovation dont ont fait montre les tribunaux pendant des procédures fondées sur la *LACC* n'a toutefois pas été sans susciter de controverses. Au moins deux des questions que soulève leur approche sont directement pertinentes en l'espèce : (1) Quelles sont les sources des pouvoirs dont dispose le tribunal pendant les procédures fondées sur la *LACC*? (2) Quelles sont les limites de ces pouvoirs?

[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

[64] La première question porte sur la frontière entre les pouvoirs d'origine législative dont dispose le tribunal en vertu de la *LACC* et les pouvoirs résiduels dont jouit un tribunal en raison de sa compétence inhérente et de sa compétence en equity, lorsqu'il est question de surveiller une réorganisation. Pour justifier certaines mesures autorisées à l'occasion de procédures engagées sous le régime de la *LACC*, les tribunaux ont parfois prétendu se fonder sur leur compétence en equity dans le but

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

de réaliser les objectifs de la Loi ou sur leur compétence inhérente afin de combler les lacunes de celle-ci. Or, dans de récentes décisions, des cours d'appel ont déconseillé aux tribunaux d'invoquer leur compétence inhérente, concluant qu'il est plus juste de dire que, dans la plupart des cas, les tribunaux ne font simplement qu'interpréter les pouvoirs se trouvant dans la *LACC* elle-même (voir, p. ex., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236, par. 45-47, la juge Newbury; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), par. 31-33, le juge Blair).

[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).

[65] Je suis d'accord avec la juge Georgina R. Jackson et la professeure Janis Sarra pour dire que la méthode la plus appropriée est une approche hiérarchisée. Suivant cette approche, les tribunaux procédèrent d'abord à une interprétation des dispositions de la *LACC* avant d'invoquer leur compétence inhérente ou leur compétence en equity pour justifier des mesures prises dans le cadre d'une procédure fondée sur la *LACC* (voir G. R. Jackson et J. Sarra, « Selecting the Judicial Tool to get the Job Done : An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters », dans J. P. Sarra, dir., *Annual Review of Insolvency Law 2007* (2008), 41, p. 42). Selon ces auteures, pourvu qu'on lui donne l'interprétation téléologique et large qui s'impose, la *LACC* permettra dans la plupart des cas de justifier les mesures nécessaires à la réalisation de ses objectifs (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.

[66] L'examen des parties pertinentes de la *LACC* et de l'évolution récente de la législation me font adhérer à ce point de vue jurisprudentiel et doctrinal : dans la plupart des cas, la décision de rendre une ordonnance durant une procédure fondée sur la *LACC* relève de l'interprétation législative. D'ailleurs, à cet égard, il faut souligner d'une façon particulière que le texte de loi dont il est question en l'espèce peut être interprété très largement.

[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

[67] En vertu du pouvoir conféré initialement par la *LACC*, le tribunal pouvait, « chaque fois qu'une demande [était] faite sous le régime de la présente loi à l'égard d'une compagnie, [. . .] sur demande

matter, . . . subject to this Act, [to] make an order under this section" (*CCAA*, s. 11(1)). The plain language of the statute was very broad.

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

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

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

d'un intéressé, [. . .] sous réserve des autres dispositions de la présente loi [. . .] rendre l'ordonnance prévue au présent article » (*LACC*, par. 11(1)). Cette formulation claire était très générale.

[68] Bien que ces dispositions ne soient pas strictement applicables en l'espèce, je signale à ce propos que le législateur a, dans des modifications récentes, apporté au texte du par. 11(1) un changement qui rend plus explicite le pouvoir discrétionnaire conféré au tribunal par la *LACC*. Ainsi, aux termes de l'art. 11 actuel de la *LACC*, le tribunal peut « rendre [. . .] sous réserve des restrictions prévues par la présente loi [. . .] toute ordonnance qu'il estime indiquée » (L.C. 2005, ch. 47, art. 128). Le législateur semble ainsi avoir jugé opportun de sanctionner l'interprétation large du pouvoir conféré par la *LACC* qui a été élaborée par la jurisprudence.

[69] De plus, la *LACC* prévoit explicitement certaines ordonnances. Tant à la suite d'une demande initiale que d'une demande subséquente, le tribunal peut, par ordonnance, suspendre ou interdire toute procédure contre le débiteur, ou surseoir à sa continuation. Il incombe à la personne qui demande une telle ordonnance de convaincre le tribunal qu'elle est indiquée et qu'il a agi et continue d'agir de bonne foi et avec la diligence voulue (*LACC*, par. 11(3), (4) et (6)).

[70] La possibilité pour le tribunal de rendre des ordonnances plus spécifiques n'a pas pour effet de restreindre la portée des termes généraux utilisés dans la *LACC*. Toutefois, l'opportunité, la bonne foi et la diligence sont des considérations de base que le tribunal devrait toujours garder à l'esprit lorsqu'il exerce les pouvoirs conférés par la *LACC*. Sous le régime de la *LACC*, le tribunal évalue l'opportunité de l'ordonnance demandée en déterminant si elle favorisera la réalisation des objectifs de politique générale qui sous-tendent la Loi. Il s'agit donc de savoir si cette ordonnance contribuera utilement à la réalisation de l'objectif réparateur de la *LACC* — à savoir éviter les pertes sociales et économiques résultant de la liquidation d'une compagnie insolvable. J'ajouterais que le critère de l'opportunité s'applique non seulement à l'objectif de l'ordonnance, mais aussi aux moyens utilisés. Les tribunaux

stakeholders are treated as advantageously and fairly as the circumstances permit.

doivent se rappeler que les chances de succès d'une réorganisation sont meilleures lorsque les participants arrivent à s'entendre et que tous les intéressés sont traités de la façon la plus avantageuse et juste possible dans les circonstances.

[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.

[71] Il est bien établi qu'il est possible de mettre fin aux efforts déployés pour procéder à une réorganisation fondée sur la *LACC* et de lever la suspension des procédures contre le débiteur si la réorganisation est [TRADUCTION] « vouée à l'échec » (voir *Chef Ready*, p. 88; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (C.A.C.-B.), par. 6-7). Cependant, quand l'ordonnance demandée contribue vraiment à la réalisation des objectifs de la *LACC*, le pouvoir discrétionnaire dont dispose le tribunal en vertu de cette loi l'habilite à rendre à cette ordonnance.

[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.

[72] L'analyse qui précède est utile pour répondre à la question de savoir si le tribunal avait, en vertu de la *LACC*, le pouvoir de maintenir la suspension des procédures à l'encontre de la Couronne, une fois qu'il est devenu évident que la réorganisation échouerait et que la faillite était inévitable.

[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*.

[73] En Cour d'appel, le juge Tysoe a conclu que la *LACC* n'habilitait pas le tribunal à maintenir la suspension des mesures d'exécution de la Couronne à l'égard de la fiducie réputée visant la TPS après l'arrêt des efforts de réorganisation. Selon l'appelante, en tirant cette conclusion, le juge Tysoe a omis de tenir compte de l'objectif fondamental de la *LACC* et n'a pas donné à ce texte l'interprétation téléologique et large qu'il convient de lui donner et qui autorise le prononcé d'une telle ordonnance. La Couronne soutient que le juge Tysoe a conclu à bon droit que les termes impératifs de la *LTA* ne laissaient au tribunal d'autre choix que d'autoriser les mesures d'exécution à l'endroit de la fiducie réputée visant la TPS lorsqu'il a levé la suspension de procédures qui avait été ordonnée en application de la *LACC* afin de permettre au débiteur de faire cession de ses biens en vertu de la *LFI*. J'ai déjà traité de la question de savoir si la *LTA* a un effet contraignant dans une procédure fondée sur la *LACC*. Je vais maintenant traiter de la question de savoir si l'ordonnance était autorisée par la *LACC*.

[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

[74] Il n'est pas contesté que la *LACC* n'assujettit les procédures engagées sous son régime à aucune limite temporelle explicite qui interdirait au tribunal d'ordonner le maintien de la suspension des procédures engagées par la Couronne pour recouvrer la TPS, tout en levant temporairement la suspension générale des procédures prononcée pour permettre au débiteur de faire cession de ses biens.

[75] Il reste à se demander si l'ordonnance contribuait à la réalisation de l'objectif fondamental de la *LACC*. La Cour d'appel a conclu que non, parce que les efforts de réorganisation avaient pris fin et que, par conséquent, la *LACC* n'était plus d'aucune utilité. Je ne partage pas cette conclusion.

[76] Il ne fait aucun doute que si la réorganisation avait été entreprise sous le régime de la *LFI* plutôt qu'en vertu de la *LACC*, la Couronne aurait perdu la priorité que lui confère la fiducie réputée visant la TPS. De même, la Couronne ne conteste pas que, selon le plan de répartition prévu par la *LFI* en cas de faillite, cette fiducie réputée cesse de produire ses effets. Par conséquent, après l'échec de la réorganisation tentée sous le régime de la *LACC*, les créanciers auraient eu toutes les raisons de solliciter la mise en faillite immédiate du débiteur et la répartition de ses biens en vertu de la *LFI*. Pour pouvoir conclure que le pouvoir discrétionnaire dont dispose le tribunal ne l'autorise pas à lever partiellement la suspension des procédures afin de permettre la cession des biens, il faudrait présumer l'existence d'un hiatus entre la procédure fondée sur la *LACC* et celle fondée sur la *LFI*. L'ordonnance du juge en chef Brenner suspendant l'exécution des mesures de recouvrement de la Couronne à l'égard de la TPS faisait en sorte que les créanciers ne soient pas désavantagés par la tentative de réorganisation fondée sur la *LACC*. Cette ordonnance avait pour effet de dissuader les créanciers d'entraver une liquidation ordonnée et, de ce fait, elle contribuait à la réalisation des objectifs de la *LACC*, dans la mesure où elle établit une passerelle entre les procédures régies par la *LACC* d'une part et celles régies par la *LFI* d'autre part. Cette interprétation du pouvoir discrétionnaire du tribunal se trouve renforcée par

the *BIA*. Section 20 clearly indicates the intention of Parliament for the *CCAA* to operate *in tandem* with other insolvency legislation, such as the *BIA*.

[77] The *CCAA* creates conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all. Because the alternative to reorganization is often bankruptcy, participants will measure the impact of a reorganization against the position they would enjoy in liquidation. In the case at bar, the order fostered a harmonious transition between reorganization and liquidation while meeting the objective of a single collective proceeding that is common to both statutes.

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

l'art. 20 de la *LACC*, qui précise que les dispositions de la Loi « peuvent être appliquées conjointement avec celles de toute loi fédérale [. . .] autorisant ou prévoyant l'homologation de transactions ou arrangements entre une compagnie et ses actionnaires ou une catégorie de ces derniers », par exemple la *LFI*. L'article 20 indique clairement que le législateur entend voir la *LACC* être appliquée *de concert* avec les autres lois concernant l'insolvabilité, telle la *LFI*.

[77] La *LACC* établit les conditions qui permettent de préserver le statu quo pendant qu'on tente de trouver un terrain d'entente entre les intéressés en vue d'une réorganisation qui soit juste pour tout le monde. Étant donné que, souvent, la seule autre solution est la faillite, les participants évaluent l'impact d'une réorganisation en regard de la situation qui serait la leur en cas de liquidation. En l'espèce, l'ordonnance favorisait une transition harmonieuse entre la réorganisation et la liquidation, tout en répondant à l'objectif — commun aux deux lois — qui consiste à avoir une seule procédure collective.

[78] À mon avis, le juge d'appel Tysoe a donc commis une erreur en considérant la *LACC* et la *LFI* comme des régimes distincts, séparés par un hiatus temporel, plutôt que comme deux lois faisant partie d'un ensemble intégré de règles du droit de l'insolvabilité. La décision du législateur de conserver deux régimes législatifs en matière de réorganisation, la *LFI* et la *LACC*, reflète le fait bien réel que des réorganisations de complexité différente requièrent des mécanismes légaux différents. En revanche, un seul régime législatif est jugé nécessaire pour la liquidation de l'actif d'un débiteur en faillite. Le passage de la *LACC* à la *LFI* peut exiger la levée partielle d'une suspension de procédures ordonnée en vertu de la *LACC*, de façon à permettre l'engagement des procédures fondées sur la *LFI*. Toutefois, comme l'a signalé le juge Laskin de la Cour d'appel de l'Ontario dans un litige semblable opposant des créanciers garantis et le Surintendant des services financiers de l'Ontario qui invoquait le bénéfice d'une fiducie réputée, [TRADUCTION] « [l]es deux lois sont

lost in bankruptcy (*Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, at paras. 62-63).

[79] The Crown's priority in claims pursuant to source deductions deemed trusts does not undermine this conclusion. Source deductions deemed trusts survive under both the *CCAA* and the *BIA*. Accordingly, creditors' incentives to prefer one Act over another will not be affected. While a court has a broad discretion to stay source deductions deemed trusts in the *CCAA* context, this discretion is nevertheless subject to specific limitations applicable only to source deductions deemed trusts (*CCAA*, s. 11.4). Thus, if *CCAA* reorganization fails (e.g., either the creditors or the court refuse a proposed reorganization), the Crown can immediately assert its claim in unremitted source deductions. But this should not be understood to affect a seamless transition into bankruptcy or create any "gap" between the *CCAA* and the *BIA* for the simple reason that, regardless of what statute the reorganization had been commenced under, creditors' claims in both instances would have been subject to the priority of the Crown's source deductions deemed trust.

[80] Source deductions deemed trusts aside, the comprehensive and exhaustive mechanism under the *BIA* must control the distribution of the debtor's assets once liquidation is inevitable. Indeed, an orderly transition to liquidation is mandatory under the *BIA* where a proposal is rejected by creditors. The *CCAA* is silent on the transition into liquidation but the breadth of the court's discretion under the Act is sufficient to construct a bridge to liquidation under the *BIA*. The court must do so in a manner that does not subvert the scheme of distribution under the *BIA*. Transition

liées » et il n'existe entre elles aucun « hiatus » qui permettrait d'obtenir l'exécution, à l'issue de procédures engagées sous le régime de la *LACC*, de droits de propriété qui seraient perdus en cas de faillite (*Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, par. 62-63).

[79] La priorité accordée aux réclamations de la Couronne fondées sur une fiducie réputée visant des retenues à la source n'affaiblit en rien cette conclusion. Comme ces fiducies réputées survivent tant sous le régime de la *LACC* que sous celui de la *LFI*, ce facteur n'a aucune incidence sur l'intérêt que pourraient avoir les créanciers à préférer une loi plutôt que l'autre. S'il est vrai que le tribunal agissant en vertu de la *LACC* dispose d'une grande latitude pour suspendre les réclamations fondée sur des fiducies réputées visant des retenues à la source, cette latitude n'en demeure pas moins soumise à des limitations particulières, applicables uniquement à ces fiducies réputées (*LACC*, art. 11.4). Par conséquent, si la réorganisation tentée sous le régime de la *LACC* échoue (p. ex. parce que le tribunal ou les créanciers refusent une proposition de réorganisation), la Couronne peut immédiatement présenter sa réclamation à l'égard des retenues à la source non versées. Mais il ne faut pas en conclure que cela compromet le passage harmonieux au régime de faillite ou crée le moindre « hiatus » entre la *LACC* et la *LFI*, car le fait est que, peu importe la loi en vertu de laquelle la réorganisation a été amorcée, les réclamations des créanciers auraient dans les deux cas été subordonnées à la priorité de la fiducie réputée de la Couronne à l'égard des retenues à la source.

[80] Abstraction faite des fiducies réputées visant les retenues à la source, c'est le mécanisme complet et exhaustif prévu par la *LFI* qui doit régir la répartition des biens du débiteur une fois que la liquidation est devenue inévitable. De fait, une transition ordonnée aux procédures de liquidation est obligatoire sous le régime de la *LFI* lorsqu'une proposition est rejetée par les créanciers. La *LACC* est muette à l'égard de cette transition, mais l'ampleur du pouvoir discrétionnaire conféré au tribunal par cette loi est suffisante pour établir une passerelle vers une liquidation opérée sous le régime

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*.

de la *LFI*. Ce faisant, le tribunal doit veiller à ne pas perturber le plan de répartition établi par la *LFI*. La transition au régime de liquidation nécessite la levée partielle de la suspension des procédures ordonnée en vertu de la *LACC*, afin de permettre l'introduction de procédures en vertu de la *LFI*. Il ne faudrait pas que cette indispensable levée partielle de la suspension des procédures provoque une ruée des créanciers vers le palais de justice pour l'obtention d'une priorité inexistante sous le régime de la *LFI*.

[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.

[81] Je conclus donc que le juge en chef Brenner avait, en vertu de la *LACC*, le pouvoir de lever la suspension des procédures afin de permettre la transition au régime de liquidation.

3.4 *Express Trust*

3.4 *Fiducie expresse*

[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.

[82] La dernière question à trancher en l'espèce est celle de savoir si le juge en chef Brenner a créé une fiducie expresse en faveur de la Couronne quand il a ordonné, le 29 avril 2008, que le produit de la vente des biens de LeRoy Trucking — jusqu'à concurrence des sommes de TPS non remises — soit détenu dans le compte en fiducie du contrôleur jusqu'à ce que l'issue de la réorganisation soit connue. Un autre motif invoqué par le juge Tysoe de la Cour d'appel pour accueillir l'appel interjeté par la Couronne était que, selon lui, celle-ci était effectivement la bénéficiaire d'une fiducie expresse. Je ne peux souscrire à cette conclusion.

[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).

[83] La création d'une fiducie expresse exige la présence de trois certitudes : certitude d'intention, certitude de matière et certitude d'objet. Les fiducies expresses ou « fiducies au sens strict » découlent des actes et des intentions du constituant et se distinguent des autres fiducies découlant de l'effet de la loi (voir D. W. M. Waters, M. R. Gillen et L. D. Smith, dir., *Waters' Law of Trusts in Canada* (3e éd. 2005), p. 28-29, particulièrement la note en bas de page 42).

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

[84] En l'espèce, il n'existe aucune certitude d'objet (c.-à-d. relative au bénéficiaire) pouvant être inférée de l'ordonnance prononcée le 29 avril 2008 par le tribunal et suffisante pour donner naissance à une fiducie expresse.

[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.

[85] Au moment où l'ordonnance a été rendue, il y avait un différend entre Century Services et la Couronne au sujet d'une partie du produit de la vente des biens du débiteur. La solution retenue par le tribunal a consisté à accepter, selon la proposition de LeRoy Trucking, que la somme en question soit détenue séparément jusqu'à ce que le différend puisse être réglé. Par conséquent, il n'existait aucune certitude que la Couronne serait véritablement le bénéficiaire ou l'objet de la fiducie.

[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.

[86] Le fait que le compte choisi pour conserver séparément la somme en question était le compte en fiducie du contrôleur n'a pas à lui seul un effet tel qu'il suppléerait à l'absence d'un bénéficiaire certain. De toute façon, suivant l'interprétation du par. 18.3(1) de la *LACC* dégagée précédemment, aucun différend ne saurait même exister quant à la priorité de rang, étant donné que la priorité accordée aux réclamations de la Couronne fondées sur la fiducie réputée visant la TPS ne s'applique pas sous le régime de la *LACC* et que la Couronne est reléguée au rang de créancier non garanti à l'égard des sommes en question. Cependant, il se peut fort bien que le juge en chef Brenner ait estimé que, conformément à l'arrêt *Ottawa Senators*, la créance de la Couronne à l'égard de la TPS demeurerait effective si la réorganisation aboutissait, ce qui ne serait pas le cas si le passage au processus de liquidation régi par la *LFI* était autorisé. Une somme équivalente à cette créance serait ainsi mise de côté jusqu'à ce que le résultat de la réorganisation soit connu.

[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

[87] Par conséquent, l'incertitude entourant l'issue de la restructuration tentée sous le régime de la *LACC* exclut l'existence d'une certitude permettant de conférer de manière permanente à la Couronne un intérêt bénéficiaire sur la somme en question. Cela ressort clairement des motifs exposés de vive voix par le juge en chef Brenner le 29 avril 2008, lorsqu'il a dit : [TRADUCTION] « Comme il est notoire que [des procédures fondées sur la *LACC*] peuvent échouer et que cela entraîne des faillites, le maintien du statu quo en l'espèce me semble militer en faveur de l'acceptation de la proposition d'ordonner au contrôleur de détenir ces fonds en fiducie. » Il y avait donc manifestement un doute quant à la question de savoir qui au juste pourrait toucher l'argent

that bankruptcy was inevitable, confirms the absence of a clear beneficiary required to ground an express trust.

4. Conclusion

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

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

The following are the reasons delivered by

Fish J. —

I

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

[91] More particularly, I share my colleague's interpretation of the scope of the judge's discretion under s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*").

en fin de compte. L'ordonnance ultérieure du juge en chef Brenner — dans laquelle ce dernier a rejeté, le 3 septembre 2008, la demande de la Couronne sollicitant le bénéfice de la fiducie présumée après qu'il fut devenu évident que la faillite était inévitable — confirme l'absence du bénéficiaire certain sans lequel il ne saurait y avoir de fiducie expresse.

4. Conclusion

[88] Je conclus que le juge en chef Brenner avait, en vertu de la *LACC*, le pouvoir discrétionnaire de maintenir la suspension de la demande de la Couronne sollicitant le bénéfice de la fiducie réputée visant la TPS, tout en levant par ailleurs la suspension des procédures de manière à permettre à LeRoy Trucking de faire cession de ses biens. Ma conclusion selon laquelle le par. 18.3(1) de la *LACC* neutralisait la fiducie réputée visant la TPS pendant la durée des procédures fondées sur cette loi confirme que les pouvoirs discrétionnaires exercés par le tribunal en vertu de l'art. 11 n'étaient pas limités par la priorité invoquée par la Couronne au titre de la TPS, puisqu'il n'existe aucune priorité de la sorte sous le régime de la *LACC*.

[89] Pour ces motifs, je suis d'avis d'accueillir le pourvoi et de déclarer que la somme de 305 202,30 $ perçue par LeRoy Trucking au titre de la TPS mais non encore versée au receveur général du Canada ne fait l'objet d'aucune fiducie réputée ou priorité en faveur de la Couronne. Cette somme ne fait pas non plus l'objet d'une fiducie expresse. Les dépens sont accordés à l'égard du présent pourvoi et de l'appel interjeté devant la juridiction inférieure.

Version française des motifs rendus par

Le juge Fish —

I

[90] Je souscris dans l'ensemble aux motifs de la juge Deschamps et je disposerais du pourvoi comme elle le propose.

[91] Plus particulièrement, je me rallie à son interprétation de la portée du pouvoir discrétionnaire conféré au juge par l'art. 11 de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C.

And I share my colleague's conclusion that Brenner C.J.S.C. did not create an express trust in favour of the Crown when he segregated GST funds into the Monitor's trust account (2008 BCSC 1805, [2008] G.S.T.C. 221).

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

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

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

[95] Parliament has in recent years given detailed consideration to the Canadian insolvency scheme. It has declined to amend the provisions at issue in this case. Ours is not to wonder why, but rather to treat Parliament's preservation of the relevant provisions as a deliberate exercise of the legislative discretion that is Parliament's alone. With respect, I reject any suggestion that we should instead characterize the apparent conflict between s. 18.3(1) (now s. 37(1)) of the *CCAA* and s. 222 of the *ETA* as a drafting anomaly or statutory lacuna properly subject to judicial correction or repair.

1985, ch. C-36 (« *LACC* »). Je partage en outre sa conclusion suivant laquelle le juge en chef Brenner n'a pas créé de fiducie expresse en faveur de la Couronne en ordonnant que les sommes recueillies au titre de la TPS soient détenues séparément dans le compte en fiducie du contrôleur (2008 BCSC 1805, [2008] G.S.T.C. 221).

[92] J'estime néanmoins devoir ajouter de brefs motifs qui me sont propres au sujet de l'interaction entre la *LACC* et la *Loi sur la taxe d'accise*, L.R.C. 1985, ch. E-15 (« *LTA* »).

[93] En maintenant, malgré l'existence des procédures d'insolvabilité, la validité de fiducies réputées créées en vertu de la *LTA*, l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), et les décisions rendues dans sa foulée ont eu pour effet de protéger indûment des droits de la Couronne que le Parlement avait lui-même choisi de subordonner à d'autres créances prioritaires. À mon avis, il convient en l'espèce de rompre nettement avec ce courant jurisprudentiel.

[94] La juge Deschamps expose d'importantes raisons d'ordre historique et d'intérêt général à l'appui de cette position et je n'ai rien à ajouter à cet égard. Je tiens toutefois à expliquer pourquoi une analyse comparative de certaines dispositions législatives connexes vient renforcer la conclusion à laquelle ma collègue et moi-même en arrivons.

[95] Au cours des dernières années, le législateur fédéral a procédé à un examen approfondi du régime canadien d'insolvabilité. Il a refusé de modifier les dispositions qui sont en cause dans la présente affaire. Il ne nous appartient pas de nous interroger sur les raisons de ce choix. Nous devons plutôt considérer la décision du législateur de maintenir en vigueur les dispositions en question comme un exercice délibéré du pouvoir discrétionnaire de légiférer, pouvoir qui est exclusivement le sien. Avec égards, je rejette le point de vue suivant lequel nous devrions plutôt qualifier l'apparente contradiction entre le par. 18.3(1) (maintenant le par. 37(1)) de la *LACC* et l'art. 222 de la *LTA* d'anomalie rédactionnelle ou de lacune législative susceptible d'être corrigée par un tribunal.

II

[96] In the context of the Canadian insolvency regime, a deemed trust will be found to exist only where two complementary elements co-exist: first, a statutory provision *creating* the trust; and second, a *CCAA* or *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") provision *confirming* — or explicitly preserving — its effective operation.

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

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

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

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

> (4.1) Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person . . . equal in value to the amount so deemed to be held in trust is deemed
>
> (*a*) to be held, from the time the amount was deducted or withheld by the person, separate and

II

[96] Dans le contexte du régime canadien d'insolvabilité, on conclut à l'existence d'une fiducie réputée uniquement lorsque deux éléments complémentaires sont réunis : en premier lieu, une disposition législative qui *crée* la fiducie et, en second lieu, une disposition de la *LACC* ou de la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* ») qui *confirme* l'existence de la fiducie ou la maintient explicitement en vigueur.

[97] Cette interprétation se retrouve dans trois lois fédérales, qui renferment toutes une disposition relative aux fiducies réputées dont le libellé offre une ressemblance frappante avec celui de l'art. 222 de la *LTA*.

[98] La première est la *Loi de l'impôt sur le revenu*, L.R.C. 1985, ch. 1 (5^e suppl.) (« *LIR* »), dont le par. 227(4) *crée* une fiducie réputée :

> (4) Toute personne qui déduit ou retient un montant en vertu de la présente loi est réputée, malgré toute autre garantie au sens du paragraphe 224(1.3) le concernant, le détenir en fiducie pour Sa Majesté, séparé de ses propres biens et des biens détenus par son créancier garanti au sens de ce paragraphe qui, en l'absence de la garantie, seraient ceux de la personne, et en vue de le verser à Sa Majesté selon les modalités et dans le délai prévus par la présente loi. [Dans la présente citation et dans celles qui suivent, les soulignements sont évidemment de moi.]

[99] Dans le paragraphe suivant, le législateur prend la peine de bien préciser que toute disposition législative fédérale ou provinciale à l'effet contraire n'a aucune incidence sur la fiducie ainsi constituée :

> (4.1) Malgré les autres dispositions de la présente loi, la *Loi sur la faillite et l'insolvabilité* (sauf ses articles 81.1 et 81.2), tout autre texte législatif fédéral ou provincial ou toute règle de droit, en cas de non-versement à Sa Majesté, selon les modalités et dans le délai prévus par la présente loi, d'un montant qu'une personne est réputée par le paragraphe (4) détenir en fiducie pour Sa Majesté, les biens de la personne [. . .] d'une valeur égale à ce montant sont réputés :
>
> *a*) être détenus en fiducie pour Sa Majesté, à compter du moment où le montant est déduit ou retenu,

apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, . . .

. . .

. . . and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

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

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

(2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* . . . .

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

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

(3) Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* . . . .

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

séparés des propres biens de la personne, qu'ils soient ou non assujettis à une telle garantie;

. . .

. . . et le produit découlant de ces biens est payé au receveur général par priorité sur une telle garantie.

[100] Le maintien en vigueur de cette fiducie réputée est expressément *confirmé* à l'art. 18.3 de la *LACC* :

18.3(1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

(2) Le paragraphe (1) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* . . .

[101] L'application de la fiducie réputée prévue par la *LIR* est également confirmée par l'art. 67 de la *LFI* :

(2) Sous réserve du paragraphe (3) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens du failli ne peut, pour l'application de l'alinéa (1)*a*), être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

(3) Le paragraphe (2) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* . . .

[102] Par conséquent, le législateur a *créé*, puis *confirmé le maintien en vigueur* de la fiducie réputée établie par la *LIR* en faveur de Sa Majesté *tant* sous le régime de la *LACC que* sous celui de la *LFI*.

[103] The second federal statute for which this scheme holds true is the *Canada Pension Plan*, R.S.C. 1985, c. C-8 ("*CPP*"). At s. 23, Parliament creates a deemed trust in favour of the Crown and specifies that it exists despite all contrary provisions in any other Canadian statute. Finally, and in almost identical terms, the *Employment Insurance Act*, S.C. 1996, c. 23 ("*EIA*"), creates a deemed trust in favour of the Crown: see ss. 86(2) and (2.1).

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

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

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

222. (1) Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II <u>is deemed</u>, for all purposes and despite any security interest in the amount, <u>to hold the amount in trust for Her Majesty</u> in right of Canada, <u>separate and apart</u> from the property of the person and from property held by any secured creditor of the person that, but for a

[103] La deuxième loi fédérale où l'on retrouve ce mécanisme est le *Régime de pensions du Canada*, L.R.C. 1985, ch. C-8 (« *RPC* »). À l'article 23, le législateur crée une fiducie réputée en faveur de la Couronne et précise qu'elle existe malgré les dispositions contraires de toute autre loi fédérale. Enfin, la *Loi sur l'assurance-emploi*, L.C. 1996, ch. 23 (« *LAE* »), crée dans des termes quasi identiques, une fiducie réputée en faveur de la Couronne : voir les par. 86(2) et (2.1).

[104] Comme nous l'avons vu, le maintien en vigueur des fiducies réputées créées en vertu de ces dispositions de la *LIR*, du *RPC* et de la *LAE* est confirmé au par. 18.3(2) de la *LACC* et au par. 67(3) de la *LFI*. Dans les trois cas, le législateur a exprimé en termes clairs et explicites sa volonté de voir la fiducie réputée établie en faveur de la Couronne produire ses effets pendant le déroulement de la procédure d'insolvabilité.

[105] La situation est différente dans le cas de la fiducie réputée créée par la *LTA*. Bien que le législateur crée en faveur de la Couronne une fiducie réputée dans laquelle seront conservées les sommes recueillies au titre de la TPS mais non encore versées, et bien qu'il prétende maintenir cette fiducie en vigueur malgré les dispositions à l'effet contraire de toute loi fédérale ou provinciale, il ne *confirme* pas l'existence de la fiducie — ni ne prévoit expressément le maintien en vigueur de celle-ci — dans la *LFI* ou dans la *LACC*. Le second des deux éléments obligatoires que j'ai mentionnés fait donc défaut, ce qui témoigne de l'intention du législateur de laisser la fiducie réputée devenir caduque au moment de l'introduction de la procédure d'insolvabilité.

[106] Le texte des dispositions en cause de la *LTA* est substantiellement identique à celui des dispositions de la *LIR*, du *RPC* et de la *LAE* :

222. (1) La personne qui perçoit un montant au titre de la taxe prévue à la section II <u>est réputée</u>, à toutes fins utiles et malgré tout droit en garantie le concernant, <u>le détenir en fiducie pour Sa Majesté du chef du Canada, séparé</u> de ses propres biens et des biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ceux de la personne, jusqu'à ce qu'il soit security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

. . .

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

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

. . .

. . . and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

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

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

[109] With respect, unlike Tysoe J.A., I do not find it "inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception" (2009 BCCA 205, 98 B.C.L.R. (4th) 242, at para. 37). *All* of the deemed trust

versé au receveur général ou retiré en application du paragraphe (2).

. . .

(3) Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté du chef du Canada, à compter du moment où le montant est perçu par la personne, séparés des propres biens de la personne, qu'ils soient ou non assujettis à un droit en garantie;

. . .

. . . et le produit découlant de ces biens est payé au receveur général par priorité sur tout droit en garantie.

[107] Pourtant, aucune disposition de la *LACC* ne prévoit le maintien en vigueur de la fiducie réputée une fois que la *LACC* entre en jeu.

[108] En résumé, le législateur a imposé *deux* conditions explicites — ou « composantes de base » — devant être réunies pour que survivent, sous le régime de la *LACC*, les fiducies réputées qui ont été établies par la *LIR*, le *RPC* et la *LAE*. S'il avait voulu préserver de la même façon, sous le régime de la *LACC*, les fiducies réputées qui sont établies par la *LTA*, il aurait inséré dans la *LACC* le type de disposition confirmatoire qui maintient explicitement en vigueur d'autres fiducies réputées.

[109] Avec égards pour l'opinion contraire exprimée par le juge Tysoe de la Cour d'appel, je ne trouve pas [TRADUCTION] « inconcevable que le législateur, lorsqu'il a adopté la version actuelle du par. 222(3) de la *LTA*, ait désigné expressément la *LFI* comme une exception sans envisager que la *LACC* puisse constituer une deuxième exception » (2009 BCCA

provisions excerpted above make explicit reference to the *BIA*. Section 222 of the *ETA* does not break the pattern. Given the near-identical wording of the four deemed trust provisions, it would have been surprising indeed had Parliament not addressed the *BIA* at all in the *ETA*.

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

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

[112] Finally, I believe that chambers judges should not segregate GST monies into the Monitor's trust account during *CCAA* proceedings, as was done in this case. The result of Justice Deschamps's reasoning is that GST claims become unsecured under the *CCAA*. Parliament has deliberately chosen to nullify certain Crown super-priorities during insolvency; this is one such instance.

III

[113] For these reasons, like Justice Deschamps, I would allow the appeal with costs in this Court and in the courts below and order that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada

205, 98 B.C.L.R. (4th) 242, par. 37). *Toutes* les dispositions établissant des fiducies réputées qui sont reproduites ci-dessus font explicitement mention de la *LFI*. L'article 222 de la *LTA* ne rompt pas avec ce modèle. Compte tenu du libellé presque identique des quatre dispositions établissant une fiducie réputée, il aurait d'ailleurs été étonnant que le législateur ne fasse aucune mention de la *LFI* dans la *LTA*.

[110] L'intention du législateur était manifestement de rendre inopérantes les fiducies réputées visant la TPS dès l'introduction d'une procédure d'insolvabilité. Par conséquent, l'art. 222 mentionne la *LFI* de manière à l'*exclure* de son champ d'application — et non de l'y *inclure*, comme le font la *LIR*, le *RPC* et la *LAE*.

[111] En revanche, je constate qu'*aucune* de ces lois ne mentionne expressément la *LACC*. La mention explicite de la *LFI* dans ces textes n'a aucune incidence sur leur interaction avec la *LACC*. Là encore, ce sont les dispositions confirmatoires que l'on trouve *dans les lois sur l'insolvabilité* qui déterminent si une fiducie réputée continuera d'exister durant une procédure d'insolvabilité.

[112] Enfin, j'estime que les juges siégeant en leur cabinet ne devraient pas, comme cela s'est produit en l'espèce, ordonner que les sommes perçues au titre de la TPS soient détenues séparément dans le compte en fiducie du contrôleur pendant le déroulement d'une procédure fondée sur la *LACC*. Il résulte du raisonnement de la juge Deschamps que les réclamations de TPS deviennent des créances non garanties sous le régime de la *LACC*. Le législateur a délibérément décidé de supprimer certaines superpriorités accordées à la Couronne pendant l'insolvabilité; nous sommes en présence de l'un de ces cas.

III

[113] Pour les motifs qui précèdent, je suis d'avis, à l'instar de la juge Deschamps, d'accueillir le pourvoi avec dépens devant notre Cour et devant les juridictions inférieures, et d'ordonner que la somme de 305 202,30 $ — qui a été perçue par LeRoy Trucking

be subject to no deemed trust or priority in favour of the Crown.

au titre de la TPS mais n'a pas encore été versée au receveur général du Canada — ne fasse l'objet d'aucune fiducie réputée ou priorité en faveur de la Couronne.

The following are the reasons delivered by

Version française des motifs rendus par

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

[114] LA JUGE ABELLA (dissidente) — La question qui est au cœur du présent pourvoi est celle de savoir si l'art. 222 de la *Loi sur la taxe d'accise*, L.R.C. 1985, ch. E-15 (« *LTA* »), et plus particulièrement le par. 222(3), donnent préséance, dans le cadre d'une procédure relevant de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« *LACC* »), à la fiducie réputée qui est établie en faveur de la Couronne à l'égard de la TPS non versée. À l'instar du juge Tysoe de la Cour d'appel, j'estime que tel est le cas. Il s'ensuit, à mon avis, que le pouvoir discrétionnaire conféré au tribunal par l'art. 11 de la *LACC* est circonscrit en conséquence.

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

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

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

[115] L'article 11[1] de la *LACC* disposait :

> **11.** (1) Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations*, chaque fois qu'une demande est faite sous le régime de la présente loi à l'égard d'une compagnie, le tribunal, sur demande d'un intéressé, peut, sous réserve des autres dispositions de la présente loi et avec ou sans avis, rendre l'ordonnance prévue au présent article.

Pour être en mesure de déterminer la portée du pouvoir discrétionnaire conféré au tribunal par l'art. 11, il est nécessaire de trancher d'abord la question de la priorité. Le paragraphe 222(3), la disposition de la *LTA* en cause en l'espèce, prévoit ce qui suit :

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

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

1 L'article 11 a été modifié et le texte modifié, qui est entré en vigueur le 18 septembre 2009, est rédigé ainsi :

> **11.** Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*, le tribunal peut, dans le cas de toute demande sous le régime de la présente loi à l'égard d'une compagnie débitrice, rendre, sur demande d'un intéressé, mais sous réserve des restrictions prévues par la présente loi et avec ou sans avis, toute ordonnance qu'il estime indiquée.

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

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

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

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

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

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

[117] As MacPherson J.A. correctly observed in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (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

(3) Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté du chef du Canada, à compter du moment où le montant est perçu par la personne, séparés des propres biens de la personne, qu'ils soient ou non assujettis à un droit en garantie;

b) ne pas faire partie du patrimoine ou des biens de la personne à compter du moment où le montant est perçu, que ces biens aient été ou non tenus séparés de ses propres biens ou de son patrimoine et qu'ils soient ou non assujettis à un droit en garantie.

Ces biens sont des biens dans lesquels Sa Majesté du chef du Canada a un droit de bénéficiaire malgré tout autre droit en garantie sur ces biens ou sur le produit en découlant, et le produit découlant de ces biens est payé au receveur général par priorité sur tout droit en garantie.

[116] Selon Century Services, la disposition dérogatoire générale de la *LACC*, le par. 18.3(1), l'emportait, et les dispositions déterminatives à l'art. 222 de la *LTA* étaient par conséquent inapplicables dans le cadre d'une procédure fondée sur la *LACC*. Le paragraphe 18.3(1) dispose :

18.3 (1) . . . [P]ar dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

[117] Ainsi que l'a fait observer le juge d'appel MacPherson, dans l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), le par. 222(3) de la *LTA* [TRADUCTION] « entre nettement en conflit » avec le par. 18.3(1) de la *LACC* (par. 31). Essentiellement, la résolution du conflit entre ces deux dispositions requiert à mon sens une

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

opération relativement simple d'interprétation des lois : Est-ce que les termes employés révèlent une intention claire du législateur? À mon avis, c'est le cas. Le texte de la disposition créant une fiducie réputée, soit le par. 222(3) de la *LTA*, précise sans ambiguïté que cette disposition s'applique malgré toute autre règle de droit sauf la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* »).

[118] En excluant explicitement une seule loi du champ d'application du par. 222(3) et en déclarant de façon non équivoque qu'il s'applique malgré toute autre loi ou règle de droit au Canada *sauf* la *LFI*, le législateur a défini la portée de cette disposition dans des termes on ne peut plus clairs. Je souscris sans réserve aux propos suivants du juge d'appel MacPherson dans l'arrêt *Ottawa Senators* :

> [TRADUCTION] L'intention du législateur au par. 222(3) de la *LTA* est claire. En cas de conflit avec « tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*) », c'est le par. 222(3) qui l'emporte. En employant ces mots, le législateur fédéral a fait deux choses : il a décidé que le par. 222(3) devait l'emporter sur tout autre texte législatif fédéral et, fait important, il a abordé la question des exceptions à cette préséance en en mentionnant une seule, la *Loi sur la faillite et l'insolvabilité* [. . .] La *LFI* et la *LACC* sont des lois fédérales étroitement liées entre elles. Je ne puis concevoir que le législateur ait pu mentionner expressément la *LFI* à titre d'exception, mais ait involontairement omis de considérer la *LACC* comme une deuxième exception possible. À mon avis, le fait que la *LACC* ne soit pas mentionnée au par. 222(3) de la *LTA* était presque assurément une omission mûrement réfléchie de la part du législateur. [par. 43]

[119] L'opinion du juge d'appel MacPherson suivant laquelle le fait que la *LACC* n'ait pas été soustraite à l'application de la *LTA* témoigne d'une intention claire du législateur est confortée par la façon dont la *LACC* a par la suite été modifiée après l'édiction du par. 18.3(1) en 1997. En 2000, lorsque le par. 222(3) de la *LTA* est entré en vigueur, des modifications ont également été apportées à la *LACC*, mais le par. 18.3(1) de cette loi n'a pas été modifié.

[120] L'absence de modification du par. 18.3(1) vaut d'être soulignée, car elle a eu pour effet de maintenir le statu quo législatif, malgré les

various constituencies that s. 18.3(1) be amended to make the priorities in the *CCAA* consistent with those in the *BIA*. In 2002, for example, when Industry Canada conducted a review of the *BIA* and the *CCAA*, the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals recommended that the priority regime under the *BIA* be extended to the *CCAA* (Joint Task Force on Business Insolvency Law Reform, *Report* (March 15, 2002), Sch. B, proposal 71). The same recommendations were made by the Standing Senate Committee on Banking, Trade and Commerce in its 2003 report, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*; by the Legislative Review Task Force (Commercial) of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals in its 2005 *Report on the Commercial Provisions of Bill C-55*; and in 2007 by the Insolvency Institute of Canada in a submission to the Standing Senate Committee on Banking, Trade and Commerce commenting on reforms then under consideration.

demandes répétées de divers groupes qui souhaitaient que cette disposition soit modifiée pour aligner l'ordre de priorité établi par la *LACC* sur celui de la *LFI*. En 2002, par exemple, lorsque Industrie Canada a procédé à l'examen de la *LFI* et de la *LACC*, l'Institut d'insolvabilité du Canada et l'Association canadienne des professionnels de l'insolvabilité et de la réorganisation ont recommandé que les règles de la *LFI* en matière de priorité soient étendues à la *LACC* (Joint Task Force on Business Insolvency Law Reform, *Report* (15 mars 2002), ann. B, proposition 71). Ces recommandations ont été reprises en 2003 par le Comité sénatorial permanent des banques et du commerce dans son rapport intitulé *Les débiteurs et les créanciers doivent se partager le fardeau : Examen de la Loi sur la faillite et l'insolvabilité et de la Loi sur les arrangements avec les créanciers des compagnies*, ainsi qu'en 2005 par le Legislative Review Task Force (Commercial) de l'Institut d'insolvabilité du Canada et de l'Association canadienne des professionnels de l'insolvabilité *et de la* réorganisation dans son *Report on the Commercial Provisions of Bill C-55*, et en 2007 par l'Institut d'insolvabilité du Canada dans un mémoire soumis au Comité sénatorial permanent des banques et du commerce au sujet de réformes alors envisagées.

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

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

[121] La *LFI* demeure néanmoins la seule loi soustraite à l'application du par. 222(3) de la *LTA*. Même à la suite de l'arrêt rendu en 2005 dans l'affaire *Ottawa Senators*, qui a confirmé que la *LTA* l'emportait sur la *LACC*, le législateur n'est pas intervenu. Cette absence de réaction de sa part me paraît tout aussi pertinente en l'espèce que dans l'arrêt *Société Télé-Mobile c. Ontario*, 2008 CSC 12, [2008] 1 R.C.S. 305, où la Cour a déclaré ceci :

> Le silence du législateur n'est pas nécessairement déterminant quant à son intention, mais en l'espèce, il répond à la demande pressante de Telus et des autres entreprises et organisations intéressées que la loi prévoie expressément la possibilité d'un remboursement des frais raisonnables engagés pour communiquer des éléments de preuve conformément à une ordonnance. L'historique législatif confirme selon moi que le législateur n'a pas voulu qu'une indemnité soit versée pour l'obtempération à une ordonnance de communication. [par. 42]

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

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

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

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

[122] Tout ce qui précède permet clairement d'inférer que le législateur a délibérément choisi de soustraire la fiducie réputée établie au par. 222(3) à l'application du par. 18.3(1) de la *LACC*.

[123] Je ne vois pas non plus 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. Je ne saurais expliquer mieux que ne l'a fait le juge d'appel Tysoe les raisons pour lesquelles l'argument invoquant des considérations de politique générale ne peut, selon moi, être retenu en l'espèce. Je vais donc reprendre à mon compte ses propos à ce sujet :

> [TRADUCTION] Je ne conteste pas qu'il existe des raisons de politique générale valables qui justifient d'inciter les entreprises insolvables à tenter de se restructurer de façon à pouvoir continuer à exercer leurs activités avec le moins de perturbations possibles pour leurs employés et pour les autres intéressés. Les tribunaux peuvent légitimement tenir compte de telles considérations de politique générale, mais seulement si elles ont trait à une question que le législateur n'a pas examinée. Or, dans le cas qui nous occupe, il y a lieu de présumer que le législateur a tenu compte de considérations de politique générale lorsqu'il a adopté les modifications susmentionnées à la *LACC* et à la *LTA*. Comme le juge MacPherson le fait observer au par. 43 de l'arrêt *Ottawa Senators*, il est inconcevable que le législateur, lorsqu'il a adopté la version actuelle du par. 222(3) de la *LTA*, ait désigné expressément la *LFI* comme une exception sans envisager que la *LACC* puisse constituer une deuxième exception. Je signale par ailleurs que les modifications apportées en 1992 à la *LFI* ont permis de rendre les propositions concordataires opposables aux créanciers garantis et que, malgré la plus grande souplesse de la *LACC*, il est possible pour une compagnie insolvable de se restructurer sous le régime de la *LFI*. [par. 37]

[124] Bien que je sois d'avis que la clarté des termes employés au par. 222(3) tranche la question, j'estime également que cette conclusion est même renforcée par l'application d'autres principes d'interprétation. Dans leurs observations, les parties indiquent que les principes suivants étaient, selon elles, particulièrement pertinents : la Couronne a invoqué le principe voulant que la loi « postérieure » l'emporte; Century Services a fondé son argumentation sur le principe de la préséance de la loi spécifique sur la loi générale (*generalia specialibus non derogant*).

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

[125] Le principe de la préséance de la « loi postérieure » accorde la priorité à la loi la plus récente, au motif que le législateur est présumé connaître le contenu des lois alors en vigueur. Si, dans la loi nouvelle, le législateur adopte une règle inconciliable avec une règle préexistante, on conclura qu'il a entendu déroger à celle-ci (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5e éd. 2008), p. 346-347; Pierre-André Côté, *The Interpretation of Legislation in Canada* (3e éd. 2000), p. 358).

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

[126] L'exception à cette supplantation présumée des dispositions législatives préexistantes incompatibles réside dans le principe exprimé par la maxime *generalia specialibus non derogant* selon laquelle une disposition générale plus récente n'est pas réputée déroger à une loi spéciale antérieure (Côté, p. 359). Comme dans le jeu des poupées russes, cette exception comporte elle-même une exception. En effet, une disposition spécifique antérieure peut dans les faits être « supplantée » par une loi ultérieure de portée générale si le législateur, par les mots qu'il a employés, a exprimé l'intention de faire prévaloir la loi générale (*Doré c. Verdun (Ville)*, [1997] 2 R.C.S. 862).

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

> . . . the overarching rule of statutory interpretation is that statutory provisions should be interpreted to give effect to the intention of the legislature in enacting the law. This primary rule takes precedence over all maxims or canons or aids relating to statutory interpretation, including the maxim that the specific prevails over the general (*generalia specialibus non derogant*). As expressed by Hudson J. in *Canada v. Williams*, [1944] S.C.R. 226, . . . at p. 239 . . . :
>
> The maxim *generalia specialibus non derogant* is relied on as a rule which should dispose of the question, but the maxim is not a rule of law but a rule of construction and bows to the intention of the

[127] Ces principes d'interprétation visent principalement à faciliter la détermination de l'intention du législateur, comme l'a confirmé le juge d'appel MacPherson dans l'arrêt *Ottawa Senators*, au par. 42 :

> [TRADUCTION] . . . en matière d'interprétation des lois, la règle cardinale est la suivante : les dispositions législatives doivent être interprétées de manière à donner effet à l'intention du législateur lorsqu'il a adopté la loi. Cette règle fondamentale l'emporte sur toutes les maximes, outils ou canons d'interprétation législative, y compris la maxime suivant laquelle le particulier l'emporte sur le général (*generalia specialibus non derogant*). Comme l'a expliqué le juge Hudson dans l'arrêt *Canada c. Williams*, [1944] R.C.S. 226, [. . .] à la p. 239 . . . :
>
> On invoque la maxime *generalia specialibus non derogant* comme une règle qui devrait trancher la question. Or cette maxime, qui n'est pas une règle de droit mais un principe d'interprétation, cède le pas

> legislature, if such intention can reasonably be gathered from all of the relevant legislation.

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

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

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

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

> devant l'intention du législateur, s'il est raisonnablement possible de la dégager de l'ensemble des dispositions législatives pertinentes.

(Voir aussi Côté, p. 358, et Pierre-André Côté, avec la collaboration de S. Beaulac et M. Devinat, *Interprétation des lois* (4e éd. 2009), par. 1335.)

[128] J'accepte l'argument de la Couronne suivant lequel le principe de la loi « postérieure » est déterminant en l'espèce. Comme le par. 222(3) de la *LTA* a été édicté en 2000 et que le par. 18.3(1) de la *LACC* a été adopté en 1997, le par. 222(3) est, de toute évidence, la disposition postérieure. Cette victoire chronologique peut être neutralisée si, comme le soutient Century Services, on démontre que la disposition la plus récente, le par. 222(3) de la *LTA*, est une disposition générale, auquel cas c'est la disposition particulière antérieure, le par. 18.3(1), qui l'emporte (*generalia specialibus non derogant*). Mais, comme nous l'avons vu, la disposition particulière antérieure n'a pas préséance si la disposition générale ultérieure paraît la « supplanter ». C'est précisément, à mon sens, ce qu'accomplit le par. 222(3) de par son libellé, lequel précise que la disposition l'emporte sur tout autre texte législatif fédéral, tout texte législatif provincial ou « toute autre règle de droit » *sauf la LFI*. Le paragraphe 18.3(1) de la *LACC* est par conséquent rendu inopérant aux fins d'application du par. 222(3).

[129] Il est vrai que, lorsque la *LACC* a été modifiée en 2005[2], le par. 18.3(1) a été remplacé par le par. 37(1) (L.C. 2005, ch. 47, art. 131). Selon la juge Deschamps, le par. 37(1) est devenu, de ce fait, la disposition « postérieure ». Avec égards pour l'opinion exprimée par ma collègue, cette observation est réfutée par l'al. 44*f*) de la *Loi d'interprétation*, L.R.C. 1985, ch. I-21, qui décrit expressément l'effet (inexistant) qu'a le remplacement — sans modifications notables sur le fond — d'un texte antérieur qui a été abrogé (voir *Procureur général du Canada c. Commission des relations de travail dans la Fonction publique*, [1977] 2 C.F. 663, qui portait sur

2 Les modifications ne sont entrées en vigueur que le 18 septembre 2009.

"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 re-order the provisions of this Act". During second reading, the Hon. Bill Rompkey, then the Deputy Leader of the Government in the

la disposition qui a précédé l'al. 44*f*)). Cet alinéa précise que le nouveau texte ne doit pas être considéré de « droit nouveau », sauf dans la mesure où il diffère au fond du texte abrogé :

> **44.** En cas d'abrogation et de remplacement, les règles suivantes s'appliquent :
>
> . . .
>
> *f*) sauf dans la mesure où les deux textes diffèrent au fond, le nouveau texte n'est pas réputé de droit nouveau, sa teneur étant censée constituer une refonte et une clarification des règles de droit du texte antérieur;

Le mot « texte » est défini ainsi à l'art. 2 de la *Loi d'interprétation* : « Tout ou partie d'une loi ou d'un règlement. »

[130] Le paragraphe 37(1) de la *LACC* actuelle est pratiquement identique quant au fond au par. 18.3(1). Pour faciliter la comparaison de ces deux dispositions, je les ai reproduites ci-après :

> **37.** (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme tel par le seul effet d'une telle disposition.
>
> **18.3** (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

[131] L'application de l'al. 44*f*) de la *Loi d'interprétation* vient tout simplement confirmer l'intention clairement exprimée par le législateur, qu'a indiquée Industrie Canada dans l'analyse du Projet de loi C-55, où le par. 37(1) était qualifié de « modification d'ordre technique concernant le réaménagement des dispositions de la présente loi ». Par ailleurs, durant la deuxième lecture du projet de loi

Senate, confirmed that s. 37(1) represented only a technical change:

> On a technical note relating to the treatment of deemed trusts for taxes, the bill [*sic*] makes no changes to the underlying policy intent, despite the fact that in the case of a restructuring under the CCAA, sections of the act [*sic*] were repealed and substituted with renumbered versions due to the extensive reworking of the CCAA.

(*Debates of the Senate*, vol. 142, 1st Sess., 38th Parl., November 23, 2005, at p. 2147)

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

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

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

au Sénat, l'honorable Bill Rompkey, qui était alors leader adjoint du gouvernement au Sénat, a confirmé que le par. 37(1) représentait seulement une modification d'ordre technique :

> Sur une note administrative, je signale que, dans le cas du traitement de fiducies présumées aux fins d'impôt, le projet de loi ne modifie aucunement l'intention qui sous-tend la politique, alors que dans le cas d'une restructuration aux termes de la LACC, des articles de la loi ont été abrogés et remplacés par des versions portant de nouveaux numéros lors de la mise à jour exhaustive de la LACC.

(*Débats du Sénat*, vol. 142, 1re sess., 38e lég., 23 novembre 2005, p. 2147)

[132] Si le par. 18.3(1) avait fait l'objet de modifications notables sur le fond lorsqu'il a été remplacé par le par. 37(1), je me rangerais à l'avis de la juge Deschamps qu'il doit être considéré comme un texte de droit nouveau. Mais comme les par. 18.3(1) et 37(1) ne diffèrent pas sur le fond, le fait que le par. 18.3(1) soit devenu le par. 37(1) n'a aucune incidence sur l'ordre chronologique du point de vue de l'interprétation, et le par. 222(3) de la *LTA* demeure la disposition « postérieure » (Sullivan, p. 347).

[133] Il s'ensuit que la disposition créant une fiducie réputée que l'on trouve au par. 222(3) de la *LTA* l'emporte sur le par. 18.3(1) dans le cadre d'une procédure fondée sur la *LACC*. La question qui se pose alors est celle de savoir quelle est l'incidence de cette préséance sur le pouvoir discrétionnaire conféré au tribunal par l'art. 11 de la *LACC*.

[134] Bien que l'art. 11 accorde au tribunal le pouvoir discrétionnaire de rendre des ordonnances malgré les dispositions de la *LFI* et de la *Loi sur les liquidations*, L.R.C. 1985, ch. W-11, ce pouvoir discrétionnaire demeure assujetti à l'application de toute autre loi fédérale. L'exercice de ce pouvoir discrétionnaire est donc circonscrit par les limites imposées par toute loi *autre* que la *LFI* et la *Loi sur les liquidations*, et donc par la *LTA*. En l'espèce, le juge siégeant en son cabinet était donc tenu de respecter le régime de priorités établi au par. 222(3) de la *LTA*. Ni le par. 18.3(1) ni l'art. 11 de la *LACC* ne l'autorisaient à en faire abstraction. Par conséquent,

for payment of the GST funds during the *CCAA* proceedings.

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*.

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

[135] Vu cette conclusion, il n'est pas nécessaire d'examiner la question de savoir s'il existait une fiducie expresse en l'espèce.

[136] I would dismiss the appeal.

[136] Je rejetterais le présent pourvoi.

APPENDIX

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

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

. . .

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

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

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

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

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

ANNEXE

Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36 (en date du 13 décembre 2007)

11. (1) [Pouvoir du tribunal] Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations*, chaque fois qu'une demande est faite sous le régime de la présente loi à l'égard d'une compagnie, le tribunal, sur demande d'un intéressé, peut, sous réserve des autres dispositions de la présente loi et avec ou sans avis, rendre l'ordonnance prévue au présent article.

. . .

(3) [Demande initiale — ordonnances] Dans le cas d'une demande initiale visant une compagnie, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour une période maximale de trente jours :

a) suspendre, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, les procédures intentées contre la compagnie au titre des lois mentionnées au paragraphe (1), ou qui pourraient l'être;

b) surseoir, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, au cours de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, d'intenter ou de continuer toute action, poursuite ou autre procédure contre la compagnie.

(4) [Autres demandes — ordonnances] Dans le cas d'une demande, autre qu'une demande initiale, visant une compagnie, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période qu'il estime indiquée :

(*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,

a) suspendre, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, les procédures intentées contre la compagnie au titre des lois mentionnées au paragraphe (1), ou qui pourraient l'être;

b) surseoir, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, au cours de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, d'intenter ou de continuer toute action, poursuite ou autre procédure contre la compagnie.

. . .

(6) [Preuve] Le tribunal ne rend l'ordonnance visée aux paragraphes (3) ou (4) que si :

a) le demandeur le convainc qu'il serait indiqué de rendre une telle ordonnance;

b) dans le cas de l'ordonnance visée au paragraphe (4), le demandeur le convainc en outre qu'il a agi — et continue d'agir — de bonne foi et avec toute la diligence voulue.

11.4 (1) [Suspension des procédures] Le tribunal peut ordonner :

a) la suspension de l'exercice par Sa Majesté du chef du Canada des droits que lui confère le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* ou toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie à ce paragraphe et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents, à l'égard d'une compagnie lorsque celle-ci est un débiteur fiscal visé à ce paragraphe ou à cette disposition, pour une période se terminant au plus tard :

(i) à l'expiration de l'ordonnance rendue en application de l'article 11,

(ii) au moment du rejet, par le tribunal ou les créanciers, de la transaction proposée,

(iii) six mois après que le tribunal a homologué la transaction ou l'arrangement,

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

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

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

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

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

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

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

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

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

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

(iv) au moment de tout défaut d'exécution de la transaction ou de l'arrangement,

(v) au moment de l'exécution intégrale de la transaction ou de l'arrangement;

b) la suspension de l'exercice par Sa Majesté du chef d'une province, pour une période se terminant au plus tard au moment visé à celui des sous-alinéas *a*)(i) à (v) qui, le cas échéant, est applicable, des droits que lui confère toute disposition législative de cette province à l'égard d'une compagnie, lorsque celle-ci est un débiteur visé par la loi provinciale et qu'il s'agit d'une disposition dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

(2) [Cessation] L'ordonnance cesse d'être en vigueur dans les cas suivants :

a) la compagnie manque à ses obligations de paiement pour un montant qui devient dû à Sa Majesté après l'ordonnance et qui pourrait faire l'objet d'une demande aux termes d'une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou 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

d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents,

(iii) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(B) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe;

b) un autre créancier a ou acquiert le droit de réaliser sa garantie sur un bien qui pourrait être réclamé par Sa Majesté dans l'exercice des droits que lui confère l'une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents,

(iii) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne, and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

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

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

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

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

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

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

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

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

ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(B) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

(3) [Effet] Les ordonnances du tribunal, autres que celles rendues au titre du paragraphe (1), n'ont pas pour effet de porter atteinte à l'application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents;

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

Pour l'application de l'alinéa *c*), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou 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.

provincial et toute règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa *c*)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa *c*)(ii), et quant aux intérêts, pénalités ou autres montants y afférents, quelle que soit la garantie dont bénéficie le créancier.

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

(2) [Exceptions] Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(*a*) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

18.3 (1) [Fiducies présumées] Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

(2) [Exceptions] Le paragraphe (1) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* (chacun étant appelé « disposition fédérale » au présent paragraphe) ou à l'égard des montants réputés détenus en fiducie aux termes de toute loi d'une province créant une fiducie présumée dans le seul but d'assurer à Sa Majesté du chef de cette province la remise de sommes déduites ou retenues aux termes d'une loi de cette province, dans la mesure où, dans ce dernier cas, se réalise l'une des conditions suivantes :

a) la loi de cette province prévoit un impôt semblable, de par sa nature, à celui prévu par la *Loi de l'impôt sur le revenu*, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*;

b) cette province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) du *Régime de pensions du Canada*, la loi de cette province institue un « régime provincial de pensions » au sens de ce paragraphe, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 23(3) ou (4) du *Régime de pensions du Canada*.

Pour l'application du présent paragraphe, toute disposition de la loi provinciale qui crée une fiducie présumée est réputée avoir, à l'encontre de tout créancier du failli et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que la disposition fédérale correspondante, quelle que soit la garantie dont bénéficie le créancier.

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

18.4 (1) [Réclamations de la Couronne] Dans le cadre de procédures intentées sous le régime de la présente loi, toutes les réclamations de Sa Majesté du chef du Canada ou d'une province ou d'un organisme compétent au titre d'une loi sur les accidents du travail, y compris les réclamations garanties, prennent rang comme réclamations non garanties.

. . .

(3) [Effet] Le paragraphe (1) n'a pas pour effet de porter atteinte à l'application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents;

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

Pour l'application de l'alinéa *c*), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa *c*)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa *c*)(ii), in respect of any related interest, penalties or other amounts.

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

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

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

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

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

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

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

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

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

et quant aux intérêts, pénalités ou autres montants y afférents, quelle que soit la garantie dont bénéficie le créancier.

20. [La loi peut être appliquée conjointement avec d'autres lois] Les dispositions de la présente loi peuvent être appliquées conjointement avec celles de toute loi fédérale ou provinciale, autorisant ou prévoyant l'homologation de transactions ou arrangements entre une compagnie et ses actionnaires ou une catégorie de ces derniers.

Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36 (en date du 18 septembre 2009)

11. [Pouvoir général du tribunal] Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*, le tribunal peut, dans le cas de toute demande sous le régime de la présente loi à l'égard d'une compagnie débitrice, rendre, sur demande d'un intéressé, mais sous réserve des restrictions prévues par la présente loi et avec ou sans avis, toute ordonnance qu'il estime indiquée.

11.02 (1) [Suspension : demande initiale] Dans le cas d'une demande initiale visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période maximale de trente jours qu'il estime nécessaire :

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*;

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

(2) [Suspension : demandes autres qu'initiales] Dans le cas d'une demande, autre qu'une demande initiale, visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période qu'il estime nécessaire :

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime des lois mentionnées à l'alinéa (1)*a*);

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

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

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

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

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

. . .

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

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

(i) the expiry of the order,

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

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

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

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

(*b*) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company if the company is a debtor under that legislation and the provision has a purpose similar to subsection 224(1.2) of the *Income*

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

(3) [Preuve] Le tribunal ne rend l'ordonnance que si :

a) le demandeur le convainc que la mesure est opportune;

b) dans le cas de l'ordonnance visée au paragraphe (2), le demandeur le convainc en outre qu'il a agi et continue d'agir de bonne foi et avec la diligence voulue.

. . .

11.09 (1) [Suspension des procédures : Sa Majesté] L'ordonnance prévue à l'article 11.02 peut avoir pour effet de suspendre :

a) l'exercice par Sa Majesté du chef du Canada des droits que lui confère le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* ou toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie à ce paragraphe et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents, à l'égard d'une compagnie qui est un débiteur fiscal visé à ce paragraphe ou à cette disposition, pour la période se terminant au plus tard :

(i) à l'expiration de l'ordonnance,

(ii) au moment du rejet, par le tribunal ou les créanciers, de la transaction proposée,

(iii) six mois après que le tribunal a homologué la transaction ou l'arrangement,

(iv) au moment de tout défaut d'exécution de la transaction ou de l'arrangement,

(v) au moment de l'exécution intégrale de la transaction ou de l'arrangement;

b) l'exercice par Sa Majesté du chef d'une province, pour la période que le tribunal estime indiquée et se terminant au plus tard au moment visé à celui des sous-alinéas *a*)(i) à (v) qui, le cas échéant, est applicable, des droits que lui confère toute disposition

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

législative de cette province à l'égard d'une compagnie qui est un débiteur visé par la loi provinciale, s'il s'agit d'une disposition dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d'une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe.

(2) [Cessation d'effet] Les passages de l'ordonnance qui suspendent l'exercice des droits de Sa Majesté visés aux alinéas (1)*a*) ou *b*) cessent d'avoir effet dans les cas suivants :

a) la compagnie manque à ses obligations de paiement à l'égard de toute somme qui devient due à Sa Majesté après le prononcé de l'ordonnance et qui pourrait faire l'objet d'une demande aux termes d'une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents,

(iii) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la collection of a sum, and of any related interest, penalties or other amounts, and the sum

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

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

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

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

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

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

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

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection

perception d'une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(B) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe;

b) un autre créancier a ou acquiert le droit de réaliser sa garantie sur un bien qui pourrait être réclamé par Sa Majesté dans l'exercice des droits que lui confère l'une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents,

(iii) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d'une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(B) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens

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

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

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

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

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

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

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

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

du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe.

(3) [Effet] L'ordonnance prévue à l'article 11.02, à l'exception des passages de celle-ci qui suspendent l'exercice des droits de Sa Majesté visés aux alinéas (1)*a*) ou *b*), n'a pas pour effet de porter atteinte à l'application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents;

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d'une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe.

Pour l'application de l'alinéa *c*), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou provincial et toute autre règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa *c*)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa *c*)(ii), et quant aux intérêts, pénalités et autres charges afférents, quelle que soit la garantie dont bénéficie le créancier.

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

(2) [Exceptions] Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision"), nor does it apply in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province if

(*a*) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

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

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

37. (1) [Fiducies présumées] Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme tel par le seul effet d'une telle disposition.

(2) [Exceptions] Le paragraphe (1) ne s'applique pas à l'égard des sommes réputées détenues en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* (chacun étant appelé « disposition fédérale » au présent paragraphe) ou à l'égard des sommes réputées détenues en fiducie aux termes de toute loi d'une province créant une fiducie présumée dans le seul but d'assurer à Sa Majesté du chef de cette province la remise de sommes déduites ou retenues aux termes d'une loi de cette province, si, dans ce dernier cas, se réalise l'une des conditions suivantes :

a) la loi de cette province prévoit un impôt semblable, de par sa nature, à celui prévu par la *Loi de l'impôt sur le revenu*, et les sommes déduites ou retenues au titre de cette loi provinciale sont de même nature que celles visées aux paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*;

b) cette province est une province instituant un régime général de pensions au sens du paragraphe 3(1) du *Régime de pensions du Canada*, la loi de cette province institue un régime provincial de pensions au sens de ce paragraphe, et les sommes déduites ou retenues au titre de cette loi provinciale sont de même nature que celles visées aux paragraphes 23(3) ou (4) du *Régime de pensions du Canada*.

Pour l'application du présent paragraphe, toute disposition de la loi provinciale qui crée une fiducie présumée est réputée avoir, à l'encontre de tout créancier de la compagnie et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que la disposition fédérale correspondante, quelle que soit la garantie dont bénéficie le créancier.

Loi sur la taxe d'accise, L.R.C. 1985, ch. E-15 (en date du 13 décembre 2007)

222. (1) [Montants perçus détenus en fiducie] La personne qui perçoit un montant au titre de la taxe prévue à la section II est réputée, à toutes fins utiles et malgré tout droit en garantie le concernant, le détenir en fiducie pour Sa Majesté du chef du Canada, séparé de ses propres biens et des biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ceux de la creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

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

. . .

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

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

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

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

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

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

personne, jusqu'à ce qu'il soit versé au receveur général ou retiré en application du paragraphe (2).

(1.1) [Montants perçus avant la faillite] Le paragraphe (1) ne s'applique pas, à compter du moment de la faillite d'un failli, au sens de la *Loi sur la faillite et l'insolvabilité*, aux montants perçus ou devenus percevables par lui avant la faillite au titre de la taxe prévue à la section II.

. . .

(3) [Non-versement ou non-retrait] Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté du chef du Canada, à compter du moment où le montant est perçu par la personne, séparés des propres biens de la personne, qu'ils soient ou non assujettis à un droit en garantie;

b) ne pas faire partie du patrimoine ou des biens de la personne à compter du moment où le montant est perçu, que ces biens aient été ou non tenus séparés de ses propres biens ou de son patrimoine et qu'ils soient ou non assujettis à un droit en garantie.

Ces biens sont des biens dans lesquels Sa Majesté du chef du Canada a un droit de bénéficiaire malgré tout autre droit en garantie sur ces biens ou sur le produit en découlant, et le produit découlant de ces biens est payé au receveur général par priorité sur tout droit en garantie.

Loi sur la faillite et l'insolvabilité, L.R.C. 1985, ch. B-3 (en date du 13 décembre 2007)

67. (1) [Biens du failli] Les biens d'un failli, constituant le patrimoine attribué à ses créanciers, ne comprennent pas les biens suivants :

(*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

a) les biens détenus par le failli en fiducie pour toute autre personne;

b) les biens qui, à l'encontre du failli, sont exempts d'exécution ou de saisie sous le régime des lois applicables dans la province dans laquelle sont situés ces biens et où réside le failli;

b.1) dans les circonstances prescrites, les paiements au titre de crédits de la taxe sur les produits et services et les paiements prescrits qui sont faits à des personnes physiques relativement à leurs besoins essentiels et qui ne sont pas visés aux alinéas *a*) et *b*),

mais ils comprennent :

c) tous les biens, où qu'ils soient situés, qui appartiennent au failli à la date de la faillite, ou qu'il peut acquérir ou qui peuvent lui être dévolus avant sa libération;

d) les pouvoirs sur des biens ou à leur égard, qui auraient pu être exercés par le failli pour son propre bénéfice.

(2) [Fiducies présumées] Sous réserve du paragraphe (3) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens du failli ne peut, pour l'application de l'alinéa (1)*a*), être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

(3) [Exceptions] Le paragraphe (2) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* (chacun étant appelé « disposition fédérale » au présent paragraphe) ou à l'égard des montants réputés détenus en fiducie aux termes de toute loi d'une province créant une fiducie présumée dans le seul but d'assurer à Sa Majesté du chef de cette province la remise de sommes déduites ou retenues aux termes d'une loi de cette province, dans la mesure où, dans ce dernier cas, se réalise l'une des conditions suivantes :

a) la loi de cette province prévoit un impôt semblable, de par sa nature, à celui prévu par la *Loi de l'impôt sur le revenu*, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*;

(*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

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

. . .

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

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

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

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

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

b) cette province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) du *Régime de pensions du Canada*, la loi de cette province institue un « régime provincial de pensions » au sens de ce paragraphe, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 23(3) ou (4) du *Régime de pensions du Canada*.

Pour l'application du présent paragraphe, toute disposition de la loi provinciale qui crée une fiducie présumée est réputée avoir, à l'encontre de tout créancier du failli et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que la disposition fédérale correspondante, quelle que soit la garantie dont bénéficie le créancier.

86. (1) [Réclamations de la Couronne] Dans le cadre d'une faillite ou d'une proposition, les réclamations prouvables — y compris les réclamations garanties — de Sa Majesté du chef du Canada ou d'une province ou d'un organisme compétent au titre d'une loi sur les accidents du travail prennent rang comme réclamations non garanties.

. . .

(3) [Effet] Le paragraphe (1) n'a pas pour effet de porter atteinte à l'application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents;

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(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.

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

Pour l'application de l'alinéa *c*), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa *c*)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa *c*)(ii), et quant aux intérêts, pénalités ou autres montants y afférents, quelle que soit la garantie dont bénéficie le créancier.

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

Solicitors for the appellant: Fraser Milner Casgrain, Vancouver.

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

Pourvoi accueilli avec dépens, la juge ABELLA *est dissidente.*

Procureurs de l'appelante : Fraser Milner Casgrain, Vancouver.

Procureur de l'intimé : Procureur général du Canada, Vancouver.

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **JTI-MACDONALD CORP.**
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **IMPERIAL TOBACCO CANADA LIMITED** AND **IMPERIAL TOBACCO COMPANY LIMITED**
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **ROTHMANS, BENSON & HEDGES INC.**

Court File No. CV-19-615862-00CL
Court File No CV-19-616077-00CL
Court File No CV-19-616779-00CL

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Motions for Meeting Orders & Claims Procedure Orders
(Returnable October 31, 2024)

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