

COURT FILE NUMBER 2403-05996  
COURT COURT OF KING'S BENCH OF ALBERTA  
JUDICIAL CENTRE EDMONTON  
PLAINTIFF ROYAL BANK OF CANADA  
DEFENDANTS BEREKET & G HOLDINGS CORP., HABESHA AFRICAN  
SUPERMARKET LTD., and SEMERE BERHANE

Clerk's Stamp

**DOCUMENT BENCH BRIEF OF RBC**

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**BENCH BRIEF OF ROYAL BANK OF CANADA,  
IN SUPPORT OF THE APPLICATION re: ASSIGNMENT INTO BANKRUPTCY**

**TO BE HEARD BY THE HONOURABLE JUSTICE J.J GILL (Commercial List)  
March 18, 2026 at 2:00 P.M**

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## I. OVERVIEW

1. This Bench Brief is submitted by the Plaintiff/Applicant, Royal Bank of Canada (“**RBC**”), in support of its application (the “**Application**”), to direct BDO Canada Limited (“**BDO**”), in its capacity as the receiver and manager (the “**Receiver**”) of all the assets, undertakings and property of Bereket & G Holdings Corp (“**Bereket**”) and Habesha African Supermarket Ltd. (“**Habesha**”, and together with Bereket, the “**Debtors**”), to assign Bereket into bankruptcy.
2. RBC respectfully seeks for its Application to be heard concurrently with the Receiver’s application for discharge filed on March 9, 2026 (the “**Discharge Application**”).
3. RBC commenced the within proceedings in early 2024 and sought to appoint BDO as Receiver at that time. This Honourable Court granted the initial Receivership Order sought by RBC on April 4, 2024. Subsequently, pursuant to a further application by RBC, this Honourable Court granted an Amended and Restated Receivership Order on July 22, 2024 (the “**ARRO**”), which among other things, expanded the Receiver’s powers to “assign the Debtors, or any of them, into bankruptcy”. Section 3 of the AARO states the Receiver is “empowered and authorized, but not obligated” to exercise the assignment power.
4. RBC holds the first-ranking security interest in all of the property of Bereket. All else being equal, it is entitled to a distribution of all of the realizations from the property of Bereket. RBC has also funded this receivership pursuant to Receiver’s Borrowings.
5. However, RBC understands that the Canada Revenue Agency (“**CRA**”) has asserted a deemed trust claim against Bereket’s property on an account of unpaid GST (the “**GST Trust Claim**”), as provided for under Section 222 of the *Excise Tax Act*, RSC 1985, c E-15 (the “**Excise Tax Act**”).
6. It is trite law that the CRA’s deemed trust in respect of unremitted GST terminates upon a bankruptcy. This is clear from the express terms of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (“**BIA**”), and has been confirmed by the Supreme Court of Canada.<sup>1</sup>
7. Put simply, RBC seeks an Order directing the Receiver to exercise its existing power under the ARRO, to assign Bereket into bankruptcy, so as to terminate the CRA’s GST Trust Claim. This Court has the authority and discretion to grant that direction, and that relief is commercially

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<sup>1</sup> *Quebec (Revenue) v Caisse populaire Desjardins de Montmagny*, 2009 SCC 49 [*Desjardins de Montmagny*] at [paras 14-15, 28](#) [TAB 1].

reasonable, just and appropriate in all the circumstances, since it will allow the property of Bereket to be distributed equitably in accordance with the priorities established by the *BIA*. Further, given that RBC is the party that commenced these proceedings, and undertook the risk of funding these proceedings, it is reasonable that RBC should recover what has been generated.

8. RBC understands that the Receiver takes no position on the Application, but if appointed, BDO consents to act as trustee in bankruptcy of Bereket.

## II. FACTUAL BACKGROUND

9. The relevant background is set out in Receiver's Fourth Report to the Court, dated March 9, 2026 (the "**Fourth Report**"). Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Fourth Report.

10. As is more fully set out in the Fourth Report, the relevant facts include that:

- (a) RBC is Bereket's first-ranking secured creditor. It holds security over all of Bereket's real and personal property, and the Receiver has confirmed the validity and enforceability of RBC's security;<sup>2</sup>
- (b) As of November 14, 2025, RBC was owed from Bereket approximately \$2,911,537, plus accruing interests and costs, but excluding the Receiver's Borrowings.<sup>3</sup> Although RBC is expected to receive a distribution from the Receiver, RBC will nevertheless experience a material shortfall on its security;<sup>4</sup>
- (c) RBC is the party that commenced the within proceedings, and has funded the proceedings, by advancing \$140,000 to the Receiver as Receiver's Borrowings;<sup>5</sup>
- (d) CRA asserts the GST Trust Claim in the amount of approximately \$76,242.<sup>6</sup> All else being equal,<sup>7</sup> the Receiver is of the view that any distribution to RBC will be subject to a distribution to the CRA in respect of the GST Trust Claim;<sup>8</sup> and

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<sup>2</sup> Fourth Report at para 40.

<sup>3</sup> Fourth Report at para 27(a)(i).

<sup>4</sup> Fourth Report at para 42

<sup>5</sup> Fourth Report at paras 6, 27(a)(i).

<sup>6</sup> Fourth Report at para 27(a)(iv).

<sup>7</sup> Note, however, that CRA's GST Trust Claim would be subordinate to RBC's mortgage security; see: *Excise Tax Act*, [s. 222\(4\) \[TAB 2\]](#); *Security Interest (GST/HST) Regulations*, [SOR/2011-55 \[TAB 3\]](#).

<sup>8</sup> Fourth Report at para 41.

- (e) The ARRO, granted upon the application of RBC, gave the Receiver the power (but not obligation) to assign Bereket into bankruptcy. CRA was served with the application materials for the ARRO,<sup>9</sup> and thus, has had notice of the Receiver’s assignment power for nearly two years.

### III. ISSUE

11. The issue before this Honourable Court is whether the Receiver should be directed to exercise its existing authority to assign Bereket into bankruptcy to defeat the CRA’s GST Trust Claim?

### IV. LAW AND ARGUMENT

#### *Bankruptcy Ensures the Equitable Distribution of an Insolvent Debtor’s Property*

12. An important goal of Canadian bankruptcy and insolvency law is to ensure the “equitable distribution” of a debtor’s assets among the debtor’s creditors *inter se*.<sup>10</sup> Importantly, it has “long been accepted” that the goal of ensuring an equitable distribution is achieved by applying the “federal system of bankruptcy priorities”.<sup>11</sup>
13. Additionally, Canadian appellate authority holds that it is permissible for a secured creditor to seek to bankrupt a debtor to alter priorities in its favour.<sup>12</sup> Such relief is permissible, and often appropriate, because it allows Canadian bankruptcy and insolvency laws to achieve the goal of an equitable distribution through invoking the bankruptcy scheme of distribution.
14. Pursuant to the *BIA*, Parliament has made clear that the priority for GST terminates upon a bankruptcy.<sup>13</sup> Put differently, equitable distribution in the context of a bankruptcy means that the CRA’s GST claims rank as unsecured claims.

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<sup>9</sup> Affidavit of Service of Jennifer Gorrie, filed on July 19, 2024 at para 7; Application for Receiver and Manager, filed on July 16, 2024, see Schedule B.

<sup>10</sup> *Husky Oil Operations Ltd v Minister of National Revenue*, 1995 CanLII 69 (SCC) [*Husky Oil*] at [para 7](#) [TAB 4].

<sup>11</sup> *Husky Oil* at [para 8](#) [TAB 4].

<sup>12</sup> *Grant Forest Products Inc v Toronto-Dominion Bank*, 2015 ONCA 570 at [para 118](#) [TAB 5]; *Federal Business Development Bank v Québec (CSST)*, 1988 CanLII 105 (SCC) at [para 20](#) [TAB 6].

<sup>13</sup> *Desjardins de Montmagny*, 2009 SCC 49 at [paras 14-15](#) [TAB 1]; *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, at [ss 67, 86](#) [TAB 7].

***Canadian Courts Have Allowed Receivers to Assign Debtors into Bankruptcy***

15. Consistent with these overarching principles, Canadian Courts have permitted court-appointed receivers to assign debtors into bankruptcy for the specific purpose of terminating the priority in favour of the CRA for GST or HST.
16. For instance, in *2403177 Ontario Inc v Bending Lake Iron Group Ltd*,<sup>14</sup> a court-appointed receiver brought a motion to, among other things, approve a sale transaction and authorize it to file an assignment in bankruptcy on behalf of the insolvent debtor. The evidence before the court was that the secured creditors were expected to incur a material shortfall on their security.<sup>15</sup> The receiver sought the bankruptcy assignment to nullify a deemed trust in favour of the CRA for HST, and as a result, improve the position of the secured creditors.<sup>16</sup> The Ontario Superior Court of Justice granted the relief and affirmed that a creditor may seek a bankruptcy to alter priorities and improve its position. Further, the Court was satisfied the assignment was appropriate since the debtor was insolvent within the meaning of the *BIA*.<sup>17</sup>
17. Similarly, in *CIBC v 1340182 Ontario Limited*,<sup>18</sup> a court-appointed receiver brought an application to, among other things, be discharged and to assign the debtor into bankruptcy. The purpose of the bankruptcy assignment was to determine (*i.e.* by terminating) a potential deemed trust claim for HST. In that matter, the “financial records [of the debtor] are in such a state that it is impossible for the Receiver to determine the HST Claim”.<sup>19</sup> Thus, the Ontario Superior Court of Justice was satisfied the assignment by the receiver was appropriate. The Court further noted that an assignment by a receiver may be appropriate even where the aim is to reverse priorities in favour of CRA.<sup>20</sup>

***It is Appropriate for the Receiver to Assign Bereket into Bankruptcy***

18. In the instant case, RBC respectfully submits that it is commercially reasonable, just and appropriate for this Court to direct the Receiver to assign Bereket into bankruptcy to terminate the GST Trust Claim, and for the following reasons:

- (a) First, as outlined above, this Court has already determined it was appropriate to grant the Receiver the power to assign Bereket into bankruptcy under the AARO. The CRA, who is

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<sup>14</sup> [2016 ONSC 199](#) [*Bending Lake*] [TAB 8].

<sup>15</sup> *Bending Lake* at para 68.

<sup>16</sup> *Bending Lake* at paras 113-114, 117.

<sup>17</sup> *Bending Lake* at paras 119-120, 123.

<sup>18</sup> [2024 ONSC 3658](#) [*1340182 Ontario*] [TAB 9]

<sup>19</sup> *1340182 Ontario* at para 15.

<sup>20</sup> *1340182 Ontario* at paras 13-14.

affected by that relief, was served with the application materials for the AARO and has had notice of the assignment power since 2024. In effect, the substantive relief sought by RBC has already been granted by this Court and determined appropriate.

- (b) Second, an assignment into bankruptcy will invoke the comprehensive priorities scheme set out by the *BIA* and advance the goal of an equitable distribution of Bereket's property.
- (c) Third, consistent with the authority described above, there is nothing improper in RBC, as a secured creditor, to seek to invoke the bankruptcy priorities regime to improve its position. Rather, court-appointed receivers have been specifically authorized to make assignments to improve the position of secured creditors.
- (d) Fourth, RBC commenced the within proceedings, funded the proceedings through Receiver's Borrowings, and has made direct and meaningful contributions to these proceedings from time to time. The successful results of the Receiver in this case are due, in part, to the efforts and financial resources of RBC. It is commercially fair and reasonable in such circumstances to allow an assignment into bankruptcy, which has the effect of benefiting RBC.
- (e) Finally, there is no issue that Bereket is an insolvent person within the meaning of the *BIA* and the usual requirements for an assignment into bankruptcy under the *BIA* are satisfied.<sup>21</sup>

## V. RELIEF REQUESTED

- 19. In conclusion, RBC respectfully requests that this Honourable Court grant the relief set out in the Application by directing the Receiver to assign Bereket into bankruptcy.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10<sup>th</sup> day of March, 2026.**

**LAWSON LUNDELL LLP**

Per:

  
 \_\_\_\_\_  
**Jack R. Maslen**

Solicitor for the Applicant, Royal Bank of  
 Canada

<sup>21</sup> *BIA*, s 2 def'n of "insolvent person"; [s 49\(2\)](#) [TAB 7].

**TABLE OF AUTHORITIES**

<b><u>TAB</u></b>	<b><u>AUTHORITY</u></b>
1.	<i>Quebec (Revenue) v Caisse populaire Desjardins de Montmagny</i> , 2009 SCC 49
2.	<i>Excise Tax Act</i> , RSC 1985, c E-15, s 222
3.	<i>Security Interest (GST/HST) Regulations</i> , SOR/2011-55
4.	<i>Husky Oil Operations Ltd v Minister of National Revenue</i> , 1995 CanLII 69 (SCC)
5.	<i>Grant Forest Products Inc v Toronto-Dominion Bank</i> , 2015 ONCA 570
6.	<i>Federal Business Development Bank v Québec (CSST)</i> , 1988 CanLII 105 (SCC)
7.	<i>Bankruptcy and Insolvency Act</i> , RSC 1985, c B-3, ss 2, 49, 67, 86
8.	<i>2403177 Ontario Inc v Bending Lake Iron Group Ltd</i> , 2016 ONSC 199
9.	<i>CIBC v 1340182 Ontario Limited</i> , 2024 ONSC 3658

# TAB 1

**Deputy Minister of Revenue of Quebec  
and Her Majesty The Queen in right of  
Canada** *Appellants*

v.

**Caisse populaire Desjardins de Montmagny  
and Raymond Chabot Inc., in its capacity as  
Trustee in bankruptcy of 9083-4185 Québec  
Inc.** *Respondents*

and

**Canadian Association of Insolvency and  
Restructuring Professionals** *Intervener*

- and -

**Deputy Minister of Revenue of Quebec  
and Her Majesty The Queen in right of  
Canada** *Appellants*

v.

**Raymond Chabot Inc., in its capacity  
as Trustee for the estate of the debtor,  
Consortium Promecan Inc.** *Respondent*

- and -

**Deputy Minister of Revenue of Quebec  
and Her Majesty The Queen in right of  
Canada** *Appellants*

v.

**National Bank of Canada** *Respondent*

and

**Canadian Association of Insolvency and  
Restructuring Professionals** *Intervener*

**Sous-ministre du Revenu du Québec  
et Sa Majesté la Reine du chef du  
Canada** *Appellants*

c.

**Caisse populaire Desjardins de Montmagny  
et Raymond Chabot inc., en sa qualité de  
syndic à la faillite de 9083-4185 Québec  
inc.** *Intimées*

et

**Association canadienne des  
professionnels de l'insolvabilité et de la  
réorganisation** *Intervenante*

- et -

**Sous-ministre du Revenu du Québec  
et Sa Majesté la Reine du chef du  
Canada** *Appellants*

c.

**Raymond Chabot inc., en sa qualité de syndic  
à l'actif de la débitrice Consortium Promecan  
inc.** *Intimée*

- et -

**Sous-ministre du Revenu du Québec  
et Sa Majesté la Reine du chef du  
Canada** *Appellants*

c.

**Banque Nationale du Canada** *Intimée*

et

**Association canadienne des  
professionnels de l'insolvabilité et de la  
réorganisation** *Intervenante*

*Éric Vallières and Sidney Elbaz*, for the interveners.

English version of the judgment of the Court delivered by

LEBEL J. —

## I. Introduction

[1] In these three cases, the Canadian and Quebec tax authorities, on the one hand, and the trustees in bankruptcy of certain businesses and financial institutions holding various security interests in the property of the bankrupts, on the other, disagree about what should be done with taxes on consumption that had been collected but not remitted, or were collectible, as of the date of the bankruptcy. The tax authorities submit that they are entitled to the amounts in issue as the owners thereof. The respondents contend that, under the law applicable in bankruptcy matters, the federal or provincial Crown is only an ordinary creditor and must be ranked as such with the debtors' other creditors. The financial institutions submit that their security interests can be set up against the Crown as against any ordinary creditor. The Quebec Superior Court found for the Crown. The Quebec Court of Appeal set aside the judgments and accepted the arguments of the trustees and financial institutions. In my view, that decision is well founded, and I would uphold it.

## II. Origins of the Cases

[2] These three cases result from the bankruptcies of a number of businesses and from problems that arose as a result of their insolvency in respect of the administration of the federal goods and services tax ("GST") imposed under the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("ETA"), and the Quebec sales tax ("QST") payable under the *Act respecting the Québec sales tax*, R.S.Q., c. T-0.1 ("AQST"). To begin, I will summarize the facts that must be considered to understand these cases. The relevant statutory provisions are reproduced in the Appendix.

*Éric Vallières et Sidney Elbaz*, pour l'intervenante.

Le jugement de la Cour a été rendu par

LE JUGE LEBEL —

## I. Introduction

[1] Dans ces trois dossiers, les autorités fiscales du Canada et du Québec, d'une part, et les syndicis à des faillites d'entreprises ainsi que les institutions financières titulaires de garanties diverses sur les biens des faillies, d'autre part, s'affrontent au sujet du sort de montants de taxes à la consommation perçus, mais non remis, ou percevables à la date de la faillite. Le fisc soutient que ces sommes lui reviennent de droit car il en serait propriétaire. Les intimées rétorquent que le droit applicable en cas de faillite réduit la Couronne fédérale ou provinciale au rang de créancière ordinaire et qu'elle doit être colloquée en cette qualité avec les autres créanciers des débiteurs. Selon les institutions financières, leurs sûretés sont opposables à l'État, comme à tous les créanciers ordinaires. La Cour supérieure du Québec a donné raison à l'État. La Cour d'appel du Québec a cassé ces jugements et admis les prétentions des syndicis et des institutions financières. À mon avis, cet arrêt est bien fondé et je le confirmerais.

## II. Origine des litiges

[2] Ces trois affaires résultent de la faillite d'entreprises commerciales et des problèmes découlant de leur insolvabilité quant à l'application de la taxe fédérale sur les produits et services (« TPS ») imposée en vertu de la *Loi sur la taxe d'accise*, L.R.C. 1985, ch. E-15 (« LTA »), et de la taxe de vente du Québec (« TVQ ») exigible sous l'autorité de la *Loi sur la taxe de vente du Québec*, L.R.Q., ch. T-0.1 (« LTVQ »). Je résumerai d'abord les faits essentiels à la compréhension de ces litiges. Les dispositions législatives pertinentes sont reproduites en annexe.

A. *Deputy Minister of Revenue of Quebec and Her Majesty the Queen in Right of Canada v. Caisse populaire Desjardins de Montmagny and Raymond Chabot Inc., in Its Capacity as Trustee in Bankruptcy of 9083-4185 Québec Inc.*

[3] In this case, a manufacturing company required, as a supplier, to collect the GST and the QST went bankrupt on September 7, 2005. Raymond Chabot Inc. was appointed trustee in bankruptcy. The debtor had hypothecated its claims and accounts receivable in favour of the respondent Caisse populaire Desjardins de Montmagny. Quebec's Deputy Minister of Revenue gave the trustee notice that he considered it to be his mandatar for the recovery of GST and QST amounts that had been collected but not remitted or were collectible. The tax authorities claimed that they owned the amounts in question. Furthermore, the record shows that some of the taxes that had been collected or were collectible at the time of the bankruptcy had been payable for more than 60 days. The Caisse populaire Desjardins de Montmagny claimed to hold valid security interests, which could be set up against the tax authorities, in the tax amounts related to the claims hypothecated in its favour. In view of these conflicting claims, the trustee asked the Superior Court to determine to whom the tax amounts belonged.

B. *Deputy Minister of Revenue of Quebec and Her Majesty the Queen in Right of Canada v. Raymond Chabot Inc. in Its Capacity as Trustee for the Estate of the Debtor, Consortium Promecan Inc.*

[4] In this case, Consortium Promecan Inc. went bankrupt on March 20, 2004, and Raymond Chabot Inc. was appointed trustee. The debtor had not filed returns with respect to the GST and the QST since February 1, 2004. Quebec's Deputy Minister of Revenue asked the trustee to remit to him all GST and QST amounts in respect of the period between February 1 and March 20, 2004 that had been collected or were collectible. The trustee replied that, in its view, the Deputy Minister was only an ordinary creditor in the bankruptcy, and it denied his

A. *Sous-ministre du Revenu du Québec et Sa Majesté la Reine du chef du Canada c. Caisse populaire Desjardins de Montmagny et Raymond Chabot inc., en sa qualité de syndic à la faillite de 9083-4185 Québec inc.*

[3] Dans cette affaire, une entreprise manufacturière assujettie comme fournisseur à la TPS et à la TVQ a fait faillite le 7 septembre 2005. La société Raymond Chabot inc. a été nommée syndic à sa faillite. La débitrice avait hypothéqué ses créances et comptes à recevoir en faveur de l'intimée la Caisse populaire Desjardins de Montmagny. Le sous-ministre du Revenu du Québec a donné avis au syndic qu'il le considérait comme son mandataire pour le recouvrement des montants de TPS et de TVQ perçus, mais non remis, ou percevables. Le fisc affirmait être propriétaire de ces montants. Par ailleurs, il appert du dossier qu'une partie des taxes perçues ou percevables au moment de la faillite étaient exigibles depuis plus de 60 jours. La Caisse populaire Desjardins de Montmagny a prétendu détenir des sûretés valables et opposables au fisc sur les taxes afférentes aux créances hypothéquées en sa faveur. Devant ces prétentions contradictoires, le syndic a demandé à la Cour supérieure de déterminer à qui appartenaient les montants des taxes.

B. *Sous-ministre du Revenu du Québec et Sa Majesté la Reine du chef du Canada c. Raymond Chabot inc., en sa qualité de syndic à l'actif de la débitrice Consortium Promecan inc.*

[4] Dans cette affaire, Consortium Promecan inc. a fait faillite le 20 mars 2004 et la société Raymond Chabot inc. a été nommée syndic. La débitrice n'avait pas produit de déclaration de TPS et de TVQ depuis le 1<sup>er</sup> février 2004. Le sous-ministre du Revenu du Québec a alors demandé au syndic de lui remettre tous les montants de TPS et de TVQ perçus ou percevables entre le 1<sup>er</sup> février et le 20 mars 2004. Le syndic lui a répondu qu'il ne lui reconnaissait qu'un statut de créancier ordinaire dans la faillite et a rejeté sa demande. L'État

request. The Crown appealed that decision to the Superior Court.

C. *Deputy Minister of Revenue of Quebec and Her Majesty the Queen in Right of Canada v. National Bank of Canada*

[5] The tax claims in this case result from the bankruptcies of two companies, Alternative Granite et Marbre inc. and Stone Vogue Ressources inc., on November 5, 2004. The Crown claimed GST and QST amounts related to the accounts receivable of the bankrupt debtors. The National Bank of Canada had obtained, on those accounts, security under s. 427 of the *Bank Act*, S.C. 1991, c. 46, and movable hypothecs. It tried to exercise its rights under these various security interests and claimed the proceeds of the accounts receivable as well as the GST and QST amounts related to these claims. It then applied to the Superior Court to resolve the resulting dispute between itself and the tax authorities. In the meantime, the Bank's mandatary, the trustee and the Crown all collected portions of the disputed taxes and even of the accounts receivable.

### III. Judicial History

#### A. *Quebec Superior Court*

[6] The Superior Court heard the three cases separately. The result was the same in all of them. All three judges concluded that the Crown owned the disputed GST and QST amounts. If the trustee in bankruptcy collected them, it was as a mandatary of the tax authorities. Quebec's Deputy Minister of Revenue and the Minister of National Revenue could not be considered to be mere ordinary creditors. In essence, the Superior Court judges held that the GST and QST amounts were not part of the bankrupt's patrimony: 2006 QCCS 2108, 34 C.B.R. (5th) 245 (*per* Boisvert J.), 2006 QCCS 6370, [2006] J.Q. n° 15239 (QL) (*per* St-Julien J.), 2006 QCCS 2656, 21 C.B.R. (5th) 289 (*per* Bouchard J.). All three judgments were appealed to the Quebec Court of Appeal.

a alors interjeté appel de cette décision devant la Cour supérieure.

C. *Sous-ministre du Revenu du Québec et Sa Majesté la Reine du chef du Canada c. Banque Nationale du Canada*

[5] Les réclamations de taxes dans ce dossier proviennent de la faillite de deux entreprises, Alternative Granite et Marbre inc. et Stone Vogue Ressources inc., le 5 novembre 2004. L'État a réclamé la TPS et la TVQ afférentes aux comptes clients des débitrices en faillite. Ceux-ci étaient alors grevés d'une sûreté constituée en vertu de l'art. 427 de la *Loi sur les banques*, L.C. 1991, ch. 46, et d'hypothèques mobilières en faveur de la Banque Nationale du Canada. Cette dernière a invoqué ses droits en vertu de ces diverses sûretés et réclamé le produit des comptes clients ainsi que les montants de TPS et de TVQ afférents à ces créances. La Banque s'est alors adressée à la Cour supérieure pour faire trancher le débat qui l'opposait ainsi au fisc. Entre-temps, le mandataire de la Banque, le syndic de faillite et l'État auraient tous perçu des parties des taxes en litige et même des comptes clients.

### III. Historique judiciaire

#### A. *Cour supérieure du Québec*

[6] La Cour supérieure a entendu ces trois affaires séparément. Dans chacune d'entre elles, le résultat a été le même. Les trois jugements ont conclu que l'État était propriétaire des montants de TPS et de TVQ en litige. Si le syndic de faillite les recouvrait, il agissait alors à titre de mandataire du fisc. Le sous-ministre du Revenu du Québec et le ministre du Revenu du Canada ne pouvaient être considérés comme de simples créanciers ordinaires. En substance, les juges de la Cour supérieure ont décidé que les montants de TPS et de TVQ ne faisaient pas partie du patrimoine du failli : 2006 QCCS 2108, 34 C.B.R. (5th) 245 (le juge Boisvert), 2006 QCCS 6370, [2006] J.Q. n° 15239 (QL) (le juge St-Julien), 2006 QCCS 2656, 21 C.B.R. (5th) 289 (le juge Bouchard). Des appels ont été institués dans les trois dossiers devant la Cour d'appel du Québec.

B. *Quebec Court of Appeal, Forget, Doyon and Duval Hesler JJ.A.*

[7] Duval Hesler J.A., writing for the Court of Appeal, allowed the appeals and set aside the Superior Court's judgments: 2007 QCCA 1837, 2007 QCCA 1835, 2007 QCCA 1813, [2008] R.J.Q. 39. She acknowledged that the QST and the GST are direct taxes payable by the recipient of the good or service. But in her view, as a result of the 1992 amendments to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA"), the tax authorities must be treated as an ordinary creditor in such a case. They do not own tax amounts payable by purchasers of goods and services that are subject to the GST and QST, but instead have a claim against the supplier. Furthermore, any deemed trust in favour of the tax authorities ended at the time of the bankruptcy. The tax amounts in issue were therefore part of the bankrupt's patrimony but remained subject to any security interests that had been validly granted to creditors like the Caisse populaire Desjardins de Montmagny and the National Bank of Canada. This Court granted leave for three appeals from that judgment.

IV. Analysis

A. *Issues and Positions of the Parties*

[8] The issue is the nature of the rights of the tax authorities, the trustee in bankruptcy and the secured creditors to GST and QST amounts that have been collected but not remitted or are collectible at the time of the bankruptcy of a supplier within the meaning of the *AQST* and the *ETA*. In sum, the tax authorities submit that they own these amounts. In their opinion, the trustee collects the taxes on their behalf, as their mandatary, and these amounts are not part of the bankrupt's patrimony. The respondents reply that the amounts are part of the bankrupt's patrimony, subject to any validly granted security interests. In their view, the Crown does not have a right of ownership in the tax amounts and enjoys only the rights of an ordinary creditor in a bankruptcy situation. To resolve this issue, it will be necessary to begin by considering

B. *Cour d'appel du Québec, les juges Forget, Doyon et Duval Hesler*

[7] Au nom de la Cour d'appel, la juge Duval Hesler a accueilli les pourvois et infirmé les jugements de la Cour supérieure : 2007 QCCA 1837, 2007 QCCA 1835, 2007 QCCA 1813, [2008] R.J.Q. 39. Ses motifs reconnaissent que la TVQ et la TPS sont des taxes directes exigibles de l'acquéreur du bien ou du service. Cependant, selon la juge, depuis les modifications apportées en 1992 à la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3 (« LFI »), le fisc doit être traité comme un créancier ordinaire dans ce cas. Il n'est pas propriétaire des montants des taxes exigibles des acheteurs de biens et de services assujettis à la TPS et à la TVQ, mais plutôt titulaire d'une créance contre le fournisseur. Par ailleurs, toute fiducie réputée en faveur du fisc se termine au moment de la faillite. En conséquence, les montants des taxes en litige font partie du patrimoine de la faillite, mais demeurent grevés des sûretés qui avaient été valablement constituées en faveur de créanciers comme la Caisse populaire Desjardins de Montmagny ou la Banque Nationale du Canada. Trois pourvois contre cet arrêt ont été autorisés par notre Cour.

IV. Analyse

A. *Les questions en litige et la position des parties*

[8] La question en jeu est celle de la nature des droits du fisc, du syndic de faillite et des créanciers garantis sur les montants de TPS et de TVQ perçus mais non remis ou percevables au moment de la faillite d'un fournisseur au sens de la *LTVQ* et de la *LTA*. En somme, le fisc plaide qu'il est propriétaire de ces montants. Il soutient que le syndic perçoit les taxes pour son compte, comme son mandataire, et que ces taxes n'entrent pas dans le patrimoine du failli. Les intimées répondent que les montants en question font partie de ce patrimoine, sous réserve des sûretés valablement créées. Selon eux, l'État ne détient pas un droit de propriété sur les taxes et ne jouit que des droits d'un créancier ordinaire en cas de faillite. Pour régler ce litige, il faudra donc au départ examiner la nature et le mode d'application des deux taxes en cause, la TPS et la TVQ. Avant

the nature of the two taxes in issue, the GST and the QST, and the mechanism for administering them. I will also need, before ruling on the legal characterization of the Crown's rights, to discuss the effect of the 1992 amendments to the *BIA*.

B. *Nature of the GST and the QST*

[9] The GST and the QST are similar types of taxes on consumption. The legal framework for imposing them was established almost 20 years ago now. They are considered to be direct taxes, and the ultimate recipient of taxable goods and services is responsible for paying them. However, the taxes are collected, and credits apply, at each step of the manufacturing and marketing chains. In principle, the supplier acts only as a mandatary of the Crown in collecting and remitting these taxes (*Reference re Quebec Sales Tax*, [1994] 2 S.C.R. 715, at pp. 720-22).

[10] The GST, which was implemented in 1990 by legislation that amended the *ETA* (S.C. 1990, c. 45), replaced the former federal manufacturers' sales tax. The GST can be regarded as a value-added tax. It is collected at every stage of the manufacturing and marketing of goods and services and is payable by the recipient, who is regarded as the debtor in respect of the tax liability to the Crown (s. 165 *ETA*). However, the supplier is responsible for collecting and remitting the tax (s. 221(1) *ETA*). The supplier is deemed to hold the amounts so collected in trust for Her Majesty (s. 222(1) and (3) *ETA*) and must periodically file returns and make remittances. In addition, the Act establishes a system under which input credits can be claimed, at each step of the marketing and supply of the good, in respect of the taxes the supplier has had to pay to his or her own suppliers (ss. 141.01 and 169(1) *ETA*). The ultimate recipient bears the full burden of the tax (R. Brakel & Associates Ltd., *Value-Added Taxation in Canada: GST, HST, and QST* (2nd ed. 2003), at pp. 2-3). This Court has confirmed this as a valid exercise of the Parliament of Canada's taxing power (*Reference re Goods and Services Tax*, [1992] 2 S.C.R. 445).

de se prononcer sur la qualification juridique des droits de l'État, il faudra aussi s'interroger sur l'effet des modifications à la *LFI* survenues en 1992.

B. *Nature de la TPS et de la TVQ*

[9] La TPS et la TVQ représentent toutes deux des formes voisines de taxes à la consommation. Le cadre juridique de leur imposition a été établi, il y a maintenant près de 20 ans. Elles sont considérées comme des taxes directes, dont le dernier acquéreur des produits et services taxables est responsable. Toutefois, les taxes sont prélevées et créditées à chaque étape de la fabrication et de la mise en marché. En principe, le fournisseur n'agit que comme mandataire de la Couronne pour la perception et la remise de ces taxes (*Renvoi relatif à la taxe de vente du Québec*, [1994] 2 R.C.S. 715, p. 720-722).

[10] Mise en œuvre en 1990 par une loi modifiant la *LTA* (L.C. 1990, ch. 45), la TPS a remplacé l'ancienne taxe fédérale sur les ventes des fabricants. La TPS peut être considérée comme une taxe sur la valeur ajoutée. Elle est prélevée à toutes les étapes de la fabrication et de la mise en marché des produits et des services et est exigible de l'acquéreur, qui est considéré comme le débiteur de l'obligation fiscale à l'égard de l'État (art. 165 *LTA*). Cependant, le fournisseur demeure responsable de la perception et de la remise de la taxe (par. 221(1) *LTA*). Il est réputé détenir les montants perçus en fiducie pour Sa Majesté (par. 222(1) et (3) *LTA*). Il doit produire des déclarations et faire des remises périodiques. Par ailleurs, la loi établit, à chaque étape de la commercialisation ou de la fourniture du produit, un système de crédits pour intrants, correspondant aux taxes que chaque fournisseur a dû verser à ses propres fournisseurs (art. 141.01 et par. 169(1) *LTA*). Le dernier acquéreur supporte le poids entier de la taxe (R. Brakel & Associates Ltd., *Value-Added Taxation in Canada : GST, HST, and QST* (2<sup>e</sup> éd. 2003), p. 2-3). Notre Cour a confirmé la validité de cette forme d'exercice du pouvoir de taxation du Parlement du Canada (*Renvoi relatif à la taxe sur les produits et services*, [1992] 2 R.C.S. 445).

[11] In parallel with this federal tax reform, an in-depth review of the consumption tax system took place in Quebec. In 1991, the National Assembly enacted new sales tax legislation, the *Act respecting the Québec sales tax and amending various fiscal legislation*, S.Q. 1991, c. 67. The National Assembly's intention in enacting this statute was to achieve extensive harmonization with the GST and to align this aspect of Quebec's tax system with the model chosen by the Parliament of Canada. The legislation came into force on July 1, 1992 (Brakel, at pp. 3-4). Under an agreement with the Government of Canada, the Quebec government is responsible for collecting both the GST and the QST in Quebec (Brakel, at p. 4). Moreover, pursuant to s. 20 of the *Act respecting the Ministère du Revenu*, R.S.Q., c. M-31 ("AMR"), amounts collected by suppliers of goods and services are deemed to be held in trust for the State. This Court held that this new sales tax falls within the provincial taxing power under s. 92(2) of the *Constitution Act, 1867* (*Reference re Quebec Sales Tax*).

C. *Effects of the Amendments to the BIA on the Status of Claims of the Crown*

[12] In 1992, the Parliament of Canada also made extensive changes to the *BIA*, and those changes are of particular relevance to this issue of the nature and extent of the Crown's rights to recover the GST and QST amounts. The amendments in question were set out in the *Act to amend the Bankruptcy Act and to amend the Income Tax Act in consequence thereof*, S.C. 1992, c. 27. Some of these changes related to the Crown's priority in bankruptcy situations. The federal government seemed at the time to want to respond to criticisms that the system establishing the priority of the Crown's claims often left nothing for a bankrupt's ordinary creditors. A government spokesperson acknowledged these concerns at the time of the introduction of the legislation to revise the Crown priority system:

[11] Parallèlement à cette réforme de la fiscalité fédérale, une révision en profondeur du régime de taxation de la consommation a eu lieu au Québec. En 1991, l'Assemblée nationale a adopté une nouvelle loi sur la taxe de vente, la *Loi sur la taxe de vente du Québec et modifiant diverses dispositions législatives d'ordre fiscal*, L.Q. 1991, ch. 67. L'Assemblée nationale cherchait alors à réaliser une harmonisation poussée avec la TPS et à aligner cette partie de la fiscalité québécoise sur le modèle fiscal choisi par le Parlement du Canada. Cette loi est entrée en vigueur le 1<sup>er</sup> juillet 1992 (Brakel, p. 3-4). Une entente entre le gouvernement du Canada et celui du Québec a confié à ce dernier la responsabilité de percevoir à la fois la TPS et la TVQ au Québec (Brakel, p. 4). Par ailleurs, en raison de l'art. 20 de la *Loi sur le ministère du Revenu*, L.R.Q., ch. M-31 (« LMR »), les sommes prélevées par les fournisseurs de biens et de services sont réputées détenues en fiducie pour l'État. Notre Cour a reconnu que cette nouvelle taxe de vente respectait les limites du pouvoir de taxation accordé aux provinces par le par. 92(2) de la *Loi constitutionnelle de 1867* (*Renvoi relatif à la taxe de vente du Québec*).

C. *Les modifications apportées à la LFI et leurs effets sur le statut des créances de l'État*

[12] En 1992, le Parlement du Canada a aussi apporté des changements importants à la *LFI*, dont l'application joue un rôle important dans le présent débat sur la nature et l'étendue des droits de l'État au recouvrement des montants de TPS et de TVQ. Ces modifications se retrouvent dans la *Loi modifiant la Loi sur la faillite et la Loi de l'impôt sur le revenu en conséquence*, L.C. 1992, ch. 27. Certains de ces changements touchent les priorités de l'État en cas de faillite. Le gouvernement du Canada semblait alors soucieux de répondre aux critiques selon lesquelles le régime des priorités des créances de l'État ne laissait souvent rien dans les faillites pour les créanciers ordinaires. Un porte-parole du gouvernement a reconnu ces préoccupations lors de la présentation des mesures législatives destinées à revoir le régime des priorités de l'État :

We also took steps to limit the priority of the Crown, one of the more blatantly unfair aspect[s] of the present Bankruptcy Act.

(*House of Commons Debates*, vol. II, 3rd Sess., 34th Parl., June 19, 1991, at p. 2106)

[13] Felix Holtmann, the Chairman of the Standing Committee on Consumer and Corporate Affairs and Government Operations, also acknowledged the problems and injustices caused by the proliferation of deemed trusts developed to protect the Crown's claims. He stressed the need to reduce the extent of such trusts in order to achieve a better balance among creditors in bankruptcy situations:

One of the main areas is Crown priority. Under the present Bankruptcy Act the Crown has a preferred claim for various types of taxes and ranks ahead of all unsecured creditors. In 1970 a study report made reference to Crown priority; then again in 1986 proposed bankruptcy amendments recommended the abolition of the Crown priority. With the Crown priority, creditors are less likely to participate in an insolvency, in a bankruptcy, and today rarely come out to meetings of creditors because there are no assets. The assets are fully secured to the secured creditors, banks and major lenders as well as to Crowns. As a result there is virtually nothing left for the unsecureds. We recommend that the Crown priority be abolished and that if the Crown wants to contract directly with the debtor, it be entitled to a contractual priority but not a Crown priority.

(*Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 9, September 5, 1991, at p. 9:5)

[14] During the parliamentary debates on Bill C-22 regarding the amendment of the *BIA*, comments by the government spokesperson confirmed that the government intended to reduce the Crown to the rank of an ordinary creditor in bankruptcy situations:

Nous avons également pris des mesures pour réduire les priorités de la Couronne, une des injustices les plus flagrantes de l'actuelle loi sur la faillite.

(*Débats de la Chambre des communes*, vol. II, 3<sup>e</sup> sess., 34<sup>e</sup> lég., 19 juin 1991, p. 2106)

[13] Le président du Comité permanent des Consommateurs et Sociétés et Administration gouvernementale, M. Felix Holtmann, avait lui aussi reconnu les difficultés et les injustices causées par la prolifération des fiducies réputées instituées pour protéger des créances de l'État. Il avait souligné la nécessité d'en réduire la portée afin de réaliser un meilleur équilibre entre les créanciers à la suite d'une faillite :

L'un des éléments clés des mesures étudiées concerne la priorité accordée à la Couronne. Aux termes de la Loi sur la faillite actuelle, la Couronne bénéficie d'un droit préférentiel pour le recouvrement de différentes catégories d'impôt et se place au premier rang de tous les créanciers non garantis. Une étude réalisée en 1970 faisait mention de la priorité accordée à la Couronne, et cette question a été reprise en 1986 quand des modifications à la loi qui étaient proposées recommandaient l'abolition de cette priorité de la Couronne. En effet, du fait de cette priorité, les créanciers s'intéressent moins à une participation à un cas d'insolvabilité, à une faillite, et, même, ne se présentent que rarement de nos jours aux réunions de créanciers, car il n'y a tout simplement pas d'actifs. Les actifs sont grevés de privilèges en faveur des créanciers garantis, des banques et des principaux prêteurs ainsi que de la Couronne. En conséquence, il ne reste pratiquement rien pour compenser les créanciers non garantis. Nous recommandons l'abolition du traitement préférentiel accordé à la Couronne, et si celle-ci désire établir des rapports contractuels avec le débiteur, elle serait alors autorisée à se réclamer d'une priorité contractuelle, et non pas d'un privilège de la Couronne.

(*Procès-verbaux et témoignages du Comité permanent des Consommateurs et Sociétés et Administration gouvernementale*, fascicule n<sup>o</sup> 9, 5 septembre 1991, p. 9:5)

[14] Au cours des débats parlementaires au sujet du projet de loi C-22 portant sur la modification de la *LFI*, des remarques du porte-parole du gouvernement ont confirmé l'intention de celui-ci de ramener l'État au rang de créancier ordinaire en cas de faillite :

A second very important point in the legislation is that the Government of Canada, the Crown, does not put itself in a priority position. It stands in line with the unsecured creditors in almost all cases except for the deductions of tax and unemployment owed.

*(House of Commons Debates, vol. IV, 3rd Sess., 34th Parl., November 1, 1991, at p. 4354)*

In the course of the discussions in the Standing Committee on Consumer and Corporate Affairs and Government Operations, the government spokesperson had clearly expressed the intention to abolish the deemed trust in respect of the GST in bankruptcy situations:

As far as the GST is concerned, if there is a deemed trust for GST, it will not come under this particular provision so it will not survive. If there is a statutory lien or priority, or a statutory security interest for GST, it will not take priority under this legislation unless it is a registered interest.

*(Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations, Issue No. 10, September 5, 1991, at p. 10:18)*

[15] The amendments to the bankruptcy legislation appear to be consistent with the legislative intention announced during the parliamentary debates. First of all, s. 67 *BIA* reinforces the principle that all the bankrupt's property is part of the estate of the bankrupt and constitutes the common pledge of the creditors, although with the exception of property held in trust for another person. However, s. 67(2) *BIA* provides that, with certain exceptions, property may not be regarded as held in trust unless it would be so regarded in the absence of a statutory provision. This renders statutory trusts ineffective without affecting trusts resulting from the common law or the civil law or statutory trusts that secure claims of the federal and provincial Crowns related to source deductions for income tax, a comprehensive pension plan or the federal employment insurance program (s. 67(3) *BIA*). No mention is made of trusts related to the GST or to provincial taxes such as the QST. Moreover, s. 86(1) *BIA* confirms that

Le deuxième élément important de ce projet de loi, c'est que le gouvernement du Canada, l'État, ne se place pas en position prioritaire, mais au même rang que les créanciers non garantis dans tous les cas, sauf pour les retenues d'impôt et d'assurance-chômage qui sont dues.

*(Débats de la Chambre des communes, vol. IV, 3<sup>e</sup> sess., 34<sup>e</sup> lég., 1<sup>er</sup> novembre 1991, p. 4354)*

Au cours des discussions au Comité permanent des Consommateurs et Sociétés et Administration gouvernementale, l'intention d'abolir la fiducie réputée pour la TPS, en cas de faillite, a été clairement exprimée par le porte-parole du gouvernement :

Dans le cas de la TPS, s'il existe une fiducie présumée pour cette taxe, elle ne sera pas visée par cette disposition particulière et elle s'éteindra d'elle-même. S'il y a une obligation ou une priorité prévue par la loi, ou s'il y a une garantie prévue par la loi pour la TPS, cette mesure législative ne lui donnera pas de priorité, à moins qu'il ne s'agisse d'un droit enregistré.

*(Procès-verbaux et témoignages du Comité permanent des Consommateurs et Sociétés et Administration gouvernementale, fascicule n<sup>o</sup> 10, 5 septembre 1991, p. 10:18)*

[15] Les modifications apportées à la législation sur la faillite paraissent correspondre à l'intention législative annoncée au cours des débats parlementaires. D'abord, l'art. 67 *LFI* consolide le principe selon lequel l'ensemble des biens du failli fait partie de l'actif de la faillite et constitue le gage commun des créanciers, à l'exception toutefois des biens détenus en fiducie pour autrui. Cependant, selon le par. 67(2) *LFI* et sauf exception, aucun bien ne peut être considéré comme détenu en fiducie dans les cas où il ne serait pas considéré comme détenu en fiducie en l'absence d'une disposition législative. Cette mesure prive d'effet les fiducies législatives sans toucher aux fiducies qui résultent de la common law ou du droit civil ou aux fiducies législatives qui garantissent les créances de l'État fédéral et des provinces relatives aux retenues à la source pour l'impôt sur le revenu et un régime de pension général, ainsi que pour le régime fédéral d'assurance-emploi (par. 67(3) *LFI*). Aucune mention n'est faite

the Crown is only an ordinary creditor in a bankruptcy situation:

**86.** (1) 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.

[16] In addition, not long after these changes to the *BIA*, the Parliament of Canada enacted concordance amendments with regard to GST claims (S.C. 1993, c. 27). It added subs. (1.1) to s. 222 *ETA*. As a result of this provision, deemed trusts intended to secure GST claims are ineffective in bankruptcy situations:

**222.** . . .

(1.1) 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.

[17] The Quebec legislation respecting the QST does not contain a provision similar to s. 222(1.1) *ETA* that renders the deemed trust in favour of the tax authorities ineffective in bankruptcy situations. However, according to a settled principle of constitutional law regarding the Parliament of Canada's legislative authority over bankruptcy and insolvency, the provincial legislatures may not modify the order of priority established in the *BIA*. In the event of conflict, the *BIA* will prevail and the provincial statute will be inapplicable regardless of the legislature's intention (*D.I.M.S. Construction inc. (Trustee of) v. Quebec (Attorney General)*, 2005 SCC 52, [2005] 2 S.C.R. 564, at para. 12, *per Deschamps J.*).

[18] The tax authorities do not dispute the clear terms of the statutory provisions. Rather, they argue that those provisions do not apply to the GST and the QST and that the Crown is not a creditor, but the owner of the tax amounts. Thus, the amounts

des fiducies relatives à la TPS ou à des taxes provinciales comme la TVQ. Par ailleurs, le par. 86(1) *LFI* confirme que l'État n'est qu'un créancier ordinaire en cas de faillite :

**86.** (1) 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.

[16] De plus, peu de temps après ces changements à la *LFI*, le Parlement du Canada a adopté des modifications de concordance au sujet des créances relatives à la TPS (L.C. 1993, ch. 27). Le Parlement a ajouté à l'art. 222 *LTA* un par. (1.1) qui prive d'effet les fiducies réputées destinées à garantir les créances relatives à la TPS en cas de faillite :

**222.** . . .

(1.1) 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.

[17] La législation québécoise sur la TVQ ne contient pas de disposition analogue à celle du par. 222(1.1) *LTA* pour mettre fin à la fiducie réputée en faveur du fisc en cas de faillite. On se rappellera, toutefois, qu'un principe de droit constitutionnel bien établi et concernant la mise en œuvre de la compétence législative du Parlement du Canada sur la faillite et l'insolvabilité ne permet pas aux législatures provinciales de créer des priorités incompatibles avec l'ordre de collocation établi par la *LFI*. Cette loi prévaut en cas de conflit et rend la législation provinciale inapplicable, sans égard à l'intention de la législature (*D.I.M.S. Construction inc. (Syndic de) c. Québec (Procureur général)*, 2005 CSC 52, [2005] 2 R.C.S. 564, par. 12, la juge Deschamps).

[18] Le fisc ne conteste pas la teneur évidente des textes législatifs. Il plaide plutôt qu'ils ne s'appliquent pas à la TPS et à la TVQ. L'État ne serait pas créancier, mais propriétaire des montants des taxes. Ainsi, les montants perçus ou percevables

collected or collectible at the time of the bankruptcy in respect of the GST or the QST do not form part of the bankrupt's patrimony. As a result, they are not included in the property that is to be liquidated in accordance with the order of priority established in the *BIA*. It will therefore be necessary to resolve the issue of the legal characterization of the Crown's rights with respect to the GST and QST amounts. The characterization of those rights will essentially resolve the dispute before this Court.

#### D. *Legal Characterization of the Crown's Rights*

[19] In this analysis, it is important to abide by the fundamental rules of contemporary statutory interpretation. Parliament's intent must be ascertained, and to do this, it is often necessary to review the statutory provisions at issue in their overall context (R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 276). This approach casts doubt on the validity of the tax authorities' arguments.

[20] The appellants' arguments consist of a few fundamental propositions. They submit, first, that the GST and the QST are direct taxes on consumption. They are imposed on the consumer, and more specifically on the ultimate recipient of a taxable good or service. The legislation establishes a direct link between the Crown and the recipient, as the former may claim the taxes payable directly from the latter if they have not been collected (s. 296(1)(b) *ETA*). The appellants contend that where the GST is collected by a trustee in bankruptcy, the trustee, like the bankrupt supplier, collects it as an agent of, and on behalf of, the Crown. And the Crown is in a similar legal situation where the QST is concerned. The recipient owes the sales tax to the Crown pursuant to ss. 16 and 82 *AQST*. The supplier collects the tax on the Crown's behalf and is deemed to be a mandatary of the Crown pursuant to s. 422 *AQST*. Moreover, under s. 23 *AMR*, a person who does not collect a tax he or she was required to collect becomes a debtor of the State for that amount. The appellants further submit that, in the context of the *ETA* and the *AQST*, the

au moment de la faillite, au titre de la TPS ou de la TVQ, ne feraient pas partie du patrimoine du failli et donc de l'ensemble des biens destinés à être liquidés conformément au régime de collocation établi par la *LFI*. Il faut donc régler le problème de la qualification juridique des droits de l'État à l'égard des montants de TPS et de TVQ. Cette qualification résoudra l'essentiel du débat dont notre Cour est saisie.

#### D. *La qualification juridique des droits de l'État*

[19] Il importe, au cours de cette analyse, de rester fidèle aux règles fondamentales de l'interprétation législative contemporaine. Il faut rechercher l'intention du législateur et, pour ce faire, il est souvent nécessaire d'étudier les dispositions législatives en cause dans leur cadre d'ensemble (R. Sullivan, *Sullivan on the Construction of Statutes* (5<sup>e</sup> éd. 2008), p. 276). L'usage de cette méthode provoque un peu de scepticisme à l'égard de la validité des arguments du fisc.

[20] Les moyens des appelants se composent de quelques propositions fondamentales. D'abord, selon leurs prétentions, la TPS et la TVQ conservent leur caractère de taxes directes à la consommation. Elles sont imposées au consommateur, plus précisément au dernier acquéreur du bien ou service taxable. La loi crée un lien direct entre l'État et l'acquéreur, puisque le premier peut réclamer directement au second les taxes exigibles lorsqu'elles n'ont pas été perçues (al. 296(1)(b) *LTA*). Dans le cas où la TPS est perçue par un syndic de faillite, les appelants soutiennent que le syndic la recouvre, comme le fournisseur failli, à titre de mandataire de l'État, pour le compte de celui-ci. Dans le cas de la TVQ, la situation juridique de l'État serait semblable. L'acquéreur doit la taxe de vente à l'État selon les art. 16 et 82 *LTVQ*. Le fournisseur perçoit la taxe pour le compte de l'État, dont il est réputé être le mandataire, selon l'art. 422 *LTVQ*. Par ailleurs, la personne qui n'a pas perçu la taxe qu'elle devait percevoir en devient débitrice envers l'État, suivant l'art. 23 *LMR*. Toujours selon les appelants, dans le contexte établi par la *LTA* et

supplier, a mandatary of the Crown, is responsible, after supplying a taxable service or good to a consumer, for the recovery of property — a GST or QST amount — that belongs to the Crown and that remains Crown property, until it is remitted to the Crown. The legal situation is the same regardless of whether the tax is collected by the supplier or by a trustee after its bankruptcy. In the appellants' view, when the collected tax is remitted, the mandatary does not settle a claim, but remits to the Crown its own property. Moreover, according to this argument, this Court has established a general principle that, in performing its obligation, the mandatary does not discharge a debt, but delivers over property belonging to the mandator (*Victuni AG v. Minister of Revenue of Quebec*, [1980] 1 S.C.R. 580, at p. 584, *per* Pigeon J.).

[21] This set of legal propositions disregards the mechanisms for administering the GST and the QST. The legal characterization of the relationships between the tax authorities and the suppliers and recipients of goods and services cannot be considered in isolation from the overall context of the system for the collection and remittance of these taxes and from the provisions of the *BIA*.

[22] An initial comment must be made about the impact of the federal bankruptcy legislation. The appellants are oversimplifying the trustee's role and, in particular, his or her legal situation *vis-à-vis* the bankrupt. This Court has noted the complexity of the trustee's duties in, for example, *Lefebvre (Trustee of)*, 2004 SCC 63, [2004] 3 S.C.R. 326, at paras. 35-37. The trustee's role is not limited to representing the bankrupt. The trustee manages the bankrupt's patrimony and is seized thereof as a result of the bankruptcy, but he or she also represents the creditors and is responsible to them for the liquidation and orderly distribution of the patrimony.

[23] In the cases before the Court, the trustees were responsible for liquidating a patrimony that included the GST and QST amounts in issue, as the Court of Appeal concluded (see paras. 51-55). In her reasons, Duval Hesler J.A. clearly and correctly defined the nature of the trustee's role in this

la *LTVQ*, le fournisseur, mandataire de l'État, est chargé de recouvrer un bien, la TPS ou la TVQ, qui appartient à l'État et qui demeure sa propriété jusqu'à ce qu'il lui soit remis après la fourniture du service ou du bien taxable au consommateur. La situation juridique ne change pas, que le recouvrement de la taxe soit fait par le fournisseur ou par le syndic à sa faillite. Selon les appelants, au moment de la remise de la taxe perçue, le mandataire ne règle pas une créance, mais remet à l'État un bien qui lui appartient. D'ailleurs, d'après cet argument, notre Cour aurait posé comme principe général que le mandataire, en exécutant son obligation, n'acquitte pas sa dette, mais livre son bien au mandant (*Victuni AG c. Ministre du Revenu du Québec*, [1980] 1 R.C.S. 580, p. 584, le juge Pigeon).

[21] Ce faisceau de propositions juridiques fait fi des mécanismes d'application de la TPS et de la TVQ. En effet, la qualification juridique des rapports entre le fisc, les fournisseurs et les acquéreurs de biens et services ne saurait être isolée de l'ensemble du contexte établi par le système de perception et de remise de ces taxes et par les dispositions de la *LFI*.

[22] Une première remarque s'impose au sujet de l'impact de la législation fédérale sur les faillites. Les appelants simplifient à l'excès le rôle du syndic et, notamment, sa situation juridique vis-à-vis du failli. Notre Cour a d'ailleurs souligné la complexité des fonctions du syndic, par exemple dans l'arrêt *Lefebvre (Syndic de)*, 2004 CSC 63, [2004] 3 R.C.S. 326, par. 35-37. Son rôle ne se réduit pas à la seule représentation du failli. Il assure la gestion du patrimoine du failli, dont la faillite lui donne la saisine, mais il représente aussi les créanciers à l'égard desquels il est responsable de la liquidation et de la distribution ordonnée de ce patrimoine.

[23] Dans les cas que notre Cour examine, les syndics avaient la charge de liquider un patrimoine qui comprenait les montants de TPS et de TVQ en litige, comme l'a conclu la Cour d'appel (voir par. 51-55). L'opinion de la juge Duval Hesler définit d'ailleurs clairement et correctement la nature du rôle du

respect. The reason why the supplier was given the status of a mandatary was to ensure that the tax qualified as a direct tax so that the imposition, by the province of Quebec, of the QST in a form compatible with that of the federal GST would be constitutional (para. 50). However, the fact that this tax is ultimately borne by the recipient does not support a finding that the supplier and then the trustee, the bankrupt's representative, merely collect and remit the Crown's "property" or "thing". The nature of the collection mechanism for the two taxes suggests another interpretation of the legal situation.

[24] This mechanism is designed to implement a direct tax that is also a tax on the value added at each stage of the production and marketing of the good or service until it is acquired by its ultimate recipient. In such a system, as Duval Hesler J.A. noted, [TRANSLATION] "[t]he dollar collected is not the dollar remitted" (para. 52).

[25] First of all, the collection mechanism does not require separate invoices for the GST and the QST. These taxes are indicated and included in the invoice or other document given to the recipient (s. 223 *ETA*; s. 425 *AQST*). Next, the tax amounts collected by suppliers are remitted in accordance with the accrual, not cash, method of accounting. At periodic intervals, which vary depending on the individual supplier's sales and sometimes on the nature of the business, suppliers remit to the tax authorities amounts corresponding to the tax amounts that have been billed for and are collectible during the reporting period in question even if these collectible amounts have not in fact been collected from the recipients. When sending remittances, suppliers deduct from the amounts being remitted credits corresponding to their own inputs, that is, to the taxes they have paid to their own suppliers. Thus, they remit net tax amounts based on the difference between the taxes they have collected and the taxes they themselves have paid (s. 228 *ETA*; s. 437 *AQST*). At times, under this system, they can obtain rebates.

[26] Moreover, nothing in the legislation respecting the GST and the QST requires suppliers to keep

syndic en cette matière. La création du mandat du fournisseur visait à conserver à la taxe son caractère de taxe directe, pour sauvegarder la capacité constitutionnelle de la province de Québec d'imposer la TVQ dans une forme compatible avec la TPS fédérale (par. 50). Cependant, le fait que cette taxe repose en définitive sur l'acquéreur ne permet pas de conclure que le fournisseur, puis le syndic, représentant du failli, ne font que percevoir et remettre « le bien », « la chose » de l'État. La nature du mécanisme de perception des deux taxes suggère une autre interprétation de la situation juridique.

[24] En effet, ce mécanisme vise à mettre en place une taxe directe qui est aussi une taxe sur la valeur ajoutée, à toutes les étapes de la production et de la mise en marché, jusqu'à l'acquisition du bien ou du service par son dernier acquéreur. Dans un tel régime, comme le souligne la juge Duval Hesler : « Le dollar perçu n'est pas le dollar remis » (par. 52).

[25] D'abord, le mécanisme de perception mis en place n'exige pas une facturation distincte de la TPS et de la TVQ. Ces taxes se trouvent indiquées et incluses dans la facture ou dans le document remis à l'acquéreur (art. 223 *LTA*; art. 425 *LTVQ*). Ensuite, la remise des taxes perçues par les fournisseurs se fait sur la base d'une comptabilité d'exercice et non de caisse. À des échéances périodiques, qui varient selon son chiffre d'affaires et parfois d'après la nature de son entreprise, le fournisseur remet au fisc des montants correspondant aux taxes facturées et percevables, au cours de la période visée par son rapport, même s'il ne les a pas effectivement recouvrées des acquéreurs. En envoyant sa remise, il déduit de son paiement des crédits correspondant à ses propres intrants, c'est-à-dire aux taxes qu'il a payées à ses fournisseurs. Chaque fournisseur remet donc une taxe nette basée sur la différence entre la taxe qu'il a perçue et celle qu'il a lui-même versée (art. 228 *LTA*; art. 437 *LTVQ*). Ce système lui permet parfois d'obtenir des remboursements.

[26] Par ailleurs, rien dans les lois relatives à la TPS et à la TVQ n'oblige le fournisseur à conserver

the taxes they collect separate. Until a bankruptcy occurs, only the deemed trusts established by s. 222 *ETA* and s. 20 *AMR* lead to this legal result by giving the tax authorities a right to equivalent amounts from the suppliers' assets. Finally, while it is true that the recipient owes the tax to the Crown, a supplier who has remitted the tax owed by the recipient but has not collected it has a cause of action against the recipient (s. 224 *ETA*; s. 427 *AQST*).

[27] The statutory mandate imposed on the supplier to collect the GST and the QST differs from the mandate in issue in *Victuni*, which related to the acquisition and development of an immovable. The mandate with respect to the two taxes involves the performance of obligations to collect and then to remit, not the amounts collected, but a balance resulting from offsetting claims of the Crown and the supplier. The existence of these offsetting claims confirms that claims for the amounts collected by suppliers are fungible, as this Court in fact pointed out in *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24, at pp. 34-35.

[28] I note that the appellants' position amounts to maintaining that the deemed trusts established by s. 222 *ETA* and s. 20 *AMR* continue to exist after a bankruptcy. The appellants' argument is inconsistent with the nature of their rights under the system for the collection and remittance of the GST and QST. It also conflicts with Parliament's clear intent and with the very explicit wording of the relevant statutory provisions regarding what is to happen if a supplier goes bankrupt. Before 1992, the Crown held a priority where certain tax claims were concerned. These claims were often protected by an increasingly complex series of statutory deemed trusts. The 1992 amendments to the *BIA* rendered these trusts ineffective in a bankruptcy situation, although there were exceptions with respect, for example, to claims for income tax source deductions (see, for example, *Caisse populaire Desjardins de l'Est de Drummond v. Canada*, 2009 SCC 29, [2009] 2 S.C.R. 94). Other than where these exceptions apply, when a debtor goes bankrupt, the Crown becomes an ordinary creditor. The trustee will give it the same priority as other

à part les taxes perçues. Jusqu'à la faillite, seules les fiducies réputées établies par l'art. 222 *LTA* et l'art. 20 *LMR* permettent ce résultat juridique, en créant un droit en faveur du fisc sur des montants équivalents des actifs des fournisseurs. Enfin, s'il est vrai que l'acquéreur doit la taxe à l'État, le fournisseur qui a effectivement remis la taxe due par l'acquéreur, sans l'avoir perçue, obtient un recours contre celui-ci (art. 224 *LTA*; art. 427 *LTVQ*).

[27] Le mandat législatif imposé au fournisseur pour la perception de la TPS et de la TVQ diffère du mandat étudié dans l'arrêt *Victuni*, qui portait sur l'acquisition et l'exploitation d'un immeuble. Le mandat relatif aux deux taxes vise l'exécution d'obligations de perception, suivies de la remise non pas des sommes perçues, mais du solde résultant de la compensation des créances de l'État et du fournisseur. Ce système de compensation confirme la fungibilité des créances relatives aux sommes perçues par les fournisseurs, fungibilité que soulignait d'ailleurs notre Cour dans l'arrêt *Colombie-Britannique c. Henfrey Samson Belair Ltd.*, [1989] 2 R.C.S. 24, p. 34-35.

[28] Je constate que la position des appelants équivaut à soutenir que les fiducies réputées établies par l'art. 222 *LTA* et l'art. 20 *LMR* survivent à la faillite. La thèse défendue par les appelants s'avère incompatible avec la nature des droits que leur reconnaît le système de perception et de remise de la TPS et de la TVQ. Elle ne respecte pas non plus l'intention claire du Parlement fédéral et la rédaction fort explicite des textes législatifs pertinents, lorsque survient la faillite d'un fournisseur. Avant 1992, l'État détenait des priorités pour protéger certaines créances fiscales. Ces créances se trouvaient souvent protégées par un ensemble de plus en plus touffu de fiducies législatives réputées. Les modifications apportées en 1992 à la *LFI* ont privé ces fiducies d'effet en cas de faillite, sauf quelques exceptions comme les créances pour la retenue à la source des impôts sur le revenu (voir, pour un cas d'application, *Caisse populaire Desjardins de l'Est de Drummond c. Canada*, 2009 CSC 29, [2009] 2 R.C.S. 94). Pour le surplus, une fois la faillite survenue, l'État devient un créancier ordinaire. Le syndic le colloquera avec les autres créanciers de

creditors of the same rank. The trustee will be personally responsible for paying the GST or QST in respect of its own activities only (s. 265 *ETA*; s. 302.1 *AQST*).

[29] Canadian tax authorities are bound by the choice of legislative policy now expressed in the *BIA*. The order of priority established in the *BIA* is also binding on the Quebec tax authorities, even though the *AMR* is silent on what happens to the deemed trust established in s. 20 thereof in the event of bankruptcy. The appellants' arguments conflict with both the words of the statutory provisions in question and their underlying legislative intent, and cannot be accepted.

#### V. Conclusion

[30] For these reasons, I would affirm the decision of the Quebec Court of Appeal and dismiss the appellants' appeals with costs.

### APPENDIX

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

**165.** (1) Subject to this Part, every recipient of a taxable supply made in Canada shall pay to Her Majesty in right of Canada tax in respect of the supply calculated at the rate of 5% on the value of the consideration for the supply.

. . .

**221.** (1) Every person who makes a taxable supply shall, as agent of Her Majesty in right of Canada, collect the tax under Division II payable by the recipient in respect of the supply.

. . .

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

même rang. Le syndic ne sera tenu personnellement au paiement de la TPS et de la TVQ que pour ses propres opérations (art. 265 *LTA*; art. 302.1 *LTVQ*).

[29] Les autorités fiscales canadiennes sont liées par le choix de politique législative exprimée aujourd'hui dans la *LFI*. L'ordre de collocation établi par celle-ci lie également le fisc québécois, même si la *LMR* demeure muette à propos du sort de la fiducie réputée établie par son art. 20 à la suite d'une faillite. Les prétentions des appelants contredisent le texte des dispositions législatives en question et l'intention législative qui leur est sous-jacente, et ne sauraient être retenues.

#### V. Conclusion

[30] Pour ces motifs, je confirmerais l'arrêt de la Cour d'appel du Québec et je rejetterais les pourvois des appelants avec dépens.

### ANNEXE

*Loi sur la taxe d'accise*, L.R.C. 1985, ch. E-15

**165.** (1) Sous réserve des autres dispositions de la présente partie, l'acquéreur d'une fourniture taxable effectuée au Canada est tenu de payer à Sa Majesté du chef du Canada une taxe calculée au taux de 5 % sur la valeur de la contrepartie de la fourniture.

. . .

**221.** (1) La personne qui effectue une fourniture taxable doit, à titre de mandataire de Sa Majesté du chef du Canada, percevoir la taxe payable par l'acquéreur en vertu de la section II.

. . .

**222.** (1) 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 personne, jusqu'à ce qu'il soit versé au receveur général ou retiré en application du paragraphe (2).

(1.1) 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) 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.

*An Act respecting the Québec sales tax*, R.S.Q., c. T-0.1

**16.** Every recipient of a taxable supply made in Québec shall pay to the Minister of Revenue a tax in respect of the supply calculated at the rate of 7.5% on the value of the consideration for the supply.

**422.** Every person who makes a taxable supply shall, as a mandatary of the Minister, collect the tax payable by the recipient under section 16 in respect of the supply.

(1.1) 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) 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 taxe de vente du Québec*, L.R.Q., ch. T-0.1

**16.** Tout acquéreur d'une fourniture taxable effectuée au Québec doit payer au ministre du Revenu une taxe à l'égard de la fourniture calculée au taux de 7,5 % sur la valeur de la contrepartie de la fourniture.

**422.** Toute personne qui effectue une fourniture taxable doit, à titre de mandataire du ministre, percevoir la taxe payable par l'acquéreur en vertu de l'article 16 à l'égard de cette fourniture.

*An Act respecting the Ministère du Revenu, R.S.Q., c. M-31*

**20.** Every person who deducts, withholds or collects any amount under a fiscal law is deemed to hold it in trust for the State, separately from the person's patrimony and the person's own funds, for payment to the State in the manner and at the time provided under a fiscal law.

Where at any time an amount deemed by the first paragraph to be held by a person in trust for the State is not paid to the State in the manner and at the time provided under a fiscal law, an amount equal to the amount thus deducted, withheld or collected is deemed, from the time the amount is deducted, withheld or collected, to be held in trust for the State, separately from the person's patrimony and the person's own funds, and to form a separate fund not forming part of the property of that person, whether or not the amount has in fact been held separately from that person's patrimony or that person's own funds.

. . .

**23.** Every person who does not collect a duty that he was bound to collect as a mandatary of the Minister or does not withhold a duty that he was bound to withhold, under a fiscal law or a regulation made under such a law, shall become a debtor of the State for the amount of that duty, with the exception of the withholding provided for in section 1015 of the Taxation Act (chapter I-3), unless the withholding concerns a duty that a person was required to withhold from an amount paid to another person who is not resident in Canada for services performed in Québec.

. . .

**24.** Every person who deducts, withholds or collects an amount under a fiscal law is bound to pay to the Minister, at the date fixed by such law, or in accordance with the provision for such payment, an amount equal to that which the person must remit under the said Act.

. . .

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

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

*Loi sur le ministère du Revenu, L.R.Q., ch. M-31*

**20.** Toute personne qui déduit, retient ou perçoit un montant quelconque en vertu d'une loi fiscale est réputée le détenir en fiducie pour l'État, séparé de son patrimoine et de ses propres fonds, et en vue de le verser à l'État selon les modalités et dans le délai prévus par une loi fiscale.

En cas de non-versement à l'État, selon les modalités et dans le délai prévus par une loi fiscale, d'un montant qu'une personne est réputée par le premier alinéa détenir en fiducie pour l'État, un montant égal au montant ainsi déduit, retenu ou perçu est réputé, à compter du moment où le montant est déduit, retenu ou perçu, être détenu en fiducie pour l'État, séparé de son patrimoine et de ses propres fonds, et former un fonds séparé ne faisant pas partie des biens de cette personne, que ce montant ait été ou non, dans les faits, tenu séparé du patrimoine de cette personne ou de ses propres fonds.

. . .

**23.** Toute personne qui ne perçoit pas un droit qu'elle était tenue de percevoir comme mandataire du ministre ou ne retient pas un droit qu'elle était tenue de retenir, en vertu d'une loi fiscale ou d'un règlement adopté en vertu d'une telle loi, devient débitrice envers l'État du montant de ce droit, à l'exception de la retenue prévue à l'article 1015 de la Loi sur les impôts (chapitre I-3), sauf si cette retenue concerne un droit qu'une personne devait retenir sur un montant payé à une autre personne qui ne réside pas au Canada pour services rendus au Québec.

. . .

**24.** Toute personne qui déduit, retient ou perçoit un montant en vertu d'une loi fiscale est tenue de payer au ministre, à la date fixée par cette loi ou conformément à la disposition prévue pour un tel paiement, un montant égal à celui qu'elle est tenue de remettre en vertu de cette loi.

. . .

*Loi sur la faillite et l'insolvabilité, L.R.C. 1985, ch. B-3*

**67.** (1) 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,

a) les biens détenus par le failli en fiducie pour toute autre personne;

(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.

(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) 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

(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* (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) 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) 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*,

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*.

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.

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) In relation to a bankruptcy or proposal, all provable claims, including secured claims, of Her

**86.** (1) Dans le cadre d'une faillite ou d'une proposition, les réclamations prouvables — y compris les

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.

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 prenant rang comme réclamations non garanties.

87. (1) A security provided for in federal or provincial legislation for the sole or principal purpose of securing a claim of Her Majesty in right of Canada or of a province or of a workers' compensation body is valid in relation to a bankruptcy or proposal only if the security is registered under a prescribed system of registration before the date of the initial bankruptcy event.

87. (1) Les garanties créées aux termes d'une loi fédérale ou provinciale dans le seul but — ou principalement dans le but — de protéger des réclamations mentionnées au paragraphe 86(1) ne sont valides, dans le cadre d'une faillite ou d'une proposition, que si elles ont été enregistrées, conformément à un système d'enregistrement prescrit, avant l'ouverture de la faillite.

*Appeals dismissed with costs.*

*Pourvois rejetés avec dépens.*

*Solicitor for the appellant the Deputy Minister of Revenue of Quebec: Attorney General of Quebec, Montréal.*

*Procureur de l'appelant le sous-ministre du Revenu du Québec : Procureur général du Québec, Montréal.*

*Solicitor for the appellant Her Majesty The Queen: Attorney General of Canada, Montréal.*

*Procureur de l'appelante Sa Majesté la Reine : Procureur général du Canada, Montréal.*

*Solicitors for the respondents Caisse populaire Desjardins de Montmagny and Raymond Chabot Inc., in its capacity as Trustee in bankruptcy of 9083-4185 Québec Inc.: Langlois Kronström Desjardins, Lévis.*

*Procureurs des intimées la Caisse populaire Desjardins de Montmagny et Raymond Chabot inc., en sa qualité de syndic à la faillite de 9083-4185 Québec inc. : Langlois Kronström Desjardins, Lévis.*

*Solicitors for the respondent Raymond Chabot Inc., in its capacity as Trustee for the estate of the debtor, Consortium Promecan Inc.: McCarthy Tétrault, Montréal.*

*Procureurs de l'intimée Raymond Chabot inc., en sa qualité de syndic à l'actif de la débitrice Consortium Promecan inc. : McCarthy Tétrault, Montréal.*

*Solicitors for the respondent the National Bank of Canada: Stein Monast, Québec.*

*Procureurs de l'intimée la Banque Nationale du Canada : Stein Monast, Québec.*

*Solicitors for the intervener: McMillan, Montréal.*

*Procureurs de l'intervenante : McMillan, Montréal.*

# TAB 2



CANADA

CONSOLIDATION

CODIFICATION

## Excise Tax Act

## Loi sur la taxe d'accise

R.S.C., 1985, c. E-15

L.R.C. (1985), ch. E-15

### NOTE

**Application provisions are not included in the consolidated text; see relevant amending Acts.**

### NOTE

**Les dispositions d'application ne sont pas incluses dans la présente codification; voir les lois modificatives appropriées.**

Current to February 18, 2026

À jour au 18 février 2026

Last amended on June 2, 2025

Dernière modification le 2 juin 2025

**D** is the total of all consideration, included in determining that income, for supplies made by the registrant of items of inventory of the registrant.

### Cessation

**(7)** An authorization granted under subsection (2) to a registrant ceases to have effect on the earlier of

**(a)** the day on which a revocation of the authorization becomes effective, and

**(b)** the day that is three years after the day on which the authorization, or its renewal, became effective.

### Application after revocation

**(8)** Where an authorization granted to a registrant under subsection (2) is revoked, effective on a particular day, the Minister shall not grant to the registrant another authorization under that subsection that becomes effective before

**(a)** where the authorization was revoked in circumstances described in paragraph (5)(a), the day that is two years after the particular day; and

**(b)** in any other case, the first day of the second fiscal year of the registrant commencing after the particular day.

[NOTE: Application provisions are not included in the consolidated text; see relevant amending Acts and regulations.] ; 1993, c. 27, s. 86; 2000, c. 30, s. 49; 2001, c. 15, s. 10; 2007, c. 18, s. 25.

### Trust for amounts collected

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

### Amounts collected before bankruptcy

**(1.1)** 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.

### Withdrawal from trust

**(2)** A person who holds tax or amounts in trust by reason of subsection (1) may withdraw from the aggregate of the moneys so held in trust

**D** le total des contreparties, incluses dans le calcul de ce revenu, des fournitures de stocks que l'inscrit a effectuées.

### Cessation

**(7)** L'autorisation accordée à un inscrit cesse d'avoir effet trois ans après la date de la prise d'effet de l'autorisation ou de son renouvellement, ou si elle est antérieure, à la date de la prise d'effet du retrait de l'autorisation.

### Demande après retrait d'autorisation

**(8)** Toute autorisation que le ministre accorde, en application du paragraphe (2), à un inscrit à qui il a déjà retiré une semblable autorisation à compter d'un jour donné ne peut prendre effet qu'à compter du jour suivant :

**a)** si l'autorisation a été retirée en vertu de l'alinéa (5)a), le jour qui tombe deux ans après le jour donné;

**b)** dans les autres cas, le premier jour du deuxième exercice de l'inscrit qui commence après le jour donné.

[NOTE : Les dispositions d'application ne sont pas incluses dans la présente codification; voir les lois et règlements modificatifs appropriés.] ; 1993, ch. 27, art. 86; 2000, ch. 30, art. 49; 2001, ch. 15, art. 10; 2007, ch. 18, art. 25.

### Montants perçus détenus en fiducie

**222 (1)** 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 personne, jusqu'à ce qu'il soit versé au receveur général ou retiré en application du paragraphe (2).

### Montants perçus avant la faillite

**(1.1)** 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.

### Retraits de montants en fiducie

**(2)** La personne qui détient une taxe ou des montants en fiducie en application du paragraphe (1) peut retirer les montants suivants du total des fonds ainsi détenus :

(a) the amount of any input tax credit claimed by the person in a return under this Division filed by the person in respect of a reporting period of the person, and

(b) any amount that may be deducted by the person in determining the net tax of the person for a reporting period of the person,

as and when the return under this Division for the reporting period in which the input tax credit is claimed or the deduction is made is filed with the Minister.

### Extension of trust

(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.

### Meaning of security interest

(4) For the purposes of subsections (1) and (3), a security interest does not include a prescribed security interest.

[NOTE: Application provisions are not included in the consolidated text; see relevant amending Acts and regulations.] ; 1990, c. 45, s. 12; 1993, c. 27, s. 87; 2000, c. 30, s. 50.

### Sale of account receivable

**222.1** If a person makes a taxable supply that gives rise to an account receivable and at any time the person supplies by way of sale or assignment the debt, for the purposes of sections 222, 225, 225.1 and 227,

a) le crédit de taxe sur les intrants qu'elle demande dans une déclaration produite aux termes de la présente section pour sa période de déclaration;

b) le montant qu'elle peut déduire dans le calcul de sa taxe nette pour sa période de déclaration.

Ce retrait se fait lors de la présentation au ministre de la déclaration aux termes de la présente section pour la période de déclaration au cours de laquelle le crédit est demandé ou le montant déduit.

### Non-versement ou non-retrait

(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.

### Sens de droit en garantie

(4) Pour l'application des paragraphes (1) et (3), n'est pas un droit en garantie celui qui est visé par règlement.

[NOTE : Les dispositions d'application ne sont pas incluses dans la présente codification; voir les lois et règlements modificatifs appropriés.] ; 1990, ch. 45, art. 12; 1993, ch. 27, art. 87; 2000, ch. 30, art. 50.

### Vente d'un compte client

**222.1** Lorsqu'une personne effectue une fourniture taxable donnée engendrant un compte client et que la personne fournit cette dette par vente ou cession, les présomptions suivantes s'appliquent dans le cadre des articles 222, 225, 225.1 et 227 :

# TAB 3



CANADA

CONSOLIDATION

CODIFICATION

## Security Interest (GST/HST) Regulations

## Règlement sur les droits en garantie (TPS/TVH)

SOR/2011-55

DORS/2011-55

Current to February 18, 2026

À jour au 18 février 2026

Published by the Minister of Justice at the following address:  
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Publié par le ministre de la Justice à l'adresse suivante :  
<http://lois-laws.justice.gc.ca>

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## OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (3) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

### Published consolidation is evidence

**31 (1)** Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

...

### Inconsistencies in regulations

**(3)** In the event of an inconsistency between a consolidated regulation published by the Minister under this Act and the original regulation or a subsequent amendment as registered by the Clerk of the Privy Council under the *Statutory Instruments Act*, the original regulation or amendment prevails to the extent of the inconsistency.

## LAYOUT

The notes that appeared in the left or right margins are now in boldface text directly above the provisions to which they relate. They form no part of the enactment, but are inserted for convenience of reference only.

## NOTE

This consolidation is current to February 18, 2026. Any amendments that were not in force as of February 18, 2026 are set out at the end of this document under the heading “Amendments Not in Force”.

## CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (3) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1<sup>er</sup> juin 2009, prévoient ce qui suit :

### Codifications comme élément de preuve

**31 (1)** Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

[...]

### Incompatibilité — règlements

**(3)** Les dispositions du règlement d'origine avec ses modifications subséquentes enregistrées par le greffier du Conseil privé en vertu de la *Loi sur les textes réglementaires* l'emportent sur les dispositions incompatibles du règlement codifié publié par le ministre en vertu de la présente loi.

## MISE EN PAGE

Les notes apparaissant auparavant dans les marges de droite ou de gauche se retrouvent maintenant en caractères gras juste au-dessus de la disposition à laquelle elles se rattachent. Elles ne font pas partie du texte, n'y figurant qu'à titre de repère ou d'information.

## NOTE

Cette codification est à jour au 18 février 2026. Toutes modifications qui n'étaient pas en vigueur au 18 février 2026 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

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**TABLE OF PROVISIONS****Security Interest (GST/HST) Regulations**

- 1 Interpretation
- 2 Prescribed Security Interest
- 3 Coming into Force

**TABLE ANALYTIQUE****Règlement sur les droits en garantie (TPS/TVH)**

- 1 Définition
- 2 Droits en garantie visés
- 3 Entrée en vigueur

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Registration  
SOR/2011-55 March 3, 2011

EXCISE TAX ACT

**Security Interest (GST/HST) Regulations**

P.C. 2011-262 March 3, 2011

His Excellency the Governor General in Council, on the recommendation of the Minister of Finance, pursuant to section 277<sup>a</sup> of the *Excise Tax Act*<sup>b</sup>, hereby makes the annexed *Security Interest (GST/HST) Regulations*.

Enregistrement  
DORS/2011-55 Le 3 mars 2011

LOI SUR LA TAXE D'ACCISE

**Règlement sur les droits en garantie (TPS/TVH)**

C.P. 2011-262 Le 3 mars 2011

Sur recommandation du ministre des Finances et en vertu de l'article 277<sup>a</sup> de la *Loi sur la taxe d'accise*<sup>b</sup>, Son Excellence le Gouverneur général en conseil prend le *Règlement sur les droits en garantie (TPS/TVH)*, ci-après.

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<sup>a</sup> S.C. 1993, c. 27, s. 125(1)

<sup>b</sup> R.S., c. E-15

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<sup>a</sup> L.C. 1993, ch. 27, par. 125(1)

<sup>b</sup> L.R., ch. E-15

## Security Interest (GST/HST) Regulations

### Interpretation

**1** In these Regulations, **Act** means the *Excise Tax Act*.

### Prescribed Security Interest

**2 (1)** For the purpose of subsection 222(4) of the Act, a prescribed security interest, in relation to an amount deemed under subsection 222(1) of the Act to be held in trust by a person, is that part of a mortgage or hypothec securing the performance of an obligation of the person that encumbers land or a building, but only if the mortgage or hypothec is registered pursuant to the appropriate land registration system before the time the amount is deemed under subsection 222(1) of the Act to be held in trust by the person.

**(2)** For the purpose of subsection (1), if, at a particular time, an amount deemed to be held in trust by the person referred to in that subsection is not remitted to the Receiver General or withdrawn in the manner and at the time provided under Part IX of the Act, the amount of the prescribed security interest referred to in that subsection may not exceed the amount determined by the following formula until such time as all amounts deemed under subsection 222(1) of the Act to be held in trust by the person are withdrawn in accordance with subsection 222(2) of the Act or are remitted to the Receiver General:

**A – B**

where

**A** is the amount of the obligation secured by the mortgage or hypothec that is outstanding at the particular time; and

**B** is the total of

**(a)** all amounts, each of which is the value determined at the particular time, having regard to all the circumstances including the existence of any deemed trust for the benefit of Her Majesty pursuant to subsection 222(1) of the Act, of all the rights of the secured creditor securing the obligation, whether granted by the person or not, including guarantees or rights of set-off or of compensation but not including the mortgage or hypothec referred to in subsection (1), and

## Règlement sur les droits en garantie (TPS/TVH)

### Définition

**1** Dans le présent règlement, **Loi** s'entend de la *Loi sur la taxe d'accise*.

### Droits en garantie visés

**2 (1)** Pour l'application du paragraphe 222(4) de la Loi, est un droit en garantie visé, quant à un montant qui est réputé en vertu du paragraphe 222(1) de la Loi être détenu en fiducie par une personne, la partie d'une hypothèque garantissant l'exécution d'une obligation de la personne qui grève un fonds ou un bâtiment, mais seulement si l'hypothèque est enregistrée conformément au régime d'enregistrement foncier applicable avant le moment où le montant est ainsi réputé être détenu en fiducie.

**(2)** Pour l'application du paragraphe (1), si, à un moment donné, un montant réputé être détenu en fiducie par la personne mentionnée à ce paragraphe n'est pas versé au receveur général ou retiré selon les modalités et dans le délai prévus par la partie IX de la Loi, le montant du droit en garantie mentionné à ce paragraphe ne peut excéder la somme obtenue par la formule ci-après tant que tous les montants réputés en vertu du paragraphe 222(1) de la Loi être détenus en fiducie par la personne ne sont pas retirés conformément au paragraphe 222(2) de la Loi ou versés au receveur général :

**A – B**

où :

**A** représente le montant de l'obligation garantie par l'hypothèque qui est impayé au moment donné;

**B** la somme des montants suivants :

**a)** le total des montants dont chacun représente la valeur déterminée au moment donné, compte tenu des circonstances, y compris l'existence d'une fiducie réputée établie au profit de Sa Majesté conformément au paragraphe 222(1) de la Loi, des droits du créancier garanti garantissant l'obligation, consentis par la personne ou non, y compris les garanties et droits de compensation mais non l'hypothèque visée au paragraphe (1),

**b)** les montants appliqués en réduction de l'obligation après le moment donné.

**(b)** all amounts applied after the particular time on account of the obligation.

**(3)** A prescribed security interest under subsection (1) includes the amount of any insurance or expropriation proceeds relating to land or a building that is the subject of a registered mortgage interest or registered hypothecary right, adjusted in accordance with subsection (2), but does not include a lien, a priority or any other security interest created by statute, an assignment or hypothec of rents or leases, or a mortgage interest or hypothecary right in any equipment or fixtures that a mortgagee, hypothecary creditor or any other person has the right absolutely or conditionally to remove or dispose of separately from the land or building.

## Coming into Force

**3** These Regulations are deemed to have come into force on October 20, 2000.

**(3)** Le droit en garantie visé au paragraphe (1) comprend le produit de l'assurance ou de l'expropriation lié à un fonds ou à un bâtiment qui fait l'objet d'un droit hypothécaire enregistré, rajusté conformément au paragraphe (2), mais non les privilèges, priorités ou autres garanties créés par une loi, les cessions ou hypothèques de loyers ou de baux ou les droits hypothécaires sur les biens d'équipement ou les accessoires fixes que le créancier hypothécaire ou une autre personne a le droit absolu ou conditionnel d'enlever du fonds ou du bâtiment ou dont il a le droit absolu ou conditionnel de disposer séparément.

## Entrée en vigueur

**3** Le présent règlement est réputé être entré en vigueur le 20 octobre 2000.

# TAB 4

**Workers' Compensation Board** *Appellant*  
(*Respondent*)

v.

**Husky Oil Operations Ltd.** *Respondent*  
(*Applicant*)

and

Her Majesty The Queen in right of Canada, as represented by the Minister of National Revenue, Her Majesty The Queen in right of the Province of Saskatchewan, as represented by the Minister of Human Resources, Labour and Employment, Her Majesty The Queen in right of the province of Saskatchewan, as represented by the Minister of Finance, Bank of Montreal, Eric Zimmerman, Garth Price, Trevor Brown, Arthur Gingras, Kelly Houston, Darcy Kuzio, Hans Bohle, Charles Pshebenicki, Terry Sapergia, SBW—Wright Construction Inc., Campbell West (1991) Ltd., Fuller Austin Insulation Inc., United Industrial Equipment Rentals Ltd., Atco Enterprises Ltd. and Deloitte & Touche Inc., as Trustee in Bankruptcy of the Estate of Metal Fabricating & Construction Ltd. *Respondents*

and

**The Attorney General for Saskatchewan** *Respondent (Intervener in the Court of Appeal)*

and

**The Attorney General for Ontario, the Attorney General for New Brunswick, the Attorney General of British Columbia, the Attorney General for Alberta, the Workers' Compensation Board of Ontario,**

**Workers' Compensation Board** *Appelante*  
(*Intimée*)

c.

**Husky Oil Operations Ltd.** *Intimée*  
(*Requérante*)

et

Sa Majesté la Reine du chef du Canada, représentée par le ministre du Revenu national, Sa Majesté la Reine du chef de la province de la Saskatchewan, représentée par le ministre des Ressources humaines, du Travail et de l'Emploi, Sa Majesté la Reine du chef de la province de la Saskatchewan, représentée par le ministre des Finances, Banque de Montréal, Eric Zimmerman, Garth Price, Trevor Brown, Arthur Gingras, Kelly Houston, Darcy Kuzio, Hans Bohle, Charles Pshebenicki, Terry Sapergia, SBW—Wright Construction Inc., Campbell West (1991) Ltd., Fuller Austin Insulation Inc., United Industrial Equipment Rentals Ltd., Atco Enterprises Ltd. et Deloitte & Touche Inc., syndic de faillite de l'actif de Metal Fabricating & Construction Ltd. *Intimés*

et

**Le procureur général de la Saskatchewan** *Intimé (Intervenant en Cour d'appel)*

et

**Le procureur général de l'Ontario, le procureur général du Nouveau-Brunswick, le procureur général de la Colombie-Britannique, le procureur général de l'Alberta,**

**the Workers' Compensation Board of  
British Columbia,  
the Workers' Compensation Board of  
Alberta and  
the Yukon Workers' Compensation Health  
and Safety Board** *Interveniers*

**INDEXED AS: HUSKY OIL OPERATIONS LTD. v. MINISTER  
OF NATIONAL REVENUE**

File No.: 23936.

1995: January 25; 1995: October 19.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major J.J.

**ON APPEAL FROM THE COURT OF APPEAL FOR  
SASKATCHEWAN**

*Bankruptcy — Priorities — Set-off — Provincial law allowing Board to seek payments of monies owed by bankrupts from the bankrupt's creditors and the creditors entitled to set off that amount from any payment made to trustee in bankruptcy — Whether or not conflict with priorities established by Bankruptcy Act — The Workers' Compensation Act, 1979, S.S. 1979, c. W-17.1, ss. 133(1), (3) — Bankruptcy Act, R.S.C., 1985, c. B-3, ss. 97(3), 136.*

*Constitutional law — Division of powers — Paramountcy — Conflict between provincial and federal law — Provincial law allowing Board to seek payments of monies owed by bankrupts from the bankrupt's creditors and the creditors entitled to set off that amount from any payment made to trustee in bankruptcy — Whether or not conflict with priorities established by Bankruptcy Act.*

Husky Oil Operations Ltd. (Husky) owed Metal Fabricating & Construction Ltd. (Metal Fab), a firm which, after being formally notified of its arrears to the Workers' Compensation Board (the Board) and after making a general assignment of its book debts to the Bank of Montreal, made an assignment in bankruptcy and ceased operations. The Board, when it learned that Metal Fab had ceased operations, looked to Husky for payment under s. 133(1) of *The Workers' Compensation Act, 1979*. Section 133(1) of the Saskatchewan *Workers' Compensation Act, 1979*, permitted the Board to obtain amounts owing its Injury Fund from a principal of a

**la Commission des accidents du travail de  
l'Ontario,  
la Workers' Compensation Board de la  
Colombie-Britannique,  
la Workers' Compensation Board de  
l'Alberta et  
la Commission de la santé et de la sécurité  
au travail du Yukon** *Intervenants*

**RÉPERTORIÉ: HUSKY OIL OPERATIONS LTD. c. MINISTRE  
DU REVENU NATIONAL**

N° du greffe: 23936.

1995: 25 janvier; 1995: 19 octobre.

Présents: Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci et Major.

**EN APPEL DE LA COUR D'APPEL DE LA  
SASKATCHEWAN**

*Faillite — Ordre de priorité — Compensation — Loi provinciale permettant à la Commission d'obtenir des créanciers d'un failli paiement des sommes dues par celui-ci et aux créanciers d'opérer compensation entre ce montant et tout paiement fait au syndic de la faillite — Y a-t-il conflit avec l'ordre de priorité établi par la Loi sur la faillite? — The Workers' Compensation Act, 1979, S.S. 1979, ch. W-17.1, art. 133(1), (3) — Loi sur la faillite, L.R.C. (1985), ch. B-3, art. 97(3), 136.*

*Droit constitutionnel — Partage des pouvoirs — Prépondérance — Conflit entre une loi provinciale et une loi fédérale — Loi provinciale permettant à la Commission d'obtenir des créanciers d'un failli paiement des sommes dues par celui-ci et aux créanciers d'opérer compensation entre ce montant et tout paiement fait au syndic de la faillite — Y a-t-il conflit avec l'ordre de priorité établi par la Loi sur la faillite?*

Husky Oil Operations Ltd. (Husky) était propriétaire de Metal Fabricating & Construction Ltd. (Metal Fab), une firme qui, après avoir été dûment avisée des arriérés qu'elle devait à la Workers' Compensation Board (la Commission) et après avoir fait une cession générale de ses comptes débiteurs à la Banque de Montréal, a fait cession de ses biens et cessé ses opérations. Lorsqu'elle a appris la cessation des opérations de Metal Fab, la Commission s'est adressée à Husky pour obtenir paiement en vertu du par. 133(1) de *The Workers' Compensation Act, 1979*. Le paragraphe 133(1) de *The Workers' Compensation Act, 1979*, de la Saskatchewan permettait

Written submission only by *Bruce L. Willis, Q.C.*, for the intervener the Workers' Compensation Health and Safety Board of Yukon.

The judgment of Lamer C.J. and La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ. was delivered by

GONTHIER J. — I have had the benefit of the reasons of my colleague Justice Iacobucci. I respectfully disagree with his conclusion that s. 133 of *The Workers' Compensation Act, 1979, S.S. 1979, c. W-17.1*, is applicable in bankruptcy, and that provincial legislation can, through the operation of set-off in this manner, effectively reorder the priorities otherwise provided in the *Bankruptcy Act, R.S.C., 1985, c. B-3*.

In my opinion, the combined effect of the deemed debt in s. 133(1) and set-off against property of the bankrupt in s. 133(3) is to secure the Workers' Compensation Board's (the Board) claim against the estate of the bankrupt. When ss. 133(1) and (3) operate in tandem as intended by the Legislature, the effect is that the Board's claim is satisfied with property of the bankrupt in the form of the monies withheld by the principal. The principal becomes nothing more than a conduit for transferring to the Board monies which form property of the bankrupt's estate. The end result is that the bankrupt's estate is diminished to the extent of the contractor's liability to the Board, and the Board is correspondingly enriched by an identical amount, thereby recovering its claim in full. On the other hand, the principal's estate or patrimony remains entirely unaffected. The Board's claim is thus secured against the bankrupt's estate, mediated through the legally compelled agency of the principal. In this way, the Board recovers against the estate ahead of the priority mandated by Parliament in s. 136(1)(h) of the *Bankruptcy Act*, creating an operational conflict.

Recourse to s. 97(3) of the *Bankruptcy Act*, which incorporates by reference the provincial law of set-off, does not provide much assistance to the Board in this case. It is true that set-off itself may

Argumentation écrite seulement par *Bruce L. Willis, c.r.*, pour l'intervenante la Commission de la santé et de la sécurité au travail du Yukon.

Version française du jugement du juge en chef Lamer et des juges La Forest, L'Heureux-Dubé, Gonthier et McLachlin rendu par

LE JUGE GONTHIER — J'ai pris connaissance des motifs de mon collègue le juge Iacobucci. En toute déférence, je ne souscris pas à sa conclusion que l'art. 133 de *The Workers' Compensation Act, 1979, S.S. 1979, ch. W-17.1*, est applicable en matière de faillite, et que la loi provinciale peut, par une telle application de la compensation, effectivement modifier l'ordre de priorité par ailleurs prévu dans la *Loi sur la faillite, L.R.C. (1985), ch. B-3*.

À mon avis, la dette réputée, visée au par. 133(1), et la compensation sur les biens du failli, prévue au par. 133(3), ont pour effet conjugué de garantir la réclamation de la Workers' Compensation Board (la Commission) contre l'actif du failli. Lorsque les par. 133(1) et (3) s'appliquent ensemble comme l'a voulu le législateur, la réclamation de la Commission est alors réglée sur les biens du failli, grâce aux sommes retenues par le commettant. Ce dernier ne devient rien de plus qu'un intermédiaire qui transfère à la Commission des sommes qui font partie des biens de l'actif du failli. L'actif du failli se trouve alors diminué de la somme que l'entrepreneur doit à la Commission, et la Commission se trouve enrichie d'un montant identique et recouvre ainsi en totalité le montant qu'elle réclame. Par contre, l'actif ou le patrimoine du commettant demeure intact. La réclamation de la Commission est donc garantie sur l'actif du failli, par l'intermédiaire du commettant comme l'exige la Loi. Cette réclamation se trouve donc colloquée plus favorablement qu'elle ne le serait suivant l'ordre de priorité prescrit par le législateur à l'al. 136(1)(h) de la *Loi sur la faillite*, d'où une incompatibilité d'application.

Un recours au par. 97(3) de la *Loi sur la faillite*, qui incorpore par renvoi les règles provinciales de la compensation, n'est pas vraiment utile à la Commission en l'espèce. Il est vrai que la compen-

give rise to a reordering of priorities in bankruptcy in the limited sense that the party claiming set-off will secure his or her claim against the estate rather than recover under the priority otherwise provided by the *Bankruptcy Act*. This much is acknowledged by Parliament in enacting s. 97(3). However, the real question is the extent to which Parliament has deferred to the relevant provincial law. Here, Parliament has deferred to the extent of allowing the party claiming set-off to recover exceptionally ahead of his priority. But Parliament has not deferred to the extent of allowing third parties the same benefit as a result of the operation of provincial legislation. Set-off, in other words, is simply a defence to the payment of a debt, not a basis for validating statutory security devices which have the effect of securing the claims of third parties against the estate ahead of the priority stipulated by Parliament. The question is thus not whether the province has created a proprietary interest, but rather, it is whether that interest can have the effect of defeating the scheme of distribution under the *Bankruptcy Act*. Here, s. 133 not only gives a priority to the principal claiming set-off, which is permissible under s. 97(3), it also has the effect of securing the Board's claim against the estate, which most assuredly is impermissible. As a result, if s. 133 were applicable in bankruptcy, it would enter into conflict with the order of priorities required by the *Bankruptcy Act*. Consistent with the presumption of constitutionality, it is my opinion that s. 133 should be read down to the extent of the conflict; that is, s. 133 is inapplicable in bankruptcy. I would therefore dismiss the appeal with costs throughout.

#### I. Background Facts, Relevant Legislation and the Courts Below

Since my colleague Iacobucci J. has helpfully summarized the relevant factual and legislative

sation peut donner lieu à un changement d'ordre de priorité en matière de faillite, en ce sens restreint que la partie qui invoque la compensation garantit sa réclamation contre l'actif au lieu de la recouvrer suivant l'ordre de priorité par ailleurs prévu par la *Loi sur la faillite*. C'est précisément ce qu'a reconnu le législateur fédéral lorsqu'il a adopté le par. 97(3). Cependant, la véritable question est de savoir jusqu'à quel point le législateur fédéral s'en est remis à la loi provinciale pertinente. En l'espèce, il est allé jusqu'à permettre à la partie qui invoque la compensation d'être colloquée plus favorablement qu'elle ne le serait normalement. Cependant, le législateur fédéral n'a pas voulu aller jusqu'à accorder à une tierce partie le même avantage par application d'une loi provinciale. En d'autres termes, la compensation n'est qu'un moyen de défense opposable au paiement d'une créance; elle n'est pas un moyen de valider des instruments de garantie créés par la loi, qui font en sorte que les réclamations ainsi garanties de tierces parties contre l'actif se trouvent alors colloquées plus favorablement qu'elles ne le seraient suivant l'ordre de priorité établi par le législateur fédéral. C'est pourquoi il s'agit de savoir non pas si la province a créé un droit de propriété, mais plutôt si ce droit peut avoir pour effet de contrecarrer le plan de répartition établi dans la *Loi sur la faillite*. En l'espèce, non seulement l'art. 133 accorde-t-il la priorité au commettant qui invoque la compensation, ce que permet le par. 97(3), mais encore il a pour effet de garantir la réclamation de la Commission contre l'actif, ce qui est très certainement inacceptable. En conséquence, si l'art. 133 était applicable en matière de faillite, il entrerait en conflit avec l'ordre de priorité établi par la *Loi sur la faillite*. Conformément à la présomption de constitutionnalité, je suis d'avis que l'art. 133 devrait recevoir une interprétation atténuée dans la mesure du conflit, c'est-à-dire que l'art. 133 est inapplicable en matière de faillite. En conséquence, je suis d'avis de rejeter le pourvoi avec dépens dans toutes les cours.

#### I. Les faits, les textes législatifs pertinents et les juridictions inférieures

Puisque mon collègue le juge Iacobucci a résumé utilement les contextes factuels et législa-

background together with the judgments of the courts below, I need not repeat that discussion. However, for reasons that will become apparent, it is important to reproduce the impugned provision, s. 133 of the Saskatchewan *Workers' Compensation Act, 1979*, in its entirety:

133. — (1) Where a person, whether carrying on an industry included under this Act or not, in this section referred to as the principal, contracts with any other person, in this section referred to as the contractor, for the execution by or under the contractor of the whole or any part of any work for the principal, it is the duty of the principal to ensure that any sum that the contractor or any subcontractor is liable to contribute to the fund is paid and, where the principal fails to do so and the sum is not paid, he is personally liable to pay that sum to the board.

(2) The board shall have the same powers and be entitled to the same remedies for enforcing payment under subsection (1) that it possesses in respect of an assessment under this Act.

(3) Where the principal is liable to make payment to the board under subsection (1), he is entitled to be indemnified by any person who should have made the payment and is entitled to withhold, out of any indebtedness due to that person, a sufficient amount in respect of that indemnity.

(4) All questions as to the right to and the amount of such indemnity shall be determined by the board.

## II. Issues on Appeal

The constitutional questions raised by this appeal were stated by the Chief Justice on September 14, 1994 as follows:

1. Where a contractor as referred to in s. 133 of *The Workers' Compensation Act, 1979*, S.S. 1979, c. W-17.1, is in bankruptcy and but for the bankruptcy, the principal as referred to in s. 133 would be liable to pay the assessment due by the contractor under the Act, is s. 133 of the said Act inoperative or inapplicable in whole or in part, by reason of being in conflict with the *Bankruptcy Act*, R.S.C., 1985, c. B-3, and in particular ss. 17(1), 67, 95, 136(1)(h), 148, 158(a) and 198(a) thereof?

tifs pertinents ainsi que les jugements des tribunaux d'instance inférieure, je n'ai pas à les reprendre. Cependant, pour des motifs que l'on comprendra, il est important de reproduire intégralement la disposition contestée, l'art. 133 de *The Workers' Compensation Act, 1979*, de la Saskatchewan:

[TRADUCTION] 133. — (1) Si une personne, appelée le commettant dans le présent article, qu'elle exploite ou non une industrie visée par la présente loi, conclut un contrat avec une autre personne, appelée l'entrepreneur dans le présent article, pour l'exécution, par l'entrepreneur ou sous sa direction, de la totalité ou d'une partie d'un travail pour le compte du commettant, il incombe à ce dernier de veiller à ce que toute somme que l'entrepreneur ou un sous-traitant est tenu de verser à la caisse soit versée. Le commettant qui néglige de le faire est, à défaut de paiement, personnellement tenu de payer cette somme à la commission.

(2) La commission possède les mêmes pouvoirs et a droit aux mêmes recours pour l'exécution du paiement visé au paragraphe (1) que ceux dont elle dispose relativement à une cotisation en vertu de la Loi.

(3) Le commettant qui est tenu de faire un paiement à la commission en vertu du paragraphe (1) a le droit d'être indemnisé par toute personne qui aurait dû faire ce paiement et il a le droit de retenir, sur toute somme due à cette personne, un montant suffisant correspondant à cette indemnité.

(4) La commission tranche toutes les questions relatives au droit à cette indemnité et à son montant.

## II. Les questions en litige

Le Juge en chef a formulé les questions constitutionnelles suivantes le 14 septembre 1994:

1. Lorsque l'entrepreneur mentionné à l'art. 133 de *The Workers' Compensation Act, 1979*, S.S. 1979, ch. W-17.1, est en faillite et que, n'eût été cette faillite, le commettant mentionné à ce même article serait tenu de payer la cotisation due par l'entrepreneur en vertu de la Loi, l'art. 133 de ladite loi est-il inopérant ou inapplicable en totalité ou en partie pour cause de conflit avec la *Loi sur la faillite*, L.R.C. (1985), ch. B-3, et, en particulier, avec les art. 17(1), 67, 95, 136(1)(h), 148, 158(a) et 198(a) de cette loi?

2. Was s. 133 of the said Act inoperative or inapplicable in the circumstances of this case?

2. L'article 133 de ladite loi était-il inopérant ou inapplicable dans les circonstances de la présente affaire?

6 I agree with my colleague Iacobucci J. that the parties before this Court focused their arguments on the alleged conflict between s. 133 of the Saskatchewan *Workers' Compensation Act, 1979*, and s. 136(1)(h) of the *Bankruptcy Act*. Certainly, that is the gravamen of this appeal. However, I respectfully disagree with Iacobucci J.'s restatement of the issues in the constitutional questions posed by the Chief Justice. Iacobucci J.'s reasons adopt the appellant's reformulation of the issues and examine the constitutional validity of ss. 133(1) and (3) separately. As will become apparent, in my view this manner of proceeding obscures the response to the constitutional questions. The question is not whether these provisions are independently valid, but rather, it is whether when combined they have the effect of reordering priorities in bankruptcy. When s. 133(1) is read together with s. 133(3), it is clear that the combined effect of the statutory deemed debt and the right to set-off against property of the bankrupt is to secure the Board's claim against the bankrupt's estate. In so doing, s. 133 read as a whole conflicts with Parliament's intention to accord the Board's claim the priority established in s. 136(1)(h) of the *Bankruptcy Act*.

Je conviens avec mon collègue le juge Iacobucci que les arguments des parties qui ont comparu devant nous ont surtout porté sur le conflit qui existerait entre l'art. 133 de *The Workers' Compensation Act, 1979*, de la Saskatchewan et l'al. 136(1)(h) de la *Loi sur la faillite*. Certes, il s'agit là de l'essence du présent pourvoi. En toute déférence, cependant, je ne suis pas d'accord avec sa reformulation des questions constitutionnelles posées par le Juge en chef. Dans ses motifs, le juge Iacobucci adopte la reformulation des questions faite par l'appelante et examine séparément la constitutionnalité des par. 133(1) et (3). Comme on le verra, cette façon de procéder dissimule, à mon avis, l'enjeu véritable des questions constitutionnelles. Il s'agit de déterminer non pas si ces dispositions sont valides indépendamment l'une de l'autre, mais plutôt si elles ont pour effet conjugué de modifier l'ordre de priorité en matière de faillite. Lorsque le par. 133(1) est lu conjointement avec le par. 133(3), il est évident que la créance légale réputée et le droit à la compensation sur les biens du failli ont pour effet conjugué de garantir la réclamation de la Commission contre l'actif du failli. De ce fait, l'art. 133, pris dans son ensemble, est incompatible avec l'intention du législateur fédéral d'accorder à la réclamation de la Commission la priorité établie à l'al. 136(1)(h) de la *Loi sur la faillite*.

### III. Analysis

#### A. The Purposes of Federal Bankruptcy Legislation

7 At the outset, it is useful to remember that our bankruptcy system serves two distinct goals. The first is to ensure the equitable distribution of a bankrupt debtor's assets among the estate's creditors *inter se*. As one commentator has noted (Aleck Dadson, "Comment" (1986), 64 *Can. Bar Rev.* 755, at p. 755):

Bankruptcy serves this goal by replacing a regime of individual action with a regime of collective action. While the pre-bankruptcy regime of individual action

### III. Analyse

#### A. Les objets de la loi fédérale sur la faillite

Il est tout d'abord utile de se rappeler que notre régime de faillite a deux objectifs distincts. Le premier est d'assurer un partage équitable des biens du débiteur failli entre les créanciers de l'actif. Comme l'a fait remarquer un commentateur (Aleck Dadson, «Commentaire» (1986), 64 *R. du B. can.* 755, à la p. 755):

[TRADUCTION] Une faillite permet d'atteindre ce but en remplaçant un régime d'action individuelle par un régime d'action collective. Alors que le régime d'action

allows creditors to pursue their separate and competing claims to the debtor's assets, bankruptcy's regime of collective action sorts out those diverse claims and deals with the debtor's assets in a way which brings benefits to creditors as a group (reduced costs, increased recovery) . . . .

The collectivization of insolvency proceedings can only be achieved by denying to creditors the use of pre-bankruptcy remedies.

See also Peter W. Hogg, *Constitutional Law of Canada* (3rd ed. 1992), vol. 1, at p. 25-3. The second goal of the bankruptcy system is the financial rehabilitation of insolvent individuals (Dadson, *supra*, at p. 755). This goal is furthered through the opportunity for an insolvent individual's discharge from outstanding debts.

It has long been accepted that the first goal of ensuring an equitable distribution of a debtor's assets is to be pursued in accordance with the federal system of bankruptcy priorities. In the seminal case of *Royal Bank of Canada v. Larue*, [1928] A.C. 187, affirming [1926] S.C.R. 218, Viscount Cave L.C. confirmed that the exclusive federal power over bankruptcy and insolvency in s. 91(21) of the *Constitution Act, 1867* enables Parliament to provide for the ranking of creditors in bankruptcy. He observed at p. 197:

In *Attorney-General of Ontario v. Attorney-General for Canada*, [1894] A.C. 189, 200, Lord Herschell observed that a system of bankruptcy legislation might frequently require various ancillary provisions for the purpose of preventing the scheme of the Act from being defeated, and added: "It may be necessary for this purpose to deal with the effect of executions and other matters which would otherwise be within the legislative competence of the Provincial Legislature. Their Lordships do not doubt that it would be open to the Dominion Parliament to deal with such matters as part of a bankruptcy law, and the Provincial Legislature would doubtless be then precluded from interfering with this legislation inasmuch as such interference would affect the bankruptcy law of the Dominion Parliament." Taking these observations as affording assistance in the construction of s. 91, head 21, of the Act of 1867, their Lordships are of the opinion that the exclusive authority thereby given to the

individuelle antérieur à la faillite permet aux créanciers de demander paiement de leurs réclamations distinctes et concurrentes sur les biens du débiteur; le régime d'action collective instauré par la faillite classe ces diverses réclamations et traite l'actif du débiteur d'une façon qui confère des avantages aux créanciers en tant que groupe (réduction des coûts, recouvrement plus important) . . .

Ce n'est qu'en privant les créanciers du recours aux redressements antérieurs à la faillite qu'on arrive à collectiviser les procédures en matière d'insolvabilité.

Voir aussi Peter W. Hogg, *Constitutional Law of Canada* (3<sup>e</sup> éd. 1992), vol. 1, à la p. 25-3. Le deuxième objectif du régime de faillite est la réhabilitation financière de la personne insolvable (Dadson, *loc. cit.*, à la p. 755). On en favorise la réalisation en permettant à la personne insolvable de se libérer de ses dettes.

On reconnaît depuis longtemps qu'il faut chercher à atteindre le premier objectif, celui d'assurer un partage équitable de l'actif du débiteur, en respectant l'ordre de priorité établi par le régime fédéral en matière de faillite. Dans l'arrêt de principe *Royal Bank of Canada c. Larue*, [1928] A.C. 187, confirmant [1926] R.C.S. 218, le vicomte Cave, lord chancelier, confirme que la compétence fédérale exclusive en matière de faillite et d'insolvabilité, conférée au par. 91(21) de la *Loi constitutionnelle de 1867*, permet au législateur fédéral d'établir l'ordre des créanciers dans une faillite. Il fait remarquer, à la p. 197:

[TRADUCTION] Dans l'arrêt *Attorney-General of Ontario c. Attorney-General for Canada*, [1894] A.C. 189, à la p. 200, lord Herschell fait remarquer qu'un régime législatif sur la faillite peut souvent exiger diverses dispositions accessoires pour empêcher que l'économie de la loi ne soit mise en échec; il ajoute: «Il peut être nécessaire, à cette fin, de traiter de l'effet des saisies et d'autres sujets qui autrement seraient de la compétence législative de la province. Leurs Seigneuries ne doutent pas qu'il soit loisible au Parlement du Dominion de légiférer sur ces questions dans une loi sur la faillite et que la législature provinciale serait sans doute alors empêchée d'empiéter sur cette loi pour autant que cet empiètement toucherait la loi sur la faillite du Parlement du Dominion». Considérant que ces remarques aident à interpréter le par. 91(21) de la loi de 1867, leurs Seigneuries sont d'avis que la compétence exclusive accordée de ce fait au Parlement du Dominion pour légiférer

Dominion Parliament to deal with all matters arising within the domain of bankruptcy and insolvency enables that Parliament to determine by legislation the relative priorities of creditors under a bankruptcy or an authorized assignment. [Emphasis added.]

9 The power to determine the priorities of distribution of the bankrupt's assets thus confirmed, Parliament has created an equitable distribution wherein the general rule is that creditors are to rank equally, with claims provable in bankruptcy being paid rateably (*Bankruptcy Act*, s. 141). The rule of creditor equality is subject to 10 classes of debt which are accorded priority in a stated order, the so-called list of "preferred" creditors (s. 136). Included in these classes of exceptions is "all indebtedness of the bankrupt under any Workmen's Compensation Act" in s. 136(1)(h), ranked eighth in the list. Lastly, the entire scheme of distribution is "[s]ubject to the rights of secured creditors" (s. 136) which, as Professor Hogg has noted, "enables secured creditors to realize their security as if there were no bankruptcy" (Hogg, *supra*, at p. 25-9).

#### B. The "Quartet" of Supreme Court Bankruptcy Decisions

10 In recent years, the constitutional relationship between the scheme of distribution under the *Bankruptcy Act* and various branches of provincial law governing property has received heightened scrutiny in the so-called "quartet" of decisions of this Court. Since my interpretation of the quartet differs from Iacobucci J.'s, I hope that I will be forgiven for re-canvassing that familiar terrain in order to explain the basis of my position.

##### (i) Overview of the Quartet

11 First, in *Deputy Minister of Revenue v. Rainville*, [1980] 1 S.C.R. 35 (hereinafter *Re Bourgault*), the trustee in bankruptcy sought to cancel a privilege registered by the Quebec Deputy Minister of Revenue on the bankrupt's immovable

sur toutes les questions relevant du domaine de la faillite et de l'insolvabilité permet à ce dernier de légiférer sur la priorité relative des créanciers en cas de faillite ou de cession autorisée. [Je souligne.]

Après avoir ainsi reçu confirmation de son pouvoir d'établir l'ordre de priorité applicable au partage de l'actif du failli, le législateur fédéral a créé un plan de répartition équitable qui, en règle générale, veut que les créanciers soient sur un pied d'égalité et qu'il y ait paiement au prorata des réclamations pouvant être établies dans la faillite (*Loi sur la faillite*, art. 141). La règle de l'égalité des créanciers est assujettie à 10 catégories de créances classées selon un ordre de priorité, soit la liste dite des créanciers «privilegiés» (art. 136). L'une de ces catégories d'exceptions, «toutes dettes contractées par le failli sous l'autorité d'une loi sur les accidents du travail», prévue à l'al. 136(1)(h), est au huitième rang de la liste. Enfin, l'ensemble du plan de répartition est appliqué «[s]ous réserve des droits des créanciers garantis» (art. 136), ce qui, comme l'a fait remarquer le professeur Hogg, [TRADUCTION] «permet aux créanciers garantis de réaliser leur garantie comme s'il n'y avait pas de faillite» (Hogg, *op. cit.*, à la p. 25-9).

#### B. Le «quatuor» d'arrêts de la Cour suprême en matière de faillite

Au cours des dernières années, dans quatre arrêts qualifiés de «quatuor», notre Cour a fait une étude particulière des rapports qui, du point de vue constitutionnel, existent entre le plan de répartition fondé sur la *Loi sur la faillite* et les divers aspects du droit provincial régissant la propriété. Puisque mon interprétation du quatuor d'arrêts diffère de celle du juge Iacobucci, j'espère que l'on me pardonnera de revenir en terrain battu pour expliquer le fondement de ma position.

##### (i) Aperçu du quatuor d'arrêts

Dans le premier arrêt, *Sous-ministre du Revenu c. Rainville*, [1980] 1 R.C.S. 35 (ci-après *Re Bourgault*), le syndic de faillite cherchait à faire annuler un privilège enregistré par le sous-ministre du Revenu du Québec sur l'immeuble du failli en

# TAB 5

COURT OF APPEAL FOR ONTARIO

CITATION: Grant Forest Products Inc. v. The Toronto-Dominion Bank, 2015  
ONCA 570  
DATE: 20150807  
DOCKET: C58636

Doherty, Gillese and Lauwers JJ.A.

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 Grant Forest Products Inc., Grant Alberta Inc., Grant Forest Products Sales Inc., and Grant U.S. Holdings G.P.

BETWEEN

Grant Forest Products Inc., Grant Alberta Inc., Grant Forest Products Sales Inc.,  
and Grant U.S. Holdings GP

Applicants

and

The Toronto-Dominion Bank, in its capacity as agent for the secured lenders holding first lien security and the Bank of New York Mellon, in its capacity as agent for secured lenders holding second lien security

Respondents

Mark Bailey and Deborah McPhail, for the appellant Superintendent of Financial Services

Jane Dietrich, for the respondents Grant Forest Products Inc., Grant Alberta Inc., Grant Forest Products Sales Inc., and Grant U.S. Holdings GP

John Marshall and Roger Jaipargas, for the respondent West Face Capital Inc.

Alex Cobb, for the respondent Mercer (Canada) Limited

David Byers and Dan Murdoch, for the respondent Ernst & Young Inc.

Andrew J. Hatnay, James Harnum and Adrian Scotchmer, for the intervener the court-appointed Representative Counsel to non-union active employees and retirees of U.S. Steel Canada Inc. in its CCAA proceedings

Heard: February 3, 2015

On appeal from the order of Justice Colin Campbell of the Superior Court of Justice, dated September 20, 2013, with reasons reported at 2013 ONSC 5933, 6 C.B.R. (6th) 1.

**Gillese J.A.:**

## **OVERVIEW**

[1] The debtor companies in this case obtained protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "**CCAA**") and entered into a liquidation process. After selling their assets and paying out the first lien lenders in full, there were insufficient funds to satisfy the claims of the second lien lenders and the claims asserted on behalf of two of the debtor companies' pension plans. A contest ensued between one of the secured creditors and the pension claimants.

[2] The CCAA judge ordered the remaining debtor companies into bankruptcy, thereby resolving the contest in favour of the secured creditor.

[3] Ontario's Superintendent of Financial Services (the "**Superintendent**") appeals.

[4] During the CCAA proceeding, the Superintendent made wind up orders in respect of the two pension plans. He contends that a deemed trust arose on

wind up of each plan (the “**wind up deemed trust**”). He says that those wind up deemed trusts, which encompass all unpaid contributions, took priority over the claims of the secured creditors because the remaining funds are the proceeds of sale of the debtor companies’ accounts and inventory.

[5] The basis for the Superintendent’s position is a combination of ss. 57(3) and (4) of the *Pension Benefits Act*, R.S.O. 1990, c. P.8 (“**PBA**”) and s. 30(7) of the *Personal Property Security Act*, R.S.O. 1990, c. P.10 (“**PPSA**”).

[6] Sections 57(3) and (4) of the PBA read as follows:

57 (3) An employer who is required to pay contributions to a pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to the employer contributions due and not paid into the pension fund.

57 (4) Where a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations.

[7] The priority of the PBA deemed trusts is established by s. 30(7) of the PPSA. Section 30(7) reverses the first-in-time principle for certain assets and gives the beneficiaries of the deemed trusts priority over an account or inventory and its proceeds. Section 30(7) states:

30 (7) A security interest in an account or inventory and its proceeds is subordinate to the interest of a person

who is the beneficiary of a deemed trust arising under the *Employment Standards Act* or under the *Pension Benefits Act*.

[8] The Superintendent contends that the decision below is wrong because, among other things, he says that it is inconsistent with the Supreme Court of Canada's recent decision in *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271.

[9] For the reasons that follow, I would dismiss the appeal.

### **THE CAST OF CHARACTERS**

[10] Grant Forest Products Inc. ("**GFPI**") and certain of its subsidiaries carried on an oriented strand board manufacturing business from facilities in Ontario, Alberta and the United States. At the beginning of these proceedings, GFPI and its subsidiaries were the third largest such manufacturer in North America.

[11] GFPI and related companies (the "**Applicants**") brought an application for protection from creditors under the CCAA (the "**CCAA Proceeding**"). Following the sale of certain assets, the CCAA Proceeding was terminated in relation to some of the Applicants. GFPI, Grant Forest Products Sales Inc. and Grant Alberta Inc. are the "**Remaining Applicants**" in the CCAA Proceeding.

[12] Mercer (Canada) Ltd. is the administrator of the two pension plans in question in the CCAA Proceeding (the "**Administrator**"). Mercer replaced PricewaterhouseCoopers Inc. as administrator in August 2013.

[100] Before turning to this question, I will consider whether the CCAA judge made a procedural error in the process leading up to the making of the Transition Order.

**DID THE CCAA JUDGE MAKE A PROCEDURAL ERROR?**

[101] The procedural complaint levied against the CCAA judge is based on his having adjourned the Pension Motion on more than one occasion, on his own motion, so that additional notice could be given to the Second Lien Lenders. The Superintendent says that additional notice was not required because the Second Lien Lenders had been given sufficient notice and the resulting delay in having the Pension Motion heard caused prejudice to the pension claimants.

[102] I would not accept this submission. Considered in context, I do not view the CCAA judge as having acted improperly in adjourning the Pension Motion on his own motion.

[103] It is important to begin this analysis by reminding ourselves of the role played by the CCAA judge in a CCAA proceeding. Paragraphs 57-60 of *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379 are instructive in this regard. From those paragraphs, we see that the role of the CCAA judge is more than to simply decide the motions placed before him or her. The CCAA is skeletal in nature. It gives the CCAA judge broad discretionary powers that are to be exercised in furtherance of the CCAA's purposes. The

CCAA judge must “provide the conditions under which the debtor can attempt to reorganize” (para. 60). This includes supervising the process and advancing it to the point where it can be determined whether reorganization will succeed. In performing these tasks, the CCAA judge “must be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors” (para. 60).

[104] *Century Services*, it can be seen, makes it clear that the CCAA judge in the present CCAA Proceeding had to “be cognizant” of the interests of the Second Lien Lenders, as well as those of the moving parties and the pension claimants.

[105] It would have been apparent to the CCAA judge that the Pension Motion had the potential to adversely affect the interests of the Second Lien Lenders. At the time that the Pension Motion was brought, the Applicants’ assets had been sold and only limited funds were left for distribution. Those funds were clearly insufficient to meet the claims of both the Second Lien Lenders and the pension claimants. It will be recalled that by means of the motion, GFPI, the CRO and the Monitor sought to be relieved of any obligation to continue making contributions into the Plans. The Pension Motion was vigorously opposed. Had the CCAA judge refused to grant the Pension Motion and contributions continued to be made to the Plans, the Second Lien Lenders would have been prejudiced

because there would have been even fewer funds available to satisfy their claims.

[106] The CCAA judge was also aware that in March 2012 – some three months before the Pension Motion was brought – counsel for the Second Lien Lenders’ Agent had given notice that it was to be removed from the service list because it no longer represented the Second Lien Lenders’ Agent.

[107] Despite service of the Pension Motion on the Second Lien Lenders’ Agent and on the Second Lien Lenders, in these circumstances, it is understandable that the CCAA judge had concerns about the adequacy of notice to the Second Lien Lenders.

[108] That this concern drove the adjournments is apparent from the CCAA judge’s direction to the Monitor on August 27, 2012, to provide additional communication to the Second Lien Lenders themselves, not the Agent. (The Monitor followed those directions, holding a conference call directly with the Second Lien Lenders themselves.)

[109] In these circumstances, I do not accept that the adjournments of the Pension Motion amounted to procedural unfairness. Rather, the adjournments are consonant with the Supreme Court’s dictates in *Century Services*, described above.

**DID THE CCAA JUDGE ERR IN PRINCIPLE OR ACT UNREASONABLY IN LIFTING THE STAY AND ORDERING THE REMAINING APPLICANTS INTO BANKRUPTCY?**

[110] In general terms, I see no error in the CCAA judge's exercise of discretion to lift the CCAA stay and order the Remaining Applicants into bankruptcy.

[111] At the time the Motions were heard, GFPI had long since ceased operating, its assets had been sold, and the bulk of the sale proceeds had been distributed. It was a liquidating CCAA with nothing left to liquidate. Nor was there anything left to reorganise or restructure. All that was left was to distribute the Remaining Funds and it was clear that those funds were insufficient to meet the claims of both the Second Lien Lenders and the pension claimants.

[112] In those circumstances, the breadth of the CCAA judge's discretion was sufficient to "construct a bridge" to the BIA – that is, he had the discretion to lift the stay and order the Remaining Applicants into bankruptcy. Although this was not a situation in which creditors had rejected a proposal, the reasoning of the Supreme Court at paras. 78 and 80 of *Century Services* applied:

... 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 [Superintendent] seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes that would allow

the enforcement of property interests at the conclusion of CCAA proceedings that would be lost in bankruptcy (*Ivaco*, at paras. 62-63). [Citation excluded.]

...

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

[113] Consequently, the question for this court is whether the CCAA judge erred in principle, or exercised his discretion unreasonably, by lifting the stay and ordering the Remaining Applicants into bankruptcy.

[114] The various complaints levied against the CCAA judge's exercise of discretion can be summarized as raising the following questions. Did the motion judge err in:

1. failing to properly take into consideration West Face's conduct in bringing the Bankruptcy Motion?

2. failing to recognize, and require payment of, the wind up deemed trusts that arose during the CCAA Proceeding before ordering GFPI into bankruptcy?
3. wrongly considering that the pension claimants had to take certain steps earlier in the CCAA Proceeding in order to successfully assert their claims? and
4. failing to consider the question posed by the Pension Motion, namely, whether GFPI, the CRO and the Monitor should be relieved from making further payments into the Plans?

#### **1. West Face's Conduct**

[115] Two complaints are levied about West Face's conduct. The first is that West Face delayed in bringing the Bankruptcy Motion and the second is that West Face brought that motion to defeat the wind up deemed trust regime.

[116] Even if delay is a relevant consideration when considering West Face's conduct, I do not accept that West Face failed to bring the Bankruptcy Motion in a timely manner. The Pension Motion was brought on June 8, 2012, and originally returnable on June 25, 2012. Although in March 2012, West Face had been served with notice that counsel for the Second Lien Lenders' Agent no longer represented the Agent, the record is not clear on when West Face discovered that the Agent could not obtain timely instructions from the Second

Lien Lenders in respect of the Pension Motion. From the record, it appears that West Face acted promptly upon discovering that fact. West Face retained its own counsel on October 19, 2012, served a notice of appearance that same day and brought the Bankruptcy Motion on October 21, 2012, returnable on October 22, 2012.

[117] In the circumstances, I do not view West Face as having been dilatory in the bringing of the Bankruptcy Motion.

[118] As for the submission that the Bankruptcy Motion was brought to defeat the wind up deemed trust priority regime, assuming that to have been West Face's motivation, it does not disentitle West Face from being granted the relief it sought in the Bankruptcy Motion. A creditor may seek a bankruptcy order under the BIA to alter priorities in its favour: see *Federal Business Development Bank v. Québec*, [1988] 1 S.C.R. 1061, at p. 1072; *Bank of Montreal v. Scott Road Enterprises Ltd.* (1989), 57 D.L.R. (4th) 623 (B.C.C.A), at pp. 627, 630-31; and *Ivaco*, at para. 76.

## **2. The Wind up Deemed Trusts**

[119] The Superintendent (joined by the Administrator and the Intervener) makes two submissions as to why the CCAA judge erred in failing to order payment of the wind up deemed trusts deficits before ordering the Remaining Applicants into bankruptcy. First, he submits that, unlike bankruptcy where PBA deemed trusts

are inoperative, the wind up deemed trusts in this case were not rendered inoperative because they did not conflict with a provision of the CCAA or an order made under the CCAA (for example, an order establishing a debtor-in-possession charge). Second, he contends that *Indalex* requires that the wind up deemed trusts be given priority in this case.

[120] I would not accept either submission.

### ***Federal Paramountcy***

[121] In my view, the first submission misses a crucial point: federal paramountcy in this case is based on the BIA.

[122] As I have explained, at the time that the Motions were heard, it was open to the CCAA judge to order the Remaining Applicants into bankruptcy. Once the CCAA judge exercised his discretion and made that order, the priorities established by the BIA applied to the Remaining Funds and rendered the wind up deemed trust claims inoperative.

[123] Because wind up deemed trusts are created by provincial legislation, their payment could not be ordered when the Motions were heard because payment would have had the effect of frustrating the priorities established by the federal law of bankruptcy. A provincial statute cannot alter priorities within the federal scheme nor can it be used in a manner that subverts the scheme of distribution under the BIA: *Century Services*, at para. 80.

# TAB 6

# *Federal Business Development Bank v. Québec (Commission de la santé et de la sécurité du travail du Québec)*

Supreme Court Reports

Supreme Court of Canada

Present: Beetz, Estey \*, Lamer, Wilson, Le Dain, La Forest and L'Heureux-Dubé JJ.

1988: March 24 / 1988: May 26.

File No.: 19858.

[1988] 1 S.C.R. 1061 | [\[1988\] 1 R.C.S. 1061](#) | [\[1988\] S.C.J. No. 44](#) | [\[1988\] A.C.S. no 44](#)

Federal Business Development Bank, appellant; v. Commission de la santé et de la sécurité du travail, respondent; and Prothonotary of Superior Court, Quebec district, mis en cause; and Workers' Compensation Board of Alberta and Workers' Compensation Board of British Columbia, interveners.

ON APPEAL FROM THE COURT OF APPEAL OF QUEBEC

\* Estey J. took no part in the judgment.

## **Case Summary**

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**Bankruptcy — Debt priority — Liquidation of property of bankrupt in possession of secured creditor outside bankruptcy — Whether to apply provisions of Bankruptcy Act indicating order of priority for payment of creditors or provisions of provincial law governing order of collocation — Bankruptcy Act, R.S.C. 1970, c. B-3, ss. 47, 49(2), 107 — Workmen's Compensation Act, R.S.Q. 1977, c. A-3, s. 110(1).**

In its capacity as appellant's mandatary, a trustee took possession of the debtor's immovable because the debtor did not meet its obligations to appellant. Three months later, the debtor made an assignment of all its property in accordance with the provisions of the Bankruptcy Act. The trustee brought a hypothecary action in the civil division of the Superior Court to have the immovable of the debtor sold by the court. The trustee in bankruptcy did not appear. Before the sale, respondent registered a privilege against the immovable under s. 110 of the Workmen's Compensation Act. Once the immovable had been sold, the deputy prothonotary prepared an order of distribution in accordance with the [page1062] rules of provincial law: respondent was placed fourth and appellant seventh. Appellant then challenged the scheme of collocation, alleging that it should have been prepared in accordance with the provisions of the Bankruptcy Act. Its action was allowed by the Superior Court but the Court of Appeal reversed the judgment and approved the order of collocation fixed by the deputy prothonotary.

Held: The appeal should be allowed.

Once the bankruptcy occurs the provisions of the Bankruptcy Act apply to all creditors and their claims must be ranked in the order fixed by the Act. As Parliament has exclusive jurisdiction to set priorities in a bankruptcy matter, a provincial statute cannot override the scheme of distribution set out in the federal statute. In the case at bar, respondent's claim is covered by s. 107(1)(h) of the Bankruptcy Act. Respondent is a preferred creditor whose debt must be ranked after that of appellant.

Section 107 is applicable regardless of the fact that the trustee took possession of the debtor's property before the bankruptcy and realized on his security outside the bankruptcy proceeding. The trustee who takes possession of the property is only a creditor under a pledge; he cannot claim a right of ownership over the asset. The immovable, encumbered to appellant and seized by the trustee, is part of the bankrupt's estate and is "property of a bankrupt" within the meaning of ss. 47 and 107 of the Bankruptcy Act.

## Cases Cited

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Applied: Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board, [\[1985\] 1 S.C.R. 785](#); Deputy Minister of Revenue v. Rainville, [\[1980\] 1 S.C.R. 35](#); disapproved: Re Rosenberg, Zeller and Rosenberg (1948), 29 C.B.R. 103; Manufacture de seaux et de boîtes de Trois-Rivières v. Béliveau (1920), 30 K.B. 389; In re Centre de golf Mont Pelier Inc.: Hébert v. Trust général du Canada, Mtl. C.A., No. 09-000498-72, March 22, 1974; referred to: Laliberté v. Larue, [\[1931\] S.C.R. 7](#); General Trust of Canada v. Roland Chalifoux Ltée, [\[1962\] S.C.R. 456](#); In re Sérabec Ltée: Place Desjardins Inc. et Perras, Fafard, Gagnon Inc., [\[1985\] C.A. 212](#); Re Broydon Printers Ltd. [\(1975\), 19 C.B.R. \(N.S.\) 226](#); Re Black Forest Restaurant Ltd. [\(1981\), 37 C.B.R. \(N.S.\) 176](#).

## Statutes and Regulations Cited

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Bankruptcy Act, R.S.C. 1970, c. B-3, ss. 2 "property", 12(11), 47, 49, 57, 98, 101, 102, 107(1). Workmen's Compensation Act, R.S.Q. 1977, c. A-3, s. 110(1).

[page1063]

## Authors Cited

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Houlden, L.W. and C.H. Morawetz. Bankruptcy Law of Canada, vol. 1. Toronto: Carswells, 1984.

APPEAL from a judgment of the Court of Appeal for Quebec, [1986] R.J.Q. 633, setting aside a judgment of the Superior Court (Sup. Ct. District of Québec, No. 200-05-005299-826, October 21, 1983). Appeal allowed.

P. Michel Bouchard and Michel Cordeau, for the appellant. Pierre Lessard and Albert Bohémier, for the respondent. Patrick G. Yearwood, for the intervener the Workers' Compensation Board of Alberta. Gerald W. Massing, for the intervener the Workers' Compensation Board of British Columbia.

Solicitors for the appellant: Hickson, Sirois, Martin & Blanchard, Sillery. Solicitors for the respondent: Lafontaine, Chayer, Cliche & Associés, Québec. Solicitor for the intervener the Workers' Compensation Board of Alberta: Patrick G. Yearwood, Edmonton. Solicitor for the intervener the Workers' Compensation Board of British Columbia: Gerald W. Massing, Richmond.

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English version of the judgment of the Court delivered by

### LAMER J.

1 The rules governing the liquidation of the property of a bankrupt and the distribution of the proceeds of sale of that property as part of a bankruptcy proceeding are contained in the Bankruptcy Act, R.S.C. 1970, c. B-3. The federal Parliament has exclusive jurisdiction to determine the status and rank of creditors claiming in the bankruptcy proceeding. That is in effect what this Court held in *Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board*, [\[1985\] 1 S.C.R. 785](#) (hereinafter *Deloitte*); but what happens when a secured creditor takes advantage of s. 49(2) of the Act and proceeds to liquidate his security outside the bankruptcy proceeding? In such a case, must one apply the provisions of the Bankruptcy Act specifying the order of priority for the payment of creditors or the provisions of provincial law governing the order of collocation? That is the issue raised by the appeal at bar.

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2 On August 14, 1979, Structal Inc. entered to a trust deed with the Royal Trust Company to secure the payment of a bond for \$1,800,000 issued to appellant. In July 1982, as Structal Inc. did not meet its obligations, the Royal Trust Company took possession of the debtor's property in its capacity as trustee and mandatary of appellant. Three months later, Structal Inc. made an assignment of all its property, in accordance with the provisions of the Bankruptcy Act. Royal Trust, acting as trustee, brought a hypothecary action in the civil division of the Superior Court to have the immovables of Structal Inc. sold by the Court. The trustee in bankruptcy did not appear and Royal Trust was authorized to proceed with the judicial sale of the property. Before the sale took place, respondent registered a privilege under s. 110 of the Workmen's Compensation Act, R.S.Q., c. A-3, on the immovables owned by Structal Inc. Section 110(1) provides:

110.(1) The amount of any assessment or compensation for which an employer is liable shall constitute a privileged claim on all the moveable and immoveable property of such employer and of the principal contemplated by subsection 3 of section 11 of this act, ranking immediately after law costs without registration.

3 The debtor's immovables were sold in June 1983. The deputy prothonotary prepared an order of distribution in accordance with the rules of Quebec law; respondent ranked fourth and appellant seventh. Appellant challenged the scheme of collocation, alleging that it should have been prepared in accordance with the relevant provisions of the Bankruptcy Act, in particular the scheme of distribution set out in s. 107 of the Act. The action was allowed by the Superior Court. Respondent appealed this decision and the Court of Appeal allowed the appeal, approving the order of collocation prepared by the deputy prothonotary: hence the appeal to this Court.

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## II

### Judgments

4 In the opinion of Côté J. of the Superior Court, as he then was, the scheme of collocation prepared by the deputy prothonotary should have complied with the order of distribution set out in s. 107(1) of the Bankruptcy Act. He considered that the immovable encumbered by the trust deed is, within the meaning of s. 47 of the Act, "property of the bankrupt" which vests in the trustee in bankruptcy. The hypothecary action brought by Royal Trust and authorized by s. 49(2) of the Act does not deprive the trustee in bankruptcy of his rights to the proceeds of the judicial sale of the property. If such proceeds exceed the amount of the secured debt, the trustee in bankruptcy is entitled to the surplus. In the judge's view, once the bankruptcy occurs the provisions of the Bankruptcy Act apply. Accordingly in the case at bar respondent is no longer a secured creditor but a preferred creditor ranked according to s. 107(1)(h) of the Act. The judge accordingly altered the order of distribution, quashing the collocation made in respondent's favour.

5 In reasons written by Tyndale J.A., the Court of Appeal took the opposite view and restored the scheme of distribution prepared by the deputy prothonotary: [1986] R.J.Q. 633. In its opinion, by taking possession of the property and bringing a hypothecary civil action Royal Trust was acting as a secured creditor unrelated to the bankruptcy. The right to possession, administration and disposal of the property belongs to Royal Trust: this right has never been transferred to the trustee in bankruptcy. Section 107 of the Bankruptcy Act therefore cannot govern the distribution of the proceeds of sale of property possessed by Royal Trust. The decisions in *Deputy Minister of Revenue v. Rainville*, [1980] 1 S.C.R. 35 (hereinafter *Re Bourgault*), and *Deloitte*, supra, are not conclusive because, in the Court's view, the facts of each case can readily be distinguished. As all the proceedings and the court sale took place outside the bankruptcy, the Court of Appeal considered that only the rules of provincial law are relevant. Respondent's debt should therefore rank fourth in priority, ahead of appellant's hypothecary debt.

[page1066]

## III

## Law

**6** The issue at bar arises from the fact that the provisions which may apply originate at two legislative levels, federal and provincial, and lead to opposing solutions. If the provincial law rules prevail, respondent is a secured creditor and its debt ranks before that of the trustee. If on the other hand the Bankruptcy Act has priority, the scheme of distribution set out in s. 107 of the Act determines the priority ranking. According to the decision of this Court in *Deloitte*, supra, respondent would then lose the benefit of its privilege and become merely a preferred creditor, since its claim is dealt with by s. 107(1)(h) as follows:

107. (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:

...

- (h) all indebtedness of the bankrupt under any Workmen's Compensation Act, under any Unemployment Insurance Act, under any provision of the Income Tax Act or the Income War Tax Act creating an obligation to pay to Her Majesty amounts that have been deducted or withheld, *pari passu*;

**7** In this Court respondent argued, *inter alia*, that the order of priority set out in s. 107 of the Bankruptcy Act is not applicable, as the immovable in Royal Trust's possession at the time of the bankruptcy was not part of the estate which passed to the trustee in bankruptcy. In respondent's submission property of a bankrupt within the meaning of s. 107 of the Act only includes property in the possession of the trustee in bankruptcy free of any encumbrance. This argument is based on the position taken by Houlden and Morawetz, who interpret s. 107 as follows: (Houlden & Morawetz, *Bankruptcy Law of Canada*, 1984, vol. 1, p. G-71):

Section 107 makes provision for the order of priority of the claims of the persons named therein, in the distribution of the property of the debtor. It is confined to those assets which come into the trustee's hands free from any encumbrance and are available for distribution among the unsecured creditors.

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(*Bankruptcy Law of Canada* (1984), vol. 1, at p. G-71.)

**8** Some decided cases have in fact followed this line of approach (see for example, *Re Rosenberg, Zeller and Rosenberg* (1948), 29 C.B.R. 103 (Ont. S.C.); *Manufacture de seaux et de boîtes de Trois-Rivières v. Béliveau* (1920), 30 K.B. 389). In *In re Centre de golf Mont Pellier Inc.: Hébert v. Trust général du Canada, Mtl. C.A.*, No. 09-000498-72, March 22, 1974, the Court of Appeal held that the rights of a trustee who has already taken possession of the debtor's assets are not affected by the occurrence of a bankruptcy. The following passage from the judgment accurately reflects this point of view (at pp. 13-14):

[TRANSLATION] ... before becoming bankrupt, the company had lost possession of the property assigned and hypothecated under the trust deed... the right to dispose of this property and the right to its possession were no longer part of its estate and therefore did not form part of the estate in the possession of the trustee....

**9** With respect, I cannot accept this reasoning. The immovable, encumbered to appellant and seized by the trustee, is part of the "property of a bankrupt" mentioned in s. 107 of the Bankruptcy Act. Under s. 2 of the Act, the word "property" includes immovables situated in Canada or elsewhere. The phrase "property of a bankrupt" is also defined in s. 47 of the Bankruptcy Act:

47. The property of a bankrupt divisible among his creditors shall not comprise

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

Federal Business Development Bank v. Québec (Commission de la santé et de la sécurité du travail du Québec)

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

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.

[page1068]

**10** These two definitions clearly show that the immovable in the case at bar is property of the bankrupt within the meaning of the Bankruptcy Act. Even if the trustee takes possession of the immovable before the bankruptcy, the bankrupt remains owner of his property. The trustee who has seized an encumbered immovable cannot claim to have a right of ownership over that property: he has only the rights of a creditor under a pledge or hypothec. This Court has ruled this way twice in *Laliberté v. Larue*, [\[1931\] S.C.R. 7](#), and *General Trust of Canada v. Roland Chalifoux Ltée*, [\[1962\] S.C.R. 456](#). Under s. 47 of the Bankruptcy Act, the fact that property is owned by the bankrupt at the time of the bankruptcy is sufficient to make it part of the bankrupt's estate and for it to pass to the trustee in bankruptcy automatically. Thus the immovable is "property of the bankrupt" within the meaning of s. 47 of the Act, regardless of the rights conferred on the trustee by the security. Several decisions bear out my view on this point. In *In re Sérabec Ltée: Place Desjardins Inc. et Perras, Fafard, Gagnon Inc.*, [\[1985\] C.A. 212](#), the Quebec Court of Appeal held that the taking of possession of property by a trustee did not in any way affect ownership of that property. The appellant in that case was arguing that the immovable seized by the trustee before the bankruptcy had become the trustee's property and was no longer part of the bankrupt's estate. I agree with the Court of Appeal's description of the rights of the trustee (at p. 221):

[TRANSLATION] In my opinion, the taking of possession changed nothing as regards ownership of the property.

The right of a trustee if he is not paid is to have the property sold and to be paid from the proceeds.

Taking of possession and administration are only stages preliminary to realizing on the guarantee.

**11** In another case, *Re Broydon Printers Ltd.* [\(1975\), 19 C.B.R. \(N.S.\) 226](#) (Ont. S.C.), the trustee in bankruptcy informed the secured creditor of his intention to inspect the property held by the latter. Section 57 of the Bankruptcy Act authorizes the trustee in bankruptcy to proceed with the inspection of the "property of a bankrupt" [page1069] held as a pledge, pawn or other security, in order to determine whether such property represents an interest that may be realized for the creditors as a whole. The secured creditor denied the trustee in bankruptcy permission to inspect the said property. The Court defined the phrase "property of a bankrupt... held as... other security" (at pp. 228-29):

... I do not think s. 57 is intended to be restricted to property in the nature of a pledge or pawn. Rather, I believe the section is wide enough to include property of the bankrupt which is in the possession of a secured creditor at the date of bankruptcy. If this were not so, the trustee would be unable to protect the rights of creditors in respect of such property.

**12** It is thus impossible for me to accept respondent's argument that s. 107 of the Bankruptcy Act cannot apply here, as the immovable at issue is not property of the bankrupt. In my view, though this immovable was held by the trustee at the time of the bankruptcy, it is property of the bankrupt within the meaning of s. 47, and thus of s. 107 of the Act -- to the extent of course that these provisions are applicable.

**13** The issue then is to determine what legislation, provincial or federal, applies here. A problem of the same type came before this Court in *Re Bourgault and Deloitte*, *supra*. In *Re Bourgault*, this Court held that in a bankruptcy matter s. 107(1)(j) of the Bankruptcy Act determines the priority of any claim covered by that provision. A provincial statute cannot override the scheme of distribution set out in s. 107 of the Act. To borrow the words of Pigeon J. (at

## Federal Business Development Bank v. Québec (Commission de la santé et de la sécurité du travail du Québec)

p. 44), "Parliament intended to put all debts to a government on an equal footing; it therefore cannot have intended to allow provincial statutes to confer any higher priority". Similarly, the majority of the Court in Deloitte held that a creditor who holds a privilege under a provincial statute cannot claim the status of a secured creditor within the meaning of the Bankruptcy Act so as to avoid the order of distribution of s. 107 of the Act. In the event of bankruptcy, priorities are exclusively a matter for federal jurisdiction.

[page1070]

**14** Respondent maintained that these two cases should be distinguished on the facts from the appeal at bar and that they are therefore not conclusive here. Respondent noted that in those cases, unlike the case at bar, no trustee or any secured creditor took possession of the property before the bankruptcy; the immovables subject to a privilege thus automatically passed to the trustee in bankruptcy. Moreover, respondent added that the point now at issue differs fundamentally from that raised in *Re Bourgault* and *Deloitte*. In those cases the Court had to decide whether creditors holding privileges under provincial statutes were secured creditors within the meaning of the Bankruptcy Act. In the case at bar respondent is not claiming the status of a secured creditor within the meaning of the Bankruptcy Act. Instead respondent is arguing that, as the hypothecated property was liquidated outside the bankruptcy proceeding, without involvement by the trustee in bankruptcy, the solution must be sought not in federal but in Quebec law. Respondent added that, as the trustee chose to realize his security himself outside the bankruptcy, he must bear the consequences of that choice and accept the order of collocation determined by provincial statutes.

**15** While it is appealing this argument does not convince me. The secured creditor did liquidate his security outside the bankruptcy proceeding. However, it must be kept in mind that it is the Bankruptcy Act itself which authorizes him to act in this way. Section 49(2) of the Act provides that "a secured creditor may realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it" if s. 49(1) had not had the effect of staying proceedings brought by creditors of the debtor. It is therefore wrong to suggest that the Bankruptcy Act does not apply to a creditor who chooses to realize his security outside the bankruptcy proceeding. Sections 49, 57, 98, 101 and 102 of the Act, which deal with secured creditors in this context, only reinforce this opinion.

[page1071]

**16** Further, the failure of the trustee in bankruptcy to act cannot be taken as meaning that he has waived his right in the immovable property owned by the bankrupt. For such a waiver to be valid, it must meet the conditions specified by s. 12(11) of the Act, which is not the case here. Under the Bankruptcy Act the trustee in bankruptcy has several powers and rights which he may exercise over property encumbered by a security. For example, he may inspect property held "as a pledge, pawn or other security"; he may prevent a secured creditor from realizing his security before he has a reasonable opportunity to inspect the property and exercise his right of redemption (s. 57); the trustee in bankruptcy may also ask the court to order a creditor to stay realization on his security (s. 49). In my opinion, even if a trustee in bankruptcy does not exercise these rights and powers, the application of the Bankruptcy Act is not thereby precluded.

**17** In any event, I feel that the decisions in *Re Bourgault* and *Deloitte* are conclusive as to the fate of the appeal. These cases stand for the following proposition: in a bankruptcy matter, it is the Bankruptcy Act which must be applied. If a bankruptcy occurs, the order of priority is determined by the ranking in s. 107 of the Act, and any debt mentioned in that provision must therefore be given the specified priority. In *Deloitte*, Wilson J., for the majority, accepted the reasoning and conclusions adopted in *Re Bourgault*, *supra*, and *Re Black Forest Restaurant Ltd.* (1981), 37 C.B.R. (N.S.) 176 (N.S.S.C.), and held that those cases determined the matter. In this regard she said (at p. 806):

With respect, the issue in *Re Bourgault* and *Re Black Forest Restaurant Ltd.* was not whether a proprietary interest has been created under the relevant provincial legislation. It was whether provincial legislation, even if it did create a proprietary interest, could defeat the scheme of distribution under s. 107(1) of the Bankruptcy Act. These cases held that it could not, that while the provincial legislation could validly secure

debts on the property of the debtor in a non-bankruptcy situation, once bankruptcy occurred s. 107(1) determined the status and priority of the claims specifically dealt with in the section. [Emphasis added.]

[page1072]

**18** It is clear in light of this passage that respondent's arguments cannot be upheld.

#### IV

#### Conclusion

**19** I therefore consider that the claims of the parties to the case must be ranked in the order determined by the Bankruptcy Act. As the federal Parliament has exclusive jurisdiction to set priorities in a bankruptcy matter, the scheme of distribution in s. 107 of the Bankruptcy Act must be applied here. As respondent's claim was covered by s. 107(1)(h) of the Act, respondent is a preferred creditor whose claim must be ranked after that of appellant, whether or not the trustee realized on his security outside the bankruptcy proceeding. Once the bankruptcy has occurred, the federal statute applies to all creditors of the debtor.

**20** It is true that such a solution may encourage secured creditors to bring about the bankruptcy of their debtor in order to improve their title. On the other hand, this solution has obvious advantages. As soon as the bankruptcy occurs the Bankruptcy Act will be applied: the mere fact that a creditor is mentioned in s. 107 of the Act suffices for such creditor to be ranked as a preferred creditor and in the position indicated in that provision. As provincial statutes cannot affect the priorities created by the federal statute, consistency in the order of priority in bankruptcy situations is ensured from one province to another.

**21** For all these reasons, the appeal is allowed and the judgment of the Superior Court restored with costs throughout.

# TAB 7



CANADA

CONSOLIDATION

CODIFICATION

## Bankruptcy and Insolvency Act

## Loi sur la faillite et l'insolvabilité

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

L.R.C. (1985), ch. B-3

Current to February 18, 2026

À jour au 18 février 2026

Last amended on December 12, 2024

Dernière modification le 12 décembre 2024

**income trust** means a trust that has assets in Canada if

- (a) its units are listed on a prescribed stock exchange on the date of the initial bankruptcy event, or
- (b) the majority of its units are held by a trust whose units are listed on a prescribed stock exchange on the date of the initial bankruptcy event; (*fiducie de revenu*)

**insolvent person** means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

- (a) who is for any reason unable to meet his obligations as they generally become due,
- (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
- (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due; (*personne insolvable*)

**legal counsel** means any person qualified, in accordance with the laws of a province, to give legal advice; (*conseiller juridique*)

**locality of a debtor** means the principal place

- (a) where the debtor has carried on business during the year immediately preceding the date of the initial bankruptcy event,
- (b) where the debtor has resided during the year immediately preceding the date of the initial bankruptcy event, or
- (c) in cases not coming within paragraph (a) or (b), where the greater portion of the property of the debtor is situated; (*localité*)

**Minister** means the Minister of Industry; (*ministre*)

**net termination value** means the net amount obtained after netting or setting off or compensating the mutual obligations between the parties to an eligible financial contract in accordance with its provisions; (*valeurs nettes dues à la date de résiliation*)

**official receiver** means an officer appointed under subsection 12(2); (*séquestre officiel*)

(b) il a résidé au cours de l'année précédant l'ouverture de sa faillite;

(c) se trouve la plus grande partie de ses biens, dans les cas non visés aux alinéas a) ou b). (*locality of a debtor*)

**localité d'un débiteur** [Abrogée, 2005, ch. 47, art. 2(F)]

**ministre** Le ministre de l'Industrie. (*Minister*)

**moment de la faillite** S'agissant d'une personne, le moment :

- a) soit du prononcé de l'ordonnance de faillite la visant;
- b) soit du dépôt d'une cession de biens la visant;
- c) soit du fait sur la base duquel elle est réputée avoir fait une cession de biens. (*time of the bankruptcy*)

**opération sous-évaluée** Toute disposition de biens ou fourniture de services pour laquelle le débiteur ne reçoit aucune contrepartie ou en reçoit une qui est manifestement inférieure à la juste valeur marchande de celle qu'il a lui-même donnée. (*transfer at undervalue*)

**ouverture de la faillite** Relativement à une personne, le premier en date des événements suivants à survenir :

- a) le dépôt d'une cession de biens la visant;
- b) le dépôt d'une proposition la visant;
- c) le dépôt d'un avis d'intention par elle;
- d) le dépôt de la première requête en faillite :
  - (i) dans les cas visés aux alinéas 50.4(8) a) et 57 a) et au paragraphe 61(2),
  - (ii) dans le cas où la personne, alors qu'elle est visée par un avis d'intention déposé aux termes de l'article 50.4 ou une proposition déposée aux termes de l'article 62, fait une cession avant que le tribunal ait approuvé la proposition;
- e) dans les cas non visés à l'alinéa d), le dépôt de la requête à l'égard de laquelle une ordonnance de faillite est rendue;
- f) l'introduction d'une procédure sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies*. (*date of the initial bankruptcy event*)

**personne**

### Meaning of disbursements

(2) In subsection (1), “disbursements” do not include payments made in operating a business of the debtor.

### Accounts, discharge of interim receivers

(3) With respect to interim receivers appointed under section 46, 47 or 47.1,

- (a) the form and content of their accounts, including their final statement of receipts and disbursements,
- (b) the procedure for the preparation and taxation of those accounts, and
- (c) the procedure for the discharge of the interim receiver

shall be as prescribed.

1992, c. 27, s. 16; 2004, c. 25, s. 30; 2005, c. 47, s. 32; 2015, c. 3, s. 7(F).

### Application of sections 43 to 46

48 Sections 43 to 46 do not apply to individuals whose principal occupation and means of livelihood is fishing, farming or the tillage of the soil or to any individual who works for wages, salary, commission or hire at a rate of compensation not exceeding twenty-five hundred dollars per year and does not on their own account carry on business.

R.S., 1985, c. B-3, s. 48; 1997, c. 12, s. 28.

## Assignments

### Assignment for general benefit of creditors

49 (1) An insolvent person or, if deceased, the executor or administrator of their estate or the liquidator of the succession, with the leave of the court, may make an assignment of all the insolvent person’s property for the general benefit of the insolvent person’s creditors.

### Sworn statement

(2) The assignment must be accompanied by a sworn statement in the prescribed form showing the debtor’s property that is divisible among his or her creditors, the names and addresses of all his or her creditors and the amounts of their respective claims.

### Filing of assignment

(3) The assignment made under subsection (1) shall be offered to the official receiver in the locality of the debtor, and it is inoperative until filed with that official receiver, who shall refuse to file the assignment unless it is in the prescribed form or to the like effect and accompanied by the sworn statement required by subsection (2).

### Sens de débours

(2) Pour l’application du paragraphe (1), ne sont pas compris parmi les débours les paiements effectués dans le cadre des opérations propres aux affaires du débiteur.

### Comptes et libération du séquestre intérimaire

(3) La forme et le contenu des comptes — y compris l’état définitif des recettes et des débours — du séquestre intérimaire nommé aux termes des articles 46, 47 ou 47.1 et la procédure à suivre pour leur préparation et leur taxation, ainsi que pour la libération du séquestre intérimaire sont déterminés par les Règles générales.

1992, ch. 27, art. 16; 2004, ch. 25, art. 30; 2005, ch. 47, art. 32; 2015, ch. 3, art. 7(F).

### Application des art. 43 à 46

48 Les articles 43 à 46 ne s’appliquent pas au particulier dont la principale activité — et la principale source de revenu — est la pêche, l’agriculture ou la culture du sol, ni au particulier qui travaille pour un salaire, un traitement, une commission ou des gages ne dépassant pas deux mille cinq cents dollars par année et qui n’exerce pas un commerce pour son propre compte.

L.R. (1985), ch. B-3, art. 48; 1997, ch. 12, art. 28.

## Cessions

### Cession au profit des créanciers en général

49 (1) Une personne insolvable ou, si elle est décédée, l’exécuteur testamentaire, le liquidateur de la succession ou l’administrateur à la succession, avec la permission du tribunal, peut faire une cession de tous ses biens au profit de ses créanciers en général.

### Déclaration sous serment

(2) La cession est accompagnée d’une déclaration sous serment dans la forme prescrite, indiquant les biens du débiteur susceptibles d’être partagés entre ses créanciers, les noms et adresses de tous ses créanciers et les montants de leurs réclamations respectives.

### Production de la cession

(3) La cession est présentée au séquestre officiel dans la localité du débiteur, et elle est inopérante tant qu’elle n’a pas été déposée auprès de ce séquestre officiel qui en refuse la production, à moins qu’elle ne soit en la forme

### Appointment of trustee

(4) Where the official receiver files the assignment made under subsection (1), he shall appoint as trustee a licensed trustee whom he shall, as far as possible, select by reference to the wishes of the most interested creditors if ascertainable at the time, and the official receiver shall complete the assignment by inserting therein as grantee the name of the trustee.

### Cancellation of assignment

(5) Where the official receiver is unable to find a licensed trustee who is willing to act, the official receiver shall, after giving the bankrupt five days notice, cancel the assignment.

### Procedure in small estates

(6) Where the bankrupt is not a corporation and in the opinion of the official receiver the realizable assets of the bankrupt, after the claims of secured creditors are deducted, will not exceed five thousand dollars or such other amount as is prescribed, the provisions of this Act relating to the summary administration of estates shall apply.

### Future property not to be considered

(7) In the determination of the realizable assets of a bankrupt for the purposes of subsection (6), no regard shall be had to any property that may be acquired by the bankrupt or devolve on the bankrupt before the bankrupt's discharge.

### Where subsection (6) ceases to apply

(8) The official receiver may direct that subsection (6) shall cease to apply in respect of the bankrupt where the official receiver determines that

(a) the realizable assets of the bankrupt, after the claims of secured creditors are deducted, exceed five thousand dollars or the amount prescribed, as the case may be, or

(b) the costs of realization of the assets of the bankrupt are a significant proportion of the realizable value of the assets,

and the official receiver considers that such a direction is appropriate.

R.S., 1985, c. B-3, s. 49; 1992, c. 1, s. 15, c. 27, s. 17; 1997, c. 12, s. 29; 2004, c. 25, s. 31(E); 2005, c. 47, s. 33.

prescrite ou en des termes ayant le même effet, et accompagnée de la déclaration sous serment requise au paragraphe (2).

### Nomination de syndic

(4) Lorsque le séquestre officiel accepte la production de la cession, il nomme comme syndic un syndic autorisé qu'il choisira, autant que faire se peut, en tenant compte des désirs des créanciers les plus intéressés, s'il est possible de s'en rendre compte à ce moment. Le séquestre officiel complète la cession en y insérant comme cessionnaire le nom du syndic.

### Annulation de cession

(5) Le séquestre officiel annule la cession, sur préavis de cinq jours au failli, lorsqu'il ne peut trouver un syndic autorisé qui consente à agir.

### Procédures à l'égard d'actifs peu considérables

(6) Lorsque le failli n'est pas une personne morale et que, de l'avis du séquestre officiel, ses avoirs réalisables, déduction faite des réclamations des créanciers garantis, ne dépassent pas cinq mille dollars ou tout autre montant prescrit, les dispositions de la présente loi concernant l'administration sommaire des actifs s'appliquent.

### Exclusion des biens futurs

(7) Il n'est pas tenu compte pour la détermination des avoirs réalisables du failli des biens que celui-ci peut acquérir ou qui peuvent lui être dévolus avant sa libération.

### Cessation d'effet du paragraphe (6)

(8) Le séquestre officiel peut ordonner que le paragraphe (6) cesse de s'appliquer au failli s'il détermine que les avoirs réalisables de celui-ci, déduction faite des réclamations des créanciers garantis, dépassent cinq mille dollars ou le montant prescrit, ou que les coûts de réalisation de ces avoirs représentent une partie importante de leur valeur réalisable, et s'il estime pareille mesure indiquée.

L.R. (1985), ch. B-3, art. 49; 1992, ch. 1, art. 15, ch. 27, art. 17; 1997, ch. 12, art. 29; 2004, ch. 25, art. 31(A); 2005, ch. 47, art. 33.

such modifications as the circumstances require, to consumer proposals.

### Where consumer debtor is bankrupt

**(2)** Where a consumer proposal is made by a consumer debtor who is a bankrupt,

- (a)** the consumer proposal must be approved by the inspectors, if any, before any further action is taken thereon;
- (b)** the consumer debtor must have obtained the assistance of a trustee who shall act as administrator of the proposal in the preparation and execution thereof;
- (c)** the time with respect to which the claims of creditors shall be determined is the time at which the consumer debtor became bankrupt; and
- (d)** the approval or deemed approval by the court of the consumer proposal operates to annul the bankruptcy and to revest in the consumer debtor, or in such other person as the court may approve, all the right, title and interest of the trustee in the property of the consumer debtor, unless the terms of the consumer proposal otherwise provide.

1992, c. 27, s. 32; 1997, c. 12, s. 58.

## PART IV

# Property of the Bankrupt

### Property of bankrupt

**67 (1)** The property of a bankrupt divisible among his creditors shall not comprise

- (a)** property held by the bankrupt in trust for any other person;
- (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;
  - (b.1)** goods and services tax credit payments that are made in prescribed circumstances to the bankrupt and that are not property referred to in paragraph (a) or (b);
  - (b.2)** prescribed payments relating to the essential needs of an individual that are made in prescribed circumstances to the bankrupt and that are not property referred to in paragraph (a) or (b); or

adaptations de circonstance, aux propositions de consommateur.

### Application de la présente loi

**(2)** Dans le cas d'une proposition de consommateur faite par un failli :

- a)** la proposition doit être approuvée par les inspecteurs, le cas échéant, avant que toute autre mesure ne soit prise à son égard;
- b)** le débiteur consommateur doit avoir obtenu les services d'un syndic pour agir comme administrateur dans le cadre de la préparation et de l'exécution de la proposition;
- c)** le moment par rapport auquel les réclamations des créanciers sont déterminées est celui où le débiteur consommateur est devenu un failli;
- d)** l'approbation — effective ou présumée — de la proposition par le tribunal a pour effet d'annuler la faillite et de réattribuer au débiteur consommateur, ou à toute autre personne que le tribunal peut approuver, le droit, le titre et l'intérêt complets du syndic aux biens du débiteur, à moins que les conditions de la proposition ne soient à l'effet contraire.

1992, ch. 27, art. 32; 1997, ch. 12, art. 58.

## PARTIE IV

# Biens du failli

### Biens du failli

**67 (1)** Les biens d'un failli, constituant le patrimoine attribué à ses créanciers, ne comprennent pas les biens suivants :

- a)** les biens détenus par le failli en fiducie pour toute autre personne;
- b)** les biens qui, selon le droit applicable dans la province dans laquelle ils sont situés et où réside le failli, ne peuvent faire l'objet d'une mesure d'exécution ou de saisie contre celui-ci;
  - b.1)** dans les circonstances prescrites, les paiements qui sont faits au failli au titre de crédits de taxe sur les produits et services et qui ne sont pas des biens visés aux alinéas a) ou b);
  - b.2)** dans les circonstances prescrites, les paiements prescrits qui sont faits au failli relativement aux besoins essentiels de personnes physiques et qui ne sont pas des biens visés aux alinéas a) ou b);

**(b.3)** without restricting the generality of paragraph (b), property in a *registered retirement savings plan*, a *registered retirement income fund* or a *registered disability savings plan*, as those expressions are defined in the *Income Tax Act*, or in any prescribed plan, other than property contributed to any such plan or fund in the 12 months before the date of bankruptcy,

but it shall comprise

**(c)** all property wherever situated of the bankrupt at the date of the bankruptcy or that may be acquired by or devolve on the bankrupt before their discharge, including any refund owing to the bankrupt under the *Income Tax Act* in respect of the calendar year — or the fiscal year of the bankrupt if it is different from the calendar year — in which the bankrupt became a bankrupt, except the portion that

**(i)** is not subject to the operation of this Act, or

**(ii)** in the case of a bankrupt who is the judgment debtor named in a garnishee summons served on Her Majesty under the *Family Orders and Agreements Enforcement Assistance Act*, is garnishable money that is payable to the bankrupt and is to be paid under the garnishee summons, 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.

### Deemed trusts

**(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.

### Exceptions

**(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* (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

**b.3)** sans restreindre la portée générale de l’alinéa b), les biens détenus dans un *régime enregistré d’épargne-retraite*, un *fonds enregistré de revenu de retraite* ou un *régime enregistré d’épargne-invalidité*, au sens de la *Loi de l’impôt sur le revenu*, ou dans tout régime prescrit, à l’exception des cotisations aux régimes ou au fonds effectuées au cours des douze mois précédant la date de la faillite,

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, y compris les remboursements qui lui sont dus au titre de la *Loi de l’impôt sur le revenu* relativement à l’année civile — ou à l’exercice lorsque celui-ci diffère de l’année civile — au cours de laquelle il a fait faillite, mais à l’exclusion de la partie de ces remboursements qui :

**(i)** soit sont des sommes soustraites à l’application de la présente loi,

**(ii)** soit sont des sommes qui lui sont dues et qui sont saisissables en vertu d’un bref de saisie-arrêt signifié à Sa Majesté en application de la *Loi d’aide à l’exécution des ordonnances et des ententes familiales* dans lequel il est nommé comme débiteur;

**d)** les pouvoirs sur des biens ou à leur égard, qui auraient pu être exercés par le failli pour son propre bénéfice.

### Fiducies présumées

**(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.

### Exceptions

**(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* (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

(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.

R.S., 1985, c. B-3, s. 67; 1992, c. 27, s. 33; 1996, c. 23, s. 168; 1997, c. 12, s. 59; 1998, c. 19, s. 250; 2005, c. 47, s. 57; 2007, c. 36, s. 32; 2019, c. 29, s. 134.

### Directives re surplus income

**68 (1)** The Superintendent shall, by directive, establish in respect of the provinces or one or more bankruptcy districts or parts of bankruptcy districts, the standards for determining the surplus income of an individual bankrupt and the amount that a bankrupt who has surplus income is required to pay to the estate of the bankrupt.

### Definitions

(2) The following definitions apply in this section.

**surplus income** means the portion of a bankrupt individual's total income that exceeds that which is necessary to enable the bankrupt individual to maintain a reasonable standard of living, having regard to the applicable standards established under subsection (1). (*revenu excédentaire*)

### total income

(a) includes, despite paragraphs 67(1)(b) and (b.3), a bankrupt's revenues of whatever nature or from whatever source that are earned or received by the bankrupt between the date of the bankruptcy and the date of the bankrupt's discharge, including those received as damages for wrongful dismissal, received as

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.

L.R. (1985), ch. B-3, art. 67; 1992, ch. 27, art. 33; 1996, ch. 23, art. 168; 1997, ch. 12, art. 59; 1998, ch. 19, art. 250; 2005, ch. 47, art. 57; 2007, ch. 36, art. 32; 2019, ch. 29, art. 134.

### Instructions du surintendant — revenu excédentaire

**68 (1)** Le surintendant fixe, par instruction, pour les provinces ou pour un ou plusieurs districts ou parties de district, des normes visant l'établissement du revenu excédentaire du failli qui est une personne physique et de la somme que celui-ci doit verser à l'actif de la faillite.

### Définitions

(2) Les définitions qui suivent s'appliquent au présent article.

**revenu excédentaire** Le montant du revenu total d'une personne physique en faillite qui excède ce qui est nécessaire au maintien d'un niveau de vie raisonnable, compte tenu des normes applicables mentionnées au paragraphe (1). (*surplus income*)

**revenu total** Malgré les alinéas 67(1)(b) et b.3), revenus de toute nature ou source gagnés ou reçus par le failli entre la date de sa faillite et celle de sa libération, y compris les sommes reçues entre ces dates à titre de dommages-intérêts pour congédiement abusif ou de règlement en matière de parité salariale, ou en vertu d'une loi fédérale ou provinciale relative aux accidents du travail. Ne sont pas visées par la présente définition les sommes

the action, and, if he does not claim any benefit therefrom, he shall be indemnified against costs in respect thereof as the court directs.

R.S., 1985, c. B-3, s. 85; 2004, c. 25, s. 52.

## Crown Interests

### Status of Crown claims

**86 (1)** 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.

### Exceptions

**(2)** Subsection (1) does not apply

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

**(i)** pursuant to any law, or

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

**(b)** to the extent provided in subsection 87(2), to claims that are secured by a security referred to in subsection 87(1), if the security is registered in accordance with that subsection.

### Exceptions

**(3)** Subsection (1) does not affect the operation of

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

**(b)** any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts; or

**(c)** any provision of provincial legislation that has a 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

reçoive sa juste part du produit de l'action; et, s'il ne réclame aucun profit de cette action, il est indemnisé de tous frais à cet égard, suivant que le tribunal l'ordonne.

L.R. (1985), ch. B-3, art. 85; 2004, ch. 25, art. 52.

## Droits de la Couronne

### Réclamations de la Couronne

**86 (1)** 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.

### Exceptions

**(2)** Sont soustraites à l'application du paragraphe (1) :

**a)** les réclamations garanties par un type de charge ou de sûreté dont toute personne, et non seulement Sa Majesté ou l'organisme, peut se prévaloir au titre de dispositions législatives fédérales ou provinciales n'ayant pas pour seul ou principal objet l'établissement de mécanismes garantissant les réclamations de Sa Majesté ou de l'organisme, ou au titre de toute autre règle de droit;

**b)** les réclamations garanties aux termes de l'article 87, dans la mesure prévue à cet article.

### Effet

**(3)** 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*, d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ou d'une cotisation prévue par la partie VII.1 de cette loi 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

related interest, penalties or other amounts, where the sum

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

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

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

R.S., 1985, c. B-3, s. 86; 1992, c. 27, s. 39; 1997, c. 12, s. 73; 2000, c. 30, s. 148; 2005, c. 47, s. 69; 2009, c. 33, s. 25.

### Statutory Crown securities

**87 (1)** A security provided for in federal or provincial legislation for the sole or principal purpose of securing a claim of Her Majesty in right of Canada or of a province or of a workers' compensation body is valid in relation to a bankruptcy or proposal only if the security is registered under a prescribed system of registration before the date of the initial bankruptcy event.

### Idem

(2) In relation to a bankruptcy or proposal, a security referred to in subsection (1) that is registered in accordance with that subsection

(a) is subordinate to securities in respect of which all steps necessary to make them effective against other creditors were taken before that registration; and

(b) is valid only in respect of amounts owing to Her Majesty or a workers' compensation body at the time of that registration, plus any interest subsequently accruing on those amounts.

R.S., 1985, c. B-3, s. 87; 1992, c. 27, s. 39; 1997, c. 12, s. 74; 2004, c. 25, s. 53; 2005, c. 47, s. 70.

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), et quant aux intérêts, pénalités ou autres montants y afférents, quelle que soit la garantie dont bénéficie le créancier.

L.R. (1985), ch. B-3, art. 86; 1992, ch. 27, art. 39; 1997, ch. 12, art. 73; 2000, ch. 30, art. 148; 2005, ch. 47, art. 69; 2009, ch. 33, art. 25.

### Garanties créées par législation

**87 (1)** Les garanties créées aux termes d'une loi fédérale ou provinciale dans le seul but — ou principalement dans le but — de protéger des réclamations mentionnées au paragraphe 86(1) ne sont valides, dans le cadre d'une faillite ou d'une proposition, que si elles ont été enregistrées, conformément à un système d'enregistrement prescrit, avant l'ouverture de la faillite.

### Rang

(2) Dans le cadre d'une faillite ou d'une proposition, les garanties visées au paragraphe (1) et enregistrées conformément à ce paragraphe :

a) prennent rang après toute autre garantie à l'égard de laquelle les mesures requises pour la rendre opposable aux autres créanciers ont toutes été prises avant l'enregistrement;

b) ne sont valides que pour les sommes dues à Sa Majesté ou à l'organisme mentionné au paragraphe 86(1)

# TAB 8

**CITATION:** 2403177 Ontario Inc. v. Bending Lake iron Group Limited, 2016 ONSC 199  
**COURT FILE NO.:** CV-14-0274-00  
**DATE:** 2016-01-08

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**B E T W E E N:** )  
 )  
2403177 Ontario Inc. ) *Michael Strickland*, for the Applicant  
 )  
Applicant )  
 )  
**- and -** )  
 )  
Bending Lake Iron Group Limited ) *Robert MacRae*, for the Respondent  
 )  
Respondent )  
 )  
 ) *Kenneth Kraft*, for A. Farbert & Partners  
 ) Inc.  
 )  
 ) *Paul Denton* the Receiver  
 ) *Caitlin Fell*, for Legacy Hill Resources Ltd.  
 )  
 ) **HEARD:** December 29 and 30, 2015, and  
 ) by way of written submissions received on  
 ) January 6, 2016, at Thunder Bay, Ontario

**Mr. Justice D. C. Shaw**

**Decision On Motion**

[1] A. Farber and Partners Inc. was appointed receiver (“the Receiver”) of all of the assets, undertakings and properties (“the Property”) of Bending Lake Iron Group (“BLIG” or “the Debtor”) by order dated September 11, 2014.

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[2] The Receiver brings this motion for an order:

- approving the Asset Purchase Agreement, dated November 27, 2015 (the “Sale Agreement”) between the Receiver and Legacy Hill Resources Ltd. (“LHR”), as assigned by LHR to 1053895 B.C. Ltd. and satisfying the Receiver’s execution of the Sale Agreement;
- approving the transaction contemplated by the Sale Agreement (the “Transaction”) and authorizing the Receiver to execute any additional documents for the completion of the Transaction;
- vesting title in the purchased assets free and clear of all encumbrances;
- authorizing the Receiver to file an assignment in bankruptcy on behalf of the Debtor;
- approving paragraph 20 of the First Report of the Receiver, dated November 18, 2014, relating to legal work for which the Debtor continued to have responsibility;
- approving the Second Report of the Receiver, dated January 20, 2015 and the Third Report of the Receiver, dated November 30, 2015;
- approving the fees and disbursements of the Receiver and its legal counsel as set out in the Third Report; and
- authorizing the Receiver to seal the unredacted version of the Third Report, containing commercially sensitive information, filed with the court, until after the closing of the Transaction.

[3] The Receiver’s motion is opposed by the Debtor. The Receiver’s motion is supported by the Applicant, 2403177 Ontario Inc. which is the security agent acting on behalf of the secured creditors, C. Stuart Livingston and James MacLean. The motion is supported by the purchaser, LHR.

[4] BLIG brings a motion for an order that the court not approve the Sale Agreement and that the Receiver be restrained from dealing further with LHR pending further order of the court. BLIG also requests an order that it be entitled to disclose to the BLIG shareholders the

value of the LHR offer in the Sale Agreement and that BLIG be provided 90 days within which to arrange funding in an amount equal to the cash amount that LHR has agreed to pay under the Sale Agreement. BLIG seeks to have numerous paragraphs of the Receiver's Third Report struck.

[5] BLIG also requested an adjournment of the Receiver's motion for a period initially stated to be 90 days, but revised on the hearing of the motion to 30 days, based on new information that it had received from counsel for the Receiver on December 23, 2015. For oral reasons delivered on December 30, 2015 during the hearing of the motions, I denied the request for an adjournment with leave to the parties to deliver by January 6, 2015 written submissions, not exceeding five pages, focused on the Receiver's decision to enter into the Sales Agreement with LHR, together with two pages on the issue of the Receiver's request to assign BLIG into bankruptcy, plus applicable case law. Those submissions and cases have been received and reviewed.

## **Background**

[6] BLIG is an early stage iron ore mine development company whose major asset is a mine site located in the Kenora Mining Division. BLIG's registered office is in Thunder Bay.

[7] Henry Wetelainen is the President and CEO of BLIG and a major shareholder of the company.

[8] BLIG owns 100% of the iron ore deposit at the mine site which occupies 624 hectares.

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[9] Although BLIG was successful in raising equity from 2008 to 2011 to finance further development of the mine site, it was unable to arrange any major financing in 2011 and 2012.

[10] During 2012 BLIG negotiated with a Chinese company, Aiwan Investment Corporation, to raise \$110 million in debt and equity. However, that transaction failed to be completed in the Fall of 2012 when Aiwan was unable to obtain permission to export capital from China.

[11] From November 2011 to September 2012, in anticipation of financing being successfully completed, Mr. Livingston and Mr. Maclean, through the Applicant, advanced a series of loans to BLIG to fund development of the mine. After financing was unsuccessful, development at the mine site was suspended in 2013.

[12] BLIG failed to make any loan payments to the Applicant after November 2012. As of June 2014, the accrued secured loans from the Applicant were recorded at \$3,120,159.33.

[13] As of October 21, 2015, the secured lenders' loans totalled in excess of \$3.5 million, inclusive of accrued interest and costs.

[14] BLIG had no employees as of the date of the Receivership Order, September 11, 2014.

[15] Significant development remains to be done before the mine is in a position to commence operations.

[16] Canada Revenue Agency has a claim for payroll deductions not made by BLIG, in the sum of \$63,596.83 as of October 20, 2014. On August 25, 2015, Canada Revenue Agency gave

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notice of an HST reassessment of \$391,802.96, for the period August 11, 2011 to October 31, 2015.

[17] BLIG's creditor list, as of September 11, 2014, shows unsecured liabilities totalling \$8,454,506.85. That list has not been audited by the Receiver.

[18] On November 27, 2014, on motion by the Receiver, the court granted a Sales and Investor Solicitation Process Order (the "SISP Order"), on consent.

[19] Pursuant to the SISP Order, the Receiver completed a list of interested parties through consultation with BLIG and the Receiver's network of advisors and investors in both the mining and the investment community, posted information on the Receiver's website, arranged for advertisements in the Northern Miner and Globe and Mail, set up and operated a virtual data room for interested parties (after they signed a confidentiality agreement) and liaised with the Ministry of Northern Development and Mines and Thunder Bay Development Corporation to facilitate due diligence and identification of interested parties.

[20] The deadline for submissions of proposals under the SISP Order was February 27, 2015. As noted in the Third Report, market conditions were not ideal for attracting interested parties given the continuing depressed conditions in the mining sector and, in particular, in the iron ore sector. Since the commencement of the receivership in September 2014 through to the end of March 2015, the market price for a dry metric ton of iron ore declined from \$82.27 to \$56.94.

[21] Pursuant to paragraph 4 of the SISP Order, the bid deadline was extended to March 27, 2015.

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[22] As a result of the SISP Order, over 120 interested parties were contacted by the Receiver. Twelve of the parties signed confidentiality agreements, were provided access to the virtual data room and undertook varying levels of due diligence. No offer or proposals were submitted by the extended deadline of March 27, 2015.

[23] Meanwhile, at the beginning of February 2015, Mr. Wetelainen, on his own initiative, contacted a representative of LHR, Andrew Malim, LHR's Director of Project Development and Finance. At the time, the Receiver had no knowledge of the contact between Mr. Wetelainen and LHR.

[24] In response to an e-mail dated February 5, 2015 from Dawn MacKay, the Chief Administrative Officer of BLIG, Mr. Malim sent an e-mail of that same date, stating in part:

We are looking forward to looking at ways we can work together. We are confident, based on our iron ore operation on Chile which we own and manage, we can at least speak the same language.

[25] On March 2, 2015, at the annual Prospectors and Developers Association of Canada convention in Toronto, Mr. Wetelainen met with Mr. Malim.

[26] On March 10, 2015, Mr. Malim wrote to Mr. Wetelainen by e-mail:

A pleasure to meet you at PDAC. We are planning a long term management and financing program in Ontario with the full support of the Ministry of Northern Development and Mines.

We would be pleased to work with you to fund and develop your family property. We understand that the company is in receivership but with goodwill and understanding on all sides, we can come up with a workable solution, I am sure. We would like to revisit the historic date.

Do you have a generic NDA (Non-Disclosure Agreement)?

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I attach our NDA if it works for you. I look forward to hearing from you.

Kind Regards Andrew.

[27] On March 10, 2015, Mr. Wetelainen responded by e-mail to Mr. Malim and said that he was looking forward to working with him.

[28] On March 12, 2015 BLIG and LHR entered into a Confidentiality Agreement (Reciprocal Non-Disclosure).

[29] Paragraph 2 of the Confidentiality Agreement provided, in part:

**2. Disclosure of Confidential Information:** The Disclosing Party may from time to time, disclose and provide to the Receiving Party certain Confidential Information pertaining to the Disclosing Party and the Transactions. The Receiving Party shall be entitled to review the Disclosing Party's Confidential Information solely in connection with the Receiving Party's evaluations, negotiation and/or consummation of a possible investment (the "Purpose") in or together with the Disclosing Party concerning the Transactions. ....

[30] The Receiver was not aware that BLIG and LHR had entered into the Confidentiality Agreement.

[31] Mr. Wetelainen deposes that he did not disclose LHR's interest to the Receiver at this time "...because LHR and BLIG were working together."

[32] Mr. Wetelainen deposes that following the signing of the Confidentiality Agreement, BLIG made available to LHR all of BLIG's intellectual property as well as the intellectual property of Mr. Wetelainen, of Ms. McKay and of Jay Mackie, who was another officer of BLIG.

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[33] Mr. Wetelainen asserts that the confidential information was provided to LHR in the context of discussions between LHR and BLIG about a joint venture/restructuring and refinancing of BLIG. Mr. Wetelainen takes the position that it was never his intention to propose a sale of BLIG's assets to LHR. Mr. Wetelainen states that the Confidentiality Agreement and the release of confidential information to LHR in furtherance of a joint venture/restructuring and refinancing of BLIG created a fiduciary duty between LHR and BLIG that required both parties to act in a manner that was not harmful to the interests of either of them.

[34] The Receiver did not become aware of the Confidentiality Agreement or of the fact that BLIG had provided confidential information to LHR until receipt of an affidavit of Mr. Wetelainen, sworn December 17, 2015, in support of BLIG's motion opposing court approval of the November 27, 2015 Sale Agreement between the Receiver and LHR.

[35] The Receiver also reports that it had no knowledge of the existence of many of the confidential documents described in Mr. Wetelainen's affidavit of December 17, 2015 that he gave to LHR.

[36] The Receiver takes the position that the actions of Mr. Wetelainen and BLIG in undertaking a parallel sales process, failing to provide confidential documents to the Receiver and negotiating and entering into agreements with LHR, without the Receiver's knowledge, contravene the Receivership Order. BLIG takes the position that because the Receiver was not appointed as manager of the Debtor and did not take possession or control of the property under the Receivership Order, Mr. Wetelainen was entitled, on behalf of BLIG, to enter into the Confidentiality Agreement with LHR and provide LHR with confidential information.

[37] The Receiver first became aware of discussions between LHR and Mr. Wetelainen (but not of the Confidentiality Agreement or the disclosure of confidential information) on March 23, 2015, during a discussion between the Receiver and Mr. Wetelainen. The Receiver reports that at that time it informed Mr. Wetelainen that the negotiations with LHR should properly be under the Receiver's purview as part of the SISP Order.

[38] Discussions between the Receiver and LHR ensued. LHR signed a Confidentiality Agreement with the Receiver on April 7, 2015. LHR then accessed the Receiver's virtual data room.

[39] Although the extended bid deadline of March 27, 2015 under the SISP Order had expired, paragraph 7 of the SISP, attached as Schedule "A" to the SISP Order, provided that following the bid deadline:

If the Receiver is unable to negotiate a Final Asset Purchase Agreement (APA), the Receiver shall be at liberty to negotiate and finalize an APA/transaction with such other offering party or parties as it deems appropriate, subject to consulting first with the secured lenders.

[40] The Third Report of the Receiver sets out the due diligence activities of LHR from May through September 2015, which included extensive consultations with the Receiver, with the secured lenders, with BLIG representatives and with representatives of the Ministry of Northern Development and Mines.

[41] The Receiver reports in its Third Report that Mr. Wetelainen was initially kept apprised of the Receiver's discussions with LHR and developments in their due diligence process. Mr.

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Wetelainen attended meetings with LHR and facilitated a visit to the mine site with representatives of LHR in early June 2015. The Receiver reports:

As its due diligence progressed, Legacy Hill subsequently indicated to the Receiver that it would not be involving Mr. Wetelainen in the process going forward and it would not be seeking to offer Mr. Wetelainen a consultancy role or any other position with the Purchaser upon the closing of the Transaction.

[42] During the period from April to September 2015, the Receiver received no concrete proposals nor expressions of interest for a restructuring or sale of BLIG in what continued to be very depressed conditions for the mining sector. Only LHR presented a proposal to the Receiver.

[43] On September 30, 2015 LHR executed a non-binding letter of intent to purchase the assets of BLIG.

[44] The Receiver and LHR concluded the Sale Agreement on November 27, 2015.

[45] Mr. Wetelainen first learned of the Sale Agreement when counsel for BLIG received a November 26, 2015 e-mail from counsel for the Receiver advising that the Receiver would be bringing a motion returnable December 10, 2015, seeking an order approving an Agreement of Purchase and Sale in respect of the assets of BLIG. A redacted copy of the Sale Agreement was provided to BLIG's counsel on November 30, 2015. An unredacted copy was provided shortly thereafter.

[46] Mr. Wetelainen deposes that the Receiver did not provide BLIG with any information with respect to meetings between the Receiver and representatives of LHR on September 29 and 30, 2015 leading to the execution of non-binding Letter of Intent on September 30, 2015. BLIG

was not advised that LHR was intending to purchase the assets of BLIG. Mr. Wetelainen deposes that he continued to work towards the goal of refinancing BLIG while the negotiations between LHR and the Receiver for the sale of BLIG's assets were going on.

[47] Mr. Wetelainen deposes that at all times it was his belief that LHR was committed to working with BLIG to refinance the mine project. Mr. Wetelainen also deposes that the Receiver knew that LHR and BLIG were working together to refinance BLIG out of receivership. He notes that there would be no other incentive for him to work on an unpaid basis to assist the Receiver as, for example, attending at the mine site in early June 2015, with representatives of LHR.

[48] Mr. Wetelainen points to a September 17, 2015 e-mail from Mr. Malim to the Receiver:

Am working on Toronto trip pref next week. Does Wed and Thurs make sense. We will spend some time with our lawyers papering agreements to give you time out. Are you able to guide me: if we elect that Henry's status going forward may be in the form of contracting work etc. rather than equity, do we fall foul of Treaty Law? Is equity carry mandatory for Aboriginal interests. You will understand that in our view there was abuse of trust by Henry and his team which contributed to the downfall of the business....

[49] Redacted

[50] The secured lenders have given an undertaking to the Receiver that in the event the share consideration may be monetized to pay out the secured lenders in full, after application of the cash purchase price, the secured lenders will pay any funds received from the monetization of the share consideration in excess of the payment amount to the Receiver. This obligation remains open for three years after the closing date.

[51] The Receiver recommends court approval of the Sale Agreement on the basis that the purchase price represents the only offer and therefore the best and highest offer in the circumstances. The Receiver reports that the offer was received after the market was adequately canvassed throughout 2015 in what was and continues to be a challenging market. During the years preceding the receivership (2012-2014), BLIG also canvassed the market in an attempt to secure debt financing and/or equity but without success.

[52] The secured lenders have approved the Sale Agreement.

[53] BLIG opposes approval of the Sale Agreement on the grounds that the Receiver has shown a lack of impartiality in its conduct after the e-mail of September 17, 2015 from LHR to the Receiver. BLIG submits that the e-mail demonstrates that LHR reneged in its commitment to BLIG and to the Receiver to work to refinance or restructure BLIG. BLIG submits that after the September 17, 2015 e-mail from LHR, the Receiver, as an officer of the court, having worked with BLIG and LHR to refinance or restructure the company, should have been on notice to make inquiries into why there had been a parting of the ways between LHR and BLIG and to inquire into the good faith of LHR. BLIG submits that the Receiver created an expectation on the part of BLIG that BLIG would successfully recover from the receivership by way of a transaction between LHR and BLIG.

[54] BLIG submits that the Receiver has shown its partiality by failing to mention in its Third Report that BLIG was working with LHR to refinance or restructure the company when the Receiver knew or ought to have known that BLIG was to have a stake in the final arrangement. BLIG submits that the Receiver has refused to provide an affidavit which it

characterizes as evidence of conduct designed to deprive BLIG of its opportunity to fully canvass the deficiencies and inaccuracies in the Receiver's report. BLIG contends that the Receiver's Third Report is biased and drafted in such a way as to suggest to the court that certain events occurred or did not occur and, as such, the Third Report should be rejected by the court.

[55] BLIG submits that LHR violated its fiduciary duty to BLIG, under the Confidentiality Agreement, by purchasing the assets of BLIG, when the stated purpose of the Confidentiality Agreement was to allow LHR to evaluate, negotiate and consummate a possible investment in, or with, BLIG.

[56] BLIG also submits that the Receiver has become an advocate for the Applicant and for LHR.

### **Discussion**

[57] All parties agree that the principles in *Royal Bank of Canada v. Soundair Corp.*, [1991] O.J. No 1137 (C.A.) are to be applied when reviewing a sale by a court appointed receiver. The duties which the court must perform in deciding whether the Receiver who has sold a property acted properly are summarized by Galligan J.A.:

- (a) It should consider whether the receiver made a sufficient effort to obtain the best price and has not acted improvidently;
- (b) It should consider the interests of all parties;
- (c) It should consider the efficacy and integrity of the process by which the offers are obtained; and

(d) It should consider whether there has been unfairness in the working out of the process.

[58] In *Skyepharmaceutical PLC v. Hyal Pharmaceutical Corp.*, [1999] O.J. No. 4300 (SCJ) (motion granted to quash the appeal [2000] O.J. No. 467 (C.A.)) at paras. 6 and 7 Farley J. set out additional principles to be applied:

6. Although the interests of the debtor and purchaser are also relevant, on a sale of assets, the receiver's primary concern is to protect the interests of the debtor's creditors. Where the debtor cannot meet statutory solvency requirements, then in accord with the Plimsoll line philosophy, the shareholders are not entitled to receive payments in priority or partial priority to the creditors. Shareholders are not creditors and in a liquidation, shareholders rank below the creditors (citations omitted).

7. Provided a receiver has acted reasonably, prudently and not arbitrarily, a court should not sit as in an appeal from a receiver's decision, reviewed (sic) in detail every element of the procedure by which the receiver made the decision (so long as the procedure fits with the authorized process specified by the court if a specific order to that affect (sic) has been issued). To do so would be futile and duplicative. It would emasculate the role of the receiver and make it almost inevitable that the final negotiation of every sale would take place on the motion for approval (citations omitted).

[59] I will address the four *Soundair* principles as applied to the facts in this case.

1. Consideration of whether the Receiver made a sufficient effort to obtain the best price and has not acted improvidently.

[60] I am satisfied that the Receiver made and adequate efforts at marketing the Property.

[61] Under the SISP, the Receiver contacted more than 120 interested parties. Of those more than 120 parties, 12 signed confidentiality agreements and accessed the Receiver's virtual data room.

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[62] When none of the interested parties put in an offer by the end of the extended bid deadline, the Receiver continued to market the Property as he was entitled to do under the SISP Order.

[63] The iron ore market is depressed. This is evidenced by the fact that none of the more than 120 interested parties contacted through the SISP were prepared to make an offer.

[64] On the hearing of the motions, BLIG expressed the opinion that the mine site, when fully in default, was worth a minimum of \$125 million.

[65] Unfortunately for the shareholders and creditors of BLIG, the market has determined what the mine site is worth. The Receiver reported receiving only the one offer that is before the court for approval.

[66] Although the secured creditors are owed approximately 3% of what BLIG says is the value of the mine site, BLIG has not been able to raise funds to redeem the secured loans or even to put in a competing offer.

[67] The Receiver has acted reasonably and not improvidently in accepting the only offer it has received after months of marketing.

2. Consideration of whether the transaction is in the best interests of all parties.

[68] Although the Receiver owes a duty to all stakeholders, its primary duty in this case is to maximize the return for the secured creditors. Even with the sale, the secured creditors stand to incur a shortfall on their security. They are the only parties with a real economic interest in the

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sale. They support the sale. They do not want to hold out in the hopes of attracting a better offer, even in face of the shortfall.

[69] BLIG opposes the sale, but does so not to provide the secured lenders with a better result, but in the context of wanting an opportunity over the next three months to match the cash purchase price offered by LHR, now that BLIG knows what cash purchase amount is, and to receive a discharge of the secured loans.

[70] As noted in *Soundair*, in an appropriate case, the interests of the debtor must be taken into account. In this case, although the debtor may have had an expectation that it would be able to refinance the company through a relationship with LHR, that expectation did not come to fruition. Approval of the sale should not be denied, and the modest recovery by the secured lenders jeopardized, on the mere possibility that BLIG could match the LHR offer. I will have more to say about BLIG's expectation interest.

[71] In *Soundair*, Galligan J.A. observed that where a purchaser has bargained at some length and expense, its interests also ought to be taken into account.

[72] In my view, in this case, it is the interests of the secured lenders, who I note are the only ones paying the costs of the Receiver, which must prevail. As such, their support of the sale assumes great significance.

3. Consideration of the efficiency and integrity of the process by which the offer was obtained.

[73] In respect of this principle, Galligan J.A. referred to the decision of Saunders J. in *Re Selkirk* (1986), 58 C.B.R.(N.S.)245(Ont.S.C.), at p. 246:

In dealing with the request for approval the court has to be concerned primarily with protecting the interest of the creditors of the former bankrupt. A secondary but important consideration is that the process under which the sale agreement is arrived at should be consistent with commercial efficacy and integrity.

In that connection, I adopt the principles stated by Macdonald J.A. of the Nova Scotia Supreme Court (Appeal Division) in *Cameron v. Bank of Nova Scotia* (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R.(2)303, 86 A.P.R. 303 (C.A.), where he said at p. 11:

In my opinion, if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they did a binding agreement. On the contrary, they would know that other bids could be received up until the application for court approval is heard – this would be an intolerable situation.

While those remarks may have been made in the context of a bidding situation rather than a private sale, I consider them to be equally applicable to a negotiation process leading to a private sale. Where the court is concerned with the disposition of property, the purpose of appointing a receiver is to have the receiver do the work that the court would otherwise have to do.

[74] Apart from the uncertainty, and indeed the speculative nature, of BLIG's proposal to be given time to match or even better the offer from LHR, acceptance of that proposal would adversely affect the integrity of the process undertaken by the Receiver.

[75] The Receiver negotiated in good faith with LHR. The Receiver's decision to enter into an agreement with LHR, under the circumstances at the time the agreement was negotiated was

reasonable. There were no competing offers despite months of marketing. The Receiver was not privy to the e-mails of February 5 and March 10, 2015 between Ms. MacKay and LHR and Mr. Wetelainen and LHR. The Receiver was unaware that Mr. Wetelainen had taken it upon himself to enter into a confidentiality agreement with LHR. The Receiver had been informed in September 2015 by LHR that Mr. Wetelainen would have no involvement with LHR's plans going forward. With the secured creditors' interests as its prime concern, the Receiver had no reason to reject the offer of LHR, with nothing to replace it.

[76] The court will not lightly interfere with the commercial judgment of a receiver. Nor will it examine in minute detail all the circumstances leading up to the decision of a receiver to sell what, in this case, was an unusual asset in difficult economic conditions. See *Soundair* at para. 47.

4. Consideration whether there has been unfairness in the working out of the process.

[77] BLIG's opposition to the sale is focussed on this principle.

[78] I address, firstly, the question of the Confidentiality Agreement between BLIG and LHR and BLIG's provision of confidential documents to LHR under that Confidentiality Agreement.

[79] In my view, these actions by BLIG were contrary to the provisions of the Receivership Order of September 11, 2014 and the SISP Order of November 24, 2014.

[80] Paragraph 3 of the Receivership Order gives the Receiver broad powers. Pursuant to paragraph 3(g), these powers are exclusive to the Receiver. There is an express exclusion of the Debtor. Included in the Receiver's exclusive powers is the right, under paragraph 3(e) to execute any documents of any nature in respect of the assets, undertakings and properties of BLIG. Pursuant to paragraph 3(g), the Receiver alone has the right to market any or all of the assets, undertakings and properties of BLIG as the Receiver, in its discretion, may deem appropriate.

[81] Under paragraph 2 of Schedule "A" of the SISP Order, the Receiver was empowered to solicit offers to purchase, or to invest in, the Debtor and/or the Property.

[82] Paragraph 4 of Schedule "A" contemplates confidentiality agreements between the Receiver and prospective purchasers. It contemplates that the Receiver will establish a virtual data room. These are not activities upon which the Debtor should be embarking.

[83] I do not accept BLIG's submission that because the Receiver was not appointed as manager of the Debtor and was not to operate the business, that this gave BLIG licence to engage in parallel negotiations that could well compromise the Receiver's negotiations. The fact that the Receiver did not operate the business does not derogate from the exclusivity of the powers that it the Receiver was given under the Receivership Order and the SISP Order.

[84] I understand BLIG to be submitting that although the Receiver could pursue a sale of assets, it was open to BLIG to pursue the alternative of a refinancing or restructuring without the Receiver's knowledge or consent. This flies in the face of paragraph 2 of Schedule "A" of the SISP Order which provides that the Receiver may solicit both or either the purchase of or

investment in the Debtor. If BLIG's submission is accepted, it could result in the Debtor working at cross-purposes with the Receiver and, as here, without the Receiver's knowledge of what marketing or solicitation activities that the Debtor might be engaged in.

[85] There can be no questioning of the duty of the Debtor, and all persons related to the Debtor, to make full and frank disclosure and production of information and documents to the Receiver.

[86] Paragraph 5 of the Receivership Order provides that all persons "...shall forthwith advise the Receiver of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Receiver, and shall deliver all such Property to the Receiver upon the Receiver's request".

[87] Paragraphs 6 and 7 of the Receivership Order require all persons to advise the Receiver of the existence of any books, documents, contracts, records and computer or other data storage information, provide it to the Receiver and give the Receiver unfettered access to all electronic storage of information. "Contracts" would include the Confidentiality Agreement between BLIG and LHR.

[88] By providing confidential information to LHR, without disclosing that fact to the Receiver, and by failing to provide much of that information to the Receiver, BLIG did not comply with the Receivership Order.

[89] I accept that BLIG may have had an expectation that it was involved in discussions with LHR about refinancing or restructuring the company.

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[90] However in opposing the Receiver's sale, BLIG should not be able to rely on an expectation interest founded on a Confidential Agreement that it should not have signed, or rely on the delivery of confidential documents that it should not have given to LHR and, moreover, having done this while keeping the Receiver in the dark and while withholding from the Receiver significant portions of the confidential information that it had provided to LHR.

[91] Even if the Receiver was aware of discussions between BLIG and LHR about possible refinancing or restructuring, the Receiver was not required to work towards restructuring or refinancing rather than an asset purchase. Paragraph 7 or Schedule "A" to the SISP Order provided that if, following the bid deadline, the Receiver was unable to negotiate a final agreement, it was at liberty to negotiate and finalize an asset purchase agreement with such other offering party as it deemed appropriate, subject to the requirement that it consult first with the secured lenders. Paragraph 7 of Schedule "A" did not require the Receiver to consult with the Debtor, nor did any other provision of the SISP Order or the Receivership Order require the Receiver to consult with the Debtor before finalizing the Sale Agreement.

[92] BLIG attacks the impartiality of the Receiver on the basis that (1) the Receiver knew that LHR had made a commitment to BLIG to work toward refinancing or restructuring the company, and (2) the Receiver itself created an expectation in BLIG that the receivership would be resolved by a refinancing or restructuring through LHR.

[93] It bears repeating, in considering this attack on the Receiver's neutrality, that the Receiver had no knowledge of the Confidentiality Agreement between BLIG and LHR and no knowledge that BLIG had given LHR confidential documents, until this was revealed in Mr.

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Wetelainen's affidavit of December 17, 2015. This was well after the non-binding Letter of Intent from LHR in September 2015 and after the November 27, 2015 Sale Agreement.

[94] Did the Receiver have notice of a commitment by LHR to work with BLIG? Mr. Wetelainen expressly deposes that he did not disclose the Confidentiality Agreement and delivery of confidential documents to LHR because BLIG and LHR "were working together". In my view, the e-mails between BLIG and LHR that the Receiver saw, and the fact that Mr. Wetelainen met with LHR representatives and toured the mine site with them, would not have reasonably led the Receiver to conclude that LHR had committed itself to work with Mr. Wetelainen in refinancing or restructuring the company. The only agreement that BLIG and LHR actually entered into was the Confidentiality Agreement which was unknown to the Receiver. In the circumstances as known by the Receiver, I do not see that the September 17, 2015 e-mail from LHR reasonably put the Receiver on notice that it should make inquiries about why LHR would not be working with BLIG to refinance or restructure the company. As the Receiver reports, LHR indicated to the Receiver that it would not be involving Mr. Wetelainen nor offering him a position with the purchaser. I see no reason why the Receiver should have been obligated to explore this straight forward position or, even more, why the Receiver should have been obligated to lobby LHR on behalf of BLIG.

[95] I do not accept that the Receiver's actions between April and September, 2015 could be reasonably viewed as creating an expectation in Mr. Wetelainen that the receivership would be resolved by LHR and BLIG working together.

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[96] BLIG relies upon the June 1, 2015 e-mail from the Receiver to Mr. Wetelainen in which the Receiver stated that, in conducting its due diligence, LHR wanted to speak to Mr. Wetelainen “about the go forward and what stake you and the team would have going forward so I think it in your interest to work with them.”

[97] In my view, this does not rise to the level that the Receiver was representing that there was a commitment by LHR to involve Mr. Wetelainen and the “team” in a refinancing or restructuring.

[98] I assume BLIG wants the court to conclude that if the Receiver had been put on inquiry after September 17, 2015:

- (a) the Receiver would have learned of the Confidentiality Agreement between LHR and BLIG;
- (b) the Receiver would have learned of the confidential information that BLIG gave to LHR; and
- (c) the Receiver would have concluded that there was a fiduciary relationship between LHR and BLIG that precluded an asset purchase.

[99] If this is BLIG’s argument, it is of no avail. In effect, BLIG would be saying that if the Receiver had made inquiries the Receiver would have discovered BLIG’s wrongful conduct and that this discovery would have been to the benefit of BLIG.

[100] The Receiver was never presented with any refinancing or restructuring proposal by LHR or BLIG. It had only an asset purchase proposal from LHR. If in fact, LHR was going to

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refinance or restructure the company, it would have had to do so through the Receiver, not through Mr. Wetelainen.

[101] BLIG submits that the Receiver has lost its impartiality by acting as an “advocate” for LHR and/or the Applicant, in the sense that the Receiver is a spokesperson or is campaigning on their behalf.

[102] The fact that a receiver recommends a course of action does not mean that it has lost its neutrality. The Receiver has a duty to exercise its judgment under the mandate given to it by the Receivership Order and to make recommendations to the court. Provided that the Receiver has acted reasonably, prudently and fairly, its decision should be given deference.

[103] Although the Receiver owes a duty to all the stakeholders to treat them fairly, the Receiver’s primary task is to ensure that the highest value is received for the assets to maximize the return to the creditors. See *Soundair* at p. 12.

[104] BLIG has presented no evidence that it is able to refinance or restructure the company. In the words of the Receiver, BLIG is “hopelessly insolvent”. It owes over \$3.5 million to the secured creditors, over \$8 million to the unsecured creditors and more than \$450,000 to Canada Revenue Agency.

[105] I do not find that the conduct of the Receiver shows any unfairness to BLIG. At all times, BLIG had all of the information that it needed and, indeed, certain information that the Receiver did not have, to make its own proposal. BLIG simply did not have the financial wherewithal to make a commercially viable offer to the Receiver. Even during the month after

BLIG became aware of the details of the Sale Agreement, it has not been able to put forward a concrete proposal, only a request for further time to raise funds.

[106] In *Soundair*, Galligan J.A., at para. 58 adopted these statements by Anderson J. contained in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87:

The court should not proceed against the recommendations of its Receiver except in special circumstances and where the necessity and propriety of doing so are plain. Any other rule or approach would emasculate the role of the Receiver and make it almost inevitable that the final negotiations of every sale would take place on the motion for approval.

It is equally clear, in my view, though perhaps not so clearly enunciated, that it is only in an exceptional case that the court will intervene and proceed contrary to the Receiver's recommendations if satisfied, as I am, that the Receiver has acted reasonably, prudently and fairly and not arbitrarily.

[107] In my view, the Receiver acted reasonably, prudently and fairly and not arbitrarily. It followed a reasonable and thorough process to get the best price for the assets of BLIG, a process which was fair to all persons who might be interested in purchasing the assets of BLIG or investing in BLIG. There was only one offer. Mr. Wetelainen's actions in dealing directly with LHR and withholding confidential information from the Receiver, and any expectations that he may have had arising out of those activities, do not justify rejection of the Sale Agreement. This is not an "exceptional case" which warrants the court proceeding against the Receiver's recommendations.

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[108] Is there reason to refuse approval of the Sale Agreement because LHR had confidential information from BLIG that the Receiver did not have at the time the Sale Agreement was negotiated?

[109] Firstly, this is confidential information that the Receiver should have had at the outset and that it would have shared with LHR. BLIG cannot rely on its own contravention of the Receiving Order to complain about this. Secondly, even with this new information, the Receiver does not seek to re-open the Sale Agreement to obtain a better price. Thirdly, and in my view most importantly, even with this new information, the secured lenders support approval of the Sale Agreement. The secured lenders are faced with a significant shortfall between their outstanding loans and what they will receive from the cash payment, net of the Receiver's fees and disbursements. Nevertheless, the secured creditors do not want to reopen the process on the chance that with this additional confidential information there may be another proposal that will give them a better result.

### **Sealing Order**

[110] The parties consent to an order sealing the unredacted version of the Third Report from the public record until after the closing of the Transaction.

[111] In this regard, paragraph 49 of these Reasons have been redacted until after the closing of the Transaction. The unredacted paragraph has been released to counsel for the Receiver, counsel for the Applicant, counsel for BLIG and counsel for LHR, all of whom have the unredacted Third Report.

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### **Fees and Disbursements of the Receiver and its Legal Counsel**

[112] The parties consent to an order approving the fees and disbursements of the Receiver and its legal counsel as set out in the Third Report.

### **Authorization for the Receiver to file an Assignment in Bankruptcy on Behalf of the Debtor.**

[113] The Receiver wishes to assign BLIG into bankruptcy.

[114] Presently, the Property of BLIG is subject to a deemed trust in favour of the Crown in respect of the claim by Canada Revenue Agency for HST. An assignment in bankruptcy would nullify that deemed trust so that the HST claim would rank equally with all other unsecured creditors of BLIG.

[115] Bankruptcy would not affect the amounts deemed to be held in trust with respect to source deductions.

[116] Additionally, if BLIG was assigned into bankruptcy and funds were realized from the monetization of the share consideration in excess of the secured creditors' loans, those funds would go to the trustee in bankruptcy, to be distributed to the unsecured creditors.

[117] BLIG opposes the request for an assignment in bankruptcy. BLIG submits that although bankruptcy would assist the secured lenders, it would be detrimental to the directors of BLIG because Canada Revenue Agency may proceed against them personally for the HST that was not paid.

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[118] The fact that the directors of BLIG may be personally liable for the claim of Canada Revenue Agency for HST that BLIG failed to remit is not a reason to deny an assignment in bankruptcy.

[119] In *Grant Forest Products Inc. v. Toronto-Dominion Bank* 2015 ONCA 570, at para.118, the Court of Appeal held that a creditor may seek a bankruptcy order under the *Bankruptcy and Insolvency Act* to alter priorities in its favour.

[120] To similar effect is the following statement by Wallace J.A. in *Bank of Montreal v. Scott Road Enterprises* 1989 Carswell BC 387 (B.C.C.A.):

The fact that a secured creditor involves the provision of the Bankruptcy Act to establish its priority in accord with a scheme of distribution provided by that act cannot constitute a “sufficient cause” for refusing a receiving order (s. 43(7)) [of the Bankruptcy and Insolvency Act.

[121] As observed in *Deakin v R.*, 2012 TCC 270 (Tax Ct. of Can.), at para. 24, the directors’ liability provisions of the Excise Tax Act should be regarded by business persons as similar to a form of personal guarantee by the directors.

[122] If HST was properly payable by BLIG I see no principled basis why it would be preferable that the outstanding amounts should be borne by the secured creditors rather than by the persons who had the responsibility at law to ensure that HST, like the outstanding source deductions, was remitted to the government.

[123] There is no issue that BLIG is insolvent within the meaning of the Bankruptcy and Insolvency Act. I see no reason to deny an assignment in bankruptcy.

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**Thomas Unger**

[124] At the conclusion of submissions on the motions on December 30, 2015, Thomas Unger, who was Vice President, Corporate Development and a director and shareholder of BLIG and who had been present in the body of the court during submissions, asked to address the court. Mr. Unger had not filed any materials with the court, he was not represented by counsel and he is not a party to the proceeding. Mr. Unger wanted to speak about an offer that he had made.

[125] All parties – the Receiver, BLIG, the Applicant and LHR – objected to Mr. Unger addressing the court and took the position that he did not have standing.

[126] I declined to hear the evidence that Mr. Unger wanted to give from the counsel table.

[127] During the afternoon of January 6, 2016, the law firm of Kronio, Rotsztain, Margles, Cappel sent to my attention an e-mail, copied to the parties, which stated:

We have been requested by 176724 Canada Ltd. and 1874084 Ontario Limited to forward to you the attached Affidavit of Thomas George Unger, sworn January 6, 2016

Yours very truly,  
Kelly Banet Law Clerk  
Kronis, Rotasztain, Maryles, Cappel LLP.

[128] I did not grant Mr. Unger standing on December 30, 2015 nor did I grant him leave to file an affidavit after the motions had been argued.

[129] The law firm which e-mailed Mr. Unger's Affidavit is not shown as counsel of record for Mr. Unger. The affidavit shows him as unrepresented.

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[130] Mr. Unger deposes that on November 25, 2015, after having been in contact with the Receiver since late 2014, he sent a detailed written “offer” to the Receiver to confirm that 1874084 Ontario Limited, a company of which he was the principal, was “very serious” in wanting to complete the purchase of the assets of the debtor. I have reviewed this letter, attached as an Exhibit to the affidavit. It is not a formal offer but rather a letter setting out what steps Mr. Unger had taken and planned to take to purchase BLIG’s assets.

[131] Mr. Unger deposes that on November 27, 2015, at approximately 5:00 p.m., the Receiver confirmed that it had forwarded 187084’s “offer” to the Applicant. Mr. Unger deposes that the Receiver advised that it was not able to consider 1874084’s “offer” as it had just completed an agreement of purchase and sale with LHR that afternoon.

[132] On December 1, 2015, Mr. Unger sent the Receiver a letter saying that he was “...well underway to complete a restructuring for the Bending Lake assets” and that he was raising an amount of money in excess of the amount set out in his letter of November 25, 2015. Again, I do not regard this letter as a formal offer.

[133] On December 24, 2015, Mr. Unger delivered a Binding Letter of Intent on behalf of 1874084 to the Receiver for a purchase price in excess of the amounts set out in his first two letters.

[134] On December 28, 2015, Mr. Unger wrote to the Receiver, criticizing the process that the Receiver had followed. He asked the Receiver to request that the Court approve the Binding

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Letter of Intent from 1874084 on the grounds that it was better for the secured lenders than the offer from LHR.

[135] In my view, Mr. Unger does not have standing. He is not a party. If I am incorrect in this view, he has come to the proceedings too late to consider his position.

[136] I rely on statements of O'Connor J.A., speaking for the Court of Appeal in *Skyepharmaceutical PLC v. Hyal Pharmaceutical Corp.*, [2000] O.J. No. 467, paras. 16, 17 and 22:

16. Moreover, the fundamental purpose of the sale approval motion is to consider the best interest of the parties with a direct interest in the proceeds of the sale, primarily the creditors. The unsuccessful would be purchaser has no interest in this issue. Indeed, the involvement of unsuccessful prospective purchasers could seriously distract from this fundamental purpose by including in the motion other issues with the potential for delay and additional expense.

17. In making these comments, I recognize that a court conducting a sale approval motion is required to consider the integrity of the process by which the offers have been obtained and to consider whether there has been unfairness in the working out of that process. *Crown Trust v. Rosenberg*, supra; *Royal Bank of Canada v. Soundair Corp.*, (1991), 4 O.R. (3d) 1 (C.A.). The examination of the sale process will in normal circumstances be focused on the integrity of that process from the perspective of those for whose benefit it has been conducted. The inquiry into the integrity of the process may incidentally address the fairness of the process to prospective purchasers, but that in itself does not create a right of interest in a prospective purchaser that is affected by a sale approval order.

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22. In the result, I conclude that the fact that Bioglan made an offer to purchase Hyal's assets did not give it a right or interest that was affected by the sale approval order. It was not entitled to standing

on the motion on that basis nor is it now entitled to bring this appeal on that basis.

[137] I also refer to *Terrace Bay Pulp Inc.(R)*, [2012] O.J. No. 3628, a decision of Morawetz J, where he found that the Monitor in a *Companies' Creditors Arrangement Act* proceeding acted properly in accepting the Purchaser's Offer in the face of a non-binding offer from another party that was approximately 30% higher.

[138] I find it noteworthy that the secured lenders opposed granting Mr. Unger standing at the hearing of the motions.

#### **Motions by BLIG**

[139] For the reasons given, BLIG's motion to not approve the Sale Agreement, to restrain the Receiver from dealing with LHR and for leave to disclose to the shareholders of BLIG the value of the LHR offer to enable them within 90 days to match the LHR cash consideration portion of the LHR offer, is dismissed.

[140] I also dismiss BLIG's motion to strike certain paragraphs of the Receiver's Third Report.

[141] BLIG sought to strike the paragraphs, on various grounds including that the paragraphs failed to disclose certain information, that they did not provide adequate explanations for the Receiver's actions, that they lacked factual underpinnings and that they did not present the best option for the stakeholders.

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[142] BLIG did not provide any authority for its motion to strike the paragraphs of the Report. In essence, the motion to strike was based on the fact that Mr. Wetelainen's affidavit contained information that either added to the information in the Third Report, or set out a position different from the position taken by the Receiver. In my view, that is not a basis for striking the paragraphs of the Report, identified in the motion. Without deciding whether in an appropriate case the court may strike parts of a receiver's report, suffice it to say that in the circumstances of this case I do not accept that BLIG has established that there is reason to strike the impugned paragraphs of the Third Report.

[143] In determining the outcome of the motions of the Receiver and of BLIG, I have considered the three reports of the Receiver, as well as the Receiver's Supplemental Report to the Third Report, and the affidavits of Mr. Wetelainen and Laura MacRae, filed on behalf of BLIG.

### **Conclusion**

[144] For the reasons given, the relief sought in the Receiver's Notice of Motion, dated November 30, 2015, is granted. The motions of BLIG are dismissed.

### **Costs**

[145] If costs of the motions are in issue, the parties shall contact the Trial Co-ordinator at

Thunder Bay within 30 days to set a date to speak to the matter, failing which costs shall be deemed to be settled.

“original signed by RSJ Shaw”

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The Hon. Mr. Justice D. C. Shaw

**Released:** January 8, 2016

**CITATION:** 2403177 Ontario Inc. v. Bending Lake iron Group Limited, 2016 ONSC 199  
**COURT FILE NO.:** CV-14-0274-00  
**DATE:** 2016-01-8

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

**B E T W E E N:**

2403177 Ontario Inc.

Applicant

- and -

Bending Lake Iron Group Limited

Respondent

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**DECISION ON MOTION**

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Shaw J.

**Released:** January 8, 2016

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# TAB 9

**CITATION:** *CIBC v. 1340182 Ontario Limited et al.*, 2024 ONSC 3658  
**COURT FILE NO.:** CV-23-00698539-00CL  
**DATE:** 20240626

**ONTARIO - SUPERIOR COURT OF JUSTICE – COMMERCIAL LIST**

**APPLICATION UNDER** section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. c-43, as amended

**RE:** Canadian Imperial Bank of Commerce, Applicant

**AND:**

1340182 Ontario Limited and Kazembe & Associates Professional Corporation,  
Respondents

**BEFORE:** Peter J. Osborne J.

**COUNSEL:** *Clifton P. Prophet*, Counsel for the Applicant, CIBC

*Timothy R. Dunn*, Counsel for the Receiver, Moving Party, MNP Ltd.

*David A. Seed*, Counsel for the Moving Party, Creditor, Arthur Bryan

*Ian P. Katchin*, Counsel for the 1<sup>st</sup> Mortgagee, 923944 Ontario Ltd.

*Demetrios Yiokaris*, Counsel for the Respondent, Kazembe & Associates Professional Corporation

**HEARD:** April 8, 2024

**REASONS FOR DECISION**

**The Two Motions before the Court, and the Positions of the Parties**

1. MNP Ltd., in its capacity as the Court-appointed Receiver (“MNP” or the “Receiver”) of the property of Kazembe & Associates Professional Corporation and 1340182 Ontario Limited (“182”), seeks an order:

- a. approving the Second Report of the Receiver dated March 28, 2024 and the activities described therein;
- b. approving the Receiver’s Interim Statement of Receipts and Disbursements;

- c. authorizing the Receiver to make a distribution to the secured creditors of 182 (defined below);
- d. approving the fees and disbursements of the Receiver and its counsel;
- e. authorizing the Receiver to assign 182 into bankruptcy; and
- f. approving the discharge of the Receiver upon the filing of the Discharge Certificate.

2. Save for the relief sought in respect to the distribution to creditors, none of the relief sought by the Receiver is opposed, and it is strongly supported by the Applicant, the Canadian Imperial Bank of Commerce (“CIBC”).

3. The distribution motion is opposed as a result of a priority dispute among the relevant mortgagees who have registered interests against title to a property located at 1888 Wilson Avenue, Toronto (the “Wilson Property”). Those mortgagees are Arthur Bryan (“Bryan”), 923944 Ontario Ltd. (“944”) and CIBC. The sale transaction of the Wilson Property closed on January 15, 2024 and the Receiver is holding approximately \$1.5 million of net sales proceeds.

4. At the time of the sale, the Parcel Register for the Wilson Property reflected 944 as the first mortgagee, CIBC as the second mortgagee, and Bryan as the third mortgagee. Bryan claims that his mortgage should rank in first position (with the result that 944 and CIBC would then rank second and third, respectively) on the basis that the Respondent, Kazembe, his former lawyer, fraudulently discharged his previously registered mortgage.

5. The Receiver relies upon its Second Report dated March 28, 2024, together with Appendices thereto, and the Supplement to the Second Report. 944 relies upon the Affidavit of Jasvir Dhillon sworn March 20, 2024, together with exhibits thereto. The Respondent Kazembe relies on his own Affidavit sworn March 21, 2024, together with Exhibits thereto. CIBC relies upon the Affidavits of its Senior Risk Manager, Jo-Ann Mitchell, sworn April 27, 2023 and March 25, 2024, respectively.

6. Bryan brings a cross-motion for an order:

- a. declaring that his previous mortgage, registered on August 16, 2018, was fraudulently discharged;
- b. declaring that the discharge registered on February 13, 2019 is fraudulent, void and of no force or effect; and
- c. declaring that the discharged mortgage is in first position and ranks in priority to all other charges or mortgages registered as against title to the Wilson Property after August 16, 2018.

7. Bryan relies on his own Affidavit sworn March 7, 2024 together with exhibits thereto.

8. The Receiver takes no position on the priority of the respective mortgages, but needs direction from this Court as to which party should receive the funds in its possession, being the net proceeds of sale of the Wilson Property.

9. CIBC, 944 and Kazembe all oppose the position advanced and the relief sought by Bryan in respect of the priority of his mortgage and the corresponding distribution of proceeds.

10. As discussed further below, the issue of whether the Bryan mortgage was fraudulently discharged is the subject of a pending action in this Court brought by Bryan against Kazembe, his professional corporation and his real estate company, 182. Kazembe therefore takes the position that no finding of fact with respect to whether the mortgage discharge was fraudulent should be made in this proceeding.

11. Defined terms in this Endorsement have the meaning given to them in the motion materials, including the Second Report, unless otherwise stated.

### **The Motion of the Receiver for Relief other than Distribution of Proceeds**

12. The basis for the Receiver's Motion for relief other than distribution of proceeds is fully set out in the Second Report and the Supplement thereto.

13. Courts have authorized Court-appointed receivers to file assignments in bankruptcy on behalf of insolvent entities in appropriate circumstances: *Royal Bank of Canada v. Gustin*, 2019 ONSC 5370, at paras. 12 and 15; and *Royal Bank of Canada v. Sun Squeeze Juices Inc. and Beit-Kirur Ltd.*, 1994 CarswellOnt 266 at paras. 6 and 10.

14. The granting of such authority to file an assignment in bankruptcy may be appropriate even where one of the purposes in so doing is reversing the priorities in respect of a claim for HST advanced by the Canada Revenue Agency: *2403177 Ontario Inc. v. Bending Late Iron Group Limited*, 2016 ONSC 199 at paras. 113 – 123.

15. In the particular circumstances of this case, I am satisfied that the financial records of 182 are in such a state that it is impossible for the Receiver to determine the HST Claim. The Applicant, CIBC, has requested, and the Receiver believes it is prudent, to seek an order expanding its powers to include the ability to assign 182 into bankruptcy to clarify the priority in respect of the HST Claim.

16. As set out in the Second Report, since there were no recoveries from the assets of the operating company of Kazembe (the Respondent professional corporation), and neither that company nor 182 had any employees, the Receiver does not anticipate a CRA claim for unremitted employee source deductions.

17. However, the CRA did send a letter to the Receiver in July, 2023 identifying an obligation of the Respondent professional corporation in respect of filed HST returns totaling \$171,334.24. In addition, the CRA filed a claim against 182 for \$103,503.77 in respect of unremitted HST. The Receiver has not assessed the priority of the CRA HST Claim as against the security interests of the respective mortgagees and proposes to maintain the funds as part of the Holdback it seeks to maintain as set out in the Second Report.

18. The Receiver recommends that it distribute all available funds to whichever party this Court may direct, subject to maintaining the Holdback in respect of outstanding and estimated fees for the Receiver and its counsel, and for the HST Claim.

19. I am satisfied for the reasons set out in the Second Report that such expanded powers are appropriate in this case.

20. I am also satisfied that the combined Interim Statement of Receipts and Disbursements as attached to and described in the Second Report is appropriate and it is approved.

21. Further, I am satisfied that the professional fees and disbursements incurred by the Receiver and its counsel are appropriate, reasonable, and reflect the time spent to complete the activities of the Receiver as set out in the Second Report. Those activities themselves are reasonable, appropriate and are consistent with the mandate given to the Receiver in the order pursuant to which it was originally appointed. See: *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851. They are approved.

22. Finally, the Receiver seeks a discharge upon completion of the Remaining Activities (as set out in the Second Report at para. 34) and the filing of the Discharge Certificate. As the Receiver will then have completed its mandate, the discharge is appropriate and it is also approved.

### **The Motion of the Receiver for Distribution of Proceeds, and the Cross-Motion of Bryan for Declaratory Relief**

23. The Respondent Kazembe operated a law practice in an office building owned by the Respondent 182 located at 1888 Wilson Ave., Toronto, Ontario (defined above as the “Wilson Property”). Both Respondent corporations were controlled by the same directing mind, the lawyer Mr. Courtney Kazembe (“Mr. Kazembe”).<sup>1</sup> The professional corporation was the operating entity running the law practice, and 182 held title to the real estate.

24. The Receiver was appointed on June 23, 2023. The Receiver entered into an agreement of purchase and sale for the Wilson Property which was approved by the Court on November 22, 2023. The sale transaction closed on January 15, 2024 and the Receiver holds approximately \$1.5 million in Net Proceeds. However, due to objections raised by Bryan, no distribution to the secured creditors of 182 has yet been made.

25. Bryan held a registered mortgage on title to the Wilson Property ranking in third position at the time of the sale. As described above, 944 and CIBC held mortgages ranking in first and second position, respectively. Bryan disputes the priority of 944 and CIBC.

26. The mortgage held by 944 at the time of closing in the principal amount of \$1 million was registered on April 4, 2019 and ranked in first position. The mortgage held by CIBC was in the principal amount of \$945,000. It was registered on August 1, 2019 and ranked in second position. The mortgage held by Bryan in the principal amount of \$200,000 was registered on August 19, 2022 and ranked in third position at the time of the sale.

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<sup>1</sup> Mr. Kazembe and the Respondent, Kazembe & Associates Professional Corporation, are referred to interchangeably as “Kazembe” unless a distinction between the two is relevant.

27. Bryan opposes the priority of the other mortgagees on the basis that Mr. Kazembe, his former lawyer, fraudulently discharged his previous mortgage registered on title to the Wilson Property on August 16, 2018, which registration date preceded the registration dates of each of the other two mortgages. Bryan alleges that this first mortgage was fraudulently discharged by Kazembe on February 13, 2019 without his permission or knowledge. His allegations against Kazembe are the subject of a pending civil action in this Court which action has not yet been determined.

28. Accordingly, the relative priority of the parties with respect to the distribution of the net proceeds from the sale of the Wilson Property depends upon whether the discharge of the Bryan mortgage is effective or not as against the other mortgagees. It is common ground that if the discharge is effective as against the other mortgagees, the relative priority of the parties would be as reflected on title to the Wilson Property at the time of the sale: 944, then CIBC, then Bryan. If the discharge is not effective as against the other mortgagees, and the original Bryan mortgage ought to be restored to title, the relative priority of the mortgages at the time of sale would be: Bryan, then 944, then CIBC.

### **Position of the Parties**

29. Bryan submits that Kazembe is “the architect of the entire mess”, and that he committed fraud. Accordingly, he seeks an order declaring that the discharge of his prior mortgage was fraudulent and of no force or effect, and that his prior first mortgage should therefore still be reflected on title, all with the result that he should rank first with respect to the distribution of net proceeds from the sale of the Wilson Property. I pause to observe that this is part of the relief he seeks in the pending action discussed below.

30. Bryan submits that the remedy he seeks on these motions, which amounts, in sum, to declaratory relief with the effect that his mortgage ranks in priority to the other two, should flow as a statutory remedy and not from the equitable exercise of discretion, all as a result of statutory amendments made in 2006 which operate so as to provide that fraudulent documents are not deemed to be registered on title to property.

31. Bryan submits that none of the other parties disputes that his original mortgage was registered first, and therefore, if still valid, it would rank in priority to the subsequent mortgages of 944 and CIBC. He further submits that no other party disputes his position that the discharge of that mortgage was the result of a fraudulent act by Kazembe.

32. It follows, he submits, that he lost his first-ranked position due to the fraud of his former lawyer, Kazembe, and that the 2006 amendments to the *Land Titles Act*, R.S.O. 1990, c. L.5 (the “*LTA*”) operate so as to provide a complete foundation for the relief he seeks. 944 and CIBC submit that the statutory provisions, as amended, have the opposite effect.

33. Bryan argues that Kazembe is a “fraudulent person” within the meaning of the *LTA* and that the 2019 mortgage discharge (and the 2022 re-registration) were “fraudulent instruments” within the meaning of the *LTA*. He submits that the 2006 amendments to the *LTA* do not address all forms of fraud in real estate transactions, but rather were enacted to prevent fraudulent activity using title: *1168760 Ontario Inc. v. 6706037 Canada Inc.*, 7 R.P.R. (6<sup>th</sup>) 48, 2019 ONSC 4702 (Div. Ct.) (“760”).

34. Bryan submits that as a result of the 2006 amendments, a fraudulent instrument is not deemed to be embodied in the land register and to be effective according to its nature and intent, and to create, transfer, charge or discharge, as the case requires, the land or estate or interest therein mentioned in the register, all of which operates to create a system of deferred indefeasibility.

35. 944 and CIBC submit that the whole point of the 2006 amendments, embodying the mirror principle, was to ensure that instruments registered on title, even subsequent to a fraudulent instrument, were valid and enforceable unless they themselves were fraudulent, such that they are not subject to defeasibility, whether immediate or deferred.

### Analysis

36. The analysis must begin with the statutory framework found in the *LTA*, which was amended in relevant part in 2006.

37. That framework, including the relevant 2006 amendments and the rationale for the statute in the first place, was set out by the Court of Appeal in *Froom v. Lafontaine*, 2023 ONCA 519 at paras. 21 – 26 as follows:

[21] The *LTA* was originally enacted in 1885 and was modelled on the English *Land Transfer Act*, 1875 (38 & 39 Vict. c. 87). The “essential purpose of land titles legislation” like the Act “is to provide the public with security of title and facility of transfer”. The Act embodies three basic principles, namely:

\* The mirror principle – i.e., that the register of title reflects accurately and completely the state of title;

\* The curtain principle – i.e., that the register is the sole source of information regarding title such that a person need not search behind the title and investigate the property’s history; and

\* The insurance principle – i.e., that that the state guarantees the accuracy of the register and compensates any person who suffers loss as the result of an inaccuracy.

[22] The *LTA* has been amended many times, including in 2006. Before the 2006 amendments, s. 78(4) provided:

(4) When registered, an instrument shall be deemed to be embodied in the register and to be effective according to its nature and intent, and to create, transfer, charge or discharge, as the case requires, the land or estate or interest therein mentioned in the register.

[23] The bare text of s. 78(4) led to the argument that the *LTA* conferred “immediate indefeasibility” on registered instruments, meaning that instruments were effective and indefeasible as soon as they were registered, even if they were fraudulent. This argument was accepted in *CIBC Mortgages Inc. v Chan*, 2004 CanLII 66351

(Ont. S.C.), appeal dismissed by this court under the name of *Household Realty Corporation Ltd. v. Liu* (2005), 2005 CanLII 43402 (ON CA), 261 D.L.R. (4th) 679 (Ont. C.A.), where the mortgage obtained through the use of a forged power of attorney was enforced. The result created a furor.

[24] Sections 78(4.1) and (4.2) were added to the *LTA* in 2006 and create an exception for “fraudulent instrument[s]” with the effect that such instruments are not deemed to be embodied in the register despite the words of s. 78(4). **The 2006 amendments provide:**

### **Exception**

**(4.1) Subsection (4) does not apply to a fraudulent instrument that is registered on or after October 19, 2006.**

### **Non-fraudulent instruments**

**(4.2) Nothing in subsection (4.1) invalidates the effect of a registered instrument that is not a fraudulent instrument described in that subsection, including instruments registered subsequent to such a fraudulent instrument.**

[25] The 2006 amendments added several definitions to s. 1 of the *LTA*. The term “fraudulent instrument” is defined in several ways in s. 1, some of which incorporate the concept of a “fraudulent person”.

1 ... “fraudulent instrument” means an instrument,

(a) under which a fraudulent person purports to receive or transfer an estate or interest in land, ...

“fraudulent person” means a person who executes or purports to execute an instrument if,

(a) the person forged the instrument,

(b) the person is a fictitious person, or

(c) the person holds oneself out in the instrument to be, but knows that the person is not, the registered owner of the estate or interest in land affected by the instrument;

[26] The 2006 amendments to the *LTA* were passed in the wake of this court’s decision in *Household Realty* and before the court overruled that decision in *Lawrence*. The amendments were aimed at ensuring that fraudulent instruments would not be given effect in the title register. The legislative debates evidence a concern about

real estate fraud and the attendant risk that a property owner might lose their property or become responsible for a fraudulent mortgage. It is noteworthy that there was no specific discussion in the legislative debates to the 2006 amendments about their impact on corporations owning land and securing financing through mortgages and charges.

[Emphasis added].

38. Those “new” subsections were intended to protect innocent parties by denying the ordinary benefit of registration to fraudulent instruments. In *CIBC Mortgages Inc. v. Computershare Trust Co. of Canada*, 2016 ONSC 7094 (“*CIBC v. Computershare*”) at para. 29, the Divisional Court quoted the following from the explanatory note for Bill 152, enacted as the *Ministry of Government Services Consumer Protection and Service Modernization Act, 2006*, the statute that included the 2006 amendments to the *LTA* excerpted above:

The Bill amends section 78 of the [*LTA*] so that a fraudulent instrument will not have any effect on the title register. *Instruments registered subsequent to a fraudulent instrument are deemed to be effective.* A fraudulent instrument is defined to be one under which a fraudulent person purports to receive or transfer an estate or interest in land, one that is given under a forged power of attorney, a transfer of an instrument that is a charge given by a fraudulent person or a type of fraudulent instrument specified by the regulations made under the Act. If an instrument registered on or after October 19, 2006 is fraudulent, the Director of Titles can delete it from the title register. A person prescribed by the regulations made under the Act who thereby suffers a loss can recover compensation from The Land Titles Assurance Fund if the person has demonstrated due diligence and is not otherwise restricted from recovering compensation from the Fund.

[Emphasis added.]

39. All parties agree that subsections 78(4.1) and (4.2), added in 2006, together with the statutory definitions, are centrally relevant to the disposition of this matter. Yet Bryan on the one hand and CIBC and 944 on the other hand, submit that they yield opposite results.

40. Bryan’s position is that the discharge of his first mortgage is a “fraudulent instrument” within the meaning of s. 1 of the *LTA* such that, pursuant to ss.78(4.1), it is not effective to discharge his mortgage, notwithstanding the fact that it was registered on title. It follows, he submits, that even if the 944 mortgage in the CIBC mortgage are valid, they rank behind his first mortgage since the discharge was fraudulent.

41. I cannot accept the submission. Subsection 78(4.2) further requires that the mortgages registered subsequent in time to the discharge of Bryan’s mortgage (i.e., the mortgages of 944 and CIBC respectively) also be “fraudulent instruments” within the meaning of s.1. They are not.

Those two mortgages are not “fraudulent instruments” and nor are the individuals who executed or purported to execute them “fraudulent persons”.

42. It follows, in my view, that even if the discharge of the Bryan mortgage was a fraudulent instrument executed by a fraudulent person, that does not invalidate the effect of the subsequently registered mortgages of 944 and CIBC as valid and effective first and second ranking mortgages respectively, since neither of them are fraudulent instruments. This is the inevitable result of the application of the clear meaning of those defined terms to the facts of this case.

43. Further in my view, the facts of this case are, in relevant part, analogous to the facts in *CIBC v. Computershare*, where the Divisional Court held that two mortgages that had been registered subsequent in time to a mortgage that was fraudulently discharged were not “fraudulent instruments” within the meaning of the *LTA*.

44. I reach the same conclusion here for the same reasons, and in my view, CIBC and 944 are, just like the subsequent mortgagees in *CIBC v. Computershare*, “entitled to rely on both the mirror principle (the register is a perfect mirror of the state of title) and the curtain principle (a purchaser need not investigate the history of past dealings with the land, or search behind title)”: *CIBC v. Computershare*, at para. 63.

45. I am reinforced in this conclusion by the fact that in this particular case, the evidence satisfies me that CIBC had no knowledge (actual or imputed) about the circumstances of the previously discharged Bryan mortgage.

46. Courts have held that notwithstanding the provisions of the *LTA* and the statutory analysis I have summarized above, s.78(4) applies only to *bona fide* registrants for value - those who do not have notice of an interest in land that differs from that of the register: see *Thomas Farrell et al. v. John Kavanagh et al.*, 2020 ONSC 8154 at para. 190, quoting from the Court of Appeal for Ontario in *Stanbarr Services Limited v. Metropolis Properties, Inc.*, 2018 ONCA 244 (“*Stanbarr*”).

47. I cannot accept the assertion of Bryan that CIBC did have actual or imputed knowledge of the fact that Kazembe fraudulently discharged Bryan’s previously registered mortgage. First, this would require as a starting point, a finding of fact that the Bryan discharge was fraudulently registered, and I am not prepared to make that finding, for the reasons set out below.

48. Even if I were prepared to make that finding however, I find that CIBC and 944 were unaware of the circumstances of the discharge of that mortgage or indeed any of the relevant facts of the relationship between and among Kazembe, his legal professional corporation, his real estate holding company 182, and Bryan.

49. CIBC and 944 take no position on whether the discharge of the Bryan mortgage was in fact a fraudulent instrument. I pause to observe that the issue of whether that discharge was fraudulent is squarely the subject of the pending action by Bryan against Kazembe and his companies, which is yet to be determined. On this motion and apparently in that action, Kazembe vigorously denies such allegations.

50. I do not need to make a determination for the purposes of the disposition of this motion as to whether that discharge was fraudulent, and to be clear, I do not do so. Even if it was fraudulent, I am satisfied that neither CIBC nor 144 had any knowledge, actual or imputed, that it was.

51. CIBC led evidence in the form of a sworn affidavit from Ms. JoAnn Mitchell, Senior Risk Manager at CIBC. Ms. Mitchell stated clearly that the bank would not have advanced any funds as against its mortgage if there was any concern that it would not receive a clear and enforceable first mortgage or if it was aware that Bryan's mortgage had been improperly discharged (see para. 3). There is no evidence to the contrary.

52. As against that evidence of CIBC, I have significant concerns about the evidence of Bryan in this proceeding in relation to his fundamental position that the discharge of his mortgage was fraudulent and that he should be restored to first-ranking position. On his examination, he confirmed that he had filed no evidence in these proceedings that confirmed that the relevant solicitor acting for CIBC, Ms. Dana Campbell, was aware that Kazembe had fraudulently discharged his mortgage (see Q. 336-338).

53. Moreover, I am not persuaded by Bryan's submission, made in the alternative, that knowledge should be imputed to CIBC. As stated by the Court of Appeal in *Stanbarr* at para. 26:

[26] Because notice has been considered to be one of a limited number of exceptions to the mirror principle, it has been strictly construed. Our courts insist on actual notice of a defect. Actual knowledge means just that; the party must actually know about the defect. It is not sufficient that it has become aware of facts that may suggest it should make inquiries: *Rose v. Peterkin* (1885), 13 S.C.R. 677, [1885] S.C.J. No. 45, at pp. 694-95 S.C.R. Constructive knowledge is insufficient. Thus, the factual analysis in considering a notice argument is limited to a consideration of what the party knew, not what it could have known had it made inquiries.

54. Bryan's argument is founded on the fact that since Kazembe's firm acted for the bank on the mortgage (as is often the practice in real estate transactions where lawyers for borrowers often act for lenders also), the knowledge of Kazembe himself should be imputed to CIBC. However, CIBC hired a different lawyer at that firm, Ms. Dana Campbell. There is no evidence from which I could conclude that Ms. Campbell had any knowledge of the fraudulent discharge (again, assuming that to be a fact) of the prior Bryan mortgage.

55. Even if Kazembe himself had been retained by CIBC (or alternatively, if, notwithstanding the lack of any evidence of actual knowledge on the part of Ms. Campbell, knowledge could be imputed from the law firm retained, regardless of which particular solicitor was involved), in my view, the exception to the proposition that knowledge of a solicitor will be imputed to his or her client would apply here.

56. That exception is applicable where the solicitor intentionally and fraudulently withholds the information from the client: *Royal Trust Corp. of Canada v. Giuggio*, 1993 CanLII 5575 (ONSC) at para. 77; and *Re Durbin et al. v. Monserat Investments Ltd., Re Monserat Investments Ltd. and Broderick*, [1978] 20 O.R. (2d) 181, 1978 CanLII 1730 (ONCA) at para. 8.

57. For all of these reasons, I find that neither 944 nor CIBC had knowledge, actual or imputed, that the previous Bryan mortgage had been fraudulently discharged, even assuming (as noted above) that such was a fact.

58. For completeness, I recognize that CIBC, in its Letter of Direction to Ms. Campbell, instructed her to ensure that the CIBC mortgage ranked in first position, and in fact this did not occur since the CIBC mortgage was registered in second position behind the 944 mortgage. However, nothing in that fact changes my conclusion above about the knowledge of CIBC with respect to the (allegedly) fraudulent discharge of the Bryan mortgage. The only relevance of that fact is that the CIBC mortgage ranks second behind 944. It still ranks ahead of the subsequently registered Bryan mortgage.

59. I pause to observe (here is as good a place as any) that I also reject Bryan's challenge to the validity of the 944 mortgage which he makes in support of his cross-motion. 944 has filed evidence confirming the loan is evidenced by a loan agreement, the valid mortgage, and a valid registered charge. Kazembe, for his part, does not dispute the validity of the 944 first mortgage and states that the principal amount of \$1 million secured by the mortgage loan on the Wilson Property is still owing.

60. On cross-examination, Bryan himself conceded that he has no reason to dispute the terms of the 944 mortgage. The Receiver has obtained a security opinion from its counsel to the effect that the 944 mortgage is valid and enforceable.

61. I recognize that Bryan challenges the authenticity of the signature of Kazembe on a letter dated June 22, 2022 acknowledging the debt owing to 944. He does so (even though Kazembe himself admits the signature is his own) by filing a report from a forensic document examiner dated February 1, 2024 which opines that there is a "high probability" that the signature is not that of Kazembe. There is no evidence in the record filed by Bryan, however, in the form of an affidavit from that forensic document examiner. I have placed no weight on that report, but even if I had, my conclusion would be the same for the reasons set out above and below.

62. For all of these reasons, I would decline to grant Bryan any declaratory relief to the effect that his subsequently registered mortgage ought to rank ahead of the 944 mortgage.

63. Similarly, Bryan does not challenge the validity of the CIBC loan, the fact that the indebtedness remains outstanding, or the fact that CIBC was entitled to the mortgage to secure that loan. His only challenge, as I have addressed above, was to the position of CIBC asserted on this motion that its mortgage ought to rank in priority to his own. The Receiver has obtained a security opinion from its counsel to the effect that the CIBC mortgage is valid and enforceable.

64. Accordingly, I am satisfied that the mortgages of both 944 and CIBC are valid and enforceable.

65. It follows, given the defined terms in s. 1 of the *LTA* and the application of ss.78(4.2), that the mortgages of 944 and CIBC were validly registered and maintain their first and second priority positions, respectively. Whether the subsequently registered (or reregistered) mortgage in favour of Bryan is valid, I need not make any determination beyond concluding, as I have done, that if it is valid, it ranks in third position behind the mortgages of 944 and CIBC.

66. Finally, even if I were in error in my interpretation of the relevant provisions of the *LTA*, I would decline to grant the relief sought by Bryan on his cross-motion in the form of a declaration that he has a valid first-ranking mortgage security.

67. The evidence in respect of whether the first Bryan mortgage that is alleged to have been fraudulently discharged was valid in the first place, is at best problematic.

68. Bryan's evidence is that the mortgage was registered to secure a \$200,000 loan made to Kazembe. That loan in turn arose out of the sale of another property Bryan states that he owned and on which Kazembe acted as his solicitor at 18 Wayne Ave., Cambridge, Ontario. Bryan's evidence is that upon completion of the sale, Kazembe failed to remit to him the full net proceeds of sale without any lawful right to do so. When Bryan subsequently discovered this, Kazembe told Bryan he needed the funds, and requested that Bryan treat the unauthorized shortfall as a loan, which Bryan apparently agreed to do.

69. However, the evidence on this motion is that the property at 18 Wayne Ave., Cambridge, Ontario, was in fact owned by Bryan's son, Austin Bryan. The loan which Bryan says the mortgage was intended to secure was, however, said to be owed to Bryan himself.

70. For his part, Kazembe denies that his firm represented Bryan at all with respect to the sale of 18 Wayne Ave., Cambridge, Ontario, and that he (Kazembe) acted only for Austin Bryan. Kazembe's evidence is that his own solicitor's file reflects that the registered owner of the property was Austin Bryan; that Austin Bryan swore the land transfer tax affidavit registered on title confirming that he was the actual transferee; and there is no mention of Bryan nor of any trust in favour of Bryan. Austin Bryan signed the agreement of purchase and sale as seller and owner and swore a contemporaneous declaration dated July 13, 2018 to the same effect.

71. Bryan asserts that there was supposed to have been a trust agreement (notwithstanding the declarations of Austin Bryan to the contrary), and yet there is no evidence before me from Austin Bryan at all, nor is there any evidence of any written trust agreement. Asked on cross-examination why his son Austin Bryan would swear a statutory declaration to the effect that he was the absolute owner of the property and no one else had an interest in it if indeed there was a trust agreement in favour of his father, Bryan refused to answer the question.

72. Kazembe denies that either he or 182 borrowed \$200,000 from Bryan (or from Austin Bryan) around that time, and says he has no loan documents evidencing any such arrangement. Bryan has not produced any such documents either.

73. Finally, Kazembe takes the position that the Bryan mortgage was discharged with Bryan's consent and authorization, and not fraudulently. As stated above, I make no determination in that regard. Kazembe states that he cannot recall why the second Bryan mortgage was registered.

74. CIBC submits, and I accept, that in the circumstances, there is no evidence on which I can conclude that Bryan actually advanced any funds to Kazembe since the funds "advanced" via the shortfall in the remitting of net proceeds were funds that belonged to Mr. Austin Bryan and Mr. Austin Bryan is not a party to the Bryan mortgage at all.

75. Moreover, Kazembe's company, 182, did not provide any guarantee of the loan.

76. It would follow from all of this that there is no evidence before me on these motions upon which I can conclude that 182 or Kazembe are actually liable in law to Bryan for the loan in any event of whether the discharge of the Bryan mortgage was fraudulent or not.

77. CIBC submits that this conclusion is reinforced by the documentary evidence filed by Bryan in support of his motion, which includes a letter from 182 (Kazembe's company) to Bryan dated July 2, 2019, acknowledged with Bryan's signature, and which references a "second mortgage *to be registered* on the [Wilson Property]". [Emphasis added]. The date of this letter precedes the date of the registration of the CIBC mortgage.

78. CIBC submits that this supports an inference that a mortgage in favour of Bryan had in fact not yet been registered and would be registered in the future, particularly since Bryan made no inquiries about the issue at all for over three years until November, 2022 when he eventually obtained a parcel register search of the Wilson Property.

79. As stated above, in my view, the application of the relevant provisions of the *LTA* to the facts in the record are dispositive of both of these motions, and I need not make (and do not make) any determination about whether the first Bryan mortgage was fraudulently discharged by Kazembe.

80. I am satisfied, however, for all of the reasons set out above, that even if I were in error in my application of the *LTA*, in my view, I cannot conclude on the evidence before me that the equities favour Bryan.

### **Result and Disposition**

81. The motion of the Receiver is granted. The Second Report and the activities described therein are approved, as are the Receiver's Interim Statement of Receipts and Disbursements, and the fees and disbursements of the Receiver and its counsel. The Receiver is authorized to assign 182 into bankruptcy, and the Receiver is discharged, effective upon the filing of the Discharge Certificate.

82. The Receiver is authorized to make a distribution to the secured creditors of 182 in a manner consistent with these Reasons, on the basis that, as against the Wilson Property, 944 holds a valid first-ranking mortgage and CIBC holds a valid second-ranking mortgage. I make no determination as to whether the previously registered Bryan mortgage was fraudulently discharged or whether the subsequently registered Bryan mortgage is valid.

83. Bryan's cross-motion is dismissed.

84. At the conclusion of the hearing of these motions, the parties made submissions with respect to costs.

85. Bryan submitted that this was a difficult case and the issues were novel, with the result that there ought to be no order as to costs, or in the alternative, an order should be made directing each party to bear its own costs.

86. Kazembe's professional corporation submitted that costs should be payable by Bryan to each of the three responding parties: CIBC, 944 and Kazembe's professional corporation, each in

the amount of \$20,000 (in fact, in his case, for a total inclusive of disbursements and HST of \$21,341.40) for an aggregate total of approximately \$60,000.

87. 944 seeks its costs, inclusive of fees and disbursements, on a partial indemnity basis in the amount of \$10,805.35.

88. CIBC submits that it, too, is entitled to its costs, and seeks the same amount as 944, or approximately \$11,000, also on a partial indemnity basis.

89. Pursuant to s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c.C.43, costs are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

90. Rule 57.01 provides that in exercising its discretion under s. 131, the court may consider, in addition to the result in the proceeding (and any offer to settle or contribute), the factors set out in that Rule.

91. The overarching objective is to fix an amount that is fair, reasonable, proportionate and within the reasonable expectations of the parties in the circumstances: *Boucher v. Public Accountants Council for the Province of Ontario*, (2004) 71 O.R. (3d) 291 (C.A.), 2004 CanLII 14579 (Ont. C.A.).

92. Rule 57.03 provides that, on the hearing of a contested motion, unless the court is satisfied that a different order would be more just, the court shall fix the costs of the motion and order them to be paid within 30 days.

93. Having considered the Rule 57.01 factors as against the evidence on these motions, the success of 944 and CIBC as against Bryan on the motion and cross-motion, and considering the submissions of all of the parties with respect to costs including as to quantum, in my view an appropriate disposition with respect to costs in this matter is that Bryan should pay to each of 944 and CIBC the sum of \$8,500 inclusive of fees, disbursements and taxes. Costs of the Receiver should be borne by the estate in the ordinary course. I make no order as to costs against or in favour of Kazembe, who supported CIBC and 944 with respect to the law, but urged that no finding be made with respect to the allegations that the discharge of the Bryan mortgage was fraudulent.

94. The costs payable to each of 944 and CIBC by Bryan shall be paid within 30 days.

Osborne J.