Federal Court of Appeal  Cour d'appel fédérale

Date: 20170727

Docket: A-400-15

Citation: 2017 FCA 162

CORAM: **PELLETIER J.A.**
NEAR J.A.
RENNIE J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

CALLIDUS CAPITAL CORPORATION

Respondent

Heard at Toronto, Ontario, on January 19, 2017.

Judgment delivered at Ottawa, Ontario, on July 27, 2017.

REASONS FOR JUDGMENT BY:	RENNIE J.A.
CONCURRED IN BY:	NEAR J.A.
DISSENTING REASONS BY:	PELLETIER J.A.

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REASONS FOR JUDGMENT

RENNIE J.A.

I. Introduction

[1] The Crown appeals from the Order of the Federal Court (per McVeigh J.), dated August 17, 2015 (2015 FC 977), in which the Court answered the following question in the affirmative and awarded costs to Callidus Capital Corporation (Callidus):

> Does the bankruptcy of a tax debtor and subsection 222(1.1) of the *Excise Tax Act*, R.S.C. 1985, c. E-15, as amended (the *Excise Tax*

> *Act*) render the deemed trust under section 222 of the *Excise Tax Act* ineffective as against a secured creditor who received, prior to bankruptcy, proceeds from the assets of the tax debtor that were deemed to be held in trust for the Plaintiff?

[2] The Crown claimed it was owed $177,299.70 plus interest in unremitted GST and HST by the operation of the deemed trust mechanism in section 222 of the *Excise Tax Act*, as amended. It commenced an action in the Federal Court to recover the debt. Callidus defended, and the parties agreed to set down a question of law for determination. For the purposes of determining the question of law the parties submitted an agreed statement of facts, which is reproduced below:

> **Background**
>
> 1. Cheese Factory Road Holdings Inc. ("Cheese Factory") is a privately-held Ontario corporation that carried on business as a real estate investment company. Cheese Factory is or was the registered owner of properties municipally known as 680 Bishop Street, Cambridge, Ontario (the "Bishop Property") and 181 Pinebush Road, Cambridge, Ontario (the "Pinebush Property").
>
> 2. At all material times Callidus was a privately-held Ontario corporation that carried on business throughout Canada as a lender of monies to commercial enterprises on a secured basis.
>
> **Failures to remit GST and HST**
>
> 3. The Plaintiff [Her Majesty the Queen, or the appellant] claims that between 2010 and 2013, Cheese Factory collected but failed to remit GST and HST to the Receiver General for a total amount of $177,299.70.
>
> **BMO credit facilities**
>
> 4. Pursuant to a commitment letter dated September 22, 2004, Cheese Factory obtained a credit facility in the principal amount of $1,950,000 from the Bank of Montreal ("**BMO**"). Cheese Factory also granted the guarantee and security documents listed on **Schedule "A"** attached hereto [not attached, can be found at AB,

Tab 4, page 35] in favour of BMO to secure its direct and indirect obligations to BMO (collectively, the "**Security**").

5. As of December 2, 2011:

(a) Cheese Factory was in default under the credit facility extended to it by BMO in the principal amount of $1,950,000;

(b) Cheese Factory was indebted to BMO as borrower under the commitment letter in the amount of $1,416,418.61 (inclusive of principal and interest but exclusive of fees;

(c) Cheese Factory was in default under the guarantees granted by it to BMO; and

(d) Cheese Factory was indebted to BMO as guarantor in the amounts of $3,387,658.53 and US$81,233,28, which amounts include principal and interest but do not include fees.

Assignment of debt and obligations to Callidus

6. Pursuant to an Assignment of Debt and Security agreement dated December 2, 2011, BMO assigned to Callidus all of its right, title and interest in and to the direct and indirect indebtedness and obligations owed to it by Cheese Factory, along with the Security.

7. Pursuant to a Forbearance Agreement dated December 2, 2011, Callidus agreed to forbear from enforcing the BMO agreements, subject to and in accordance with the terms and conditions of the Forbearance Agreement. Pursuant to the Forbearance Agreement, Callidus also agreed to extend to Cheese Factory (and other debtors) certain demand credit facilities, which amended the credit facilities granted by BMO.

Sale Proceeds from the Bishop Property

8. Pursuant to the terms of the Forbearance Agreement, Cheese Factory agreed to market the Bishop Property, among other properties, for sale and to deliver the net sales proceeds to Callidus to partially repay the amounts owed to Callidus under the credit facilities.

9. On or about April 5, 2012, Cheese Factory sold the Bishop Property to Poladian Holdings Inc. for a purchase price of $790,000.

10. On or about April 9, 2012, Callidus received the sum of $590,956.62 from the sale of the Bishop Property (the "**Sale Proceeds**").

11. Callidus has applied the Sale Proceeds to partially reduce the outstanding indebtedness and obligations owed to it by Cheese Factory.

Rent Proceeds from the Pinebush Property

12. Pursuant to the terms of the Forbearance Agreement and a Blocked Accounts Agreement dated November 9, 2011 (the "**Blocked Accounts Agreement**"), Cheese Factory also agreed to open blocked accounts (the "**Blocked Accounts**") at a Royal Bank of Canada ("**RBC**") and to deposit all funds received from all sources into the blocked accounts.

13. The Blocked Accounts Agreement provides that:

> (a) Cheese Factory shall hold all cash and Cheques (as defined therein) received by it in trust for Callidus, segregated from all other funds and other property of Cheese Factory, until such time as the cash and Cheques are delivered to RBC for deposit in the Blocked Accounts; and
>
> (b) RBC shall transfer, prior to the end of each Business Day, all amounts on deposit in the Blocked Accounts to Callidus' account or accounts.

14. All rent proceeds received from Cheese Factory or from the tenant of the Pinebush Property since December 2011 have been deposited into the Blocked Accounts.

15. Since the date that Callidus received an assignment of the BMO credit facilities and security on December 2, 2011 up to and including July 31, 2014, the sum of $780,387.62 in gross rent has been deposited into the Blocked Accounts.

16. Callidus has applied all amounts deposited into the Blocked Accounts to partially reduce the outstanding indebtedness and obligations owed to it by Cheese Factory.

Deemed Trust Asserted by the Plaintiff

17. On or about April 2, 2012, the Plaintiff, by way of a letter to Callidus, claimed an amount of $90,844.33 on the basis of the

deemed trust mechanism of the *Excise Tax Act*, R.S.C. 1985, c. E.15, as amended (the "**ETA**")

Bankruptcy of Cheese Factory

18. On or about November 7, 2013, at the request of Callidus, Cheese Factory made an assignment in bankruptcy under the *Bankruptcy or Insolvency Act*, R.S.C. 1985, c. B-3, as amended.

Action Commenced by the Plaintiff

19. The Plaintiff commenced this proceeding against Callidus pursuant to a statement of claim dated November 25, 2013.

20. The Plaintiff claims the total amount of $177,299.70 plus interest from Callidus on the basis of the deemed trust mechanism governed by section 222 of the ETA on account of GST and HST that Cheese Factory collected but failed to remit for reporting periods commencing on October 31, 2010 up to and including January 31, 2013.

21. The Plaintiff contends that as a result of Cheese Factory's failures to remit GST and HST to the Receiver General:

> (a) all of Cheese Factory's assets were deemed to be held in trust in favour of the Plaintiff in priority to the claims of Callidus pursuant to section 222 of the ETA; and,
>
> (b) all proceeds of Cheese Factory's property received by Callidus, up to the amount secured by the deemed trust, should have been paid to the Receiver General of Canada as a result of the deemed trust mechanism under section 222 of the ETA.

22. Callidus served and filed a statement of defence.

Question of Law

23. Does the bankruptcy of a tax debtor and subsection 222(1.1) of the ETA render the deemed trust under section 222 of the ETA ineffective as against a secured creditor who received, prior to the bankruptcy, proceeds from the assets of the tax debtor that were deemed to be held in trust?

II. Legislation

[3] The relevant provisions of the *Excise Tax Act* provide:

***Excise Tax Act,* R.S.C., 1985, c. E-15**	***Loi sur la taxe d'accise,* L.R.C. (1985), ch. E-15**
Trust for amounts collected	**Montants perçus détenus en fiducie**
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).	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).
Amounts collected before bankruptcy	**Montants perçus avant la faillite**
(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.	(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.
Withdrawal from trust	**Retraits de montants en fiducie**
(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	(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	a) le crédit de taxe sur les intrants qu'elle demande dans une déclaration produite aux termes de la

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

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

estate or property of the person and whether or not the property is subject to a security interest	biens ou de son patrimoine et qu'ils soient ou non assujettis à un droit en garantie.
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.***	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.***
[Emphasis added]	[Soulignement ajouté]

III. Federal Court decision

[4] The Court answered the question in the affirmative.

[5] The Court found that the deemed trust mechanism under section 222 of the *Excise Tax Act* operates to grant the Receiver General "absolute priority", but that the deemed trust, and the accompanying priority, are extinguished upon bankruptcy of the debtor such that the Crown becomes an unsecured creditor in respect of unremitted amounts. The Court determined that any liability that arises under subsection (3) to disgorge proceeds is extinguished upon bankruptcy by the operation of subsection (1.1). Subsection (3) operates to extend the deemed trust created pursuant to subsection (1) to the debtor's property, and any liability arising from it is dependent on the continuing existence of the deemed trust.

[6] The Court reviewed the legislative history and priority schemes of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 (the BIA), the *Companies' Creditors Arrangement Act,* R.S.C., 1985, c. C-36 (the CCAA) and the reasoning of the Supreme Court of Canada in *Century*

Services Inc. v. Canada (Attorney General), 2010 SCC 60, [2010] 3 S.C.R. 379 (*Century Services*), and observed that the enactment of subsection 222(1.1) appeared to align with Parliament's intent to "move away from asserting priority for Crown claims in insolvency law". While deemed trusts in relation to source deductions, such as Canada Pension Plan contributions, "remain operative" in bankruptcy, deemed trusts over GST/HST do not.

[7] Applying the reasoning in *Century Services* and the earlier decision of *Caisse populaire Desjardins de l'Est de Drummond v. Canada*, 2009 SCC 29, [2009] 2 S.C.R. 94 (*Caisse*), the judge held that the absence of express confirmation of the trust upon bankruptcy in the BIA reflected "Parliament's intention to allow it to lapse upon insolvency proceedings being commenced". The judge found that, similar to the factual scenarios in both Supreme Court of Canada cases, "the Crown seeks to maintain the deemed trust without express legislative language to do so," and further, that subsection 222(1.1) operates to "remove [the] imperative" language in subsection 222(3) of "shall be paid". The judge was not persuaded by the Crown's reference to legislative amendments in the year 2000 (the 2000 amendments) to the deemed trust mechanism in the *Income Tax Act* (R.S.C., 1985, c. 1 (5th Supp.)) (*Income Tax Act*) because they were specific to source deductions, and distinguished the cases on which the Crown relied for the same reason. The judge favoured Callidus' argument that the amendments made to the *Excise Tax Act* in 1992 demonstrated Parliamentary intent to "oust the Crown priority over all other interests in bankruptcy," and that this interpretation was evident in the jurisprudence.

[8] The judge dismissed the Crown's analogy to other collection tools in the *Excise Tax Act*, noting that those provisions did not assist the Crown's position. Both sections 317 (garnishment)

and 325 (non-arms' length transfers) require a "crystallizing event" before liability will attach prior to bankruptcy, and the Crown had not demonstrated how to reconcile a "pre-existing, fully engaged cause of action" with subsection (1.1). In the case of a non-arms' length transfer, the event is the transfer of property for less than fair market value, while in the garnishment context the crystallizing event is service of a "requirement to pay" (RTP) notice. The judge stated that, had an RTP notice been issued in this case, Callidus' obligation to pay would have survived bankruptcy of the debtor.

[9] The judge ultimately held that the tax debtor's bankruptcy engaged subsection 222(1.1) of the *Excise Tax Act*, which rendered the deemed trust, and any independent liability arising from operation of the deemed trust, ineffective in regard to the pre-bankruptcy amounts Callidus had received.

IV. Issues

[10] Before this Court, Callidus submits that, on a proper reading of the statutory language, the deemed trust under subsection (1) and the extension under subsection (3) are both extinguished upon bankruptcy. As the Crown relies on subsection (3) to establish the personal liability of the secured creditor, Callidus argues it should follow that any personal liability must be extinguished upon bankruptcy as well.

[11] The Crown concedes that, upon the bankruptcy of a tax debtor, subsection 222(1.1) of the *Excise Tax Act* renders the deemed trust under subsection 222(3) of the *Excise Tax Act* ineffective with respect to the debtor's property at the time of bankruptcy. The Crown assert,

however, that the contested question on appeal is whether subsection 222(1.1) of the *Excise Tax Act* also extinguishes the distinct and personal liability of the secured creditor that may arise prior to bankruptcy by virtue of subsection 222(3) of the *Excise Tax Act*.

[12] The respondent urges that the judge correctly found that subsection (1.1) reflects Parliament's intent to move away from Crown priority in insolvency law, in particular with respect to GST/HST. It is conceded by the Crown that the deemed trust ceases to operate upon the debtor's bankruptcy, specifically in relation to GST/HST amounts collected but not remitted prior to bankruptcy. I agree with the judge that Parliament has drawn a clear distinction post-bankruptcy between source deductions under the *Income Tax Act* and GST/HST amounts under the *Excise Tax Act* by virtue of subsection 222(1.1) and subsections 67(2) and (3) of the BIA.

[13] The issue here however, is the priority that may have existed prior to any insolvency or bankruptcy proceedings. Determination of the question of law turns on the interpretation of the effect of bankruptcy on the *prior* operation of the deemed trust mechanism as against a secured creditor who received proceeds from deemed trust assets of the tax debtor *prior* to bankruptcy.

V. Analysis

[14] The answer to the question on appeal turns on the application of the governing principles of statutory interpretation. *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 (*Rizzo*) instructs at para. 21, quoting E.A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87 that "[t]oday there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act,

the object of the Act, and the intention of Parliament". Put otherwise, the intention of Parliament is to be gleaned from the text, read in its context and in light of its purpose. Applying these principles, it is my view that the question should be answered in the negative.

[15] Support for this conclusion is found in the language of section 222, to which I turn. Section 222 of the *Excise Tax Act* provides a mechanism whereby the Crown can recover collected, but unremitted, GST or HST.

[16] Subsection 222(3) operates to deem all of a tax debtor's property to be held in trust for the benefit of the Crown where GST/HST is collected but not remitted. It is undisputed that subsection 222(1.1) renders the deemed trust ineffective with respect to the property of the tax debtor at the time of bankruptcy. The issue in this appeal concerns the Crown's recovery mechanisms for dispositions made prior to bankruptcy.

[17] The importance of timing is reflected in the text of subsection 222(3). Assets sold by the tax debtor, or realized upon by the secured creditor prior to bankruptcy are no longer "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" at the time of bankruptcy, and as a result, are not available to all creditors upon bankruptcy. *First Vancouver Finance v. Minister of National Revenue,* 2002 SCC 49, para. 42, [2002] 2 S.C.R. 720 (*First Vancouver*) confirms that "when an asset is sold by the tax debtor, the deemed trust ceases to operate over that asset". The subsequent extinction of the deemed trust on bankruptcy is irrelevant with respect to assets that

have already been sold – it has already disappeared. This interpretation is supported by the legislative evolution of subsection (1.1).

[18] Amendments in the year 2000 to the deemed trust mechanism in both the *Income Tax Act* and the *Excise Tax Act* imposed an obligation on secured creditors to pay proceeds derived from trust assets to the Crown (subsection 222(3)). This amendment, including wording that proceeds "shall be paid to the Receiver General in priority to all security interests" was prompted by the decision in *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (*Sparrow*). In *Sparrow*, the Court held that analogous deemed trust provisions for source deductions did not oust a secured creditor's security interest in a debtor's inventory. In *Sparrow,* the Supreme Court of Canada suggested this wording as the language that Parliament could add if it wished to confirm the priority of the Crown's deemed trust.

[19] The first test of the amended provisions arose in *First Vancouver*. The Court held that the enhanced trust provisions confirmed Crown priority over secured creditors.

[20] The amended trust provisions in the ITA came before this Court in *Canada (Procureure generale) c. Banque Nationale du Canada,* 2004 FCA 92, [2004] F.C.J. No. 371 (*Banque Nationale)* where, at paragraph 40, the Court held:

> [40] It seems obvious to me that a secured creditor who does not comply with his statutory obligation to "pay" the Receiver General the proceeds of property subject to the deemed trust in priority over his security interest is personally liable and thereby becomes liable for the unpaid amount. The amount is "payable" out of the proceeds flowing from the property and, as we have seen, section 222 of the ITA provides that "All... amounts payable under this Act are debts due to Her Majesty and recoverable as such...."

> (Emphasis added). In light of these provisions, and since the respondents concede that they received the proceeds from the sale of the property subject to their security interest, without making the remittance that was payable, the appellant has a cause of action to recover these amounts.
>
> [Emphasis in original]

[21] This Court, in *Banque Nationale* noted that the Crown has absolute priority over proceeds from property subject to a deemed trust, and that "the positive obligation imposed on the secured creditor to pay the Receiver General the proceeds from the property subject to the trust could not be clearer": *Banque Nationale* at para 37. The Court went on to note that a secured creditor who does not comply with this obligation "is personally liable," and the amount is "payable" to the Receiver General and may be enforced as a cause of action under the appropriate *Income Tax Act* provisions.

[22] Similarly, I note that a "tax debt" in the "Collection" section of the *Excise Tax Act* is defined as "any amount payable or remittable by a person under this Part," and tax debts are recoverable by the Crown in Federal Court: *Excise Tax Act* subsections 313(1) and (1.1). The Court in *Banque Nationale* held that the cause of action arises "when the Minister becomes aware of the failure by the secured creditor to pay": at para. 44. On this Court's reasoning in *Banque Nationale*, the Crown has a cause of action to enforce the personal liability of a secured creditor who does not comply with its statutory obligation to pay under the *Excise Tax Act*.

[23] Given the near-identical language of the two provisions, it is my view that the reasoning in *Banque Nationale* is dispositive of this appeal. Secured creditors who do not comply with the obligation to pay proceeds derived from deemed trust assets are personally liable to the Crown,

which has a separate cause of action against them, irrespective of the subsequent bankruptcy of the debtor.

[24] I note that the use of the imperative "shall" in subsection 222(3) "confers no residual discretion": Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Canada: LexisNexis, 2014), at 91-92. The protection offered the Crown by the provision is not passive – it creates a mandatory obligation: see *Banque Nationale* at paras. 37, 40. While the judge was correct to note that *Sparrow, First Vancouver* and *Banque Nationale* pertained to the deemed trust mechanism specific to source deductions under the *Income Tax Act*, the salient point, from a statutory interpretation perspective, is that the 2000 amendments are materially identical to those made contemporaneous to the amendments to the *Excise Tax Act* and operate analogously prior to bankruptcy.

[25] Given this similarity, both mechanisms render a secured creditor who receives funds out of the deemed trust personally liable for the amount owed to the Crown under an independent cause of action: *Banque Nationale*, at para. 40. The distinction urged by Callidus, namely that *Banque Nationale* concerned payroll deductions and not GST, is of no consequence. Prior to bankruptcy, the recovery mechanisms in subsection 227(4.1) of the *Income Tax Act* and subsection 222(3) of the *Excise Tax Act* operate, for present purposes, identically, and the related jurisprudence is equally applicable.

[26] While subsection 222(1.1) releases a tax debtor's assets from the deemed trust upon bankruptcy, the subsection does not extinguish the pre-existing personal liability of a secured

creditor who received proceeds from the deemed trust. The personal liability is fully engaged, the debt is due and can be pursued by the Crown in a cause of action independent of any subsequent bankruptcy proceedings. The continued existence of the cause of action is not dependent on the debtor's other assets that may or may not remain in trust, as it arises because of the secured creditor's breach of a statutory obligation to remit. To find otherwise would effectively neutralize the deemed trust mechanism with respect to GST/HST amounts.

[27] I note that Callidus relies heavily on *Caisse* and *Century Services* to support its argument with respect to liability. These cases are of limited assistance. *Caisse* did not concern either the issue of a deemed trust or the independent liability of a secured creditor, rather, the issue was the extent of the Crown's interest in GST collected by a trustee in bankruptcy. *Century Services* concerned whether the deemed trust provisions of the *Excise Tax Act* continued under CCAA proceedings, which are not at issue.

[28] Callidus points further to the case of *The Bank of Nova Scotia v. Huronia Precision Plastics Inc.* (2009), 50 C.B.R. (5th) 58 (Ont. S.C.J. - Commercial List) (*Huronia*), in which a receiver was appointed, some of the debtor's assets were sold, and the bank made a motion to lift the stay in order to bring a bankruptcy application against the debtor. The Crown moved for an order directing the receiver to pay unremitted GST immediately. The motion judge held that the bank had the ability to reverse the priority of the deemed trust by bringing an application for bankruptcy, and denied the Crown's motion. Callidus argues that, on the appellant's reading of the statute, the receiver in *Huronia* would have had a duty to remit GST to the Crown

notwithstanding the subsequent bankruptcy of the debtor. Callidus argues that this was exactly what the motion judge in *Huronia* specifically rejected.

[29] It is difficult to glean much from the very brief *Huronia* decision, which focused on the particular wording of a court order. There was also a receiver and a stay of proceedings in place in *Huronia*, such that it is not clear whether insolvency proceedings had already commenced. As well, the factual matrix in this appeal does not invoke the reversal of priority post-bankruptcy; rather this appeal addresses the effect of bankruptcy on the liability of a secured creditor that may arise as a result of pre-bankruptcy priority.

[30] Again, continuing with the plain language of section 222, subsection (1.1) does not say that, upon the debtor's bankruptcy, all rights that arose as a result of the deemed trust are extinguished. Nor is there language in section 222 to the effect that the deemed trust evaporates retroactively so as to extinguish liability arising before bankruptcy. Subsequent bankruptcy simply operates to release the debtor's assets from the deemed trust. The argument that the evaporation of the trust on bankruptcy works retroactively, and undoes or unwinds legal obligations that are already engaged, has no support in the text, and, as we will see, undermines the purpose of the 1992 amendment.

[31] In the present case, proceeds from a sale of the tax debtor's property were paid to the secured creditor. The debtor subsequently made an assignment into bankruptcy. Pursuant to the language of subsection (3), any proceeds should have been paid to the Crown in priority to any security interest pre-bankruptcy. Callidus has conceded that the deemed trust mechanisms in

both the *Income Tax Act* and the *Excise Tax Act* operate in the same manner prior to bankruptcy. Proceeds were paid out of priority in contradiction to the express wording of subsection (3), which created an obligation, independent of the existence of the deemed trust, to pay.

[32] I turn next to context, which includes analogous collection tools within the *Excise Tax Act* that impose obligations on third parties. For example, the garnishment provisions in section 317 of the *Excise Tax Act* use the same language regarding paramountcy over all statutes except the BIA. In this context, the courts have accepted that, where an RTP notice is served pre-bankruptcy, subsequent bankruptcy does not extinguish liability of a third party who fails to abide by the notice: *Toronto Dominion Bank v. Canada*, 2010 FCA 174, 325 D.L.R. (4th) 174, affirmed 2012 SCC 1, [2012] 1 S.C.R. 3 (*Toronto Dominion*).

[33] Further, section 325 of the *Excise Tax Act* establishes liability for a non-arms' length third party who has been transferred property. The liability of the third party is not affected by the debtor's subsequent bankruptcy: *Heavyside v. Canada*, [1996] F.C.J. No. 1608. Absent language suggesting otherwise, statutes should be read so as to achieve consistency and harmony across like provisions.

[34] Referencing other collection tools available to the Crown, the judge stated that there must be a "crystallizing event" in order to ground an independent cause of action. Had an RTP issued, Callidus' obligation to pay would have survived bankruptcy. In my view, the search for a crystallizing event or something analogous to that is not quite apt, given that the deemed trust mechanism is not located within the section of the legislation dealing with assessments, and, in

any event, there is no legislative requirement for, or mechanism by which, such a notice could issue. There is no need for a crystallizing event, as the legislation establishes the obligation to pay. The words “if at any time” make clear that the obligation has no temporal limitation, nor is it contingent on crystallizing events.

[35] It has been held by this Court, and affirmed by the Supreme Court of Canada, that section 317 (garnishment) transfers ownership of amounts otherwise owing to a tax debtor, on receipt by the garnishee of an RTP notice: *Toronto Dominion* at para. 52. In *Toronto Dominion*, this Court held that the words establishing the supremacy of the *Excise Tax Act* over legislation except the BIA was simply intended to limit the Crown’s power to issue an RTP post-bankruptcy.

[36] Although the circumstances are not entirely analogous, under section 317 the Minister “may issue” an RTP and the amount similarly “shall be paid”. It appears that amounts owing to the tax debtor by a third party may require notice in order to “crystallize,” in the words of the judge, the Crown’s cause of action in garnishment proceedings. Where the Crown seeks to garnish, it is not necessarily clear who the cause of action is against, and for what amount. The present circumstance is the opposite. Here, the trust operates over the amounts already in the debtor’s possession, and the circumstances are such that an amount has left the trust. Both the amount and the party in receipt are known.

[37] I note further that the subsequent bankruptcy of a tax debtor does not extinguish the Crown’s right to amounts owing where an RTP issued pre-bankruptcy. It would be inconsistent if the Crown could prevent funds from entering the debtor’s estate, but it could not recover

amounts that were removed from the deemed trust out of priority to it and which have not since been returned to the debtor's estate.

[38] To conclude, I turn to the purpose of the provision in question.

[39] Callidus argues that Parliament's intent was that the Crown becomes an unsecured creditor upon the bankruptcy of the debtor in relation to amounts owed pre-bankruptcy, and that allowing this appeal would allow the Crown to recover indirectly what it cannot recover directly.

[40] Callidus contends that, upon bankruptcy, subsection (1.1) operates to extinguish both the deemed trust and to remove the imperative in subsection (3) such that the personal liability of a secured creditor who received funds is also extinguished. I have explained why this interpretation is not supported by the language of the statute, but it would also undermine the purpose of the provision. The interpretation urged by Callidus would allow a secured creditor to manipulate both pre- and post-bankruptcy priority. Callidus agrees that the Crown has priority pre-bankruptcy, and it admits that it did not abide by that priority. Yet it asks this Court to enforce post-bankruptcy priority to the opposite effect or, put otherwise, to enforce post-bankruptcy priority to defeat priorities related to pre-bankruptcy distributions.

[41] Callidus' interpretation effectively defeats the purpose of the addition of subsection 222(3), and would create perverse incentives on the part of the secured creditors to not abide by the deemed trust. This was the very mischief to which the amendments were directed:

> Thus, the amendment will ensure that tax revenue losses are minimised and that delinquent taxpayers and their secured

> creditors do not benefit from failures to remit source deductions and GST at the expense of the Crown.
>
> The deemed trust provisions will not, however, override a prescribed security interest such as a mortgage interest in real estate or other exceptions that may be provided by regulation, where the failure to remit source deductions or net GST cannot benefit the secured creditor.
>
> [Department of Finance, Press Release, 1997-030, "Unremitted Source Deductions and Unpaid GST" (7 April 1997), online: Media Room – Press Releases www.fin.gc.ca, p.2; Appellant`s Memorandum of Fact and Law, at para. 75]

[42] A finding that the secured creditor's obligation to pay Crown proceeds from the deemed trust disappears on bankruptcy would allow the secured creditor to benefit from the debtor's failure to remit, as noted by the Supreme Court of Canada in *Sparrow*. As happened here, a secured creditor could choose the timing of bankruptcy and liquidate the deemed trust assets so as to satisfy their interests at the expense of the Crown. Even if the Crown sends a demand letter or commences an action, the secured creditor could, at any time, simply trigger the bankruptcy of the tax debtor and avoid all consequences of the deemed trust priority.

[43] Callidus' interpretation would significantly dilute the absolute priority of the Crown confirmed by both Parliament and the courts in this context. This cannot be what Parliament intended. Part of the broader context is the fact that the Crown does not have knowledge of the state of affairs between the tax debtor and its creditors; hence the provision, in statute, of the ability to enforce the duty to collect and remit by third parties: *First Vancouver*, at para. 22. To allow a secured creditor to avoid the priority created by the deemed trust mechanism pre-bankruptcy would render the mechanism, and the priority it creates, effectively useless. If

Parliament had intended, as it did post-bankruptcy, for the deemed trust to have no discernable effect on priorities pre-bankruptcy, it simply could have removed the provision altogether.

[44] I would allow the appeal with costs and answer the question in the negative to the extent outlined above.

"Donald J. Rennie"
J.A.

"I agree
D. G. Near J.A."

PELLETIER J.A. (Dissenting reasons)

[45] I have read the reasons of my colleague. I come to a different conclusion for the following reasons.

[46] In brief, I am of the view that the trust created by subsection 222(3) of the *Excise Tax Act*, R.S.C. 1985 c. E-15 (the Act) lapsed due to lack of subject matter by operation of subsection 222(1.1) of the Act following Cheese Factory Road Holdings Inc.'s (Cheese Factory) bankruptcy. As of the date of bankruptcy, there were no amounts subject to the subsection 222(1) trust and therefore no property of Cheese Factory subject to a deemed trust pursuant to subsection 222(3) of the Act. As a result, no proceeds of that property were payable to the Crown by Callidus Capital Corporation (Callidus). The fact that, prior to the bankruptcy, a demand for payment was made on Callidus is irrelevant.

[47] This is an appeal from a decision of the Federal Court in which it decided a question of law. As a result, the standard of review is the appellate standard set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235: correctness for questions of law and palpable and overriding error for questions of fact and mixed fact and law, except when it is possible to identify an extricable error of law, in which case the correctness standard applies. In this case, the standard of review is correctness

[48] To assist in the analysis, I reproduce below subsections 222(1), (1.1) and (3).

222(1) Subject to subsection (1.1), every person who collects an amount	222 (1) La personne qui perçoit un montant au titre de la taxe prévue à la

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).

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.

(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) 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

(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) 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,

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

whether or not the property is subject to a security interest, and	biens de la personne, qu'ils soient ou non assujettis à un droit en garantie;
(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.	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.

[49] In order to avoid repetition and to enhance the readability of these reasons, references to subsections in the text which follows are references to subsections of section 222 of the Act, unless otherwise specified.

[50] Subsection (1) creates a trust with respect to amounts collected as tax but not remitted or applied as permitted by subsection (2) which has no application here. Subsection (3) on the other hand creates a trust with respect to the property of the "person" i.e. the tax debtor.

[51] The subsection (1) trust arises when an amount is collected as or on account of tax and ends when the amount is remitted to the Receiver General. The result is that the amount subject to the subsection (1) trust varies as amounts are collected and remittances are made to the Receiver General.

[52] The event which gives rise to the deemed trust pursuant to subsection (3) is not the failure to remit the amounts collected as tax to the Receiver General, as is the case in subsection (1). It is the failure to remit the amount deemed by subsection (1) to be held in trust for Her Majesty:

> …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* …property of the person …. is deemed … to be held, from the time the amount was collected by the person, in trust for Her Majesty… [emphasis added]

[53] As a result, if amounts are deemed to be held in trust pursuant to subsection (1) and not remitted to the Receiver General, then the property of the person is deemed to be held in trust from the time the amount was collected. It follows from this that if no amounts are deemed to be held in trust, no subsection (3) trust arises.

[54] While the subsection (3) trust attaches to property of the person, it does not capture the whole of the person's interest in their property. The property subject to the subsection (3) trust is defined as:

> … property of the person … *equal in value to the amount so deemed to be held in trust [pursuant to subsection 222(1)]* is deemed … to be held … in trust for Her Majesty … [emphasis added]

[55] This means that the corpus of the statutory trust is a limited pecuniary interest in the property of the tax debtor. Every item of the tax debtor's property is subject to this trust but only to the extent of the amount deemed to be held in trust by subsection (1). This is a necessary limitation because of the obligation to pay imposed on secured creditors who realize on their security. Subsection (3) requires them to pay "the proceeds of the property" in priority to their

security interest. The unqualified obligation to pay the proceeds would require secured creditors to pay the entire proceeds, not simply that portion of the proceeds equal to the amount deemed to be held in trust pursuant to subsection (1).

[56] Absent a clear indication of a contrary intention, legislation should be drafted and interpreted on the assumption that the Crown only collects amounts which it is owed and not more. In this case, the legislative draftsman dealt with this issue by defining the property subject to the deemed trust in such a way that trust property, and therefore the proceeds of trust property, is equal to the amount of the subsection (1) deemed trust.

[57] As this review shows, the deemed trusts created by subsections (1) and (3) are distinct but interlinked in two important ways. First, the subsection (3) trust arises when amounts deemed to be held in trust pursuant to subsection (1) are collected but not remitted. Second, the subject-matter of the subsection (3) trust is property of the tax debtor to the extent of the amounts deemed to be held in trust pursuant to subsection (1). The effect of this interlinking is that the creation of the subsection (3) trust depends on the existence of the subsection (1) trust. If no amounts are deemed to be held in trust pursuant to subsection (1), then no subsection (3) trust arises. However, once a trust has arisen, it may subsequently fail for lack of subject-matter if the amount deemed to be held in trust is reduced to nil because of payments on account or otherwise. This is because the subject matter of the subsection (3) trust is defined by reference to the amount deemed to be held in trust pursuant to subsection (1).

[58] The application of these provisions to property in the hands of the tax debtor is reasonably straightforward. The issue in this case is how these provisions apply to the tax debtor's secured creditors.

[59] Prior to bankruptcy, subsection (3) provides that where amounts deemed to be held in trust pursuant to subsection (1) have not been remitted:

> … *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 … to be held*, from the time the amount was collected by the person, *in trust for Her Majesty … and the proceeds of the property shall be paid to the Receiver General in priority to all security interests*.
>
> [emphasis added]

[60] The operation of the deemed trusts in section 222 of the Act can be illustrated by an example. Let us assume that a tax debtor has collected and failed to remit $20,000 on account of GST/HST. The tax debtor has real property which is subject to a mortgage. The mortgage lender forces the sale of the property and receives proceeds of $50,000. Subsection (1) creates a deemed trust with respect to the $20,000 collected as tax but not remitted to the Receiver General. Subsection (3) creates a trust with respect to the debtor's property but only to the extent of the amounts held in trust pursuant to subsection (1). As a result, the mortgage lender, having received proceeds of property equal in value to the amount deemed to be held in a subsection (1) trust, i.e. $20,000, is liable to pay that amount to the Crown.

[61] Would the result be any different if subsequent to the Crown's demand for payment of $20,000, the tax debtor made a $10,000 payment to the Receiver on account of GST/HST

collected but not remitted? The amount for which the secured creditor was liable would be different but the manner of determining the amount of that liability would be the same. The payment to the Receiver General would reduce the amount of the subsection (1) deemed trust to $10,000 which in turn would reduce the extent to which the debtor's property was subject to the subsection (3) deemed trust. The secured creditor would be liable to pay the proceeds of the property subject to the subsection (3) trust, i.e. $10,000. Similarly, if the tax debtor were to pay the entire $20,000, the amount of the secured creditor's liability would be reduced to nil.

[62] The significance of the last example is that a demand for payment by the Crown does not "crystallize" the amount of the debtor's or the secured creditor's liability to the Crown. That liability is determined by the amount deemed to be held in the subsection (1) trust which in turn determines the extent to which property of the debtor is deemed to be held pursuant to the subsection (3) trust.

[63] How is this scheme affected by the bankruptcy of the tax debtor? Subsection (1.1) provides that at or after the time of bankruptcy, subsection (1) does not apply to any amounts that were collected on account of tax prior to that time. The result is that after bankruptcy, there is no amount deemed to be held in trust pursuant to subsection (1) for amounts collected as tax but not remitted pre-bankruptcy. The subsection (3) trust which arose prior to bankruptcy no longer has any subject matter because the trust only attaches to property of the tax debtor to the extent of the subsection (1) trust which no longer exists. This is true for the tax debtor as well as for the tax debtor's secured creditors.

[64] I can see no difference in principle between the reduction of the subsection (1) trust to nil by payment or by operation of law. In either case, the subsection (3) trust whose operation depends upon the existence of an amount deemed to held in trust pursuant to subsection (1), is at an end. Had Parliament meant to make the subsection (3) trust a function of the continued existence of unremitted amounts, it could have said so easily enough.

[65] Does this Court's decision in *Canada (Attorney General) v. National Bank of Canada*, 2004 FCA 92, 324 NR 31 (*National Bank*) affect this conclusion? In that case, this Court said, with respect to provisions of the *Income Tax Act*, R.S.C. 1985 c.1 (5th Supp.) (the ITA) and the *Employment Insurance Act*, S.C. 1996 c. 23 (the EIA) that are substantially the same as subsections (1) and (3), that a secured creditor who received proceeds of property subject to a trust without remitting the amount of tax payable was liable to the Crown:

> It seems obvious to me that a secured creditor who does not comply with his statutory obligation to "pay" the Receiver General the proceeds of property subject to the deemed trust in priority over his security interest is personally liable and thereby becomes liable for the unpaid amount. The amount is "payable" out of the proceeds flowing from the property … and since the respondents concede that they received the proceeds from the sale of the property subject to their security interest, without making the remittance that was payable, the appellant has a cause of action to recover these amounts.
>
> *National Bank* at paragraph 40.

[66] It is important to keep the facts of *National Bank* in mind. Secured creditors of tax debtors under the ITA and the EIA had realized on their security and had failed to remit the proceeds to the extent of the outstanding tax debt to the Minister of National Revenue. At all material times, the tax debt was outstanding and, therefore, the deemed trusts under the

legislation were in effect. As a result, *National Bank* is a case about enforcing existing deemed trusts.

[67] It is true that this Court, citing the decision of the Supreme Court of Canada's decision in *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720 (*First Vancouver Finance*), said that "The trust continues to apply to all the assets for as long as the default [to remit source deductions] continues": *National Bank*, at paragraph 29. Both *National Bank* and *First Vancouver Finance* involved deemed trusts under the ITA which is not the case here. Furthermore, the ITA has no provision equivalent to subsection (1.1). As a result, *National Bank* is authority for the proposition that, prior the tax debtor's bankruptcy, the deemed trusts created by subsection 222 apply to all assets as long as there are amounts subject to the subsection (1) deemed trust. However, *National Bank* is not authority for the proposition that this state of affairs persists after the latter's bankruptcy.

[68] The Crown argues that the failure to pay the proceeds of subsection (3) trust property to the Receiver General gives rise to a separate and fully engaged cause of action against the secured creditor. Contrary to the Crown's submissions, this argument cannot be supported by this Court's decision in *National Bank* which is authority for a much narrower proposition. As I hope to have shown earlier, the notion that a secured creditor's obligation is somehow crystallized at a particular point in time without regard to the status of the subsection (1) deemed trust cannot account for reductions in the secured creditor's obligations as a result of reductions in the amounts deemed to be held in trust. If, on the other hand, the secured creditor's obligation varies with the amounts held in the subsection (1) deemed trust, there is no statutory basis for

distinguishing between reduction in the subsection (1) deemed trust due to payments on account and reductions which occur by operation of law.

[69] I recognize that this results in a situation in which a secured creditor has an incentive to resist payment in the hope that the amount of the subsection (1) deemed trust will be extinguished and may even help that process along by petitioning the tax debtor into bankruptcy. I would only say that in this case, the Crown made a demand for payment in April 2012 but appears to have taken no steps to enforce its demand until November 2013. Nor does the Crown appear to have had recourse to the other collection tools available to in under the Act. I am not persuaded that the view I take of this matter puts the Crown's interests unjustifiably at risk.

[70] To summarize, an examination of the text of subsection 222 of the Act teaches that the relationship between the deemed trusts created by subsection (1) subsection (3) is such that the extinction of the former upon bankruptcy - by operation of subsection (1.1) - puts an end to the latter at the same time.

[71] As pointed out in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21, [1998] S.C.J. No. 2 (QL), the interpretation of a statute must consider the text, the context and the purpose of the legislation. The conclusion to which I have arrived following my examination of the text of section 222 is supported by both its context and purpose.

[72] Part of the context subsection 222, and subsection (1.1) in particular, is subsections 67(2) and (3) of the *Bankruptcy and Insolvency Act* R.S.C. 1985 c. B-3 (BIA) which provide as follows:

(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 …	(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 …

[73] Subsection 67(2) makes it clear that Parliament intended to do away with the deemed trusts in bankruptcy. The effect of these trust is to withdraw the property subject to the deemed trust from the estate of the bankrupt so that the federal government's claim takes priority over the claims of unsecured creditors. By eliminating these trusts in bankruptcy, Parliament put the Crown on the same footing as unsecured creditors.

[74] The preservation of the deemed trust for unremitted source deductions in subsection 67(3) is explained by the fact that source deductions are amounts which belong to the employee in question. The trust in respect of those funds is a real trust in favour of the employees as well as a deemed trust in favour of the Crown:

> Although [s. 227(4)] calls the trust created by it a deemed one, the trust is in truth a real one. The employer is required to deduct from his employees' wages the amounts due by the employees under the statute. This money does not belong to the employer anymore. It belongs to the employees. The employer holds it in a statutory trust to satisfy their obligations.
>
> *Roynat Inc. v. Ja-Sha Trucking & Leasing Ltd.*, [1992] 2 W.W.R. 641 (Man. C.A.) at p. 646, cited with approval in *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 at paragraph 28, 143 D.L.R. (4th) 385.

[75] As a contextual factor, these provisions, together with the absence of a provision equivalent to subsection (1.1) in any of the Acts referred in subsection 67(3) of the BIA, tend to show that the Parliament intended to create a special regime for source deductions in the event of bankruptcy but that no such regime was intended in the case of amounts of unremitted tax under the Act.

[76] The purpose of subsection (1.1) was outlined in *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny*, 2009 SCC 49, [2009] 3 S.C.R. 286 where the rationale for amendments to statutory trusts in bankruptcy proceedings (including subsection (1.1) is reviewed at paragraphs 12-17. The purpose of amendments to the *BIA* and the Act was to ensure 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": see paragraph 14.

[77] The interpretation which I propose of subsections (1), (1.1) and (3) gives effect to this purpose.

[78] As a result, I am of the view that the Federal Court correctly answered the question which was put to it. I would therefore dismiss the appeal with costs.

"J.D. Denis Pelletier"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM AN ORDER OF THE FEDERAL COURT DATED AUGUST 17, 2015 NO. T-1940-13 (2015 FC 977)

DOCKET:	A-400-15
STYLE OF CAUSE:	HER MAJESTY THE QUEEN V. CALLIDUS CAPITAL CORPORATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JANUARY 19, 2017
REASONS FOR JUDGMENT BY:	RENNIE J.A.
CONCURRED IN BY:	NEAR J.A.
DISSENTING REASONS BY:	PELLETIER J.A.
DATED:	JULY 27, 2017

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