COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

Nos.: 500-09-029763-216, 500-09-029765-211
(500-11-060355-217)

DATE: October 18, 2023

CORAM: THE HONOURABLE MARK SCHRAGER, J.A.
BENOÎT MOORE, J.A.
LORI RENÉE WEITZMAN, J.A.

No.: 500-09-029763-216

ATTORNEY GENERAL OF CANADA
APPELLANT

v.

RICHTER ADVISORY GROUP INC., in continuance of proceedings for Chronométriq Inc. and Health Myself Innovations Inc.
RESPONDENT – Proposal Trustee

and

CANADIAN IMPERIAL BANK OF COMMERCE
CANADIAN BANKERS' ASSOCIATION
INSOLVENCY INSTITUTE OF CANADA
INTERVENERS

No.: 500-09-029765-211

AGENCE DU REVENU DU QUÉBEC
APPELLANT

v.

RICHTER ADVISORY GROUP INC., in continuance of proceedings for Chronométriq Inc. and Health Myself Innovations Inc.
RESPONDENT – Proposal Trustee

and

CANADIAN IMPERIAL BANK OF COMMERCE

CANADIAN BANKERS' ASSOCIATION
INSOLVENCY INSTITUTE OF CANADA
INTERVENERS

JUDGMENT

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[1] The Attorney General of Canada and the Agence du revenu du Québec appeal against the order rendered on October 27, 2021 by the Honourable Martin Castonguay of the Superior Court, District of Montreal, which approved a *Motion for the Issuance of an Order Authorizing and Approving the Interim Financing, an Administration Charge, a Sale and Investment Solicitation Process, a Directors and Officers Charge, a Key Employee Retention Program, Procedural Consolidation of the Estates, and other Relief.*

[2] For the reasons of Justice Schrager, J.A., with which Moore and Weitzman, JJ.A. concur, **THE COURT**:

In the file number 500-09-029763-216

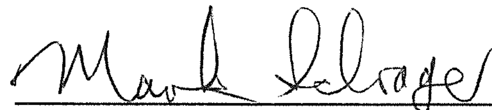
[3] **DISMISSES** the appeal;

[4] **THE WHOLE** without legal costs;

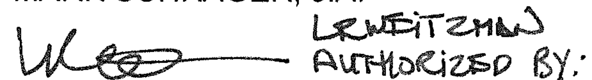
In the file number 500-09-029765-211

[5] **DISMISSES** the appeal;

[6] **THE WHOLE** without legal costs.



MARK SCHRAGER, J.A.



BENOÎT MOORE, J.A.

LORI RENÉE WEITZMAN, J.A.

Mtre Kim Sheppard
Mtre George Body
Mtre Arianne Gauthier
DEPARTMENT OF JUSTICE CANADA
For Attorney General of Canada

Mtre Daniel Cantin
LARIVIERE MEUNIER (REVENU QUÉBEC)
For Agence du revenu du Québec

Mtre Hugo Anthony Babos-Marchand
Mtre Frédérique Drainville
McCARTHY TÉTRAULT
For Richter Advisory Group inc., in continuance of proceedings for Chronométriq Inc. and Health Myself Innovations Inc.

Mtre Harvey G. Chaiton
CHAITONS
Mtre Joshua Bouzaglou
WOODS
For Canadian Imperial Bank of Commerce

Mtre Christian Lachance
Mtre Benjamin Jarvis
DAVIES WARD PHILLIPS & VINEBERG
For Canadian Bankers' Association

Mtre Alain Riendeau
Mtre Brandon Farber
FASKEN MARTINEAU DUMOULIN
For Insolvency Institute of Canada

Date of hearing: September 12, 2023

REASONS OF SCHRAGER, J.A.

I. INTRODUCTION

[7] The Attorney General of Canada and the Agence du revenu du Québec (the "**Appellants**") appeal against the order (the "**Order Under Appeal**") rendered on October 27, 2021 by the Honourable Martin Castonguay of the Superior Court, District of Montreal, which approved a *Motion for the Issuance of an Order Authorizing and Approving the Interim Financing, an Administration Charge, a Sale and Investment Solicitation Process, a Directors and Officers Charge, a Key Employee Retention Program, Procedural Consolidation of the Estates, and other Relief* (the "**Motion**").[1]

[8] Essentially, the case requires this Court to settle whether, under the *Bankruptcy and Insolvency Act*,[2] the Superior Court has the authority to order super-priority charges – an interim financing charge, an administration charge, and directors' and officers' charges – with priority over a deemed trust in favour of the Crown created by s. 227(4.1) of the *Income Tax Act*[3] (the "***ITA* Deemed Trust**") and the equivalent provisions of Quebec law.[4] The case requires a close look at *Canada v. Canada North Group Inc.*,[5] in which the Supreme Court of Canada decided that the Superior Court has such authority under the *Companies' Creditors Arrangement Act* (the "***CCAA***").[6]

* * *

[9] On October 26, 2021, faced with liquidity problems, Chronométriq Inc. and Health Myself Innovations Inc. (the "**Respondents-Debtors**") filed a notice of intention to make a proposal pursuant to s. 50.4 *BIA*. On the same date, they filed the Motion, seeking an order authorizing interim financing as well as a sale and investment process and the granting of the priority charges (whose treatment is the focus of the case). The ultimate goal expressed in the Motion was to find a purchaser or investors.

[10] The Motion discloses a total indebtedness of $9,192,413, of which $3,193,414.20 was owed to three secured creditors:

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1 *In the Matter of the Notice of Intention to Make a Proposal of Chronométriq Inc. and Health Myself Innovation Inc.*, Quebec Sup. Ct., No. 500-11-060355-217, October 27, 2021, Castonguay, J.S.C.
2 R.S.C. 1985, c. B-3 ["*BIA*"].
3 R.S.C. 1985, c. 1 ["*ITA*"].
4 *Tax Administration Act*, CQLR, c. A-6.002, s. 20.
5 *Canada v. Canada North Group Inc.*, 2021 SCC 30 ["*Canada North*"].
6 R.S.C. 1985, c. C-36 ["*CCAA*"].

1.	Canadian Imperial Bank of Commerce (an intervener in this proceeding)	$2,923,724
2.	Investissement Québec	$139,055
3.	Business Development Bank	$130,635

[11] The balance was due to unsecured creditors, although the Respondents-Debtors further represented in their proceedings that $3,181,454 in unremitted source deductions was owed to the Agence du revenu du Québec and to the Canada Revenue Agency.

[12] The Appellants, having received the notice less than four hours before the hearing of the Motion was scheduled to take place on October 27, 2021, requested an adjournment of the hearing, which the judge denied.[7] James Feldkamp, Chronométriq Inc.'s Chief Executive Officer, testified to the operating costs of Respondents-Debtors regarding salaries, consultants' fees, equipment, and services provided by suppliers such as cloud service providers, client support, and messaging. Without funding, the Respondents-Debtors would not be able to continue to provide health software services, such that their value would be substantially diminished given that the only asset of note beyond a going concern was intellectual property. According to Andrew Adessky, the representative of the proposal trustee, Respondent (the "**Proposal Trustee**"), the requested super-priority charge for the interim financing was calculated based on the cashflows of the Respondents-Debtors. The purpose of the interim financing was to sustain their operations until the end of the projected sale and investment solicitation process proposed in the Motion and scheduled to be completed within a month. He confirmed that, in his experience, the continuation of operations would enhance value.

[13] The Order Under Appeal was issued on the same day as the hearing. It authorizes, *inter alia*: (1) interim financing, with a corresponding charge of $1,920,000; (2) an administration charge of $200,000 for the fees of the Proposal Trustee and its counsel as well as those of counsel for the Respondents-Debtors; and (3) a directors' and officers' charge of $250,000.

[14] Relying on ss. 50.6, 64.1, 64.2 and 183 *BIA*, the judge ordered that the three charges rank in priority over all other interests, including the *ITA* Deemed Trust. The relevant parts of the Order Under Appeal read:

> [34] **ORDERS AND DECLARES** that each of the Charges shall constitute a charge on the Property and that such Charges shall rank in priority to any and all other hypotecs [*sic*], mortgages, liens, security interests, priorities, charges, encumbrances or security of whatever nature or kind (collectively, the

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[7] At the hearing, counsel for the Attorney General of Canada agreed that the judge could grant a super-priority charge limited to the necessary payment of salaries and operating expenses for two weeks, after which there should be another hearing.

> "Encumbrances"), or trusts (statutory or otherwise) affecting the Property in favour of any person.
>
> (...)
>
> [37] **ORDERS AND DECLARES** that notwithstanding:
>
> (...)
>
> > **(d)** the provisions of any federal or provincial statute; (...)
> >
> > the Charges shall be binding on any trustee in bankruptcy that may be appointed in respect of the Debtors and shall not be void or voidable by any person, including any creditor of the Debtors, nor shall they, or any of them, constitute or be deemed to be a preference, fraudulent conveyance, transfer at undervalue or other challengeable or reviewable transaction, under the BIA or any applicable law, nor shall they constitute oppressive or unfairly prejudicial conduct under any applicable law.

[15] As is often the case in such circumstances, the Order Under Appeal was drafted and presented to the judge by counsel and does not include lengthy or detailed reasons. The judge gave brief reasons in an oral judgment upon issuing the Order Under Appeal. He was convinced that "sans les mesures demandées, la compagnie [...] n'a aucune chance de survie". He concluded that the tax authorities would not be worse off as a result of the order granting super-priority charges, and in the exercise of his discretion said this:

> Alors, là, je regarde, je soupèse puis, et j'ai quand même une certaine discrétion, pis me semble que c'est un cas où je dois exercer ma discrétion pour permettre, au moins donner une chance, que ce soit par qui que ce soit, pour que ce service-là continue entre-temps, et on va voir, c'est pas, on ne parle pas d'une situation qui peut durer éternellement, on parle de six semaines. Alors, pour toutes ces raisons, le tribunal va signer le projet d'ordonnance qui lui a été fourni.

[16] On November 8, 2021, the Appellants each filed notices of appeal before the Court, in similar terms, within the legal time limit. On December 20, 2021, Baudouin, J.A. granted leave to intervene to the Canadian Imperial Bank of Commerce ("**CIBC**"), the interim lender.[8] On February 7, 2022, she also granted leave to intervene to the Canadian Bankers' Association[9] and she further granted the Agence du revenu du Québec's application for consolidation of the appeals.[10] Hamilton, J.A. granted leave to intervene to

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8 *Canadian Imperial Bank of Commerce v. Chronometriq Inc.*, 2021 QCCA 1923.
9 *Canadian Bankers' Association v. Richter Advisory Group Inc.*, 2022 QCCA 191.
10 *Agence du revenu du Québec v. Richter Advisory Group Inc.*, 2022 QCCA 187.

the Insolvency Institute of Canada on February 24, 2022.[11] The Appellants filed a joint brief to serve in both appeals, which were joined for hearing.

[17] The Court was informed that on November 25, 2021, Immer, J.S.C. issued an *Extension Approval, Vesting and Assignment Order*,[12] which approved a transaction whereby TELUS Health Solutions Inc. purchased the majority of the Respondents-Debtors' assets free of all encumbrances and hired the majority of the employees working for the Respondents-Debtors.

[18] The net proceeds of the transaction, amounting to $2,210,000, were paid and are now held by the Proposal Trustee until further order by the Superior Court. The amount is insufficient to pay both the super-priority charges of approximately $2,370,000 and the unremitted source deductions of approximately $3,181,454 owed to the Appellants.

II. ISSUES

[19] The parties formulate the issues differently, but, in essence, the Court is tasked with deciding the following:

- In the context of a proposal under the *BIA*, does the Superior Court have jurisdiction to grant super-priority charges that rank ahead of the *ITA* Deemed Trust (i.e., the deemed trust in favour of the Crown created by s. 227(4.1) of the *ITA* and the corresponding provisions of provincial law)?
- Did the Superior Court violate the principle of *audi alteram partem* in dismissing the Appellants' request for an adjournment?

III. PARTIES' POSITIONS

[20] Essentially, the Appellants submit that, under the *BIA*, the judge did not have any power to order super-priority charges that rank ahead of the *ITA* Deemed Trust and the provincial equivalent. Parliament has enacted mechanisms, including the *ITA* Deemed Trust, to protect unremitted source deductions, because amounts are sometimes misappropriated, and the tax authority is an "involuntary creditor" with limited information that relies on taxpayer filings.

[21] The Appellants argue that s. 227(4.1) *ITA* and comparable provisions in other statutes give "absolute" priority to the tax authority for unremitted amounts – in the case at bar, the unremitted source deductions – by creating a deemed trust over the property

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11 *Insolvency Institute of Canada v. Richter Advisory Group Inc.*, 2022 QCCA 303.

12 *In the Matter of the Notice of Intention to Make a Proposal of Chronométriq Inc. and Health Myself Innovation Inc.*, Quebec Sup. Ct., No. 500-11-060355-217, November 25, 2021, Immer, J.S.C.

of the debtor notwithstanding the *BIA*. The amounts of the *ITA* Deemed Trust are paid in priority to the security interests, which, following the Supreme Court ruling in *Canada North*, include the court-ordered super-priority charges. Section 67(3) *BIA* confirms the absolute priority of the *ITA* Deemed Trusts.

[22] Moreover, none of the statutory super-priority charge provisions, the provisions of the *BIA* or the Superior Court's inherent jurisdiction recognized in s. 183 *BIA* authorize it to subordinate *ITA* Deemed Trust claims to any charge on the debtor's property. Sections 50.6(1), 64.1(1) and 64.2(1) *BIA* do not apply because the Crown is not a secured creditor, as that expression was interpreted in *Canada North*. The inherent jurisdiction of the court does not permit the displacement of the clear language of s. 227(4.1) *ITA*.

[23] *Canada North*,[13] in which the Supreme Court of Canada decided that *CCAA* courts could grant super-priority charges ranking in priority over the aforesaid *ITA* Deemed Trust, is not applicable to a proposal made under the *BIA*. While s. 11 *CCAA* provides broad discretion to supervising judges consistent with the flexibility and discretion associated with that statute, the *BIA* is a rules-based statute that does not contain a similar provision.

[24] On the second question, the Appellants argue that the judge did not provide them with a sufficient opportunity to present their arguments: they were served the Motion less than four hours before the hearing. The judge therefore should have granted the request for an adjournment.

[25] The Appellants argue that because the judge lacked jurisdiction to make the Order Under Appeal, it must be set aside. They also maintain that the deemed trust rights operate "notwithstanding any security" – i.e., that of the Respondents-Debtors' existing secured creditors, of which only the CIBC is a party to this appeal, being the interim lender benefitting from the super-priority pursuant to the Order Under Appeal. However, given that the amount outstanding covered by super-priority charges exceeds the net proceeds of realization, it is not necessary to decide whether the Appellants would outrank the CIBC for the balance of the proceeds of realization beyond the amount outstanding under the interim loan.

[26] All the other parties argue that the judge had jurisdiction to make the Order Under Appeal and, specifically, to order the granting of a charge with priority over the deemed trusts. They add that the judge did not breach the principle of *audi alteram partem* and that he did not err in exercising his discretion to refuse an adjournment.

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[13] *Canada North*, *supra*, note 5.

IV. DISCUSSION

In the context of the proposal under the BIA, does the Superior Court have jurisdiction to grant super-priority charges that rank ahead of the ITA Deemed Trust, i.e., the deemed trust in favour of the Crown created by s. 227(4.1) of the ITA and the corresponding provisions of provincial law?

[27] I agree with the Respondent that the judge had jurisdiction to make the Order Under Appeal and that the charge to secure the interim financing ranks ahead of – or "primes" – any rights of the Appellants under the deemed trusts.

[28] To a large extent, the outcome of this case depends on one's reading of the decision of the Supreme Court of Canada in *Canada North*.[14] In that case, the Supreme Court decided that the *ITA* Deemed Trust could be subordinated pursuant to a judge's order for interim financing under the *CCAA*. As seen above, the Appellants maintain that such is not the case regarding orders under the *BIA*. The thrust of the appeal concerns the court-ordered charge to secure interim financing, such that my reasons do not address the administration charge or the directors' and officers' charge *per se*. Before examining in detail the judgment in the matter of *Canada North*, it is useful to set out the statutory provisions creating the *ITA* Deemed Trust:[15]

227 (...)

Extension of trust

(4.1) Notwithstanding any other provision of this *Act*, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this *Act*, property of the person and property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for a security interest

227 [...]

Non-versement

(4.1) Malgré les autres dispositions de la présente loi, la *Loi sur la faillite et l'insolvabilité* (sauf ses articles 81.1 et 81.2), tout autre texte législatif fédéral ou provincial ou toute règle de droit, en cas de non-versement à Sa Majesté, selon les modalités et dans le délai prévus par la présente loi, d'un montant qu'une personne est réputée par le paragraphe (4) détenir en fiducie pour Sa Majesté, les biens de la personne, et les biens détenus par son créancier garanti au sens du paragraphe 224(1.3) qui, en l'absence d'une garantie au sens du

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[14] *Canada North*, *supra*, note 5.

[15] *ITA*, *supra*, note 3.

(as defined in subsection 224(1.3)) would be property of the person, equal in value to the amount so deemed to be held in trust is deemed

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

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

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

Meaning of security interest

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

même paragraphe, seraient ceux de la personne, d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté, à compter du moment où le montant est déduit ou retenu, séparés des propres biens de la personne, qu'ils soient ou non assujettis à une telle garantie;

b) ne pas faire partie du patrimoine ou des biens de la personne à compter du moment où le montant est déduit ou retenu, que ces biens aient été ou non tenus séparés de ses propres biens ou de son patrimoine et qu'ils soient ou non assujettis à une telle garantie.

Ces biens sont des biens dans lesquels Sa Majesté a un droit de bénéficiaire malgré toute autre garantie sur ces biens ou sur le produit en découlant, et le produit découlant de ces biens est payé au receveur général par priorité sur une telle garantie.

Sens de garantie

(4.2) Pour l'application des paragraphes (4) et (4.1), n'est pas une garantie celle qui est visée par règlement.

[29] Section 224(1.3) *ITA*, which defines the expression "secured creditor", an expression that is invoked in s. 227(4.1) *ITA*, is set out in the Appendix to these reasons.

[30] In addition, the *BIA* provides that a court may order a security charge that ranks in priority over the claim of any secured creditor of the debtor, such charge applying to interim financing (s. 50.6 *BIA*), to the indemnification of directors (s. 64.1 *BIA*) and to administration costs (s. 64.2 *BIA*). The following are also pertinent for purposes of the analysis: s. 60(1.1) *BIA*, which provides that in order for the court to approve a proposal, certain Crown claims – including those related to unremitted source deductions – must be dealt with in the proposal to the satisfaction of the Crown; and s. 67 *BIA*, which preserves the *ITA* Deemed Trust in the *BIA* as regards the property of the bankrupt. These provisions are also set out in the Appendix.

[31] Sections 11.2, 11.51 and 11.52 *CCAA* are the functional equivalent of ss. 50.6, 64.1 and 64.2 *BIA* in providing for the court's discretion to order super-priority charges. Section 6(3) *CCAA* is equivalent to s. 60(1.1) *BIA* and s. 37 *CCAA* resembles s. 67 *BIA* for our purposes. All of these are set out in the Appendix.

[32] There are four sets of reasons in *Canada North*: two for the majority (Justice Coté, with Chief Justice Wagner and Justice Kasirer concurring; and Justice Karakatsanis, with Justice Martin concurring), and two for the dissent (Justices Brown and Rowe, with Justice Abella concurring, as well as the separate reasons of Justice Moldaver).

[33] Justice Côté observed that without the availability of super-priority charges, interim lending in insolvency would become impossible on a practical level given the high degree of risk involved. Professionals and financiers cannot be expected to put their time or money at risk only to learn after the fact that reimbursement to them is superseded by a deemed trust.[16] She reasoned that given the large and liberal interpretation required to give effect to the remedial nature of the *CCAA*, absent a specific impediment to subordinating the deemed trust, a *CCAA* court has jurisdiction to do so.[17] Specifically, Justice Côté found this jurisdiction in s. 11 *CCAA*:

> **11** Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any

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

[16] *Canada North*, *supra*, note 5, paras. 28-30.
[17] *Id.*, para. 31.

> order that it considers appropriate in the circumstances.
>
> avis, toute ordonnance qu'il estime indiquée.

[34] She added that the general power found in s. 11 *CCAA* is not restricted by the specific powers in ss. 11.2, 11.4, 11.51 and 11.52 *CCAA*.

[35] This is a relevant place to address a central argument put forward by the Appellants, based on s. 11.2(2) *CCAA*, which reads as follows:

> **(2)** The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> **(2)** Le tribunal peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la compagnie.

[36] It is identical to s. 50.6(3) *BIA*:

> **50.6(3)** The court may order that the security or charge rank in priority over the claim of any secured creditor of the debtor.
>
> **50.6(3)** Le tribunal peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis du débiteur.

[37] Justice Côté did not say whether the *ITA* Deemed Trust is or is not "security". She did find that there was authority to order the priming charge, which authority is grounded in s. 11 and following *CCAA*:

> 70. As discussed above, a supervising court's authority to order super-priority charges is grounded in its broad discretionary power under s. 11 of the *CCAA* <u>and also in the more specific grants of authority under ss. 11.2, 11.4, 11.51 and 11.52</u>. Those provisions authorize the court to grant certain priming charges that rank ahead of the claims of "any secured creditor". While I have already concluded that Her Majesty does not have a proprietary interest as a result of Her deemed trust, it is less certain whether Her Majesty is a "secured creditor" under the *CCAA*. Professor Wood is of the view that Her Majesty
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> 70. Comme nous l'avons vu plus haut, le pouvoir du tribunal de surveillance d'ordonner des charges super prioritaires est fondé sur le vaste pouvoir discrétionnaire que lui confère l'art. 11 de la *LACC*, <u>ainsi que sur les pouvoirs plus spécifiques que lui accordent les art. 11.2, 11.4, 11.51 et 11.52.</u> Ces dispositions autorisent le tribunal à accorder certaines charges prioritaires qui prennent rang devant les créances de « tout créancier garanti ». Bien que j'aie déjà conclu que Sa Majesté ne possède pas d'intérêt à titre de propriétaire du fait de sa fiducie présumée, il est moins sûr que la Couronne soit un « créancier garanti » au sens de

is not a "secured creditor" under the *CCAA* by virtue of Her deemed trust interest; rather, ss. 37 to 39 of the *CCAA* create "two distinct approaches — one that applies to a deemed trust, the other that applies when a statute gives the Crown the status of a secured creditor" (p. 96). Therefore, the ranking of a priming charge ahead of the deemed trust would fall outside the scope of the express priming charge provisions. <u>I do not need to definitively determine if Her Majesty falls within the definition of "secured creditor" under the *CCAA* by virtue of Her trust.</u> Instead, I would ground the supervising court's power in s. 11, which "permits courts to create priming charges that are not specifically provided for in the *CCAA*" (p. 98). I respectfully disagree with the suggestion of my colleagues Brown and Rowe JJ. that Professor Wood or any other author has suggested that s. 11 is limited by the specific provisions that follow it (para. 228). To the contrary, this Court said in *Century Services*, at paras. 68-70, that s. 11 provides a very broad jurisdiction that is not restricted by the availability of more specific orders.	la *LACC*. Selon le professeur Wood, la fiducie présumée dont bénéficie Sa Majesté ne lui confère pas la qualité de « créancier garanti » au sens de la *LACC*. Les articles 37 à 39 de la *LACC* créent plutôt [TRADUCTION] « deux approches distinctes : l'une qui s'applique à la fiducie réputée, l'autre qui entre en jeu lorsque la loi reconnaît à la Couronne la qualité de "créancier garanti" » (p. 96). Par conséquent, le fait de faire passer une charge prioritaire devant la fiducie réputée déborderait le cadre des dispositions portant expressément sur les charges prioritaires. <u>Je n'ai pas à trancher de façon définitive la question de savoir si Sa Majesté répond à la définition de « créancier garanti » au sens de la *LACC* du fait de sa fiducie.</u> Je ferais plutôt reposer le pouvoir du tribunal de surveillance sur l'art. 11, qui « permet aux tribunaux de constituer des charges prioritaires qui ne sont pas expressément prévues par la *LACC* » (p. 98). Avec égards, je ne suis pas d'accord avec la suggestion de mes collègues les juges Brown et Rowe suivant laquelle le professeur Wood ou d'autres auteurs auraient laissé entendre que la portée de l'art. 11 est limitée par les dispositions spécifiques qui le suivent (par. 228). Au contraire, notre Cour a déclaré aux par. 68-70 de l'arrêt *Century Services* que la possibilité pour le tribunal de rendre des ordonnances plus spécifiques n'avait pas pour effet de restreindre le vaste pouvoir conféré par l'art. 11.

(Emphasis added)

[38] In her interpretation of s. 227(4.1) *ITA*, Justice Côté found that the *ITA* Deemed Trust does not create a proprietary interest as would a trust at common law or civil law, since the conditions precedent for such creation are not met by the wording of the statute.[18] The *ITA* Deemed Trust might be akin to a floating charge, as the Supreme Court observed in *First Vancouver.*[19] Justice Côté did not conclusively decide that the *ITA* Deemed Trust is not a security interest, but she was clear that it does not create a proprietary interest that would take whatever property is subject to it out of the debtor's patrimony.[20]

[39] Justice Côté continued, noting that the court-ordered super-priority charges under the *CCAA* are not "security interests" within the meaning of s. 224(1.3) *ITA*. Thus, the *ITA* Deemed Trust, which operates notwithstanding any "security interest", does not rank ahead of the court-ordered super-priority. It is important to underline that Justice Côté's opinion here is a function of the wording of the definition of "security interest" in s. 224(1.3) *ITA*:[21] "Court-ordered super-priority charges are utterly different from any of the interests listed [in s. 224(1.3) *ITA*]", she wrote.

[40] I note here that any strength the Appellants' position might have, relies in large measure on the argument that s. 50.6(3) *BIA* does not give a judge the power to declare that a court-ordered priority ranks ahead of the *ITA* Deemed Trust. In other words, the *ITA* Deemed Trust is not "security" and the government claiming under the *ITA* Deemed Trust is not a "secured creditor" within the meaning of s. 50.6(3) *BIA* and the definition found in s. 2 *BIA*. Thus, its rank cannot be re-ordered, say the Appellants. Justice Côté did not say this in any definite manner.[22]

[41] Justice Karakatsanis, in her concurring reasons, found that the government claiming under the *ITA* Deemed Trust is not a secured creditor under the *CCAA*.[23] Any beneficial interest that could be claimed under the *ITA* Deemed Trust is *sui generis*. Such rights are not captured by the wording of s. 11.2 *CCAA*. However, the broad discretion under s. 11 *CCAA* provides sufficient power to make an order creating a super-priority charge ranking ahead of the *ITA* Deemed Trust. She further added: "This Court must grapple with the fact that s. 227(4.1) is both structured as a security interest, like a charge, but also uses the mechanism of a deemed trust."[24]

[42] The dissenting reasons of Justices Brown and Rowe are underlined by the Appellants since all the dissenting judges taken with Justices Karakatsanis and Martin comprise six judges who clearly stated that the government claiming under the *ITA*

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18 *Canada North*, *supra*, note 5, paras. 43-49.
19 *Id.*, para. 50; see *First Vancouver Finance v. M.N.R.*, 2002 SCC 49.
20 *Canada North*, *supra*, note 5, para. 57.
21 *Id.*, para. 62.
22 *Id.*, para. 70.
23 *Id.*, paras. 80, 165 and 167.
24 *Id.*, para. 132.

Deemed Trust is not a secured creditor within the meaning of the *CCAA*. This is the Appellants' springboard to argue that s. 50.6(3) *BIA* does not apply to empower the judge to subordinate the deemed trusts.

[43] At the hearing, the Appellants attempted to identify a *ratio decidendi* favourable to their position from the *dicta* of a majority in number of the judges, including those who dissented in the result. To such end, the Appellants rely on *Ibanescu v. R.*,[25] in which the Supreme Court said:

(...)	[...]
In our view, a statement of a legal principle that is accepted by a majority of the Court constitutes the opinion of the Court with respect to that legal principle. This is so even if some of the members of the Court who endorse that legal principle dissent from the majority's disposition of the appeal.	Selon nous, l'énoncé d'un principe juridique auquel souscrivent en majorité les juges de la Cour représente l'avis de la Cour sur ce principe juridique. Il en va ainsi malgré le fait que certains juges de la Cour qui adhèrent à ce principe sont dissidents pour ce qui est du dispositif du pourvoi.

[44] Consequently, the Appellants argue that Justice Karakatsanis (and Justice Martin)[26] as well as Justices Brown and Rowe (and Justice Abella)[27] hold that s. 227(4.1) *ITA* creates a beneficial interest in favour of the Crown, such that the opinion of Justice Côté (with Justices Wagner and Kasirer) to the effect that the provision does not create a proprietary interest[28] is a minority view. Similarly, the Appellants maintain that Justices Karakatsanis (and Martin),[29] with Justices Brown and Rowe (and Justice Abella)[30] and Justice Moldover hold[31] that the Crown is not a secured creditor under the *CCAA* for its *ITA* Deemed Trust claim.

[45] The Respondent, relying on the Supreme Court in *Henry*,[32] argues that *stare decisis* attaches to the result or ultimate conclusion of the judges. Indeed, in *Henry*, the Supreme Court stated:

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25 *Ibanescu v. R.*, 2013 SCC 31.
26 *Canada North*, *supra*, note 5, paras.111, 117, 128-129, 133 and 153.
27 *Canada North*, *supra*, note 5, paras. 192, 197 and 223.
28 *Canada North*, *supra*, note 5, paras. 4 and 57.
29 *Canada North*, *supra*, note 5, paras. 80, 165 and 167.
30 *Canada North*, *supra*, note 5, paras. 233 and 246.
31 *Canada North*, *supra*, note 5, para. 254, where Justice Moldaver expresses general agreement with his colleagues.
32 *R. v. Henry*, 2005 SCC 76.

> 57. (...) All *obiter* do not have, and are not intended to have, the same weight. The weight decreases as one moves from the dispositive *ratio decidendi* to a wider circle of analysis which is obviously intended for guidance and which should be accepted as authoritative.

> 57. [...] Les remarques incidentes n'ont pas et ne sont pas censées avoir toutes la même importance. Leur poids diminue lorsqu'elles s'éloignent de la stricte *ratio decidendi* pour s'inscrire dans un cadre d'analyse plus large dont le but est manifestement de fournir des balises et qui devrait être accepté comme faisant autorité.

The exercise suggested by the Appellants – parsing each judge's reasons on specific issues – does not change the fact that five judges (i.e., the majority) all found that s. 11 *CCAA* confers the power on a court to order that the s. 227(4.1) *ITA* Deemed Trust be subject to a priming charge in favour of an interim lender.

* * *

[46] The proposal provisions in the *BIA* serve, *inter alia*,[33] the same remedial purpose as those in the *CCCA* – i.e., the financial rehabilitation of an insolvent corporate debtor.[34] Indeed, the Supreme Court has indicated that, to the extent possible, the two statutes should be treated in a harmonized fashion.[35] In the instant case, Parliament has done this by incorporating virtually identical provisions providing for interim lending in the *BIA* and the *CCAA*. The Supreme Court also instructs that one should first seek a juridical solution through statutory interpretation before looking to inherent jurisdiction as a source of judicial authority or power.[36]

[47] With these basic principles in mind, I believe that the judge in the case at bar had the authority to make the Order Under Appeal and, specifically, to declare that the charge to secure the interim financing would rank in priority to the claims under the *ITA* Deemed Trust.

[48] There is certainly nothing in the *BIA* that prohibits this. More specifically, I do not believe that ss. 67(2) and (3) *BIA* are an impediment to this position. In their respective reasons in *Canada North*, Justices Côté and Karakatsanis commented on the impact of ss. 6(3) and 37 *CCAA* on the *ITA* Deemed Trust.[37] These provisions are similar to ss. 67 and 60(1.1) *BIA*. Applying their *dicta* to s. 67 *BIA*, the *ITA* Deemed Trust survives the filing

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[33] Individuals may make proposals under the *BIA* but not under the *CCAA*.
[34] *Century Services inc. v. Canada (Attorney general)*, 2010 SCC 60, para. 15 ["*Century*"]; *9354-9186 Québec inc. v. Callidus Capital Corp*, 2020 SCC 10, para. 40 ["*Callidus*"].
[35] *Callidus*, *supra*, note 34, para. 74; *Century*, *supra*, note 34, para. 24.
[36] *Callidus*, *supra*, note 34, para. 65; *Century*, *supra*, note 34, paras. 61, 62 and 65.
[37] *Canada North*, *supra*, note 5, paras. 36, 154 and 155.

of a notice of intention to file a proposal, but the manner of that subsistence is that an eventual proposal of the debtor cannot receive court approval unless it provides for payment of the amount protected by the *ITA* Deemed Trust within six months of court sanction, as set forth in s. 60(1.1) *BIA*, which is similar to s. 6(3) *CCAA*.

[49] The judge's power to establish the rank of the charge to secure an interim loan is found in s. 50.6(3) *BIA*. This provision is virtually identical to s. 11.2(2) *CCAA*. The Appellants maintain that since the judges of the Supreme Court in *Canada North* said that the tax authority is not a secured creditor when claiming under the *ITA* Deemed Trust, the judge cannot make an order under s. 50.6(3) *BIA* to establish the rank of the charge vis-à-vis the *ITA* Deemed Trust.

[50] It is difficult to discern such a clear holding in *Canada North* or to extrapolate an argument applicable to this case. The Appellants' position would lead to the conclusion that a judge can only create a charge that ranks ahead of secured, but not unsecured creditors. This is an untenable position for the following reasons. If the *ITA* Deemed Trust does not make the Crown a secured creditor under the *BIA*, then it is unsecured or ordinary within the scheme of the *BIA*. No one suggests that the Crown has a preferred claim under s. 136 *BIA*. Indeed, the Crown is, in principle, an unsecured creditor under the *BIA*.[38] It is not even treated as secured for voting purposes for its *ITA* Deemed Trust claim.[39] Any security created to secure interim lending pursuant to s. 50.6(1) *BIA* ranks – by definition and without the need for explicit wording in s. 50.6 *BIA* – ahead of, and is treated in priority to, the rights of unsecured or ordinary creditors. That is, those creditors not benefiting from security are paid after or "subject to the rights of the secured creditors" (s. 136 *BIA*). Thus, the rights (unsecured) of the Crown under a s. 227(4.1) *ITA* Deemed Trust would be subject to the rights of an interim lender secured pursuant to an order made under s. 50.6 *BIA*. Regarding its *ITA* Deemed Trust claims, the Crown does, however, get an advantage in a proposal under the *BIA* in that it is obligatory to provide for payment in full of the Crown claims within six months of court approval (s. 60(1.1) *BIA*).

[51] Moreover, it would seem nonsensical in the overall scheme of the *BIA* that a court could order that the interim lending charge take priority over the claim of any hypothecary or mortgage creditor but not over the claim of an unsecured creditor benefiting from a *sui generis* non-proprietary right akin to a floating charge, that is, the *ITA* Deemed Trust. In addition, the judge has all the powers ancillary and necessarily incidental to the power under s. 50.6 *BIA*.[40] This should include subordinating the *ITA* Deemed Trust – or "priming" the charge – because it is incidental to the creation of the interim lending charge that the judge determine its rank *vis-à-vis* other creditors. The creation of a charge without a determination of its rank is useless.

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[38] Section 86 *BIA*.
[39] Section 54(2.1) *BIA*.
[40] *Interpretation Act*, R.S.C. 1985, c. I-21, s. 31(2).

[52] It is self-evident, and has been recognized by the Supreme Court, that without the ability to establish a super priority, financiers would not offer interim or debtor-in-possession ("**DIP**") loans.[41] Interim lending charges are an essential ingredient of the restructuring process.[42] The Alberta Court of Appeal noted that 75% of restructurings include interim lending.[43] Thus, the outcome suggested by the Appellants' reading of the *BIA* would make interim financing under s. 50.6 *BIA* unavailable to companies that seek to file a proposal under the *BIA*. As such, companies with total indebtedness of less than $5 million (i.e., the threshold for the *CCAA* to be available pursuant to s. 3 *CCAA*) could not obtain interim financing. This is far from the harmonization to be favoured in applying the two statutes. Moreover, such a state of affairs negates any practical effect or application of s. 50.6 *BIA*. Parliament does not speak for naught.[44] I do not accept that the Appellants' interpretation of the *BIA* is the policy outcome Parliament intended.

[53] I therefore find, on the basis of statutory interpretation, that the judge had the power to issue the Order Under Appeal with respect to the interim financing charge.

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[54] If and to the extent that my exercise of statutory interpretation of the *BIA* is wrong, I believe that the judge's power to order the creation of priming charges is justified by his inherent jurisdiction.

[55] As noted, in *Canada North*, the Supreme Court found that the judge had the power to make the priming order, finding so after going through an exercise of statutory construction that led the Court to s. 11 *CCAA*, which has no equivalent in the *BIA*. There is therefore a gap in the *BIA*.

[56] Although the Supreme Court based its decision on the broad discretion found in s. 11 *CCAA*, insolvency practitioners are well aware of the fact that even prior to the 2005 amendment to s. 11 *CCAA*, courts approved DIP financing, granted priority charges and

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41 *Canada North*, *supra*, note 5, paras. 29-31.
42 *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, para. 59.
43 *Canada North*, *supra*, note 5, para.14.
44 *Interpretation Act*, *supra*, note 40, s. 12.

made other orders based on the inherent jurisdiction of the court.[45] This line of jurisprudence was taken up under the *BIA*.[46]

[57] The existence of the Superior Court's inherent jurisdiction – including, specifically, in the exercise of its jurisdiction under the *BIA* – is recognized in s. 183 *BIA* as well as by application of art. 49 of the Quebec *Code of Civil Procedure*.[47] Judgments of this Court have acknowledged the existence of this inherent jurisdiction under the *BIA*.[48]

[58] In matters of insolvency, courts have held that, as pragmatic problem solvers, they could exercise their inherent jurisdiction to effect a remedy or fill statutory gaps.[49] The jurisprudence has evolved to include substantive law within the purview of the inherent jurisdiction,[50] despite criticism.[51] At the same time, the inherent jurisdiction must be used sparingly and with caution because of its broad and loosely defined nature.[52] Inherent jurisdiction cannot be used in contravention of statutory provisions.[53] It is also limited by the nature of the *BIA*:

> [20] Inherent jurisdiction is not without limits, however. It cannot be used to negate the unambiguous expression of legislative will and moreover, because it is a special and extraordinary power, should be exercised only sparingly and in a clear case: *Baxter Student Housing Ltd. v. College Housing Cooperative Ltd.,* 1975 CanLII 164

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45 *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, paras. 57-59; *United Used Auto & Truck Parts Ltd. v. Aziz*, 2000 BCCA 146, paras. 16, 18 and 29-31, leave to appeal granted in [2000] S.C.C.A. No. 142 (subsequently settled before the hearing), citing *Canadian Asbestos Services Ltd. v. Bank of Montreal*, 1992 CanLII 7570 (ON SC); *Re Starcom International Optics Corp.*, 1998 CanLII 3832, para. 48 (BC SC); *Royal Oak Mines Inc. (Re)*, [1999] O.J. No. 709, paras. 12 and 17 (ON SC); *Royal Oak Mines Inc., Re*, [1999] O.J. No. 864, para. 4 (ON SC); *Hunters Trailer & Marine Ltd. (Re)*, 2001 ABQB 546, para. 32; *MEI Computer Technology Group Inc.*, [2005] R.J.Q. 1558, paras. 22 and 24 (QC CS); *Temple City Housing Inc. (Companies' Creditors Arrangement Act)*, 2007 ABQB 786, para. 14, leave to appeal denied in *Canada (National Revenue) v. Temple City Housing Inc.*, 2008 ABCA 1, para. 13; *Conporec inc. (Arrangement relatif à)*, 2008 QCCS 4813, paras. 55 and 56, leave to appeal denied in *Parc industriel Laprade Inc. v. Conporec Inc.*, 2008 QCCA 2222.

46 *Bearcat Explorations Ltd (Re)*, 2004 CarswellAlta 1183, paras. 5-9 (AB QB); *M Farmpure Seeds Inc. (Re)*, 2008 SKQB 381, paras. 12-15; *Comstock Canada Ltd. (Re)*, 2013 ONSC 4700, para. 20.

47 Which applies, as provided for in s. 72 *BIA*.

48 *Meubles Poitras (2002) inc. (Syndic de)*, 2013 QCCA 1671, paras. 12-13; *Syndic d'Avi Life-Lab inc.*, 2023 QCCA 297, para. 30; *Sam Levy & Associés inc. v. Azco Mining inc.*, 2001 SCC 92, para. 20.

49 *In the Matter of The Proposal of Gordon Gerard Garritty*, 2006 ABQB 238, para. 56. See Georgina R. Jackson and Janis P. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2007*, Toronto, Thomson Carswell, 2008, p. 41.

50 Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed., Toronto, Carswell, 2013, pp. 119 and 122, notes 21 and 123.

51 See Antoine Leduc, "Grands pas et faux pas de la compétence inhérente des tribunaux en droit canadien de l'insolvabilité : qui fait la loi?" (2009) 111:2 *Revue du notariat*, p. 425.

52 *Endean v. British Columbia*, 2016 SCC 42, para. 24.

53 *Ontario v Criminal Lawyers' Association*, 2013 SCC 43, para. 23.

> (SCC), [1976] 2 S.C.R. 475 at 480; *Wasserman Arsenault Ltd. v. Sone* (2002), 2002 CanLII 41494 (ON CA), 33 C.B.R. (4th)145 (Ont. C.A.). (...)
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> [21] Further limitations are based on the nature of the *BIA* - it is a detailed and specific statute providing a comprehensive scheme aimed at ensuring the certainty of equitable distribution of a bankrupt's assets among creditors. In this context, there should not be frequent resort to the power. (...)[54]

[59] In *Stephen Francis Podgurski (Re)*, Chief Justice Morawetz, of the Ontario Superior Court of Justice, delineated a broad definition of inherent jurisdiction in the context of insolvency. Here, too, in the search for a "just and practical response" – and because he found that the inherent jurisdiction of the court is broad and diverse, unlimited in substantive law and exercisable in any situation[55] – he granted a sweeping motion by the Superintendent of Bankruptcy, which had the effect of extending time limits and tolerating more extensive payment defaults in all cases in the context of COVID-19.

[60] I would point out that inherent jurisdiction attaches to the Superior Court, such that the same inherent jurisdiction exists whether the *CCAA* or the *BIA* is applied. Historically, inherent jurisdiction has been exercised more often upon application of the *CCAA*, presumably because its skeletal nature makes for more gaps than is the case for the *BIA*, which offers a detailed rules-based regime. That being said, when a gap is identified upon applying the *BIA*, the inherent jurisdiction allows the gap to be filled when and as appropriate.

[61] If the statutory interpretation exercise does not lead to the conclusion that the judge in the instant case had the power to order that the charge to secure the interim financing take precedence over the Appellants' deemed trust rights, then such exercise must be taken as disclosing a gap in the legislation. Indeed, the linchpin of the Appellants' position gleaned from *Canada North* is that the absence of an equivalent to s. 11 *CCAA* in the *BIA* means that the judge had no authority to subordinate the *ITA* Deemed Trust to the charge he created. On the contrary, given that s. 11.2 *CCAA* and s. 50.6 *BIA* are identical, the absence of a s. 11 *CCAA* equivalent in the present context must be taken as a gap to be filled by the exercise of inherent jurisdiction empowering the judge to establish the rank of the interim lending charge ahead of the *ITA* Deemed Trust. Moreover, no provision of the *BIA* explicitly prohibits this.

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54 *Kingsway General Insurance Company v. Residential Warranty Company of Canada Inc. (Trustee of)*, 2006 ABCA 293, paras. 20-21; *In the Matter of the Proposal to Creditors of Conforti Holdings Limited*, 2022 ONSC 3264, para. 41.

55 *Stephen Francis Podgurski (Re)*, 2020 ONSC 2552, paras. 65-71, citing *Endean v. British Columbia*, 2016 SCC 42. In the same vein of relief in the context of COVID-19, in Quebec, see *Proposition de St-Pierre*, 2020 QCCS 1374.

[62] The Agence du revenu du Québec is the Appellant in record 500-09-029765-211. It joined the Attorney General of Canada to file one brief serving both Appellants. It relies on the deemed trust created by s. 20 of the *Tax Administration Act*:[56]

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.	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.
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.	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.
However, the person may, when filing a return with the Minister under any of sections 468, 470 and 477.10 of the Act respecting the Québec sales tax (chapter T-0.1), withdraw from the total amount that the person is deemed by the first paragraph to	Toutefois, cette personne peut, lors de la production au ministre d'une déclaration en vertu de l'un des articles 468, 470 et 477.10 de la Loi sur la taxe de vente du Québec (chapitre T-0.1), retirer du montant total qu'elle est réputée par le

56 *Supra*, note 4.

hold in trust for the State, the amounts that the person is entitled to deduct and that the person has actually deducted in the calculation of the amount to be remitted.	premier alinéa détenir en fiducie pour l'État, les montants qu'elle a droit de déduire et qu'elle a effectivement déduits dans le calcul de son montant à remettre.

This is provincial legislation of the same nature as s. 227(4.1) *ITA*, as provided for in s. 67(3) *BIA*. Counsel for the Agence du revenu du Québec were heard and conceded that the rights under s. 20 of the *Tax Administration Act* are to be treated in the same manner as those under s. 227(4.1) *ITA*. Indeed, my reasons herein regarding the *ITA* Deemed Trust apply equally to a consideration of the Quebec legislation and the deemed trust provided for therein.

Did the Superior Court violate the principle of audi alteram partem in dismissing the Appellants' request for an adjournment?

[63] The power to allow or dismiss a motion to adjourn is discretionary. An appellate court will not intervene unless the decision is wrong in law, the discretion was not exercised judicially, or a party's right was violated.[57]

[64] With respect to insolvency matters more specifically, the Supreme Court recently stated that a motions judge enjoys a large discretion, to which an appellate court owes a great degree of deference. A court of appeal will only intervene where the judge has erred in principle or exercised their discretion unreasonably.[58]

[65] No intervention is warranted in the instant case. Insolvency proceedings are often issued with short notice[59] in urgent situations.[60] Specifically, interim finance orders have been granted on short or no notice.[61] Although it was on short notice, the Appellants were nevertheless heard by the judge.

[66] While I do not approve of giving short notice of significant proceedings, in the instant case, it is unclear whether the situation was so urgent that the judge could not have granted a short adjournment of one or two days without prejudice to the Respondents-Debtors. Nevertheless, deference is due to the judge's exercise of his discretion to refuse the adjournment, and it has not been demonstrated that the refusal was an unreasonable exercise of that discretion. Moreover, the Appellants appear not to

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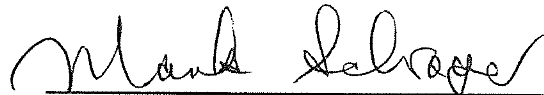
[57] *Palardy v. Québec (Sous-ministre du Revenu)*, 2010 QCCA 383, para. 9.
[58] *Callidus*, *supra*, note 34, para. 53.
[59] *Royal Oak Mines Inc., Re*, [1999] O.J. No. 709, paras. 11-13 (ON SC).
[60] *Transglobal Communications Group Inc. (Re)*, 2009 ABQB 195, para. 48, cited in *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, para. 41.
[61] *Parc industriel Laprade inc. v. Conporec inc.*, 2008 QCCA 2222, para. 15; *Royal Oak Mines Inc. (Re)*, [1999] O.J. No. 709, paras. 10-11 (ON SC); *Canada North Group Inc (Companies' Creditors Arrangement Act)*, 2017 ABQB 550, paras. 48-52, confirmed in 2019 ABCA 314 and 2021 SCC 30.

have suffered prejudice as a result of that refusal and the granting of the interim financing, because their argument regarding the priming charge is one of law subject to the correctness standard of review. Accordingly, if the judge was wrong in law, this Court could intervene, and the Appellants, having thus succeeded on that ground of appeal, would be paid from the funds set aside, to the detriment of the CIBC, which provided the interim financing. In a sense, the Appellants were possibly better off by reason of the judge's refusal to grant the adjournment, since the Order Under Appeal resulted in the injection of new funds from which the Appellants could potentially have been paid had the Court decided that the interim lender's charge does not rank ahead of the *ITA* Deemed Trust.

[67] The Appellants are not attacking the actual grant of the financing or the charges themselves, but rather the "priming" of the charges. In any event, the judge exercised his discretion based on the evidence before him as to the lack of liquidity, the need for financing in order to maintain some form of operations during the sale process and the Proposal Trustee's evidence that greater value would be generated if the Respondents-Debtors' business were continued as a going concern. Given this evidence and the deference due to the judge's exercise of that discretion, there is no basis for this Court to intervene in the judge's decision to grant the interim financing sought and the priming charges.

[68] For all of the above reasons, I would dismiss the appeals. Because the parties failed to reproduce, in Schedule II of their briefs, the various statutory enactments to which they refer, as required by s. 51 of the Court's rules,[62] I would not award legal costs.



MARK SCHRAGER, J.A.

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[62] *Regulation of the Court of Appeal of Quebec in Civil Matters*, c. C-25.01, r. 0.2.01.

Appendix

Provisions under the Income Tax Law

Definitions

224 (1.3) (...)

security interest means any interest in, or for civil law any right in, property that secures payment or performance of an obligation and includes an interest, or for civil law a right, created by or arising out of a debenture, mortgage, hypothec, lien, pledge, charge, deemed or actual trust, assignment or encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for; (*garantie*)

Définitions

224 (1.3) [...]

garantie Intérêt ou, pour l'application du droit civil, droit sur un bien qui garantit l'exécution d'une obligation, notamment un paiement. Sont en particulier des garanties les intérêts ou, pour l'application du droit civil, les droits nés ou découlant de débentures, hypothèques, privilèges, nantissements, sûretés, fiducies réputées ou réelles, cessions et charges, quelle qu'en soit la nature, de quelque façon ou à quelque date qu'elles soient créées, réputées exister ou prévues par ailleurs. (*security interest*)

Provisions under the Bankruptcy and Insolvency Act

Order — interim financing

50.6 (1) On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the debtor's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the debtor an amount approved by the court as being

Financement temporaire

50.6 (1) Sur demande du débiteur à l'égard duquel a été déposé un avis d'intention aux termes de l'article 50.4 ou une proposition aux termes du paragraphe 62(1), le tribunal peut par ordonnance, sur préavis de la demande aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens du débiteur sont grevés d'une charge ou sûreté — d'un montant qu'il estime indiqué — en faveur de la personne nommée dans l'ordonnance qui accepte de prêter au débiteur la somme qu'il

required by the debtor, having regard to the debtor's cash-flow statement referred to in paragraph 50(6)(a) or 50.4(2)(a), as the case may be. The security or charge may not secure an obligation that exists before the order is made.

(...)

Priority

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

(...)

Factors to be considered

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

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

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

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

(d) whether the loan would enhance the prospects of a viable

approuve compte tenu de l'état — visé à l'alinéa 50(6)a) ou 50.4(2)a), selon le cas — portant sur l'évolution de l'encaisse et des besoins de celui-ci. La charge ou sûreté ne peut garantir qu'une obligation postérieure au prononcé de l'ordonnance.

[...]

Priorité — créanciers garantis

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

[...]

Facteurs à prendre en considération

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

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

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

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

d) la question de savoir si le prêt favorisera la présentation d'une

proposal being made in respect of the debtor;

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

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

(g) the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.

Certain Crown claims

60 (1.1) Unless Her Majesty consents, no proposal shall be approved by the court that does not provide for the payment in full to Her Majesty in right of Canada or a province, within six months after court approval of the proposal, of all amounts that were outstanding at the time of the filing of the notice of intention or of the proposal, if no notice of intention was filed, and are of a kind that could be subject to a demand under

(a) subsection 224(1.2) 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

proposition viable à l'égard du débiteur;

e) la nature et la valeur des biens du débiteur;

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

g) le rapport du syndic visé aux alinéas 50(6)b) ou 50.4(2)b), selon le cas.

Certaines réclamations de la Couronne

60 (1.1) Le tribunal ne peut, sans le consentement de Sa Majesté, approuver une proposition qui ne prévoit pas le paiement intégral à Sa Majesté du chef du Canada ou d'une province, dans les six mois suivant l'approbation, de tous les montants qui étaient dus lors du dépôt de l'avis d'intention ou, à défaut, de la proposition et qui sont de nature à faire l'objet d'une demande aux termes d'une des dispositions suivantes :

a) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*;

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

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

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) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(i) 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

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

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

(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.

Security or charge relating to director's indemnification

64.1 (1) On application by a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the property of the person is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the person to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer after the filing of the notice of intention or the proposal, as the case may be.

Priority

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

Court may order security or charge to cover certain costs

64.2 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) is subject to a security or charge, in an amount that the court

Biens grevés d'une charge ou sûreté en faveur d'administrateurs ou de dirigeants

64.1 (1) Sur demande de la personne à l'égard de laquelle a été déposé un avis d'intention aux termes de l'article 50.4 ou une proposition aux termes du paragraphe 62(1), le tribunal peut par ordonnance, sur préavis de la demande aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de la personne sont grevés d'une charge ou sûreté, d'un montant qu'il estime indiqué, en faveur d'un ou de plusieurs de ses administrateurs ou dirigeants pour l'exécution des obligations qu'ils peuvent contracter en cette qualité après le dépôt de l'avis d'intention ou de la proposition.

Priorité

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

Biens grevés d'une charge ou sûreté pour couvrir certains frais

64.2 (1) Le tribunal peut par ordonnance, sur préavis aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de la personne à l'égard de laquelle a été déposé un avis d'intention aux termes de l'article 50.4 ou une proposition aux termes du paragraphe 62(1) sont grevés

considers appropriate, in respect of the fees and expenses of

(a) the trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee's duties;

(b) any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for the effective participation of that person in proceedings under this Division.

Priority

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

Deemed trusts

67 (2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(a) unless it would be so regarded in the absence of that statutory provision.

d'une charge ou sûreté, d'un montant qu'il estime indiqué, pour couvrir :

a) les dépenses et honoraires du syndic, ainsi que ceux des experts — notamment en finance et en droit — dont il retient les services dans le cadre de ses fonctions;

b) ceux des experts dont la personne retient les services dans le cadre de procédures intentées sous le régime de la présente section;

c) ceux des experts dont tout autre intéressé retient les services, si, à son avis, la charge ou sûreté était nécessaire pour assurer sa participation efficace aux procédures intentées sous le régime de la présente section.

Priorité

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

Fiducies présumées

67 (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) Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the Canada Pension Plan or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a **province providing a comprehensive pension plan** as defined in subsection 3(1) of the Canada Pension Plan, that law of the province establishes a **provincial**

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 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**

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.

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.

Provisions under the Companies' Creditors Arrangement Act

Compromises to be sanctioned by court

6(3) Unless Her Majesty agrees otherwise, the court may sanction a compromise or arrangement only if the compromise or arrangement provides for the payment in full to Her Majesty in right of Canada or a province, within six months after court sanction of the compromise or arrangement, of all amounts that were outstanding at the time of the application for an order under section 11 or 11.02 and that are of a kind that could be subject to a demand under

(a) subsection 224(1.2) of the *Income Tax Act*;

Homologation par le tribunal

6(3) Le tribunal ne peut, sans le consentement de Sa Majesté, homologuer la transaction ou l'arrangement qui ne prévoit pas le paiement intégral à Sa Majesté du chef du Canada ou d'une province, dans les six mois suivant l'homologation, de toutes les sommes qui étaient dues lors de la demande d'ordonnance visée aux articles 11 ou 11.02 et qui pourraient, de par leur nature, faire l'objet d'une demande aux termes d'une des dispositions suivantes :

a) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*;

(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

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 ainsi que des intérêts, pénalités ou autres charges afférents;

(c) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d'une somme, ainsi que des intérêts, pénalités ou autres charges afférents, laquelle somme :

(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

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) is of the same nature as a contribution under the Canada Pension Plan if the province is a province providing a

(ii) soit est de même nature qu'une cotisation prévue par le Régime de pensions du Canada, si la province est une

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.

Interim financing

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

Priority — secured creditors

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

Priority — other orders

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

province instituant un régime général de pensions au sens du paragraphe 3(1) de cette loi et si la loi provinciale a institué un régime provincial de pensions au sens de ce paragraphe.

Financement temporaire

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

Priorité — créanciers garantis

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

Priorité — autres ordonnances

(3) Il peut également y préciser que la charge ou sûreté n'a priorité sur toute autre charge ou sûreté grevant les biens de la compagnie au titre d'une ordonnance déjà rendue en vertu du paragraphe (1) que sur consentement

de la personne en faveur de qui cette ordonnance a été rendue.

Factors to be considered

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

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

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

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

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

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

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

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

Facteurs à prendre en considération

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

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

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

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

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

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

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

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

Security or charge relating to director's indemnification

11.51 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

Priority

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

Court may order security or charge to cover certain costs

11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

Biens grevés d'une charge ou sûreté en faveur d'administrateurs ou de dirigeants

11.51 (1) Sur demande de la compagnie débitrice, le tribunal peut par ordonnance, sur préavis de la demande aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de celle-ci sont grevés d'une charge ou sûreté, d'un montant qu'il estime indiqué, en faveur d'un ou de plusieurs administrateurs ou dirigeants pour l'exécution des obligations qu'ils peuvent contracter en cette qualité après l'introduction d'une procédure sous le régime de la présente loi.

Priorité

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

Biens grevés d'une charge ou sûreté pour couvrir certains frais

11.52 (1) Le tribunal peut par ordonnance, sur préavis aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de la compagnie débitrice sont grevés d'une charge ou sûreté, d'un montant qu'il estime indiqué, pour couvrir :

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

a) les débours et honoraires du contrôleur, ainsi que ceux des experts — notamment en finance et en droit — dont il retient les services dans le cadre de ses fonctions;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this *Act*; and

b) ceux des experts dont la compagnie retient les services dans le cadre de procédures intentées sous le régime de la présente loi;

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this *Act*.

c) ceux des experts dont tout autre intéressé retient les services, si, à son avis, la charge ou sûreté était nécessaire pour assurer sa participation efficace aux procédures intentées sous le régime de la présente loi.

Priority

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

Priorité

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

Deemed Trusts

37 (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

Fiducies présumées

37 (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme tel par le seul effet d'une telle disposition.

Exceptions

(2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the Canada Pension Plan or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision"), nor does it apply in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province if

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a province providing a comprehensive pension plan as defined in subsection 3(1) of the Canada Pension Plan, that law of the province establishes a provincial pension plan as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same

Exceptions

(2) Le paragraphe (1) ne s'applique pas à l'égard des sommes réputées détenues en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du Régime de pensions du Canada ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* (chacun étant appelé « disposition fédérale » au présent paragraphe) ou à l'égard des sommes réputées détenues en fiducie aux termes de toute loi d'une province créant une fiducie présumée dans le seul but d'assurer à Sa Majesté du chef de cette province la remise de sommes déduites ou retenues aux termes d'une loi de cette province, si, dans ce dernier cas, se réalise l'une des conditions suivantes :

a) la loi de cette province prévoit un impôt semblable, de par sa nature, à celui prévu par la *Loi de l'impôt sur le revenu*, et les sommes déduites ou retenues au titre de cette loi provinciale sont de même nature que celles visées aux paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*;

b) cette province est une province instituant un régime général de pensions au sens du paragraphe 3(1) du Régime de pensions du Canada, la loi de cette province institue un régime provincial de pensions au sens de ce paragraphe, et les sommes déduites ou retenues au titre de

nature as amounts referred to in subsection 23(3) or (4) of the Canada Pension Plan,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

cette loi provinciale sont de même nature que celles visées aux paragraphes 23(3) ou (4) du Régime de pensions du Canada.

Pour l'application du présent paragraphe, toute disposition de la loi provinciale qui crée une fiducie présumée est réputée avoir, à l'encontre de tout créancier de la compagnie et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que la disposition fédérale correspondante, quelle que soit la garantie dont bénéficie le créancier.