In the Court of Appeal of Alberta

Citation: Canada v. Canada North Group Inc., 2019 ABCA 314

Date: 20190829
Docket: 1703-0237-AC
Registry: Edmonton

Between:

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

Her Majesty the Queen in Right of Canada

Appellant
(Applicant)

- and -

Canada North Group Inc., Canada North Camps Inc., Campcorp Structures Ltd., DJ Catering Ltd., 816956 Alberta Ltd., 1371047 Alberta Ltd. and 1919209 Alberta Ltd.

Respondents
(Respondents)

- and -

Ernst & Young Inc. in its capacity as Monitor

Respondent
(Respondent)

- and -

Business Development Bank of Canada

Respondent
(Respondent)

- and -

Insolvency Institute of Canada

Intervenor

- and -

Canadian Association of Insolvency and Restructuring Professionals

Intervenor

The Court:

The Honourable Madam Justice Patricia Rowbotham
The Honourable Mr. Justice Thomas W. Wakeling
The Honourable Madam Justice Frederica Schutz

Reasons for Judgment Reserved of The Honourable Madam Justice Rowbotham
Concurred in by The Honourable Madam Justice Schutz

Dissenting Reasons for Judgment Reserved of The Honourable Mr. Justice Wakeling

Appeal from the Order by
The Honourable Madam Justice J.E. Topolniski
Dated the 11th day of September, 2017
Filed the 5th day of October, 2017
(2017 ABQB 550, Docket: 1703 12327)

Reasons for Judgment Reserved of
The Honourable Madam Justice Patricia Rowbotham

Introduction

[1] The issue on this appeal is one of statutory interpretation, and whether the chambers judge correctly interpreted s. 227(4.1) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) (*ITA*) and ss. 11.2(2), 11.51(2) and 11.52(2) of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (*CCAA*).

[2] Leave to appeal was granted on a single issue: whether the chambers judge erred in law in determining that the "super-priority" charges made in favour of the interim financier, the directors of the debtor companies, and the Monitor and its counsel under the *CCAA* (the "Priority Charges" or "Priming Charges") have priority over statutory deemed trusts in favour of the Crown for unremitted source deductions as created by the *ITA*, the *Canada Pension Plan*, RSC 1985, c C-8 (*CPP*) and the *Employment Insurance Act*, SC 1996, c 23 (*EIA*) (collectively, the "Fiscal Statutes"): *Canada v Canada North Group Inc*, 2017 ABCA 363 at para 5.

[3] This appeal pits two of Parliament's objectives against each other: avoiding the social and economic costs of a debtor liquidating its assets (*Century Services Inc v Canada (Attorney General)*, 2010 SCC 60 at para 15; *Sun Indalex Finance, LLC v United Steelworkers*, 2013 SCC 6 at para 205); and the collection of source deductions, which lie "at the heart" of income tax collection (*First Vancouver Finance v MRN*, 2002 SCC 49 at para 22). What charges have priority: court-ordered Priority Charges in favour of those who participate in *CCAA* restructuring proceedings or unremitted source deductions in favour of the Crown?

[4] The chambers judge held that the *CCAA* gives the court the ability to rank court-ordered Priority Charges ahead of the Crown's interest arising out of statutory deemed trusts.

[5] The Crown, as represented by the Minister of National Revenue (CRA), appeals, claiming that Parliament's intention to give paramount priority to the Crown's claims for unremitted source deductions over claims of those involved in *CCAA* proceedings is clear from the language of the *CCAA* and the Fiscal Statutes.

[6] The respondent interim lender (Business Development Bank of Canada) and the respondent court-appointed Monitor (Ernst & Young Inc.) argue that the chambers judge's interpretation is correct as it gives effect to the policy objectives of both the Fiscal Statutes and the *CCAA*. The intervenors (the Canadian Association of Insolvency and Restructuring Professionals and the Insolvency Institute of Canada) also argue that the appeal should be dismissed.

[7] All parties acknowledge the chilling effect on commercial restructuring that will result if the Crown's position prevails.

[8] For the reasons that follow I dismiss the appeal.

Background Facts

Initial Order

[9] On July 5, 2017, the Court of Queen's Bench issued an order granting the Debtors[1] protection under the *CCAA* (the "Initial Order"). The Initial Order provided for a total of $1,650,000 in Priming Charges in the following priority:

- Administration Charge of $500,000 in favour of the court-appointed Monitor;
- Interim Lender's Charge of $1,000,000 in favour of the interim financier; and
- Directors' Charge of $150,000.

[10] The Interim Lender's Charge was later increased to $3,500,000 and the Administration Charge to $950,000.

[11] The court's authority to order these Priming Charges is found in the *CCAA*. Parliament has afforded the court the discretion to order Priming Charges in an amount that the court considers appropriate: ss. 11.52(1), 11.51(1) and 11.2(1) of the *CCAA*. Sections 11.52(2), 11.2(2) and 11.51(2) of the *CCAA* (the "Priming Provisions") each provide as follows:

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

[12] Consistent with the discretionary authority of the court, paragraph 44 of the Initial Order provides that the Priming Charges have priority over the claims of secured creditors:

> Each of the Directors' Charge, Administration Charge and the Interim Lender's Charge ... shall constitute a charge on the Property and subject always to section 34(11) of the *CCAA* such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise ... in favour of any Person.

[13] Paragraph 46(d) of the Initial Order provides that the Priming Charges "shall not otherwise be limited or impaired in any way by...(d) the provisions of any federal or provincial statutes".

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[1] Canada North Group Inc., Canada North Camps Inc., Campcorp Structures Ltd., DJ Catering Ltd., 816956 Alberta Ltd., 1371047 Alberta Ltd., and 1919209 Alberta Ltd.

Crown's Application to Vary the Initial Order

[14] On July 31, 2017, the Crown applied to vary the Priming Charges in the Initial Order on the grounds that paragraphs 44 and 46(d) of the Initial Order failed to recognize the Crown's legislative proprietary interest in unremitted source deductions (i.e., employees' income tax, employees' CPP contributions and employees' EI premiums). At the time of the Initial Order, two of the Debtor corporations had failed to remit to the Crown a total of $685,542.93 in source deductions.

[15] The Crown argued that s. 227(4.1) of the *ITA*, s. 23(4) of the *CPP* and s. 86(2.1) of the *EIA* provide that the Crown's claims for unremitted source deductions have priority over the claims of all other creditors of a debtor, notwithstanding any other federal statute, including the *CCAA*.

[16] Sections 227(4) and (4.1) of the *ITA* provide:

> 227(4) Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act.
>
> (4.1) **Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law,** where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person and property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for a security interest (as defined in subsection 224(1.3)) would be property of the person, equal in value to the amount so deemed to be held in trust is deemed
>
> > (a) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, and
> >
> > (b) to form no part of the estate or property of the person from the time the amount was so deducted or withheld, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to such a security interest

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

[17] In *First Vancouver* at para 3, Iacobucci J explained the effect of these provisions:

> Section 153(1) of the *ITA* requires employers to deduct and withhold amounts from their employees' wages ("source deductions") and remit these amounts to the Receiver General by a specified due date. By virtue of s. 227(4), when source deductions are made, they are deemed to be held separate and apart from the property of the employer in trust for Her Majesty. If the source deductions are not remitted to the Receiver General by the due date, the deemed trust in s. 227(4.1) of the *ITA* becomes operative and attaches to property of the employer to the extent of the amount of the unremitted source deductions. As well, the trust is deemed to have existed from the moment the source deductions were made.

[18] Sections 23(4) of the *CPP* and s. 86(2.1) of the *EIA* are identical to s. 227(4.1) of the *ITA*.

[19] The chambers judge dismissed the Crown's application. She rejected the Crown's argument that the trust provisions in the Fiscal Statutes create a proprietary rather than secured interest. She preferred the analysis of Romaine J in *Temple City Housing Inc (Companies' Creditors Arrangement Act)*, 2007 ABQB 786, leave to appeal to CA refused, 2008 ABCA 1 over that of Moir J in *Rosedale Farms Limited, Hassett Holdings Inc, Resurgam Resources (Re)*, 2017 NSSC 160. The chambers judge held that the definition of a "security interest" in s. 224(1.3) of the *ITA* includes a "deemed or actual trust". The *ITA* is the enabling statute of the Crown's deemed trusts. It would be inconsistent to characterize the deemed trusts in a way contrary to their enabling statutes.

[20] She then held that the Crown's statutorily deemed trusts could be subordinated by court-ordered Priming Charges. In her view, the Crown's position implied that the Fiscal Statutes and the *CCAA* are in conflict. While it appeared that Parliament had drafted provisions that purport to grant super-priority to court-ordered Priming Charges under the *CCAA* while at the same time granting super-priority to the Crown's deemed trusts under the Fiscal Statutes, she held that this apparent conflict could be avoided by interpreting the statutes harmoniously. The chambers judge stated at para 96, citing *Thibodeau v Air Canada*, 2014 SCC 67 [footnotes omitted]:

> [T]here is a conflict between two provisions of the same legislature "**only** when the existence of the conflict, in the restrictive sense of the word, **cannot be avoided by interpretation**" (emphasis added). Nothing in these *CCAA* sections directly conflict with s. 227(4.1) [of the *ITA*] and thus, one must attempt to interpret these provisions without conflict.

[21] Applying the principle of statutory interpretation that legislation should be construed in a manner that preserves the harmony, coherence, and consistency of the entire legislative scheme, she held that the Crown's statutory deemed trusts have priority over all security interests, except those ordered under the Priming Provisions of the *CCAA*. She concluded that ss. 11.2, 11.51 and 11.52 of the *CCAA* gave the court the ability to grant priority to charges necessary for restructuring ahead of the Crown's security interest arising out of the deemed trusts.

Leave to Appeal

[22] As there are sufficient assets in the estate to satisfy both the Priming Charges and the Crown's claim, the issues on appeal are moot. Nevertheless, leave to appeal was granted given the importance of the issue: *Canada v Canada North Group Inc.*

Analysis

[23] The main issue on appeal is whether the Crown's deemed trusts under the Fiscal Statutes can be subordinated to the Priming Charges by a court order under ss. 11.2, 11.51 and 11.52 of the *CCAA*? The Crown asked the court first to determine whether its deemed trust is a proprietary interest or a security interest.

[24] These are questions of law, reviewable for correctness: *Housen v Nikolaisen*, 2002 SCC 33 at para 8.

[25] Before turning to these questions, I review the applicable principles of statutory interpretation.

The Correct Approach to Statutory Interpretation

[26] The guiding rule of statutory interpretation is this:

> Today 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.
>
> (*Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21, 36 OR (3d) 418)

[27] A governing principle of statutory interpretation is the presumption of coherence:

> It is presumed that the provisions of legislation are meant to work together, both logically and teleologically, as parts of a functioning whole. The parts are presumed to fit together logically to form a rational, internally consistent framework; and

> because the framework has a purpose, the parts are also presumed to work together dynamically, each contributing something toward accomplishing the intended goal.
>
> (R Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (LexisNexis Canada, 2014) at para 11.2)

[28] Courts presume that legislation passed by Parliament does not contain contradictions or inconsistencies, and that each provision is capable of operating without coming into conflict with any other: *Thibodeau* at para 93 citing R Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (2008) at 325. As the majority explained in *Lévis (City) v Fraternité des policiers de Lévis Inc*, 2007 SCC 14 at para 47:

> The starting point in any analysis of legislative conflict is that legislative coherence is presumed, and an interpretation which results in conflict should be eschewed unless it is unavoidable.

[29] If a conflict is unavoidable, meaning it cannot be resolved by adopting an interpretation that would remove the inconsistency, the court is faced with the question of which provision should prevail having regard to the legislature's intent: *Lévis* at para 58.

1. Is the Crown's deemed trust a proprietary interest or a security interest?

[30] Do the statutory deemed trust provisions of the Fiscal Statutes create a security interest over the debtor's property, rendering the Crown a "secured creditor" for the purposes of the Priming Provisions in the *CCAA*, or does the Crown have a proprietary interest in the debtor's property that is subject to the deemed trust, thereby removing assets from the debtor's estate?

[31] The chambers judge held that the former interpretation was correct. The Crown argues for the latter interpretation.

[32] I conclude that the chambers judge correctly interpreted the nature of the Crown's interest. The Crown's interest under the deemed statutory trust provisions of the Fiscal Statutes is akin to that of a secured creditor, but ranking ahead of all other secured creditors. The Crown does not hold a proprietary interest. Section 227(4.1) of the *ITA* does not elevate the Crown's claim to a proprietary interest. This is consistent with prior case law and the definitions of "secured creditor" and "security interest" in the Fiscal Statutes and the *CCAA*.

<u>Prior Case Law</u>

[33] The Crown advances the same argument that was rejected by Romaine J in *Temple City*. The Crown's argument is also inconsistent with the Supreme Court of Canada's characterization of the Crown's deemed trust under the *ITA* as a "floating charge over all of the assets of the tax debtor in the amount of the default": *First Vancouver* at para 40.

[34] Deemed trusts are not true trusts: *Royal Bank of Canada v Sparrow Electric Corp*, [1997] 1 SCR 411 at para 31, 143 DLR (4th) 385; *First Vancouver* at para 37. They do not attach to particular assets: *First Vancouver* at para 40. While the trust is focussed on the tax debtor's property, it attaches to the proceeds from realization of the estate of the tax debtor: *First Vancouver* at para 41. It follows that their character will change over time: *First Vancouver* at para 41.

[35] As noted by Iacobucci J, this interpretation gives effect to legislative intent. Parliament did not intend for the statutory deemed trusts to attach to particular assets thus freezing the debtor's assets and preventing the debtor from carrying on business: *First Vancouver* at para 41. I agree with the chambers judge that "the fact that a floating charge permits alienation of secured property resonates in all *CCAA* restructurings": at para 86.

[36] It follows that I do not adopt the conclusion of Moir J in *Rosedale Farms* who found the deemed trust to have priority over the security for debtor in possession financing.

Definitions

[37] Further, the Crown's interest falls squarely within the definition of "secured interest" in both the *ITA* and the *CCAA*.

ITA

[38] Section 224(1.3) of the *ITA* defines "secured creditor" as "a person who has a security interest in the property of another person." Where a "security interest" includes "any interest in ... property that secures payment ... and includes an interest ... created by or arising out of a ... deemed or actual trust ..." The *EIA* and the *CPP* cross-reference the *ITA* definitions.

[39] The Crown concedes that s. 224(1.3) of the *ITA* provides that deemed or actual trusts are security interests, but argues that this definition does not apply when the Crown is asserting its deemed trust claim. I reject this argument for the same reason as the chambers judge: it is illogical to interpret the statutory deemed trust interests in a way contrary to their enabling statutes.

CCAA

[40] The Crown's main argument relates to the definition of "secured creditor" in section 2(1) of the *CCAA*. The Crown proposes a reading of the section which it says supports a finding that the Crown is not a secured creditor. The definition reads as follows:

> **secured creditor** means a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company, or a holder of any bond of a debtor company secured by a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, or a trust

> in respect of, all or any property of the debtor company, whether the holder or beneficiary is resident or domiciled within or outside Canada, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds.

[41] The Crown argues that under the *CCAA* there are two "classes" of secured creditors: (i) holders of direct security, and (ii) holders of secured bonds. This interpretation requires that the definition be read as follows [indentation and emphasis added]:

> **secured creditor** means
>
> > a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company,
> >
> > **or a holder of any bond of a debtor company secured by**
> >
> > > a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, or **a trust in respect of, all or any property of the debtor company,**
> >
> > whether the holder or beneficiary is resident or domiciled within or outside Canada, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds. [Emphasis added]

[42] According to the Crown's interpretation, the reference to "a trust" is nested within the reference to bonds; the reference to "trust" is only in relation to an instrument securing *a bond* of a debtor company. If Parliament intended for "secured creditor" to include holders of trusts, the Crown argues there would be a third reference to "a holder of a trust" drafted in parallel to the first two classes. The Crown also points to the phrase "a trustee under any trust deed or other instrument *securing any of those bonds*" as evidence that this is the intended meaning.

[43] Neither the chambers judge nor Romaine J in *Temple Housing* specifically addressed this argument. Although the Crown's analysis is initially attractive, it ignores two things: (1) the Crown's interest could be characterized as a "charge" so is covered by the opening words of the definition; and (2) if we read the statutes harmoniously, as we must, Parliament has defined "security interest" in the *Income Tax Act* as including a deemed trust.

2. Can the deemed trust be subordinated to the Priming Provisions under the CCAA?

[44] The Crown argues that the language of the Fiscal Statutes is clear: Parliament intended that the Crown's interest in unremitted source deductions cannot be subordinated to any other secured interest, including court-ordered Priming Charges. It relies on the opening words of s. 227(4.1) of the *ITA*: "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 ..." The Crown submits, and my colleague finds, that these words lead to one conclusion: the deemed trust supersedes all.

[45] I disagree with this conclusion for a number of reasons. First, while a conflict may appear to exist at the level of the "black letter" wording of the Priming Provisions of the *CCAA* and the Fiscal Statutes, the presumption of statutory coherence requires that the provisions be read to work together to achieve the intended goal. The *CCAA* and the Fiscal Statutes are part of a larger statutory scheme that must be considered as a whole: *ATCO Gas & Pipelines Ltd v Alberta (Energy & Utilities Board)*, 2006 SCC 4 at para 49. In my view, the chambers judge's harmonious interpretation is correct.

[46] The crux of the chambers judge's reasoning is that the Crown failed to reconcile the objective of tax collection with Parliament's commitment to facilitate *CCAA* restructurings. The Crown's position ignores that *CCAA* restructurings facilitate the survival of companies, the production of goods and services, and ultimately jobs, all of which serve as fuel for the fiscal base.

[47] In *Century Services,* the Supreme Court provided an extensive history of the *CCAA*, its function amidst the body of insolvency legislation, and the principles that have been recognized by the jurisprudence. The Supreme Court explained the remedial purpose of the *CCAA* at para 18:

> Early commentary and jurisprudence also endorsed the *CCAA*'s remedial objectives. It recognized that companies retain more value as going concerns while underscoring that intangible losses, such as the evaporation of the companies' goodwill, result from liquidation (S. E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 *Can. Bar Rev.* 587, at p. 592). Reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs (*ibid.*, at p. 593). Insolvency could be so widely felt as to impact stakeholders other than creditors and employees. Variants of these views resonate today, with reorganization justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation.

[48] This remedial purpose has been recognized time and again in the jurisprudence: *Century Services* at para 59. Not only does the Crown's position undermine the objective of the *CCAA*, it will also result in fewer restructurings which will necessarily result in reduced tax revenue.

Undermining the remedial objective of the *CCAA* for the sake of tax collection disregards the obvious benefit for the government of successful corporate restructurings. In other words, the Crown is biting off the hand that feeds it. Indeed, in this case, the Priming Charges allowed the debtor to continue to operate its business and raise sufficient funds to satisfy both the Priming Charges and the Crown's claim. When the statutes are read harmoniously, as the chambers judge did, the objectives of both the Fiscal Statutes and the *CCAA* can be achieved.

[49] Second, the harmonious interpretation avoids absurd consequences. The presumption that the legislature does not intend absurd consequences was explained in *Rizzo* at para 27:

> It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to Côté [P.-A. Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991)], an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile ([R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994)], at p. 88).

[50] If the Crown's position prevailed, absurd consequences could follow. Interim financing of *CCAA* restructurings would simply end. Interim financing is necessary to achieve the purposes of the *CCAA*, with approximately 75% of restructurings requiring the aid of interim lenders: Janis P Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed (Toronto: Carswell, 2013) at 199; *Indalex* at para 59. The chambers judge rightly recognized the important role played by the court-appointed monitors who cannot resign without leave of the court, and the directors of the debtor company who steer the sinking ship.

[51] The chamber's judge's interpretation is also consistent with *Edmonton (City) v Alvarez & Marsal Canada Inc*, 2019 ABCA 109 at para 17, leave to appeal to SCC requested where this court recognized the modern commercial reality that professional services and interim lending in *CCAA* proceedings are provided in reliance on super priorities. Moreover, since the value of unremitted source deductions is often unknown at the outset of *CCAA* proceedings, the Crown's position would inject an unacceptable level of uncertainty into the insolvency process. As noted in the Report of the Standing Senate Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (Ottawa: 2003) at p 6:

> [C]anadian insolvency laws must be drafted in a manner that ensures a high level of predictability for all stakeholders, domestic and international. Everyone should have a clear understanding of how the insolvency process operates and the options that are available; consistency should enable the likely outcomes to be predicted

> with a relatively high degree of accuracy. Predictability will enable stakeholders to make the best possible choices given their particular circumstances: debtors to decide between bankruptcy and a consumer proposal or commercial reorganization, suppliers and creditors to assess the likely outcome of debtor default as a contributing factor in their decision about whether to supply and extend credit and at what cost, domestic and foreign investors about whether to make an investment, and judges to determine the most appropriate orders to be made and actions to be taken in particular circumstances, among others.

[52] The consequences of a proposed interpretation are properly considered as part of the interpretive exercises. Courts are not engaged in academic exercises; the application of legislation to facts affects the well-being of society and the legislature is presumed to act to protect the public interest: Sullivan at para 10.4. The Crown's interpretation is incompatible with the intended goal of the *CCAA*.

[53] Third, s. 6(3) of the *CCAA* prohibits the court from sanctioning a compromise or arrangement unless the plan of compromise or arrangement provides for payment in full to the Crown, within six months of the sanction of the plan, of all amounts that could be subject to a demand under the Fiscal Statutes. If the Crown's statutory deemed trusts had absolute priority, s. 6(3) would be unnecessary because the Crown would always be paid first. The legislature avoids tautology: every provision serves a purpose.

[54] Fourth, this interpretation is supported by the court's authority to displace the Crown's claim in order to facilitate a restructuring. Section 11.09(1) of the *CCAA* grants courts the power to stay the Crown's garnishment right under s. 224(1.2) of the *ITA*, just as the court can stay the enforcement mechanisms of other secured creditors. This power is illustrative of Parliament's intent to authorize courts to exercise control over the Crown's interests while monitoring restructuring proceedings. An implication of the Crown's position is that a court ordered stay would not apply to the Crown's claim.

[55] Fifth, even if there was a conflict, the implied exception rule (*generalia specialibus non derogant*) supports the chambers judge's interpretation. This principle is described by R Sullivan at para 11.58:

> When two provisions are in conflict and one of them deals specifically with the matter in question while the other has a more general application, the conflict may be resolved by applying the specific provision to the exclusion of the more general one. The specific prevails over the general; it does not matter which was enacted first.

[56] See also *Schnarr v Blue Mountain Resorts Limited*, 2018 ONCA 313 at paras 41-42, 52, 61-64, leave to appeal to SCC refused, [2018] SCCA No 187.

[57] The *CCAA* applies in special circumstances while the Fiscal Statutes are of general application. At the level of the provisions, the Priming Provisions in the *CCAA* are narrow, precise, limited to only those charges necessary for restructuring, and subject to ongoing judicial oversight. The court is typically balancing multiple interests as it moves the *CCAA* process forward. In contrast, the *ITA* deals generally with income tax collection, giving the Minister a mechanism to recover employee tax deductions that employers fail to remit to the Minister.

[58] The intended effect of s. 227(1.4) of the *ITA* is not diminished by giving effect to the *CCAA*. The Crown's interest remains specially protected as against all other secured creditors save those charges that are necessary to implement restructurings. This interpretation recognizes that the *CCAA* carves out a discretion for the court to achieve the intended legislated purpose of the *CCAA*.

[59] For these reasons, I dismiss the appeal and uphold the chambers judge's ruling that ss. 11.2, 11.51 and 11.52 of the *CCAA* give the court the ability to grant priority to charges necessary for restructuring ahead of the Crown's security interest arising out of the statutory deemed trusts under the Fiscal Statutes.

Costs

[60] The respondents argue that since the appeal was brought by the Crown as a test case on a moot point, it is just and equitable for the Crown to pay the respondents' costs on a full indemnity basis. The respondent Monitor notes that the costs of the appeal will only serve to reduce the amounts available for distribution to creditors in the subject *CCAA* proceedings. The intervenors do not seek costs.

[61] I am not persuaded that the respondents are entitled to enhanced costs. Although moot, the issue is significant to insolvency law. The default Rule (Rule 14.88) applies. The respondents are entitled to party and party costs. There will be no costs payable to the intervenors.

Appeal heard on October 4, 2018

Reasons filed at Edmonton, Alberta
this 29th day of August, 2019

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AUG 29 2019
Court of Appeal of Alberta

Rowbotham J.A.

I concur:

Schutz J.A.

Dissenting Reasons for Judgment Reserved
of The Honourable Mr. Justice Wakeling

I. Introduction

[62] This is an important statutory interpretation case involving priorities created under s. 227 (4.1) of the *Income Tax Act*[2] and under ss. 11.2(2), 11.51(2) and 11.52(2) of the *Companies' Creditors Arrangement Act.*[3]

[63] The Crown, relying on s. 227(4.1) of the *Income Tax Act*, claims that it is the beneficial owner of an amount equal to the unremitted employment income tax withholdings[4] made by Canada North Group Inc. and the other applicants seeking relief under the *Companies' Creditors Arrangement Act*. It asserts that its claim to these funds is superior to that of the Business Development Bank Canada, the insolvency professionals and the directors of the Canada North companies. The respondents rely on the provisions of the *Companies' Creditors Arrangement Act.*

[64] The Insolvency Institute of Canada predicts that validation of the Crown's position will "result in fewer restructurings [under the *Companies' Creditors Arrangement Act*], negating the primary purpose of ... [the *Act*] and, arguably, the tax collection purposes of the ... [*Income Tax Act*, the *Canada Pension Plan* and the *Employment Insurance Act*]."[5]

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[2] R.S.C. 1985 (5th Supp.), c. 1.

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

[4] *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1, s. 227(4).

[5] Factum, ¶ 15. See also ¶ 1 ("The net result of the Crown's position, if successful, will be more liquidations and *less* recoverable tax revenue") (emphasis in original) & ¶ 4 ("Priority Charges provide the basis for the participation of insolvency professionals, interim lenders and others in ... [*Companies' Creditors Arrangement Act*] proceedings and, without certainty that such parties will be compensated or repaid, the restructuring practice will suffer from a shortage of experience and capital"). See also Hanlon, Tickle & Csiszar, "Conflicting Case Law, Competing Statutes and the Confounding Priority Battle of the Interim Financing Charge and the Crown's Deemed Trust for Source Deductions", in Annual Review of Insolvency Law 2018, at 939 (J. Sarra et al eds. 2019) ("Until the Alberta Court of Appeal renders its decision, the lower court's ruling that the priority of the ... [*Income Tax Act*] deemed trust may be subordinated to a court-ordered interim financing lender charge is encouraging to interim lenders").

II. Questions Presented

[65] Section 227(4.1) of the *Income Tax Act*[6] states that

> [n]otwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* ..., any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed ... to be held by a person in trust for Her Majesty is not paid to Her Majesty ... 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.*

[66] Section 227(4) of the *Income Tax Act* states that a person who makes source deductions holds the amount deducted in trust for Her Majesty.

[67] The Crown relies on s. 227(4.1) and argues that its meaning is obvious.

[68] The respondents rely generally on s. 11 and more specifically on ss. 11.2(2), 11.51(2) and 11.52(2) of the *Companies' Creditors Arrangement Act.*[7]

[69] Section 11 declares that "[d]espite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*[8]... the court... may, subject to the restrictions set out in this *Act*... make any order that it considers appropriate in the circumstances". This is a broad but not unlimited grant of authority.

[70] It is broad in the sense that it excludes limitations of a court's authority under s. 11 that may be incorporated in the *Bankruptcy and Insolvency Act*[9] or the *Winding-up and Restructuring Act.*[10]

[71] It is limited in the sense that it does not exclude provisions in the *Income Tax Act* and other federal and provincial enactments or the other provisions of *Companies' Creditors Arrangement Act.*

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[6] R.S.C. 1985 (5th Supp.), c. 1 (emphasis added).

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

[8] R. Wood, Bankruptcy and Insolvency Law 16 (2d ed. 2015) ("The *Winding-up and Restructuring Act* ... is the only insolvency regime that can be used in connection with the insolvency of banks, insurance companies, trust companies, and loan companies. Proceeding under [it]... are characterized by a higher degree of court involvement; the court appoints a liquidator and supervises the liquidation of the debtor's assets").

[9] R.S.C. 1985, c. B-3.

[10] R.S.C. 1985, c. W-11.

[72] Sections 11.2(1), 11.51(1) and 11.52(1) of the *Companies' Creditors Arrangement Act* bestow on a court the power to create a "security or charge" on the property of the company seeking to restructure or reorganize in favour of a number of specified persons who assist a company to restructure or reorganize under the *Companies' Creditors Arrangement Act*. The first set consists of interim lenders who agree to provide financial assistance to applicants seeking relief under the *Companies' Creditors Arrangement Act*. The second set captures the insolvency professionals and the fees and expenses they incur. The third set identifies directors of the applicant companies who assist with restructuring or reorganization.

[73] Those who participate in insolvency proceedings call these "priming charges".

[74] Sections 11.2(2), 11.51(2) and 11.52(2) of the *Companies' Creditors Arrangement Act* are identical and provide that a court may order that these priming charges "rank in priority over the claim of any secured creditor of the company".

[75] The initial order issued July 5, 2017 granted priming charges in favour of the Business Development Bank Canada, the interim lender, and the insolvency professionals and directors of the Canada North companies who assisted the applicants with their attempt to restructure or reorganize under the *Companies' Creditors Arrangement Act*.

[76] Who has the best claim to the deemed trust funds created by s. 227(4) of the *Income Tax Act*?

[77] Is it the Crown on account of the deemed trust under s. 227(4) and the priority created by s. 227(4.1) of the *Income Tax Act*?

[78] Or is it the interim lender, the insolvency professionals and the directors by reason of the priming charges priority authorized by ss. 11.2(2), 11.51(2) and 11.52(2) of the *Companies' Creditors Arrangement Act*?

[79] If the consequence of giving s. 227(4.1) of the *Income Tax Act* its ordinary meaning might discourage insolvency professionals, interim lenders and directors of a relief-seeking corporation from participating in a restructuring or reorganization project under the *Companies' Creditors Arrangement Act*, does that justify a court ignoring the ordinary meaning of the statutory text?

III. Brief Answers

[80] The text of s. 227(4.1) of the *Income Tax Act*[11] bears only one plausible meaning.

[81] The Crown has a claim to the s. 227(4) deemed trust funds that supersedes any claim by those holding priming charges under ss. 11.2(2), 11.51(2) and 11.52(2) of the *Companies' Creditors Arrangement Act*.[12]

[82] Nothing in the *Companies' Creditors Arrangement Act* is inconsistent with this determination.

[83] The fact that this interpretation of s. 227(4.1) of the *Income Tax Act* might reduce the efficacy of the *Companies' Creditors Arrangement Act* is a result of a policy choice made by Parliament. It is not the judiciary's role to rewrite the legislation under the guise of statutory interpretation. If Parliament concludes that its 1997 decision to accord first priority to the Crown[13] was unwise and must be reversed, it will have to act.

IV. Statement of Facts

A. Initial Order Under the *Companies' Creditors Arrangement Act*

[84] On July 5, 2017, the return date of an originating application filed on June 28, 2017[14] by Canada North Group Inc., Canada North Camps Inc., Campcorp Structures Ltd., D.J. Catering Ltd., 816956 Alberta Ltd. and 1371047 Alberta Ltd.[15] under s. 9 of the *Companies' Creditors Arrangement Act*,[16] the Court of Queen's Bench of Alberta issued a "*Companies' Creditors Arrangement Act* Initial Order,"[17] parts of which are as follows:

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[11] R.S.C. 1985 (5th Supp.), c. 1.

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

[13] *Income Tax Amendments Act, 1997*, S.C. 1997, c. 19, s. 226.

[14] *Re Canada North Group Inc.*, 2017 ABQB 550, ¶ 2.

[15] An order pronounced July 27, 2017 added 1919209 Alberta Ltd. as an applicant.

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

[17] *Re Canada North Group Inc.*, 2017 ABQB 550, ¶ 9.

APPLICATION

2. The Applicants are companies to which the ... [*Companies' Creditors Arrangement Act*] applies.[18]

...

NO PROCEEDINGS AGAINST THE APPLICANTS OR THE PROPERTY

13. Until and including August 3, 2017,[19] or such later date as this Court may order ..., no proceeding or enforcement process in any court ... shall be commenced or continued against or in respect of the Applicants ... or the Monitor ... or affecting the Business or the Property, arising out of or in connection with any right, remedy or claim of any person against the Applicants in connection with any indebtedness, indemnity, liability or obligation of any kind whatsoever of the Applicants under contract, statute or otherwise ... except with leave of this Court, and any and all such Proceedings currently underway against or in respect of the Stay Parties or affecting the Business or the Property are hereby stayed and suspended pending further order of this Court.

...

DIRECTORS' AND OFFICERS' INDEMINIFICATION AND CHARGE

21. The directors and officers of the Applicants shall be entitled to the benefit of and are hereby granted a charge (the 'Directors' Charge') on the Property, which charge shall not exceed an aggregate amount of $150,000, as *security*[20] for the indemnity provided in paragraph 21 of this Order. The Directors' Charge shall have the priority set out in paragraphs 44 and 46 herein.

...

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[18] *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, s. 3(1) ("This Act applies in respect of a debtor company or affiliated debtor companies if the total of the claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than $5,000,000 or any other amount that is prescribed").

[19] Id. s. 11.02(1) ("A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days").

[20] Emphasis added.

APPOINTMENT OF MONITOR

30. The Monitor, counsel to the Monitor, the ... [Chief Restructuring Officer] and its counsel, if any, and the Applicants' counsel, as security for the professional fees and disbursements incurred both before and after the granting of this Order, shall be entitled to the benefits of and are hereby granted a charge (the 'Administration Charge') on the Property, which charge shall not exceed an aggregate amount of $500,000, as security for their professional fees and disbursements incurred at the normal rates and charges of the Monitor and such counsel, both before and after the making of this order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 44 and 46 hereof.

INTERIM FINANCING

...

34. The Interim Lender shall be entitled to the benefits of and is hereby granted a charge (the 'Interim Lender's Charge') on the Property to *secure*[21] all obligations under the Definitive Documents incurred on or after the date of this Order which charge shall not exceed the aggregate amount advanced on or after the date of this Order under the Definitive Documents. The Interim Lenders' Charge shall have the priority set out in paragraphs 44 and 46 hereof.

...

VALIDITY AND PRIORITY OF CHARGES

42. The priorities of the Directors' Charge, the Administration Charge and the Interim Lender's Charge, as among them, shall be as follows:

First – Administration Charge (to the maximum amount of $500,000);

Second – Interim Lender's Charge (to the maximum amount of $1,000,000); and

Third – Directors' Charge (to the maximum amount of $150,000).

...

44. Each of the Directors' Charge, Administration Charge and the Interim Lender's Charge ... shall constitute a charge on the Property and subject always to section 34(11) of the ... [*Companies' Creditors Arrangement Act*] such Charges shall rank

[21] Emphasis added.

in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise … in favour of any Person.

…

46. The Directors' Charge, Administration Charge … and the Interim Lender's Charge shall not be rendered invalid or unenforceable and the rights and remedies of the chargee entitled to the benefits of the Charges … shall not otherwise be limited or impaired in any way by:

…

> (b) any application(s) for bankruptcy order(s) issued pursuant to … [the *Bankruptcy and Insolvency Act*], or any bankruptcy order made pursuant to such applications;
>
> …
>
> (d) the provisions of any federal or provincial statutes; or
>
> (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement … which binds the Applicants, and notwithstanding any provision to the contrary in any Agreement:
>
> …
>
> > (iii) the payments made by the Applicants pursuant to this order, including the Letter of Offer … and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct or other challengeable or voidable transactions under any applicable law.

…

General

…

56. Any interested party (including the Applicants and the Monitor) may apply to this Court to vary or amend this Order on not less than seven … days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

[85] As a result of the initial order the total priming charges were $1,650,000 – directors' charge of $150,000, administration charge of $500,000 and the interim lender's charge of $1,000,000.[22]

[86] On July 20, 2017 the Business Development Bank Canada advanced $900,000 to the applicants.[23]

B. The Crown's Variation Application

[87] While the applicants served the Crown on June 28, 2017, the service package failed to make its way to the appropriate Canada Revenue Agency official until July 13, 2017.[24] As a result, the Crown did not appear at the July 5, 2017 hearing.[25]

[88] As of July 5, 2017 Canada North Group Inc. and Campcorp Structures Ltd. owed the Canada Revenue Agency $685,542.93 for employee source deductions held in trust and not remitted to the Crown.[26]

[89] On July 31, 2017 the Crown applied for an order varying paragraphs 44 and 46(d) of the initial order on the ground that

> [s]ubsections 227(4.1) of the *Income Tax Act*, 23(4) of the *Canada Pension Plan* and 86(2.1) of the *Employment Insurance Act* all provide that the Minister's claims for unremitted employee source deductions have priority over the claims of all other creditors of a debtor, notwithstanding any other federal statute, including the *Companies' Creditors Arrangement Act*.
>
> ...
>
> Paragraphs 44 and 46(d) of the Initial Order are without force and effect vis-à-vis the Minister, as those paragraphs fail to recognize the Minister's legislative proprietary interest as described in the cited provisions.

[90] The Crown sought the following variations of the initial order:

> 1. Paragraph 44 of the Initial Order in these [*Companies' Creditors Arrangement Act*] proceedings granted by the Honourable K.G. Nielsen on July 5, 2017 is

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[22] Subsequent orders increased the administration charge to $950,000 and the interim lender's charge to $3,500,000 and extended the stay-of-proceedings end date beyond August 3, 2017. 2017 ABQB 508, ¶ 15.

[23] *Re Canada North Group Inc.*, 2017 ABQB 550, ¶ 13.

[24] Id. ¶¶ 10 & 12.

[25] Id. ¶ 9.

[26] Factum of the Appellant ¶¶ 10 & 38.

amended by adding the following phrase before the opening words of paragraph 44:

> Subject to subsections 23(3) and (4) of the *Canada Pension Plan*, subsections 86(2) and (2.1) of *Employment Insurance Act*, and subsections 227(4) and (4.1) of the *Income Tax Act*,

2. The reference in paragraph 46(d) of the Initial Order to the provisions of any federal statute does not apply to the provisions cited in paragraph 1 of this Order.

3. This Order is deemed effective *ab initio* to July 5, 2017 as if the cited amendments were made as part of the Initial Order.

C. The Court of Queen's Bench Dismissed the Crown's Variation Application

[91] The chambers judge acknowledged that any funds held by Canada North Group Inc. and the other applicants covered by s. 227(4) of the *Income Tax Act*,[27] s. 23(3) of the *Canada Pension Plan*[28] and s. 86(2) of the *Employment Insurance Act*[29] were the subject of a deemed trust.[30]

[92] The critical issue, according to the chambers judge, was "whether CRA's interest arising from the deemed trusts can be subordinated [to the priming charges.]"[31]

[93] She concluded that "it is the Court's order [under the *Companies' Creditors Arrangement Act*] that sets the priority of the charges at issue."[32]

[94] This interpretation, in her opinion, was the one most consistent with the general purpose of the *Companies' Creditors Arrangement Act* – to preserve the entrepreneurial heartbeat of a stricken enterprise so that it could return to financial health in the future.[33] She noted that corporate patients who leave the operating room as functioning entities continue to employ taxpayers[34] and contribute to the Crown treasury.

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[27] R.S.C. 1985 (5th Supp.), c. 1.

[28] R.S.C. 1985, c. C-8.

[29] S.C. 1996, c. 23.

[30] 2017 ABQB 550, ¶ 79.

[31] Id.

[32] Id. ¶ 112.

[33] Id. ¶¶ 108 & 113.

[34] Id. ¶ 109.

[95] She foresaw a gloomy future for the *Companies' Creditors Arrangement Act* as the emergency physician if a court exercising its authority under the *Act* could not attach a super priority to the priming charges:[35]

> The interim financiers' charge provides both an incentive and guarantee to the lender that funds advanced in the course of the restructuring will be recovered. Without this charge such financing would simply end, and with that, so too would end the hope of positive *CCAA* outcomes. Here, I digress to note the increasing prevalence of interim financiers having no prior relationship to the debtor. It does not take a stretch of imagination to forecast that this practice will diminish if not end altogether without the comfort of super-priority charges.
>
> Similarly, the charge in favour of directors is important. The charge is intended to keep the captains aboard the sinking ship. Without the benefit of this charge, directors will be inclined to abandon the ship, and it would be remarkably difficult, if not impossible, to recruit replacements.
>
> Likewise, the priority charge for administrative fees is critical to a successful restructuring. Indeed, it is the only protection the Monitor has to ensure that its bills are paid. While the debtor's counsel has the option of resigning if its accounts go unpaid, the Monitor does not have that luxury. As a Court officer, the Monitor's job is to see the proceeding through to completion or failure and would need Court approval to be relieved of that duty. Finally, insolvency practitioners well know that they typically do not have to look to the administrative charge for their initial work – where it has the most significance is at the end.

D. The Crown Secured Leave to Appeal

[96] The Crown applied for leave to appeal[36] this question:[37] "Did the case management judge err in law in determining that the 'super-priority' charges made in favour of the interim financier, the directors of the debtor companies, and the Monitor and its counsel have priority over the claim of the Minister of National Revenue for unremitted source deductions?"

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[35] Id. ¶¶ 102-04.

[36] *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, s. 13 ("Except in Yukon, any person dissatisfied with an order or decision made under this Act may appeal from the order or decision on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs").

[37] 2017 ABCA 363, ¶ 5.

[97] The chambers judge granted leave to appeal even though there were sufficient assets in the debtors' estates to satisfy both the Crown's claim and the priming charges. He was satisfied that the "applicant has identified a substantive issue justifying a further appeal".[38]

V. Applicable Statutory Provisions

A. *Income Tax Act*

[98] The key parts of s. 227 of the *Income Tax Act*[39] are set out below:

> 227(4) Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act.
>
> (4.1) Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person and property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for a security interest (as defined in subsection 224(1.3)) would be property of the person, equal in value to the amount so deemed to be held in trust is deemed
>
> > (a) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, and
> >
> > (b) to form no part of the estate or property of the person from the time the amount was so deducted or withheld, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to such a security interest

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[38] Id.

[39] R.S.C. 1985 (5th Supp.), c.1.

> 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.

[99] "Secured creditor" and "security interest," important terms in s. 227(4) and (4.1) of the *Income Tax Act*, are defined in s. 224(1.3) of the *Income Tax Act*:

> 224(1.3) In subsection 224(1.2),
>
> *secured creditor* means a person who has a security interest in the property of another person or who acts for or on behalf of that person with respect to the security interest and includes a trustee appointed under a trust deed relating to a security interest, a receiver or receiver-manager appointed by a secured creditor or by a court on the application of a secured creditor, a sequestrator or any other person performing a similar function; ...
>
> *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 .... .

B. *Canada Pension Plan*

[100] Sections 23(3) and (4) of the *Canada Pension Plan*[40] are in this form:

> 23(3) Where an employer has deducted an amount from the remuneration of an employee as or on account of any contribution required to be made by the employee but has not remitted the amount to the Receiver General, the employer is deemed, notwithstanding any security interest (as defined in subsection 224(1.3) of the *Income Tax Act*) in the amount so deducted, to hold the amount separate and apart from the property of the employer and from property held by any secured creditor (as defined in subsection 224(1.3) of the *Income Tax Act*) of that employer that but for the security interest would be property of the employer, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act.
>
> 23(4) Notwithstanding 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

[40] R.S.C. 1985, c. C-8.

or any other law, where at any time an amount deemed by subsection (3) to be held by an employer 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 employer and property held by any secured creditor (as defined in subsection 224(1.3) of the *Income Tax Act*) of that employer that but for a security interest (as defined in subsection 224(1.3) of the *Income Tax Act*) would be property of the employer, 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 by the employer, separate and apart from the property of the employer, 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 employer from the time the amount was so deducted, whether or not the property has in fact been kept separate and apart from the estate or property of the employer 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 or in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

C. *Employment Insurance Act*

[101] Sections 86(2) and 86(2.1) of the *Employment Insurance Act*[41] are identical to ss. 23(3) and 23(4) of the *Canada Pension Plan.*

D. *Companies' Creditors Arrangement Act*

[102] The important provisions of the *Companies' Creditors Arrangement Act*[42] are set out below:

2(1) In this Act,

...

secured creditor means a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company, or a holder of any bond of a debtor company secured by a mortgage, hypothec, pledge, charge,

[41] S.C. 1996, c. 23.

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

lien or privilege on or against, or any assignment, cession or transfer of, or a trust in respect of, all or any property of the debtor company, whether the holder or beneficiary is resident or domiciled within or outside Canada, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds … .

…

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

…

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.

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

…

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.

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

…

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

(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;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; 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 their effective participation in proceedings under this Act.

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

...

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

(2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* .... .

VI. Analysis

A. A Court Cannot Give Statutory Text a Meaning It Cannot Support

[103] A court tasked with applying statutory text to a fact pattern must read the statute and related statutes in their entirety.[43]

[104] This review produces two significant benefits.

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[43] *Re Rizzo and Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, 41 (the Court approved this statement: "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") & *Purba v. Ryan*, 2006 ABCA 229, ¶ 13; 397 A.R. 251, 254 ("one must consider the combined effect of all relevant legislation as a whole and in its appropriate context").

[105] First, it may disclose the purpose or purposes[44] that the enactment pursues.[45] This is frequently helpful.[46] Sometimes it is not.[47]

[44] Most enactments incorporate more than one purpose. This is certainly the case for the *Criminal Code*. R.S.C. 1985, c. C-46. At the most abstract level the *Criminal Code* provides an exhaustive statement of crimes. Section 9 of the *Criminal Code* states that "[n]otwithstanding anything in this Act or any other Act, no person shall be convicted ... of an offence at common law". This promotes certainty. A law that clearly defines criminal conduct allows persons who have free will to factor in the lawfulness of possible courses of conduct when deciding how to act. See also *Canadian Charter of Rights and Freedoms*, s. 11(g) ("Any person charged with an offence has the right ... not be found guilty on account of an act or omission unless, at the time of the act or omission, it constitutes an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations". *Canada Act 1982*, c. 11, sch. B (U.K.). The *Criminal Code* is a comprehensive enactment that contains discrete parts each of which pursues distinct objectives. For example, Part XXIII deals with sentencing. Section 718 declares that "[t]he fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives: (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct; (b) to deter the offender and other persons from committing offences; (c) to separate offenders from society, where necessary; (d) to assist in rehabilitating offenders; (e) to provide reparations for harm done to victims or to the community; and (f) to promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims or to the community". Part XXI/Mental Disorder also promotes a distinct purpose. In *Winko v. British Columbia*, [1999] 2 S.C.R. 625, 658 Justice McLachlin opined that "the purpose of Part XX.1 is to replace the common law regime for the treatment of those who offend while mentally ill with a new approach emphasizing individualized assessment and the provision of opportunities for appropriate treatment. ... Throughout the process the offender is to be treated with dignity and accorded the maximum liberty compatible with Part XX.1's goals of public protection and fairness to the NCR accused". All this means that one must be mindful that many purposes may be at play and that they may advance completely difference interests in a way that may be complementary or discordant..

[45] *Frank v. Canada*, 2019 1 SCC 1, ¶ 130 ("the best way of discerning a legislature's purpose will usually be to look to the legislation itself"); *Alberta v. Cardinal*, 2013 ABQB 407, ¶52; 565 A.R. 271, 286 ("The best source of the goal the legislature pursues is the text itself. A part of the legislation devoted to a statement of the legislative purpose is usually an indisputable marker of the true intention of the legislature") & H. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1200 (tentative ed. Harvard University 1958) ("In interpreting a statute a court should ... [d]ecide what purpose ought to be attributed to the statute").

[46] E.g., *Election Amendment Act, 1998*, S.A. 1998, c. 34 ("Whereas the Legislative Assembly of Alberta believes that, with a few exceptions, denying the right to vote to those whose disrespect for the law has caused them to be imprisoned at the time of an election preserved the integrity of those principles and their recognition among Albertans").

[47] Knowledge of an enactment's purpose may be of minimal assistance. This is usually so if it is stated abstractly. *McMorran v. McMorran*, 2014 ABCA 387, ¶ 70; 378 D.L.R. 4th 103, 143 per Wakeling, J.A. ("For example, the determination that a labour relations statute exists to promote collective bargaining by government employees does not assist much in determining whether a worker is employed by government or is an independent contractor"); *Alberta v. Cardinal*, 2013 ABQB 407, ¶ 54; 565 A.R. 271, 287 ("On occasion, the legislative purpose is stated in terms too abstract to be helpful. A legislative purpose which is precise is of more assistance to the court than one that is not") & *Alberta Union of Provincial Employees v. Alberta Research Council*, [1992] C.L.L.R. 14390 at 14392 (Alta. P.S.E.R.B.) ("an abstract statement of purpose will as a rule be less helpful ... than one that is specific").

[106] Second, reading the statutory text[48] discloses its potential plausible meanings.[49]

[107] Words have an ordinary meaning or meanings.[50] Legislators are presumed to know the ordinary meanings of words and to have intended readers of the text to give a statute an interpretation consistent with those ordinary meanings.[51] "Words must not be given meanings they cannot possibly bear."[52]

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[48] *Spencer v. Australia*, [2010] HCA 28, ¶ 50; 241 C.L.R. 118, 138 per Hayne, Crennan, Kiefel & Bell, JJ. ("Consideration of the operation and application ... [of the summary judgment rule] must begin from consideration of its text").

[49] *Humphreys v. Trebilcock*, 2017 ABCA 116, ¶ 109 ("[a court] must identify the potential permissible meanings [of the text]"). A permissible meaning is one that a reasonable reader could have given the text when it was produced. *Unifor, Local 707A v. SMS Equipment Inc.*, 2017 ABCA 81, ¶ 81; 47 Alta. L.R. 6th 28, 56 per Wakeling, J.A. An implausible meaning is not a permissible meaning. *Lenz v. Sculptoreanu*, 2016 ABCA 111, ¶ 4; 399 D.L.R. 4th 1, 6 ("A contrary meaning would give the text an implausible meaning. A court may never do this") & *Valard Construction Ltd. v. Bird Construction Co.*, 2016 ABCA 249, ¶ 184; 57 C.L.R. 4th 171, 236 per Wakeling, J.A. in dissent ("The text of the bond does not support the interpretation the trial judge gave it"), rev'd 2018 SCC 8; [2018] 1 S.C.R. 224.

[50] Dictionaries record the ordinary meanings those who use the language correctly understand their use to represent. See *Humphreys v. Trebilcock*, 2017 ABCA 116, ¶ 113; [2017] 7 W.W.R. 343, 375 ("Reference to authoritative dictionaries is helpful. Those sources record a range of potential meanings from which the court must select the most suitable for the context") & H. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1220 (tentative ed. Harvard University1958) ("A dictionary... never says what meaning a word <u>must</u> bear in a particular context. ...An unabridged dictionary is simply an historical record, not necessarily all-inclusive, of the meanings which words in fact <u>have</u> borne, in the judgment of the editors, in the writings of reputable authors. ... A good dictionary always gives examples of the use of the word <u>in context</u> in each of the meanings ascribed to it") (emphasis in original).

[51] *The Queen v. D.A.I.*, 2012 SCC 5, ¶ 26; [2012] 1 S.C.R. 149, 166 ("The first and cardinal principle of statutory interpretation is that one must look to the plain words of the provision"); *Thomson v. Canada*, [1992] 1 S.C.R. 385, 399-400 (unless an enactment indicates a contrary intention a word should be given its ordinary or usual meaning); *Humphreys v. Trebilcock*, 2017 ABCA 116, ¶ 109; [2017] 7 W.W.R. 343, 375 ("To do so one must identify the potential permissible meanings of these terms, taking into account their ordinary meanings"); *Caminetti v. United States*, 242 U.S. 470, 485-86 (1917) ("Statutory words are uniformly presumed, unless the contrary appears, to be used in their ordinary and usual sense, and with the meaning commonly attributed to them"); R. Sullivan, Sullivan on the Construction of Statutes 28 (6th ed. 2014) ("It is presumed that the ordinary meaning of a legislative text is the meaning intended by the legislature") & A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 69 (2012) ("Words are to be understood in their ordinary, everyday meanings – unless the context indicates that they bear a technical sense").

[52] *Zuk v. Alberta Dental Ass'n*, 2018 ABCA 270, ¶ 159; 426 D.L.R. 4th 496, 539. See also *First Vancouver Finance v. Canada*, 2002 SCC 49, ¶ 43; [2002] 2 S.C.R. 720, 739 ("Although it would be open to Parliament to extend the trust to property alienated by the tax debtor, such an interpretation is simply not supported by the language of the ... [*Income Tax Act*]"); *Bourne v. Norwich Crematorium Ltd.*, [1967] 2 All E.R. 576, 578 (Ch.) ("[a court] must not ... distort ... [the *Income Tax Act, 1952*] and give it a meaning which in the context ... it can [not] possibly bear"); A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 31 (2012) ("A fundamental rule of textual interpretation is that neither a word nor a sentence may be given a meaning that it cannot bear") & H. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1200 (tentative ed. Harvard University 1958) ("In

[108] If text may bear only one plausible or permissible meaning, the inquiry is over.[53] A court must conclude that the text has this restricted meaning.[54]

[109] The next example shows how this works.

[110] Suppose that a municipality receives complaints that some residents are disrupting the peace and quiet of their neighbourhoods by mowing their lawns when school children are in bed. It amends its noise bylaw and prohibits the operation of a lawn mower in residential areas between the hours of 9 pm and 8 am. An overzealous bylaw enforcement officer charges a resident who is operating his old-fashioned reel push mower at 10 pm. The accused's mower made no or very little sound. Any noise it made would not disturb anyone. The resident has violated the noise bylaw. An old-fashioned reel push mower is a lawn mower. He operated it during prohibited hours. Any

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interpreting a statute a court should... [i]nterpret the words of the statute... so as to carry out the purpose [of the statute] as best it can, making sure, however, that it does not give the words... a meaning they will not bear").

[53] *The Queen v. Rodgers*, 2006 SCC 15, ¶ 20; [2006] 1 S.C.R. 554, 573 ("The clear language of s. 487.055(1) [of the *Criminal Code*] indicates that Parliament intended to authorize *ex parte* applications under this section. There is no room to interpret the provision as presumptively requiring that applications be brought on notice"); *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, ¶ 10; [2005] 2 S.C.R. 601, 610 ("When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process"); *The Queen v. McIntosh*, [1995] 1 S.C.R. 686, 704 ("where, by the use of clear and unequivocal language capable of only one meaning, anything is enacted by the legislature, it must be enforced however harsh or absurd or contrary to common sense the result may be"); *Canada v. Mossop*, [1993] 1 S.C.R. 554, 581 ("when Parliamentary intent is clear, courts ... are not empowered to do anything else but to apply the law") *Unifor, Local 707A v. SMS Equipment Inc.*, 2017 ABCA 81, ¶ 82; 47 Alta. L.R. 6th 28, 56 per Wakeling, J.A. ("If this endeavor produces only one ... [plausible] meaning the interpretation process comes to an end"); *Vacher & Sons, Ltd. v. London Society of Compositors*, [1913] A.C. 107, 121-22 (H.L. 1912) per Lord Atkinson ("If the language of a statute be plain, admitting of only one meaning, the Legislature must be taken to have meant and intended what it has plainly expressed, and whatever it has in clear terms enacted must be enforced though it should lead to absurd or mischievous results ... . [Y]our Lordships' House sitting judicially is not concerned with the question whether the policy it embodies is wise or unwise, or whether it leads to consequences just or unjust, beneficial or mischievous"); *Sussex Peerage Case*, 8 Eng. Rep. 1034, 1057 (H.L. Committee for Privileges 1844) per Tindal C.J. ("If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense"); *Hamilton v. Rathbone*, 175 U.S. 414, 419 (1899) ("where a statute is ... susceptible upon its face of two constructions, the court may look into... the purpose intended to be accomplished by it, to determine its proper construction. But where the act is clear upon its face, and when standing alone it is fairly susceptible of but one construction, that construction must be given to it"); *Temple v. City of Petersburg*, 182 Va. 418, 423; 29 S.E. 2d 357, 358 (Sup. Ct. 1944) ("If the language of a statute is plain and unambiguous, and its meaning perfectly clear and definite, effect must be given to it regardless of what courts think of its wisdom or policy") & de Sloovère, "Contextual Interpretation of Statutes", 5 Fordham L. Rev. 219, 219 (1936) ("Very often the obvious meaning is the correct one, but until one can say that it is the only sensible meaning, the statute has not been fully interpreted. At this point in the process the context must be studied so as to be sure there is no other equally justifiable meaning that the text will bear by fair use of language").

[54] *Royal Bank of Canada v. The Queen*, [1997] 1 S.C.R. 411, 484 ("the consequences of my colleague's approach might be more dire than even Professor Wood supposes. ... I agree that if Parliament mandated this outcome, the courts must perforce accept it. However, judges should not rush to embrace such a weighty consequence unless the statutory language requiring them to do so is unequivocal").

person asked whether this machine is a lawn mower would say yes. Webster's Third New International Dictionary of the English Language Unabridged's[55] definition of "lawn mower" supports this assertion: "a hand-operated or power-operated machine for cutting grass or a lawn." The dictionary features a picture of a reel push mower to show what a lawn mower is. The conclusion that a reel push mower is a lawn mower ends the inquiry and eliminates the need to consider why the municipality amended its noise bylaw. In any event, giving the bylaw text its ordinary meaning did not thwart the attainment of the noise bylaw's purpose. It just meant that some lawn mowers that do not disrupt the peace and quiet of a neighbourhood may not be operated at night.

[111] If the text discloses more than one plausible or permissible meaning, the court must select the one that best promotes the purpose that accounts for the statute or the contested part of the statute.[56]

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[55] Webster's Third New International Dictionary of the English Language Unabridged 1280 (2002).

[56] *Interpretation Act*, R.S.A. 2000, c. I-8, s. 10 ("An enactment ... shall be given the fair, large and liberal construction and interpretation that best assures the attainment of its objects"); *Celgene Corp. v. Canada*, 2011 SCC 1, ¶ 21; [2011] 1 S.C.R. 3, 13 ("The words, if clear, will dominate; if not, they yield to an interpretation that best meets the overriding purpose of the statute"); *McBratney v. McBratney*, 59 S.C.R. 550, 561 (1919)("where you have rival constructions of which the language of the statute is capable you must resort to the object ... of the statute ... [and adopt] the construction which best gives effect to the governing intention"); *Humphreys v. Trebilcock*, 2017 ABCA 116, ¶ 109; [2017] 7 W.W.R. 343, 375-76 ("If there is more than one potential meaning, the court must select the option that best advances the purpose that accounts for the text"); *McMorran v. McMorran*, 2014 ABCA 387, ¶ 69; 378 D.L.R. 4th 103, 142 per Wakeling, J.A. ("[a] failure to be mindful of the purpose may cause a court to select from several permissible meanings one that does not best promote the attainment of the text's object"); *Rainy Sky SA v. Kookmin Bank*, [2011] UKSC 50, ¶ 21; [2011] 1 W.L.R. 2900, 2908 ("If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other"); *The Queen v. Judge of The City of London Court*, [1892] 1 Q.B. 273, 290 (C.A. 1891) per Lord Esher, M.R. ("If the words of an Act are clear, you must follow them, even though they lead to a manifest absurdity. ... [I]f the words...admit of two interpretations, then they are not clear; and if one interpretation leads to an absurdity, and the other does not, the Court will conclude that the legislature did not intend to lead to an absurdity, and will adopt the other interpretation"); *National Tax Credit Partners, L.P. v. Havlik*, 20 F. 3d 705, 707 (7^{th} Cir. 1994) per Easterbrook, J. ("Knowing the purpose behind a rule may help a court decode an ambiguous text, ... but first there must be some ambiguity"); A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 63 (2012) ("A textually permissible interpretation that furthers rather than obstructs the document's purpose should be favored") & H. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1156 (tentative ed. Harvard University 1958)("Every statute must be conclusively presumed to be a purposive act. The idea of a statute without an intelligible purpose is foreign to the idea of law and inadmissible").

[112] Fidelity to statutory text is a fundamental feature of statutory interpretation.[57] Courts that ignore the text act as unauthorized legislators.[58] They disregard the primacy of parliament and the paramountcy of the rule of law in our legal system.[59]

[113] Courts must be wary of the harm attributable to improper and undue emphasis of the purpose of the statute and the consequential perversion of the statutory text.[60] Purpose can never trump text.[61]

[114] Here is an example of the misuse of purpose.

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[57] *Quebec v. Caisse populaire Desjardins de Montmagny*, 2009 SCC 49, ¶ 29; [2009] 3 S.C.R. 286, 304 ("Canadian tax authorities are bound by the choice of legislative policy now expressed in the ... [*Bankruptcy and Insolvency Act*]. ... The appellants' arguments conflict with both the words of the statutory provisions in question and their underlying legislative intent and cannot be accepted").

[58] *Purba v. Ryan*, 2006 ABCA 229, ¶ 56; 397 A.R. 251, 262 ("The legislation fixes the boundary between large cases (with a right to a civil jury) and small cases (with no right) at $75,000. How can a court say that the legislators were wrong, and the boundary should be lower? ... It is improper, because it is amendment, not interpretation"); *Williams v. Canada*, 2017 FCA 252, ¶ 50; 417 D.L.R. 4th 173, 189 ("judges – like everyone else – are bound by legislation. They must take it as it is. They must not insert into it the meaning they want. They must discern and apply its authentic meaning, nothing else"); *Temple v. City of Petersburg*, 182 Va. 418, 424; 29 S.E. 2d 347, 359 (Sup. Ct. 1944) ("Just why the Legislature in its wisdom saw fit to prohibit the establishment of cemeteries in cities and towns and did not see fit to prohibit enlargements or additions, is no concern of ours. Certain it is that language could not be plainer than that it employed to express the legislative will. From it we can see with certainty that while a cemetery may not be established in a city or town, it may be added to or enlarged") & *Saville v. Virginia Railway & Power Co.*, 114 Va. 444, 452-53; 76 S.E. 954, 957 (Sup. Ct. 1913) ("We hear a great deal about the spirit of the law, but the duty of this court is not to make the law, but to construe it .... It is our duty to take the words which the legislature has seen fit to employ and give them their usual and ordinary signification, and thus having ascertained the legislative intent, to give effect to it, unless it transcends the legislative power as limited by the Constitution").

[59] *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 404 (1937) per Sutherland, J. in dissent ("The judicial function is that of interpretation; it does not include the power of amendment under the guise of interpretation. To miss the point of difference between the two is to miss all that the phrase 'supreme law of the land' stands for and to convert what was intended as inescapable and enduring mandates into mere moral reflections").

[60] Frankfurter, "Some Reflections on the Reading of Statutes", 47 Colum. L. Rev. 527, 543 (1947) ("Violence must not be done to the words chosen by the legislature").

[61] *Williams Lake Indian Band v. Canada*, 2018 SCC 4, ¶ 202 per Brown, J. ("The Tribunal is no more constitutionally empowered than this Court to aim for a result consistent with its own policy preferences by holding fast to the bits of statutory text that it likes while ignoring the bits that it does not"); *The Queen v. Zundel*, [1992] 2 S.C.R. 731, 771 (the Court held that a statute cannot be given a meaning it cannot bear in order to promote equality and multiculturalism); *Covert v. Nova Scotia*, [1980] 2 S.C.R. 774, 807 per Dickson, J. ("Although a court is entitled ... to look to the purpose of the Act ... it must still respect the actual words which express the legislative intention"); *Ursa Ventures Ltd. v. City of Edmonton*, 2016 ABCA 135, ¶ 85; 91 C.P.C. 7th 73, 106 per Wakeling, J.A. ("Overzealous pursuit of an undeniable legislative purpose must not cause one to overlook the limited scope of the words the legislators used") & *Alberta v. McGeady*, 2014 ABQB 104, ¶ 23; [2014] 7 W.W.R. 559, 571 ("No statutory decision maker can ignore substantive statutory provisions because it believes [they produce] ... unfair results").

[115] Suppose that a railway safety act declares that a railway must equip freight and passenger cars with automatic couplers. Automatic couplers relieve workers of the need to manually connect and disconnect rolling stock.[62] Manual connection is a very dangerous task and causes workers many serious injuries. A dispute arises as to whether a locomotive is a freight or passenger car. The railway unions argue that it is. They claim that a contrary interpretation would largely frustrate the ameliorative effects of the legislation because locomotives frequently participate in the coupling and uncoupling process. The railways oppose this interpretation. Automatic couplers are expensive. A court contemplates holding that a locomotive is a freight or passenger car. It is attracted to this interpretation because it will enhance workplace safety. But the court ultimately rejects this option, convinced a court cannot do this. A locomotive cannot possibly be characterized as a freight or passenger car.[63] This is not a permissible reading of the statute – a legislative compromise of the positions advanced by the railway unions and the railways. If the law is to be changed the legislature must do it. It can amend the railway safety act to state that a railway must equip locomotives and freight and passenger cars with automatic couplers.

B. The Absurdity Doctrine Has a Very Limited Function in the Interpretation of Legal Texts

[116] In rare cases the generally accepted interpretation principles do not work.

[117] This is not because these principles are in any way deficient. It is because there is good reason to believe that there is something wrong with the text.

[118] The problem with the text may be attributable to an error on the part of the statutory printer.[64] Suppose the drafter of court rules had submitted text to the printer that stated a document may be served outside the jurisdiction "in accordance with the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters". The legislative printer erroneously substituted "Havana" for "Hague". There is no Havana Convention on this subject. Litigators and judges know that the governing norm is the Hague Convention. Neither the drafter nor the legislators detected this error and approved the court rules with this mistake.

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[62] See *Johnson v. Southern Pacific Co.*, 196 U.S. 1, 14-15 (1904) (the Court refused to interpret "car" in railway safety legislation narrowly – "any car ... not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars" – and exclude locomotives in order to promote the safety of railway employees responsible for coupling and uncoupling activities).

[63] Webster's Third New International Dictionary of the English Language Unabridged 908 (2002) ("freight car ... a railroad car for the transportation of freight") & 1650 ("a passenger car ... railroad car (as a coach, parlor car, dining car, or sleeping car) for carrying passengers").

[64] E.g., *An Act Respecting the Solemnization of Marriage*, R.S.M. 1970, c. M50, s. 8(2)(b) ("Where a marriage is to be solemnized under the authority of publication of banns, the intention to marry shall be proclaimed openly, at least once ... during divine service ... (b) where the parties are in the habit of attending whorship [read worship] at different churches ... in each of those churches").

[119] Sometimes the source of the error is the drafter.[65] Suppose that Parliament is convened on an emergency basis to order striking air traffic controllers back to work and declare that unresolved wage issues must be resolved by arbitration. The drafter submits a text to the printer providing that the "arbitration award is binding on the employees and the bargaining agent". The printer returns a bill as instructed. In the rush no one detected that no mention is made of "the employer". The provision should have stated that the "arbitration award is binding on the employer, employees and the bargaining agent". This is a major problem. It gives the employer an opportunity to argue that an unfavourable arbitration award is not binding on it.

[120] The doctrine of absurdity allows a court to make minor corrections of the flawed text.[66] No reasonable person would contend that the text the legislators approved was what they thought it was.

[121] This proposition allows a court either to disregard the suspect text or modify the text slightly to correct what every reasonable person would recognizes as an obvious textual error. Justice Scalia and Professor Garner assert that "[a] provision may be either disregarded or judicially corrected as an error (when the correction is textually simple) if failing to do so would result in a disposition that no reasonable person could approve".[67]

[122] Most of the time correcting the error is the desirable course.

[123] The absurdity doctrine authorizes judicial rewriting of text only in these limited circumstances.

[124] A court has no authority to ignore or revise clear and unambiguous text that bears only one meaning just because the court considers the substantive norm embodied in the text to be unwise or dangerous.[68]

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[65] E.g., 3 Geo. 4, c. 39, s. 2 (U.K.) ("or unless judgment shall have been signed or [read 'and'] execution issued [read 'levied'] on such warrant of attorney") & *Green v. Wood*, 115 Eng. Rep. 455, 458 (Q.B. 1845) per Lord Denman, C.J. ("We have here words which, as they stand, are useless ... . But, to give an effectual meaning, we must alter, not only 'or' into 'and', but 'issued' into 'levied'. It is extremely probable that this would express what the Legislature meant. But we cannot supply it") & per Williams, J. ("It is much safer to say that the words really have no meaning"). See R. Sullivan, Sullivan on the Construction of Statutes 318 (6th ed. 2014) ("Absurd results can sometimes be avoided by correcting a clear drafting mistake").

[66] A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 234 (2012) ("If an easy correction is not possible, the absurdity stands").

[67] Id.

[68] *The Queen v. Conway*, 2010 SCC 22, ¶ 97; [2010] 1 S.C.R. 765, 810 ("barring a constitutional challenge to the legislation, no judicial fiat can overrule Parliament's clear expression of intent"); *Royal Bank of Canada v. The Queen*, [1997] 1 S.C.R. 411, 484 ("the consequences of my colleague's approach might be more dire than even Professor Woods supposes. ... I agree that if Parliament mandated this outcome, the courts must perforce accept it"); *The Queen*

[125] Suppose a legislature triples the minimum hourly wage rate when it amends employment standard legislation. Employers – large and small – are up in arms. They loudly proclaim that they will not employ workers if they have to pay triple the previous minimum and that it will drive them out of business. Informed commentators agree that a minimum wage of this magnitude will be a job and business-killing initiative. A court charged with the responsibility of hearing complaints filed by employees against noncompliant employers must enforce the minimum hourly wage.

[126] Needless to say, a court acts illegitimately if it substitutes its views for that of the legislators on the merits of a provision the text of which supports only one plausible meaning and gives the

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v. McIntosh, [1995] 1 S.C.R. 686, 704 ("where, by use of clear and unequivocal language capable of only one meaning, anything is enacted by the legislature, it must be enforced however harsh or absurd or contrary to common sense the result may be"); *Zeitel v. Ellscheid*, [1994] 2 S.C.R. 142, 152 ("Recognition of the proper roles of the legislature and the judiciary requires that the courts give effect to the plain meaning of the words of a duly enacted statute. It is beyond the power of a court to interfere in a carefully crafted legislative scheme merely because it does not approve of the result produced by a statute in a particular case"); *Bedwell v. McGill*, 2008 BCCA 526, ¶ 31; 305 D.L.R. 4th 751, 765 ("I know of no judicial authority that would support our disregarding the clear terms of an enactment on the basis of absurdity"); *The Queen v. Huggins*, 2010 ONCA 746, ¶ 17 ("the clear wording of a statute must be given effect even if it may lead to an absurdity"); *Beattie v. National Frontier Insurance Co.*, 68 O.R. 3d 60, 67 (C.A. 2003) ("if the words of an Act are clear, they must be followed even though they lead to a manifest absurdity"); *Vacher & Sons Ltd. v. London Society of Composers*, [1913] A.C. 107, 121 (H.L. 1912) per Lord Atkinson ("If the language of a statute be plain, admitting of only one meaning, the Legislature must be taken to have meant and intended what it has plainly expressed, and whatever it has in clear terms enacted must be enforced though it should lead to absurd or mischievous results"); *City of Victoria v. Bishop of Vancouver Island*, [1921] 2 A.C. 384, 388 (P.C.) (B.C.) (the Privy Council cited with approval Lord Esher's speech in *The Queen v. Judge of the City of London Court*); *Cooke v. Charles A. Vogeler Co.*, [1901] A.C. 102, 107 (H.L. 1900) per Earl of Halsbury, L.C. ("a court of law has nothing to do with the reasonableness of unreasonableness of a provision"); *Warburton v. Loveland*, 6 Eng. Rep. 806, 809 (1832) per Tindal, C.J. ("Where the language of an Act is clear and explicit, we must give effect to it, whatever may be the consequences"); *Abley v. Dale*, 138 Eng. Rep. 519, 525 (Common Pleas 1851) per Jervis, C.J. ("If the precise words used are plain and unambiguous, we are bound to construe them in their ordinary sense, even though it does lead to an absurdity or manifest injustice"); *The Queen v. Judge of the City of London Court*, [1892] 1 Q.B. 273, 290 & 301-02 (C.A. 1891) per Lord Esher, M.R. ("If the words of an Act are clear, you must follow them, even though they lead to a manifest absurdity. The Court has nothing to do with the question whether the legislature has committed an absurdity") & per Lopes, L.J. ("if the words of an Act are unambiguous and clear, you must obey those words, however absurd the result may appear .... If any other rule were followed, the result would be that the Court would be legislating instead of the properly constituted authority of the country, namely, the legislature"); *The Queen v. Skeen*, 8 Cox. Cr. C. 143, 158 (Cr. App. 1859) per Lord Campbell, C.J. ("Where by the use of clear and unequivocal language, capable of only one construction, anything is enacted by the legislature, we must enforce it, although in our opinion, it may be absurd or mischievous"); *Electrical, Electronic, Telecommunication and Plumbing Union v. Times Newspapers Ltd.*, [1980] 1 Q.B. 585, 599 (1979) ("It is my task to construe the words and if I find them to be absolutely clear, then even though the results produced may be one which strikes me as being absurd, I must give effect to them") & *Temple v. City of Petersburg*, 182 Va. 418, 423; 29 S.E. 2d 357, 358 (Sup. Ct. 1914) ("If the language of a statute is plain and unambiguous, and its meaning perfectly clear and definite, effect must be given to it regardless of what courts think of its wisdom or policy").

text a meaning it cannot support.[69] It is the role of legislature – not the courts – to evaluate the merits of an enactment and to amend imprudent enactments.[70]

C. The Plain Meaning of Section 227(4.1) of the *Income Tax Act* Accords Priority to the Crown Over the Holders of Priming Charges Created by the *Companies' Creditors Arrangement Act*

[127] There is only one plausible meaning for s. 227(4.1) of the *Income Tax Act*.[71]

[128] It makes two statements unequivocally. First, the Crown is the beneficial owner of amounts a corporation seeking relief under the *Companies' Creditors Arrangement Act*[72] withheld from the

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[69] A court may properly decline to accord text that supports two plausible interpretations, only one of which is absurd, an absurd interpretation. *The Queen v. Judge of the City of London Court*, [1892] 1 Q.B. 273, 290 (C.A. 1891) per Lord Esher, M.R. ("if the words of an Act admit of two interpretations, then they are not clear; and if one interpretation leads to an absurdity, and the other does not, the Court will conclude that the legislature did not intend to lead to an absurdity, and will adopt the other interpretation"); *Holmes v. Bradfield Rural District*, [1949] 2 K.B. 1, 7 ("the mere fact that the results of applying a statute may be unjust or even absurd does not entitle this court to refuse to put it into operation. ... but if there are two reasonable interpretations ... of the words in an Act, the courts [will] adopt that which is just, reasonable and sensible rather than one which [is] ... none of those things"); *Auckland City Corp. v. Dawson*, [1929] N.Z.L.R. 614, 619 (Sup. Ct.) ("Where the meaning of the words of a section is not clear, and such unreasonable consequences result from a particular interpretation of the section, the Court should not adopt such interpretation if the language is susceptible of a more reasonable construction"); R. Sullivan, Sullivan on the Construction of Statutes 313 (6th ed. 2014) ("If the text is judged to be ambiguous, everyone agrees that avoiding absurdity is a good reason to prefer one interpretation over another") & Manning, "The Absurdity Doctrine", 116 Harv. L. Rev. 2387, 2463 (2005) ("if a given phrase has several relevant social connotations, then an interpreter may use purpose or policy considerations to choose among them").

[70] *The Queen v. McIntosh*, [1995] 1 S.C.R. 686, 706 ("Parliament ... has the right to legislate illogically (assuming that this does not raise constitutional concerns). And if Parliament is not satisfied with the judicial application of its illogical enactments, then Parliament may amend them accordingly"); *Chung Fook v. White*, 264 U.S. 443, 446 (1924) per Sutherland, J. ("The words of the statute being clear, if it unjustly discriminates against the native-born citizen or is cruel and inhuman in its results ... the remedy lies with Congress and not with the courts. Their duty is simply to enforce the law as it is written, unless clearly unconstitutional"); *Stock v. Frank Jones (Tipton) Ltd.*, [1978] 1 W.L.R. 231, 234 (H.L.) per Viscount Dilhorne ("it is not open to the court to remedy the defect. That must be left to the Legislature"); *Hill v. East and West India Dock Co.*, 9 A.C. 448, 465 (H.L. 1884) per Lord Bramwell ("it is infinitely better, although an absurdity or an injustice or other objectionable result may be evolved as the consequence of your construction, to adhere to the words of an Act of Parliament and leave the legislature to set it right than to alter these words according to one's notion of an absurdity") & *Pocock v. Pickering*, 118 Eng. Rep. 298, 301 (Q.B. 1852) per Coleridge, J. ("In constructing an Act of Parliament, our first business, I conceive, is to examine the words themselves which are used; and, if in these there be no ambiguity, it is seldom desirable to go further ... .; and ... when ... you have arrived at the meaning, I think nothing is more dangerous than to flinch from that conclusion because we think the enactment is less wise or efficacious than it might have been made, or even wholly fail of its object. Perhaps the most efficacious mode of procuring good laws, certainly the only one allowable to a Court of Justice, is to act fully up to the spirit and language of bad ones, and to let their inconvenience be fully felt, by giving them their full effect").

[71] R.S.C. 1985 (5th Supp.), c. 1.

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

employment income of its employees and failed to remit to the Crown. Second, these amounts must be paid to the Crown notwithstanding the security interests of any other secured creditors including those who are the holders of a priming charge.[73]

[129] I will now focus on the text of s. 227(4.1) of the *Income Tax Act.*

[130] For ease of reference s. 227(4.1) of the *Income Tax Act* is set out below:

> 227(4.1) Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person and property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for a security interest (as defined in subsection 224(1.3)) would be property of the person, equal in value to the amount so deemed to be held in trust is deemed
>
> > (a) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, and
> >
> > (b) to form no part of the estate or property of the person from the time the amount was so deducted or withheld, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to such a security interest
>
> and is property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

[131] Section 227(4.1) may be broken down into two parts.

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[73] *Century Services Inc. v. Canada,* 2010 SCC 60, ¶¶ 29 & 45; [2010] 3 S.C.R. 379, 400 & 406 ("The Crown retained priority for source deductions of income tax, Employment Insurance ... and Canada Pension Plan ... premiums, but ranks as an ordinary unsecured creditor for most other claims ... [T]here is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the ... [*Companies' Creditors Arrangement Act*] or the ... [*Bankruptcy and Insolvency Act*]. Unlike source deductions [under the *Income Tax Act, Canada Pension Plan* and *Employment Insurance Act*] which are clearly and expressly dealt with under both these insolvency statutes, no such clear and express language exists in those Acts carving out an exception for GST").

[132] The first part, a dependent phrase – identified by single underlining – declares that the norm embedded in the main clause of this subsection is not abridged by any other provision to the contrary in other parts of the *Income Tax Act*, provisions of the *Bankruptcy and Insolvency Act*[74] with the exception of ss. 81.1 and 81.2[75], any other enactment of Canada or any province or any other law – anything set out in the dependent phrase.

[133] "Notwithstanding"[76] routinely appears in statutes[77] and contracts in a dependent phrase to identify specific provisions of a statute or contract that do not apply to the norm set out in the main clause as "a fail-safe way of ensuring that the clause it introduces will absolutely, positively prevail".[78]

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[74] R.S.C. 1985, c. B-3.

[75] These sections are not applicable here.

[76] Black's Law Dictionary 1231 (10th ed. 2014 B. Garner ed.) ("1. Despite; in spite of < notwithstanding the conditions listed above, the landlord can terminate the lease if the tenant defaults >"); Webster's Third New International Dictionary of the English Language Unabridged 1545 (2002) ("without prevention or obstruction from or by: in spite of <~ its wide distribution, it is an animal seldom encountered") & B. Garner, Garner's Modern English Usage 635 (4th ed. 2016) ("notwithstanding is a formal word used in the sense 'despite', 'in spite of', or 'although'").

[77] E.g., *Canada v. Rainville (Bankrupt Trustee)*, [1980] 1 S.C.R. 35, 44 (1979) ("Paragraph (j) [of s. 107(1) of the *Bankruptcy Act*] ends with the following words ... '*notwithstanding any statutory preference to the contrary*'. The purpose of this part of the provision is obvious. Parliament intended to put all debts to a government on a "equal footing: it therefore cannot have intended to allow provincial statutes to confer any higher priority"); *Tennant v. Union Bank of Canada*, [1894] A.C. 31, 45 (P.C. 1893) (Ont.) ("sect. 91 [of the *British North America Act*] expressly declares that, 'notwithstanding anything in this Act', the exclusive legislative authority of the Parliament of Canada shall extend to all matters coming within the enumerated classes; which plainly indicates that the legislation of that Parliament, so long as it strictly relates to these matters, is to be of paramount authority"); *Engineered Buildings Ltd. v. City of Calgary*, 57 D.L.R. 2d 322, 325 (Alta. Sup. Ct. App. Div. 1966) ("the words 'notwithstanding anything in this Act' in s.s. (9) mean that where the facts come within that subsection no other part of the Act applies, and this includes s.s. (10) which is another party of the Act") & *Green v. Commonwealth*, 28 Va. App. 567, 569-70; 507 S.E. 2d 627, 628-29 (Ct. App. 1998) (Virginia punished carjacking with a mandatory three-year prison term and denied the sentencer the option of suspending the sentence of juveniles, an option generally available for juveniles, by the use of the prepositional phrase "notwithstanding any other provision of law").

[78] A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 127 (2012). See P. Salembier, Legal and Legislative Drafting 382-83 (2d ed. 2018) ("if Rule A is stated to be *notwithstanding* Rule B, then where Rules A and B conflict, Rule A is to be given paramountcy and hence will govern. In such a case, Rule A is introduced with *Notwithstanding Rule B*") (emphasis in original).

[134] The dependent clause in s. 227(4.1) establishes a remarkably comprehensive defensive bulwark.[79] No other statute or law that abridges the norm created by the main clause of s. 227(4.1) has any force. This is what drafters refer to as "blanket paramountcy".[80]

[135] Because there is no comparable blanket paramountcy provision in ss. 11, 11.2(2), 11.51(2) and 11.52(2) of the *Companies' Creditors Arrangement Act* there is no need to look beyond the four corners of s. 227(4.1) to determine the scope of the unassailable priority it creates.[81]

[136] The second part is the main clause. It can be subdivided. One part – identified by no underlining – declares the norm: the Crown has the best claim to an amount representing the funds the employer-applicant withheld from the employment income of its employees but failed to remit to the Crown and is entitled to be paid an amount equal to the withheld funds. The holders of the priming charges have no claim to these funds that is superior to the Crown's claim. This is because the holders of the priming charges have a security interest under s. 224(1.3) of the *Income Tax Act*[82] and the last clause of s. 227(4.1) states that "the proceeds of such property shall be paid to the Receiver General in priority to all such security interests."

[137] The other segment of the second part – identified by double underlining – explains why the Crown has this superior claim. The funds held by the corporate trustee and not properly remitted to the Crown "form no part of the estate or property" of the corporation that withheld them and failed to properly remit them to the Crown.[83] They are beneficially owned by the Crown.

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[79] See *Re Rosedale Farms Ltd.*, 2017 NSSC 160, ¶ 35 ("the opening words of s. 227(4.1) ... expressly override s. 50.6 of the *Bankruptcy and Insolvency Act*, the authority for ordering ... [debtor in possession] financing and security for priority. To hold that the court can grant priority to ... [debtor in possession financing] security over the s. 227(4.1) deemed trust is to ignore these words"). *Cf. Century Services Inc. v. Canada*, 2010 SCC 60, ¶ 34; [2010] 3 S.C.R. 379, 402 ("The amended text of s. 227(4.1) of the ... [*Income Tax Act*] and concordant source deductions deemed trusts in the *Canada Pension Plan* and the *Employment Insurance Act* state that the deemed trust operates notwithstanding any other enactment of Canada, except ss. 81.1 and 81.2 of the ... [*Bankruptcy and Insolvency Act*]. The ... [*Excise Tax Act*] deemed trust at issue in this case is similarly worded, but it excepts the ... [*Bankruptcy and Insolvency Act*] in its entirety").

[80] P. Salembier, Legal and Legislative Drafting 385 (2d ed. 2018).

[81] See P. Salembier, Legal and Legislative Drafting 387 (2d ed. 2018) ("When readers (or the courts) are confronted with two conflicting statutory provisions, each of which states that it is to operate *Notwithstanding any other Act of Parliament*, which one governs?").

[82] A priming charge is an interest in property that secures payment of an obligation. R.S.C. 1985 (5th Supp.), c.1, s. 224 (1.3) ("*security interest* means any interest in ... property that secures payment or performance of an obligation and includes an interest ... created by or arising out of a ... charge ... of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for").

[83] This is so even though the statutory trust applies to unidentifiable property and not specific assets that can be separated from the debtor's estate. See *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, s. 37(2) & *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411, 449 ("Thus while s. 227(5) [a deemed trust provision] can be seen as a provision enacted to solve the conceptual dilemma precipitated by an intermingling of

[138] Nothing in the *Companies' Creditors Arrangement Act* suggests a contrary conclusion.

[139] As mentioned, there is no counterpart to the first part of s. 227(4.1) of the *Income Tax Act* – the formidable defensive bulwark – in ss. 11, 11.2(2), 11.51(2) and 11.52(2) of the *Companies' Creditors Arrangement Act.*

[140] Indeed, s. 37(2) of the *Companies' Creditors Arrangement Act* expressly recognizes the primacy of the rule fashioned by s. 227(4.1) of the *Income Tax Act* and the comparable provisions in the *Canada Pension Plan*[84] and the *Employment Insurance Act.*[85]

[141] Section 37 of the *Companies' Creditors Arrangement Act* reads as follows:

> 37(1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.
>
> (2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* … .

[142] Section 11 of the *Companies' Creditors Arrangement Act*,[86] the provision that authorizes the court to "make any order that it considers appropriate in the circumstances," does not function without regard to s. 227(4.1) of the *Income Tax Act* and the comparable provisions in the *Canada Pension Plan*[87] and the *Employment Insurance Act.*[88] It only trumps provisions in the *Bankruptcy and Insolvency Act* and the *Winding-up and Restructuring Act.*[89]

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unremitted payroll deductions with a tax debtor's general assets, it is a legal vehicle not without its own conceptual limitations").

[84] R.S.C. 1985, c. C-8.

[85] S.C. 1996, c. 23.

[86] *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, s. 11 ("Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances").

[87] R.S.C. 1985, c. C-8.

[88] S.C. 1996, c. 23.

[89] R.S.C. 1985, c. W-11.

[143] The sections of the *Companies' Creditors Arrangement Act* that authorize a court to create priming charges – ss. 11.2(1), 11.51(1) and 11.52(1) – declare that the order attach to "all or part of the company's property". Section 227(4.1) of the *Income Tax Act* unequivocally declares that unremitted employee income tax withholdings "form no part of the estate or property of the person from the time the amount was so deducted or withheld".

[144] In addition, none of the provisions that authorize a court to make a priming charge state that a priming charge overrides the interest created by s. 227(4.1) of the *Income Tax Act*. As well, subsections 11.2(2), 11.51(2) and 11.52(2) state that a court may make a priming charge with a priority superior to other secured creditors. The Crown is not a secured creditor under the *Companies' Creditors Arrangement Act*. A "secured creditor", as defined in s. 2(1) of the *Companies' Creditors Arrangement Act*, includes "a holder of any bond of a debtor company secured by ... a trust in respect of, all or any property of the debtor company". The Crown is not the holder of a bond of Canada North Group Inc. or any of the other applicants seeking relief under the *Companies' Creditors Arrangement Act*. It does not include a beneficiary of any trust, such as the Crown. The plain and ordinary meaning of the text defining "secured creditor" compels this conclusion.[90] The structure of this s. 2(1) definition makes it easy to misread. The Crown is the beneficial owner of an amount equal to the withheld but unremitted employee income tax source deductions.[91]

[145] The fact that s. 6(3) of the *Companies' Creditors Arrangement Act* prohibits a court from sanctioning a compromise or arrangement unless it results in the payment to the Crown of its entire claim protected by s. 227(4) of the *Income Tax Act* provides additional support for the view that the *Companies' Creditors Arrangement Act* complements s. 227(4.1) of the *Income Tax Act* – the Crown is the holder of the super priority.[92]

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[90] *Contra, Kerr Interior Systems Ltd. v. Kenroc Building Materials Co.*, 2009 ABCA 240, ¶ 7; 457 A.R. 274, 279 (per incuriam) & *Re Temple City Housing Inc.*, 2007 ABQB 786, ¶¶ 13 & 14; 42 C.B.R. 5th 274, 278-79.

[91] See also *Re Rosedale Farms Ltd.*, 2017 NSSC 160, ¶ 34 ("The correct contextual interpretation is that the inclusion of the [*Income Tax Act*] definition is to give the deemed trust for unremitted withholdings priority over all security interests including other federal and provincial statutory deemed trusts").

[92] See also *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, s. 6(4) (the Court may not sanction a compromise or arrangement if post initial order the company fails to remit employment income withholding on post initial order employment income) & 11.09(2)(a) & (b) (if a company defaults on its post initial order withholding and remittance obligations, the Crown may take collection measures in spite of the stay of proceedings).

D. There Is a Perfect Correlation Between the Purpose of the *Income Tax Amendments Act, 1997* and the Plain and Ordinary Meaning of Section 227(4.1) of the *Income Tax Act*

[146] I acknowledge the importance of the priming charges to the ability of companies to restructure.[93] Lenders will not advance funds and restructuring professionals will not accept assignments if they reasonably fear that their loan is in jeopardy or their fees will be unpaid.

[147] If the respondents and intervenors are correct and the efficacy of restructuring and reorganization under the *Companies' Creditors Arrangement Act* will be jeopardized by according the text of s. 227(4.1) of the *Income Tax Act* its plain and ordinary meaning, they will no doubt bring these concerns to the attention of Parliament. It is up to Parliament to assess the validity of these fears and decide whether the unassailable priority the *Income Tax Amendments Act, 1997* introduced was improvident and that its merits must be revisited.[94] Courts cannot ignore the plain and ordinary meaning of legislative text just because litigants present a compelling case that the consequences of the interpretation are problematic.[95]

[148] While it is unnecessary to examine the objective Parliament pursued when it enacted the *Income Tax Amendment Acts, 1997*[96] and introduced the current text of ss. 227(4) and (4.1) of the *Income Tax Act*, a study of the legislative history[97] reveals a perfect correlation between the stated purpose and the plain and ordinary meaning the text supports.

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[93] *City of Edmonton v. Alvarez & Marsal Canada Inc.*, 2019 ABCA 109, ¶ 17 ("without security for their fees and disbursements ... [receivers] would be understandably concerned about taking on receiverships").

[94] *Century Services Inc. v. Canada*, 2010 SCC 60, ¶¶ 15 & 18; [2010] 3 S.C.R. 379, 394 & 395 ("the purpose of the ... [*Companies' Creditors Arrangement Act*] ... is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. ... Reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs"). See also *Quebec v. Caisse populaire Desjardins de Montmagny*, 2009 SCC 49, ¶12; [2009] 3 S.C.R. 286, 296 ("In 1992 ... Parliament ... made extensive changes to the ... [*Bankruptcy and Insolvency Act*] ... . Some of these changes related to the Crown's priority in bankruptcy situations. The federal government seemed at the time to want to respond to criticisms that the system establishing the priority of the Crown's claims often left nothing for a bankrupt's ordinary creditors").

[95] See *Vacher & Sons, Ltd. v. London Society of Compositors*, [1913] A.C. 107, 121-22 per Lord Atkinson (H.L. 1912) ("your Lordships' House sitting judicially is not concerned with the question whether the policy it embodies is wise or unwise, or whether it leads to consequences just or unjust, beneficial or mischievous") & *Canada v. Callidus Capital Corp.*, 2018 SCC 47, ¶ 1 (the Court adopted Justice Pelletier's reasons) & 2017 FCA 162, ¶ 64; 414 D.L.R. 4th 132, 160 per Pelletier, J.A. ("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").

[96] S.C. 1998, c. 19, s. 226.

[97] See *Williams v. Canada*, 2017 FCA 252, ¶ 51; 417 D.L.R. 4th 173, 189 per Stratas, J.A. ("in certain circumstances and with appropriate caution – [a court may consider] extraneous, contemporaneous materials (e.g., regulatory impact or official explanatory statements), legislative debates, and legislative history").

[149] The starting point of the legislative history is the February 27, 1997 decision of the Supreme Court of Canada in *Royal Bank of Canada v. Sparrow Electric Corp.*[98] At issue was whether the Crown's ownership claim to $625,990.86 of unremitted income tax withholdings from Sparrow Electric's employees under s. 227(4) of the *Income Tax Act* superseded the Royal Bank's claim to the sale proceeds of Sparrow Electric's inventory asserted under both a general security agreement and an inventory assignment under s. 427 of the *Bank Act.*[99] The issue arose because the proceeds of an inventory sale conducted by the receiver appointed by court order at the instigation of the Royal Bank were not sufficient to discharge the debtor's obligation to both the Crown and the Royal Bank.[100]

[150] The Court concluded that the Royal Bank was entitled to the inventory sale proceeds on account of its general security agreement that "gave it a fixed and specific charge against the debtor's inventory ... ."[101]

[151] But the Court also told Parliament how to proceed if it wished a contrary result:[102]

> Finally, I wish to emphasize that it is open to Parliament to step in and assign absolute priority to the deemed trust. A clear illustration of how this might be done is afforded by s. 224(1.2) [of the *Income Tax Act*], which vests certain moneys in the Crown 'notwithstanding any security interest in those moneys' and provides that they 'shall be paid to the Receiver General in priority to any such security interest'. All that is needed to effect the desired result is clear language of that kind. In the absence of such clear language, judicial innovation is undesirable, both because the issue is policy charged and because a legislative mandate is apt to be clearer than a rule whose precise bounds will become fixed only as a result of expensive and lengthy litigation.

[152] On April 7, 1997 the Finance Minister announced the government's intention to propose amendments to the *Income Tax Act*, the *Canada Pension Plan*, the *Employment Insurance Act* and the *Excise Tax Act*[103] that would reverse the effect of *Royal Bank of Canada v. Sparrow Electric.*[104]

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[98] [1997] 1 S.C.R. 411.

[99] Id. 424.

[100] Id. 427.

[101] Id. 485.

[102] Id.

[103] R.S.C. 1985, c. E-15.

[104] Department of Finance, "Unremitted Source Deductions and Unpaid GST" (Ottawa, April 7, 1997, 1997-030).

[153] An accompanying press release explained why these amendments were desirable:[105]

> [I]t is important to assert the absolute priority of the Crown's claim as unremitted source deductions are part of the gross wages of employees and are held in trust for remittance to the Receiver General. Further, source deductions are automatically credited to these employees on account of taxes paid for the year and they are paid over to those provinces that are parties to the Federal/Provincial Tax Collection Agreements, on account of the employee's provincial taxes payable. ... Thus, the amendment will ensure that tax revenue losses are minimized 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.

[154] Parliament passed the *Income Tax Amendments Act, 1997*.[106] It came into force on June 18, 1998. Provisions that introduced the current s. 227(4) and (4.1) were given retroactive effect as of June 15, 1994.[107]

[155] The Supreme Court of Canada commented on the new ss. 227(4) and (4.1) of the *Income Tax Act* in a 2002 opinion, *First Vancouver Finance v. Canada*:[108]

> It is apparent from these changes that the intent of Parliament when drafting ss. 227(4) and 227(4.1) was to grant priority to the deemed trust in respect of property that is also subject to a security interest regardless of when the security interest arose in relation to the time the source deductions were made or when the deemed trust takes effect. This is clear from the use of the words 'notwithstanding any security interest' in both ss. 227(4) and 227(4.1). In other words, Parliament has reacted to the interpretation of the deemed trust provisions in *Sparrow Electric*, and has amended the provisions to grant priority to the deemed trust in situations where the Minister and secured creditors of a tax debtor both claim an interest in the tax debtor's property.

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[105] Id.

[106] S.C. 1998, c. 19.

[107] S.C. 1998, c. 19, s. 226(4).

[108] 2002 SCC 49, ¶¶ 28 & 29; [2002] 2 S.C.R. 720, 732-33. *First Vancouver Finance v. Canada*, as the Supreme Court expressly acknowledged, does not apply to "the question of the priority of secured creditors". Id at ¶ 39; [2002] 2 S.C.R. at 737. First Vancouver Finance was not a secured creditor of Great West Transport Ltd. It was a third party purchaser of book debts. Id.

> ... It is evident from these changes that Parliament has made a concerted effort to broaden and strengthen the deemed trust in order to facilitate the collection efforts of the Minister.

E. The Absurdity Doctrine Does Not Assist the Holders of the Priming Charges

[156] The absurdity doctrine does not apply.

[157] There is no basis to assert that s. 227(4.1) of the *Income Tax Act* contains flawed text. It obviously does not.

[158] Section 227(4.1) of the *Income Tax Act* bears only one plausible meaning. The Crown is the beneficial owner of an amount equal to the unremitted employment income tax withholdings made by the employer and is entitled to these funds in priority to those who are beneficiaries of the priming charges.

[159] A court cannot ignore the plain meaning of statutory text just because it concludes the consequences are mischievous.[109]

[160] Justice Rowbotham concludes that the interpretation I advance will undermine the general objective of the *Companies' Creditors Arrangement Act* – "[r]eorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs"[110] and thwart the restructuring process. She may be correct. She may not be.

[161] But this is irrelevant.

[162] If Parliament shares her concerns, it can amend the governing legislation.[111]

[163] I am not aware of any case in the common law world in which a court has declared that it is entitled to rewrite statutory text that bears only one plausible meaning and is indisputably in accord with the declared objective of the legislature.[112]

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[109] *Supra* note 68.

[110] *Century Services Inc. v. Canada*, 2010 SCC 60, ¶ 18; 2010 3 S.C.R. 379, 395.

[111] *Supra* note 70.

[112] See O. Jones, Bennion on Statutory Interpretation 433 (6th ed. 2013) ("If the court thinks that what it considers to be absurd was really and truly contemplated by Parliament, and was deliberately intended, then the court must defer to that").

VII. Conclusion

[164] I would allow the appeal and amend the initial order as requested by the Crown.

[165] I acknowledge the high quality of counsel's facta and oral arguments.

Appeal heard on October 4, 2018

Reasons filed at Edmonton, Alberta
this 29th day of August, 2019

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Wakeling J.A.

Appearances:

G.F. Bódy/C. Davidson
for the Appellant

S. Norris/S.A. Wanke (no appearance)
for the Respondents Canada North Group Inc., Canada North Camps Inc., 816956 Alberta Ltd., 1371047 Alberta Ltd., 1919209 Alberta Ltd.

Respondents Campcorp Structures Ltd. and DJ Catering Ltd., unrepresented (no appearance)

D.R. Bieganek, Q.C.
for the Respondent and Ernst & Young Inc. in its capacity as Monitor

M.I.A. Buttery, Q.C./J.L. Oliver/J. Enns
for the Respondent Business Development Bank of Canada

K.J. Bourassa
for the Intervenor Insolvency Institute of Canada

R.S. Van de Mosselaer
for the Intervenor Canadian Association of Insolvency and Restructuring Professionals