Federal Court of Appeal | Cour d'appel fédérale

Date: 20200429

Docket: A-183-18

Citation: 2020 FCA 80

CORAM: **DAWSON J.A.**
NEAR J.A.
GLEASON J.A.

BETWEEN:

THE TORONTO-DOMINION BANK

Appellant

and

HER MAJESTY THE QUEEN

Respondent

and

THE CANADIAN BANKERS' ASSOCIATION

Intervener

Heard at Toronto, Ontario, on October 8, 2019.

Judgment delivered at Ottawa, Ontario, on April 29, 2020.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: NEAR J.A.
GLEASON J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20200429

Docket: A-183-18

Citation: 2020 FCA 80

CORAM: **DAWSON J.A.**
NEAR J.A.
GLEASON J.A.

BETWEEN:

THE TORONTO-DOMINION BANK

Appellant

and

HER MAJESTY THE QUEEN

Respondent

and

THE CANADIAN BANKERS' ASSOCIATION

Intervener

REASONS FOR JUDGMENT

DAWSON J.A.

[1] As a general principle, subject to certain exceptions that do not apply in the present case, "[e]very person who makes a taxable supply shall, as agent of Her Majesty in right of Canada,

collect" the goods and services tax "payable by the recipient in respect of the supply." (section 221, *Excise Tax Act*, R.S.C. 1985, c. E-15 (sometimes the Act)).

[2] Subsection 222(1) of the Act creates a deemed trust with respect to amounts that are collected as goods and services tax. Amounts deemed to be held in trust are to be remitted to the Receiver General or properly withdrawn from the trust as input tax credits or deductions:

222 (1) Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).	222 (1) La personne qui perçoit un montant au titre de la taxe prévue à la section II est réputée, à toutes fins utiles et malgré tout droit en garantie le concernant, le détenir en fiducie pour Sa Majesté du chef du Canada, séparé de ses propres biens et des biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ceux de la personne, jusqu'à ce qu'il soit versé au receveur général ou retiré en application du paragraphe (2).
(underlining added)	(soulignements ajouté)

[3] Subsection 222(3) extends the trust created by subsection (1) to the property of the tax debtor and property of the tax debtor held by any secured creditor:

222 (3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the Bankruptcy and Insolvency Act), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or	222 (3) Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour

withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed	Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés :
(*a*) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and	*a*) être détenus en fiducie pour Sa Majesté du chef du Canada, à compter du moment où le montant est perçu par la personne, séparés des propres biens de la personne, qu'ils soient ou non assujettis à un droit en garantie;
(*b*) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest	*b*) ne pas faire partie du patrimoine ou des biens de la personne à compter du moment où le montant est perçu, que ces biens aient été ou non tenus séparés de ses propres biens ou de son patrimoine et qu'ils soient ou non assujettis à un droit en garantie.
and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.	Ces biens sont des biens dans lesquels Sa Majesté du chef du Canada a un droit de bénéficiaire malgré tout autre droit en garantie sur ces biens ou sur le produit en découlant, et le produit découlant de ces biens est payé au receveur général par priorité sur tout droit en garantie.
(underlining added)	(soulignements ajoutés)

[4] These are the provisions that form the basis of this appeal. Section 222 in its entirety is set out in the appendix to these reasons.

[5] The central issue raised on this appeal is the correct interpretation of subsections 222(1) and (3) of the Act: is a secured creditor who receives proceeds from a tax debtor's property at a time when the debtor owes GST to the Crown required to pay the proceeds, or a portion thereof equalling the tax debt, to the Receiver General in priority to all security interests? This issue arises in the following circumstances.

Factual background

[6] Mr. M. Weisflock (the debtor) owned and operated a landscaping business as a sole proprietorship. The debtor was required to collect and remit GST to the Receiver General.

[7] In 2007 and 2008, before he became a banking customer of the Toronto Dominion Bank, the debtor collected, but did not remit to the Receiver General, GST in the amount of $67,854 in relation to his landscaping business.

[8] In 2010, the Bank extended loans to the debtor. In March 2010, the Bank granted a line of credit to the debtor and his wife with a credit limit of $246,000. The line of credit was secured by a charge in favour of the Bank registered against a property owned by the debtor (the property). Later, in April 2010, the Bank extended a loan to the debtor and his wife in the amount of $352,000. This loan was secured by mortgage, also registered against the property.

[9] At the time of both loan applications the Bank was not aware of any debts owed by the debtor pursuant to the Act.

[10] On or about October 28, 2011, the debtor sold and transferred the property to third party purchasers for $881,000. The Bank did not enforce its security against the debtor. Rather, the debtor's lawyer issued two trust cheques to the Bank in the amounts of $245,147.78 and $334,546.49 to repay the line of credit and the mortgage and discharge the charges registered against the property.

[11] Subsequently, the Bank discharged the charge and mortgage registered against the property.

[12] On April 18, 2013, and February 2, 2015, the Canada Revenue Agency asserted a deemed trust claim under section 222 of the Act against the Bank on the basis that the proceeds it received from the sale of the property ought to have been paid to the Receiver General up to the amount deemed to be held in trust. The amount of the deemed trust claim was $67,854.

[13] The Bank refused to pay the amount claimed.

[14] Accordingly, the Crown commenced an action against the Bank seeking $67,854 plus interest and costs. The Bank defended the claim.

[15] The trial in the Federal Court proceeded solely on the basis of an agreed statement of facts.

The decision of the Federal Court

[16] For reasons cited as 2018 FC 538 the Federal Court found that subsection 222(3) of the Act obliged the Bank to remit that portion of the sale proceeds caught by the deemed trust. In reaching this conclusion the Federal Court found that:

- The amounts paid by the debtor to the Bank were "proceeds" of the sale of the debtor's property and were subject to the deemed trust (reasons, paragraph 16).

- Upon the sale of a tax debtor's property, the debtor is obliged to pay the proceeds, or the portion of the proceeds required to retire the tax debt, to the Receiver General (reasons, paragraph 31).

- In the present case, the debtor was obliged to pay his tax debt out of the sale proceeds of the property, but failed to do so. Instead, he used the proceeds to pay the Bank, a secured creditor. In this circumstance, the Bank had a statutory obligation to pay the tax debt out of the proceeds it received (reasons, paragraph 33).

- As a secured creditor of the debtor, the Bank cannot invoke the *bona fide* purchaser defence to counter the statutory obligation imposed by subsection 222(3) of the Act. To allow the Bank to invoke the defence would defeat the purpose of the deemed trust, rendering it meaningless (reasons, paragraphs 44 and 46).

- No triggering event is necessary to bring the deemed trust created by section 222 of the Act into operation (reasons, paragraphs 54 through 56).

- The Crown's deemed trust is the reflection of a considered legislative priority scheme between certain tax debts and secured claims. Parliament's intention to confer a super priority to the Crown for unremitted GST over secured creditors is clear (reasons, paragraph 63 and 64).

- Parliament considered the potential challenges posed by the deemed trust on secured lenders by providing a remedy in the form of the prescribed security interest under subsection 222(4) of the Act (reasons, paragraph 65).

[17] This is an appeal from the judgment of the Federal Court that required the Bank to pay the sum of $67,854 plus interest to the Crown.

The issues on appeal

[18] The Bank raises three issues on this appeal:

1. Did the Federal Court err by finding that the deemed trust does not require a triggering event which causes the trust to crystallize around specified assets?

2. Did the Federal Court err by finding that secured creditors cannot avail themselves of the *bona fide* purchaser for value defence?

3. Did the Federal Court err by failing to consider that the security interests of the Bank were not created and granted in a transaction providing financing to the debtor's business?

Consideration of the issues

a. Text, context and purpose

[19] The issues raised on this appeal turn on the proper interpretation of subsections 222(1) and (3) of the Act. This is a question of law and the Federal Court's interpretation of the provisions is reviewable on the standard of correctness.

[20] I begin by ascertaining the proper interpretation to be given to subsections 222(1) and (3) of the Act. These provisions must be interpreted using a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. The Court would have benefitted from well-developed submissions from the Bank and the intervener on these points. Instead, aside from brief references to sections 317, 323 and 325 of the Act (which are dealt with below) their submissions focused in the largest part on prior jurisprudence and passages contained in the jurisprudence that supported their submissions. The intervener also made submissions based on policy considerations. In its view, the decision of the Federal Court creates unacceptable uncertainty for secured lenders which will have a material, adverse impact on commercial transactions and secured lending.

[21] I begin by observing, by way of background, that amounts withheld by employers from salaries and wages paid to employees on account of income tax, the Canada Pension Plan and Employment Insurance (often referred to as source deductions) are to be remitted to the Receiver General within a specified period of time. Employees are credited for the amounts withheld whether or not the employer remits the withholdings to the Receiver General. When an employer withholds source deductions, but has not yet remitted the deductions to the Receiver General, the amounts are deemed by subsection 227(4) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) to be held in trust for Her Majesty.

[22] This trust is similar to the deemed trust provisions found in subsection 222(1) of the *Excise Tax Act*, subsection 23(3) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8 and subsection 86(2) of the *Employment Insurance Act*, S.C. 1996, c. 23.

[23] The relevance of this is that, due to the similarity of the deemed trust provisions (including subsection 227(4.1) of the *Income Tax Act* and subsection 222(3) of the *Excise Tax Act*), jurisprudence which has considered the deemed trust provisions of the *Income Tax Act* is relevant to the interpretation of the deemed trust provisions of the *Excise Tax Act*.

[24] In *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411, 208 N.R. 161, the Supreme Court considered the scope of the deemed trust provisions of the *Income Tax Act* then in force. Subsections 227(4) and (5) of the *Income Tax Act* then provided in material part:

227. …	227. …
(4) Every person who deducts or withholds any amount under this Act	(4) Toute personne qui déduit ou retient un montant quelconque en

shall be deemed to hold the amount so deducted or withheld in trust for Her Majesty.

vertu de la présente loi est réputée retenir le montant ainsi déduit ou retenu en fiducie pour Sa Majesté.

(5) Notwithstanding any provision of the *Bankruptcy Act*, in the event of any liquidation, assignment, receivership or bankruptcy of or by a person, an amount equal to any amount

(5) Malgré la *Loi sur la faillite*, en cas de liquidation, cession, mise sous séquestre ou faillite d'une personne, un montant égal à l'un ou l'autre des montants suivants est considéré comme tenu séparé et ne formant pas partie du patrimoine visé par la liquidation, cession, mise sous séquestre ou faillite, que ce montant ait été ou non, en fait, tenu séparé des propres fonds de la personne ou des éléments du patrimoine:

(a) deemed by subsection (4) to be held in trust for Her Majesty, ...

a) le montant réputé, selon le paragraphe (4), être détenu en fiducie pour Sa Majesté;

shall be deemed to be separate from and form no part of the estate in liquidation, assignment, receivership or bankruptcy, whether or not that amount has in fact been kept separate and apart from the person's own moneys or from the assets of the estate.

[25] By way of comparison, subsections 222(1) and (3) of the *Excise Tax Act* at that time read:

222. (1) Subject to subsection (1.1), where a person collects an amount as or on account of tax under Division II, the person shall, for all purposes, be deemed to hold the amount in trust for Her Majesty until it is remitted to the Receiver General or withdrawn under subsection (2).

222. (1) La personne qui perçoit un montant au titre de la taxe prévue à la section II est réputée, à toutes fins utiles, détenir ce montant en fiducie pour Sa Majesté jusqu' à ce qu'il soit versé au receveur général ou retiré en application du paragraphe (2).

…

[…]

(3) In the event of any liquidation,

(3) En cas de liquidation, cession,

assignment, receivership or bankruptcy of or by a person, an amount equal to the amount deemed under subsection (1) to be held in trust for Her Majesty shall, for all purposes, be deemed to be separate from and to form no part of the estate in liquidation, assignment, receivership or bankruptcy, whether or not that amount has in fact been kept separate and apart from the person's own moneys or from the assets of the estate.	mise sous séquestre ou faillite d'une personne, un montant égal à celui réputé par le paragraphe (1) détenu en fiducie pour Sa Majesté est considéré, à toutes fins utiles, comme tenu séparé et ne formant pas partie des actifs visés par la liquidation, cession, mise sous séquestre ou faillite, que ce montant ait été ou non, en fait, tenu séparé des propres fonds de la personne ou des actifs.

[26] In *Sparrow*, the majority of the Supreme Court held that the deemed trust that then arose in favour of the Crown by operation of subsection 227(4) of the *Income Tax Act* did not take priority over the security interests that the Royal Bank possessed under the *Bank Act*, S.C. 1991, c. 46 and the *Personal Property Security Act*, S.A. 1988, c. P-4.05 (reasons, paragraph 89). The deemed trust did not have the effect of undoing an existing security interest; rather, it was "a device for going back in time and seeking out an asset that was not, at the moment the income taxes came due, subject to any competing security interest." (reasons, paragraph 99). This said, the majority emphasized that it was open to Parliament to use clear language to "assign absolute priority to the deemed trust." (reasons, paragraph 112).

[27] Parliament accepted this invitation, and amendments were made to section 227 of the *Income Tax Act*, section 222 of the *Excise Tax Act* and the equivalent provisions of the *Canada Pension Plan* and the *Employment Insurance Act*. The amended, deemed trust provisions of the *Income Tax Act* were then considered by the Supreme Court in *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720. At that time, subsections 227(4) and (4.1) provided:

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 (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

227. . . .

(4) Toute personne qui déduit ou retient un montant en vertu de la présente loi est réputée, malgré toute autre garantie au sens du paragraphe 224(1.3) le concernant, le détenir en fiducie pour Sa Majesté, séparé de ses propres biens et des biens détenus par son créancier garanti au sens de ce paragraphe qui, en l'absence de la garantie, seraient ceux de la personne, et en vue de le verser à Sa Majesté selon les modalités et dans le délai prévus par la présente loi.

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

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

b) ne pas faire partie du patrimoine ou

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	des biens de la personne à compter du moment où le montant est déduit ou retenu, que ces biens aient été ou non tenus séparés de ses propres biens ou de son patrimoine et qu'ils soient ou non assujettis à une telle garantie.
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.	Ces biens sont des biens dans lesquels Sa Majesté a un droit de bénéficiaire malgré toute autre garantie sur ces biens ou sur le produit en découlant, et le produit découlant de ces biens est payé au receveur général par priorité sur une telle garantie.

[28] Justice Iacobucci, writing for a unanimous Court in *First Vancouver*, held that Parliament had amended the deemed trust 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." (reasons, paragraph 28). The deemed trust did not, however, impress the property of a tax debtor sold to a *bona fide* purchaser for value (reasons, paragraph 43).

[29] With this background, I now turn to the text, context and purpose of sections 222(1) and (3) of the *Excise Tax Act*.

[30] Post-*Sparrow* amendments comparable to the amendments made to subsection 227(4) of the *Income Tax Act* were made to the deemed trust provision in subsection 222(1) of the *Excise Tax Act*. The words "despite any security interest in the amount" were added. Thus, "every person who collects an amount as or on account of" GST is "deemed, for all purposes" to hold the amount in trust for the Crown "despite any security interest in the amount" collected until the amount is remitted to the Receiver General or properly withdrawn.

[31] Again, comparable to the post-*Sparrow* amendments made to the *Income Tax Act*, subsection 222(3) of the *Excise Tax Act* was amended to extend the scope of the deemed trust to include "property of the person and property held by any secured creditor… that, but for a security interest, would be property of the" tax debtor. Subsection 222(3) was also amended to remove reference to the triggering events of liquidation, assignment, receivership or bankruptcy. Instead, "if at any time an amount deemed … to be held by a person in trust … is not remitted to the Receiver General" or properly withdrawn, the property of the tax debtor and "property held by any secured creditor" of the tax debtor that "but for a security interest, would be property" of the tax debtor is deemed to be held "from the time the amount was collected by the [tax debtor] in trust for Her Majesty … whether or not the property is subject to a security interest". While subsection 222(3) continued to provide that monies deemed to be held in trust were also deemed to be separate and apart from the property of the tax debtor, the phrase "whether or not the property is subject to a security interest" was added. Finally, subsection 222(3) was amended to add that the property deemed to be held in trust is further deemed to be "property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests."

[32] This analysis has proceeded on the basis of the English version of the provisions. No one submitted that any ambiguity exists between the English and equally authoritative French versions of the provisions.

[33] I take from the grammatical and ordinary sense of the language of subsections 222(1) and (3) that Parliament intended to grant priority to the deemed trust in respect of property that is also subject to a security interest, regardless of when the security interest arose in relation to the time the GST was collected. This flows from Parliament's use of the phrase "despite any security interest in the amount" in subsection 222(1).

[34] In the present case, when the debtor collected amounts as or for GST he was deemed "for all purposes … to hold the amount in trust for Her Majesty … separate and apart from" his property (subsection 222(1)).

[35] When the debtor failed to properly remit or withdraw amounts "in the manner and at the time provided" the debtor's property "equal in value to the amount … deemed to be held in trust" was further deemed "to be held, from the time the amount was collected … separate and apart from the property of the" debtor and "to form no part of the estate or property of the person from the time the amount was collected" and to be "property beneficially owned by Her Majesty … despite any security interest in the property or in the proceeds thereof".

[36] Thus, when the Bank lent money to the debtor and took its security interests, the debtor's property to the extent of the tax debt was already deemed to be beneficially owned by the Crown (subsection 222(3)).

[37] On the sale of the debtor's property "despite any security interest in the property or in the proceeds thereof … the proceeds of the property shall be paid to the Receiver General in priority to all security interests."

[38] It follows that when the debtor's property was sold, by operation of subsection 222(3) of the Act the Bank was under a statutory obligation to remit the proceeds it received to the Crown.

[39] This grammatical and ordinary meaning of the language used is confirmed when one looks to the purpose and the context of the deemed trust provisions.

[40] The purpose of the provision is to protect the collection of unremitted GST. This purpose is effected by granting priority to the deemed trust in respect of property that is also subject to a security interest, irrespective of when the security interest arose in relation to the time GST was collected (except in respect of a prescribed security interest). When one looks to the equivalent provisions in the *Income Tax Act* it is apparent that the purpose is to secure, to the extent possible, the collection of a significant portion of the government's tax revenues.

[41] This purpose is served by construing the deemed trust provisions to apply so as to recognize that a secured creditor is obliged to remit proceeds it receives from the disposition of a debtor's property that are impressed with a trust in favour of the Crown.

[42] The most important contextual factors are found in subsections 222(1.1) and (4) of the Act and in the evolution of the legislation.

[43] Subsection 222(1.1) provides that the deemed trust is eliminated on bankruptcy with respect to amounts that were collected "or became collectible" before the bankruptcy. Related to this, subsection 37(1) of the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 provides:

37 (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.	37 (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme tel par le seul effet d'une telle disposition.
(underlining added)	(soulignements ajoutés)

[44] Subsection 37(2) of the *Companies' Creditors Arrangement Act* provides a number of exceptions to this relieving provision. One exception is for subsections 227(4) and (4.1) of the *Income Tax Act*. However, section 222 of the *Excise Tax Act* is not included in the exceptions. Accordingly, subsection 37(1) applies to the deemed trust provision under the *Excise Tax Act*. The Supreme Court has confirmed that the deemed trust under the *Excise Tax Act* does not apply under the *Companies' Creditors Arrangement Act* protection. This affords equivalent protection under the *Companies' Creditors Arrangement Act* to that provided under the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 (*Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379).

[45] The relevance of this is that when the post-*Sparrow* amendments were announced in the Department of Finance, Press Release 97-030, "Unremitted Source Deductions and Unpaid

GST" (April 7, 1997) it was stated that in exchange for the "absolute priority" to be given to the collection of unremitted GST "the Crown waived all other priorities in bankruptcy." This is a relevant, extrinsic interpretive aid that adds context to the interpretation of section 222. It reflects a policy decision made by Parliament that in exchange for the super priority ordinarily given to the deemed trust provision of the *Excise Tax Act*, the priority does not survive bankruptcy under the *Bankruptcy and Insolvency Act* and does not apply to arrangements under the *Companies' Creditors Arrangement Act*.

[46] The second contextual factor flows from the fact that together subsections 222(1) and (3) explicitly override any "security interest". This general rule is, however, limited by subsection 222(4) which provides that "[f]or the purposes of subsections (1) and (3), a security interest does not include a prescribed security interest." The term "prescribed security interest" is defined in section 2 of the *Security Interest (GST/HST) Regulations*, S.O.R./2011-55.

[47] Generally, a mortgage will be a "prescribed security interest" in situations where a lender registers a mortgage on a debtor's real property before a deemed trust arises. This again recognizes the potential harshness of the deemed trust provision and provides a means of protection to a secured creditor that lends money to a borrower and takes security at a time before the borrower collects, but fails to remit, GST amounts. Lenders who do advance funds and take security from a borrower who is in default of the obligation to remit collected GST are not provided with these protections. These lenders are, however, able to make inquiries of the borrower as to GST compliance and take some steps as briefly discussed below.

[48] The evolution of the legislation is part of the "entire context" in which statutes are to be read (*Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*, 2005 SCC 70, [2005] 3 S.C.R. 425, at paragraph 28). Here, as explained above, the legislation was amended in response to the decision of the Supreme Court in *Sparrow*. Parliament intended to enlarge the scope of the deemed trust provisions so as to ensure that unremitted source deductions and unremitted GST are to be recovered in priority to all debts.

[49] Having examined the text, context and purpose of subsections 222(1) and (3) I now turn to the specific arguments advanced by the Bank and endorsed by the intervener.

b. Did the Federal Court err by finding that the deemed trust does not require a triggering event which causes the trust to crystallize around specified assets?

[50] The Bank submits that the Federal Court erred in finding that the deemed trust does not require a triggering event to crystallize around satisfied assets. The Bank acknowledges that the deemed trust provisions grant an absolute priority to the Crown, but argues that the provisions do not amount to a statutory direction to pay at the time GST ought to have been remitted.

[51] The Bank submits that inherent in the concept of priority is that priorities are to be assessed at the time competing claims come into conflict. Because the right to a priority is essentially remedial in nature, it arises upon the exercise of enforcement or bankruptcy remedies by creditors. When there is a competition between claimants, and there will be a shortfall, the Crown is able at that time to assert its priority. Here, the Bank was not a secured creditor at the time the Crown asserted its claim.

[52] This submission is tethered to the text of the deemed trust provisions by the use of the word “priority” at the end of subsection 222(3). As well, the Bank argues that in both *Sparrow* and *First Vancouver* the Supreme Court understood the deemed trust structure to be a structure to deal with priority disputes. The Bank supports this submission by reference to paragraphs 1, 7, 99, 101, 110 and 112 of *Sparrow* and the Court’s implied or express reference therein to the concept of priority. The Bank also relies upon paragraph 28 of *First Vancouver* where the Court described Parliament’s intent when drafting the deemed trust provisions to be “to grant priority to the deemed trust in respect of property that is also subject to a security interest” and stated that the provisions had been amended “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.”

[53] Further, the Bank argues that in *First Vancouver* the Supreme Court likened the deemed trust to a “floating charge” (reasons, paragraph 40). The Bank submits that, as with a floating charge, a triggering event is necessary for the deemed trust to crystallize. Triggering events would include bankruptcy, the initiation of proceedings by the Crown for the recovery of unpaid taxes, and the exercise of a security interest.

[54] Finally, the Bank argues that when Parliament intends to draft a direction to pay it uses clear language. Reference is made to subsections 317(1), 317(3), 323(1) and 325(1) of the *Excise Tax Act*. As well, the Bank argues that subsections 317(3) and (7) would be redundant if subsection 222(3) imposes a mandatory obligation to pay upon a secured creditor.

[55] I respectfully disagree. In my view, for the following reasons, the deemed trust does not require a triggering event.

[56] First, as mentioned above, the word "priority" appears only once in subsections 222(1) and (3); the word is found at the end of subsection 222(3) where it is provided that property deemed to be held in trust "is property beneficially owned by Her Majesty … despite any security interest in the property or in the proceeds thereof" and that the proceeds of the property "shall be paid to the Receiver General in priority to all security interests." The Bank's submission fails to take into account the balance of the words found in subsections 222(1) and (3) and the conferral of a beneficial interest, the proceeds of which "shall be paid" to the Crown.

[57] Second, the Bank's submission fails to take into account the legislative evolution of the deemed trust provisions. As described above, the words that spoke to the triggering events of "liquidation, assignment, receivership or bankruptcy" were found in the prior iteration of the deemed trust provisions but removed from the current version. This reflects, in my view, Parliament's intent that no triggering event was to be required to cause the trust to crystallize around specified assets. Instead, the legislation deems property of a tax debtor and property held by a secured creditor to be held in trust once GST is collected but not remitted.

[58] Third, the Bank's reliance on references to the use of the word "priority" in *Sparrow* and paragraph 28 of the reasons in *First Vancouver* is misplaced. In paragraph 28 of *First Vancouver* the Court was describing the effect of the amended provisions. The Court was not describing the

mechanism used to affect to that purpose. I believe this is demonstrated at paragraph 33 of the Court's reasons in *First Vancouver*:

> I find additional support for this view in the fact that s. 227(4.1) deems the trust to be in effect "at any time [source deductions are] not paid to Her Majesty in the manner and at the time provided under this Act" … . Further, in the event of default, the trust extends back "from the time the amount was deducted or withheld by the person". These words indicate that the intent of the section is to allow the trust to operate in a continuous manner, attaching to any property which comes into the hands of the debtor as long as the debtor continues to be in default, and extending back in time to the moment of the initial deduction. The language Parliament has chosen belies the suggestion that the deemed trust only captures property of the tax debtor in existence at some particular moment in time.
>
> (emphasis in original)

[59] The Court's rejection of the notion that "the deemed trust only captures property of the tax debtor in existence at some particular moment in time" is inconsistent with the Bank's argument that the deemed trust requires a triggering event which causes the trust to crystallize around specified assets.

[60] Next, I reject the submission that the Supreme Court's likening of the deemed trust to a "floating charge" supports the requirement of a triggering event to crystallize the deemed trust.

[61] At paragraphs 4 and 40 of *First Vancouver* Justice Iacobucci did analogize the deemed trust to a floating charge, stating that the deemed trust is "similar in principle to a floating charge" (reasons, paragraph 4). However, I do not believe that Justice Iacobucci intended to equate the deemed trust with an equitable floating charge for all purposes. Rather, he intended his analogy to describe a tax debtor's ability to sell property subject to the deemed trust in the ordinary course of business.

[62] This is demonstrated by Justice Iacobucci's conclusion, at paragraph 28, that the deemed trust takes "priority" over both existing and future security interests. In equity, a subsequent fixed charge overrides a floating charge. It follows that the reference to being "similar in principle to a floating charge" was not intended to import all of the equitable principles that surround floating charges. Otherwise the deemed trust could not have priority over subsequent, fixed charges.

[63] In *Canada (Attorney General) v. Community Expansion Inc.*, (2004), 72 O.R. (3d) 546, [2004] O.J. No. 5493 the Ontario Superior Court of Justice came to a similar conclusion at paragraphs 28 to 33. This decision was affirmed on appeal in a brief endorsement (2005 CanLII 1402, [2005] O.J. No. 186). The Court of Appeal expressed "substantial agreement with the reasons … both as they relate to the relevant provisions of the *Income Tax Act* … and the interpretation of *First Vancouver Finance v. Canada …*".

[64] Finally, while I accept that Parliament has drafted provisions directed to collecting tax debt from third parties, as seen in sections 317, 323 and 325 of the *Excise Tax Act*, I agree with the Federal Court that the Crown's right to the proceeds of property deemed to be held in trust is an assertion of the statutory obligation created when the tax debtor collected and failed to remit GST (reasons of the Federal Court, paragraph 64). The Crown is not imposing direct liability upon a secured creditor to pay a borrower's tax debt in the same way that sections 317, 323 and 325 make third parties liable for the tax debt of another.

[65] As to the redundancy argument, the Bank argues that pursuant to section 317 of the *Excise Tax Act* the Crown may serve a garnishment notice upon an account debtor or a secured creditor of the tax debtor requiring payment to the Crown of monies otherwise payable to the tax debtor. Subsection 317(3) provides that, upon receipt of the garnishment notice, the monies "shall be paid to the Receiver General in priority to any such security interest". Subsection 317(7) of the Act then provides:

317 (7) Every person who fails to comply with a requirement under subsection (1), (3) or (6) is liable to pay to Her Majesty in right of Canada an amount equal to the amount that the person was required under subsection (1), (3) or (6), as the case may be, to pay to the Receiver General.	317 (7) Toute personne qui ne se conforme pas à une exigence du paragraphe (1), (3) ou (6) est redevable à Sa Majesté du chef du Canada d'un montant égal à celui qu'elle était tenue de verser au receveur général en application d'un de ces paragraphes.

[66] The concluding words in subsection 317(3) are almost identical to the concluding words in subsection 222(3) of the Act. The conclusion that, properly interpreted, the words in subsection 222(3) "the proceeds shall be paid" create a mandatory obligation to pay on the part of a secured creditor is therefore said to render subsection 317(7) superfluous and therefore meaningless.

[67] Parliament does not intend words used in legislation to be redundant. The Bank has not cited authority to support the application of the principle of redundancy in the context where Parliament has created a suite of enforcement remedies to be available in an almost limitless set of possible scenarios.

[68] In any event, the garnishment remedy requires the Minister to have knowledge of the existence of a tax debt. In the case of unremitted GST the Crown is an unwilling, often unknown creditor. In this circumstance, garnishment is not a relevant remedy. I see no unacceptable redundancy.

[69] In my view the Federal Court did not err by finding that no triggering event is required to cause the trust to crystallize around specified assets.

c. Did the Federal Court err by finding that secured creditors cannot avail themselves of the *bona fide* purchaser for value defence?

[70] The Bank argues that it is a *bona fide* purchaser for value of the money paid to it by the debtor. Because the deemed trust provisions of the Act do not extend to *bona fide* purchasers for value the Bank submits that it is entitled to retain the funds provided in payment of the debtor's loan and mortgage. The Federal Court rejected this submission, finding that this "possibility has been foreclosed by *First Vancouver* and subsequent cases, as it would essentially render the deemed trust meaningless." (reasons, paragraph 44).

[71] The Bank argues that the Federal Court erred because "Parliament is assumed to know the concept it has implied and only if it has excluded the defence with irresistible clearness is the defence excluded." The *bona fide* purchaser for value defence is well-established in law and "Parliament has not enacted a change to the common law that eliminates a long-standing defence to an equitable (or in this case, a deemed trust) claim." The Bank also argues that this defence would not eviscerate the deemed trust as the Federal Court found.

[72] In my view, for the following reasons, the *bona fide* purchaser for value defence is not available to secured creditors such as the Bank.

[73] First, in *i Trade Finance Inc. v. Bank of Montréal*, 2011 SCC 26, [2011] 2 S.C.R. 360, at paragraph 60, the Supreme Court quoted with approval the following explanation of the *bona fide* purchaser for value defence:

> The full name of the equitable defence is 'bona fide purchase of a legal interest for value without notice of a pre-existing equitable interest.' The effect of the defence is to allow the defendant to hold its legal proprietary rights unencumbered by the pre-existing equitable proprietary rights. In other terms, where the defence operates, the pre-existing equitable proprietary rights are stripped away and lost in the transaction by which the defendant acquires its legal proprietary rights.
>
> (L. Smith, *The Law of Tracing* (1997), at p. 386 (footnote omitted, underlining added))

[74] Seen in this light, it would be irrational for Parliament, in an effort to ensure that collected, unremitted GST was to be recovered in priority to all debts, to intend the *bona fide* purchaser defence to be available so as to undo the Crown's pre-existing beneficial interest in the property of the deemed trust. As the Federal Court found, this would eviscerate the deemed trust provisions.

[75] Second, while in *First Vancouver* the question of the priority of secured creditors was not before the Court (reasons, paragraph 39) Justice Iacobucci wrote at paragraph 43:

> 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 *ITA*. It is significant in this regard that purchasers for value are not included in ss. 227(4) and 227(4.1) whereas secured creditors are.

[76] While finding that *bona fide* purchasers for value were not caught by the deemed trust, the Court noted that secured creditors were. This is consistent with the conclusion that secured creditors cannot avail themselves of the *bona fide* purchaser for value defence.

[77] Finally, in *Canada (Attorney General) v. National Bank of Canada*, 2004 FCA 92, 324 N.R. 31, this Court considered whether secured lenders who had lent money secured by movable hypothecs were *bona fide* purchasers, thereby excluding from the deemed trust the property they had taken as payment, seized or obtained by surrender (reasons, paragraph 19). The debtors failed to repay the loans guaranteed by the hypothecs and failed to remit source deductions. This Court relied upon the decision of the Supreme Court in *First Vancouver* to conclude that lenders were "not comparable to third party purchasers. They are secured creditors and the property over which they asserted their security interest continued to be subject to the deemed trust and remained so at the time of its sale." (reasons, paragraph 30).

[78] No error has been demonstrated in this conclusion. It follows that the Federal Court did not err by finding that secured creditors cannot avail themselves of the *bona fide* purchaser for value defence.

d. Did the Federal Court err by failing to consider that the security interests of the Bank were not created and granted in a transaction providing financing to the debtor's business?

[79] The Bank argues that the Federal Court ought to have distinguished between the tax debtor carrying on business as a sole proprietorship and the tax debtor transacting in his personal capacity. The Bank cites no authority for this proposition, but argues that the secured creditor is

not unjustly enriched at the expense of the Crown because the creditor has not received proceeds of the tax debtor's business in priority to the Crown. This is said to be so because the secured property was not an asset of the business. Further, the Bank argues that a secured creditor who does not grant credit to a debtor's business cannot protect itself or know the obligations of the business.

[80] I see no merit in these arguments. Subsection 222(1) of the Act states that "every person who collects an amount as or on account of" GST "is deemed … to hold the amount in trust for Her Majesty". It was the Bank's debtor that collected amounts as or on account of GST and who was obliged to remit the amounts collected to the Crown.

[81] While the Bank argues that a secured creditor who does not grant credit to a debtor's business cannot protect itself or know the obligations of the business, in the present case the Agreed Statement of Facts is silent about what the Bank knew about its debtor's source of income and what, if anything, the Bank did to inquire into the state of its debtor's compliance with his obligations under the *Excise Tax Act*. The Agreed Statement of Facts is the sole source of evidence before the Court and so there is simply no evidence on these points.

[82] Before concluding, I will deal briefly with the policy arguments advanced by the Bank and the intervener.

e. The policy arguments

[83] The Bank posits three hypothetical examples that are said to reflect the "absurdity" of the interpretation adopted by the Federal Court. The intervener makes a number of policy arguments including that:

- Unless a secured creditor is entitled to receive ordinary course payments from its borrower unencumbered by the deemed trust, a secured creditor will be unlikely to give credit for any cheques or cash deposits made by a tax debtor or to provide a discharge of its security on payment without continuous confirmation from the Canada Revenue Agency that all deemed trust amounts have been paid.

- It is anomalous and illogical that a secured creditor receiving proceeds of property of the tax debtor in the ordinary course is personally liable to pay the Crown the unpaid amount of GST when there is no such liability imposed upon a lender providing an unsecured credit facility, or any other unsecured creditor whose claim ranks subordinate to the secured creditor.

- The interpretation of the Federal Court promotes liquidation and bankruptcy over restructuring alternatives that may preserve going concern value, employment and other benefits for shareholders.

[84] In my view, the answer to these concerns is that Parliament made a considered policy choice to prioritize protection of the fisc over the interests of secured creditors. Parliament tempered the potential harshness of this choice by providing for prescribed security interests and

by waiving the Crown's deemed trust rights in cases of bankruptcy and arrangements under the *Companies' Creditors Arrangement Act*.

[85] Moreover, secured lenders are not without some ability to manage the risk posed by deemed trusts. For example, they may identify higher risk borrowers (which might include persons operating sole proprietorships), require borrowers to give evidence of tax compliance, or require borrowers to provide authorization to allow the lender to verify with the Canada Revenue Agency whether there are outstanding GST liabilities then known to the Agency.

Conclusion

[86] In my view the Federal Court made no error that warrants intervention. I would dismiss the appeal with costs.

"Eleanor R. Dawson"
J.A.

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

"I agree.
Mary J.L. Gleason J.A."

APPENDIX

222 (1) Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).	222 (1) La personne qui perçoit un montant au titre de la taxe prévue à la section II est réputée, à toutes fins utiles et malgré tout droit en garantie le concernant, le détenir en fiducie pour Sa Majesté du chef du Canada, séparé de ses propres biens et des biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ceux de la personne, jusqu'à ce qu'il soit versé au receveur général ou retiré en application du paragraphe (2).
(1.1) Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the *Bankruptcy and Insolvency Act*), to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.	(1.1) Le paragraphe (1) ne s'applique pas, à compter du moment de la faillite d'un failli, au sens de la *Loi sur la faillite et l'insolvabilité*, aux montants perçus ou devenus percevables par lui avant la faillite au titre de la taxe prévue à la section II.
(2) A person who holds tax or amounts in trust by reason of subsection (1) may withdraw from the aggregate of the moneys so held in trust	(2) La personne qui détient une taxe ou des montants en fiducie en application du paragraphe (1) peut retirer les montants suivants du total des fonds ainsi détenus :
(*a*) the amount of any input tax credit claimed by the person in a return under this Division filed by the person in respect of a reporting period of the person, and	*a*) le crédit de taxe sur les intrants qu'elle demande dans une déclaration produite aux termes de la présente section pour sa période de déclaration;
(*b*) any amount that may be deducted by the person in determining the net tax of the person for a reporting period of the person,	*b*) le montant qu'elle peut déduire dans le calcul de sa taxe nette pour sa période de déclaration.
as and when the return under this Division for the reporting period in	Ce retrait se fait lors de la présentation au ministre de la déclaration aux

which the input tax credit is claimed or the deduction is made is filed with the Minister.

termes de la présente section pour la période de déclaration au cours de laquelle le crédit est demandé ou le montant déduit.

(3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(3) Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés :

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

a) être détenus en fiducie pour Sa Majesté du chef du Canada, à compter du moment où le montant est perçu par la personne, séparés des propres biens de la personne, qu'ils soient ou non assujettis à un droit en garantie;

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

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

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to

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

all security interests.

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

droit en garantie.

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

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-183-18
STYLE OF CAUSE:	THE TORONTO-DOMINION BANK v. HER MAJESTY THE QUEEN and THE CANADIAN BANKERS' ASSOCIATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 8, 2019
REASONS FOR JUDGMENT BY:	DAWSON J.A.
CONCURRED IN BY:	NEAR J.A. GLEASON J.A.
DATED:	APRIL 29, 2020

APPEARANCES:

Christine Lonsdale Daniel Goudge	FOR THE APPELLANT
Louis L'Heureux Edward Harrison	FOR THE RESPONDENT
Harvey Chaiton	FOR THE INTERVENER

SOLICITORS OF RECORD:

McCarthy Tétrault LLP Toronto, Ontario	FOR THE APPELLANT
Nathalie G. Drouin Deputy Attorney General of Canada	FOR THE RESPONDENT
Chaitons LLP Toronto, Ontario	FOR THE INTERVENER