Federal Court  Cour fédérale

**Date: 20150817**

**Docket: T-1940-13**

**Citation: 2015 FC 977**

**Ottawa, Ontario, August 17, 2015**

**PRESENT: The Honourable Madam Justice McVeigh**

**BETWEEN:**

**HER MAJESTY THE QUEEN IN RIGHT OF CANADA**

**Plaintiff**

**and**

**CALLIDUS CAPITAL CORPORATION**

**Defendant**

## ORDER AND REASONS

[1] The Defendant in the underlying action, Callidus Capital Corporation ("Callidus"), has brought a motion for this Court to determine a question of law, pursuant to Rule 220 of the *Federal Courts Rules*, SOR/98-106.

[2] The Plaintiff, Her Majesty the Queen (the "Crown"), and Callidus agree to the Statement of Facts set out below solely for the purposes of this motion:

**Background**

1. Cheese Factory Road Holdings Inc. ("Cheese Factory") is a privately-held Ontario corporation that carried on business as a real estate investment company. Cheese Factory is or was the registered owner of properties municipally known as 680 Bishop Street, Cambridge, Ontario (the "**Bishop Property**") and 181 Pinebush Road, Cambridge, Ontario (the "**Pinebush Property**").

2. At all material times, Callidus was a privately-held Ontario corporation that carried on business throughout Canada as a lender of monies to commercial enterprises on a secured basis.

**Failure to remit GST and HST**

3. The Crown claims that between 2010 and 2013, Cheese Factory collected but failed to remit GST and HST to the Receiver General for a total amount of $177, 299.70.

**BMO Credit Facilities**

4. Pursuant to a commitment letter dated September 22, 2004, Cheese Factory obtained a credit facility in the principal amount of $1,950,000 from the Bank of Montreal ("**BMO**"). Cheese Factory also granted guarantee and security documents in favour of BMO to secure its direct and indirect obligations to BMO (collectively, the "**Security**").

5. As of December 2, 2011:

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

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

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

d) Cheese Factory was indebted to BMO as guarantor in the amounts of $3,387,658.53 and US$81,233.28,

which amounts include principal and interest but do not include fees.

**Assignment of Debt and Obligation to Callidus**

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

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

**Sale Proceeds from the Bishop Property**

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

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

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

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

**Rent Proceeds from the Pinebush Property**

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

13. The Blocked Accounts Agreement provides that:

a) Cheese Factory shall hold all cash and Cheques(as defined therein) received by it in trust for Callidus, segregated from all other funds and property of Cheese Factory, until such time as the cash and Cheques are delivered to RBC for deposit in the Blocked Accounts; and

b) RBC shall transfer, prior to the end of each Business Day, all amounts on deposit in the Blocked Accounts to Callidus' account or accounts.

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

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

16. Callidus has applied all amounts deposited into these accounts to partially reduce the outstanding debt and obligations owed to it by Cheese Factory.

**Deemed Trust Asserted by the Crown**

17. On or about April 2, 2012, the Plaintiff, by way of a letter to Callidus, claimed an amount of $90,844.33 on the basis of the deemed trust mechanism of the *Excise Tax Act*, RSC 1985, c B-3, as amended (the "**ETA**").

**Bankruptcy of Cheese Factory**

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

**Action Commenced by the Crown**

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

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

periods commencing on October 31, 2010 up to and including January 31, 2013.

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

a) All of Cheese Factory's assets were deemed to be held in trust in favour of the Plaintiff in priority to the claims of Callidus pursuant to section 222 of the ETA; and,

b) All proceeds of Cheese Factory's property received by Callidus, up to the amount secured by the deemed trust, should have been paid to the Receiver General of Canada as a result of the deemed trust mechanism under section 222 of the ETA.

22. Callidus served and filed a statement of defence.

**Question of Law**

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

## I. Applicable Legislation

[3] The applicable legislation is attached as Annex "A".

## II. Parties' Submissions

### A. *Callidus – Defendant*

[4] Callidus interprets sections 222(1.1) and 222(3) of the ETA to mean that the deemed trust does not apply once the tax debtor becomes bankrupt. This means that the Receiver General of Canada's ("Receiver General") deemed trust claim for collected but unremitted GST and HST is ineffective on bankruptcy and ranks as an ordinary unsecured claim.

[5] Callidus submits that the deemed trust established under section 222(3) is like a "floating charge" and does not attach to any specific property. Thus the tax debtor may deal with its property free of the deemed trust. Further, section 222(3) does not allow for the deemed trust to continue to attach to the property of the tax debtor following payment to a creditor, whether or not the tax debtor has subsequently become bankrupt. Callidus proposes that had Parliament intended for the deemed trust to continue to attach to the property, clear and unambiguous language would have been used. The fact that section 222(3) does not include such language is reflective of Parliament's clear legislative intent.

[6] Meanwhile, section 222(1.1) does not distinguish between property collected and disbursed by the tax debtor and property that continues to be in the possession of the tax debtor at the time of bankruptcy.

[7] Callidus submits that if the Crown were permitted to recover amounts paid by a tax debtor to its creditors notwithstanding subsequent bankruptcy, creditors would have no incentive to try to work with their debtors to avoid bankruptcy. Callidus argues that creditors would attempt to immediately place debtors in bankruptcy rather than reaching an out-of-court solution, which would aggravate the social and economic losses of insolvency.

[8] Callidus analogizes the facts in this case to those presented in *Bank of Nova Scotia v Huronia Precision Plastics Inc*, 2009 OJ No 312 ("*Huronia*"). In *Huronia*, where the assets of the tax debtor had been sold prior to the tax debtor becoming bankrupt and were being held by the receiver subject to the claims of the bank and the Receiver General. In that decision, Justice

Morawetz, formerly of the Ontario Superior Court of Justice (Commercial List), held that the operation of section 222(1.1) of the ETA means that any priority granted to a deemed trust under section 222(1) does not apply to amounts that were collected or became collectable at or after the time a person becomes bankrupt within the meaning of the *Bankruptcy Insolvency Act*, RSC, 1985, c B-3 ("BIA").

[9] Callidus further drew comparisons to *Re Gold's Gym and Total Fitness Inc (Bankrupt)*, 2005 ABQB 716, where the bank seized and sold the tax debtor's equipment to pay a portion of the debt owed. There, *in obiter*, the Court noted that the tax debtor's property that was subject to a deemed trust pre-bankruptcy ceases to be subject to that trust upon bankruptcy.

[10] Finally, Callidus argues that it is entitled to apply for an assignment in bankruptcy in order to reverse priorities and that it is a legitimate reason to bring such an application (*Re Ivanco Inc*, [2006] OJ No 4152 (ONCA); *CIBC Mortgages Inc (Firstline Mortgages) v Chartrand*, 2010 ONCA 456 at para 8).

B. *Crown - Plaintiff*

[11] The Crown's primary submission is that the deemed trust pursuant to section 222(3) provides two layers of protection in respect of GST and HST remittances. Firstly, the assets of the tax debtor are deemed to be held in trust for, and beneficially owned by, the Crown despite a security interest. Secondly, and most importantly for the issue at hand, the Crown argues that the deemed trust is a personal and independent liability imposed on secured creditors who do not pay Crown proceeds that they have received from the sale of assets "imprinted" with a deemed trust.

[12] The Crown submits that the language of section 222(3) imposes a positive obligation which mandates that proceeds of assets "imprinted" with a deemed trust shall be paid:

> 222(3) […] and the proceeds of the property shall be paid to the Receiver General in priority to all security interests

[13] The Crown submits that the word "shall" confers no residual discretion and that where a secured creditor fails to comply with the obligation to pay the deemed trust proceeds, they become personally liable for the unpaid amounts. The Crown submits that the Crown then has an independent cause of action against the secured creditor.

[14] In support, the Crown cites *Banque National v Canada*, 2004 FCA 92 ("Banque National"), where the Federal Court of Appeal wrote:

> [40] It seems obvious to me that a secured creditor who does not comply with his statutory obligation to "pay" the Receiver General the proceeds of property subject to the deemed trust in priority over his security interest is personally liable and thereby becomes liable for the unpaid amount.

[15] The Crown submits that the effect of section 222(1.1) is to release all assets from the deemed trust that are owned by the tax debtor at the time of bankruptcy. However, this section of the ETA does not alter the personal liability, as described above, of creditors who received proceeds pre-bankruptcy from the sale of deemed trust assets. The Crown submits that the secured creditor's liability originates, and the cause of action crystalizes, prior to the bankruptcy. Specifically, the liability of the creditor and separate cause of action is not dependent on whether the deemed trust continues to operate.

[16] The Crown characterizes this as a pre-existing and fully engaged cause of action for pre-bankruptcy misapplication of proceeds. The Crown's position is that section 325 of the ETA results in personal liability for a third party who receives property from a person for less than fair market value. The transferee under that section then becomes liable for the tax debt. The Crown argues that the secured creditor's liability has a "life of its own" and the eventual bankruptcy is irrelevant.

[17] Particularly, the Crown cites *Caisse populaire Desjardins de l'Est de Drummond v Canada*, 2009 SCC 29 ("Caisse") in support of its position that the deemed trust does not operate exclusively in relation to source deductions. The Crown submits that the ETA provides other examples of collection tools where the liability of a third party is not affected by subsequent bankruptcy. The Crown analogizes to the garnishment provisions in section 317(3) of the ETA where the Crown has priority over all competing creditors. The Crown submits that despite the clause excluding the BIA, where a requirement to pay ("RTP") has been served before bankruptcy, the tax debtors subsequent bankruptcy does not erase the liability of the third party who did not pay.

[18] In support of their position the Crown cites *TD Bank Bank v Canada*, 2010 FCA 174 ("TD Bank"), aff'd 2012 SCC 1. In that case the Federal Court of Appeal found that upon receipt of the requirement to pay, the secured creditor had a statutory obligation to pay the amount required and if not paid, then personal liability attached despite the bankruptcy of the tax debtor. The Crown submits that the same logic applies to deem trust assets received prior to bankruptcy, as it ensures consistency among statutory collection tools.

[19] Finally, the Crown attacks the cases relied on by Callidus and argue that they do not involve a "pre-existing personal and independent liability" of secured creditors. The Crown argues that the legislative intent of the 1992 BIA reforms was not to diminish the Crown ability to recover from secured creditors before bankruptcy, but to bolster recovery for unsecured creditors in a bankruptcy context.

III. Analysis

[20] In my view, the question of law should be answered in the affirmative. A plain reading of the legislation and an examination of the relevant jurisprudence establish that upon the bankruptcy of Cheese Factory, the deemed trust under section 222(1) of the ETA was rendered ineffective against Callidus for collected but unremitted GST and HST.

[21] The issues in this case are similar to those considered by the Supreme Court in *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60 ("Century"). I employ the same reasoning used by the Supreme Court of Canada in that case to the question of law at issue here, keeping in mind that in this case we are **not** dealing with source deductions and there was never a Requirement To Pay or garnishment served.

[22] Section 222(1) of the ETA explicitly provides that GST or HST collected is deemed held in trust for the Crown and it is not the property of the collector. The deemed trust mechanism applies also to third parties and for all purposes.

[23] Section 222(3) of the ETA is an extension of the deemed trust: if the collected GST and or HST are not paid, the equivalent funds or property of the tax debtor are deemed to be property of the Crown, despite any security interest. The extension of the trust gives the Receiver General greatest priority over all other claims and security interests. This absolute priority of claims contrasts sharply with the ordinary creditor status of the Crown in bankruptcy as seen in section 222(1.1).

[24] Section 222(1.1) of the ETA, provides that the deemed trust is extinguished upon bankruptcy of the tax debtor. Sections 67(2) and 67(3) of the BIA work in conjunction with the provision by reinforcing with strong language that the deemed trust does not exist following bankruptcy unless the amounts deducted are considered source deductions, i.e. income tax, Canada Pension Plan deductions or Employment Insurance deductions.

[25] In *Century*, the Supreme Court of Canada outlined the legislative history that led to the enactment of section 222(1.1) in 1992 ("the 1992 amendments"). The Court wrote that prior to these amendments, Crown claims had priority; however, legislative reform proposals at the time recommended that Crown claims should not receive preferential treatment.

[26] Madam Justice Deschamps writing for the majority in *Century* discussed priorities when dealing with the BIA and *Companies Creditors Arrangement Act*, RSC, c C-36 ("CCAA") in the context of deemed trusts. She covered the history of the priority scheme in insolvency and the policy backdrop for the development of the law. The Court noted that Parliament appeared to

move away from asserting priority for Crown claims in insolvency law and more specifically, found that:

> [45] …Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so explicitly and elaborately. For example, s. 18.3(2) of the *CCAA* and s. 67(3) of the *BIA* expressly provide that deemed trusts for source deductions remain effective in insolvency. Parliament has, therefore, clearly carved out exceptions from the general rule that deemed trusts are ineffective in insolvency. The *CCAA* and *BIA* are in harmony, preserving deemed trusts and asserting Crown priority only in respect of source deductions. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. Unlike source deductions, 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 claims.
>
> Emphasis added

[27] However, Justice Deschamps also recognized a potential inconsistency in the Crown's position in relation to the CCAA:

> [47] Moreover, a strange asymmetry would arise if the interpretation giving the *ETA* priority over the *CCAA* urged by the Crown is adopted here: the Crown would retain priority over GST claims during *CCAA* proceedings but not in bankruptcy. As courts have reflected, this can only encourage statute shopping by secured creditors in cases such as this one where the debtor's assets cannot satisfy both the secured creditors' and the Crown's claims (*Gauntlet*, at para. 21). If creditors' claims were better protected by liquidation under the *BIA*, creditors' incentives would lie overwhelmingly with avoiding proceedings under the *CCAA* and not risking a failed reorganization. Giving a key player in any insolvency such skewed incentives against reorganizing under the *CCAA* can only undermine that statute's remedial objectives and risk inviting the very social ills that it was enacted to avert.
>
> [49] Evidence that Parliament intended different treatments for GST claims in reorganization and bankruptcy is scant, if it exists at all. ….. Indeed, the summary for deemed trusts states only that amendments to existing provisions are aimed at "ensuring that employment insurance premiums and Canada Pension Plan

> contributions that are required to be remitted by an employer are fully recoverable by the Crown in the case of the bankruptcy of the employer" (Summary to S.C. 2000, c. 30, at p. 4a). The wording of GST deemed trusts resembles that of statutory deemed trusts for source deductions and incorporates the same overriding language and reference to the *BIA*. However, as noted above, Parliament's express intent is that only source deductions deemed trusts remain operative. An exception for the *BIA* in the statutory language establishing the source deductions deemed trusts accomplishes very little, because the explicit language of the *BIA* itself (and the *CCAA*) carves out these source deductions deemed trusts and maintains their effect. It is however noteworthy that no equivalent language maintaining GST deemed trusts exists under either the *BIA* or the *CCAA*.
>
> Emphasis added

[28] Ultimately, the Supreme Court in *Century* stated that there is little evidence that the CCAA and the BIA were intended to be treated differently by Parliament. Accordingly, the result in *Century* is that a deemed trust for GST remitted does not survive a CCAA reorganization and that same result can be analogized to what occurs in the BIA. The extension of the deemed trust created by section 222(3) of the ETA does not operate in bankruptcy when section 67(2) of the BIA governs.

[29] Mr. Justice Fish, who concurred with the majority, wrote his own reasons regarding the interaction between the CCAA and the ETA. His reasons add support to those written by Madam Justice Deschamps in that they shared the conclusion that there was no deemed trust for GST after bankruptcy, save, of course, source deductions.

[30] Mr. Justice Fish noted that Parliament had given "detailed" consideration to Canada's insolvency scheme and it is the role of the Court "to treat Parliament's preservation of the

relevant provisions as a deliberate exercise of the legislative discretion that is Parliament's alone" (*Century* at para 95). He continued at paragraph 105:

> [105] …Although Parliament creates a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it does not confirm the trust — or expressly provide for its continued operation — in either the BIA or the CCAA.

[31] In arriving at this conclusion, Mr. Justice Fish developed a simple test for a complex priority scheme concerning insolvency and deemed trusts involving the ITA, ETA and CCAA. He said first look at whether there is a deemed trust created by the statute in question. Then Mr. Justice Fish turned to the question of whether Parliament had confirmed the continued operation of the Crown's deemed trust under the BIA and CCAA regimes. He determined that absence of either one of these two mandatory elements reflects Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

[32] In applying this test to the case at hand, I find that a deemed trust was properly created. However, upon an examination of the BIA, it becomes clear that the operation of the deemed trust is not confirmed, thereby reflecting Parliament's intention to allow it to lapse upon insolvency proceedings being commenced.

[33] The reasoning of the Supreme Court in *Century* is consistent with its earlier decision in *Caisse*. In *Caisse,* the Supreme Court heard three cases together. Each case involved a situation where the Crown claimed a deemed trust over GST and Provincial sales tax that had been collected but not remitted at the time of bankruptcy. The banks who were creditors claimed that

the Crown was just an ordinary creditor and must be ranked in priority as such. The Supreme Court observed that "Canadian tax authorities are bound by the choice of legislative policy now expressed in the BIA" and found that the deemed trusts that were created to secure the GST and HST were terminated at the time of bankruptcy. It was determined that the trustee in Bankruptcy was responsible for liquidating patrimonies that include the GST and HST amounts that are in issue.

[34] In *Caisse*, both the Quebec Court of Appeal and the Supreme Court of Canada described the 1992 amendments as clearly enacted to limit the Crown's priority in order to create a better balance between creditors during bankruptcy. The Supreme Court found that Parliament's intent was clear and had explicit wording governing what happens during bankruptcy and that the provisions also had express exceptions, such as for source deductions.

[35] As in *Century* and *Caisse*, here the Crown seeks to maintain the deemed trust without express legislative language to do so. As I stated above, the Supreme Court in *Century* states that where the Crown wishes to protect claims, it does so through explicit and elaborate legislation. However, section 222(1.1) is neither explicit nor elaborate to the degree that the Crown wishes to characterize it. The Crown's interpretation of section 222(3) is correct in the sense that the words "shall be paid" is the imperative, however, the exact function of section 222(1.1) is to remove this imperative. Neither section 222(1.1) nor section 222(3) specify which assets remain imprinted and which do not. Had Parliament intended to distinguish between assets in the possession of the tax debtor or those that had already been sold, it was open to specify as such. Furthermore, the Crown's argument at paragraph 46 of their memorandum that the net effect of

section 222(1.1) is to release assets owned by the tax debtor is not supported by any jurisprudence and is not reflected in the language of the statute.

[36] The Crown's argument that the 2000 amendments to the ITA strengthened the deemed trust under section 222(3) overlooks the fact that the amendments were specific to source deductions, not GST remittance. The Crown argues that the statutory obligation of Callidus is supported by *Banque National*, however, that case was also in relation to source deductions that were collected by the tax debtor but not remitted. The same is true of the decisions in *Royal Bank v Sparrow Electric Corp*, [1997] 1 SCR 411 and *First Vancouver Finance v Minister of National Revenue*, 2002 SCC 49 ("*First Vancouver*"). The decision in *First Vancouver* is also distinguishable on the basis that an Enhanced Requirement To Pay Notice (RTP) was served.

[37] It appears that the Crown's analogy to section 317 and section 325 of the ETA further highlights that Parliament has not enacted a provision that explicitly attaches liability pre-bankruptcy to the proceeds of sale without a crystalizing event. Sections 317 and 325 specify that they operate notwithstanding bankruptcy. In section 317, it is receipt of an RTP and in section 325 it is the moment that the transfer of property for less than fair market value occurs. In this case, the Crown has not identified any crystalizing moment that immunizes the deemed trust from the operation of the BIA and section 222(1.1) of the ETA.

[38] These collections tools may be distinguished because, as described in *TD Bank*, there was a RTP or "notice of garnishment" received prior to seeking bankruptcy. The Crown analogizes *TD Bank* to the case at bar, however, the issue may be distinguished because the Agreed

Statement of Facts did not disclose that a notice of garnishment or RTP was issued to Callidus. In this case, the Agreed Statement of Facts describes that a notice by letter was provided, not an official RTP notice.

[39] The Crown argues that the same logic applies to this case, however, it is very different. In *TD Bank*, the RTP was issued, and the moneys became immediately subject to the RTP, which endured when bankruptcy was sought in that case. Had Callidus received such a notice, it would have created the obligation for Callidus to pay the unremitted GST despite seeking bankruptcy. The Crown's contention that collection tools should be harmonious and that independent liability continues notwithstanding subsequent bankruptcy would make the BIA and CCAA at odds with each other, which is what the Supreme Court majority decision attempted to prevent in *Century*.

[40] Most importantly, the Crown does not reconcile how the proposed scenario, where a "pre-existing, fully engaged cause of action" against Callidus reconciles with section 222(1.1). The Crown argues that whether the deemed trust operates or not----does not impact that this separate cause of action has crystalized, but does not reconcile section 222(1.1) with its position that a separate cause of action exists. The Crown is attempting to re-characterize the question of law to be answered. The question was not whether Callidus was independently liable, but whether the trust continues to operate notwithstanding bankruptcy.

[41] The personal liability of a secured creditor is not distinguished or identified as an exception in either section 222(1.1) or 222(3) of the ETA or section 67(3) and 67(3) of the BIA which would justify the Crown's argument. Furthermore, the authority the Crown submits refers

to an explicit "crystallization" moment when the person becomes liable for the tax despite subsequent bankruptcy. This defeats the Crown's argument that other collection tools available under the ETA, specifically section 317 and 325(1), do not expire on bankruptcy of the tax debtor.

[42] Callidus persuasively argued their interpretation of the purpose of the 1992 amendments; introducing section 222(1.1) was to oust the Crown priority over all other interests in bankruptcy. I disagree with the Crown's characterization that the legislative intent behind the 1992 amendments reforms was to elevate the claims of unsecured creditors rather than to diminish Crown priority. It is clear from my reading of *Caisse* and *Century* that the amendments were intended to reduce the priority of the Crown. I find that the bankruptcy of Cheese Factory engaged section 222(1.1) of the ETA such that the deemed trust under section 222(1) and 222(3) are ineffective.

## IV. Costs

[43] The parties were asked at the end of the hearing if they could reach an agreement as to the amount of costs that should be awarded to the successful party. The Court thanks the parties for providing an agreed figure in the amount of $2,600.00 inclusive of HST and disbursements.

[44] I am awarding costs payable forthwith in the amount of $2,600.00 to Callidus Capital Corporation by the Receiver General for Canada on behalf of the Plaintiff, Her Majesty the Queen.

**ORDER**

**THIS COURT ORDERS that:**

1. The Question of Law presented by agreement of the parties is answered in the affirmative;

2. Costs payable forthwith in the amount of $2,600.00 to Callidus Capital Corporation by the Receiver General for Canada on behalf of the Plaintiff, Her Majesty the Queen.

"Glennys L. McVeigh"
Judge

ANNEX "A"

*Excise Tax Act* (RSC, 1985, c E-15)

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

**Amounts collected before bankruptcy**
(1.1) Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the Bankruptcy and Insolvency Act), to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

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

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

**Montants perçus détenus en fiducie**
222. (1) La personne qui perçoit un montant au titre de la taxe prévue à la section II est réputée, à toutes fins utiles et malgré tout droit en garantie le concernant, le détenir en fiducie pour Sa Majesté du chef du Canada, séparé de ses propres biens et des biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ceux de la personne, jusqu'à ce qu'il soit versé au receveur général ou retiré en application du paragraphe (2).

**Montants perçus avant la faillite**
(1.1) Le paragraphe (1) ne s'applique pas, à compter du moment de la faillite d'un failli, au sens de la Loi sur la faillite et l'insolvabilité, aux montants perçus ou devenus percevables par lui avant la faillite au titre de la taxe prévue à la section II.

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

a) être détenus en fiducie pour Sa Majesté

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

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

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

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

*Bankruptcy and Insolvency Act* (RSC, 1985, c B-3)

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

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

**Fiducies présumées**
(2) Sous réserve du paragraphe (3) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens du failli ne peut, pour l'application de l'alinéa (1)a), être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

**Exceptions**
(3) Le paragraphe (2) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la Loi de l'impôt sur le revenu, des paragraphes 23(3) ou (4) du Régime de pensions du Canada ou des paragraphes 86(2) ou (2.1) de la Loi sur l'assurance-emploi (chacun étant appelé « disposition fédérale » au présent paragraphe) ou à l'égard des montants réputés détenus en fiducie aux termes de toute loi d'une

withheld under a law of the province where

(a) that law of the province imposes a tax similar in nature to the tax imposed under the Income Tax Act and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the Income Tax Act, or
(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the Canada Pension Plan, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the Canada Pension Plan,

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

province créant une fiducie présumée dans le seul but d'assurer à Sa Majesté du chef de cette province la remise de sommes déduites ou retenues aux termes d'une loi de cette province, dans la mesure où, dans ce dernier cas, se réalise l'une des conditions suivantes :

a) la loi de cette province prévoit un impôt semblable, de par sa nature, à celui prévu par la Loi de l'impôt sur le revenu, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 227(4) ou (4.1) de la Loi de l'impôt sur le revenu;
b) cette province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) du Régime de pensions du Canada, la loi de cette province institue un « régime provincial de pensions » au sens de ce paragraphe, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 23(3) ou (4) du Régime de pensions du Canada.

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

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-1940-13 |
| **STYLE OF CAUSE:** | HMTQ V CALLIDUS CAPITAL CORPORATION |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | APRIL 8, 2015 |
| **ORDER AND REASONS:** | MCVEIGH J. |
| **DATED:** | AUGUST 17, 2015 |

**APPEARANCES:**

| | |
|---|---|
| Louis L'Heureux<br>Edward Harrison | FOR THE PLAINTIFF |
| Harvey Chaiton<br>Sam Rappos | FOR THE DEFENDANT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| William F. Pentney<br>Deputy Attorney General of Canada<br>Toronto, Ontario | FOR THE PLAINTIFF |
| Chaitons LLP<br>Toronto, Ontario | FOR THE DEFENDANT |