Federal Court of Appeal | Cour d'appel fédérale

Date: 20100630

Docket: A-490-09

Citation: 2010 FCA 174

CORAM: **BLAIS C.J.**
NOËL J.A.
TRUDEL J.A.

BETWEEN:

TORONTO DOMINION BANK

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Hearing held at Montréal, Quebec, on June 9, 2010.

Judgment delivered at Ottawa, Ontario, on June 30, 2010.

REASONS FOR JUDGMENT BY: NOËL J.A.

CONCURRED IN BY: BLAIS C.J.
TRUDEL J.A.

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REASONS FOR JUDGMENT

NOËL J.A.

[1] This is an appeal of a decision by Justice Angers of the Tax Court of Canada (the TCC judge), dismissing the appeal of Toronto Dominion Bank (the appellant) from an assessment issued under section 317 of the *Excise Tax Act*, R.S.C. 1985, c. E-15 (the ETA) for failure to comply with a requirement to pay.

[2] The dispute lies at the heart of a conflict in the case law involving the Court of Appeal of Québec and certain courts of the common law provinces, particularly the Ontario Court of

Appeal, on the issue of whether requirements to pay (also called notices of garnishment) served before a tax debtor entered into bankruptcy, but not settled at the time of the bankruptcy, can be set up against trustees and secured creditors.

[3] In the case at bar, the TCC judge relied on the decisions by the courts of Ontario, Saskatchewan and British Columbia and by his own court to conclude that, according to the language of subsection 317(3) of the ETA, the moneys subject to the requirement to pay were immediately relinquished to the Crown on the appellant's receipt of the requirement. Those moneys were no longer part of the tax debtor's patrimony when the notice of stay issued under section 69 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the BIA), was filed and, consequently, there is no conflict between the BIA and the requirement to pay, which remains fully applicable.

[4] The appellant is relying primarily on the decision of the Court of Appeal of Québec in *Sous-ministre du Revenu du Québec v. De Courval*, [2009] R.J.Q. 597 (*De Courval*), which interpreted analogous provisions of the *Act respecting the ministère du Revenu*, R.S.Q. c. M-31 (the AMR). The appellant alleges that the relinquishment in favour of the Crown was subject to section 70 of the BIA, that there is therefore a conflict and that according to the very language of subsection 317(3), the BIA prevails.

[5] For the reasons that follow, I am of the opinion that the appeal must be dismissed.

RELEVANT FACTS

[6] The facts are straightforward. For the purposes of this appeal, both parties have adopted the TCC judge's summary (Reasons, paragraph 1):

> (a) Corporation 9161-3505 Québec Inc. (hereinafter 9161) with a debt of $12,014.93 to the respondent, the Quebec Minister of Revenue (the Minister), through one of its authorized employees, sent the appellant a Requirement to Pay on December 11, 2007, pursuant to subsections 317(1) and (3) of the [ETA];
>
> (b) when the Minister sent the Requirement to Pay to the appellant, the appellant had $8,868.19 belonging to 9161;
>
> (c) on December 24, 2007, 9161 filed a notice of intention to make a Proposal to its creditors under the *Bankruptcy and Insolvency Act* (the BIA);
>
> (d) on December 24, 2007, the trustee of the 9161 proposal sent the appellant, pursuant to the BIA, a notice to stay the Requirement to Pay;
>
> (e) the appellant did not comply with the Requirement to Pay from December 11, 2007, to December 24, 2007, although the bank account for 9161 had a positive balance of $8,868.19;
>
> (f) on April 9, 2008, the Minister issued a Notice of Assessment to the appellant for $6,000.22 pursuant to section 317 of the Act and on April 22, 2008, the appellant filed an objection;
>
> (g) on or around October 21, 2008, the objection officer dismissed the objection but recommended that the amount of the assessment be reduced to $2,867.97 because the $6,000.22 required had already been assessed pursuant to sections 15.5 and 15.6 of the Act by Quebec's Ministère du Revenu, as the positive balance in the bank account was only $8,868.19, leaving only $2,867.97 in the account;
>
> (h) a reassessment was made on September 26, 2008, and is the subject of the current appeal.

[7] Both at the objection stage and before the TCC, the appellant argued that because it still had not paid the amount claimed by the Minister when it received the notice of stay regarding the requirement to pay, subsection 70(1) of the BIA prevails according to the very language of subsection 317(3) of the ETA, rendering any prior seizure proceedings ineffective (Appeal Book, pages 18 and 66).

STATUTORY FRAMEWORK

[8] Subsection 317(3) of the ETA, as applicable during the time at issue, reads as follows:

317. (3) Despite any other provision of this Part, any other enactment of Canada other than the *Bankruptcy and Insolvency Act*, any enactment of a province or any law, if the Minister has knowledge or suspects that a particular person is, or will become within one year, liable to make a payment (*a*) to a tax debtor, or (*b*) to a secured creditor who has a right to receive the payment that, but for a security interest in favour of the secured creditor, would be payable to the tax debtor, the Minister may, by notice in writing, require the particular person to pay without delay, if the moneys are payable immediately, and in any other case as and when the moneys become payable, the moneys otherwise payable to the tax debtor or the secured creditor in whole or in part to the Receiver General on account of the tax debtor's liability under this	**317.** (3) Malgré les autres dispositions de la présente partie, tout texte législatif fédéral à l'exception de la *Loi sur la faillite et l'insolvabilité*, tout texte législatif provincial et toute règle de droit, si le ministre sait ou soupçonne qu'une personne est ou deviendra, dans les douze mois, débitrice d'une somme à un débiteur fiscal, ou à un créancier garanti qui, grâce à un droit en garantie en sa faveur, a le droit de recevoir la somme autrement payable au débiteur fiscal, il peut, par avis écrit, obliger la personne à verser au receveur général tout ou partie de cette somme, immédiatement si la somme est alors payable, sinon dès qu'elle le devient, au titre du montant dont le débiteur fiscal est redevable selon la présente partie. Sur réception par la personne de l'avis, la somme qui y est indiquée comme devant être versée devient, malgré tout autre droit en garantie au titre de cette somme, la propriété de Sa Majesté du chef du Canada, jusqu'à concurrence du montant dont le débiteur fiscal est ainsi redevable

Part, and on receipt of that notice by the particular person, the amount of those moneys that is so required to be paid to the Receiver General shall, despite any security interest in those moneys, become the property of Her Majesty in right of Canada to the extent of that liability as assessed by the Minister and shall be paid to the Receiver General in priority to any such security interest.	selon la cotisation du ministre, et doit être versée au receveur général par priorité sur tout autre droit en garantie au titre de cette somme.
…	[…]

[Emphasis added.]

[9] A person who fails to remit the amount required becomes liable to pay that amount (subsection 317(7) of the ETA).

[10] Subsection 317(3) of the ETA, as reproduced, has remained essentially unchanged since it was introduced in 1990 (S.C. 1990, c. 45). The only changes that have since been made are the following: the words “notwithstanding” and “nonobstant”, which appeared in the original version, were replaced with the words “despite” and “malgré”; in the same text, the means of communicating the requirement was changed (that is, written notice instead of registered letter); and the reference was changed to the BIA instead of the *Bankruptcy Act*, according to the new nomenclature adopted in 1992.

[11] The equivalent provisions of the AMR are as follows:

15. The Minister may, by notice served or sent by registered mail,	**15.** Le ministre peut, par avis signifié ou transmis par courrier recommandé,

require that a person who, by virtue of an existing obligation, is or will be bound to make a payment to a person owing an amount exigible under a fiscal law, pay to the Minister, on behalf of the person's creditor, all or part of the amount that the person owes or will have to pay to the creditor, such payment to be made at the time the amount becomes payable to the creditor.	exiger d'une personne qui, en vertu d'une obligation existante, est ou sera tenue de faire un paiement à une personne qui est redevable d'un montant exigible en vertu d'une loi fiscale, qu'elle lui verse, à l'acquit de son créancier, la totalité ou une partie du montant qu'elle a ou aura à payer à ce dernier et ce, au moment où ce montant devient payable au créancier.
…	[…]
15.3.1. Upon receipt of a notice from the Minister served or sent by registered mail, the amount indicated in the notice as having to be paid to him becomes the property of the State and payment thereof to the Minister shall take priority over any other security granted in respect of the amount.	**15.3.1.** Sur réception d'un avis du ministre signifié ou transmis par courrier recommandé, le montant qui y est indiqué comme devant lui être versé devient la propriété de l'État et doit lui être remis par priorité sur toute autre sûreté donnée à l'égard de ce montant.
…	[…]

[Emphasis added.]

[12] It is also useful to reproduce subsection 224(1.2) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (ITA), as amended in 1990 (S.C. 1990, c. 34, subsections 1(2) and (3)), the same year that subsection 317(3) of the ETA (above) was introduced:

224. (1.2) Notwithstanding any other provision of this Act, the *Bankruptcy Act*, any other enactment of Canada, any enactment of a province or any law, where the Minister has knowledge or suspects that a particular person is or will become, within 90 days, liable to make a payment	**224.** (1.2) Nonobstant les autres dispositions de la présente loi et nonobstant la *Loi sur la faillite*, tout autre texte législatif fédéral, tout texte législatif provincial et toute règle de droit, s'il sait ou soupçonne qu'une personne donnée est ou deviendra, dans les 90 jours, débiteur d'une somme

(*a*) to another person (in this subsection referred to as the "tax debtor") who is liable to pay an amount assessed under subsection 227(10.1) or a similar provision, or

(*b*) to a secured creditor who has a right to receive the payment that, but for a security interest in favour of the secured creditor, would be payable to the tax debtor,

the Minister may, by registered letter or by a letter served personally, require the particular person to pay forthwith, where the moneys are immediately payable, and in any other case, as and when the moneys become payable, the moneys otherwise payable to the tax debtor or the secured creditor in whole or in part to the Receiver General on account of the tax debtor's liability under subsection 227(10.1) or a similar provision, and on receipt of that letter by the particular person, the amount of those moneys that is required by that letter to be paid to the Receiver General shall, notwithstanding any security interest in those moneys, become the property of Her Majesty and shall be paid to the Receiver General in priority to any such security interest.

a) soit à un débiteur fiscal, à savoir une personne redevable d'un montant cotisé en application du paragraphe 227(10.1) ou d'une disposition semblable,

b) soit à un créancier garanti, à savoir une personne qui, grâce à une garantie en sa faveur, a le droit de recevoir la somme autrement payable au débiteur fiscal,

le ministre peut, par lettre recommandée ou signifiée à personne, obliger la personne donnée à payer au receveur général tout ou partie de cette somme, sans délai si la somme est payable immédiatement, sinon dès qu'elle devient payable, au titre du montant cotisé en application du paragraphe 227(10.1) ou d'une disposition semblable dont le débiteur fiscal est redevable. Sur réception de la lettre par la personne donnée, la somme qui y est indiquée comme devant être payée devient, nonobstant toute autre garantie au titre de cette somme, la propriété de Sa Majesté et doit être payée au receveur général par priorité sur toute autre garantie au titre de cette somme.

[Emphasis added.]

[13] Prior to that amendment, this was the text that followed paragraph (*b*):

the Minister may, by registered letter or by a letter served personally, require the particular person to pay forthwith, where the moneys are immediately payable, and in any other case, as an when the moneys become payable, the moneys otherwise payable to the tax debtor or the secured creditor in whole or in part to the Receiver General on account of the tax debtor's liability under subsection 227(10.1) or a similar provision.	le ministre peut, par lettre recommandée ou signifiée à personne, obliger la personne donnée à payer au receveur général tout ou partie de cette somme, sans délai si la somme est payable immédiatement, sinon dès qu'elle devient payable, au titre du montant cotisé en application du paragraphe 227(10.1) ou d'une disposition semblable dont le débiteur fiscal est redevable.

[14] Subsection 224(1.2), as it currently stands, reads essentially as it did in 1990. I emphasize, out of an abundance of caution, that the word "nonobstant" which appeared at the beginning of the French text and in the last paragraph was replaced with the word "malgré" in 1994. However, the word "notwithstanding" in the English text remained unchanged. I do not think this change can be construed as intending to change the meaning of this provision.

[15] Subsection 70(1) of the BIA, which is at the centre of the controversy, reads as follows:

70. (1) Every bankruptcy order and every assignment made under this Act takes precedence over all judicial or other attachments, garnishments, certificates having the effect of judgments, judgments, certificates of judgment, legal hypothecs of judgment creditors, executions or other process against the property of a	**70**. (1) Toute ordonnance de faillite rendue et toute cession faite en conformité avec la présente loi ont priorité sur toutes saisies, saisies-arrêts, certificats ayant l'effet de jugements, jugements, certificats de jugements, hypothèques légales résultant d'un jugement, procédures d'exécution ou autres procédures

bankrupt, except those that have been completely executed by payment to the creditor or the creditor's representative, and except the rights of a secured creditor.	contre les biens d'un failli, sauf ceux qui ont été complètement réglés par paiement au créancier ou à son représentant, et sauf les droits d'un créancier garanti.

[Emphasis added.]

[16] That provision has remained unchanged since it was adopted in 1985 (R.S.C., c. B-3, section 1).

[17] Subsections 67(2) and (3) and 86(1) and (3) of the BIA are also relevant to the analysis:

67. (2) **Deemed trusts** – 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.	**67.** (2) **Fiducies présumées** – Sous réserve du paragraphe (3) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens du failli ne peut, pour l'application de l'alinéa (1)*a*), être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.
(3) **Exceptions** – 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	(3) **Exceptions** – 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 »

under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

…

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

[…]

86. (1) **Status of Crown claims** – In relation to a bankruptcy or proposal, all provable claims, including secured claims, of Her Majesty in right of Canada or a province or of any body under an Act respecting workers' compensation, in this section and in section 87 called a "workers' compensation body", rank as unsecured claims.

…

(3) **Exceptions** – Subsection (1) does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*;

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an

86. (1) **Réclamations de la Couronne** – Dans le cadre d'une faillite ou d'une proposition, les réclamations prouvables – y compris les réclamations garanties – de Sa Majesté du chef du Canada ou d'une province ou d'un organisme compétent au titre d'une loi sur les accidents du travail prennent rang comme réclamations non garanties.

[…]

(3) **Effet** - Le paragraphe (1) n'a pas pour effet de porter atteinte à l'application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de *la Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt*

employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts; or	*sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents;
…	[…]

[Emphasis added.]

DECISION OF THE TCC JUDGE

[18] After having summarized the facts, the TCC judge identified numerous issues that he considered relevant to his analysis, including the following (Reasons, paragraph 2):

> . . . Is there a transfer of the ownership of money following . . . [the Requirement to Pay] and, if so, did the Notice to Stay cancel the right of ownership?

[19] First, the TCC judge reviewed the decisions by his own court in *Wa-Bowden Real Estate Reports Ltd. v. Her Majesty*, [1997] T.C.J. No. 582 (*Wa-Bowden*) and *Absolute Bailiffs Inc. v. Canada*, [2002] T.C.J. No. 549, both of which support the point of view that subsection 317(3) of the ETA gives the Crown absolute ownership of the moneys identified in the requirement to pay on receipt thereof by the garnishee (Reasons, paragraphs 4 to 6).

[20] The TCC judge also addressed the decisions of the Courts of Appeal for Ontario and Saskatchewan in *Bank of Montreal v. Canada (Attorney General)*, 66 O.R. (3d) 161 (*Bank of*

Montreal) and *Encor Energy Corp. v. Slaferek's Oilfield Services (1983) Ltd.*, [1995] G.S.T.C. 54, as well as the decision of the Supreme Court of British Columbia in *Canoe Cove Manufacturing Ltd. (Re)*, 2 GTC 7151, [1994] B.C.J. No. 982, which are all to the same effect (Reasons, paragraphs 7 to 12).

[21] Third, the TCC judge dealt with the decisions from Quebec, namely *Giguère et le Ministre du Revenu du Québec v. Lloyd Woodfine et la Banque Nationale du Canada*, [2001] R.J.Q. 2584, *Forget et Druker & Associés Inc. v. Le sous-ministre du Revenu du Québec*, [2003] J.Q. No. 1026 and *De Courval* (Reasons, paragraphs 16 to 19). Those decisions conclude that according to subsection 317(3) of the ETA — and the corresponding provisions of the AMR — the BIA prevails in the event of conflict. In this case, since the amounts subject to the requirement to pay were not fully settled at the time of the bankruptcy, there would be a conflict with subsection 70(1) of the BIA.

[22] The TCC judge refused to follow the trend in Quebec case law. According to him, the Supreme Court's decision in *Alberta (Treasury Branches) v. M.N.R.*, [1996] 1 SCR 963 (*Alberta*) must be taken into account, which concluded that Parliament's intention in enacting subsection 317(3) was to create a superior garnishing right that may be set up against all (Reasons, paragraphs 20 to 25).

[23] The TCC judge concluded his analysis as follows (Reasons, paragraph 27):

> Regardless of the fact that subsection 317(3) of the ETA excludes the application of all federal, provincial or other enactments, with the exception of the BIA, that could have an effect on the application of subsection 317(3), it is still clear that its application here does not contradict the provisions of the BIA, especially subsection 70(1) of the BIA, which only applies to a bankrupt's property. So the tax debtor's property in this case became the property of Her Majesty the Queen at the time the notice pursuant to subsection 317(3) of the ETA was sent, which was before the bankruptcy proposal was made to the creditors.

POSITIONS OF THE PARTIES

[24] The appellant is relying on the interpretation adopted by the Quebec courts, particularly the reasons of the Court of Appeal of Québec in *De Courval*, which contain the most complete and exhaustive analysis on the subject. The appellant submits that subsection 70(1) of the BIA trumps the effects of subsection 317(3) of the ETA because, by its language, only executions that are not completely settled by payment are unaffected by bankruptcy. In this case, since that condition was not met when the notice of stay was filed and since subsection 317(3) of the ETA gives priority to the BIA in the event of conflict, subsection 70(1) of the BIA applies.

[25] The appellant submits that the Supreme Court of Canada's recent decision in *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny*, 2009 SCC 49 (*Caisse de Montmagny*) supports that conclusion. The appellant places particular emphasis on the key finding that deemed trusts for unpaid GST and QST cease to exist at the time of bankruptcy. The Supreme Court thus rejected the tax authorities' argument that at no time could those moneys have been part of the bankrupt's patrimony and, therefore, part of the property to be liquidated in compliance with the settling scheme established under the BIA (*Caisse de Montmagny*, paragraphs 18 and 28).

[26] The respondent for her part readily admits that any deemed trusts for the GST which remained unpaid by 9161 (the tax debtor) necessarily ceased to exist at the time of bankruptcy. However, the respondent takes the position that this has no bearing on the operation of the recovery measure set out at subsection 317(3) of the ETA, which was not engaged in *Caisse de Montmagny*.

[27] According to the respondent, it is well settled since the Supreme Court's decision in *Alberta* that subsection 317(3) of the ETA, like subsection 224(1.2) of the ITA, has the effect of transferring ownership, which transfer occurs upon the garnishee's receipt of a requirement to pay. In the case at bar, the appellant received the requirement to pay before the notice of stay was filed.

[28] The respondent further submits that, the Court of Appeal of Québec's reasoning in *De Courval* is based on an incorrect interpretation of the phrase "other than the [BIA]" in subsection 317(3) of the ETA. The effect of those words is not to give precedence to the BIA in the event of conflict, but rather to delimit the time during which the power given to the Minister may be exercised (*Bank of Montreal*, paragraph 14). Thus, the Minister cannot use that power after bankruptcy proceedings have been initiated. In this case, since the power was exercised before the bankruptcy, it remains fully applicable.

ANALYSIS

[29] The question at issue is the following: When the Minister issues a requirement to pay under subsection 317(3) of the ETA before a notice of stay under section 69 of the BIA is filed and, on the date of that notice, the payment owing in respect of the requirement to pay still has not been made (in whole or in part), does subsection 70(1) of the BIA give priority to the assignment of the tax debtor's property over the Minister's requirement to pay?

[30] The answer to that question depends on the meaning to be given to the words "other than the [BIA]" ("à l'exception de la [LFI]" in the French text) as they appear at subsection 317(3) of the ETA.

[31] The appellant, relying on the ordinary meaning of the words, contends that this phrase causes subsection 317(3) to apply despite any other enactment, except the BIA. It follows that where a provision of the BIA conflicts with the operation of subsection 317(3), it prevails.

[32] However, the respondent is of the opinion that the phrase has the effect of delimiting the time within which the Minister's power may be exercised, by preventing that power from being exercised after the BIA comes into play. Since, in this case, the requirement to pay was served before the notice of stay was filed, the power was validly exercised.

[33] Thus put, the question asked is one of pure statutory interpretation. In this respect, it is useful to recall that the provisions of any enactment, including tax statutes, must be construed

contextually having regard to the statute read as a whole (R. Sullivan, *Sullivan on the Construction of Statutes* (5th Ed., 2008, page 276)).

[34] Before we deal with that question, it is appropriate to address the decision of the Court of Appeal of Québec in *De Courval* to which the appellant devoted all of its submissions. The facts underlying that decision are similar to those at issue here, except with regard to the nature of the unpaid taxes (Quebec Sales Tax or QST) and the statute under which a requirement to pay was issued (the AMR).

[35] In that case, the Deputy Minister of Revenue (the Deputy Minister) argued that the unpaid taxes were part of the deemed trust created in favour of the Crown, that this trust was unaffected by the bankruptcy and that the requirement to pay issued under the provision equivalent to subsection 317(3) of the ETA had the effect of crystallizing a pre-existing right of ownership. In effect, according to the Deputy Minister, the deemed trust meant that at no time could the unpaid taxes (or moneys in lieu thereof) have been part of the bankrupt's patrimony (*De Courval*, paragraphs 13 and 14).

[36] Correctly anticipating the Supreme Court's decision in *Caisse de Montmagny*, the Quebec Court of Appeal rejected the argument that the deemed trust remained in effect despite the bankruptcy (*De Courval*, paragraphs 28 to 32). Indeed, as the Supreme Court confirmed (*Caisse de Montmagny*, paragraphs 12 to 29), since the 1992 amendments (the *Act to amend the Bankruptcy Act and to amend the Income Tax Act in consequence thereof*, S.C. 1992, c. 27), the

deemed trusts established for GST and QST that have been collected but not remitted or recoverable under section 222 of the ETA and section 20 of the AMR cease to exist at the time of the bankruptcy (subsection 67(2) of the BIA). This treatment differs from that applicable to deemed trusts pertaining to source deductions under the ITA, a comprehensive pension plan or the federal employment insurance program, which do survive bankruptcy (subsection 67(3) of the BIA).

[37] The Court of Appeal of Québec then dealt with the argument that section 15.3.1 of the AMR (the provision that is equivalent to the part of subsection 317(3) of the ETA providing that the claimed moneys "become" the property of the Crown) had, in any event, effected a complete transfer of ownership to the Crown before the bankruptcy (*De Courval*, paragraphs 35 to 37). According to the Court of Appeal, the Supreme Court's decision in *Alberta*, which attributed that effect to subsection 317(3) of the ETA, is distinguishable because, first, section 70 of the BIA was not at issue and, second, the events in *Alberta* took place before the 1992 amendments came into force (*De Courval*, paragraph 36). The Court of Appeal also declined to follow the decision of the Ontario Court of Appeal in *Bank of Montreal* (*De Courval*, paragraphs 38 and 39) on the ground, amongst others, that it was reached in reliance of the decision of the Supreme Court in *Alberta*, which is no longer good law.

[38] Aware of the different treatment that the 1992 amendments afforded to source deductions, the Court of Appeal emphasized subsection 224(1.2) of the ITA, which was intended to facilitate recovery of those deductions in the event of default. Unlike subsection 317(3) of the

ETA, that provision applies notwithstanding the BIA and, therefore, notwithstanding subsection 70(1) (*De Courval*, paragraph 37).

[39] According to the Court of Appeal, the right of ownership conferred by subsection 317(3) of the ETA (and section 15.3.1 of the AMR) operates subject to the tax debtor not going bankrupt and, if that happens, subject to the amount claimed by the requirement to pay being settled in full before the bankruptcy. Otherwise, subsection 70(1) of the BIA prevails.

[40] The Court of Appeal drew this conclusion at the end of its reasons (*De Courval*, paragraph 45):

> [TRANSLATION]
> . . ., since the notice under section 15 AMR is an "other process" under section 70 BIA, in order for the BIA not to prevail, the payment must be completed before the bankruptcy date. In this case, such a payment was not made and the amounts owing to the Minister were in a deemed trust on the bankruptcy date. In addition, they were held with other moneys from various sources, so they were not held in a real trust. Consequently, subsection 67(2) BIA applies and the moneys held by the Bank are the property of the bankrupt debtor.

[41] The opinion expressed above, which is based on the Court of Appeal's analysis of subsection 317(3) of the ETA, rests entirely on the premise that the phrase ("other than the [BIA]") causes that statute to prevail in the event of a conflict. That premise is held as true without any discussion. Although in its reasons the Court of Appeal did analyze and distinguish numerous aspects of the Ontario Court of Appeal's decision in *Bank of Montreal*, it did not address the following conclusion (*Bank of Montreal*, paragraph 14):

> The appellant submits that under [subsection] 70(1) of the [BIA] a receiving order takes precedence over a garnishment that has not been completely executed by payment being made because [subsection] 317(3) of the ETA is made subject to the BIA. Otherwise, the appellant submits the court would not be giving effect to the words, "other than the BIA". The words "other than the BIA" have meaning apart from the interpretation suggested by the appellant. They mean that any [Goods and services taxes (GST)] payments that become due after a receiving order in Bankruptcy has been made no longer can be collected in priority to other creditors.
>
> [Emphasis added.]

[42] This interpretation of the words "other than the [BIA]" is not new. It has been expressed previously, in particular by Justice Sarchuk of the Tax Court of Canada in *Wa-Bowden* (paragraph 5):

> … Subsection 317(3) also specifies that its application is subject to the [BIA]. This has been interpreted in a number of instances to mean that where monies were immediately due and owing prior to the date of bankruptcy, those monies are subject to the application of the Act, but where service of the Requirement occurs after the date of bankruptcy, or where the amount at issue was not immediately due and payable prior to the date of bankruptcy, any monies otherwise payable in the latter two instances are not available to the Respondent. [internal citations omitted]
>
> [Emphasis added.]

Adopting that interpretation, Justice Sarchuk found that the moneys subject to the requirement to pay became the property of the Crown on the garnishee's receipt of the requirement and, therefore, were no longer the tax debtor's property at the time of the ensuing bankruptcy (*Wa-Bowden*, paragraph 6).

[43] Therefore, the issue surrounding the interpretation of the words "other than the [BIA]" remains unresolved.

[44] The interpretation proposed by the appellant according to which the BIA prevails in the event of a conflict seems, at first glance, to stem from the natural meaning of the words.

[45] However, the respondent asks this Court to consider the legislative and jurisprudential context surrounding the adoption of subsection 317(3) in 1990 and the amendment to subsection 224(1.2) of the ITA in that same year, which enactments were intended to confirm, once and for all, the Crown's right of ownership over the amounts subject to a requirement to pay. From that angle, the Supreme Court's decision in *Alberta* is of particular interest since it sets out the precise state of the law in 1990, when those provisions were adopted.

[46] In that case, the Supreme Court considered the legislative history surrounding subsections 224(1.2) of the ITA and 317(3) of the ETA and, in particular, Parliament's attempts, until then fruitless, to give the Crown right of ownership having priority over all computing claims (*Alberta*, paragraphs 11 to 14). Both Justice Cory, writing for the majority, and Justice Major, dissenting (but not on this point) expressed the view that the language of subsection 224(1.2) of the ITA, as amended in 1990, was clear enough to give the Crown the right of ownership which had been sought (the amended text and the text it replaced are reproduced at paragraphs 12 and 13, above). Both judges also expressed the view that subsection 224(1.2) of the ITA and subsection 317(3) of the ETA were, in that regard, identical (*Alberta*, paragraph 1, Justice Cory; and paragraph 58, Justice Major). Among other things, each

concluded that on receipt of the requirement, the claimed moneys “become” the property of Her Majesty.

[47] Justice Major, after having specified that he would focus his analysis on subsection 224(1.2) of the ITA rather than subsection 317(3) of the ETA “[f]or the sake of convenience” (*idem*), wrote the following (*Alberta*, paragraphs 65, 66 and 69):

> 65. Apparently in order to deal with the competing lines of authority as to whether [subsection] 224(1.2) was sufficient to grant a priority to the [Minister of National Revenue] MNR, Parliament amended the section in 1990 by adding the following to the end of the section:
>
> > . . . and on receipt of that letter [i.e. the garnishment summons] by the particular person, the amount of those moneys that is required by that letter, to be paid to the Receiver General shall, notwithstanding any security interest in those moneys, become the property of Her Majesty and shall be paid to the Receiver General in priority to any such security interest.
>
> 66. This 1990 amendment was made to both the [ITA] and the relevant provisions of the [ETA]. The three trial decisions in the cases at issue in these appeals are principally concerned with the issue of whether this amendment constituted the “something further” which [*Lloyds Bank of Canada c. International Warranty Co.*, (1989), 64 Alta. L.R. (2d) 340 (B.R.), overturned by (1989), 68 Alta. L.R. (2d) 356 (C.A.) (*Lloyds Bank*)] had held was necessary to transfer the property interest in the funds to the MNR or to grant a priority to the MNR.
>
> 69. I agree with Forsyth J. that the 1990 amendments to the [ITA] and the [ETA] were sufficient to provide the “something further” which the Alberta Court of Appeal thought to be necessary in *Lloyds Bank*. . . .
>
> [Emphasis added.]

No one takes issue with the fact that this "something further" resulted in the Crown becoming the owner of the moneys subject to the requirement upon the garnishee's receipt of the requirement to pay (*Alberta*, paragraphs 5 and 6).

[48] According to the respondent, it is the time when this ownership-transferring power may be exercised which Parliament had in mind when it provided, in the case of subsection 224(1.2) of the ITA, that it applies "[n]otwithstanding . . . the [BIA]" and, in the case of subsection 317(3) of the ETA, despite any enactment "other than the [BIA]". While Parliament intended that the unpaid source deductions identified at subsection 224(1.2) of the ITA be subject to this power at all times — both before and after bankruptcy — Parliament also intended that the equivalent power under subsection 317(3) only be exercised before bankruptcy. The respondent submits that this is the way in which the words "Notwithstanding . . . the [BIA]" and "other than the [BIA]" must be understood.

[49] In my view, that is the correct interpretation. Returning to 1990, deemed trusts had the same effect whether they pertained to source deductions or GST. Both took effect at the time of the default and survived bankruptcy (see paragraph 67(1)(*a*) of the BIA, as it read before the 1992 amendments), such that the moneys held in those trusts could not, at any time, become part of the tax debtor's patrimony. Therefore, even if a requirement to pay was issued at a time which coincided with the tax debtor's bankruptcy, there was no conflict possible between the BIA and the right of ownership conferred upon the Crown under subsection 317(3) of the ETA, or between the BIA and the right of ownership granted under 224(1.2) of the ITA. It was only after

the 1992 amendments that this state of affairs changed and that deemed trusts for unpaid GST ceased to have effect upon the tax debtor's bankruptcy (*Caisse de Montmagny*, paragraphs 12 to 16).

[50] In this context, it cannot be said that the words "other than the [BIA]" were inserted into subsection 317(3) to give precedence to the BIA in the event of conflict since no conflict was possible. Rather, keeping in mind the principle according to which Parliament does not speak in vain, it seems that the purpose of this phrase was to prevent the power set out at subsection 317(3) from being exercised after bankruptcy.

[51] Subsection 317(3) could not be read otherwise in 1990 and was deliberately left intact when the BIA was amended in 1992, as was subsection 224(1.2) of the ITA. Since the power set out at that subsection may not be exercised after bankruptcy, it is in keeping with the spirit of those amendments to the effect that only source deductions were special and were to be given priority after bankruptcy. This explains why the exercise of the power set out at subsection 224(1.2) is not subject to that limitation and why, since the amendments, the BIA stipulates that bankruptcy does not affect the exercise of that power (subsection 86(3) of the BIA).

[52] Aside from that important difference, the powers set out at subsections 317(3) of the ETA and 224(1.2) of the ITA, when validly exercised, both have the effect of transferring ownership

to the Crown of the moneys subject to the requirement to pay on receipt thereof by the garnishee (*Alberta*, above).

[53] Since the requirement to pay was received by the appellant before the notice of stay was filed, the TCC judge rightly concluded that the Crown became the owner of the moneys required before the bankruptcy occurred and that those moneys were therefore not part of the tax debtor's patrimony at the time of the bankruptcy. Consequently, the appellant had an obligation to pay the amount required and, having failed to do so, is personally liable for making that payment.

[54] I would dismiss the appeal with costs.

"Marc Noël"
J.A.

"I agree.
Pierre Blais C.J."

"I agree.
Johanne Trudel J.A."

Certified true translation
Sarah Burns

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-490-09
(APPEAL OF A JUDGMENT BY THE HONOURABLE MR. JUSTICE ANGERS, DATED NOVEMBER 10, 2009, DOCKET NO. 2009-114(GST)I.)	
STYLE OF CAUSE:	Toronto Dominion Bank and Her Majesty the Queen
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	June 9, 2010
REASONS FOR JUDGMENT BY:	Noël J.A.
CONCURRED IN BY:	Blais C.J. Trudel J.A.
DATED:	June 30, 2010

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