

**SUPREME COURT OF NEWFOUNDLAND AND LABRADOR  
IN BANKRUPTCY AND INSOLVENCY**

**IN THE MATTER OF** the Receivership of  
Petroforma Inc.

**AND IN THE MATTER OF** the *Bankruptcy  
and Insolvency Act*, RSC 1985 c. B3, as  
amended

**Estate No. 51-126021  
Court No. 21491**

**SECOND REPORT OF THE RECEIVER**

**Report of BDO Canada Limited,  
in its capacity as Receiver of the assets, undertakings and property of  
Petroforma Inc.**

1. This second report of BDO Canada Limited (“BDO” or the “Receiver”), Receiver of all the assets, undertaking and property of Petroforma Inc. (“Petroforma”), follows the first report of the Receiver dated December 6, 2017, in support of an interim distribution to the Toronto Dominion Bank (“TD”) as previously filed with the Court.
  
- II. Introduction
  
2. The purposes of this report are to:
  - (a) Detail the Receiver’s understanding of the claims of creditors against the property of Petroforma and the quantum of those claims; and
  
  - (c) Provide the Court and stakeholders with the factual information necessary to formulate their positions on distribution of the proceeds realized from the sale of Petroforma’s property.
  
3. In developing this report the Receiver has relied on information obtained during the administration of the estate from The Toronto Dominion Bank (“TD”) and its legal counsel, the Receiver’s independent legal counsel, and Canada Revenue Agency (“CRA”).

### **III. History and Creditor Claims**

4. On July 14, 2017, TD appointed BDO as private receiver pursuant to various security agreements between TD and Petroforma. Also on July 14, 2017, the Receiver took possession and control of the assets and undertakings of Petroforma.
5. On July 27, 2017, the Federal Court of Appeal (“FCA”) issued its decision in *Canada v. Callidus Capital Corporation*, 2017 FCA 162 (“Callidus”), attached hereto as Exhibit “A”. In its decision, the FCA confirmed that a tax debtor’s bankruptcy does not extinguish the federal Crown’s priority to proceeds a secured creditor obtains from that tax debtor’s assets before its bankruptcy.
6. On September 13, 2017, the Receiver was contacted by a representative of Canada Revenue Agency (“CRA”) who indicated that CRA would be conducting an audit of the payroll and HST accounts. Between September 13, 2017, and February 28, 2018, the Receiver responded to various requests for information from CRA in support of the audit.
7. On October 12, 2017, the Receiver received the results of CRA’s payroll examination, attached hereto as Exhibit “B”, which reflects a balance due of \$19,452.55. Included in this amount is a property claim of \$11,783.51 which is in priority to security held by TD.
8. As detailed in the Receiver’s First Report, on November 3, 2017, the sale of the assets and undertakings of Petroforma to Avalon Analytics closed. On December 21, 2017, the Court issued a Distribution Order, attached hereto as Exhibit “C”, authorizing the Receiver to distribute \$400,000 to TD.
9. On February 1, 2018, a Bankruptcy Order was made against Petroforma.
10. On March 22, 2018, the Supreme Court of Canada granted leave to appeal the Callidus decision.
11. On May 2, 2018, the Receiver received an HST audit report from CRA, attached hereto as Exhibit “D”, detailing adjustments to Petroforma’s HST account in the amount of \$141,686.95. As evidenced in the proof of claim attached hereto as Exhibit “E”, filed by Canada Revenue Agency with the Receiver on July 24, 2018, the total balance due under Petroforma’s GST/HST account is \$176,847.47.

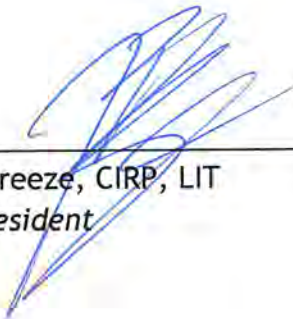
#### IV. Next Steps

12. The Receiver currently holds \$380,214.32 in trust as detailed in the Receivers Interim Statement of Receipts and Disbursements, attached hereto as Exhibit "F", dated August 16, 2018.
13. The Receiver proposes to make a second interim distribution to TD in the amount of \$189,891.85, and to hold \$190,322.47 in trust pending the outcome of the appeal of the Callidus decision, and with respect to future Receiver's and Trustee's fees.
14. The Receiver makes this report in good faith, and in connection with the receivership proceedings and for no other purpose.

Dated at Halifax, Nova Scotia, this 16<sup>th</sup> day of August, 2018.

**BDO Canada Limited**  
Court Appointed Receiver of Petroforma Inc.

Per: \_\_\_\_\_  
Jason Breeze, CIRP, LIT  
*Vice President*



**THIS IS EXHIBIT "A"**  
**TO THE REPORT OF THE RECEIVER**  
**DATED AUGUST 16, 2018**

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20170727**

**Docket: A-400-15**

**Citation: 2017 FCA 162**

**CORAM: PELLETIER J.A.  
NEAR J.A.  
RENNIE J.A.**

**BETWEEN:**

**HER MAJESTY THE QUEEN**

**Appellant**

**and**

**CALLIDUS CAPITAL CORPORATION**

**Respondent**

Heard at Toronto, Ontario, on January 19, 2017.

Judgment delivered at Ottawa, Ontario, on July 27, 2017.

**REASONS FOR JUDGMENT BY:**

**RENNIE J.A.**

**CONCURRED IN BY:**

**NEAR J.A.**

**DISSENTING REASONS BY:**

**PELLETIER J.A.**

Federal Court of Appeal



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**BETWEEN:**

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**Appellant**

**and**

**CALLIDUS CAPITAL CORPORATION**

**Respondent**

**REASONS FOR JUDGMENT**

**RENNIE J.A.**

**I. Introduction**

[1] The Crown appeals from the Order of the Federal Court (per McVeigh J.), dated August 17, 2015 (2015 FC 977), in which the Court answered the following question in the affirmative and awarded costs to Callidus Capital Corporation (Callidus):

Does the bankruptcy of a tax debtor and subsection 222(1.1) of the *Excise Tax Act*, R.S.C. 1985, c. E-15, as amended (the *Excise Tax*

*Act*) render the deemed trust under section 222 of the *Excise Tax Act* ineffective as against a secured creditor who received, prior to bankruptcy, proceeds from the assets of the tax debtor that were deemed to be held in trust for the Plaintiff?

[2] The Crown claimed it was owed \$177,299.70 plus interest in unremitted GST and HST by the operation of the deemed trust mechanism in section 222 of the *Excise Tax Act*, as amended. It commenced an action in the Federal Court to recover the debt. Callidus defended, and the parties agreed to set down a question of law for determination. For the purposes of determining the question of law the parties submitted an agreed statement of facts, which is reproduced below:

### **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.

### **Failures to remit GST and HST**

3. The Plaintiff [Her Majesty the Queen, or the appellant] 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 the guarantee and security documents listed on Schedule “A” attached hereto [not attached, can be found at AB,

Tab 4, page 35] in favour of BMO to secure its direct and indirect obligations to BMO (collectively, the “Security”).

5. As of December 2, 2011:

(a) Cheese Factory 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 by it to 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 obligations 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 the 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 the sum of \$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 a 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 other 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 the Blocked Accounts to partially reduce the outstanding indebtedness and obligations owed to it by Cheese Factory.

**Deemed Trust Asserted by the Plaintiff**

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*, R.S.C. 1985, c. E.15, 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 or Insolvency Act*, R.S.C. 1985, c. B-3, as amended.

**Action Commenced by the Plaintiff**

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 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 failures 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?

## II. Legislation

[3] The relevant provisions of the *Excise Tax Act* provide:

***Excise Tax Act, R.S.C., 1985, c. E-15***      ***Loi sur la taxe d'accise, L.R.C. (1985), ch. 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.

### **Withdrawal from trust**

(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

- (a) the amount of any input tax credit claimed by the person in a return under this Division filed by

### **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.

### **Retraits de montants en fiducie**

(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) le crédit de taxe sur les intrants qu'elle demande dans une déclaration produite aux termes de la

the person in respect of a reporting period of the person, and

(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,

as and when the return under this Division for the reporting period in which the input tax credit is claimed or the deduction is made is filed with the Minister.

#### **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 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

présente section pour sa période de déclaration;

b) le montant qu'elle peut déduire dans le calcul de sa taxe nette pour sa période de déclaration.

Ce retrait se fait lors de la présentation au ministre de la déclaration aux termes de la présente section pour la période de déclaration au cours de laquelle le crédit est demandé ou le montant déduit.

#### **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 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

estate or property of the person and whether or not the property is subject to a security interest

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.***

[Emphasis added]

[Soulignement ajouté]

### III. Federal Court decision

[4] The Court answered the question in the affirmative.

[5] The Court found that the deemed trust mechanism under section 222 of the *Excise Tax Act* operates to grant the Receiver General “absolute priority”, but that the deemed trust, and the accompanying priority, are extinguished upon bankruptcy of the debtor such that the Crown becomes an unsecured creditor in respect of unremitted amounts. The Court determined that any liability that arises under subsection (3) to disgorge proceeds is extinguished upon bankruptcy by the operation of subsection (1.1). Subsection (3) operates to extend the deemed trust created pursuant to subsection (1) to the debtor’s property, and any liability arising from it is dependent on the continuing existence of the deemed trust.

[6] The Court reviewed the legislative history and priority schemes of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 (the BIA), the *Companies’ Creditors Arrangement Act*, R.S.C., 1985, c. C-36 (the CCAA) and the reasoning of the Supreme Court of Canada in *Century*

*Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379 (*Century Services*), and observed that the enactment of subsection 222(1.1) appeared to align with Parliament's intent to "move away from asserting priority for Crown claims in insolvency law". While deemed trusts in relation to source deductions, such as Canada Pension Plan contributions, "remain operative" in bankruptcy, deemed trusts over GST/HST do not.

[7] Applying the reasoning in *Century Services* and the earlier decision of *Caisse populaire Desjardins de l'Est de Drummond v. Canada*, 2009 SCC 29, [2009] 2 S.C.R. 94 (*Caisse*), the judge held that the absence of express confirmation of the trust upon bankruptcy in the BIA reflected "Parliament's intention to allow it to lapse upon insolvency proceedings being commenced". The judge found that, similar to the factual scenarios in both Supreme Court of Canada cases, "the Crown seeks to maintain the deemed trust without express legislative language to do so," and further, that subsection 222(1.1) operates to "remove [the] imperative" language in subsection 222(3) of "shall be paid". The judge was not persuaded by the Crown's reference to legislative amendments in the year 2000 (the 2000 amendments) to the deemed trust mechanism in the *Income Tax Act* (R.S.C., 1985, c. 1 (5th Supp.)) (*Income Tax Act*) because they were specific to source deductions, and distinguished the cases on which the Crown relied for the same reason. The judge favoured Callidus' argument that the amendments made to the *Excise Tax Act* in 1992 demonstrated Parliamentary intent to "oust the Crown priority over all other interests in bankruptcy," and that this interpretation was evident in the jurisprudence.

[8] The judge dismissed the Crown's analogy to other collection tools in the *Excise Tax Act*, noting that those provisions did not assist the Crown's position. Both sections 317 (garnishment)

and 325 (non-arms' length transfers) require a "crystallizing event" before liability will attach prior to bankruptcy, and the Crown had not demonstrated how to reconcile a "pre-existing, fully engaged cause of action" with subsection (1.1). In the case of a non-arms' length transfer, the event is the transfer of property for less than fair market value, while in the garnishment context the crystallizing event is service of a "requirement to pay" (RTP) notice. The judge stated that, had an RTP notice been issued in this case, Callidus' obligation to pay would have survived bankruptcy of the debtor.

[9] The judge ultimately held that the tax debtor's bankruptcy engaged subsection 222(1.1) of the *Excise Tax Act*, which rendered the deemed trust, and any independent liability arising from operation of the deemed trust, ineffective in regard to the pre-bankruptcy amounts Callidus had received.

#### **IV. Issues**

[10] Before this Court, Callidus submits that, on a proper reading of the statutory language, the deemed trust under subsection (1) and the extension under subsection (3) are both extinguished upon bankruptcy. As the Crown relies on subsection (3) to establish the personal liability of the secured creditor, Callidus argues it should follow that any personal liability must be extinguished upon bankruptcy as well.

[11] The Crown concedes that, upon the bankruptcy of a tax debtor, subsection 222(1.1) of the *Excise Tax Act* renders the deemed trust under subsection 222(3) of the *Excise Tax Act* ineffective with respect to the debtor's property at the time of bankruptcy. The Crown assert,

however, that the contested question on appeal is whether subsection 222(1.1) of the *Excise Tax Act* also extinguishes the distinct and personal liability of the secured creditor that may arise prior to bankruptcy by virtue of subsection 222(3) of the *Excise Tax Act*.

[12] The respondent urges that the judge correctly found that subsection (1.1) reflects Parliament's intent to move away from Crown priority in insolvency law, in particular with respect to GST/HST. It is conceded by the Crown that the deemed trust ceases to operate upon the debtor's bankruptcy, specifically in relation to GST/HST amounts collected but not remitted prior to bankruptcy. I agree with the judge that Parliament has drawn a clear distinction post-bankruptcy between source deductions under the *Income Tax Act* and GST/HST amounts under the *Excise Tax Act* by virtue of subsection 222(1.1) and subsections 67(2) and (3) of the BIA.

[13] The issue here however, is the priority that may have existed prior to any insolvency or bankruptcy proceedings. Determination of the question of law turns on the interpretation of the effect of bankruptcy on the *prior* operation of the deemed trust mechanism as against a secured creditor who received proceeds from deemed trust assets of the tax debtor *prior* to bankruptcy.

## V. Analysis

[14] The answer to the question on appeal turns on the application of the governing principles of statutory interpretation. *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 (*Rizzo*) instructs at para. 21, quoting E.A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87 that “[t]oday there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act,



the object of the Act, and the intention of Parliament”. Put otherwise, the intention of Parliament is to be gleaned from the text, read in its context and in light of its purpose. Applying these principles, it is my view that the question should be answered in the negative.

[15] Support for this conclusion is found in the language of section 222, to which I turn. Section 222 of the *Excise Tax Act* provides a mechanism whereby the Crown can recover collected, but unremitted, GST or HST.

[16] Subsection 222(3) operates to deem all of a tax debtor’s property to be held in trust for the benefit of the Crown where GST/HST is collected but not remitted. It is undisputed that subsection 222(1.1) renders the deemed trust ineffective with respect to the property of the tax debtor at the time of bankruptcy. The issue in this appeal concerns the Crown’s recovery mechanisms for dispositions made prior to bankruptcy.

[17] The importance of timing is reflected in the text of subsection 222(3). Assets sold by the tax debtor, or realized upon by the secured creditor prior to bankruptcy are no longer “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” at the time of bankruptcy, and as a result, are not available to all creditors upon bankruptcy. *First Vancouver Finance v. Minister of National Revenue*, 2002 SCC 49, para. 42, [2002] 2 S.C.R. 720 (*First Vancouver*) confirms that “when an asset is sold by the tax debtor, the deemed trust ceases to operate over that asset”. The subsequent extinction of the deemed trust on bankruptcy is irrelevant with respect to assets that

have already been sold – it has already disappeared. This interpretation is supported by the legislative evolution of subsection (1.1).

[18] Amendments in the year 2000 to the deemed trust mechanism in both the *Income Tax Act* and the *Excise Tax Act* imposed an obligation on secured creditors to pay proceeds derived from trust assets to the Crown (subsection 222(3)). This amendment, including wording that proceeds “shall be paid to the Receiver General in priority to all security interests” was prompted by the decision in *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (*Sparrow*). In *Sparrow*, the Court held that analogous deemed trust provisions for source deductions did not oust a secured creditor’s security interest in a debtor’s inventory. In *Sparrow*, the Supreme Court of Canada suggested this wording as the language that Parliament could add if it wished to confirm the priority of the Crown’s deemed trust.

[19] The first test of the amended provisions arose in *First Vancouver*. The Court held that the enhanced trust provisions confirmed Crown priority over secured creditors.

[20] The amended trust provisions in the ITA came before this Court in *Canada (Procureure generale) c. Banque Nationale du Canada*, 2004 FCA 92, [2004] F.C.J. No. 371 (*Banque Nationale*) where, at paragraph 40, the Court held:

[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. The amount is “payable” out of the proceeds flowing from the property and, as we have seen, section 222 of the ITA provides that “All... amounts payable under this Act are debts due to Her Majesty and recoverable as such...”

(Emphasis added). In light of these provisions, and since the respondents concede that they received the proceeds from the sale of the property subject to their security interest, without making the remittance that was payable, the appellant has a cause of action to recover these amounts.

[Emphasis in original]

[21] This Court, in *Banque Nationale* noted that the Crown has absolute priority over proceeds from property subject to a deemed trust, and that “the positive obligation imposed on the secured creditor to pay the Receiver General the proceeds from the property subject to the trust could not be clearer”: *Banque Nationale* at para 37. The Court went on to note that a secured creditor who does not comply with this obligation “is personally liable,” and the amount is “payable” to the Receiver General and may be enforced as a cause of action under the appropriate *Income Tax Act* provisions.

[22] Similarly, I note that a “tax debt” in the “Collection” section of the *Excise Tax Act* is defined as “any amount payable or remittable by a person under this Part,” and tax debts are recoverable by the Crown in Federal Court: *Excise Tax Act* subsections 313(1) and (1.1). The Court in *Banque Nationale* held that the cause of action arises “when the Minister becomes aware of the failure by the secured creditor to pay”: at para. 44. On this Court’s reasoning in *Banque Nationale*, the Crown has a cause of action to enforce the personal liability of a secured creditor who does not comply with its statutory obligation to pay under the *Excise Tax Act*.

[23] Given the near-identical language of the two provisions, it is my view that the reasoning in *Banque Nationale* is dispositive of this appeal. Secured creditors who do not comply with the obligation to pay proceeds derived from deemed trust assets are personally liable to the Crown,

which has a separate cause of action against them, irrespective of the subsequent bankruptcy of the debtor.

[24] I note that the use of the imperative “shall” in subsection 222(3) “confers no residual discretion”: Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6<sup>th</sup> ed. (Canada: LexisNexis, 2014), at 91-92. The protection offered the Crown by the provision is not passive – it creates a mandatory obligation: see *Banque Nationale* at paras. 37, 40. While the judge was correct to note that *Sparrow*, *First Vancouver* and *Banque Nationale* pertained to the deemed trust mechanism specific to source deductions under the *Income Tax Act*, the salient point, from a statutory interpretation perspective, is that the 2000 amendments are materially identical to those made contemporaneous to the amendments to the *Excise Tax Act* and operate analogously prior to bankruptcy.

[25] Given this similarity, both mechanisms render a secured creditor who receives funds out of the deemed trust personally liable for the amount owed to the Crown under an independent cause of action: *Banque Nationale*, at para. 40. The distinction urged by Callidus, namely that *Banque Nationale* concerned payroll deductions and not GST, is of no consequence. Prior to bankruptcy, the recovery mechanisms in subsection 227(4.1) of the *Income Tax Act* and subsection 222(3) of the *Excise Tax Act* operate, for present purposes, identically, and the related jurisprudence is equally applicable.

[26] While subsection 222(1.1) releases a tax debtor’s assets from the deemed trust upon bankruptcy, the subsection does not extinguish the pre-existing personal liability of a secured

creditor who received proceeds from the deemed trust. The personal liability is fully engaged, the debt is due and can be pursued by the Crown in a cause of action independent of any subsequent bankruptcy proceedings. The continued existence of the cause of action is not dependent on the debtor's other assets that may or may not remain in trust, as it arises because of the secured creditor's breach of a statutory obligation to remit. To find otherwise would effectively neutralize the deemed trust mechanism with respect to GST/HST amounts.

[27] I note that Callidus relies heavily on *Caisse* and *Century Services* to support its argument with respect to liability. These cases are of limited assistance. *Caisse* did not concern either the issue of a deemed trust or the independent liability of a secured creditor, rather, the issue was the extent of the Crown's interest in GST collected by a trustee in bankruptcy. *Century Services* concerned whether the deemed trust provisions of the *Excise Tax Act* continued under CCAA proceedings, which are not at issue.

[28] Callidus points further to the case of *The Bank of Nova Scotia v. Huronia Precision Plastics Inc.* (2009), 50 C.B.R. (5th) 58 (Ont. S.C.J. - Commercial List) (*Huronia*), in which a receiver was appointed, some of the debtor's assets were sold, and the bank made a motion to lift the stay in order to bring a bankruptcy application against the debtor. The Crown moved for an order directing the receiver to pay unremitted GST immediately. The motion judge held that the bank had the ability to reverse the priority of the deemed trust by bringing an application for bankruptcy, and denied the Crown's motion. Callidus argues that, on the appellant's reading of the statute, the receiver in *Huronia* would have had a duty to remit GST to the Crown

notwithstanding the subsequent bankruptcy of the debtor. Callidus argues that this was exactly what the motion judge in *Huronia* specifically rejected.

[29] It is difficult to glean much from the very brief *Huronia* decision, which focused on the particular wording of a court order. There was also a receiver and a stay of proceedings in place in *Huronia*, such that it is not clear whether insolvency proceedings had already commenced. As well, the factual matrix in this appeal does not invoke the reversal of priority post-bankruptcy; rather this appeal addresses the effect of bankruptcy on the liability of a secured creditor that may arise as a result of pre-bankruptcy priority.

[30] Again, continuing with the plain language of section 222, subsection (1.1) does not say that, upon the debtor's bankruptcy, all rights that arose as a result of the deemed trust are extinguished. Nor is there language in section 222 to the effect that the deemed trust evaporates retroactively so as to extinguish liability arising before bankruptcy. Subsequent bankruptcy simply operates to release the debtor's assets from the deemed trust. The argument that the evaporation of the trust on bankruptcy works retroactively, and undoes or unwinds legal obligations that are already engaged, has no support in the text, and, as we will see, undermines the purpose of the 1992 amendment.

[31] In the present case, proceeds from a sale of the tax debtor's property were paid to the secured creditor. The debtor subsequently made an assignment into bankruptcy. Pursuant to the language of subsection (3), any proceeds should have been paid to the Crown in priority to any security interest pre-bankruptcy. Callidus has conceded that the deemed trust mechanisms in

both the *Income Tax Act* and the *Excise Tax Act* operate in the same manner prior to bankruptcy. Proceeds were paid out of priority in contradiction to the express wording of subsection (3), which created an obligation, independent of the existence of the deemed trust, to pay.

[32] I turn next to context, which includes analogous collection tools within the *Excise Tax Act* that impose obligations on third parties. For example, the garnishment provisions in section 317 of the *Excise Tax Act* use the same language regarding paramountcy over all statutes except the BIA. In this context, the courts have accepted that, where an RTP notice is served pre-bankruptcy, subsequent bankruptcy does not extinguish liability of a third party who fails to abide by the notice: *Toronto Dominion Bank v. Canada*, 2010 FCA 174, 325 D.L.R. (4th) 174, affirmed 2012 SCC 1, [2012] 1 S.C.R. 3 (*Toronto Dominion*).

[33] Further, section 325 of the *Excise Tax Act* establishes liability for a non-arms' length third party who has been transferred property. The liability of the third party is not affected by the debtor's subsequent bankruptcy: *Heavyside v. Canada*, [1996] F.C.J. No. 1608. Absent language suggesting otherwise, statutes should be read so as to achieve consistency and harmony across like provisions.

[34] Referencing other collection tools available to the Crown, the judge stated that there must be a "crystallizing event" in order to ground an independent cause of action. Had an RTP issued, Callidus' obligation to pay would have survived bankruptcy. In my view, the search for a crystallizing event or something analogous to that is not quite apt, given that the deemed trust mechanism is not located within the section of the legislation dealing with assessments, and, in

any event, there is no legislative requirement for, or mechanism by which, such a notice could issue. There is no need for a crystallizing event, as the legislation establishes the obligation to pay. The words “if at any time” make clear that the obligation has no temporal limitation, nor is it contingent on crystallizing events.

[35] It has been held by this Court, and affirmed by the Supreme Court of Canada, that section 317 (garnishment) transfers ownership of amounts otherwise owing to a tax debtor, on receipt by the garnishee of an RTP notice: *Toronto Dominion* at para. 52. In *Toronto Dominion*, this Court held that the words establishing the supremacy of the *Excise Tax Act* over legislation except the BIA was simply intended to limit the Crown’s power to issue an RTP post-bankruptcy.

[36] Although the circumstances are not entirely analogous, under section 317 the Minister “may issue” an RTP and the amount similarly “shall be paid”. It appears that amounts owing to the tax debtor by a third party may require notice in order to “crystallize,” in the words of the judge, the Crown’s cause of action in garnishment proceedings. Where the Crown seeks to garnish, it is not necessarily clear who the cause of action is against, and for what amount. The present circumstance is the opposite. Here, the trust operates over the amounts already in the debtor’s possession, and the circumstances are such that an amount has left the trust. Both the amount and the party in receipt are known.

[37] I note further that the subsequent bankruptcy of a tax debtor does not extinguish the Crown’s right to amounts owing where an RTP issued pre-bankruptcy. It would be inconsistent if the Crown could prevent funds from entering the debtor’s estate, but it could not recover



amounts that were removed from the deemed trust out of priority to it and which have not since been returned to the debtor's estate.

[38] To conclude, I turn to the purpose of the provision in question.

[39] Callidus argues that Parliament's intent was that the Crown becomes an unsecured creditor upon the bankruptcy of the debtor in relation to amounts owed pre-bankruptcy, and that allowing this appeal would allow the Crown to recover indirectly what it cannot recover directly.

[40] Callidus contends that, upon bankruptcy, subsection (1.1) operates to extinguish both the deemed trust and to remove the imperative in subsection (3) such that the personal liability of a secured creditor who received funds is also extinguished. I have explained why this interpretation is not supported by the language of the statute, but it would also undermine the purpose of the provision. The interpretation urged by Callidus would allow a secured creditor to manipulate both pre- and post-bankruptcy priority. Callidus agrees that the Crown has priority pre-bankruptcy, and it admits that it did not abide by that priority. Yet it asks this Court to enforce post-bankruptcy priority to the opposite effect or, put otherwise, to enforce post-bankruptcy priority to defeat priorities related to pre-bankruptcy distributions.

[41] Callidus' interpretation effectively defeats the purpose of the addition of subsection 222(3), and would create perverse incentives on the part of the secured creditors to not abide by the deemed trust. This was the very mischief to which the amendments were directed:

Thus, the amendment will ensure that tax revenue losses are minimised and that delinquent taxpayers and their secured

creditors do not benefit from failures to remit source deductions and GST at the expense of the Crown.

The deemed trust provisions will not, however, override a prescribed security interest such as a mortgage interest in real estate or other exceptions that may be provided by regulation, where the failure to remit source deductions or net GST cannot benefit the secured creditor.

[Department of Finance, Press Release, 1997-030, “Unremitted Source Deductions and Unpaid GST” (7 April 1997), online: Media Room – Press Releases [www.fin.gc.ca](http://www.fin.gc.ca), p.2; Appellant’s Memorandum of Fact and Law, at para. 75]

[42] A finding that the secured creditor’s obligation to pay Crown proceeds from the deemed trust disappears on bankruptcy would allow the secured creditor to benefit from the debtor’s failure to remit, as noted by the Supreme Court of Canada in *Sparrow*. As happened here, a secured creditor could choose the timing of bankruptcy and liquidate the deemed trust assets so as to satisfy their interests at the expense of the Crown. Even if the Crown sends a demand letter or commences an action, the secured creditor could, at any time, simply trigger the bankruptcy of the tax debtor and avoid all consequences of the deemed trust priority.

[43] Callidus’ interpretation would significantly dilute the absolute priority of the Crown confirmed by both Parliament and the courts in this context. This cannot be what Parliament intended. Part of the broader context is the fact that the Crown does not have knowledge of the state of affairs between the tax debtor and its creditors; hence the provision, in statute, of the ability to enforce the duty to collect and remit by third parties: *First Vancouver*, at para. 22. To allow a secured creditor to avoid the priority created by the deemed trust mechanism pre-bankruptcy would render the mechanism, and the priority it creates, effectively useless. If

Parliament had intended, as it did post-bankruptcy, for the deemed trust to have no discernable effect on priorities pre-bankruptcy, it simply could have removed the provision altogether.

[44] I would allow the appeal with costs and answer the question in the negative to the extent outlined above.

“Donald J. Rennie”

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J.A.

“I agree  
D. G. Near J.A.”

**PELLETIER J.A. (Dissenting reasons)**

[45] I have read the reasons of my colleague. I come to a different conclusion for the following reasons.

[46] In brief, I am of the view that the trust created by subsection 222(3) of the *Excise Tax Act*, R.S.C. 1985 c. E-15 (the Act) lapsed due to lack of subject matter by operation of subsection 222(1.1) of the Act following Cheese Factory Road Holdings Inc.'s (Cheese Factory) bankruptcy. As of the date of bankruptcy, there were no amounts subject to the subsection 222(1) trust and therefore no property of Cheese Factory subject to a deemed trust pursuant to subsection 222(3) of the Act. As a result, no proceeds of that property were payable to the Crown by Callidus Capital Corporation (Callidus). The fact that, prior to the bankruptcy, a demand for payment was made on Callidus is irrelevant.

[47] This is an appeal from a decision of the Federal Court in which it decided a question of law. As a result, the standard of review is the appellate standard set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235: correctness for questions of law and palpable and overriding error for questions of fact and mixed fact and law, except when it is possible to identify an extricable error of law, in which case the correctness standard applies. In this case, the standard of review is correctness

[48] To assist in the analysis, I reproduce below subsections 222(1), (1.1) and (3).

222(1) Subject to subsection (1.1), 222 (1) La personne qui perçoit un  
every person who collects an amount montant au titre de la taxe prévue à la

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).

(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.

(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,

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) 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.

(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 du chef du Canada, à compter du moment où le montant est perçu par la personne, séparés des propres

whether or not the property is subject to a security interest, and

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 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.

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.

[49] In order to avoid repetition and to enhance the readability of these reasons, references to subsections in the text which follows are references to subsections of section 222 of the Act, unless otherwise specified.

[50] Subsection (1) creates a trust with respect to amounts collected as tax but not remitted or applied as permitted by subsection (2) which has no application here. Subsection (3) on the other hand creates a trust with respect to the property of the "person" i.e. the tax debtor.

[51] The subsection (1) trust arises when an amount is collected as or on account of tax and ends when the amount is remitted to the Receiver General. The result is that the amount subject to the subsection (1) trust varies as amounts are collected and remittances are made to the Receiver General.

[52] The event which gives rise to the deemed trust pursuant to subsection (3) is not the failure to remit the amounts collected as tax to the Receiver General, as is the case in subsection (1). It is the failure to remit the amount deemed by subsection (1) to be held in trust for Her Majesty:

*...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 ...property of the person .... is deemed ... to be held, from the time the amount was collected by the person, in trust for Her Majesty... [emphasis added]*

[53] As a result, if amounts are deemed to be held in trust pursuant to subsection (1) and not remitted to the Receiver General, then the property of the person is deemed to be held in trust from the time the amount was collected. It follows from this that if no amounts are deemed to be held in trust, no subsection (3) trust arises.

[54] While the subsection (3) trust attaches to property of the person, it does not capture the whole of the person's interest in their property. The property subject to the subsection (3) trust is defined as:

*... property of the person ... equal in value to the amount so deemed to be held in trust [pursuant to subsection 222(1)] is deemed ... to be held ... in trust for Her Majesty ... [emphasis added]*

[55] This means that the corpus of the statutory trust is a limited pecuniary interest in the property of the tax debtor. Every item of the tax debtor's property is subject to this trust but only to the extent of the amount deemed to be held in trust by subsection (1). This is a necessary limitation because of the obligation to pay imposed on secured creditors who realize on their security. Subsection (3) requires them to pay "the proceeds of the property" in priority to their

security interest. The unqualified obligation to pay the proceeds would require secured creditors to pay the entire proceeds, not simply that portion of the proceeds equal to the amount deemed to be held in trust pursuant to subsection (1).

[56] Absent a clear indication of a contrary intention, legislation should be drafted and interpreted on the assumption that the Crown only collects amounts which it is owed and not more. In this case, the legislative draftsman dealt with this issue by defining the property subject to the deemed trust in such a way that trust property, and therefore the proceeds of trust property, is equal to the amount of the subsection (1) deemed trust.

[57] As this review shows, the deemed trusts created by subsections (1) and (3) are distinct but interlinked in two important ways. First, the subsection (3) trust arises when amounts deemed to be held in trust pursuant to subsection (1) are collected but not remitted. Second, the subject-matter of the subsection (3) trust is property of the tax debtor to the extent of the amounts deemed to be held in trust pursuant to subsection (1). The effect of this interlinking is that the creation of the subsection (3) trust depends on the existence of the subsection (1) trust. If no amounts are deemed to be held in trust pursuant to subsection (1), then no subsection (3) trust arises. However, once a trust has arisen, it may subsequently fail for lack of subject-matter if the amount deemed to be held in trust is reduced to nil because of payments on account or otherwise. This is because the subject matter of the subsection (3) trust is defined by reference to the amount deemed to be held in trust pursuant to subsection (1).



[58] The application of these provisions to property in the hands of the tax debtor is reasonably straightforward. The issue in this case is how these provisions apply to the tax debtor's secured creditors.

[59] Prior to bankruptcy, subsection (3) provides that where amounts deemed to be held in trust pursuant to subsection (1) have not been remitted:

*... 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 ... to be held, from the time the amount was collected by the person, in trust for Her Majesty ... and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.*

[emphasis added]

[60] The operation of the deemed trusts in section 222 of the Act can be illustrated by an example. Let us assume that a tax debtor has collected and failed to remit \$20,000 on account of GST/HST. The tax debtor has real property which is subject to a mortgage. The mortgage lender forces the sale of the property and receives proceeds of \$50,000. Subsection (1) creates a deemed trust with respect to the \$20,000 collected as tax but not remitted to the Receiver General. Subsection (3) creates a trust with respect to the debtor's property but only to the extent of the amounts held in trust pursuant to subsection (1). As a result, the mortgage lender, having received proceeds of property equal in value to the amount deemed to be held in a subsection (1) trust, i.e. \$20,000, is liable to pay that amount to the Crown.

[61] Would the result be any different if subsequent to the Crown's demand for payment of \$20,000, the tax debtor made a \$10,000 payment to the Receiver on account of GST/HST

collected but not remitted? The amount for which the secured creditor was liable would be different but the manner of determining the amount of that liability would be the same. The payment to the Receiver General would reduce the amount of the subsection (1) deemed trust to \$10,000 which in turn would reduce the extent to which the debtor's property was subject to the subsection (3) deemed trust. The secured creditor would be liable to pay the proceeds of the property subject to the subsection (3) trust, i.e. \$10,000. Similarly, if the tax debtor were to pay the entire \$20,000, the amount of the secured creditor's liability would be reduced to nil.

[62] The significance of the last example is that a demand for payment by the Crown does not "crystallize" the amount of the debtor's or the secured creditor's liability to the Crown. That liability is determined by the amount deemed to be held in the subsection (1) trust which in turn determines the extent to which property of the debtor is deemed to be held pursuant to the subsection (3) trust.

[63] How is this scheme affected by the bankruptcy of the tax debtor? Subsection (1.1) provides that at or after the time of bankruptcy, subsection (1) does not apply to any amounts that were collected on account of tax prior to that time. The result is that after bankruptcy, there is no amount deemed to be held in trust pursuant to subsection (1) for amounts collected as tax but not remitted pre-bankruptcy. The subsection (3) trust which arose prior to bankruptcy no longer has any subject matter because the trust only attaches to property of the tax debtor to the extent of the subsection (1) trust which no longer exists. This is true for the tax debtor as well as for the tax debtor's secured creditors.

[64] I can see no difference in principle between the reduction of the subsection (1) trust to nil by payment or by operation of law. In either case, the subsection (3) trust whose operation depends upon the existence of an amount deemed to held in trust pursuant to subsection (1), is at an end. Had Parliament meant to make the subsection (3) trust a function of the continued existence of unremitted amounts, it could have said so easily enough.

[65] Does this Court's decision in *Canada (Attorney General) v. National Bank of Canada*, 2004 FCA 92, 324 NR 31 (*National Bank*) affect this conclusion? In that case, this Court said, with respect to provisions of the *Income Tax Act*, R.S.C. 1985 c.1 (5th Supp.) (the ITA) and the *Employment Insurance Act*, S.C. 1996 c. 23 (the EIA) that are substantially the same as subsections (1) and (3), that a secured creditor who received proceeds of property subject to a trust without remitting the amount of tax payable was liable to the Crown:

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. The amount is "payable" out of the proceeds flowing from the property ... and since the respondents concede that they received the proceeds from the sale of the property subject to their security interest, without making the remittance that was payable, the appellant has a cause of action to recover these amounts.

*National Bank* at paragraph 40.

[66] It is important to keep the facts of *National Bank* in mind. Secured creditors of tax debtors under the ITA and the EIA had realized on their security and had failed to remit the proceeds to the extent of the outstanding tax debt to the Minister of National Revenue. At all material times, the tax debt was outstanding and, therefore, the deemed trusts under the

legislation were in effect. As a result, *National Bank* is a case about enforcing existing deemed trusts.

[67] It is true that this Court, citing the decision of the Supreme Court of Canada's decision in *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720 (*First Vancouver Finance*), said that "The trust continues to apply to all the assets for as long as the default [to remit source deductions] continues": *National Bank*, at paragraph 29. Both *National Bank* and *First Vancouver Finance* involved deemed trusts under the ITA which is not the case here. Furthermore, the ITA has no provision equivalent to subsection (1.1). As a result, *National Bank* is authority for the proposition that, prior the tax debtor's bankruptcy, the deemed trusts created by subsection 222 apply to all assets as long as there are amounts subject to the subsection (1) deemed trust. However, *National Bank* is not authority for the proposition that this state of affairs persists after the latter's bankruptcy.

[68] The Crown argues that the failure to pay the proceeds of subsection (3) trust property to the Receiver General gives rise to a separate and fully engaged cause of action against the secured creditor. Contrary to the Crown's submissions, this argument cannot be supported by this Court's decision in *National Bank* which is authority for a much narrower proposition. As I hope to have shown earlier, the notion that a secured creditor's obligation is somehow crystallized at a particular point in time without regard to the status of the subsection (1) deemed trust cannot account for reductions in the secured creditor's obligations as a result of reductions in the amounts deemed to be held in trust. If, on the other hand, the secured creditor's obligation varies with the amounts held in the subsection (1) deemed trust, there is no statutory basis for

distinguishing between reduction in the subsection (1) deemed trust due to payments on account and reductions which occur by operation of law.

[69] I recognize that this results in a situation in which a secured creditor has an incentive to resist payment in the hope that the amount of the subsection (1) deemed trust will be extinguished and may even help that process along by petitioning the tax debtor into bankruptcy. I would only say that in this case, the Crown made a demand for payment in April 2012 but appears to have taken no steps to enforce its demand until November 2013. Nor does the Crown appear to have had recourse to the other collection tools available to in under the Act. I am not persuaded that the view I take of this matter puts the Crown's interests unjustifiably at risk.

[70] To summarize, an examination of the text of subsection 222 of the Act teaches that the relationship between the deemed trusts created by subsection (1) subsection (3) is such that the extinction of the former upon bankruptcy - by operation of subsection (1.1) - puts an end to the latter at the same time.

[71] As pointed out in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21, [1998] S.C.J. No. 2 (QL), the interpretation of a statute must consider the text, the context and the purpose of the legislation. The conclusion to which I have arrived following my examination of the text of section 222 is supported by both its context and purpose.

[72] Part of the context subsection 222, and subsection (1.1) in particular, is subsections 67(2) and (3) of the *Bankruptcy and Insolvency Act* R.S.C. 1985 c. B-3 (BIA) which provide as follows:

(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.

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 ...

(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.

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

[73] Subsection 67(2) makes it clear that Parliament intended to do away with the deemed trusts in bankruptcy. The effect of these trust is to withdraw the property subject to the deemed trust from the estate of the bankrupt so that the federal government’s claim takes priority over the claims of unsecured creditors. By eliminating these trusts in bankruptcy, Parliament put the Crown on the same footing as unsecured creditors.

[74] The preservation of the deemed trust for unremitted source deductions in subsection 67(3) is explained by the fact that source deductions are amounts which belong to the employee in question. The trust in respect of those funds is a real trust in favour of the employees as well as a deemed trust in favour of the Crown:

Although [s. 227(4)] calls the trust created by it a deemed one, the trust is in truth a real one. The employer is required to deduct from his employees' wages the amounts due by the employees under the statute. This money does not belong to the employer anymore. It belongs to the employees. The employer holds it in a statutory trust to satisfy their obligations.

*Roynat Inc. v. Ja-Sha Trucking & Leasing Ltd.*, [1992] 2 W.W.R. 641 (Man. C.A.) at p. 646, cited with approval in *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 at paragraph 28, 143 D.L.R. (4th) 385.

[75] As a contextual factor, these provisions, together with the absence of a provision equivalent to subsection (1.1) in any of the Acts referred in subsection 67(3) of the BIA, tend to show that the Parliament intended to create a special regime for source deductions in the event of bankruptcy but that no such regime was intended in the case of amounts of unremitted tax under the Act.

[76] The purpose of subsection (1.1) was outlined in *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny*, 2009 SCC 49, [2009] 3 S.C.R. 286 where the rationale for amendments to statutory trusts in bankruptcy proceedings (including subsection (1.1)) is reviewed at paragraphs 12-17. The purpose of amendments to the BIA and the Act was to ensure that “the Government of Canada, the Crown, does not put itself in a priority position. It stands in line with the unsecured creditors in almost all cases except for the deductions of tax and unemployment owed”: see paragraph 14.

[77] The interpretation which I propose of subsections (1), (1.1) and (3) gives effect to this purpose.

[78] As a result, I am of the view that the Federal Court correctly answered the question which was put to it. I would therefore dismiss the appeal with costs.

“J.D. Denis Pelletier”

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J.A.



**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**APPEAL FROM AN ORDER OF THE FEDERAL COURT DATED AUGUST  
17, 2015 NO. T-1940-13 (2015 FC 977)**

**DOCKET:** A-400-15  
**STYLE OF CAUSE:** HER MAJESTY THE QUEEN V.  
CALLIDUS CAPITAL  
CORPORATION  
**PLACE OF HEARING:** TORONTO, ONTARIO  
**DATE OF HEARING:** JANUARY 19, 2017  
**REASONS FOR JUDGMENT BY:** RENNIE J.A.  
**CONCURRED IN BY:** NEAR J.A.  
**DISSENTING REASONS BY:** PELLETIER J.A.  
**DATED:** JULY 27, 2017

**APPEARANCES:**

Louis L'Heureux  
Edward Harrison  
FOR THE APPELLANT  
Harvey G. Chaiton  
Sam P. Rappos  
FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Nathalie G. Drouin  
Deputy Attorney General of Canada  
FOR THE APPELLANT  
Chaitons LLP  
Barristers & Solicitors  
Toronto, Ontario  
FOR THE RESPONDENT

**THIS IS EXHIBIT "B"**  
**TO THE REPORT OF THE RECEIVER**  
**DATED AUGUST 16, 2018**



### Payroll Examination Statement of Account

Taxpayer's Name <b>PETROFORMA INC.</b>			Date <b>2017-10-12</b>
Taxpayer's Address <b>201 - 255 LACEWOOD DR</b>		Collections Section Contact	
<b>HALIFAX, NS B3M 4G2</b>		Collections Section Telephone	
Account Number <b>802655019RP0001</b>		Tax Services Office <b>1203 Nova Scotia</b>	
An examination of your payroll records performed on <b>2017-10-12</b>		covering the period(s) from <b>2016-01-01</b> to <b>2017-08-31</b>	
discloses discrepancies in your remittances as follows:			
Details	Current Year <u>2017</u> \$	Previous Year <u>2016</u> \$	Previous Year(s) <u>          </u> \$
Total deductions and taxpayer's obligation	<b>138,536.62</b>	<b>341,331.79</b>	
Total credits to date	<b>145,046.20</b>	<b>341,331.79</b>	
Adjustments	<b>-23,707.89</b>	<b>0.00</b>	
Difference	<b>17,198.31</b>	<b>0.00</b>	
Corrections re EI and/or CPP (See PD86 attached)	<b>413.10</b>	<b>0.00</b>	
Balance	<b>17,611.41</b>	<b>0.00</b>	
Failure to remit penalty	<b>1,761.14</b>	<b>0.00</b>	
Interest	<b>80.00</b>	<b>0.00</b>	
Late remitting penalty	<b>0.00</b>	<b>0.00</b>	
Failure to deduct penalty	<b>0.00</b>	<b>0.00</b>	
Late filing penalty	<b>0.00</b>	<b>0.00</b>	
Mandatory electronic filing penalty	<b>0.00</b>	<b>0.00</b>	
Total owing	<b>19,452.55</b>	<b>0.00</b>	
Total arrears disclosed during examination		<b>19,452.55</b>	
Previous arrears		<b>0.00</b>	
Adjustments (Previous arrears)		<b>0.00</b>	
Interest to date on previous arrears		<b>0.00</b>	
Sub total		<b>19,452.55</b>	
Less: Current payment		<b>0.00</b>	
Balance due		<b>19,452.55</b>	

A notice of assessment will follow shortly. However, the amount owing is due and payable immediately and you are therefore required to provide the examination officer with the appropriate payment. Failure to do so may result in legal proceedings either by way of garnishee or action in the Federal Court which could result in seizure and sale of your assets.

<b>MONIKA BOIVIN</b>	2017-10-12
▶ For Assistant Director, Revenue Collections Division	Date

Signature for receipt only of this statement
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**THIS IS EXHIBIT "C"**  
**TO THE REPORT OF THE RECEIVER**  
**DATED AUGUST 16, 2018**

2017 01 21491

**SUPREME COURT OF NEWFOUNDLAND AND LABRADOR  
IN BANKRUPTCY AND INSOLVENCY**

**IN THE MATTER OF** the  
*Bankruptcy and Insolvency Act*, RSC  
1985 c. B-3, as amended

**AND IN THE MATTER OF** the  
Receivership of Petroforma Inc.

**Estate No. 51-126021  
Court No. 21491**

**DISTRIBUTION ORDER**

**UPON** reading the Notice of Motion of the Toronto-Dominion Bank (TD) seeking a distribution by BDO Canada Limited, in its capacity as receiver (the Receiver), of the assets, undertaking and property of Petroforma Inc., (Petroforma), **AND UPON** hearing the submissions of counsel, **AND UPON** reading the material as filed by counsel, **IT IS HEREBY ORDERED AS FOLLOWS:**

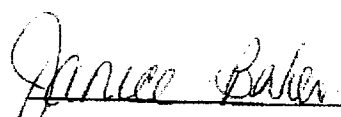
1. The time for service of the Notice of Motion is hereby abridged and validated, and all service of the Notice of Motion is hereby validated, so that this motion is properly returnable today and further service of the Notice of Motion is hereby dispensed with.
2. The Receiver is hereby authorized and directed to distribute funds currently held by the Receiver from the sale of property of Petroforma as follows:
  - (a) the amount of \$400,000.00 to TD.
3. Notwithstanding:

	Filed	Dec 21/17	WCH
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- (a) the pendency of these proceedings;
- (b) any applications for a bankruptcy order now or in the future issued pursuant to the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended (the BIA), in respect of Petroforma and any bankruptcy order issued pursuant to any such applications; and
- (c) any assignment in bankruptcy made in respect of Petroforma;

the payments authorized and directed by section 1 of this Order shall be binding on any trustee in bankruptcy that may be appointed in respect of Petroforma and shall not be void or voidable by creditors of Petroforma, nor shall it constitute nor be deemed to be a settlement, fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue or other reviewable transaction under the BIA or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

DATED the 21 day of Dec. , 2017 at St. John's, Newfoundland and Labrador.

  
Assistant Deputy Registrar

**THIS IS EXHIBIT "D"**  
**TO THE REPORT OF THE RECEIVER**  
**DATED AUGUST 16, 2018**

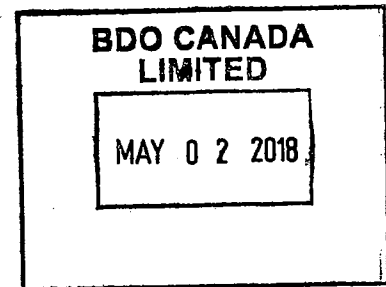


Canada Revenue  
Agency

Agence du revenu  
du Canada

April 30, 2018

Jason Breeze  
BDO Canada Limited  
Receiver Trustee of  
PETROFORMA INC.  
201 - 255 LACEWOOD DR  
HALIFAX NS B3M4G2



Dear Mr. Breeze:

**Subject: Proposed changes to your goods and services tax/harmonized sales tax (GST/HST) returns for the period from 2015-01-01 to 2017-03-31  
Account number: 80265 5019 RT0001**

We have completed our audit of your GST/HST returns for the above period.

We propose the following adjustments to the net tax payable on your GST/HST returns:

For the reporting periods ending:	2015	2016	2017	Total
Revenue Adjustments (No net tax implication)	3,870.52	-58,809.91	11,854.56	--
GST/HST Reconciliation Adjustments	53,386.06	-15,517.68	69.48	\$37,937.86
Disallowed input tax credits	16,928.22	9,527.84	77,293.03	\$103,749.09
Additional net GST/HST payable	70,314.28	-5,989.46	77,362.51	\$141,686.95

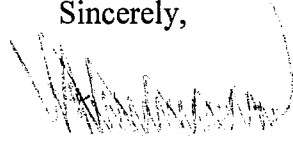
We have enclosed a summary of audit adjustments and detailed working papers to support the proposed adjustments.

If you have more information about the proposed adjustments that you would like us to consider, or if you have any questions, please call me at 1-709-772-2695, before May 30, 2018. My team leader, Damien Roche, may also be reached at 1-709-772-0618. If we do not hear from you before May 30, 2018, we will finalize the audit based on the adjustments proposed.



You will then receive a notice of reassessment that reflects these changes, and you will be responsible for paying the additional net GST/HST payable and interest as calculated.

Sincerely,



Md Kalam Mahmud  
Audit Division  
St. John's Office

Telephone: 1-709-772-2695  
Facsimile: 1-709-772-5263  
Address: 165 Duckworth Street  
P.O. Box 12075 Stn A  
St. John's, NL A1B 4R5

Website: [www.canada.ca](http://www.canada.ca)

- Enclosures:
- (1) Summary of Audit Adjustments
  - (2) WP 3100 – HST Reconciliation
  - (3) WP 3200 – ITC Reconciliation
  - (4) WP 3300 – Revenue Reconciliation
  - (5) WP 5100 – ITC Detailed Testing
  - (6) WP 5200 – HST Paid on TD Bank Loan
  - (7) WP 5300 – Unpaid HST on Accounts Payable

## Summary of Audit Adjustments

<b>Registrant:</b>	Petroforma Inc.	<b>WP:</b>	6600
<b>Account Number:</b>	80265 5019 RT0001	<b>Auditor:</b>	Md Kalam Mahmud
<b>Audit Period:</b>	2015-01-01 to 2017-03-31	<b>Date:</b>	2018-04-20

Period Ending	HST Adjustment	ITC Adjustment	Total Adjustment to Net Tax	Revenue Adjustment	Working Paper Reference	ETA Reference
2017 03 31	69.48	- 77,293.03	- 77,362.51	11,854.56	WP3100, WP3300 & WP5300	225(1), 238(4), 296(1)(b)
2016 12 31		210.82	210.82	- 58,809.91	WP3100, WP3200, WP3300 & WP5200	169(1), 225(1), 238(4)
2016 09 30	- 9.32	- 5,891.50	- 5,882.18		WP3100, WP3200, WP5100 & WP5200	169(1), 169(4), 225(1)
2016 06 30		- 3,619.54	- 3,619.54		WP3100, WP3200 & WP5200	169(1), 225(1), 238(4)
2016 03 31	- 15,508.36	- 227.62	15,280.74		WP3100, WP3200 & WP5200	169(1), 225(1)
2015 12 31	17,069.24	46,887.73	29,818.49	3,870.52	WP3100, WP3200, WP3300 & WP5200	169(1), 225(1), 238(4)
2015 09 30	14.42	2,962.07	2,947.65		WP3100, WP3200, WP5100 & WP5200	169(1), 169(4), 225(1)
2015 06 30		- 4,593.15	- 4,593.15		WP3100, WP3200 & WP5200	169(1), 225(1)
2015 03 31	36,302.40	- 62,184.87	- 98,487.27		WP3100, WP3200 & WP5200	169(1), 225(1)
	<b>37,937.86</b>	<b>- 103,749.09</b>	<b>- 141,686.95</b>	<b>- 43,084.83</b>		

The registrant's general ledger reflects \$37,937.86 greater HST collectible than was reported on the corresponding HST returns. The registrant's HST returns are proposed to be assessed for this discrepancy. Please refer to working paper 3100 for further details.

The registrant's general ledger reflects \$22,482.99 greater HST paid on purchases than was reported on the corresponding HST returns. The registrant's HST returns are proposed to be credited for this discrepancy. Please refer to working paper 3200 for further details.

The remaining ITC adjustments proposed pertain to: \$710.87 for insufficiently supported claims identified on working paper 5100; \$48,228.18 for erroneous ITCs claimed on TD Bank Loan payments identified on working paper 5200; and \$77,293.03 for claims imbedded on accounts payable that were not paid identified on working paper 5300.

\$43,084.83 of sales revenue has been proposed to be assessed to match revenues found in books and records. The adjustments are proposed with no net tax implication per working paper 3300.

## HST Reconciliation

<b>Registrant:</b>	Petroforma Inc.	<b>Working Paper:</b>	3100
<b>Business Number:</b>	80265 5019 RT0001	<b>Auditor:</b>	Md Kalam Mahmud
<b>Audit Period:</b>	2015-01-01 to 2017-03-31	<b>Date:</b>	2017-11-30

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### Objective

To ensure that the HST recorded in the books and records is correctly recorded on the returns filed.

### Findings

Period Ending	HST Collected per G/L	HST Reported on Returns	Discrepancy	Amount Proposed
<i>2015 Opening Balance in the 'HST Charged on Sales Account' per books &amp; records: \$53,851.05</i>				53,851.05
2015 03 31	88,793.35	106,342.00	-17,548.65	-17,548.65
2015 06 30	79,629.54	79,629.00	0.54	
2015 09 30	103,290.42	103,276.00	14.42	14.42
2015 12 31	83,218.24	66,149.00	17,069.24	17,069.24
	354,931.55	355,396.00	-464.45	
2016 03 31	51,257.64	66,766.00	-15,508.36	-15,508.36
2016 06 30	79,917.96	79,917.00	0.96	
2016 09 30	75,331.68	75,341.00	-9.32	-9.32
2016 12 31	84,595.42	84,596.00	-0.58	
	291,102.70	306,620.00	-15,517.30	
2017 03 31	30,072.48	30,003.00	69.48	69.48
		<b>Net amount of adjustments</b>		<b>\$ 37,937.86</b>

Based on a comparison of the HST Collectible recorded in the general ledger to the HST reported on the HST returns, HST was overstated by \$464.45 in 2015, overstated by \$15,517.30 in 2016, and understated by \$69.48 in the first quarter of 2017. These amounts have been proposed to be assessed. Additionally, the auditor confirmed that the \$53,851.05 audit period opening balance in the HST Collectible account was not reported on the audit period HST returns and as a result, this amount will be proposed to be assessed.

Journal entry 5188 dated February 27, 2015 recorded a \$25,000 reduction to the HST Collectible account, however, it was not supported by the registrant's records. As a result, this reduction was not included in the proposed HST reconciliation adjustments.

### Conclusion

The auditor proposes to adjust the amount of HST collectible on the HST returns to the totals recorded in the books and records. Net proposed amount is \$37,937.86 per ETA 225(1).

## ITC Reconciliation

<b>Registrant:</b> Petroforma Inc.	<b>Working Paper:</b> 3200
<b>Business Number:</b> 80265 5019 RT0001	<b>Auditor:</b> Md Kalam Mahmud
<b>Audit Period:</b> 2015-01-01 to 2017-03-31	<b>Date:</b> 2017-11-30

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### Objective

To ensure ITCs claimed on the return reconcile to the ITCs per general ledger account.

### Findings

Period Ending	ITCs Per GL	ITCs Claimed	Discrepancy	Proposed Adjustments
2017 03 31	84,622.00	84,622.00	-	-
2016 12 31	79,020.01	76,617.00	2,403.01	2,403.01
2016 09 30	47,594.85	46,429.00	1,165.85	1,165.85
2016 06 30	44,257.03	41,300.00	2,957.03	2,957.03
2016 03 31	29,388.95	23,040.00	6,348.95	6,348.95
	200,260.84	187,386.00	12,874.84	12,874.84
2015 12 31	78,643.30	25,179.00	53,464.30	53,464.30
2015 09 30	42,982.73	33,214.00	9,768.73	9,768.73
2015 06 30	54,572.42	52,589.00	1,983.42	1,983.42
2015 03 31	52,657.70	108,266.00	- 55,608.30 -	55,608.30
	228,856.15	219,248.00	9,608.15	9,608.15
		<b>Total Net Adjustments</b>	<b>\$</b>	<b>22,482.99</b>

The registrant's audit period records reflected \$22,482.99 greater HST Paid than was claimed as ITCs on the corresponding HST returns. As a result, the auditor has proposed to allow the registrant these additional ITC entitlements.

The auditor also identified a \$21,944.26 opening balance in the HST Paid account at the beginning of the audit period. The auditor informed the trustee of this balance and requested supporting documentation for the underlying transactions and documentation to verify that these amounts had not yet been claimed on HST returns filed prior to the audit period. No supporting documentation for this amount was provided, and as a result, no adjustments to allow additional ITCs in relation to this amount have been proposed.

### Conclusion

The auditor proposes to allow \$22,482.99 of additional entitlements based on the results of the ITC Reconciliation in accordance with ETA 225(1).

## Revenue Reconciliation

<b>Registrant:</b>	Petroforma Inc.	<b>WP:</b>	3300
<b>Account Number:</b>	80265 5019 RT0001	<b>Auditor:</b>	Md Kalam Mahmud
<b>Audit Period:</b>	2015-01-01 to 2017-03-31	<b>Date:</b>	2017-11-30

### Objective

To ensure revenues recorded in the books and records are accurately reported on the GST/HST Returns.

### Findings

Account Name	Account #	Q1 2017	2016	2015
Sales ( from IDEA analysis)				
Laboratory Fees	4020	198,154.34	2,028,754.99	2,711,866.74
Facility Rentals	4030	2,318.00	14,000.72	13,908.00
Interest Income	4040		-	29.82
Technical Services	4050		30,000.00	19,875.00
other revenue	4450	3,413.18	64,255.38	-
		203,885.52	2,137,011.09	2,745,679.56
<b>Revenue per GST/HST Return</b>		200,015.00	2,195,821.00	2,733,825.00
Discrepancy		3,870.52 -	58,809.91	11,854.56
<b>Revenue per T2 Filed</b>		N/A	Not filed	2,745,893.00
Discrepancy			-	213.44

Following discrepancies found between revenue per books and HST return revenue:

FY 2015: +\$11,854.56	Less amount of revenue reported on HST return
FY 2016: -\$58,809.91	Excess amount of revenue reported on HST return
FY 2017 Q1: +\$3,870.52	Less amount of revenue reported on HST return

Auditor reviewed the general ledger revenues and proposes to adjust the revenue amount reported on the HST returns to match the general ledger amount without any net tax implication.

Period Ending	Revenue reported	Adjustments	Sales Revenue after adjustment
2017-03-31	200,015.00	11,854.56	211,869.56
2016-12-31	564,118.00	- 58,809.91	505,308.09
2015-12-31	508,846.00	3,870.52	512,716.52
	<b>Net adjustments -</b>	<b>43,084.83</b>	

### Conclusion

The auditor proposes to adjust the sales total reported per the registrant's HST returns to correspond with the totals reflected in the general ledger in accordance with ETA 238(4).

## ITC - Detailed Testing

Registrant: Petroforma Inc.  
Account Number: 80265 5019 RT0001  
Audit Period: 2015-01-01 to 2017-03-31

WP: 5100  
Auditor: Md Kalam Mahmud  
Date: 2017-12-04

### Objective

To ensure ITCs meet documentary requirements and expenses are incurred for use in commercial activity.

### Findings

Auditor reviewed the documentation maintained to support ITC claims and confirmed that all transactions met documentary requirements with the following exceptions.

Auditor verified that on two occasions the registrant claimed greater ITCs than the actual HST paid for the goods and services. Therefore, the auditor proposes following adjustments:

JE_DATE	JE_DESC	JE_NO	ITC claimed	Disallowed ITCs	ETA Ref	Remarks
2016-08-09	CALA	6705	1,149.63	480.78	169(4)	Excess ITC claimed
2015-07-07	CALA	1676	938.59	230.09	169(4)	Excess ITC claimed
<b>Total adjustments</b>				<b>\$ 710.87</b>		

### Conclusion

The auditor proposes the \$710.87 ITC adjustments as noted above as per ETA 169(4).

## HST Paid on TD Bank Loan

Registrant:	Petroforma Inc.	WP:	5200
Account Number:	80265 5019 RT0001	Auditor:	Md Kalam Mahmud
Audit Period:	2015-01-01 to 2017-03-31	Date:	2018-03-29

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### Objective

To ensure ITCs meet documentary requirements, and expenses are incurred for use in commercial activity, and to examine if any ITCs were duplicated.

### Findings

RBC Equipment Lease Agreement No.		107787511710
Purchase Option Price:	\$	544,805.22
HST @13%	\$	70,824.69
Total Amount	\$	615,629.91

The registrant was allowed a \$70,824.69 ITC for the HST paid related to a \$544,805.22 lease buy-out from RBC. It then secured a loan from TD Bank to finance the lease buy-out. The registrant claimed ITCs of \$2,192.19 on the monthly loan payments, however, there was no HST imbedded in these payments. As a result, the registrant overstated its ITCs on these loan payments.

Period Ending	Disallowed ITCs	Additional Net Tax Payable	Remarks
2015 03 31	2,192.19	2,192.19	Subsection 169(1) of Excise Tax Act.
2015 06 30	6,576.57	6,576.57	
2015 09 30	6,576.57	6,576.57	
2015 12 31	6,576.57	6,576.57	
2016 03 31	6,576.57	6,576.57	
2016 06 30	6,576.57	6,576.57	
2016 09 30	6,576.57	6,576.57	
2016 12 31	6,576.57	6,576.57	
<b>Total adjustments</b>		<b>\$ 48,228.18</b>	

### Conclusion

The auditor proposes to disallow \$48,228.18 of ITC claimed on TD bank loan payments.

## Unpaid HST on Accounts Payable

Registrant:	Petroforma Inc.	WP:	5300
Account Number:	80265 5019 RT0001	Auditor:	Md Kalam Mahmud
Audit Period:	2015-01-01 to 2017-03-31	Date:	2018-04-03

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### Objective

To identify any unpaid accounts payable recorded that the registrant had claimed Input Tax Credits for.

### Findings

The auditor obtained the registrant's Accounts Payable listing as of July 14, 2017, the receivership date, from the Trustee. The auditor then reviewed the Accounts Payable balance recorded for each vendor as of the receivership date and reviewed a sample of purchase invoices issued by the vendors to determine which Accounts Payable contained HST paid (WP9009). Based on this information, the auditor calculated the HST paid claimed on purchases from each vendor, and identified the \$77,293.03 total HST Paid proposed to be recaptured on the March 31, 2017 HST return.

### Conclusion

The ITCs claimed per the March 31, 2017 HST return are proposed to be reduced by \$77,293.03 in accordance with paragraph 296(1)(b) of the Excise Tax Act.



### Unpaid HST on Accounts Payable - Worksheet

Nome of creditor	A/P balance as on 2017-07-14	HST paid applied?	GST/HST Rate (A)	Sample document reviewed	A/P balance as on 2017-11-03	Amount Paid	Base amount for HST Recapture (B)	HST Recapture (B x A/(100+A))
Air Canada Cargo	302.00	Yes	15	JE#7097 dt 2016-09-30	1,038.00		302.00	39.39
Air Liquide Canada Inc.- Atlantic Region	10,792.00	Yes	15	JE#7711 dt 2016-08-01	18,314.00		10,792.00	1,407.65
Alere ULC	719.00	Yes	15	JE#7949 dt 2016-10-27	719.00		719.00	93.78
ALS Canada Ltd.	1,026.00	Yes	5	JE#8053 dt 2016-12-16	1,026.00		1,026.00	48.86
AMJ Campbell Van Lines	8,145.00	No	Exempt	Invoice#40592 dt.2017-0	8,145.00			-
Aqua Tox Testing & Cons	10,580.00	Yes	15	JE#7557 dt 2016-12-21	10,580.00		10,580.00	1,380.00
Atlantic Business	9,200.00	Yes	15	JE#7077 dt 2016-09-01	9,200.00		9,200.00	1,200.00
ATS Scientific Inc.	426.00	N/A	N/A		426.00			-
BABB Security Sys	504.00	Yes	15	JE#7447 dt 2016-11-25	504.00		504.00	65.74
Bear Cleaners & Supply	2,224.00	Yes	15	JE#7539 dt 2016-12-15	2,224.00		2,224.00	290.09
Bell Canada	1,702.00	Yes	15	JE#7563 dt 2016-12-03	3,606.00		1,702.00	222.00
Best Dispensers Ltd.	283.00	Yes	15	JE#7231 dt 2016-10-06	283.00		283.00	36.91
BIOMERIEUX Canada	28,675.00	Yes	15	JE#7339 dt 2016-11-21	54,744.00		28,675.00	3,740.22
Budget Plumbing and He	2,099.00	N/A	N/A		2,099.00			-
CALA	9,732.00	Yes	15	Invoice#201702079 dt.20	1,018.00	8,714.00	1,018.00	132.78
Canadawide Scientific Lte	7,348.00	N/A	N/A		-	7,348.00		-
City of St. John's	21,711.00	N/A	N/A		154,171.00			-
CRA-Tax-Atlantic	36,783.00	No	N/A		36,893.00			-
DMK Chartered Acc	5,917.00	Yes	15	JE#3543 dt 2016-05-18	-	5,917.00	-	-
Envirosystems Inc..	3,220.00	N/A	N/A		3,220.00			-
Evoqua Water Technolog	1,635.00	N/A	N/A		2,079.00			-
Federal Express Canada	107.00	Yes	13	JE#6557 dt 2016-02-25	107.00		107.00	12.31
Fisher Scientific Compar	6,250.00	Yes	15	Invoice#4839943 dt.2015	6,250.00		6,250.00	815.22
Fundy Engineering	4,680.00	N/A	N/A		4,680.00			-
Hach Sales & Service Car	728.00	Yes	15	JE#8085 dt 2016-12-16	728.00		728.00	94.96
HHM Transportation Sol	575.00	N/A	N/A		575.00			-
High Pertly Water Servic	221.00	N/A	N/A		221.00			-
IEAS Ltd.	3,119.00	Yes	15	JE#7545 dt 2016-12-22	3,119.00		3,119.00	406.83
Iron Mountain Canada C	1,302.00	N/A	N/A		1,302.00			-
Irving Energy Distributio	65.00	N/A	N/A		-	65.00	-	-
Ispire Inspired Technolog	19,975.00	Yes	13	JE#6076 dt 2017-03-15	19,975.00		19,975.00	2,298.01

J&T Construction Ltd.	398,056.00	Yes	15	Invoice#1612-04 dt 2017-	398,056.00		398,056.00	51,920.35
J&J Investments	644.00	N/A	N/A		1,288.00			-
Mandel Scientific Comp	158.00	Yes	15	JE#7769 dt 2016-08-12	158.00		158.00	20.61
Marsh Canada Limited	1,868.00	N/A	N/A		1,868.00			-
Memorial University of	2,524.00	Yes	15	JE#7401 dt 2016-11-14	2,524.00		2,524.00	329.22
Modem Water Inc.	3,121.00	Yes	13	JE#4619 dt 2016-05-23	3,472.00		3,121.00	359.05
Newfoundland Power In	8,856.00	Yes	13	JE#766 dt 2017-02-10	11,635.00		8,856.00	1,018.83
NL Employers' Council	5,750.00	Yes	15	JE#7399 dt 2016-11-09	5,750.00		5,750.00	750.00
North Atlantic Systems	6,174.00	Yes	15	JE#8119 dt 2016-12-06	6,174.00		6,174.00	805.30
Orkin Canada	150.00	Yes	15	JE#7537 dt 2016-12-14	339.00		150.00	19.57
Osprey Scientific Inc.	309.00	Yes	15	JE#7315 dt 2016-11-08	309.00		309.00	40.30
Oxoid Company	3,505.00	Yes	15	JE#8115 dt 2016-11-23	4,602.00		3,505.00	457.17
Pardy's Waste Managem	4,121.00	Yes	15	Invoice#00061252 dt.201	4,121.00		4,121.00	537.52
PF Collins International	2,692.00	Yes	15	JE#7325 dt 2016-11-16	5,540.00		2,692.00	351.13
phenova	5,488.00	N/A	N/A		6,746.00			-
Purolator Inc.	1,454.00	Yes	15	JE#6701 dt 2016-12-09	1,962.00		1,454.00	189.65
Rainbow Spring Trout Ha	1,244.00	Yes	15	JE#8013 dt 2016-11-30	3,107.00		1,244.00	162.26
Seacology	2,499.00	Yes	13	JE#4005 dt 2015-12-17	2,499.00		2,499.00	287.50
SGS Canada Inc.	3,508.00	Yes	15	Invoice#10864022 dt.201	1,085.00	2,423.00	1,085.00	141.52
Sigma Aldrich Canada Lt	880.00	Yes	15	JE#7933 dt 2016-10-25	2,888.00		880.00	114.78
SNC-Lavalin Inc.	29,037.00	Yes	15	Invoice#1258891 dt.2016	29,038.00		29,037.00	3,787.43
System Plus	1,780.00	Yes	15	JE#8063 dt 2016-12-28	1,780.00		1,780.00	232.17
Telelink	674.00	Yes	15	JE#7561 dt 2016-12-01	1,331.00		674.00	87.91
The Idea Factory	23,919.00	Yes	15	Invoice#6709 dt.2016-01-	23,919.00		23,919.00	3,119.87
Thermo Fisher Scientific	6,250.00	N/A	N/A		6,250.00			-
Tom Parsons	1,400.00	Yes	15	JE#7547 dt 2016-12-27	1,400.00		1,400.00	182.61
Twin City Movers	667.00	N/A	N/A		667.00			-
WINDCO Enterprises	288.00	N/A	N/A		288.00			-
Xerox Canada	717.00	Yes	15	JE#7525 dt 2016-12-28	1,921.00		717.00	93.52
	717,778.00					24,467.00	597,309.00	77,293.03

The amount of HST that has not been paid to the suppliers:

\$ 77,293.03

For recapture, the auditor considered only those vendors for whom an accounting entry or an invoice reviewed to verify that the supply was taxable. A/P balances by vendor represents the accumulated balance of the total payable. Therefore, the auditor calculated recaptured HST based on the rate found on the last reviewed transaction.

**THIS IS EXHIBIT "E"**  
**TO THE REPORT OF THE RECEIVER**  
**DATED AUGUST 16, 2018**

JUL. 24. 2018 11:18AM

CRA

NO. 9234 P. 7



Canada Revenue Agency  
Agence du revenu  
du Canada

Nova Scotia Tax Services Office (Halifax)  
Halifax NS B3J 2T5

July 24, 2018

BDO CANADA LIMITED  
ATTN: JASON BREEZE  
SUITE 201, 255 LACEWOOD DRIVE  
HALIFAX NS B3M 4G2

Dear Mr. Breeze:

Re: Petroforma Inc.  
of the City of Paradise  
in the Province of Newfoundland and Labrador  
Date of the receivership: July 14, 2017

Please find enclosed our claim and supporting schedule in the  
above-noted insolvency event for the amount of \$212,755.53.

Issue dividend payment directly to the Receiver General quoting  
the account number shown on the schedule.

Please send individual, corporate and payroll dividend payments  
to:

Canada Revenue Agency  
PO BOX 3800 STN A  
Sudbury ON P3A 0C3

Please send goods and services tax/harmonized sales tax (GST/HST)  
remittances, including dividend payments to the applicable  
tax centre (shown on your client's GST/HST return).

.../2

National Insolvency Office  
145 Hobsons Lake Drive  
PO BOX 638  
Halifax NS B3J 2T5

Local : 902-450-8542  
Toll Free : 1-800-461-7714  
Fax : 902-450-8565  
Web site : [canada.ca/taxes](http://canada.ca/taxes)

JUL. 24. 2018 11:18AM

CRA

NO. 9234 P. 8

- 2 -

If you need more information about this claim, such as a more detailed breakdown of the debt, please contact the undersigned at one of the telephone numbers provided in this letter.

Yours truly,



Ryan DeMerchant (1203)  
Resource/Complex Case Officer

Enclosure(s)

JUL 24 2018 11:18AM CRA

NO. 9234 P. 9

ATTACHMENT PAGE 1

Proof of Claim (Form 31)  
(Sections 50.1, 81.5, 81.6, subsections 65.2(4), 81.2(1), 81.3(8),  
81.4(8), 102(2), 124(2), 128(1), and paragraphs 51(1)(e)  
and 66.14(b) of the Act)

Send all notices or correspondence regarding this claim to the following address:

National Insolvency Office  
145 Hobsons Lake Drive  
PO Box 638  
Halifax NS B3J 2T5  
Attention: Ryan DeMerchant

In the matter of the receivership of Petroforma Inc. of the City of Paradise in the Province of Newfoundland and Labrador, and the claim of Her Majesty the Queen in Right of Canada as represented by the Minister of National Revenue, creditor.

I, Ryan DeMerchant, of the City of Halifax in the Province of Nova Scotia, do hereby certify:

1. That I am a resource officer/complex case officer of the Canada Revenue Agency.
2. That I have knowledge of all the circumstances connected with the claim referred to below.
3. That the debtor was, at the date of the receivership namely the 14th day of July, 2017, and still is, indebted to the creditor in the sum of \$212,755.53, as specified in the statement of account attached and marked Schedule "A", after deducting any counterclaims to which the debtor is entitled.
4. (X) UNSECURED CLAIM of \$200,792.00. That in respect of this debt, I do not hold any assets of the debtor as security.

(X) PROPERTY CLAIM of \$11,783.53.

That property holding a value equal to the debt enumerated in the Schedule "A" was in possession of the debtor and still remains in the possession of the debtor and (or) the trustee. The claimant hereby claims an interest in all assets of the debtor up to the value of the property claim shown. The claimant is entitled to demand from the trustee the return of the property.

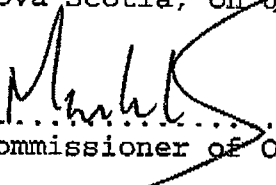
5. That, to the best of my knowledge, the above-named creditor is not related to the debtor within the meaning of section 4 of the Act, and has not dealt with the debtor in a non-arm's length manner.

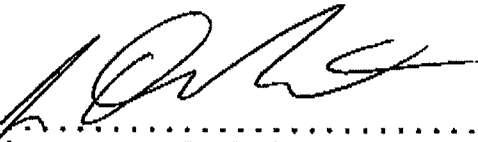
ATTACHMENT PAGE 2

6. That the following are the payments that I have received from, and the credits that I have allowed to the debtor within the three months immediately before the date of the initial bankruptcy event within the meaning of section 2 of the Act.

Nil

Sworn before me at the City of Halifax in the Province of Nova Scotia, on July 24, 2018.

  
.....  
Commissioner of Oaths

  
.....  
Signature of Claimant

\*  
MARK LOHNES  
A Commissioner of the Supreme  
Court of Nova Scotia  
My Commission expires: March 14, 2023

ATTACHMENT PAGE 3

Schedule "A"

Name: Petroforma Inc.

Unsecured claim

Income Tax Act  
(as it relates to payroll deductions - non deemed trust)

Account number: 802655019RP0001  
Assessed period(s): 2017  
Principal: \$20,354.21  
Penalty and interest: \$3,590.32

Total: \$23,944.53

Excise Tax Act

Account number: 802655019RT0001  
Assessed period(s): 2015, 2016, 2017  
Principal: \$159,766.40  
Penalty and interest: \$17,081.07

Total: \$176,847.47

Total Unsecured claim \$200,792.00

Property claim


Income Tax Act  
(as it relates to payroll deductions - deemed trust)

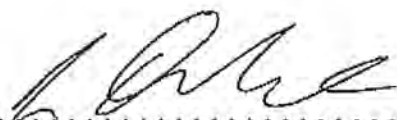
Account number: 802655019RP0001  
Assessed period(s): 2017  
Principal: \$11,783.53


Total: \$11,783.53

Total Property claim \$11,783.53

Sworn before me at the City of Halifax in the Province of  
Nova Scotia, on July 24, 2018.

  
.....  
Commissioner of Oaths

  
.....  
Signature of Claimant

 MARK LOHNES  
A Commissioner of the Supreme  
Court of Nova Scotia  
My Commission expires: March 14, 2023



**THIS IS EXHIBIT "F"**  
**TO THE REPORT OF THE RECEIVER**  
**DATED AUGUST 16, 2018**

PETROFORMA INC.  
IN RECEIVERSHIP  
RECEIVER'S INTERIM STATEMENT OF RECEIPTS AND DISBURSEMENTS  
FROM DATE OF APPOINTMENT ON JULY 14, 2017  
TO AUG 16, 2018

RECEIPTS:

Receiver's Accounts Receivable from Operations		\$545,909.36
Pre Accounts Receivable Collected up to September 7th		144,024.71
Pre Accounts Receivable Collected after September 7th		46,124.44
Funds in Company Bank Account (Accounts Receivable Collections)		0.00
Sale of Assets		585,500.00
HST Collected		89,086.32
HST Collected, PRE Accounts Receivable		28,522.37
Pre HST Refund		15,916.95
Seized Funds		11,500.23
Miscellaneous Other Receipts		6,115.54
Funding from Secured Lender		<u>55,000.00</u>
<b>TOTAL RECEIPTS</b>		<b>\$1,527,699.92</b>

DISBURSEMENTS:

<b>Prior Charges:</b>		
Rent May and 1/2 July	\$12,108.70	
Source Deductions, Deemed Trust	<u>11,783.53</u>	23,892.23
<b>Administration:</b>		
Registration Fee	\$70.00	
Appraisal Fee and Travel	5,370.54	
Security	305.50	
Insurance	3,884.29	
Operating Expenses	196,493.86	
Legal Fees	1,275.00	
Rent 1/2 July, August, September and October	41,300.00	
Wages, including employee/employer remittances/wcb	214,854.13	
Bank Charges	1,988.23	
Mail Redirection	514.40	
HST Paid on Expenses	39,964.09	
HST Remittance	<u>52,382.36</u>	558,402.40
<b>Wage Earner Protection Program:</b>		
Super Priority Claim	<u>7,476.32</u>	7,476.32
<b>Bankruptcy Administration:</b>		
Funding for Bankruptcy Administration	<u>5,000.00</u>	5,000.00
<b>Receiver's Remuneration:</b>		
Receiver's Fees & Disbursements	100,835.60	
HST on Receiver's Fees & Disbursements (13%)	13,108.63	
Receiver's Fees & Disbursements, Open WIP	19,708.34	
HST on Receiver's Fees & Disbursements (13%)	<u>2,562.08</u>	136,214.65
<b>Payment to Secured Lender:</b>		
TD Canada Trust (Note 1)	16,500.00	
TD Canada Trust	<u>400,000.00</u>	416,500.00
<b>TOTAL DISBURSEMENTS</b>		<b>1,147,485.60</b>
<b>CURRENT BALANCE IN TRUST</b>		<b>380,214.32</b>
Proposed Current Payment to TD Canada Trust		<u>189,891.85</u>
<b>BALANCE IN TRUST AFTER PROPOSED PAYMENT OF RECEIVER'S FEES AND DISBURSEMENTS</b>		<b>\$190,322.47</b>
<i>Balance in Trust (from above)</i>		\$190,322.47
<b>Less:</b>		
<i>Estimated Future Disbursements</i>		
Bankruptcy Administration, including HST and disbursements	\$5,000.00	
Estimated Receiver's Fees and Disbursements to finalize, including HST	8,475.00	<u>13,475.00</u>
<b>Final Balance to Distribute to TD Bank or CRA (estimate) (Note 2)</b>		<b>\$176,847.47</b>

Note 1 Funds seized by TD Bank from company bank account post receivership.

Note 2 Subject to appeal of the Queen vs Callidus Capital Corporation to the Supreme Court of Canada