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Ontario Court Rejects Crown Super-Priority for GST Claims in CCAA Proceedings

In the recent case of *Re Ottawa Senators Hockey Club Corp* (*"Re Ottawa Senators"*), the Ontario Superior Court of Justice (the "**Ontario Court**") held that, notwithstanding provisions of the *Excise Tax Act* (the "**ETA**") which create a deemed trust in favour of the Crown for collected and unremitted GST, Crown claims for such GST will rank as an unsecured claim. Accordingly, such claims will not enjoy super-priority over the debtor company's secured creditors in proceedings commenced under the *Companies' Creditors Arrangement Act* (the "**CCAA**"). *Re Ottawa Senators* is significant in that it marks a departure from previous case law decided at the Alberta Court of Queen's Bench (the "**Alberta Court**") which has held that the deemed trust under the ETA in respect of collected and unremitted GST is effective in CCAA proceedings and ranks in priority to secured creditors' claims.

The Legislative Background

Section 222 of the ETA provides that every person who collects GST is deemed to hold property in an amount equal to the GST collected in trust for the Crown, notwithstanding any security interest that may exist in such property. The ETA further provides that the deemed trust will apply "notwithstanding any other federal or provincial statute" with the exception of the *Bankruptcy and Insolvency Act* (the "**BIA**"). There is no parallel exception under the ETA with respect to the CCAA. The result is an inconsistency between the ETA and Section 18.3 of the CCAA, which purports to nullify any statutory deemed trusts in favour of the Crown apart from certain enumerated deemed trusts. The deemed trust created by Section 222 of the ETA is not among the enumerated deemed trusts permitted pursuant to Section 18.3 of the CCAA.

There is no doubt that in the case of a proposal filed under Part III of the BIA (the "**BIA Proposal**"), all claims of the Crown in relation to collected and unremitted GST will rank as unsecured.[1] Thus, the selection by the debtor of proceedings under either the CCAA or the BIA Proposal provisions could result in different treatment of the Crown claims for collected and unremitted GST.

The Alberta Approach – Crown Super-Priority for GST Claims

The Alberta Court considered the apparent inconsistency between Section 222 of the ETA and Section 18.3 of the CCAA in *Re Solid Resources Ltd.* (***"Re Solid"***) and *Re Gauntlet Energy Corporation* (***"Re Gauntlet"***). In each case, the Alberta Court relied on the Supreme Court of Canada's decision in *City of Verdun* v. *Dore* ("***Dore***") to resolve the inconsistency in favour of the ETA and therefore give paramountcy to the ETA provision. In *Dore*, the Supreme Court of Canada held that where a general provision states that it applies "notwithstanding" any prior legislation, such provision creates an implied repeal of any inconsistent provision of earlier legislation. The Alberta Court applied the reasoning from *Dore* to find that the enactment of Section 222 of the ETA in October, 2000 implicitly repealed Section 18.3 of the CCAA, which was enacted in September, 1997.

In *Re Gauntlet*, the Alberta Court acknowledged that its ruling was "perhaps troubling for insolvency practitioners and insolvency law generally" and ran counter to legislative attempts to harmonize the provisions of the BIA and CCAA relating to the treatment of Crown claims (since the result would be the survival of the deemed trust in CCAA proceedings and the ineffectiveness of the deemed trust in BIA Proposal proceedings), but nonetheless considered itself to be bound by *Dore*.

[1] The only possible exception is where the Crown has sent notices of garnishment prior to the commencement of the proposal process.

The Ontario Approach – No Crown Super-Priority for GST Claims

In *Re Ottawa Senators*, the Ontario Court took a more limited view of *Dore*, finding that *Dore* does not require that the doctrine of implied repeal be applied in all cases of inconsistency between legislative provisions, but rather that a court must examine the legislation in question to determine the proper interpretation. Moreover, the Ontario Court noted that where there is a conflict between an earlier statute and a later statute, a repeal by implication is to be effected only where the provisions of the two statutes are so inconsistent that the two cannot stand together.

The Ontario Court then considered the principles and policies underlying the CCAA, noting that the purpose of the CCAA is to facilitate compromise and arrangements between companies and their creditors as an alternative to bankruptcy. In addition, the Ontario Court noted that the CCAA applies only to certain fact situations while the ETA is a statute of general application. Based on the foregoing, the Ontario Court applied the doctrine of implied exception to find that the CCAA establishes an exception to the application of the ETA's GST statutory deemed trust provisions.[2]

Conclusion

From a policy perspective, the Ontario Court's decision in *Re Ottawa Senators* is compelling, as it results in the same treatment of Crown claims for collected and unremitted GST under both the CCAA and BIA. Such a result is consistent with legislative attempts to harmonize the treatment of competing creditor claims under the CCAA and the BIA. However, it must be noted that the Ontario Court's decision in *Re Ottawa Senators* is binding only in Ontario and does not overrule the earlier decisions of the Alberta Court in *Solid* and *Gauntlet.* Accordingly, until such time as Parliament or the Supreme Court steps in to resolve the inconsistency between the ETA and CCAA with respect to Crown claims for collected and unremitted GST, there remains an unsettling divide between jurisdictions in the treatment of such claims.

Written by Chris Bennett and Kathy Martin

The foregoing provides only an overview. Readers are cautioned against making any decisions based on this material alone. Rather, a qualified lawyer should be consulted.

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[2] The Crown has sought leave from the Court of Appeal for Ontario to appeal the Ontario Court's decision in *Re Ottawa Senators*, but leave has not yet been granted.

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