

ALBERTA COURT OF APPEAL RANKS CCAA SUPER-PRIORITY CHARGES AHEAD OF CRA'S DEEMED TRUST, BUT UNCERTAINTY REMAINS

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In a recent split decision, the Alberta Court of Appeal held that super-priority charges granted in a *Companies' Creditor Arrangement Act* ("CCAA") proceeding may take priority over statutory deemed trusts claims advanced by the Crown. In *Canada v Canada North Group Inc.*^[1], the deemed trusts flowed from provisions of the *Income Tax Act* ("ITA"), Canada Pension Plan, and the *Employment Insurance Act* (collectively, the "Fiscal Statutes"). The decision offers the first Appellate Court consideration of the apparent conflict between the super-priority provisions of the CCAA and the Fiscal Statutes in connection with unremitted source deductions.

Background

In 2017, the Court of Queen's Bench issued an order granting the debtor companies protection under the CCAA. As per sections 11.2(1), 11.51(1) and 11.52(1) of the CCAA, the initial order charged the debtors' property with security interests in favour of the interim lender, the debtors' directors and the insolvency professionals (collectively, the "Priming Charges"). The initial order expressly subordinated the Crown's interest arising under any federal or provincial statute in favour of the Priming Charges.

The CRA, sought to vary the initial order. It asserted that its claim for unremitted source deductions were a property interest superseding all security interests, including court-ordered charges granted in CCAA proceedings. Specifically, the CRA argued that section 227(4.1) of the ITA creates a deemed trust in favour of the Crown over property of a tax debtor for unremitted source deductions. The amounts deducted are deemed to be held separate and apart from the property of the taxpayer in trust for the Crown. Such amounts are owed to the Crown in priority over any security interests "notwithstanding" any other legislation.

The Chambers Judge dismissed the Crown's application holding that the super-priority charges of the CCAA gave the court the discretion to rank the Priming Charges ahead of the Crown's security interest arising out of the Fiscal Statutes. The CRA appealed.

Decision of the Majority

Writing for the majority, Justice Rowbotham agreed with the Chambers Judge. Rowbotham J. observed that adopting the Crown's view would introduce "an unacceptable level of uncertainty" and "absurd consequences" into the insolvency process.

The majority first noted that the Crown's deemed trust under the Fiscal Statutes is in the nature of a floating charge. Based on this position and a harmonious interpretation of the CCAA and the Fiscal Statutes, the majority characterized the Crown as a secured creditor. The Crown's interest in unremitted source deductions could thus be subordinated by court-ordered super-priority charges under the CCAA which expressly provides for such subordination. The crux of the majority's reasoning is that the Crown ignored the remedial purpose of restructuring legislation for the sake of tax collection. Recognizing that lenders and insolvency professionals would be discouraged from participating in restructuring proceedings without super-priority, the majority reconciled the CCAA and Fiscal Statutes to facilitate the survival of business and maintenance of employment for individuals. This interpretation coincides with the goals of maximizing tax revenue.

Decision of the Minority

Justice Walkeling would have allowed the Crown's appeal. In his view, a plain reading of the Fiscal Statutes bears only one possible meaning: the Crown is the beneficial owner of unremitted source deductions. These amounts must be paid to the Crown "notwithstanding" the security interest of other creditors including holders of super-priority charges.

He found that the policy reasons for encouraging restructurings cannot justify ignoring the ordinary meaning of the statutory text. If a strict interpretation of 227(4.1) of the *ITA* reduces the efficacy of the CCAA, that is a policy choice that only Parliament can address.

Implications

For now, *Canada North* provides greater confidence and protection for lenders and insolvency professionals in CCAA proceedings. However, some uncertainties remain, owing to the limited scope of both the majority and dissenting judgments.

The majority did not address in its reasons section 37 of the CCAA which would seem to nullify statutory deemed trusts in favour of the Crown once a CCAA proceeding is commenced, but explicitly preserves the source deduction deemed trusts arising under the Fiscal Statutes. This exemption arguably has the effect, in the circumstances at issue in *Canada North*, of treating the property of a debtor company as being held in trust for the Crown. This provision appears to reinforce the Crown's priority under the Fiscal Statutes given that a court has jurisdiction to charge only property belonging to the debtor.

Also, the dissenting judge concluded that the Crown is not a secured creditor under the CCAA, but did not

address the majority's observation that the definition of "secured creditor" under the CCAA includes the holder of a "charge", and that the Supreme Court of Canada has had occasion to describe the Crown's interest in a deemed trust as a "floating charge." The dissent also did not explicitly reconcile its interpretation with the ITA's definition of "security interest" which includes a reference to a deemed trust.

Based on these uncertainties and the importance of this issue to both the Crown and insolvency proceedings, it may be that the priority battle for source deductions is not finally settled.

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[1] 2017 ABQB 550.[ps2id id='1' target='']