

SCC Grants Leave to Appeal Priority of CCAA Charges Over Federal Source Deduction Deemed Trusts

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On March 26, 2020, leave to appeal the decision of the Alberta Court of Appeal (the “**Alberta CA**”) in *Canada v. Canada North Group Inc.*¹ (“**Canada North Group**”) was granted by the Supreme Court of Canada (the “**SCC**”).² No reasons were given.

The Federal Crown sought leave to appeal the Alberta CA majority decision that sections 11.2, 11.51 and 11.52 of the *Companies’ Creditors Arrangement Act* (“**CCAA**”)³ gave a court the discretion to grant charges in respect of claims for debtor-in-possession financing, directors’ indemnification and professional fees (collectively, the “**Priming Charges**”), in priority to the statutory deemed trusts for unremitted source deductions created by the *Income Tax Act* (the “**ITA**”), the *Canada Pension Plan* (the “**CPP**”) and the *Employment Insurance Act* (the “**EIA**”) and, together with the *ITA* and the *CPP*, the “**Fiscal Statutes**”) in favour of the Crown (collectively, the “**Federal Deemed Trusts**”).⁷

The above-cited charging provisions of the *CCAA* each state that a court may order that the charges “rank in priority over the claim of any secured creditor of the company.” Following the reasoning of the SCC in *Royal Bank of Canada v. Sparrow Electric Corp.*⁸ and *First Vancouver Finance v. M.N.R.*,⁹ the Alberta CA held that the Federal Deemed Trusts were, in essence, security interests and not true trusts creating proprietary interests. On this point, the Alberta CA sided with the earlier decision of the Alberta Court of Queen’s Bench in *Temple City Housing Inc. (Companies’ Creditors Arrangement Act)*¹⁰ and rejected the opposite conclusion of the Nova Scotia Supreme Court in *Re Rosedale Farms Limited, Hassett Holdings Inc, Resurgam Resources*.¹¹ The Alberta CA also noted that the definition of “security interest” in the *ITA* itself, which is cross-referenced in the *CPP* and the *EIA*, includes any interest arising out of a “deemed or actual trust.”¹²

The Alberta CA rejected the Crown’s argument that allowing *CCAA* charges to prime the Federal Deemed Trusts would defeat the purpose of the Fiscal Statutes. The presumption of statutory coherence dictated a harmonious interpretation of the *CCAA* and the Fiscal Statutes, allowing the objectives of both to be achieved. The Priming Charges allowed the *CCAA* companies to continue to operate their business, thereby raising sufficient funds to satisfy both the Priming Charges and the Crown’s claims. In contrast, if the Crown’s position was to prevail, it would have a chilling effect on commercial restructuring, which would in turn result in reduced tax revenue. In the words of the Alberta CA majority: “[t]he Crown’s position ignores that *CCAA* restructurings facilitate the survival of companies, the production of goods and services, and ultimately jobs, all of which serve as fuel for the fiscal base.”¹³

The Crown’s contention that the Federal Deemed Trusts had absolute priority was also viewed by the Alberta CA as unacceptably rendering redundant the *CCAA* section 6(3) requirement that such claims be paid in full under any plan of arrangement.¹⁴

The Alberta CA remarked that its conclusion was consistent with its recent ruling in *Edmonton (City) v. Alvarez & Marsal Canada Inc. (“Edmonton v. Alvarez”)*¹⁵ that court-ordered charges for a receiver’s fees, disbursements and borrowings could rank ahead of unpaid municipal property tax claims. We note, however, that the SCC refused leave to appeal *Edmonton v. Alvarez*.¹⁶

The Financial Services Group at Aird & Berlis can advise on proceedings initiated pursuant to the *BIA* or *CCAA*. Details are available at our **Financial Services webpage**.

¹ *Canada v. Canada North Group Inc.*, 2019 ABCA 314.

² *Her Majesty the Queen v. Canada North Group Inc., et al.*, 2020 CanLII 23629 (SCC).

³ *Companies' Creditors Arrangement Act, RSC 1985*, c C-36.

⁴ *Income Tax Act, RSC 1985, c 1 (5th Supp)*, at subsection 227(4.1).

⁵ *Canada Pension Plan, RSC 1985, c C-8*, at subsection 23(4).

⁶ *Employment Insurance Act, SC 1996, c 23*, at subsection 86(2.1).

⁷ See: Shakaira John, Ian Aversa and Gaurav Gopinath, "CCAA Priming Charges May Supersede Statutory Deemed Trusts."

⁸ *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 SCR 411.

⁹ *First Vancouver Finance v. M.N.R.*, 2002 SCC 49.

¹⁰ *Temple City Housing Inc. (Companies' Creditors Arrangement Act)*, 2007 ABQB 786; leave to appeal refused, *Canada v. Temple City Housing Inc.*, 2008 ABCA 1.

¹¹ *Re Rosedale Farms Limited, Hassett Holdings Inc., Resurgam Resources*, 2017 NSSC 160.

¹² *ITA*, *supra* note 4, at subsection 224(1.3); *CPP*, *supra* note 5, at subsections 23(3) and (4); *EIA*, *supra* note 6, at subsections 86(2) and (2.1).

¹³ *Canada North Group*, *supra* note 1, at paragraph 46.

¹⁴ It can be noted, however, that unlike the protection for employee and pension claims in subsection 6(5) and 6(6) of the *CCAA*, Federal Deemed Trust Claims are not protected in an asset sale by section 36 of the *CCAA*.

¹⁵ *Edmonton (City) v. Alvarez & Marsal Canada Inc.*, 2019 ABCA 109.

¹⁶ *City of Edmonton v. Alvarez & Marsal Canada Inc., in its capacity as Court-appointed Receiver of the current and future assets, undertakings and properties of Reid-Built Homes Ltd., et al.*, 2019 CanLII 94465 (SCC). See: Sam Babe, "SCC Refuses Leave to Appeal Receiver's Priority Over Property Tax Claims."

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