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SECURED CREDITOR PREVAILS OVER CONTRACTOR IN PRIORITY BATTLE OVER INPUT TAX CREDITS OF BANKRUPT

In *New Skeena Forest Products Inc. v. Kitawanga Lumber Co.* (2007) B.C.S.C. 808 the issue before the Court was whether the supplier of a taxable supply had a trust claim to the related input tax credits provided by the CRA to the bankrupt.

Golder Associates Ltd. (“Golder”) provided services to New Skeena Products Inc. (“New Skeena”), and also functioned as a general contractor to New Skeena. In its capacity as general contractor Golder bought and rented equipment from other suppliers. As is done in the ordinary course, Golder paid the GST to these suppliers and claimed input tax credits from New Skeena.

Pursuant to an indemnity arrangement the Government of British Columbia paid the Golder invoices rendered to New Skeena, less the amounts owing for GST. It was agreed that New Skeena would reimburse Golder for the GST portion of the invoices by claiming a GST credit from the CRA and sending the funds to Golder after New Skeena received them from CRA.

In the midst of this arrangement New Skeena filed for protection under the CCAA. The arrangement for partial payment by the Provincial Crown continued after New Skeena obtained CCAA protection, and New Skeena continued to pay Golder in respect of GST after obtaining the credits from CRA.

Approximately 18 months into the CCAA proceedings, New Skeena assigned itself into bankruptcy without giving prior public notice. At the time of the bankruptcy Golder was owed for services it provided prior to the bankruptcy along with GST. Approximately one month later a receiver was appointed over New Skeena.

Golder continued to do the remediation work and had the non-GST portions of its invoices paid by the Provincial Crown. The receiver of New Skeena continued to claim and recover input tax credits in respect of the GST.

However, the receiver refused to pay these amounts to Golder and Golder made an application to the Court to determine whether Golder was entitled to the benefit of the GST recoveries made by the receiver or whether those recoveries comprised part of the New Skeena estate and were available for distribution to New Skeena’s creditors in accordance with their relative priorities.

Golder argued that the tax credits were subject to a constructive trust in favour of Golder, and therefore did not fall within the bankrupt estate by virtue of section 67 of the BIA. In order to succeed with the constructive trust argument Golder was required to demonstrate that the Receiver had been unjustly enriched at Golder’s expense. In order to prove unjust enrichment Golder was required to prove (1) an enrichment of the receiver, (2) a corresponding deprivation of Golder, and (3) the absence of a juristic reason for the retention of the enrichment by the receiver.

In this case, Golder argued that the receiver had received an unjust enrichment in the amount of the tax credits, and Golder had been correspondingly deprived as a result of its liability to pay the GST to CRA without compensation from New Skeena. Further, Golder argued that there was no juristic reason that the receiver should be entitled to retain the tax credits.

The Court decided that Golder could not meet the “corresponding deprivation” test, stating:

The Court decided that Golder could not meet the “corresponding deprivation” test, stating:

While the GST tax credits received from the CRA by the receiver are clearly related to the GST billing, do they “correspond” within the meaning of test? It can be argued that to the extent that the receiver was enriched by receiving New Skeena input tax credits from CRA, any deprivation suffered by Golder was not directly connected to those receipts. The receiver would have received the same credits whether or not Golder had been paid. Golder was deprived because New Skeena failed to pay it the GST, not because the receiver received the input tax credits after filing the statutorily required returns. ... The money received back by the receiver from CRA was similar to the collection of accounts receivable which fall into a bankrupt’s general estate. The only difference here is that while Golder billed New Skeena for the GST amounts, it failed to take any timely steps to secure the obligation. That being so, it is difficult to see how Golder’s position should differ from that of any other unsecured creditor... However, even if the enrichment and deprivation corresponded sufficiently to meet the unjust enrichment test, the law

regarding priorities between secured and unsecured creditors provides a juristic reason for such an enrichment. Under the provisions of the BIA, secured creditors are paid before unsecured creditors.

And finally, the Court stated in summary:

What has happened to Golder happens frequently in BIA proceedings. Creditors who have not been paid for overdue GST amounts remain primarily liable for payment of those amounts to CRA and are unable to claim the tax credits received by the debtor company’s trustee or receiver. In such a case the position of the creditors such as Golder is that of an unsecured creditor for the amount of the GST, while CRA is a debtor of the debtor company’s trustee or receiver with respect to the GST credits. No constructive trust relationship arises.

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