

focus

on

Insolvency Law

April 2009

The logo for Fraser Milner Casgrain LLP, consisting of the letters 'FMC' in white on a dark blue square background.

FRASER MILNER CASGRAIN LLP

DEBTOR IN POSSESSION CHARGE IN PRIORITY TO CANADA REVENUE AGENCY'S DEEMED TRUST

In Canada (*Deputy Attorney General*) v. *Temple City Housing Inc.*, the Alberta Court of Appeal had to consider an application for leave to appeal a provision in a Companies Creditors Arrangement Act (Canada) ("CCAA") order granting a DIP lender a charge in priority over the claims of CRA. The claims of CRA consisted of deemed trust claims arising under sections 224(1.2), 227(4) and 227(4.1) of the *Income Tax Act* (Canada).

In November 2007, Temple City Housing Inc. ("Temple"), sought protection from its creditors under the CCAA in order to carry on business and restructure as a going concern. Temple's largest creditor was CRA who claimed approximately \$973,000 for unremitted source deductions and GST.

In order to continue paying its employees and to continue carrying on business, Temple required additional financing. Echo Merchant Fund (the "DIP Lender") made loans of \$185,000 and \$91,500 on the condition that it obtains a security interest in the property of Temple on a super priority basis over all other claims, including the claims by CRA. The CCAA judge held that, in the circumstances, particularly given the number of employees affected and the spirit of the CCAA, the DIP Lender would have a first priority charge to the extent of \$300,000 over all other claims of Temple, specifically the claims of CRA. CRA sought leave to appeal the CCAA judge's order in relation to the DIP Lender first priority charge.

The Court of Appeal dismissed CRA's application for leave to appeal. In its decision, the Court of Appeal determined, in accordance with the reorganized test for granting leave in the CCAA, that (1) the appeal will not be of significance to CCAA practice because the legislation has been amended to include specific authority to grant super priority to DIP financing (although this provision has not been proclaimed in force, the issue of the CCAA judge's inherent jurisdiction to order such priorities will not be an issue in future CCAA proceedings); (2) the point on appeal may not be of significance to the action itself as the DIP Lender has advanced the funds which have already been paid to Temple's employees and suppliers; (3) an appeal would hinder the CCAA proceedings because without an order giving the DIP Lender first priority over CRA's claim, the DIP Lender would not have advanced the funds and by consequence, would be unable to restructure under the CCAA.

For further information please contact Dave Mann at 403-268-7097 or David LeGeyt at 403 268-3075, or visit our website www.fmc-law.com/insolvency.