

focus

on Financial Services



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NO SCORE FOR CCRA

Recently, the Ontario Superior Court of Justice determined that the CCAA **did not provide the Crown with any special priority for claims under the *Income Tax Act* for penalties and interest accrued and owing on unremitted employee source deduction arrears.** In the *Companies' Creditors Arrangement Act* restructuring proceedings for the *Ottawa Senators Hockey Club Corporation*, the Court also stated that **the Crown did not enjoy any superpriority for arrears of GST owing by the debtor.** The deemed trust granted to the Crown for GST arrears under the *Excise Tax Act* was not specifically protected by the CCAA.

Accordingly, in CCAA proceedings, claims under the *ITA* for penalties and interest accrued and owing on unremitted source deductions, and all arrears of GST owing by the debtor, are deemed to be ordinary unsecured claims with no priority over other creditors.

The Court decided this by interpreting the specific wording of the CCAA, which permits certain specific types of crown claims to retain their priority over unsecured creditors, while all other Crown claims are deemed to be ordinary unsecured claims.

Unlike the CCAA, under the specific provisions of the *ETA* and the *Bankruptcy and Insolvency Act*, upon the occurrence of bankruptcy, claims for unremitted GST, which ordinarily have a superpriority over the claims of other creditors, become ordinary unsecured claims with no priority over other creditors.

This case harmonizes the treatment of these Crown claims under the *BIA* and the *CCAA*. This case is currently under appeal by the Crown.

If you would like to discuss the *Ottawa Senators* case, or the priority of Crown claims, please contact **Alex Ilichenko** of our Toronto office at (416) 863-4748.

TAXING QUESTION

Can the Minister of National Revenue demand from a bank information about unnamed persons that may be relevant to an investigation under the *Income Tax Act*? In a recent case, the Federal Court said that **the Minister cannot demand such information** from a third party without first obtaining a court order.

In *MNR v. Toronto Dominion*, the Minister requested from the Bank the name, coordinates and account numbers of unnamed persons who acted as a nominee of the tax debtor or from whom the tax debtor held a power of attorney with respect to such accounts.

The Minister argued that the Court should look to the purpose of the *ITA* and should find that the *ITA* implied the Minister's right to obtain information about third parties when the intent of the request was only in respect of an investigation about a named person, that is a tax debtor. The wording of the *ITA* authorizes the Minister to demand information about the accounts of a named person in the context of an

investigation under the *ITA* without court approval. It also provides that the Minister cannot without a court order impose a requirement on a third party to provide information about an unnamed person.

The Minister, in framing the request as one regarding the tax debtor, a named person, was attempting to do indirectly what he could not do directly - to demand information about unnamed persons.

The Court decided that where the wording of the *ITA* section is clear and highly detailed, the Court should not imply additional requirements or exceptions. To do so would create intolerable uncertainty into this area of law. The difficulty that the Minister faces to obtain a court order with respect to unnamed persons, and the fact that the information sought may be useful to the investigation, were not factors to be considered by the Court.

If you would like to discuss this case please contact **Lori Lyn Chanda** of our Toronto office at (416) 863-4543.

“A COVENANTOR OR A GUARANTOR?” THAT IS THE QUESTION

The British Columbia Court of Appeal has recently clarified the difference between covenantors and guarantors. In *Cawker*, a couple signed their daughter’s mortgage as covenantors. The Court of Appeal said that **they remained liable to pay the mortgage, despite the fact that the daughter had amended her own agreement with the bank.**

The daughter renewed her mortgage for a five year term at an increased interest rate, after the mortgage expired. Her parents did not sign the mortgage modification agreement, nor were they notified of its existence. When the daughter defaulted under the mortgage, the credit union sought to collect from the parents as covenantors. The trial judge found that the parents were not liable under the mortgage extension. The Court of Appeal disagreed — they were indeed liable, but only under the original mortgage terms.

The Court of Appeal explained the difference between “covenantors” and “guarantors”. A covenantor has its own separate and direct agreement to pay the creditor, independent of the borrower’s obligations. Where a mortgage is modified, the covenantor’s obligations under the original mortgage must be fully released and replaced by the modification agreement. If the creditor refuses to release and replace the original mortgage, then the covenantor remains bound by the original mortgage terms, even if the borrower has modified its own mortgage agreement with the creditor.

In contrast, a guarantor’s obligations are dependent on the borrower’s obligations. The guarantor must receive notice of and agree to any material amendment to the debtor’s obligations. Otherwise, the guarantor may be released from its liability. Even if a guarantee states that the guarantor is bound “as if they were principal debtors”, a guarantor may retain its equitable right to receive notice and agree to amendments, unless that guarantor expressly waives those rights.

In *Cawker*, the Court of Appeal found that the parents’ original agreement to pay had not been released and replaced by the modification of mortgage.

If you would like to discuss the *Cawker* decision, please contact **Jennifer Dezell** of our Vancouver office at (604) 443-7146.

WHAT’S NEW AT FMC?

Curtis McDonnell of our Toronto Employment and Labour Group and **Gillian Akai** of our Toronto Technology Group recently delivered a presentation to the Hamilton Halton Construction Association on the subject of privacy law.

Barry Corbin of our Toronto Private Client Services Group wrote an article for the June 17, 2004 issue of CCH Tax Topics entitled *Testamentary Trusts - Not a Dead Issue - Use Them But Don't Abuse Them*. FMC has partnered with CCH Ltd. to contribute articles on a monthly basis to their Tax Topics column.

Maggie Brady, Jillian Shortt and **David Tsubouchi** of our Toronto Real Estate Group delivered presentations at the 7th Annual Federated Press Advanced Real Estate Financing Skills Summit. David presented on *Public-Private Partnerships*, while Jillian presented on the *Legal Perspective of Bondable Leases*. Maggie’s presentation was entitled *Innovative Infrastructure Transactions*.

John Fabello of our Toronto Litigation Group and **Sean Boyle** of our Vancouver Litigation Group co-authored an article for Lawyer’s Weekly. The article, entitled, “*SCC Weighs In on Power of Securities Regulators*” discussed the recent Supreme Court of Canada’s decision in *Cartaway Resources Corp.* which impacts the severity of sanctions imposed by securities regulators in Canada.