

Supreme Court of Canada Grants Leave to Challenge a CCAA Court's Jurisdiction to Prime Statutory Deemed Trusts in Favour of the Crown

Jeffrey Oliver, Jared Enns

March 27, 2020

Introduction

On March 26, 2020, the Supreme Court of Canada (the SCC) granted the leave application (the Leave Application) of the Crown on behalf of Canada Revenue Agency (CRA) in *Her Majesty the Queen v Canada North Group Inc, et al*, which sought leave to appeal the decision of the majority of the Alberta Court of Appeal in *Canada v Canada North Group Inc*, 2019 ABCA 314 (the Appeal Decision).

In the Appeal Decision, the majority upheld the decision (the Chambers Decision) of Justice Topolniski in *Canada North Group Inc*, 2017 ABQB 550 that:

1. statutory deemed trusts (Deemed Trusts) in CCAA proceedings in favour of CRA pursuant to the *Income Tax Act* (the ITA), the *Canadian Pension Plan Act* (the CPPA), and the *Employment Insurance Act* (the EIA and, together with the ITA and the CPPA the Fiscal Statutes), are properly characterized as security interests; and
2. the CCAA gives the Court the ability to grant priority charges that rank ahead of CRA's security interest arising out of the Deemed Trusts.

Importantly, and as the first appellate decision that squarely considered the nature of Deemed Trusts in insolvency proceedings, the majority added some much-needed clarity on this issue which had, prior to the Chambers Decision, been the subject of contradictory decisions in Canada.

Leave Granted

The SCC's decision to grant the Leave Application will result in the final determination on the interplay of the CCAA and the Fiscal Statutes. The outcome of this decision will be closely watched by insolvency professionals and interim financiers, both of whom rely upon the priority granted to CCAA restructuring charges relative to CRA deemed trust claims pursuant to the Fiscal Statutes.

Of additional interest is the SCC's somewhat unusual order that costs be granted "in the cause to the respondents Ernst & Young ["E&Y"] and Business Development Bank of Canada ["BDC"]," which suggests that if E&Y or BDC are successful in responding to the appeal, and are granted costs in connection therewith, they will each be entitled to recover a portion of the costs incurred in responding to the Leave Application. This may suggest that the SCC recognizes that the issues on appeal are factually moot but remain important to resolve for the sake of the profession.

Finally, due to the exceptional situation caused by COVID-19, and the SCC's adjournment of "cases previously scheduled for hearing in March, April and May" to June of this year, it is not expected that a final disposition of this matter will be made by the SCC until late 2021 or even as late as 2022. Further updates on the status and timing of the hearing will be provided as they become available.

Jeffrey Oliver, Mary I.A. Buttery, Q.C., and Jared Enns, of Cassels Brock & Blackwell LLP, act as counsel to the Respondent, Business Development Bank of Canada in this matter.

More information on this matter can be found [here](#).

This publication is a general summary of the law. It does not replace legal advice tailored to your specific circumstances.