Cassels

# The Supreme Court of Canada Releases Decision in Canada North

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**July 29, 2021**

## Introduction

On July 28, 2021, the Supreme Court of Canada (SCC) issued its much-anticipated reasons in *Her Majesty the Queen in Right of Canada v. Canada North Group Inc., et al*[1] concerning the relative priority of court ordered restructuring charges (Priming Charges) granted pursuant to the *Companies' Creditors Arrangement Act* (CCAA), and statutory deemed trusts (Deemed Trusts) arising in favour of Canada Revenue Agency (CRA) pursuant to the *Income Tax Act* (the ITA), the *Canadian Pension Plan Act*, and the *Employment Insurance Act* (collectively, the Fiscal Statutes) for deducted but unremitted source deductions.

In four sets of reasons, a 5-4 majority of the SCC dismissed CRA's appeal, concluding that a supervising CCAA court has jurisdiction to grant the Priming Charges and subordinate the Deemed Trusts where doing so is necessary to fulfill the broad, remedial objectives of the CCAA. Though taking somewhat different approaches to the issue, the concurring decisions of Justice Côté and Justice Karakatsanis summarize some of the circumstances in which necessity will require a subordination of the Deemed Trusts. These circumstances are summarized below.

## Background on Canada North: CRA's Assertion of Statutory Deemed Trusts

Our summary of the facts and procedural background on the *Canada North* decision can be found here.

## Decision of the Supreme Court of Canada

In four sets of reasons released July 28, 2021, a 5-4 majority of the SCC dismissed CRA's appeal as follows...

**Reasons of Justice Côté (Chief Justice Wagner and Justice Kasirer Concurring)**

In the first set of reasons, Justice Côté noted that the broad, remedial purpose of the CCAA necessitates a cautious approach "when interpreting security interests so as to ensure" the fulfillment of the CCAA's important purpose.[2] Justice Côté noted that *CCAA* proceedings operate for the benefit of the general pool of creditors, not the benefit of a single creditor, and that an interpretation of the relevant statutes that "would limit or eliminate the prospect of reorganization and recovery under the CCAA" could not be countenanced.[3]

Justice Côté then considered whether section 227(4.1) conferred a proprietary or ownership interest on CRA.[4] As this provision of the ITA opens with the phrase "notwithstanding any other provision of this Act … any other enactment of Canada, any enactment of a province or any other law,"[5] Justice Côté held that "Parliament has expressly chosen to dissociate itself from provincial private law."[6] Because of this deviation, Justice Côté reasoned that the Deemed Trusts must be understood on their own terms, having regard for Parliament's use of words (i.e., "beneficially owned," "deemed trust," and "held in trust").

Having regard to the language of the CCAA and the Fiscal Statutes, as well as the law of trusts in both the civil law and common law contexts, Justice Côté ultimately concluded as follows:

1. the Fiscal Statutes do "not create a beneficial interest that can be considered a proprietary interest," because the Deemed Trusts do not share the characteristics of a common law trust;[7]

2. the Priming Charges were not "security interests" within the meaning of section 224(1.3) of the ITA, and were therefore not subject to or brought within section 227(4.1);[8] and

3. it was not necessary to determine whether CRA was a secured creditor, as the jurisdiction to grant the Priming Charges is grounded in section 11 of the CCAA (which authorizes courts to grant priming charges that are not specifically provided for in the CCAA)[9] and that jurisdiction is not limited by sections 11.2, 11.51, and 11.52 of the CCAA.[10]

Though concluding the jurisdiction to subordinate the Deemed Trusts exists, Justice Côté cautioned that this jurisdiction should only be exercised when necessary:

In creating a super-priority charge, a supervising judge must always consider whether the order will achieve the objectives of the *CCAA*. When there is the spectre of a claim by Her Majesty protected by a deemed trust, the judge must also consider whether a super priority is necessary."[11]

In Justice Côté's view, the circumstances in which it may be necessary to subordinate the Deemed Trusts include the following:

1. where the supervising judge believes that, without a super-priority charge, a particular professional or lender would not act, it will likely be necessary to subordinate the Deemed Trusts; and

2. if the proceeding is a “liquidating CCAA” (one in which the objective is to liquidate rather than preserve a debtor company as a going concern), the subordination of the Deemed Trusts will have less justification (i.e., will be less necessary) “beyond potential unjust enrichment arguments.”[12]

**Concurring Reasons of Justice Karakatsanis and Justice Martin**

Justice Karakatsanis and Justice Martin concurred with Justice Côté in their dismissal of CRA’s appeal, but based their decision on differing reasons. Justice Karakatsanis noted that Parliament has generally “shown a tendency to move away from asserting Crown priority in insolvency [proceedings]”[13] and, similarly to Justice Côté, went on to conclude as follows:

1. section 11 of the CCAA, as opposed to sections 11.2, 11.51 and 11.52 thereof, confers a supervising CCAA court with the jurisdiction to subordinate the Deemed Trusts;

2. the specific nature of beneficial ownership of deemed trust property must be determined in the context in which it is asserted, because the term is “a manipulation of private law concepts, without settled meaning.”[14]

Like Justice Côté, Justice Karakatsanis set out a number of factors for determining whether it would be necessary to subordinate the Deemed Trusts. These factors include the following:

1. whether the interim lender has indicated, in good faith, that it will not lend to the debtor without ranking ahead of the Deemed Trust;

2. the relative amount of the interim loan and the unremitted source deductions;

3. whether and for how long the Crown allowed source deductions to go unremitted without taking action; and

4. the prospect of a successful restructuring, and whether the CCAA is likely to be used to sell the debtor’s assets.[15]

Finally, Justice Karakatsanis held, without enumerating them, that “different considerations will apply if a court is considering ranking a different party’s charge, like the Monitor’s or Directors’ Charge, ahead of the Crown’s deemed trust.”

**Dissenting Judgments**

Two dissenting judgments were issued.

Justices Abella, Brown, and Rowe would have allowed the appeal, on the basis that:

1. the Fiscal Statutes give absolute priority to the Deemed Trusts over all security interests, notwithstanding the CCAA;

2. Priming Charges are “security interests” within the meaning of the Fiscal Statutes; and

3. the CCAA does not subordinate the claims under the Deemed Trusts arising under the Fiscal Statutes to the Priming Charges.

In their view, these conclusions were sufficient to decide the issue on appeal.

Justice Moldaver issued separate dissenting reasons. Although concurring with Abella, Brown and Rowe in the result, Justice Moldaver would have left “the question of the nature of the Crown’s interest to another day.”[16] In Justice Moldaver’s view, although the discretionary authority under section 11 of the CCAA could, in theory, be invoked to subordinate the Deemed Trusts “that power is ultimately stopped short by the express language of s. 227(4.1) [of the ITA].”[17]

## Conclusion

The majority of the SCC in *Canada North* clearly held that the CCAA court has the authority to subordinate the Deemed Trusts to Priming Charges under section 11 of the CCAA. Of particular and practical importance to insolvency professionals and interim lenders, the decisions of Justice Côté and Justice Karakatsanis enumerate a list of factors that the supervising CCAA court will need to consider when determining whether to so exercise its discretion.

*Jeffrey Oliver and Mary I.A. Buttery, Q.C., with Jared Enns, of Cassels Brock & Blackwell LLP argued the appeal on behalf of the Respondent, Business Development Bank of Canada.*

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[1] *Her Majesty the Queen in Right of Canada v. Canada North Group Inc., et al.*, 2021 SCC 30 (*Canada North*)

[2] *Ibid*, at para 31.

[3] *Ibid*.

[4] *Ibid*, at para 39.

[5] *Ibid*, at para 41.

[6] *Ibid*.

[7] *Ibid*, at para 57.

[8] *Ibid*, at para 68.

[9] *Ibid*, at para 70.

[10] *Ibid*, at para 71.

[11] *Ibid*, at para 72.

[12] *Ibid*, at para 73.

[13] *Ibid*, at para 150.

[14] *Ibid*, at para 181.

[15] *Ibid*, at para 179.

[16] *Ibid*, at para 256.

[17] *Ibid*, at para 259.

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