Ottawa Senators Revisited — Could This One Go Into Overtime
Jamie Wilks reviews the second period of the Ottawa Senators' tilt with the CRA.

GST/HST AND OTHER LEGISLATION

THE INCONSISTENT TREATMENT OF GST PRIORITIES BETWEEN THE BIA AND CCAA

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Consistent Treatment of GST Priorities in CCAA between Alberta and Ontario

On January 6, 2005, the Ontario Court of Appeal allowed the Crown's appeal for a super-priority for GST deemed trust monies in a Companies' Creditors Arrangement Act ("CCAA")[1] proceeding.[2] The appeal arose from a motion judgement of the Ontario Superior Court of Justice.[3] The Ontario Court of Appeal's decision brings Ontario's interpretation of the Crown's GST priorities into line with the Alberta jurisprudence.[4]

Inconsistent Treatment of GST Priorities between CCAA and BIA

The Ontario Court of Appeal decision leads to inconsistent treatment of GST claims between the two principal pieces of federal insolvency legislation, the CCAA and the Bankruptcy and Insolvency Act ("BIA").[5] The Ontario Court of Appeal resolved the conflict between the GST deemed trust provision in section 222 of the Excise Tax Act ("ETA")[6] and section 18.3 of the CCAA, which defeats a GST deemed trust, in favour of the ETA.

Resolution of the ETA and CCAA Conflict by the Court of Appeal

The source of the conflict is found in inconsistencies between the ETA and the CCAA. Subsections 222(1.1) and (3) of the ETA provide that a GST deemed trust does not survive a bankruptcy. The Crown, therefore, does not enjoy a super-priority for a GST deemed trust relating to any GST liability arising before a bankruptcy. Section 222 makes no reference to an exception from the GST super-priority in the case of a CCAA proceeding. Section 222 of the ETA allows for an explicit override in the case of the BIA, but not in the case of the CCAA.

While the Ontario Court of Appeal and the motion judge both purported to follow the Supreme Court of Canada decision in *City of Verdun v. Dore*[7] to resolve the statutory conflict, they each applied different canons of statutory interpretation. In the motion judge's view, the 1997 amendments to section 18.3 of the CCAA are an exception to the 2000 amendments to section 222 of the ETA. By the implied exception rule, the more specific CCAA provision should not be considered within the scope of the more general ETA provision. In the Court of Appeal's view, the 2000 amendments to the ETA overrode the 1997 CCAA amendments. By the implied repeal rule, the later ETA amendments repealed the earlier CCAA amendments. In Dore, it was "specified that the subsequent general legislation derogates from the prior special Act."[8] Like in Dore, the legislature expressly gave effect to the precedence of the later general legislation over the specific earlier legislation by invoking an override phrase.[9]

Above all, the Court of Appeal reached the decision that it did because it believed it gave effect to the will of Parliament. The Court of Appeal stated:[10]

1 R.S.C. 1985, c. C-36, as amended.
2 *Ottawa Senators Hockey Club Corp., Re* (2005), 2005 CarswellOnt 8, 6 C.B.R. (5th) 293 (Ont. C.A.).
3 This article should be read in conjunction with our case comment on the motion judgement published in the March 2004 "GST & Commodity Tax"
4 *Solid Resources Ltd., Re* (2002), 2002 CarswellAlta 1699, [2003] G.S.T.C. 21, 40 C.B.R. (4th) 219 (Alta Q.B.); and Gauntlet Energy Corp. (Re)., 2003 Carswell Alta 1735, [2003] A.J. No. 1504, [2003] G.S.T.C. 193 (Alta Q.B.).
5 R.S.C. 1985, c. B-3, as amended.
6 R.S.C. 1985, c E-15, as amended.
7 [1997] 2 S.C.R. 862.
8 Ibid, page 887.
9 The override in subsection 222(3) of the ETA reads:
"Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the Bankruptcy and Insolvency Act), any enactment of a province or any other law,"
10 Paragraph 42 of the Ontario Court of Appeal decision.

> "First, the overarching rule of statutory interpretation is that statutory provisions should be interpreted to give effect to the intention of the legislature in enacting the law."
>
> In the next paragraph of the decision, the Court of Appeal has no doubts about the Parliamentary intent revealed by the override provision in subsection 222(3) of the ETA:
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> "The legislative intent of s. 222(3) of the ETA is clear. ... The BIA and CCAA are closely related federal statutes. I cannot conceive that Parliament would specifically identify the BIA as an exception, but accidentally fail to consider the CCAA as a possible second exception. In my view, the omission of the CCAA from s. 222(3) of the ETA was most certainly a considered omission."

It is true that "the overarching rule of statutory interpretation" is to give effect to the will of the elected legislature. All canons of statutory interpretation derive their basis from this underlying purpose. The real difficulty is in determining the legislature's intent. Where we differ with the Court of Appeal is on what Parliament's intent was in drafting subsection 222(3) of the ETA. We believe that the omission of the CCAA from the list of exceptions to the GST deemed trust provisions was an oversight by Parliament. The override provision is intended to complement the amendment that added subsection 222(1.1) to the ETA, which took effect on October 1, 1992 and was passed into law in 1993. By the time of the 2000 amendments to subsection 222(3) of the ETA, the CCAA and federal insolvency legislation had undergone considerable reform, including by the introduction of section 18.3. When Parliament finally completed its "housekeeping" amendment to subsection 222(3) of the ETA to bring it into line with subsection 222(1.1) of the ETA, it failed to focus its intention on the intervening reform to the CCAA.[11]

There is no rational policy basis for different treatments of GST priorities under the BIA and CCAA. The Court of Appeal should have also taken this fact into account in considering Parliamentary "intention". The reform and overhaul of federal insolvency legislation during the 1990's was intended to harmonize and rationalize insolvency legislation. The thrust of the Court of Appeal's decision goes against this Parliamentary intention. The Court of Appeal's decision has the effect of secured creditors preferring bankruptcy to CCAA to defeat the Crown's super-priority for GST deemed trust monies where other considerations would dictate that the flexibility of CCAA is preferable to bankruptcy.

Need for Uniformity between BIA and CCAA — Parliament Should Act

The secured creditors in Ottawa Senators might appeal the decision on the Crown's super-priority in a CCAA proceeding to the Supreme Court of Canada. However, the amount of money at stake might not warrant the cost of an appeal to the Supreme Court.[12] Of course, the Supreme Court's decision would have important precedential value beyond this case for lenders. Alternatively, it is the hope that Parliament would step into the breach and resolve the inconsistent treatment between the BIA and CCAA for Crown GST claims, by amending the ETA to add a CCAA proceeding as an excepted circumstance to the GST deemed trust super-priority. Secured lenders might devote their efforts to lobbying Parliament in this regard.

The ultimate negative effects of allowing the Court of Appeal's decision to stand could be to close the doors on the potential benefits of CCAA protection and restructuring in appropriate cases, to increase the costs to borrowers of secured financing and to decrease the availability and choice for financing.

Other Issue Considered — Crown's Priority for Interest and Penalties on Source Deductions

The Court of Appeal also considered the Crown's appeal alleging its priority for penalties and interest on unremitted deductions from employees' wages. The motion judge found that sections 18.3 and 18.4 of the CCAA provided no special priority to the Crown for interest and penalties.

On appeal, the Crown raised an interesting argument. It argued that the sale of the Ottawa Senators team subject to a CCAA distribution scheme to creditors constitutes a "compromise or arrangement" pursuant to section 18.2 of the CCAA. This provision purportedly gives the Crown a super-priority for not only source deductions, but also for "any related interest, penalties or other amounts".

The Court of Appeal rejected the Crown's arguments on the basis "that this appeal [does not provide] a proper forum to address this issue on the merits."[13] First, the Court of Appeal believed that this argument was not argued before the motion judge.[14] Second, "we are hampered on this issue by an inadequate motion record which makes it difficult to properly consider the Crown's argument relating to s. 18.2 of the CCAA."[15] Finally, and less importantly, the Court of Appeal did not wade into this difficult issue because of the relatively small dollars at stake for the Crown.[16]

The fundamental issue on the merits awaits another day in court. The Crown's priority for interest and penalties on unremitted source deductions depends on the scope of section 18.2 of the CCAA. As the Court of Appeal states:[17]

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11 Since the Superintendent of Bankruptcy takes an active interest in championing amendments relating to the BIA, it is entirely possible that the intervening CCAA reform and amendments fell off the "radar screen" of Parliament.

12 Including interest and penalties, which arguably should not be included in a GST deemed trust claim, the amount in dispute is $187,470.25. See paragraph 13 of the Court of Appeal decision.

13 Paragraph 21 of the Court of Appeal decision.

14 Paragraphs 22 and 23 of the Court of Appeal decision.

15 Paragraph 24 of the Court of Appeal decision.

16 Paragraphs 29 and 30 of the Court of Appeal decision.

17 Paragraph 25 of the Court of Appeal decision.

> The core of the Crown's argument is that a sale of the assets of a company is a compromise or arrangement that triggers the application of s. 18.2 of the CCAA.

Interpretation of the CCAA leaves plenty of room for the exercise of discretion by a court and judge-made law. Perhaps somewhat surprisingly, a "compromise or arrangement" is not specifically defined in the CCAA. The term is not necessarily synonymous with a "plan". A sale and distribution scheme sanctioned under the CCAA may be sufficient to constitute a "compromise or arrangement" by compromising economic recovery and legal rights of creditors.