

Case Law Update: Century Services Inc. v. Canada (Attorney General)

January 18, 2011

Bankruptcy and Insolvency *Companies' Creditors Arrangement Act* Priorities

In the first decision of the Supreme Court of Canada considering the *Companies' Creditors Arrangement Act* ("CCAA"), the court discusses the principles of interpretation for the CCAA. Apart from its importance in that respect, the decision is also of interest for its discussion of statutory interpretation, particularly with respect to statutory amendments.

In Century Services, the issue was the relationship between s. 222(3) of the *Excise Tax Act* ("ETA"), which creates a statutory deemed trust over unremitted GST, and s. 18.3(1) of the CCAA, which provided that any statutory deemed trusts in favour of the Crown did not operate under the CCAA, subject to certain exceptions (none of which include GST). An order made in the CCAA proceedings allowed a payment to the debtor company's main creditor, Century Services Inc.; however, the debtor company was also ordered to hold back an amount equal to its unremitted GST, and segregate it in the Monitor's trust account. The debtor company's restructuring efforts failed, and it moved for a partial lift of the stay of proceedings to allow it to make an assignment in bankruptcy under the *Bankruptcy and Insolvency Act* ("BIA"). The Crown moved for an order requiring the immediate payment of unremitted GST.

The motion was denied by the CCAA chambers judge, but the Court of Appeal for British Columbia allowed the appeal. The Court of Appeal held that the chambers judge had no discretion under s. 11 of the CCAA (which permits orders, inter alia, staying claims against the debtor) to continue the stay of the Crown's claim, and that the order that funds be segregated in the Monitor's account in the amount of the GST payments created an express trust in favour of the Crown.

The Supreme Court of Canada allowed the appeal. The reasons of the majority emphasized the flexibility of the CCAA. Its general language should not be read restrictively, and the requirements of appropriateness, good faith and due diligence should be considered by the court whenever exercising CCAA authority. The purpose of orders made under the CCAA, and the means they employ, should be focused on furthering efforts to avoid social and economic losses resulting from liquidation of an insolvent company. There should also be regard to a harmonious transition from the CCAA to the BIA, with the objective of a single proceeding common to both statutes. The court held there is no "gap" between the CCAA and the BIA; they operate in tandem. Thus, the chambers judge had the discretion under the CCAA to effectively construct a "bridge" between the CCAA proceedings and liquidation under the BIA, by staying the Crown's claim for payment of the GST monies. On the question of the express trust, the majority found that no express trust was created by the chamber judge's order; the funds were not sufficiently segregated to have a clear beneficiary, and the uncertainty of the outcome of the CCAA restructuring eliminated any certainty respecting the vesting of a beneficial interest in these funds in the Crown.

Justice Abella dissented and took the view that the ETA gave priority during CCAA proceedings to the Crown's deemed trust over unremitted GST, and that the court's discretion under s. 11 of the CCAA was circumscribed accordingly. Justice Abella examined the various amendments to the ETA, the BIA and the CCAA over the years, and concluded there was a clear inference of a legislative decision to protect the deemed trust over GST in the ETA from the operation of s. 18.3(1) of the CCAA. The chambers judge was

therefore required to respect the priority scheme set out in s. 222(3) of the ETA, and neither ss. 11 or 18.3(1) of the CCAA would give him authority to deny the Crown's request of the payment of GST funds during the CCAA proceedings. Due to this finding, Abella J. held it was unnecessary to consider whether there was an express trust.

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