



Canada Revenue Agency Super Priority

By
Paul De Francesca
Lawyer

Abstract

Lenders should make enquiries of borrower's in order to ensure that there are no outstanding payments to be made by the borrower to the Canada Revenue Agency ("CRA") such as unremitted HST and employee source deductions. If amounts are outstanding, CRA will have a priority over any monies owed by the borrower to the lender. As well, lenders should be careful if there is any execution in favour of CRA that was filed post the lender's security because the execution filed by CRA may relate to outstanding tax monies that were owed by the borrower prior to the registration of the lender's mortgage.

Full Article

According to legislation, the CRA has a super-priority over a mortgage in regards to a repayment of creditors in the event the borrower defaults. This results in the CRA being able to collect any amount owing by the borrower before any payment is to be made to the lender. This deemed trust attaches to all of the tax debtors assets in the amount of the unremitted source deductions and continues so long as any default in source deductions continues; therefore it has the ability to displace any pre-existing security interests in the assets, hence its description as having "super-priority" status.

As such, it is prudent for a lender or the lender's lawyer to obtain the written consent of the borrower to do a file search of CRA. This would give the lender some comfort that there are no outstanding HST payments or employee source deductions payable by the borrower.

The case of Attorney General of Canada (MNR) v. GlassCell Isfab Inc. 2011 ONSC 2660, concerns an application by the Attorney General of Canada ("AG") to the Superior Court of Justice for an order requiring the Respondent, GlassCell Isfab Inc. ("GlassCell"), to pay to CRA the amount of \$121,042.47 plus interest and costs.

In 2008, GlassCell obtained judgment in the amount of \$219,460.90 plus costs in an action against Quality Insulation Ltd. ("Quality") to recover the costs of goods sold and delivered by GlassCell to Quality. GlassCell obtained a Writ of Seizure and Sale against Quality and caused garnishments to be issued and served. Pursuant to the Creditors Relief Act, R.S.O. 1990, C.45, the garnishments were paid to the Sheriff and notices of proposed



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distribution were issued stating that the amount would be distributed to GlassCell unless disputed within ten days of the notice.

Unbeknownst to GlassCell, Quality was also a tax debtor to CRA for unremitted source deductions (representing income tax, employment insurance, and Canada Pension Plan contributions withheld from its employees' to be remitted to the CRA). Upon discovering that the Sheriff was proposing to distribute the amount to GlassCell, CRA attempted to object to the proposed distribution and make a claim for the amount owed for the unremitted source deductions; however, the CRA's objection was rejected by the Sheriff on the grounds that it was made after the ten day notice period. Additionally, the AG brought a motion to extend the time for the CRA to contest the proposed distribution of funds, but this was dismissed. The AG then made an application to the Superior Court of Justice. The court had to decide whether the CRA had priority over the execution creditor GlassCell. It was concluded that the CRA had a statutory deemed trust which has priority over claims of all creditors. This trust cannot be invalidated by procedural irregularities (such as missing the objection period for a notice of proposed distribution of garnished funds).