Court File No.: CV-14-10766-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 47 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED; AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O., 1990, c, C.43, AS AMENDED

AND IN THE MATTER OF SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c, B-3, AS AMENDED; AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c, C.43, AS AMENDED

BETWEEN:

TRISURA GUARANTEE INSURANCE COMPANY

Applicant

- and -

EBERSOLE EXCAVATING INC. AND D&S RAILWAY CONSTRUCTION INC.

Respondents

RESPONDING FACTUM OF THE CANADA REVENUE AGENCY

(for distribution hearing returnable May 13, 2015)

May 1st, 2015

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B E T W E E N:

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Applicant

- and -

EBERSOLE EXCAVATING INC. AND D&S RAILWAY CONSTRUCTION INC.

Respondents

RESPONDING FACTUM OF THE CANADA REVENUE AGENCY

(for distribution hearing returnable May 13, 2015)

<u>TABLE OF CONTENTS</u>

OVERVIEW

1. This responding factum is filed on behalf of the Canada Revenue Agency ("CRA") in the context of the distribution hearing[1] of funds held by Grant Thornton Limited (the "Interim Receiver" and the "Receiver") arising from the sale of certain assets of Ebersole Excavating Inc. ("Ebersole") and D&S Railway Construction Inc. ("D&S Railway") by Maynards Industries Ltd. ("Maynards").

2. The CRA claims priority entitlement to $190,669, plus all interest accrued thereon, from the DLPC Funds[2].

3. This responding factum is submitted in response to the claim of Trisura Guarantee Insurance Company ("Trisura") in its factum dated April 24, 2015 (the "Trisura Factum") that, on the basis of a perfected PPSA registration, it held and holds security in priority to all other claimants over the DLPC funds.[3]

4. CRA submits that, prior to the bankruptcies of Ebersole and D&S Railways (together, the "Debtors"), Trisura's security interest did not have priority over any Crown deemed trust amounts and at the time of the creation of the CRA Trust Fund[4], CRA held absolute priority to the amounts placed in trust by Sandra Ebersole.

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[1] As defined at paragraph 5 of the Order of Justice Wilton-Siegel, dated March 6, 2015.

[2] As defined at paragraph 5(b) of the Order of Justice Wilton-Siegel, dated March 6, 2015.

[3] Factum of Trisura Guarantee Insurance Company, dated April 24, 2015, para 19.

[4] The $190,669 amount placed in trust for CRA by Sandra Ebersole, as defined in the Factum of the Canada Revenue Agency, dated April 24, 2015, para 10.

PART I – STATEMENT OF FACTS

The Deemed Trust Amounts at the Date the CRA Trust Fund was Created

5. On November 14, 2014, Sandra Ebersole placed into trust for CRA funds flowing from the sale of the Debtors assets to Maynards, in the amount of $190,669.[5]

6. As at November 14, 2014, CRA had a deemed trust of $99,794.76 for collected but unremitted GST/HST by Ebersole[6] and a deemed trust of $72,094.71 for collected but unremitted GST/HST by D&S Railway.[7] Therefore, at the date of the creation of the CRA Trust Fund, CRA held a total deemed trust amount of $171,889.47 for the unremitted GST/HST of the Debtors.

7. As at November 14, 2014 D&S had failed to remit employee source deductions to CRA. The exact amount of unremitted source deductions on that particular date is not known. However, CRA subsequently assessed the D&S source deduction debt on January 8, 2015 and February 11, 2015 and it currently stands at $94,583.64.[8]

The Bankruptcy of the Debtors

8. By Order of Justice Pattillo dated December 23, 2014, the Interim Receiver was appointed Receiver and was authorized and directed to file assignments into

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[5] Affidavit of Sandra Ebersole, affirmed April 9, 2015, paras 7-14.

[6] Affidavit of Kyle Choe, affirmed March 26, 2015, para 6.

[7] Affidavit of Kyle Choe, para 4.

[8] Affidavit of Kyle Choe, para 3.

bankruptcy for each of the Debtors.[9] The bankruptcies of the Debtors were effective January 2, 2015 (the "Bankruptcies").

PART II – POINTS IN ISSUE

9. The point in issue in this responding factum is whether, on November 14, 2014, the date Sandra Ebersole established the CRA Trust Fund, the CRA held a deemed trust over the amounts used to create the CRA Trust Fund such that CRA had a priority to these funds over Trisura and all other creditors of the Debtors.

PART III – SUBMISSIONS

The Crown's Deemed Trusts

10. Pursuant to subsection 222(1) of the *Excise Tax Act* ("ETA") and 227(4) of the *Income Tax Act* ("ITA"), persons who have collected GST/HST amounts or withheld employee source deductions but have not remitted them to the CRA as and when required to do so by the *ETA* and *ITA,* are deemed to hold those amounts in trust for the Crown.[10]

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[9] Order of Justice Pattillo dated December 23, 2014, Receiver's Motion Record, Part 2, Tab 4.

[10] *Excise Tax Act*, R.S.C. 1985, c.E-15 ("ETA"), ss.222(1); *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), Book of Authorities of the Canada Revenue Agency, dated April 24, 2015, Tab B3; *Century Services Inc. v. Canada,* 2010 SCC 60 at para 31, Book of Authorities of the Canada Revenue Agency, dated April 24, 2015, Tab A5; *First Vancouver Finance v Canada*, 2002 SCC 49 at paras 27, 28.

11. In principle, this deemed trust operates like a floating charge over all the assets of the tax debtor in respect of the amount of the unremitted tax. The deemed trust arises from the time the GST/HST or source deductions are collected or withheld and not remitted, and remains in existence as long as the default continues.[11]

12. In the event that the said assets are sold and proceeds of sale generated, the *ETA* states, quite specifically, that "the proceeds of the property shall be paid to the Receiver General in priority to all security interests."[12] Nearly identical language is found in the deemed trust provision of the *ITA*.[13]

13. In *Canada (Minister of National Revenue) v. National Bank of Canada*[14], the Federal Court of Appeal described the effects of the *ITA* deemed trust provision as follows:

> However, the ITA and EIA deemed trust provisions are complete and explicit as to their effect on property taken in possession by secured creditors in the exercise of their security interest, judging from the Supreme Court's reasons in First Vancouver: the Crown has an absolute priority over the proceeds from the property subject to the deemed trust, which must be paid to the Receiver General...[15]
>
> In this case, Parliament's intention is not hard to decipher ... Parliament evidently wished to confer on the Crown an ongoing interest in the property that is deemed to be held in trust for as long as the tax debtor's default persists, and to subject the secured creditor to the obligation to remit to the Receiver General the proceeds arising from the property held in trust in absolute priority, to the extent of the unpaid debt.[16]

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[11] *First Vancouver Finance*, 2002 SCC 49 at para 40.

[12] See *ETA*, *supra* note 10, ss 222(3).

[13] See *ITA, supra* note 10, ss 227(4.1).

[14] *Canada v National Bank of Canada*, 2004 FCA 92.

[15] *Ibid* at para 34.

[16] *Supra* note 14 at para 50.

14. Parliament intended to ensure that unremitted GST/HST was to be recovered, absent a bankruptcy of the registrant, in absolute priority to all other debts. Subsection 222(1) of the *ETA* makes it clear that GST/HST trust funds are not to be available to satisfy the debts of the secured creditors of the registrant.[17]

15. Accordingly, not until after the Bankruptcies could Trisura's perfected PPSA registration have had priority over the Crown's GST/HST debts. However, by that time, a portion of the Crown's GST/HST debts had been placed into an express trust and thus retained priority on a distinct legal basis unaffected by the Bankruptcies.

16. With respect to the source deduction deemed trust, Parliament confers absolute priority to the Crown for these amounts notwithstanding the Bankruptcies.[18] Accordingly, Trisura's PPSA registration does not have, and never could have had, priority over the Crown's source deduction deemed trust.

The Composition of the CRA Trust Fund

17. The CRA Trust Fund was created using proceeds from the sale of the Debtors' assets. These proceeds were then placed into trust by Sandra Ebersole for the express purpose of satisfying CRA trust claims.[19]

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[17] See *ETA*, *supra* note 10, ss. 222(1).

[18] See *ITA, supra* note 10, ss 227(4.1)

[19] Affidavit of Sandra Ebersole, para 14.

18. The CRA Trust is in the amount of $190,669. This amount consists of $94,583.64 arising from the deemed trust for the unremitted source deductions of D&S Railway plus the balance of $96,085.36, which arises from the GST/HST debts of the Debtors.

19. Pursuant to section 222 of the *ETA* and 227(4.1) of the *ITA* these unremitted amounts were deemed to be held in trust for the Crown. Furthermore, all of the assets of the debtors, including the proceeds from the sale of assets placed in the CRA Trust Fund by Sandra Ebersole, were also deemed to be held in trust and had to be paid to the Receiver General notwithstanding any other security interest.

CRA's $190,669 Claim on the DLPC Funds Has Priority over All Other Claims

20. As argued in the CRA's factum of April 24, 2015, based on section 227 (4.1) of the *Income Tax Act* ("ITA"), CRA claims priority to its $94,583.64 source deduction deemed trust ahead of all other creditors, notwithstanding the Bankruptcies and notwithstanding this honourable court's finding concerning the existence of an express trust.

21. With respect to the remaining balance of $96,085.36 arising from the Debtor's unremitted GST/HST, CRA does not assert a priority to these funds based on its statutory deemed trust. As a result of the Bankruptcies and the effect of section 222(1.1) of the *ETA*, the Crown's GST/HST deemed trust no longer

operates. However, CRA asserts priority to the remaining balance of $96,085.36 based on the inclusion of this amount in the express trust created by Sandra Ebersole.

22. CRA further asserts that, in response to the argument of Trisura set out at paragraph 19 of the Trisura Factum, when the CRA Trust Fund was created, all of CRA's statutory deemed trusts were in operation and, to the extent of the unremitted GST/HST amounts and the unremitted source deductions, CRA had an absolute priority over all other secured creditors of the Debtors.

23. When Sandra Ebersole created the CRA Trust Fund on November 14, 2014, she was required by statutory obligation to hold those funds in priority for the Crown ahead of any secured creditor of the Debtors and to pay those funds to the Receiver General in compliance with her obligations under 222 of the *ETA* and 227(4.1) of the *ITA*. Therefore, the creation of the CRA Trust Fund in no way prejudiced the rights of Trisura with respect to its PPSA registration.

PART IV – ORDER SOUGHT

24. The CRA respectfully requests:

a. An order declaring that CRA is the beneficiary of a validly constituted express trust in the amount of $190,669.

b. An order that Grant Thornton Limited, in its capacity as interim receiver and receiver of all the assets, undertakings and properties of Ebersole Excavating Inc. and D&S Railways Construction Inc. pay to the CRA its express trust claim of $190,669 and any interest accrued thereon.

c. In the alternative, an order that Grant Thornton Limited, in its capacity as interim receiver and receiver of all the assets, undertakings and properties of Ebersole Excavating Inc. and D&S Railways Construction

Inc. pay to the CRA its deemed trust claim of $94,583.64 and any interest accrued thereon.

d. Costs.

e. Such further and other relief as counsel may request and this Honourable Court may deem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto this 1st day of May, 2015.

Edward Harrison
Of Counsel for Canada Revenue Agency

APPENDIX A – LIST OF AUTHORITIES

1. *Canada v National Bank of Canada*, 2004 FCA 92.
2. *Century Services Inc. v. Canada, 2010 SCC 60.*
3. *First Vancouver Finance v Canada*, 2002 SCC 49.

APPENDIX B – STATUTES AND REGULATIONS

1. *Excise Tax Act*, R.S.C. 1985, c.E-15.
2. *Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.).*

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TRISURA GUARANTEE INSURANCE COMPANY Applicant **AND** **EBERSOLE EXCAVATING INC., et al.** Respondents

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Proceeding Commenced at Toronto

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