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

B E T W E E N :

TRISURA GUARANTEE INSURANCE COMPANY

Applicant

- and -

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

Respondents

FACTUM OF THE CANADA REVENUE AGENCY

(for distribution hearing returnable May 13, 2015)

April 24, 2015

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

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FACTUM OF THE CANADA REVENUE AGENCY

(for distribution hearing returnable May 13, 2015)

TABLE OF CONTENTS

OVERVIEW

1. These submissions are in support of the Canada Revenue Agency's ("CRA") claim for payment at the distribution hearing for the assets, undertakings and properties of Ebersole Excavating Inc. (Ebersole) and D&S Railway Construction Inc. (D&S) held by Grant Thornton Limited (GTL) in its capacity as Court-appointed interim receiver and receiver. The CRA is claiming entitlement to an express trust, established by Sandra Ebersole, Director of Ebersole and D&S, for the benefit of CRA, in the amount of $190,669. All requisite conditions for an express trust exist in the circumstances and CRA seeks payment of its $190,669 trust, plus interest accrued thereon.

2. In the alternative, if the Court does not find that an express trust exists, CRA is claiming entitlement to deemed trust funds in the amount of $94,583.64 on the basis of its statutory super priority under the *Income Tax Act* ("ITA").

PART I – STATEMENT OF FACTS

The Tax Debts

1) D&S Railway

3. D&S Railway is currently indebted to Her Majesty the Queen as represented by the Minister of National Revenue (the "Crown") for $175,565.07 (the "Debt"). The Debt consists of both unremitted employee source deductions and unremitted GST/HST.[1]

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[1] Affidavit of Kyle Choe, sworn March 26, 2015, para 2.

4. D&S Railway has an outstanding source deduction debt of $101,859.76, which includes a deemed trust amount of $94,583.64 (the "Deemed Trust").[2] The Deemed Trust amount consists of the principal tax debt owing for collected but unremitted employee payroll source deductions and does not include penalty or interest amounts.

5. D&S Railway has an outstanding GST/HST debt of $73,705.31, which consists of a principal debt of $72,094.71 and penalty and interest amounts of $1610.60.[3]

2) Ebersole

6. Ebersole is currently indebted to the Crown for unremitted GST/HST in the amount of $101,454.84, which consists of a principal debt of $99,794.76 and accrued interest of $1,660.08.

The Sale of Assets

7. On October 31, 2014 D&S Railways and Maynards Industries Ltd. ("Maynards") entered into an agreement (the "Sale Agreement") pursuant to which various assets (the "Assets") of both D&S Railway and Ebersole were sold to Maynards for $1,350,000.00 plus HST (the "Proceeds").[4]

8. The Proceeds received by D&S Railway from the Sale were paid to D&S Railway's accountant, John MacDonald of JMA Group.[5]

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[2] Affidavit of Kyle Choe, para 3.
[3] Affidavit of Kyle Choe, para 5.
[4] Affidavit of Sandra Ebersole, sworn April 9, 2015, paras 3, 7.
[5] Affidavit of Sandra Ebersole, para 8.

9. On November 13, 2014, JMA Group transferred $438,444 to the D&S Railway bank account.[6]

The CRA Trust Fund

10. On November 14, 2014 Sandra Ebersole withdrew $601,830 from the D&S Railway account. Of this amount, Sandra Ebersole held $205,573 in trust for herself, gave Darrell Ebersole $205,573 and held $190,669 for CRA (the "CRA Trust Fund").[7]

11. The CRA Trust Fund was subsequently transferred by Sandra Ebersole to her lawyer's firm, Dunnet Law Professional Corporation ("DLPC") to be held in trust for the payment of D&S Railway's and Ebersole's tax liabilities.[8]

12. On December 12, 2014, $396,242 held by DLPC in its trust account, which included both the $190,669 amount placed in trust for CRA, and the monies in trust for Sandra Ebersole, were transferred to the receiver, Grant Thornton Limited. [9]

PART II – POINTS IN ISSUE

13. The principal point in issue for the CRA is its entitlement to the $190,669 fund, placed in trust by Sandra Ebersole for its benefit, prior to the Interim

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[6] First Report of the Interim Receiver, para 45; Affidavit of Sandra Ebersole, para 11.
[7] Affidavit of Sandra Ebersole, para 14; First Report of the Interim Receiver, para 52.
[8] Affidavit of Kyle Choe, para 7. Exhibit "D' to the Affidavit of Kyle Choe.
[9]Affidavit of Kyle Choe, para 8; Order of Justice Wilton-Siegel, para 5(b); First Report of the Interim Receiver, para 53.

Receivership Order. The CRA claims entitlement to this money as a beneficiary of an express trust.

14. Alternatively, if the court does not agree that CRA is the beneficiary of an express trust, CRA asserts a priority claim over all other creditors of D&S Railway for its Deemed Trust in the amount of $94,583.64.

PART III – SUBMISSIONS

The CRA Trust Fund Satisfies All Required Conditions for an Express Trust

15. The $190,669.00 fund, set aside by Sandra Ebersole on November 14, 2014 for the benefit of CRA, constitutes an express trust.

16. Express or "true trusts" arise from the acts and intentions of the settlor and require the presence of "three certainties": certainty of intention, certainty of subject-matter and certainty of object.[10]

17. In *Waters' Law of Trust in Canada*[11] the author describes the nature of the three certainties:

> For a trust to come into existence, it must have three essential characteristics. As Lord Langdale M.R. remarked in *Knight v. Knight*, in words adopted by Barker J. in *Renehan v. Malone* and considered fundamental in common law Canada, (1) the language of the alleged settlor must be imperative; (2) the subject-matter or trust property must be certain; (3) the objects of the trust must be certain. This means that the alleged settlor, whether he is giving the property on the terms of a trust or is transferring property on trust in exchange for consideration, must employ language which clearly shows his intention that the recipient should hold on trust. No trust exists if the recipient is to take absolutely,

[10] *Century Services Inc. v Canada (Attorney General)* [2010] 3 SCR 379 at para 83.
[11] Donovan W.M. Waters, *Waters' Law of Trust in Canada*, 4th ed (Carswell, 2012), at 140.

> but he is merely put under a moral obligation as to what is to be done with the property. If such imperative language exists, it must, second, be shown that the settlor has so clearly described the property which is to be subject to the trust that it can be definitively ascertained. Third, the objects of the trust must be equally and clearly delineated. There must be no uncertainty as to whether a person is, in fact, a beneficiary. If any one of these three certainties does not exist, the trust fails to come into existence or, to put it differently, is void.
>
> The principle of the three certainties has been fundamental at least since the days of Lord Eldon, and no one today could seek to challenge the principle; the problems that exist concern the issue of what constitutes certainty.[12]

18. The three certainties in this case could not be clearer: The CRA Trust Fund, of the specified amount of $190,669.00, was established by Sandra Ebersole before the Interim Receivership Order of November 26, 2014, for the clearly stated objective of paying to CRA the outstanding tax liabilities of D&S Railway and Ebersole.

19. The clearly earmarked $190,669 was transferred by Sandra Ebersole to DLPC, her lawyers, to be held in trust for CRA. Funds received by a solicitor for application to a particular purpose (such as remission to the CRA here) are necessarily held in trust.[13]

20. An express trust, created for the benefit of the Crown before the bankruptcy of a tax debtor was found to exist in the case of *Alnav Platinum Group Inc. v. APM Delstar Inc.*[14] In this case, a secured creditor had acted on its security and had collected accounts receivable owing to the debtor company. The amounts

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[12] *Waters, supra* note 12.
[13] *Maralta Oil Co. v Indust. Incomes Ltd.* (1964) 49 WWR 175 (Alta. C.A.); *MacDonald v Arenson* (1980) 37 CBR (N.S.) 30 (Man. C.A.); *Price Waterhouse Limited v Parlee McLaws* (1989) 64 Alta. LR (2d) 219 (Q.B.).
[14] *Alnav Platinum Group Inc. v APM Delstar Inc.*, 2001 ABQB 930.

collected included GST. The amount collected exceeded the amount owed to the secured creditor and it paid the surplus to a receiver appointed at the instance of another secured creditor. The first secured creditor and the receiver entered into a "Proceeds Agreement" that referred to "Pre-Receivership G.S.T.", and the Alberta Queen's Bench ordered that the sum relating to GST claims be paid by the receiver into a separate account. On a subsequent application after the debtor company had been adjudged bankrupt, the court held that an express trust had been created and that the funds were to be paid to the Crown.[15]

21. In the Supreme Court case of *Century Services Inc. v. Canada (Attorney General)*[16] the issue of express trust was argued by the Crown with respect to GST amounts that had been set aside by the monitor in a segregated account pending the outcome of the debtor's CCAA restructuring.

22. The BC Court of Appeal had found that these amounts, set aside for the benefit of CRA, did establish an express trust. The Court stated:

> **24** It is my view that an express trust was created once the chambers judge made his order of April 29, 2008 and the $305,202.30 sum was paid into the trust account of the Monitor. In my opinion, the common law requirements for a trust (being certainty of intent, subject matter and object) were all met. There is no doubt that the monies were intended to be held in trust and that the investment of the funds in a term deposit kept them identifiable.[17]

23. The Court of Appeal's finding of an express trust was overturned by the Supreme Court, but only for the reason that it found no certainty of object. Deschamps, J., writing for the majority, did not address the Court of Appeal's

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[15] Case summary from *Canada v. Ted LeRoy Trucking Ltd.*, 2009 BCCA 205, at para 27.
[16] *Century Services, supra* note 11.
[17] *Ted LeRoy, supra* note 18 para 24.

finding that certainty of both intention and subject matter existed. However, the majority did find that because CRA's right to the monies in the segregated fund was contingent on the outcome of the restructuring, any certainty to permanently vest in the Crown a beneficial interest in the funds was eliminated.[18]

24. In the case at bar, no such uncertainty exists with respect to the intention of Sandra Ebersole to vest in the Crown a beneficial interest in the CRA Trust Fund.

25. In the Supreme Court case of *British Columbia v. Henfrey Samson Belair Ltd.*[19], the Court dealt with the issue of whether a statutory trust created by a British Columbia provincial law gave the province priority over other creditors in bankruptcy in the same way as would a common law trust. The court ruled that in order for the Crown to benefit from a true trust, the ordinary conditions for a common law trust must exist. McLachlin J. (as she then was) stated:

> If the money collected for tax is identifiable or traceable, then the true state of affairs conforms with the ordinary meaning of "trust" and the money is exempt from distribution to creditors[20]

26. Belair stands for the principle that so long as monies held in trust for the Crown conform with the ordinary principles of trust law, they will be considered trust funds and will be exempt from distribution to creditors under the BIA.

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[18] *Century Services*, *supra* note 11 para 87.
[19] *British Columbia v Henfrey Samson Belair Ltd.*, [1989] SCR 24
[20] *Ibid*, at para 19.

27. In the case at bar, the requisite certainties exist to establish an ordinary trust and therefore the monies in trust for the CRA should not be distributed to other creditors of D&S and Ebersole.

Super Priority of the Deemed Trust

28. If the Court does not accept that CRA is the beneficiary under an express trust for the amount of $190,669, the Crown submits that CRA is nevertheless entitled to its Deemed Trust in the amount of $94,583.64, based on its statutory super priority.

29. Subsection 227(4) of the *Income Tax Act* ("ITA") deems funds withheld from employees' wages to be held in trust by the employer for the benefit of the Crown until those funds are remitted to the Crown. If the deductions are not remitted as required, subsection 227(4.1) extends the trust over all the property of the debtor, notwithstanding the provisions of the BIA. The extension of the trust specifically grants the Crown priority over other creditors, including secured creditors.

> Trust for moneys deducted
>
> 227 (4) Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act.
>
> Extension of trust
>
> 227 (4.1) Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any

> otherenactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person intrust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person and property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for a security interest (as defined in subsection 224(1.3)) would be property of the person, equal in value to the amount so deemed to be held in trust is deemed
>
> (a) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, and
>
> (b) to form no part of the estate or property of the person from the time the amount was so deducted or withheld, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to such a security interest
>
> And is property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.
>
> Meaning of security interest
>
> 227(4.2) For the purposes of subsections 227(4) and 227(4.1), a security interest does not include a prescribed security interest.

30. As a result of the deemed trust mechanism of the ITA, when a taxpayer fails to remit payroll deductions to the Crown, essentially all of the assets of the taxpayer are deemed to be held in trust notwithstanding any security interest in the assets or the bankruptcy of the tax debtor. The property of the debtor then becomes:

> **"property beneficially owned by Her Majesty notwithstanding any security interest in such property** and in the proceeds thereof, **and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests**." (emphasis added)

31. Parallel provisions to ss. 227 (4) and (4.1) exist in the Employment Insurance Act[21] and the Canadian Pension Plan[22]. The result is the Crown's source deduction deemed trust covers withheld and unremitted federal income tax, provincial income tax, and the employees' share of Canada Pension Plan ("CPP") and employment insurance ("EI") levies. The employer's share of CPP and EI levies and penalties and interest on the payroll account are not included as part of the deemed trust.

Tax Liability Deemed Valid and Binding

32. Under subsection 152(8) of the ITA, an assessed tax liability is deemed valid and binding unless and until the tax liability has been overturned on objection or appeal. In the present matter, none of the various tax liabilities have been varied or vacated by an objection or appeal.

PART IV – ORDER SOUGHT

33. 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

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[21] *Employment Insurance Act*, R.S. 1996 c.23, s. 86
[22] *Canada Pension Plan*, R.S.C. 1985, c. C-8, s. 23

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 24th day of April, 2015.

Edward Harrison
Of Counsel for Canada Revenue Agency

APPENDIX A – LIST OF AUTHORITIES

1. *Alnav Platinum Group Inc. v APM Delstar Inc.,* 2001 ABQB 930
2. *British Columbia v Henfrey Samson Belair Ltd.*, [1989] S.C.R. 24
3. *Canada v Ted LeRoy Trucking Ltd.*, 2009 BCCA 205
4. *Canadian Commercial Bank v Parlee McLaws*, [1989] A.J. No. 59
5. *Century Services Inc. v Canada (Attorney General),* 2010 SCC 60
6. *F.D.T. Ltd. (Trustee of) v Arenson*, 116 D.L.R. (3d) 186
7. *Maralta Oil Co. Ltd. v Industrial Incomes Ltd.*, 46 D.L.R. (2d) 511
8. Donovan W.M. *Waters, Waters' Law of Trusts in Canada*, 4th ed (Carswell, 2012).

APPENDIX B – STATUTES AND REGULATIONS

1. *Alberta Personal Income Tax Act,* RSA 2000, c. A-30
2. *Canada Pension Plan,* RSC 1985, c. C-8
3. *Employment Insurance Act,* RS 1996, c.23
4. *Income Tax Act*, RSC, 1985, c. 1 (5th Supp.)

CV-14-10766-00CL

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Proceeding Commenced at Toronto

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