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Civil Enforcement Fundamentals

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Civil Enforcement Priorities: Deemed Trusts Under the *Income Tax Act* and *Excise Tax Act*

Civil Enforcement Fundamentals

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DEEMED TRUSTS – INCOME TAX ACT AND EXCISE TAX ACT

One of the most difficult aspects providing solid advice to your client is the problem of the super priority granted to the Canada Revenue Agency¹ (“CRA”) with respect to employee withholdings and GST pursuant to s. 222 of the *Excise Tax Act*² and s. 227(4.1) of the *Income Tax Act*.³ The deemed trust does not protect penalties and interest associated with the failure by the debtor to remit the GST or withholdings as required. The CRA’s claim can be difficult to discover. It is even more problematic in terms of your client’s underwriting, since in certain situations the CRA takes the position that a deemed trust applies without notice, and may retroactively attach to funds that were arguably free and clear of any CRA claim at the time your client made the credit granting decisions.

In fairness, the CRA’s position would be that the claim was always there – the CRA was simply unaware of the fact that it existed. The situation I’m referring to is one of a reassessment – where, at the time the credit was granted, the CRA’s records did not show any GST or withholdings due. After the advance, a reassessment determined that GST or withholdings are due and owing. This creates a deemed trust claim, which the CRA asserts arose as of the date of the GST or date withholdings should have been paid.

So, let’s consider briefly CRA’s rights under the deemed trust and how they can affect both secured and unsecured claims enforcement.⁴

GENERAL PRIORITY VIS-À-VIS UNSECURED CLAIMS

The Crown’s deemed trust under the *ITA* and the *ETA* takes priority over all unsecured claims. As noted above, CRA’s position is that the deemed trust arises when the GST or withholding should have been forwarded to CRA. This means it can take priority over writs that were registered at a time when no one, including CRA, actually knew there was any deemed trust claim. It also means that if the seizure has been fully effected and your client paid, CRA can potentially seek to have your client repay the amount of their deemed trust claim.

¹ To be completely accurate, the priority is granted to Her Majesty the Queen in right of Canada, but that priority is administered by her Minister for National Revenue through the auspices of CRA. For convenience and clarity, we will use the common parlance of describing all the rights and actions taken on behalf of Her Majesty by the CRA as being the rights and actions of CRA.

² RSC 1985, c. E-14 (the “*ETA*”)

³ RSC 1985, c1 (5th Supp) (the “*ITA*”)

⁴ I will not be reproducing the provisions in the text. While this is not traditional in the LESA paper, the *ITA* and *ETA* are particularly difficult piece of legislation to read and interpret.