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PRIORITY OF CROWN CLAIMS IN INSOLVENCY

Lamer

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Introduction

This text is designed to aid the practitioner in remaining current with the nature of the law of Crown Claims in the various processes of insolvency. Resolving priorities between contractual personal property security transactions and statutory Crown security interests means navigating numerous legislative provisions, wrestling with conflicting case law, and balancing bankruptcy and insolvency law, *Bank Act* security, the *Income Tax Act*, the *Excise Tax Act* and federal/provincial jurisdictions. This text provides: a thorough overview of the general principles applicable to the priority of statutory Crown claims; the constantly evolving rules governing statutory priorities including those resulting from interplay of the *Bankruptcy and Insolvency Act*, the *Bank Act*, the *Income Tax Act* and the *Excise Tax Act*; an in-depth analysis of Crown security interests, such as deemed statutory trusts, statutory liens, super priority and enhanced garnishment orders and an examination of the impact of the *Companies' Creditors Arrangement Act* (CCAA) on the other legislative regimes.

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This release includes updates and amendments to Chapter 1 (General Principles); Chapter 4 (Priority Disputes in Bankruptcy and Under the Company Creditors' Arrangement Act); Chapter 6 (Summary of Priority Findings and Considerations for Law Reform) and Words and Phrases.

Case Law Highlights

***Wage Earner Protection Program Act* (*WEPPA*) – Former Employer – Declaration by Court**: In a CCCA proceeding a number of orders were granted by the Ontario Superior Court of Justice. These included approval of an asset purchase agreement ("APA") and a declaration under the *Wage Earner Protection Program Act* (*WEPPA*) to assist terminated employees in the submission of their claims to obtain benefits. The court noted that WEPPA permits, in section 5, eligible former employees of the company subject to the *CCAA* to collect certain benefits, including termination and severance pay, if certain criteria are met. Those criteria are set out in section 3.2 of the *WEPPA Regulations*. That provision gave the Court the discretion to determine whether the former employer of the terminated employees (in this case, Hudson's Bay) was the former employer. The court was satisfied that the proposed declaration should be issued. The employer of record was Hudson's Bay or The Bay Holdings (other than with respect to seven employees in the United States). The Company had terminated approximately 89% of the employees who were employed at the commencement of the *CCAA* Proceedings, with further employee reductions expected in the near future. Those remaining will assist with windup activities. The court noted that the declaration would assist eligible terminated employees to submit claims and seek to receive benefits under *WEPPA* following the *WEPPA* Effective Date. This would in turn minimize the hardship experienced by these employees and their families (resulting from the termination of their employment and the inability of the Applicants to pay them any termination and severance pay. The court requested that Employee Representative Counsel and the Monitor liaise with Service Canada to maximize the efficiency and minimize the administrative burden and delay on affected eligible employees with respect to the submission of WEPPA claims: Hudson's Bay Company, Re 2025 ONSC 3328, 2025 CarswellOnt 9289, 19 C.B.R. (7th) 265, 2025 A.C.W.S. 2823.

***Companies' Creditors Arrangement Act (CCAA)* — Stay – Impact on Penal Conviction -**The applicant companies were part of group that sold telephone and other telecommunications services in various provinces in Canada, and L was operating mind of group. L sought to set aside his penal conviction, under the Québec Tax Administration Act, for failure to report and remit approximately $1.6 million in employee source deductions. He argued that his prosecution was contrary to a 2016 stay order of this court granted under the *Companies' Creditors Arrangement Act*. The application was dismissed. *Inter alia*, the court held, citing *Milner Greenhouses Ltdv*. *Saskatchewan*, 2004 SKQB 160 (Sask. Q.B.) paras. 24-29, that a CCAA stay does not apply to legal sanctions against alleged wrongdoers so long as sanctions are penal rather than commercial in nature. The fines and penalties imposed by the Court of Québec related to tax offences but were not a mechanism for recovering tax debts. As evidenced by the decisions of the Québec Court, they are punitive in nature and served, among other things, to deter. The court further noted that the Quebec Revenue Agency's (QRA) evidence was that their payment would be treated, not as a private debt remitted to the QRA, but as a public law penalty paid into the public treasury managed by the Receiver General for Québec. Accordingly, the court did not accept the arguments that the revenue agency was attempting to recover debts that should have been sought in the *CCAA* proceedings or that it was trying to enforce a "super priority: *8640025 Canada Inc. (Re)* 2025 BCSC 1268, 2025 CarswellBC 1973, 2025 A.C.W.S. 3361, leave to appeal refused, 2025 BCCA 372, 2025 CarswellBC 3162, affirmed 2025 BCCA 406, 2025 CarswellBC 3443.

***Wage Earner Protection Program Act* (*WEPPA*) – Receivership of Employer – RVO- Impact on Eligibility of Employees** – In this case, although an RVO application was dismissed on other grounds the court dealt with a submission from Employment and Social Development Canada (Employment Canada) who appeared at the application to advise the Court of potential adverse consequences of the RVO for former employees. It advised that pursuant to the *Wage Earner Protection Payment Act*, S.C. 2005, c. 47 ("*WEPPA*") former employees who had received payments pursuant to WEPP could have their payments clawed back if the RVO is approved. *WEPPA* s 5 outlined the eligibility criteria for employees whose former employer was in receivership. The key requirements were, in its view, that "the former employer is subject to a receivership" and that "the individual is owed eligible wages by the former employer." Employment Canada submitted that should the RVO be granted, the liabilities related to unpaid wages of the former employees would be transferred to the residual company. Equally, C Corp would emerge from the receivership proceedings and continue to carry on its business operations as a viable corporation. Following the issuance of the RVO, the eligibility criteria under s. 5(1)(b)(ii) and 5(1)(c) of the WEPPA would no longer be met and, the objective of the WEPP would equally be undermined. As a result, this would likely affect the former employees' entitlement to WEPP benefits and lead to an overpayment of program benefits, which would be subject to recovery. Employment Canada further stated that whether the conditions for eligibility were met was within the exclusive discretion of the Minister responsible for *WEPPA*, subject to an appeal before the Canada Industrial Relations Board, which, in turn, is subject to judicial review under the exclusive jurisdiction of the Federal Court of Appeal. The court viewed Employment Canada's submission as, in essence, a warning that following the approval of the RVO, payments to former employees may be clawed back and that the Court would have no say in the matter. The court did not agree. It cited Justice Collier in ***Arrangement relatif à Former Gestion Inc*, 2024 QCCS 3645** at para 34 who, in the court's view, dispensed with a similar argument by Employment Canada as follows:

> [T]he relevant time for determining when WEPPA applies is the moment at which all an insolvent entity's employees are terminated due to a bankruptcy or restructuring. That is when the employee's entitlement to compensation arises and neither the Act nor the regulations indicate that circumstances arising after the termination are relevant.

The court went on to say that WEPP exists to protect employees from the adverse consequences of the insolvency of their employer. Terminated employees had no control over how insolvency and restructuring transactions are structured after their termination. Terminated employees who had received WEPPs payment and had no inkling of the possibility of a claw back may have used the money to pay for groceries or rent. A choice to claw back payments made to terminated employees of an insolvent corporation because of subsequent events beyond their control would be to the immense discredit of the Minister and, would the court hoped, be swiftly reversed by the Canada Industrial Relations Board or the Federal Court of Appeal: *Cleo Energy Corp (Re)* 2025 ABKB 621, 2025 CarswellAlta 2550.