# TABLE OF CONTENTS

1. INTRODUCTION .................................................. 1

2. CROWN CLAIMS AND THE CONSTITUTION ................. 1

3. HIDDEN PRIORITY — DEEMED TRUSTS ..................... 2
   3.1 Employee Source Deductions ............................ 3
   3.2 HST/GST .................................................. 4
   3.3 Real Property and the Prescribed Security Interest ... 4

4. STATUTORY LIENS ............................................. 5

5. GARNISHMENT .................................................. 6

6. ENVIRONMENTAL CLAIMS .................................... 7

7. THE TIPPING POINT – CRYSTALLIZATION OF PRIORITY ... 7
   7.1 Priority of Federal Crown Claims for Source Deductions 8
   7.2 Priority of Other Federal Crown Claims ................. 9
   7.3 Priority of Provincial Crown Claims ..................... 10

8. CREDITOR VS. CROWN — THE FIGHT TO THE FRONT OF THE LINE 13
   8.1 Priority of Statutory Liens, Garnishments and other Charges 13
   8.2 Priority of Deemed Trusts vs. True Trusts .............. 14

9. STREAMLINING PRIORITY RIGHTS IN RESTRUCTURING .... 15

10. CONCLUSION .................................................. 17
1. INTRODUCTION

A creditor’s priority for recovery is critical in assessing the risks of doing business whether by way of secured lending, in supplying goods and services or by otherwise assuming a financial risk for the benefit of a debtor company.

Understanding one’s priority in relation to a company’s secured creditors is relatively straightforward and accessible. Creditors can determine their place in the queue for payment by conducting a thorough review of the personal and real property registries and taking advantage of statutory provisions granting third parties the right to prescribed information from registered secured creditors.

However, understanding one’s priority in respect of Crown claims is neither straightforward nor readily accessible. Security interests in favour of the Crown are created through various statutes and are not always required to be registered to be effective against the general creditor body. The most common forms of Crown security interest are the deemed trust and statutory lien, which are effective and poignant tools of the Crown used in the recovery of tax arrears. Included in this class are claims for unremitted source deductions and HST/GST arrears.

Problematically companies with tightened purse strings often hang on to tax remittances tagged in favour of the Crown as a quick fix solution for short term cash flow problems. In a perfect world short term cash flow problems do not turn into long term cash flow problems. In the real world they often do which can mean a company will have incurred significant debts to the Crown by the time the white flag is waved. The consequence to general secured creditors is the Crown jumping to the front of the queue for payment.

When considering insolvency options the choice of proceeding can significantly impact the order for recovery of creditors. Strategically companies and their creditors must consider the impact a bankruptcy vs. a receivership vs. a restructuring will have on distribution. Each choice of proceeding can trigger certain priorities while reversing others, effectively re-ordering the queue of creditors waiting for recovery.

This paper will review the most commonly encountered Crown claims and discuss how such claims are treated generally in various insolvency contexts. It is not intended to be an exhaustive review of all Crown interests in real and personal property. This paper will aim to assist creditors and practitioners in encountering and anticipating Crown claims and to assist in developing strategies to use the insolvency regime to acquire a better position for recovery.

2. CROWN CLAIMS AND THE CONSTITUTION

Unlike ordinary secured claims which are created through express and direct agreement with a debtor, Provincial Crown and Federal Crown claims derive their authority and priority from statutes legislated by either the provincial or federal governments. Many statutorily created Crown claims waive ordinary course “perfection” steps typically required of creditors such as the giving of notice of an interest by way of registration. In many cases the status
and existence of a Crown claim is not revealed until insolvency proceedings are commenced.

Bankruptcy is an exclusive power constitutionally granted to the Federal government. Insolvency proceedings are primarily legislated through one of two federal statutes: the *Companies Creditors Arrangement Act*¹ ("CCAA") or the *Bankruptcy and Insolvency Act*² ("BIA"). Receivers may be court-appointed through provincial legislation³ or through the BIA. Corporate restructuring proceedings may be commenced under either the CCAA or BIA.

Once an insolvency proceeding has been commenced which engages the provisions of the CCAA or BIA, these statutes may be found to “trump” any conflicting provision of a provincial statute. Many provincial statutes touch upon or create priority regimes for creditor recovery at the provincial level, and to the extent possible, the provincial priority regimes will continue in a federally governed insolvency proceeding, subject to the doctrine of paramountcy⁴.

When a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes⁵. However, to the extent that a provincial statute conflicts with, contradicts or otherwise attempts to modify or direct an insolvency proceeding in a manner that creates a conflict with any of the BIA, CCAA or other federal statute, the federal legislation will be given paramountcy and the provincial legislation will be deemed to have no force or effect to the extent of the conflict. The doctrine of paramountcy is applied to resolve conflicts in the application of overlapping valid federal and provincial legislation⁶.

The above results in competing priority schemes within the various insolvency proceedings available for debtors and a creditor that is at the front of the line in a receivership may find themselves at the back of the line in a bankruptcy, or vice versa.

### 3. HIDDEN PRIORITY — DEEMED TRUSTS

Deemed trusts are a very powerful tool of the Crown in recovery. The general model of deemed trust legislation operates in the following manner:

1) There is a charging provision which deems to be held in trust for the Crown all “property” of a tax debtor situated in Canada up to the value of the amounts of the unremitted tax arrears;

2) The deemed trust is expressly given superpriority over all competing “security interests” in the same property (including mortgages); and

---

¹ R.S.C., 1985, c. C-36, as amended ["CCAA"]
² R.S.C. 1985, c. B-3, as amended ["BIA"]
³ For example, pursuant to section 101 of the *Courts of Justice Act*, R.S.O. 1990 c. C43, as amended
⁴ *Canadian Western Bank v. Alberta*, 2007 SCC 22
⁶ *Indalex*, ibid. at p. 55. At p. 56, the Supreme Court stated: ‘A party relying on paramountcy must demonstrate that the federal and provincial laws are in fact incompatible by establishing either that it is impossible to comply with both laws or that to apply the provincial law would frustrate the purpose of the federal law’.
3) The legislation then limits the superpriority by excluding its applicability against any “prescribed security interests”, which are defined by regulation as mortgages registered on real property before the deemed trust arose.

The “trust” arises solely by language of the statute and would not otherwise be considered a trust under general trust law principals. The trust is impressed upon all real and personal property of the debtor. The Crown has certain rights to trace or follow its deemed trust rights in property impressed and held in trust. Where property subject to a trust is sold to a third party, that property is released from the deemed trust, and the Crown may instead trace its interest into the proceeds of sale.

3.1 EMPLOYEE SOURCE DEDUCTIONS

Employee payroll source deductions are “at the heart of income tax collection in Canada”, hence the powerful tool of the deemed trust given to the Crown by the legislation.

In Canada, source deductions refers to amounts required to be deducted by employers from their employee wages for income tax, employment insurance and Canada Pension Plan (“CPP”) contributions.

Subsection 227(4) of the Income Tax Act (“ITA”) provides the Crown a superpriority right to recover against all property of a tax debtor for amounts owing for income tax arrears which were deducted but not remitted from wages. The deemed trust is created from the first instance of failure to remit, and continues until such time as all arrears for income tax deductions are brought current.

Pursuant to subsection 227(4.1) of the ITA, the Crown is granted the right to recover first as against all of the tax debtor’s property, in advance of all other “security interests” (a broadly defined term including all charges and liens on property). The only exception to this superpriority is set out in subsection 227(4.2) of the ITA, which carves out a “prescribed security interest” from the definition of “security interest”, discussed in Section 3.3 below. Otherwise, ITA arrears must be satisfied in priority to all other security interest and claims in the same property.

In respect of employment insurance and CPP contributions, the deemed trust provisions for amounts deducted but not remitted are created, respectively, pursuant to section 86 of the Employment Insurance Act and section 23 of the Canada Pension Plan.

---

7 See First Vancouver Finance v. MNR, [2002] 2 S.C.R. 720 (“First Vancouver”). From a policy perspective, the decision in First Vancouver makes sense and gives comfort to third party purchasers (both having knowledge of deemed trust arrears or with no knowledge of existing arrears) that they will be free to deal with the purchased property without fear the Crown may later attempt to make a trust claim against such property. See also Francis Lamer, Priority of Crown Claims in Insolvency, loose-leaf, as amended (Toronto: Carswell, 2008) [“Lamer”] at 2-3.


9 R.S.C. 1985, C1 (5th Suppl), as amended [“ITA”].

10 S.C. 1996, c. 23, as amended.

3.2 HST/GST

On July 1, 2010, Ontario replaced its retail sales tax with the harmonized sales tax (“HST”). The HST is a federally administered value added tax that combines the provincial retail sales tax with the federal goods and services tax (“GST”).

Claims for HST/GST arrears arise under the Excise Tax Act (“ETA”). Subsection 222(1) of the ETA creates a trust for collected but unremitted HST/GST, which attaches to and is impressed upon all real and personal property of the debtor. All monies received by a debtor in respect of HST/GST, notwithstanding any “security interest” which may otherwise be in effect as against the debtor’s property, are accepted subject to the trust and deemed to be held separate and apart from all other property of the debtor.

Subsection 222(3) of the ETA allows the Crown to trace its interest in HST/GST arrears in and to any cash on hand and any proceeds of sale of a debtor’s property, and to recover against such cash and proceeds in priority to all “security interests” in the same property.

As set out in subsection 222(4) of the ETA, for the purpose of the superpriority created in subsection 222(3), a “security interest” does not include a “prescribed security interest”, discussed in Section 3.3 below.

3.3 REAL PROPERTY AND THE PRESCRIBED SECURITY INTEREST

Each statute which creates a right of deemed trust subject to a “prescribed security interest” will define the parameters of the interest in its Regulations. When encountering deemed trust claims, careful review of the relevant Regulations should be made by a creditor.

As provided for under each of the ETA and the ITA in respect of the deemed trusts for source deductions and HST/GST, a “prescribed security interest” means the part of a mortgage securing the performance of an obligation of the tax debtor which was registered against real property before the arrears over which the deemed trust attaches arose.

A deemed trust will not override a “prescribed security interest” because the failure of the delinquent taxpayer to remit taxes did not benefit the secured creditor (the mortgagee) holding the “prescribed security interest”.

As a general rule, deemed trust claims for tax arrears arising prior to the registration of mortgage security will enjoy superpriority over the mortgage and must be satisfied in full from proceeds of sale of real property before any payments can be made to a mortgagee. However, deemed trust claims arising after the registration of the mortgage will lose priority to the extent required to satisfy the dollar amount of the mortgagee’s “prescribed security interest”.

---

12 R.S.C. 1985, c. E-15, as amended [“ETA”].
13 For example, Section 2201 of the ITA General Regulation, C.R.C. c 945 (SOR/99-322) s. 2, and the Security Interest (GST/HST) Regulations SOR/2011-55 (Excise Tax Act), each of which provides the definition of “prescribed security interest” for the ITA and the ETA respectively. However, not all provincial legislation has yet passed a Regulation which provides the definition of “prescribed security interest” (see for example the Fuel Tax Act, R.S.O. 1990, Ch. F 35 and the Tobacco Tax Act, R.S.O. 1990, c. T. 10).
Under the ETA and ITA, the calculation and limitations of the prescribed security interest are as follows:

1) the base amount of a mortgagee’s prescribed security interest is the amount of the mortgage advanced at the time of registration, less all amounts received by the mortgagee from the mortgagor on account of the mortgage obligation, including payments on account of both principal and interest, but excluding any payments received on account of real property taxes; and

2) the amount of the prescribed security interest will be further reduced by the value of any collateral securities held by the mortgagee which, together with the mortgage on land or building, guarantee or otherwise secure the mortgagor’s obligations.

3) The limitations to a “prescribed security interest” attempt to prevent a mortgagee from avoiding the erosion of the amount of its “prescribed security interest” through attempting to enforce any collateral securities held before a deemed trust is invoked or by arranging for preferential payments of its mortgage debt.  

4. STATUTORY LIENS

Another tool for recovery of the Crown are statutory liens, which are designed to “secure” by way of a lien over real and/or personal property situated within Canada the repayment of certain protected obligations (typically payment of taxes). Often, deemed trust and statutory lien rights overlap, and the Crown has the benefit of both a statutory lien and a deemed trust in respect of its recovery of a debt.

In general, Crown liens take the form of a floating charge over the all property or property of a specific nature. The lien may not be deemed to attach to property of a debtor until such time as there is an actual default in a debtor’s obligations occur or the Crown takes “active steps” to perfect its lien right, such as through registration of its lien under the PPSA or other registry system, as may be required by the relevant statute.

The parameters of each lien and any obligation on the Crown is prescribed by statute. Unfortunately, statutory lien provisions and the priority rules prescribed by them are inconsistent and reference must be made to each statute and the deeming provisions and the underlying jurisprudence. However, the legislation typically requires the Crown to register the lien in accordance with the relevant provincial registration requirements.  

---

14 The reduction of the “prescribed security interest” amount by the value of collateral securities can be problematic if the Crown argues a “prescribed security interest” should be reduced because of unsecured collateral guarantee(s), a position which has been assumed although does not appear to have been litigated and reported on to date. A guarantee is not “security” in the traditional sense, as it does not give a lender a priority or general security right to the guarantor’s property in and of itself. Careful consideration of the Crown’s position in respect of a prescribed security interest will have to be given on a case by case basis.

15 See for example the ITA, supra. note 9.

16 There are exceptions to this rule and each statute must be checked for requirements. As an example, the Municipal Act, 2001, S.O. 2001, c. 25 at subsection 349(3) creates a statutory lien enforceable against a debtor’s real property for taxes outstanding and registration of such lien is not required for perfection and priority. Moreover, the lien ranks ahead of other secured creditors whether their interests were perfected prior to or subsequent to the date the lien arose.
5. GARNISHMENT

Garnishment allows the Crown to garnish funds owed to a tax debtor or prospective tax debtor by a third party within a set time frame (usually one year)\(^\text{17}\). Third parties receiving a notice of garnishment must redirect payment of any obligations owing to the tax debtor to the Crown. For a secured creditor receiving a notice of garnishment, funds received by the secured creditor which but for the security interest of the secured creditor would otherwise be available to the debtor may also be caught by garnishment notice\(^\text{18}\).

Failure to pay over the garnished funds, if any, renders the recipient of the garnishment notice personally liable for the garnished debts\(^\text{19}\). The liability of a recipient to pay the garnished debt is generally subordinate to prior perfected security interests. However, garnishment rights arising under the ETA\(^\text{20}\) or ITA\(^\text{21}\), which are sometimes referred to as an “Enhanced Requirement to Pay”, confer a proprietary right of the Crown in the debt the third party is required to pay to the tax debtor which defeats any security interest, charge or assignment on the tax debtor’s account receivables.

An Enhanced Requirement to Pay is a tool that enables the federal government to intercept monies owed to tax debtors. Pursuant to the wording of the Enhanced Requirement to Pay provisions under the ITA and the ETA, the money garnished “becomes” the property of the Crown to the extent of the tax debtor’s liability as assessed by the Crown. Because the recipient of the Enhanced Requirement to Pay has no ability to deal with the garnished funds, they are not available for or subject to the rights of the recipient’s remaining creditors once a notice has been served\(^\text{22}\).

Interestingly, as discussed below, the deemed trust created by the ETA over the property of a tax debtor ceases to operate in both bankruptcy and in CCAA proceedings\(^\text{23}\). However, an Enhanced Requirement to Pay issued to a third party in respect of the same tax debt continues to be an enforceable superpriority in both bankruptcy and in CCAA proceedings as long as it was issued before the proceedings were commenced\(^\text{24}\).

The stay of proceedings that typically accompanies an insolvency proceeding should prevent the issuance of a garnishment notice (including an Enhanced Requirement to Pay), to those parties protected by or receiving the benefit of the stay, on the basis that the remedy would be considered action against the protected party’s property (specifically, its accounts receivable).

---

\(^{17}\) Lamar, supra. note 9 at 1-2.6 to 3.

\(^{18}\) See for example ITA, supra, note 9, at Subsection 224(1.2)(b).

\(^{19}\) See for example ITA, supra, note 6, at Subsection 224(4).

\(^{20}\) ETA, supra note 9, at s. 317(3).

\(^{21}\) ITA, supra note 13, s. 224 (1 -1.2).


\(^{23}\) ETA, supra note 9.

\(^{24}\) See Vitapharm, supra. note 22. The position of the Court of Appeal in Vitapharm is consistent with the position of the Supreme Court of Canada in Royal Bank of Canada v. Sparrow Electric Corp. Sparrow Electric, [1997] 1 SCR 411; (1997) CanLII 377. Justice Iacobucci concluded that “...it is open to Parliament to step in and assign absolute priority to the [Crown]... All that is needed to effect the desired result is clear language of that kind.”
6. ENVIRONMENTAL CLAIMS

There has been a significant increase in the number of large insolvency cases where Crown claims for environmental remediation costs have been a significant and controversial issue. Environmental contamination is a serious issue generally coupled with far reaching health and safety consequences for both the contaminated and surrounding areas. Consequently, remediation orders issued by the Crown often impose tight timelines within which remediation steps must be conducted and the cost of environmental remediation is a burden which many companies (regardless of their financial health as at the date of the remediation order) may struggle to meet.

Where a debtor cannot meet its obligations to remediate, subsection 14.06(7) of the BIA and subsection 11.8(8) of the CCAA grants the Crown a superpriority charge in connection with a claim for the costs of remediating any environmental condition or environmental damage affecting real property or an immovable of the debtor. The superpriority charge is secured against the contaminated real property or immovable of the debtor and on any other real property or immovable of the debtor that is contiguous with that real property or immovable and that is related to the activity that caused the environmental condition.

However, the Supreme Court of Canada has recently ruled that a claim under the environmental charge will constitute a provable claim by the Crown regardless of whether the contamination occurred before or after the date of the insolvency proceeding and that the cost of remediation, whether or not the work has actually been performed by the Crown, is a claim provable. Consequently, such claim may be compromised by a CCAA plan of arrangement.

7. THE TIPPING POINT – CRYSTALLIZATION OF PRIORITY

In the case of an insolvent debtor, the queue of creditors has the potentially to be re-ordered at many steps along the path to distribution.

The general principal governing the priority of Crown claims is established through each of the BIA and CCAA, which establish that all Federal and Provincial Crown claims, including claims secured by statutory security interests and garnishment claims, shall rank as unsecured claims in a bankruptcy or a BIA/CCAA proposal proceeding. This principle is

---

25 A current and controversial issue before the courts and the legislation is whether the priority and scope of the superpriority charge granted by the BIA and CCAA in respect of Crown claims should be expanded to include a charge over the other assets and real property of the debtor unrelated to the activity which caused the contamination. See for example the pending appeal of Her Majesty the Queen in right of Ontario, as represented by the Ministry of the Environment, before the Ontario Court of Appeal in the Matter of a Plan of Compromise or Arrangement of Northstar Aerospace, Inc., Northstar Aerospace (Canada) Inc., 2007775 Ontario Inc. and 3024308 Nova Scotia Company.
26 Newfoundland and Labrador v. AbitibiBowater Inc., 2012 SCC 67. It should also be a claim provable in a BIA proposal.
28 BIA, supra, note 2, at s. 86(1) and CCAA, supra, note 1, at 38(1).
subject to several important exceptions. The most significant exceptions are in respect of deemed trusts created for source deductions and Crown claims perfected by registration.

The below three charts summarize the various ways in which Federal and Provincial Crown claims are prioritized as against other claims in and to the same property both generally and within the different insolvency regimes. These charts are not intended to be an exhaustive overview of all Crown claims, but are the most common claims at issue in insolvency proceedings.

7.1 PRIORITY OF FEDERAL CROWN CLAIMS FOR SOURCE DEDUCTIONS

<table>
<thead>
<tr>
<th>Statute</th>
<th>Section and Interest Created</th>
<th>General Priority Outside of Insolvency</th>
<th>Priority in Receivership</th>
<th>Priority in CCAA/BIA Proposal</th>
<th>Priority in Bankruptcy</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Canada Pension Plan: Crown claim for employee source deductions</strong></td>
<td>Deemed Trust per Sections 23(3) and (4)</td>
<td>Deemed trust has superpriority over existing perfected security interests but is subordinate to a “prescribed security interest” in real property.</td>
<td>General priority of deemed trust continues.</td>
<td>General priority of deemed trust continues, subject to sections 81.1 and 81.2 of the BIA.</td>
<td>General priority of deemed trust continues, subject to sections 81.1 and 81.2 of the BIA.</td>
</tr>
<tr>
<td></td>
<td>Garnishment per Section 23(2)(a) [which incorporates Section 224 (1.2) of the ITA]</td>
<td>Garnishment has superpriority over all security interests in accounts of the party upon whom a notice of garnishment is served.</td>
<td>General priority of garnishment rights continue.</td>
<td>General priority of garnishment rights continue, subject to subsections 69(1) and 69.1(1) of the BIA and section 11.09 of the CCAA.</td>
<td>General priority of garnishment rights continue.</td>
</tr>
<tr>
<td><strong>Employment Insurance Act: Crown claims for employee source deductions</strong></td>
<td>Deemed Trust per Sections 86 (2), (2.1), (2.2)</td>
<td>Deemed trust has superpriority over existing perfected security interests but is subordinate to a “prescribed security interest” in real property.</td>
<td>General priority of deemed trust continues.</td>
<td>General priority of deemed trust continues, subject to sections 81.1 and 81.2 of the BIA.</td>
<td>General priority of deemed trust continues, subject to sections 81.1 and 81.2 of the BIA.</td>
</tr>
<tr>
<td></td>
<td>Garnishment per Section 99(a) [which incorporates Section 224 (1.2) of the ITA]</td>
<td>Garnishment has superpriority over all security interests in accounts of the party upon whom a notice of garnishment is served.</td>
<td>General priority of garnishment rights continue.</td>
<td>General priority of garnishment rights continue, subject to subsections 69(1) and 69.1(1) of the BIA and section 11.09 of the CCAA.</td>
<td>General priority of garnishment rights continue.</td>
</tr>
</tbody>
</table>

29 For a summary of the most important exceptions in bankruptcy or a BIA proposal, see subsections 86(2), 86(3) and section 87 of the BIA. For exceptions in CCAA proceedings, see subsections 38(2), 38(3) and section 39 of the CCAA.

30 See section 86(3) of the BIA.

31 See section 87 of the BIA and the prescribed limits to such claims therein. Claims perfected by registration are limited to amounts owing to the Crown at the time of registration. This means practically that the Crown should not register in advance of a claim arising (for example, for the purpose of obtaining priority out of bankruptcy for future amounts incurring).
<table>
<thead>
<tr>
<th>Statute</th>
<th>Section and Interest Created</th>
<th>General Priority Outside of Insolvency</th>
<th>Priority in Receivership</th>
<th>Priority in CCAA/BIA Proposal</th>
<th>Priority in Bankruptcy</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Income Tax Act: Crown claims for employee source deductions</strong></td>
<td>Deemed Trust per Sections 227(4), (4.1)</td>
<td>Deemed trust has superpriority over existing perfected security interests but is subordinate to a “prescribed security interest” in real property.</td>
<td>General priority of deemed trust continues.</td>
<td>General priority of deemed trust continues, subject to sections 81.1 and 81.2 of the BIA.</td>
<td>General priority of deemed trust continues, subject to sections 81.1 and 81.2 of the BIA.</td>
</tr>
<tr>
<td>Garnishment [Enhanced Requirement to Pay for source deductions per Section 224 (1.2)]</td>
<td>Garnishment has superpriority over all security interests in accounts of the party upon whom a notice of garnishment is served.</td>
<td>General priority of garnishment rights continue.</td>
<td>Garnishment rights continue, subject to subsections 69(1) and 69.1(1) of the BIA and section 11.09 of the CCAA.</td>
<td>General priority of garnishment rights continue.</td>
<td></td>
</tr>
<tr>
<td><strong>Income Tax Act: Crown claims for any amount payable by a tax debtor under the ITA</strong></td>
<td>Statutory Lien per Sections 223(5), (6), (11.1)</td>
<td>Lien has priority over subsequently perfected security interests once registered, limited to the amount owing at time of registration of the lien together with interest and costs.</td>
<td>General priority of lien continues.</td>
<td>General priority of lien continues. See section 87 of the BIA.</td>
<td>General priority of lien continues. See section 87 of the BIA.</td>
</tr>
<tr>
<td>Garnishment for any amount payable by a tax debtor under the ITA per Section 224(1), (1.1)</td>
<td>Garnishment is subordinate to existing perfected security interests in accounts receivable of the party upon whom a notice of garnishment is served.</td>
<td>General priority of garnishment rights continue.</td>
<td>Claim is treated as an unsecured claim.</td>
<td>Claim is treated as an unsecured claim.</td>
<td></td>
</tr>
<tr>
<td><strong>Excise Tax Act: Crown claims in respect of HST/GST</strong></td>
<td>Deemed Trust per Sections 222(1), (2), (3), (4)</td>
<td>Deemed trust has superpriority over exiting perfected security interests but is subordinate to a “prescribed security interest” in real property.</td>
<td>General priority of deemed trust continues.</td>
<td>General priority of deemed trust ceases to operate.</td>
<td>General priority of deemed trust ceases to operate.</td>
</tr>
</tbody>
</table>

### 7.2 Priority of Other Federal Crown Claims

<table>
<thead>
<tr>
<th>Statute</th>
<th>Section and Interest Created</th>
<th>General Priority Outside of Insolvency</th>
<th>Priority in Receivership</th>
<th>Priority in CCAA/BIA Proposal</th>
<th>Priority in Bankruptcy</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Income Tax Act: Crown claims for any amount payable by a tax debtor under the ITA</strong></td>
<td>Statutory Lien per Sections 223(5), (6), (11.1)</td>
<td>Lien has priority over subsequently perfected security interests once registered, limited to the amount owing at time of registration of the lien together with interest and costs.</td>
<td>General priority of lien continues.</td>
<td>General priority of lien continues. See section 87 of the BIA.</td>
<td>General priority of lien continues. See section 87 of the BIA.</td>
</tr>
<tr>
<td>Garnishment for any amount payable by a tax debtor under the ITA per Section 224(1), (1.1)</td>
<td>Garnishment is subordinate to existing perfected security interests in accounts receivable of the party upon whom a notice of garnishment is served.</td>
<td>General priority of garnishment rights continue.</td>
<td>Claim is treated as an unsecured claim.</td>
<td>Claim is treated as an unsecured claim.</td>
<td></td>
</tr>
<tr>
<td><strong>Excise Tax Act: Crown claims in respect of HST/GST</strong></td>
<td>Deemed Trust per Sections 222(1), (2), (3), (4)</td>
<td>Deemed trust has superpriority over exiting perfected security interests but is subordinate to a “prescribed security interest” in real property.</td>
<td>General priority of deemed trust continues.</td>
<td>General priority of deemed trust ceases to operate.</td>
<td>General priority of deemed trust ceases to operate.</td>
</tr>
<tr>
<td>Statute</td>
<td>Section and Interest Created</td>
<td>General Priority Outside of Insolvency</td>
<td>Priority in Receivership</td>
<td>Priority in CCAA/BIA Proposal</td>
<td>Priority in Bankruptcy</td>
</tr>
<tr>
<td>------------------------------------------------------------------------</td>
<td>-----------------------------------------------------------------------------------------------</td>
<td>--------------------------------------------------------------------------------------------------------</td>
<td>----------------------------------------------------------------------------------------</td>
<td>---------------------------------------------------------------------------------------------</td>
<td>------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Garnishment per Section 317(3) [Enhanced Requirement to Pay]</td>
<td>Garnishment has priority over existing perfected security interests in accounts receivable of the party upon whom a notice of garnishment is served.</td>
<td>General priority continues in respect of garnishment notice issued prior to receivership. However, a notice may not be delivered after Receivership Order.</td>
<td>General priority continues in respect of garnishment notice issued prior to filing. A notice may not be delivered after CCAA/BIA proposal filing.</td>
<td>General priority continues in respect of garnishment notice issued prior to filing. A notice may not be delivered after bankruptcy.</td>
<td></td>
</tr>
<tr>
<td>Garnishment for any amount payable by a tax debtor under the ETA per Section 317(1), (2)</td>
<td>Garnishment is subordinate to existing perfected security interests in accounts receivable of the party upon whom a notice of garnishment is served.</td>
<td>General priority of garnishment rights continue. However, a notice may not be delivered after Receivership Order.</td>
<td>Claim is treated as an unsecured claim. A notice may not be delivered after CCAA/BIA proposal filing.</td>
<td>Claim is treated as an unsecured claim. A notice may not be delivered after bankruptcy.</td>
<td></td>
</tr>
<tr>
<td>Crown claims for environmental remediation under the provisions of the BIA/CCAA:</td>
<td>Secured Charge over contaminated real property for costs of remediation in adherence with Ministry issued remediation orders per CCAA ss. 11.8(8), (9) of and BIA ss. 14.06(7)</td>
<td>Not applicable.</td>
<td>In each of receivership, CCAA/BIA proposals and in bankruptcy: First ranking superpriority secured claim against the contaminated real property or immovable of the debtor and on any other real property or immovable of the debtor that is contiguous with that real property or immovable and that is related to the activity that caused the environmental condition. Unsecured claim against the remainder of the debtor’s real and personal property.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### 7.3 Priority of Provincial Crown Claims

<table>
<thead>
<tr>
<th>Statute</th>
<th>Section and Interest Created</th>
<th>General Priority Outside of Insolvency</th>
<th>Priority in Receivership</th>
<th>Priority in CCAA/BIA Proposal</th>
<th>Priority in Bankruptcy</th>
</tr>
</thead>
<tbody>
<tr>
<td>Corporations Tax Act: Crown claims in respect of provincial corporate tax</td>
<td>Statutory Lien per Sections 99(1) – (4)</td>
<td>Registered lien has priority over subsequently perfected security interests and other encumbrances except purchase money security interests (priority is determined in accordance with section 28 of the PPSA). The lien is effective against all amounts owing at time of registration and any arrears which continue to be incurred while registered.</td>
<td>General priority of lien continues.</td>
<td>General priority of lien continues, but the amount of the lien is limited to the amount owing as at the date of registration of the lien. See section 39 of the CCAA.</td>
<td>General priority of lien continues, but the amount of the lien is limited to the amount owing as at the date of registration of the lien. See section 87 of the BIA.</td>
</tr>
<tr>
<td>Statute</td>
<td>Section and Interest Created</td>
<td>General Priority Outside of Insolvency</td>
<td>Priority in Receivership</td>
<td>Priority in CCAA/BIA Proposal</td>
<td>Priority in Bankruptcy</td>
</tr>
<tr>
<td>------------------------------------------------------------------------</td>
<td>-------------------------------</td>
<td>----------------------------------------</td>
<td>--------------------------</td>
<td>------------------------------</td>
<td>------------------------</td>
</tr>
<tr>
<td><strong>Employer Health Tax Act: Crown claims in respect of health tax</strong></td>
<td>Statutory Lien per Sections 23(1) – (4)</td>
<td>Registered lien has priority over subsequently perfected security interests and other encumbrances except purchase money security interests (priority is determined in accordance with section 28 of the PPSA). The lien is effective against all amounts owing at time of registration and any arrears which continue to be incurred while registered.</td>
<td>General priority of lien continues.</td>
<td>General priority of lien continues, but the amount of the lien is limited to the amount owing as at the date of registration of the lien. See section 39 of the CCAA.</td>
<td>General priority of lien continues, but the amount of the lien is limited to the amount owing as at the date of registration of the lien. See section 87 of the BIA.</td>
</tr>
<tr>
<td></td>
<td>Garnishment per Sections 100(1), (2), (3)</td>
<td>Garnishment is subordinate to existing perfected security interests.</td>
<td>Claim is treated as an unsecured claim. A notice may not be delivered after receivership.</td>
<td>Claim is treated as an unsecured claim. Notice may not be delivered after proposal filing.</td>
<td>Claim is treated as an unsecured claim. Notice may not be delivered after bankruptcy.</td>
</tr>
<tr>
<td><strong>Fuel Tax Act: Crown claims in respect of fuel tax</strong></td>
<td>Deemed Trust per Section 3.6.1</td>
<td>Deemed Trust has superpriority over existing perfected security interests, subject to a “prescribed security interest”.</td>
<td>General priority of deemed trust continues.</td>
<td>Deemed trust ceases to operate.</td>
<td>Deemed trust ceases to operate.</td>
</tr>
<tr>
<td></td>
<td>Statutory Lien per Section 17.1</td>
<td>Registered lien has priority over subsequently perfected security interests and other encumbrances except purchase money security interests (priority is determined in accordance with section 28 of the PPSA). The lien is effective against all amounts owing at time of registration and any arrears which continue to be incurred so long as the lien remains registered.</td>
<td>General priority of lien continues.</td>
<td>General priority of lien continues, but the amount of the lien is limited to the amount owing as at the date of registration of the lien. See section 39 of the CCAA.</td>
<td>General priority of lien continues, but the amount of the lien is limited to the amount owing as at the date of registration of the lien. See section 87 of the BIA.</td>
</tr>
</tbody>
</table>

32 The Regulations of the *Fuel Tax Act* do not define “prescribed security interest”.

Cassels Brock
Admin*1766982.1

11
<table>
<thead>
<tr>
<th>Statute</th>
<th>Section and Interest Created</th>
<th>General Priority Outside of Insolvency</th>
<th>Priority in Receivership</th>
<th>Priority in CCAA/BIA Proposal</th>
<th>Priority in Bankruptcy</th>
</tr>
</thead>
<tbody>
<tr>
<td>Garnishment per Sections 17(3), (3.0.1), (3.1)</td>
<td>Garnishment has priority over existing perfected security interests in accounts receivable of the party upon whom a notice of garnishment is served.</td>
<td>General priority continues in respect of garnishment notice issued prior to receivership. Further notice may not be delivered after receivership.</td>
<td>General priority is lost and claim is treated as an unsecured claim.</td>
<td>General priority is lost and claim is treated as an unsecured claim.</td>
<td></td>
</tr>
<tr>
<td>Statutory Lien per Sections 208(7), 349(3), and 446(1), (3), (6)</td>
<td>Statutory lien has priority over existing mortgages and other encumbrances affecting real property, arising prior to or after the lien arises. No registration is required.</td>
<td>General priority of lien continues.</td>
<td>General priority of lien continues.</td>
<td>General priority of lien continues.</td>
<td></td>
</tr>
<tr>
<td>Deemed Trust per Section 24.1</td>
<td>Deemed trust has superpriority over existing perfected security interests, subject to a “prescribed security interest”⁵³.</td>
<td>Deemed trust ceases to operate.</td>
<td>Deemed trust ceases to operate.</td>
<td>Deemed trust ceases to operate.</td>
<td></td>
</tr>
<tr>
<td>Statutory Lien per Section 25.1(1), (2)</td>
<td>When notice of lien is registered against real or personal property, lien has priority over subsequently perfected security interests except purchase money security interests, limited to the amount of the lien owing at the time of registration.</td>
<td>Priority of lien continues.</td>
<td>Priority of lien continues.</td>
<td>Priority of lien continues.</td>
<td></td>
</tr>
<tr>
<td>Garnishment per Section 26 (1), (2.1)</td>
<td>Garnishment has priority over existing perfected security interests in accounts receivable of those third parties upon whom a notice of garnishment is served.</td>
<td>Priority is lost and claim is treated as an unsecured claim. See Section 24.1(4).</td>
<td>Priority is lost and claim is treated as an unsecured claim. See Section 24.1(4).</td>
<td>Priority is lost and claim is treated as an unsecured claim. See Section 24.1(4).</td>
<td></td>
</tr>
</tbody>
</table>

⁵³ The Regulations of the Tobacco Tax Act do not define “prescribed security interest”.

---

**Cassels Brock**

Admin*1766982.1
8. CREDITOR VS. CROWN — THE FIGHT TO THE FRONT OF THE LINE

The priority of Crown claims is defined by and confined within the language of the statute creating the claim. The priority granted is strictly interpreted by the Courts and historically ambiguities have been decided in favour of competing creditors.34

A receivership proceeding commenced under either the BIA or the Courts of Justice Act will not in and of itself impact the statutory priorities of Crown claims.

As stated above, the BIA deems Crown claims as unsecured in bankruptcy or a proposal subject to certain exceptions including those in subsections 86(2), 86(3) and section 87. Further, Crown trust claims are addressed in subsection 67(2) of the BIA, which reverses any legislative provision that deems property of a debtor to be held in trust, unless such property would be found to be held by way of a “true trust” or is the subject of the exceptions set out in subsection 67(3).

Following a bankruptcy or filing of a BIA proposal, the Crown and other creditors for whose benefit statutory liens or charges are created are no longer permitted to enforce such liens or charges, except to the extent permitted by sections 67, 86 and 87.

Under the CCAA, sections 37 – 39 address Crown statutory liens and deemed trusts in a manner consistent with sections 67, 86 and 87 of the BIA. For the purpose of the below discussion, only the BIA provisions will be addressed in detail. However, the priority scheme for Crown claims established by the CCAA will substantively mirror the priority scheme established in both bankruptcy and BIA proposals.

8.1 PRIORITY OF STATUTORY LIENS, GARNISHMENTS AND OTHER CHARGES

In the absence of express statutory language exempting federal statutory liens and garnishment rights from the effect of the BIA and the exceptions described below, sections 86 and 87 of the BIA will invalidate the priority status of Federal and Provincial Crown claims, subject to the exceptions described below.

In sections 86 and 87, the BIA differentiates between three kinds of Crown interests which continue to be enforceable in bankruptcy and proposals as follows:

34 See For example: Dauphin Plains Credit Union Ltd. v. Xyloid Industries Ltd. [1980] S.C.J. No. 35; Homeplan Realty Ltd. v. Avco Financial Services Ltd. (1977), 5 B.C.L.R. 289 (B.C.C.A.), affd. by S.C.C. (1979), 18 B.C.L.R. 23 [Avco]. As stated by the Court in Avco at p. 24: “If the legislative assembly intends to produce by statute results that are so brutal and piratical, it has the power to do so, but the Courts will hold that that was its intention only if the language of the statute compels that interpretation.”
35 Supra., note 3.
36 BIA, supra. note 2, s. 86(1).
37 Or a notice of intention to file a proposal as provided for under subsection 50.4(1) of the BIA.
38 Where there is a distribution under the BIA of proceeds of sale of a debtors property, certain liens or charges invalidated by virtue of sections 86 and 87 may still be eligible to receive payment in accordance with the distribution scheme set out in section 136 of the BIA.
39 In addition to Crown claims, section 86 and 87 of the BIA also include the claims of any body under an Act respecting workers’ compensation.
1) claims that are secured by a security which can be obtained by persons other than the Crown pursuant to: (i) any law, or (ii) any federal or provincial legislation where the federal or provincial provisions have not solely been created to secure the Crown claim;

2) secured claims that are created in federal or provincial legislation for the sole purpose of securing the Crown claim, provided that: (i) the Crown interest has been registered under the prescribed registry system before the bankruptcy or proposal filing; and (ii) the Crown will only have priority for the amount of the arrears owing as at the date of registration of the lien; and

3) Crown claims for payroll source deduction obligations under the ITA, the Canada Pension Plan and the Employment Insurance Act.

Priority of Provincial Crown garnishment orders affecting a debtor’s accounts receivable will be defeated by section 86 of the BIA. Priority of Federal Crown garnishment orders affecting a debtor’s accounts receivable will be defeated by section 86 unless an exemption from section 86 or the BIA generally is provided for under the relevant federal statute (such as the ITA), or a proprietary right is created in the garnished funds (such as the ITA and the ETA).

8.2 PRIORITY OF DEEMED TRUSTS VS. TRUE TRUSTS

The Crown can make, in addition or in substitution of its deemed trust claim, a claim for a “true trust”, which claim will, if it meets the requirements of a “true trust”, survive a bankruptcy and will not be extinguished by virtue of section 67(2) of the BIA. This is because a creditor’s proprietary claim in trust property will defeat all other secured interests in the same property. Pursuant to section 67(1)(a) of the BIA, “trust” property is deemed not to form part of a debtor’s property available to creditors generally.

Section 67(1)(a) applies to property which is found in law to be held as a “true trust” by a debtor for a creditor. The word “trust” as used therein only refers to a “trust arising under general principles of trust law” and does not include deemed trusts. For certainty, subject to certain express exceptions set out in subsection 67(3) of the BIA, subsection 67(2) expressly excludes deemed trusts in favour of the Crown from 67(1)(a).

Crown deemed trusts are created by statute and are not “true trusts” in any legal sense. In order to assert a successful “true trust” claim, the Crown must demonstrate that the three “certainties” of trust law have been met, being: (i) certainty of intent; (ii) certainty of subject

---

40 BIA, supra. note 2 at., s. 86(2)(a)(i). Presumably, this would be security, such as a mortgage.
41 BIA, ibid., s. 86(2)(a)(ii).
42 BIA, ibid., s. 87(1), (2).
43 BIA, ibid., s. 86(3)
44 See Vitapharm, supra. note 22.
45 There was some uncertainty in respect of the pre-1992 wording of section 67 of the BIA, which allowed the Crown to submit the position its deemed trusts were captured by use of the word “trust”. This argument was rejected by the Supreme Court of Canada in British Columbia v. Henfrey Samson Belair Ltd [1989] S.C.J. No. 78 [“Belair”], and the BIA was amended to expressly deal with the application of statutory deemed trusts in bankruptcy.
46 Belair, ibid. at para. 16.
matter; and (iii) certainty of object\textsuperscript{47}. Importantly, trust property must not be mixed or co-mingled with other property such that it can no longer be identified. If fungible property such as money has been co-mingled, a creditor’s interest can no longer be traced to the specific trust property and their trust claim will be defeated\textsuperscript{48}. As such, it is critical for a creditor to understand where and how a debtor’s fungible property is held prior to bankruptcy. Segregating proceeds of sale into which the Crown can trace its interest for example can lead to arguments that the Crown’s trust rights survives bankruptcy and is preserved by subsection 67(1)(a)\textsuperscript{49}.

Section 67(3) sets out the exceptions to the rule extinguishing deemed trusts on bankruptcy as set out in section 67(2) of the BIA and preserves deemed trusts created over source deductions under ITA, the Employment Insurance Act and the Canada Pension Plan\textsuperscript{50}.

\section{9. STREAMLINING PRIORITY RIGHTS IN RESTRUCTURING}

The Court of Appeal decision in \textit{Ivaco}\textsuperscript{51} stands for the proposition that it is not improper for a secured creditor or other stakeholder to seek a bankruptcy order for the purpose of reversing a statutory deemed trust or other similar superpriority of the Crown. In coming to this decision, the Court relied on the express provisions of the BIA and other federal legislation where the intent to reverse and extinguish the superpriority status of the Crown is clear.

Oftentimes for insolvency professionals and secured creditors the tactical consequence of a strategic bankruptcy is readily apparent. Recovery for creditors other than the Crown is exponentially increased. Frequently, the reversal of the deemed trust for HST/GST alone can be the tipping point for a secured creditor considering a strategic bankruptcy of its debtor company\textsuperscript{52}.

But for the debtor and its stakeholders - which include shareholders, employees, suppliers, customers, and both senior and junior secured creditors - the practical consequence of a bankruptcy is the death of a company. With the death of a company comes invariably the loss of jobs, opportunities, and domestic economic growth.

In order to avoid bankruptcy, a debtor may undertake a restructuring of its assets and affairs. However, in order to successfully restructure, there must be a compromise of competing interests to a debtor’s property at both the Crown and creditor level. The Court in \textit{Metcalfe} eloquently stated:

\begin{flushright}

\textit{Ivaco}, ibid., see also Belair, supra, note 45.

\textit{Ivaco} , supra, note 47.


\textit{Also excluded are trusts created by provincial legislation which impose a tax similar in nature to the tax imposed by the ITA and contains language substantially similar to that of subsection 227(4) or (4.1) of the ITA and trusts created by legislation which are “substantially similar” to subsection 23(3) or (4) of the \textit{Canada Pension Plan}."

\textit{Ivaco} , supra, note 47.

\textit{However, prior to initiating a strategic bankruptcy, a secured party must consider the total effect of such a bankruptcy on the ability to realize on the debtor’s assets to repay the debt. For example, a bankruptcy proceeding can trigger certain superpriority charges in favour of employees of the debtor which do not otherwise exist outside of bankruptcy."

\textit{Cassels Brock &-gray}

\textit{Admin*1766982.1}
In insolvency restructuring proceedings almost everyone loses something. To the extent that creditors are required to compromise their claims, it can always be proclaimed that their rights are being unfairly confiscated and that they are being called upon to make the equivalent of a further financial contribution to the compromise or arrangement. Judges have observed on a number of occasions that CCAA proceedings involve “a balancing of prejudices,” inasmuch as everyone is adversely affected in some fashion.\(^{53}\)

The Crown historically has not been willing or is not able to concede its priority rights in restructuring. Debtors seeking to restructure under the CCAA or BIA with significant Crown debts often end up in bankruptcy because creditors cannot support or a debtor cannot put forth a proposal or plan of arrangement that is solely to the benefit of the Crown. In the past, this reality was compounded by the fact that the Crown’s deemed trust for HST/GST arrears (among other trust claims for taxes) appeared to continue in restructuring proceedings and could only be extinguished (despite best efforts arguments of the Crown to the contrary) in bankruptcy.

Disputes as to whether amounts held for the Crown by way of a deemed trust continued in many insolvency cases. This issue was settled by the Supreme Court of Canada in *Caisse Populaire*\(^{54}\), where the Supreme Court disagreed with the Crown’s position that the deemed trusts established by the legislature should continue to exist after a bankruptcy because they create a proprietary right in receivables which is not vested out by a bankruptcy. The Supreme Court found that the Crown’s position conflicted with both the words and the intent of the BIA, where the intent to reverse and extinguish the superpriority status of the Crown is clear, and further, was inconsistent with the nature of the tax authorities’ rights under the system for the collection and remittance of the GST and QST. Where a supplier company becomes bankrupt, the Crown does not “own” or have proprietary rights in and to GST/HST and QST amounts. Instead, it has an unsecured claim.

The Supreme Court took this one step further in *Century Services*\(^{55}\), when it ruled that deemed trust claims for GST under the ETA are also ineffective in CCAA proceedings. Deemed trusts for GST/HST will however still continue in a receivership proceeding\(^{56}\).

Conflicting priority schemes between the BIA and CCAA can hamper the fundamental purpose of the CCAA, which is to preserve the status quo so a compromise or arrangement can be developed and negotiated for the betterment of all parties\(^{57}\). *Century Services* is one of many cases\(^{58}\) which appear to be focused on streamlining the legislation so that Crown (and other superpriority) claims have clearly defined boundaries which are consistent and do not conflict with the purpose of the Canadian insolvency regime.

---

\(^{53}\) *Metcalfe & Mansfield Alternative Investments II Corp (Re)* (2008), 92 OR (3d) 513 at para, 117, (CA)

\(^{54}\) *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny*, 2009 SCC 49.

\(^{55}\) *Ted Leroy Trucking Ltd., Re* (2010), Supreme Court of Canada 2010, 3 S.C.R. 379 (S.C.C.) ["Century Services"]

\(^{56}\) Prior to Century Services, *ibid.*, the Court of Appeal in *Re Ottawa Senators Hockey Club Corp.* (2003), 2003 CarswellOnt 5132, 68 O.R. (3d) 603 (C.A.) held that *Excise Tax Act* deemed trusts for GST are enforceable against a CCAA debtor unless there was an assignment in bankruptcy.

\(^{57}\) *Re: Forest & Marine Financial Corp.* (2009), 2009 Carswell B.C. 1738, 54 C.B.R. (5th) 201 (B.C. C.A.)

\(^{58}\) See for example *Re Timminco Limited* (2012) ONSC 506 (Ont. Commercial List) and (2012) ONSC 948 (Ont. Commercial List) and Timminco Limited and Bécancour Silicon Inc., *Re*, (20 July 2012), Ontario M41062 & M41085 (Ont. C.A.), which address superpriority administrative and DIP charges.
However, this is not to say that all priorities in bankruptcy will or should be upheld in CCAA and restructuring proceedings. Each insolvency forum is governed by its own process. As recently articulated by the Supreme Court of Canada in *Indalex*:

In order to avoid a race to liquidation under the BIA, courts will favour an interpretation of the CCAA that affords creditors analogous entitlements. Yet, this does not mean that courts may read bankruptcy priorities into the CCAA at will. Parliament did not expressly apply all bankruptcy priorities either to CCAA proceedings or to proposals under the BIA. Although the creditors of a corporation that is attempting to reorganize may bargain in the shadow of their bankruptcy entitlements, those entitlements remain only shadows until a bankruptcy occurs.59

10. CONCLUSION

Understanding priority rights both prior to and following bankruptcy is essential for any secured party anticipating enforcement of its security rights. Further, appreciating the cost consequences of the chosen manner of enforcement is the key in ensuring the financial wellbeing of the secured creditor throughout the process.

Strategies for effective enforcement of a creditor’s security are shaped by the landscape surrounding a debtor’s insolvency. Understanding the scope of risk to a creditor’s priority first from other creditor and Crown claims and second from the choice of insolvency proceeding are critical to any proactive creditor seeking to maximize its recovery.

The Courts and the legislation generally appear to be moving towards resolution of Crown (and other legislated superpriority claims) in a manner so as not to frustrate or impede the rehabilitative purpose of the CCAA and BIA restructuring regimes. Forcing a bankruptcy solely to reverse Crown priority is contrary to the insolvency regime, and where possible, should be discouraged.

---

59 *Indalex*, *supra* note 5 at p. 51.