

## Tax

# Bank owes unremitted tax of former client: Federal Court of Appeal

By **Ian Burns**

(May 15, 2020, 2:20 PM EDT) -- The Federal Court of Appeal has confirmed secured creditors who receive proceeds from a tax debtor's property when that person owes GST to the Crown is required to pay that debt in priority to all other security interests, with a real estate lawyer calling the decision concerning as it has the potential to add uncertainty to future financing decisions.

The case in *Toronto-Dominion Bank v. Canada* 2020 FCA 80 focused on the "deemed trust" provisions in the *Excise Tax Act*, which says HST or GST collected is deemed to be held in trust for the Canada Revenue Agency (CRA). A landscaping business owner named Weisflock had collected, but did not remit, GST for the 2007 and 2008 tax year. In 2010, TD Bank gave him both a line of credit and a loan, which were secured by a charge and mortgage registered against his property; the following year, the property was sold. At the time, TD did not enforce its security against Weisflock, but received two cheques to repay the line of credit and the mortgage. The bank subsequently discharged the charges registered against the property.

The CRA later informed the bank that part of the proceeds it received from the sale of the property should have been given to it to pay the unremitted tax, but the bank refused to pay. The CRA started legal action, seeking repayment of approximately \$67,000.

And Justice Eleanor Dawson of the Federal Court of Appeal upheld a lower court ruling which said s. 222(3) of the Act obliged the bank to remit the money back to the CRA. She wrote the language of the Act means that Parliament intended to grant priority to the deemed trust in respect of property that is also subject to a security interest, regardless of when the security interest arose in relation to the time the GST was collected.

"This flows from Parliament's use of the phrase 'despite any security interest in the amount' in s. 222(1)," she wrote in her April 29 decision. "In the present case, when the debtor collected amounts as or for GST he was deemed 'for all purposes ... to hold the amount in trust for Her Majesty ... separate and apart from' his property. Thus, when the bank lent money to the debtor and took its security interests, the debtor's property to the extent of the tax debt was already deemed to be beneficially owned by the Crown."

As part of its case, the bank acknowledged the deemed trust provisions grant an absolute priority to the Crown, but argued it was not a secured creditor at the time the obligation to pay was "triggered." But Justice Dawson held no such triggering event is required.

"The words that spoke to the triggering events of 'liquidation, assignment, receivership or bankruptcy' were found in the prior iteration of the deemed trust provisions but removed from the current version," she wrote. "Instead, the legislation deems property of a tax debtor and property held by a secured creditor to be held in trust once GST is collected but not remitted."



Steven Pordage, Pallett Valo LLP

Justice Dawson then dismissed the bank's appeal, joined by Justices David Near and Mary Gleason. But she noted lenders are not without some ability to manage the risk posed by deemed trusts.

"They may identify higher risk borrowers (which might include persons operating sole proprietorships), require borrowers to give evidence of tax compliance, or require borrowers to provide authorization to allow the lender to verify with the Canada Revenue Agency whether there are outstanding GST liabilities," she wrote.

Lawyer Steven Pordage of Pallett Valo LLP said the decision is concerning because lenders are going to want to protect themselves against any outstanding liabilities, but it is very difficult to figure out whether someone owes the CRA money short of a full audit.

"Without an audit, I don't think [the CRA] can give you an unqualified 'no' that there is nothing owing," he said. "[The court] says to contact the CRA to see if there is anything owing, but the issue I have with that is I don't think that you'll get an unqualified answer from them. So, certainly lenders are going to want some kind of assurances that there is either no liability or it is minimal, but how they get those assurances I'm not sure."

Pordage said title insurance does mitigate some of the risk associated with unremitted tax, but added there still needs to be a way for lenders to ascertain with some certainty whether deemed trust provisions apply.

"It is probably a good idea to write to the CRA when you are financing a transaction because, even if you get the letter back saying there is something owing you could, depending how much equity is in the property, just not discharge your security until there is evidence that tax debt has been paid," he said. "But there is still a risk, and that is the scary part because I am not aware of any way to ascertain with absolute certainty whether tax debts are owing."

A CRA representative declined comment on the case, citing confidentiality provisions. TD Bank did not respond to a request for comment.

*If you have any information, story ideas or news tips for The Lawyer's Daily please contact Ian Burns at [Ian.Burns@lexisnexis.ca](mailto:Ian.Burns@lexisnexis.ca) or call 905-415-5906.*

---

© 2020, The Lawyer's Daily. All rights reserved.