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CCAA Provisions Override Statutory Deemed Trusts: SCC

The Crown has no priority for unremitted GST in proceedings under the *Companies' Creditors Arrangement Act* according to the Supreme Court of Canada in [*Century Services Inc. v. Canada \(Attorney General\)*](#), 2010 SCC 60, decided December 16, 2010. The court found that GST monies collected by a debtor and held in trust while restructuring attempts were made pursuant to the CCAA were not payable to the Crown when bankruptcy proceedings were subsequently initiated. The court resolved the seeming conflict between provisions in the CCAA (s.18.3(1)) and the *Excise Tax Act* (s. 222(3)) by examining the history and scope of insolvency legislation. The court noted that "(w)ith parallel CCAA and BIA restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation." (para. 24) This context, the court found, supports the conclusion that the statutory lacuna in s. 222(3) of the ETA (failure to specifically exempt the CCAA from the deemed trust provisions as it does the BIA) is "a facial conflict only, capable of resolution by looking at the broader approach taken to Crown priorities and by giving precedence to the statutory language of s.18.3 of the CCAA in a manner that does not produce an anomalous outcome." (para. 50) These articles discuss the decision:

- [Supreme Court Rules Crown Has No GST Priority Under CCAA](#), CAIRP bulletin;
- [Government Loses its Priority to GST in CCAA Proceedings](#), FMC Law.

Offshore Trust Rulings Confirmed: FCA

The Federal Court of Appeal has upheld last year's Tax Court of Canada decisions concerning the use of offshore trusts as tax and estate planning vehicles (discussed in our October 2009 eLaw). In [*St. Michael Trust Corp. v. Canada*](#), 2010 FCA 309 (also known as Garron) the appeal court confirmed that the correct test of trust residency is central management and control, not residence of the trustee. In [*Antle v. Canada*](#), 2010 FCA 280 the Federal Court of Appeal agreed with the lower court that the spousal trust had not been validly constituted. It disagreed with the earlier finding that the transaction was not a sham, however, holding that the trial judge

misconstrued the notion of intentional deception in the context of a sham. The required intent or state of mind is not equivalent to *mens rea* and need not go so far as to give rise to what is known at common law as the tort of deceit... It suffices that parties to a transaction present it as being different from what they know it to be.

These articles shed more light on the implications of the decisions for tax planning purposes:

- [*Trust Residency - "Central Management and Control"*](#), posted December 17, 2010 on McCarthy Tetrault;
- [*Antle v. Canada \(2010\): That Trust was a Sham!*](#) by Cris Best Posted November 30, 2010 on The Court;
- [*Antle and Garron - Federal Court of Appeal's Decisions and Implications for Trusts*](#), December 2010 Blakes bulletin.

Voluntary Conveyances Between Close Relatives Inherently Suspicious: MBQB

In [*Lazer Grant Inc. v. Tsouras*](#), 2010 MBQB 265 the court grants summary judgment to the trustee of a bankrupt estate after finding that money transfers from the bankrupt husband to his wife were fraudulent conveyances. The court found that the bankrupt had failed to meet the substantial evidentiary burden to establish that the transactions were not made with the intent to defeat, hinder, delay or defraud creditors or others. The court also rejected the bankrupt's argument that he had to have been insolvent at the time of the transactions for them to be fraudulent.

Anti-Spam Legislation Passed

[*Bill C-28*](#), the *Fighting Internet and Wireless Spam Act* introduced last spring, received royal assent December 15, 2010. It will come into force upon proclamation, likely not until next fall. The new legislation is outlined in this [government summary](#) and its impact is discussed in these articles:

- [*Anti-Spam Legislation Passed, Awaits Proclamation*](#), Slaw, December 30, 2010;
- [*Bill C-28: Canada's Anti-Spam Legislation Passes - The Impact on Your Marketing Programs and Practices*](#), a Borden Ladner Gervais bulletin; and
- [*FISA: The New Anti-Spam Law in Canada*](#), a Gowlings briefing bulletin.

New Product Safety Legislation

[*Bill C-36*](#), the *Canada Consumer Product Safety Act* (CCPSA) received royal assent December 15, 2010. It is expected that the legislation will come into force "within the next few months" according to the [Health Canada press release](#). The new legislation will repeal sections of the 40 year old *Hazardous Products Act* and impose mandatory record keeping and incident reporting standards applying to sellers, manufacturers and importers. These documents summarize the changes:

- [*Consumer Product Prohibitions and Regulations under the Proposed Canada Consumer Product Safety Act*](#), Health Canada;
- [*The Rules Change: Canadian Consumer Product Safety Act Enacted*](#), Blakes Bulletin;

- [Bill C-36 would ratchet up consumer protection](#), *Globe and Mail*.

Workplace Safety Changes

Workplace Safety and Health [Regulation 147/2010](#) will come into force February 1, 2011, requiring Manitoba employers to protect workers from psychological harassment (such as bullying and intimidation) in the workplace. The amendments also address the control of workplace hazards. See the following article for more detail on the new regulation and on proposed changes to *The Workplace Safety and Health Act* ([Bill 219](#), requiring employers to create policies and train workers concerning workplace violence, was not passed last session, but may be reintroduced):

- [Important Changes and Proposed Amendments to Manitoba's Workplace Safety and Health Act Legislation](#), McCarthy Tétrault.

General Corporation Capital Tax Eliminated

The Manitoba government [announced](#) the elimination of another business tax this week. Effective January 1, 2011, the general corporation capital tax will no longer apply to Manitoba businesses. This tax was eliminated for manufacturers and processors in July 2008. The government estimates this change will save businesses \$119 million annually.

Recommend Reading

Business lawyers may find these recent publications interesting:

- Two articles on the new IFRS standards from the December 2010 [LawPRO magazine: *New rules and guidelines: Assessing your client's outstanding claims for audit purposes*](#), co-authored by local lawyer Carmele Peter, and [Gearing up for IFRS at LawPRO](#);
- The December 2010 edition of the Canadian Bar Association's [Business and Corporate Bulletin](#) contains articles on [outsourcing agreements](#), [proposed revisions to the merger enforcement guidelines](#), the [proof of claim process](#), [restructuring trends](#), and [income trust conversions](#);
- [Business Law Quarterly](#) and [Tax Update](#), both McCarthy Tétrault publications;
- [Proposed tax reforms breach privilege, warns Bar](#) [Aggressive tax planning legislation could pit lawyers against clients](#), a *Lawyers Weekly* article from November 26, 2010 which discusses the information reporting regime set out in the proposed s.237.3(2) of the *Income Tax Act*.

Upcoming Law Society CPD Programs

Register soon for these winter CPD programs:

- [Gain the Edge! Negotiation Strategies for Lawyers](#) - This day long seminar, presented by Martin Latz, negotiation expert and author of *Gain the Edge! Negotiating to Get What You Want*, received rave reviews when it was presented in 2009. Attendees will learn to approach negotiations with a strategic mindset, a critical skill that benefits inexperienced and seasoned negotiators alike. The program will be held February 11, 2011 at the Law Society classroom. Register by January 15th to take advantage of the early bird discount.
- [Annual Hot Topics in Real Estate](#) - An experienced panel of real estate practitioners will discuss commercial deals, new construction issues, and the meaning of "subject to lawyer's approval" in this program to be held February 8, 2011 from 1:00 - 4:00 p.m. in the Law Society classroom. The panel will also update attendees on last year's hot topics, including revenue properties, title insurance, condominium issues and the onsite wastewater management regulation. [Register](#) soon to guarantee your spot.

MBA Mid-Winter Meeting

The 2011 [Mid-Winter Meeting](#) will take place January 20-22, 2011 at the Fairmont Winnipeg, with professional development programs on January 21. Topics that may be of interest to business lawyers include:

- Interpreting Manitoba's New *Franchise Act* and Tips for Practitioners - from 9:30 - 11:30 a.m.; and
- The Impact of International Reporting Standards and the Changing Accounting Landscape on Audit Inquiries under the Joint Policy Statement - from 2:00 - 4:00 p.m.

Contact the [Bar Association](#) for further details.

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