



Super Priority of Revenue Canada over Lender

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Lenders should conduct a record search of the Canada Revenue Agency in order to ensure that there are no outstanding payments to be made by the borrower to Revenue Canada. If amounts are outstanding, Revenue Canada will have a priority over any moneys owed by the borrower to the lender.

According to legislation, the Canada Revenue Agency (the "CRA") has a super-priority over a mortgage in regards to a repayment of creditors in the event the borrower defaults. This results in the CRA being able to collect any amount owing by the borrower before any payment is to be made to the lender.

A recent Ontario court decision highlights the importance of a lender to ensure that the borrower has no outstanding amount owing with the CRA.

In *MCAP Service Corp. v. Hunter*, 2005 CanLII 47759 (ON S.C.), a mortgage was granted to the borrower as security for a loan of approximately \$94,500. At the time the mortgage was granted the lender was not aware that the borrower owed unremitted GST and employee deductions in the amount of \$51,212.85. The mortgage eventually went into default and action was taken to have the loan repaid to the mortgagee.

The court decided that the mortgagor was required to repay the entire amount owing to CRA and to the lender in order to remedy the default. The issue was as to which creditor had priority over the mortgaged land. The court addressed Section 227(4.1) of the Income Tax Act to verify that the legislation had created a super-priority of the CRA over the lender.

A valid argument was made to raise the constitutional validity of the legislation creating the super-priority of the CRA. This argument was raised because the CRA does not allow third parties to access a person's affairs and confidential information. This makes it impossible for a lender to see if there are any outstanding amounts owing to the CRA before the lender decides to grant the loan, so in essence the lender is assuming this risk involuntarily.



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As such, it is prudent for a lender's lawyer to obtain the written consent of the borrower to do a file search of CRA. This would give the lender some comfort that there are no outstanding GST payments or employee source deductions payable by the borrower.

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