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| <b>PRIORITY OF CROWN CLAIMS IN<br/>INSOLVENCY</b><br>Lamer<br>Release No. 3, July 2022 |
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### Publisher's Special Release Note 2021

The pages in this work were reissued in December 2021 and updated to reflect that date in the release line. Please note that we did not review the content on every page of this work in the December 2021 release. We will continue to review and update the content according to the work's publication schedule. This will ensure that subscribers are reading commentary that incorporates developments in the law as soon as possible after they have happened or as the author deems them significant.

Changes to chapter and heading numbering may have occurred. Please refer to the Correlation Table in the front matter if you wish to confirm references.

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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.

This release includes updates and amendments to Appendix A (Related Legislation), Appendix B (British Columbia), Appendix C (Alberta), Appendix D (Saskatchewan), Appendix E (Manitoba), Appendix F (Ontario), Appendix G (Québec), Appendix H (New Brunswick), Appendix I (Nova Scotia), Appendix IF (Issues in Focus), Appendix J (Prince Edward Island), Appendix K (Newfoundland and Labrador).

## HIGHLIGHTS

**Appendix IF: Issues in Focus — What liabilities do corporate directors face with respect to taxes?** — In this release, updates to the memo “What liabilities do corporate directors face with respect to taxes?” have been added to the text at Appendix IF:5. Corporate directors are liable under a myriad of statutes, such as the *Canada Business Corporations Act*, the *Business Corporations Act* (Ontario), and the *Bankruptcy and Insolvency Act*. Additionally, directors may also be held liable for certain tax liabilities of the corporations they serve. Specifically, corporate directors can be held personally liable under the *Income Tax Act*, the *Excise Tax Act*, the *Employment Insurance Act*, the *Employer Health Tax Act*, the *Corporations Tax Act*, and the *Retail Sales Tax Act*, as well as under the *Canada Pension Plan*.

**Appendix IF: Issues in Focus — Does the registration of a memorial by the Canada Revenue Agency create a security interest or lien against property?** — In this release, updates to the memo “Does the registration of a memorial by the Canada Revenue Agency create a security interest or lien against property?” have been added to the text at Appendix IF:7. The *Income Tax Act* (“ITA”) and the *Excise Tax Act* (“ETA”) allow the Crown to register a certificate(s), with the Federal Court, for the purpose of certifying ‘amounts payable’ (or, monies owing) by a debtor to the Crown — most commonly, tax arrears (e.g., unpaid income taxes, unpaid HST). Once registered with the Court, the certificate — known also as a ‘memorial’ — may then be registered by the Crown in the province’s applicable personal property registry (“PPR”) or LTO, or both, for the purpose of creating a charge, lien or priority on, or a binding

interest in, the debtor’s property. This, by extension, may create a security interest on the debtor’s property, depending on a multitude of factors, including, but not limited to: the province wherein the certificate is registered, the timing of the registration, whether a bankruptcy or insolvency is at issue, and the property upon which the memorial is registered.

Importantly, the *Companies’ Creditors Arrangement Act* (“CCAA”) and the *Bankruptcy and Insolvency Act* (“BIA”) state that Crown claims — including those derived from the registration of a memorial — shall rank as unsecured claims in the context of a bankruptcy and/or a proposal proceeding under the BIA or CCAA.

**Appendix IF: Issues in Focus — Does s. 22(4) of the *Highway 407 Act, 1998* (407 Act) conflict with the purpose of the bankruptcy and insolvency system?** — In this release, updates to the memo “Does s. 22(4) of the *Highway 407 Act, 1998* (407 Act) conflict with the purpose of the bankruptcy and insolvency system?” have been added to the text at Appendix IF:8. Section 22(4) of the 407 Act, if operative, could have the potential consequence of allowing a creditor claim to remain ‘active’ even when a debtor has received an absolute discharge from bankruptcy under s. 178 of the BIA — that is, despite the bankruptcy, the Registrar would still be mandated to deny a vehicle permit to a debtor until such time that the toll debt is paid. As this runs contrary to the fresh start principle, and given the doctrine of paramountcy, the Ontario Court of Appeal (ONCA) and Supreme Court of Canada (SCC) have ruled that s. 22(4) is inoperative as against discharged bankrupts.

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