COURT OF APPEAL FOR ONTARIO

CITATION: Canada (Superintendent of Bankruptcy) v. 407 ETR Concession Company Limited, 2013 ONCA 769
DATE: 20131219
DOCKET: C54560

Doherty, Simmons and Pepall JJ.A.

In the Matter of the Bankruptcy of Matthew David Moore, of the City of Brampton, in the Regional Municipality of Peel, Province of Ontario

BETWEEN

The Superintendent of Bankruptcy

Appellant

and

407 ETR Concession Company Limited and Matthew David Moore

Respondents

Liz Tinker and Mark Taggart, for the appellant

J. Thomas Curry, Andrew Parley and Jon Laxer, for the respondents

David Thompson and Matthew G. Moloci, for the interveners

Heard: June 10, 2013

On appeal from the order of Justice Frank J. C. Newbould of the Superior Court of Justice dated October 25, 2011, with reasons reported at 30 M.V.R. (6th) 137.

Pepall J.A.:

A. INTRODUCTION

[1] Highway 407 is a public-private partnership between the respondent, 407 ETR Concession Company Limited ("ETR"), and the Government of Ontario. The electronic, open-access highway was established to enhance transportation in and around the Greater Toronto Area.

[2] ETR is a private company that owns and operates Highway 407 pursuant to a 99-year lease and certain concession agreements with the Ontario government. The *Highway 407 Act*, 1998, S.O. 1998, c. 28 (the "*407 Act*"), enables ETR to establish, collect and enforce tolls, administration fees and interest ("toll debt") charged to members of the public for their use of the highway.

[3] By operation of s. 22(4) of the *407 Act*, toll debt owing to ETR may be enforced against a discharged bankrupt through the suspension of his or her vehicle permit by Ontario's Registrar of Motor Vehicles. The appellant, the Superintendent of Bankruptcy (the "Superintendent"), argues that the doctrine of federal paramountcy renders s. 22(4) inoperative with respect to a discharged bankrupt for two reasons. First, s. 22(4) conflicts with the operation of s. 178(2) of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 ("*BIA*"), which provides that a discharge releases a bankrupt from all claims provable in

bankruptcy. Second, s. 22(4) frustrates the purposes of the bankruptcy and insolvency system.

[4] This appeal addresses whether these two statutory schemes can co-exist in the limited context of a discharged bankrupt. For the reasons that follow, I am of the view that they cannot.

[5] Although served, the Attorney General for the Province of Ontario did not appear to defend the provincial statutory scheme or to advance any public policy argument in support of its application in the circumstances of a discharged bankrupt.

B. FACTS

[6] Matthew David Moore was a truck driver. He had two vehicles. Due to his use of Highway 407, he incurred indebtedness to the ETR which he failed to pay. As a result, in March 2005 and December 2006, ETR sent notices of his non-payment relating to two separate vehicles to the Registrar of Motor Vehicles for the Province of Ontario (the "Registrar"). When the vehicle permit for one of the vehicles expired in August 2005, it could not be renewed. Nonetheless, Moore continued to use Highway 407 for another 18 months contrary to s. 51 of the *Highway Traffic Act*, R.S.O. 1990, c. H.8. As of October 2007, Moore's indebtedness to ETR amounted to $34,977.06.

[7] Moore made an assignment into bankruptcy on November 10, 2007. ETR was listed as a creditor on Moore's statement of affairs filed in his bankruptcy proceedings, however, it did not file a proof of claim. A proof of claim would have enabled ETR to make submissions at any hearing into Moore's discharge from bankruptcy and to share rateably with Moore's other unsecured creditors in the bankruptcy.

[8] After his assignment into bankruptcy, Moore was involved in a slip and fall. As a result of this accident, he retrained to become an automotive salesperson and now works in that field. He gave evidence that he requires a vehicle permit for his livelihood.

[9] Moore obtained a conditional discharge from bankruptcy in February 2011. He requested an Ontario Ministry of Transportation ("MTO") vehicle permit. MTO refused his request due to his outstanding indebtedness to ETR.

[10] On June 21, 2011, Moore obtained an absolute discharge from bankruptcy.

[11] Moore then moved before a Registrar in Bankruptcy seeking a declaration that his debt to ETR was released as a result of his discharge, and an order compelling the MTO to issue a vehicle permit to him upon the payment of the usual licensing fees. ETR was served but due to inadvertence, did not attend at the motion. Neither did the Superintendent. The Registrar in Bankruptcy granted the requested declaration on September 8, 2011. Specifically, she ordered that:

> (1) the discharge of the bankrupt dated June 21, 2011 released him from all claims provable in bankruptcy, including the debt of ETR as at November 10, 2007, and
>
> (2) the Ministry of Transportation was directed to issue plates to him upon payment of the usual licensing fees.

[12] ETR then brought a motion before a judge seeking to set aside the order of the Registrar in Bankruptcy. Moore brought an amended motion essentially seeking the same relief he had already sought and obtained. The Superintendent was not served with either of these motions.

[13] The motions judge granted ETR's motion and dismissed Moore's motion. As of October 25, 2011, the date of the order, Moore's toll debt to ETR amounted to $88,767.83. The motions judge concluded that there was no operational conflict between s. 22(4) of the *407 Act* and s. 178(2) of the *BIA*. Although the motions judge noted that one of the purposes of the *BIA* is financial rehabilitation, he did not consider this purpose in the context of the second branch of the paramountcy analysis, that is, whether any legislative purpose of the *BIA* was thwarted. He did not consider whether the operation of s. 22(4) to collect pre-bankruptcy indebtedness impeded Moore's ability as a discharged bankrupt to have a "fresh start" post-bankruptcy or resulted in unequal treatment of unsecured creditors.

[14] The Superintendent was concerned about the correctness of the motions judge's decision and its impact on the integrity of the bankruptcy and insolvency system. Moore advised the Superintendent that he was not pursuing an appeal because he had received a "very, very attractive offer" to settle from ETR. The Superintendent therefore sought to appeal the order.

[15] ETR moved to quash the Superintendent's notice of appeal. The Superintendent then sought leave to appeal the motion judge's decision. This Court (Weiler, Blair and Rouleau JJ.A.) concluded that while the Superintendent did not have the right to bring an appeal, the circumstances were exceptional, and leave to appeal under s. 193(e) of the *BIA* should be granted.

[16] On November 26, 2012, Blair J.A. granted intervener status to Michael Dow, Gwendolyn Miron and Peter Teolis, proposed representative plaintiffs in a class action proceeding against ETR relating to its collection of toll debt in a bankruptcy context.

C. ISSUES ON APPEAL

[17] The issues on this appeal are**:**

> (i) Does s. 22(4) of the *407 Act* conflict with the *operation* of s. 178 (2) of the *BIA*?
>
> (ii) Does s. 22(4) of the *407 Act* conflict with the *purpose* of the bankruptcy and insolvency system because it (a) thwarts the objective of providing the bankrupt with a fresh start or (b) creates a new class of debt that survives bankruptcy and frustrates

> Parliament's intention to treat all unsecured creditors equally?

[18] While argued by the interveners, this appeal does not extend to address the time period post-bankruptcy and pre-discharge and more particularly, the effect of the *BIA* stay of proceedings on a bankrupt's debt obligations.

D. LEGISLATIVE SCHEMES

(i) The *407 Act*

[19] In *407 ETR Concession Co. Ltd. v. Ontario (Registrar of Motor Vehicles)* (2005), 82 O.R. (3d) 703 (Div. Ct.), at para. 27, the court described the purpose of the *407 Act*:

> [T]he purpose of the [*407 Act*] was to privatize the operation of Highway 407 and, given its open-access character, to provide [ETR] with an effective method of toll collection. The legislature recognized that plate denial is a necessary feature of an open-access toll highway given the exceptionally large number of transactions, the small balances and the cost of other means of debt collection.

[20] The legislative debates surrounding the enactment of the *407 Act* indicate that it was intended to relieve congestion on Highway 401 in and around the Greater Toronto Area, reduce the pollution caused by idling cars, and create jobs while striking an optimal risk-sharing arrangement with the private sector. See *Ontario, Legislative Assembly, Official Report of Debates (Hansard)*, 36 Parl., 2nd Sess., No. 47 (21 October 1998), at 1520 (Rob Sampson); 36 Parl., 2nd

Sess., No. 48A (22 October 1998) at 2120 (John Gerretson); 36 Parl., 2nd Sess., No. 50A (27 October 1998) at 1940 (Doug Galt).

[21] The *407 Act* designates Highway 407 as a private toll highway. In its capacity as owner, ETR is required to provide the public with open access to the highway. Members of the public who use the highway are obliged to pay a toll and any related fees to ETR. ETR may establish, collect and enforce payment of tolls and administration fees. These powers are only to be exercised in accordance with the terms and conditions of an agreement entered into by the Minister for Privatization for the Province and ETR. (No such agreement was before the Court on this appeal.) Toll debt collected by or on behalf of ETR is the property of ETR. There are no toll booths, and no fees are paid at the entrance to or exit from the highway. The system is electronic, and ETR invoices the owner of the vehicle permit or the lessee of an electronic transponder or toll device that has been mounted on to the user's vehicle.

[22] Pursuant to s. 15 of the *407 Act*, the toll debt is payable on the day an invoice is sent. If not paid within 35 days, ETR may send a notice of failure to pay to the debtor. If not paid within 90 days thereafter, ETR may send a s. 22 notice to both the debtor and the Registrar.

[23] The relevant sub-sections of s. 22 of the *407 Act* state:

> 22. (1) If a toll, and the related fees and interest, are not paid within 90 days of the day a person receives a

> notice of failure to pay under section 16, the owner [ETR] may notify the Registrar of Motor Vehicles of the failure to pay.
>
> …
>
> (3) The owner [ETR] shall promptly inform the person who received notice of failure to pay under section 16 that notice has been given to the Registrar of Motor Vehicles under subsection (1).
>
> (4) If the Registrar of Motor Vehicles receives notice under subsection (1), he or she shall, at the next opportunity, refuse to validate the vehicle permit issued to the person who received the notice of failure to pay under section 16 and refuse to issue a vehicle permit to that person.
>
> …
>
> (6) If notice has been given to the Registrar of Motor Vehicles under subsection (1) and the toll and related fees and interest are subsequently paid, the owner [ETR] shall immediately notify the Registrar of the payment.
>
> (7) If the Registrar of Motor Vehicles is notified by the owner [ETR] that the toll, fees and interest have been paid or is notified by the dispute arbitrator that the person is not responsible for paying the toll, fees and interest, the Registrar shall,
>
> > (a) validate any vehicle permit that he or she refused to validate under subsection (4);
> >
> > (b) issue a vehicle permit to a person if it was refused under subsection (4).

[24] As can be seen, the effect of this statutory provision is to permit ETR to enforce payment of toll debt. Once the Registrar receives notice from the ETR of

a failure to pay, the Registrar must refuse to validate the debtor's vehicle permit and may not issue a vehicle permit to that person. Once ETR notifies the Registrar that payment has been made (or the Registrar is notified by the dispute arbitrator that the debtor is not responsible for paying the toll), the Registrar shall validate and issue a vehicle permit.

[25] There is nothing in the *407 Act* that requires a driver to use Highway 407. Conversely, ETR is unable to refuse anyone access to the highway, including debtors who have failed to pay toll debt. To enforce payment, it must rely on the powers granted under the *407 Act*.

[26] There is no dispute that s. 22 of the *407 Act* is validly enacted pursuant to the Province's authority under s. 92 of the *Constitution Act, 1867* and is therefore within the Province's competence. As the motions judge noted at para. 33 of his reasons, there is also no quarrel with the proposition that the purpose of s. 22(4) is to enforce payment of a debt. Similarly, there is no issue that the denial of vehicle permits is a legitimate mechanism to achieve the purposes of the Highway 407 private/public partnership and the operation of that highway. Indeed, for most of those members of the public who use Highway 407, the issues before this court are immaterial. The appellant's challenge relates only to a member of the public who is a discharged bankrupt.

(ii) **The *BIA***

[27] Bankruptcy is triggered by insolvency. It is a procedure that is governed by statute. The *BIA* is the comprehensive code that addresses bankruptcy. Rand J. captured the essence of the bankruptcy process in *Canadian Bankers' Association v. Attorney General of Saskatchewan*, [1956] S.C.R. 31, at p. 46:

> Bankruptcy is a well understood procedure by which an insolvent debtor's property is coercively brought under a judicial administration in the interests primarily of the creditors. To this proceeding not only a personal stigma may attach but restrictions on freedom in future business activity may result. The relief to the debtor consists in the cancellation of debts which, otherwise, might effectually prevent him from rehabilitating himself economically and socially.

[28] The Supreme Court reiterated these public policy objectives in *Sam Lévy & Associés Inc. v. Azco Mining Inc.*, 2001 SCC 92, [2001] 3 S.C.R. 978, at paras. 33 and 65.

[29] In *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, at para. 7, Gonthier J. stated that the bankruptcy system serves two distinct goals: the equitable distribution of a bankrupt's assets among the estate's creditors *inter se* and the financial rehabilitation of insolvent individuals.

[30] In *The 2013 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 2013), at p. 2, Lloyd W. Houlden, Geoffrey B. Morawetz and Janis P. Sarra describe the purposes of the *BIA* as follows:

> It is a fundamental purpose of the *Act* to provide for the financial rehabilitation of insolvent persons. The *Act* permits an honest debtor, who has been unfortunate, to secure a discharge so that he or she can make a fresh start and resume his or her place in the business community.
>
> The *Act* was passed to provide for the orderly and fair distribution of the property of a bankrupt among his or her creditors on a *pari passu* basis.
>
> ...
>
> The Act provides a regime whereby the creditors of the bankrupt will pursue their claims by collective action through the trustee so that the assets of the bankrupt can be realized and distributed on an equitable basis subject to the priorities of preferred creditors and the rights of secured creditors. [Citations omitted.]

[31] This last purpose was emphasized by Deschamps J. in *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 22:

> While insolvency proceedings may be governed by different statutory schemes, they share some commonalities. The most prominent of these is the single proceeding model. The nature and purpose of the single proceeding model are described by Professor Wood in *Bankruptcy and Insolvency Law*:
>
> > They all provide a collective proceeding that supersedes the usual civil process available to creditors to enforce their claims. The creditors' remedies are collectivized in order to prevent the free-for-all that would otherwise prevail if creditors were permitted to exercise their remedies. In the absence of a collective

> process, each creditor is armed with the knowledge that if they do not strike hard and swift to seize the debtor's assets, they will be beat out by other creditors. [pp. 2-3]
>
> The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing, rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise.

[32] When a person becomes bankrupt, all of his or her property vests in the trustee in bankruptcy: s. 71. Section 69.2(1) of the *BIA* precludes "any remedy against the debtor or the debtor's property" once in bankruptcy. The exercise of a remedy to collect and enforce is stayed by the bankruptcy.

[33] The bankrupt's property is then divisible among the bankrupt's creditors unless an exemption applies: s. 67. Exemptions include prescribed payments relating to the essential needs of an individual and property that is exempt from execution or seizure under provincial laws. As a result of the operation of s. 67 and s. 2(1)6 of the *Execution Act*, R.S.O. 1990, c. E.24, a motor vehicle not exceeding $5,000 in value is exempt.

[34] Pursuant to s. 121 of the *BIA*, all debts and liabilities, present or future, to which the bankrupt is subject on the day of bankruptcy are deemed to be claims

provable in bankruptcy. Pursuant to s. 124, every creditor shall prove his or her claim, failing which, the creditor is not entitled to share in any distribution that is made. All unsecured claims provable in bankruptcy are to be paid rateably. The duties and the discharge of a bankrupt are addressed in Part VI of the *BIA*. Creditors who have filed a proof of claim receive notice of the discharge hearing and may make submissions and address their concerns at the hearing. As mentioned, if a creditor fails to file a proof of claim, it may not participate in any distribution of the debtor's property.

[35] In *Vachon v. Canada Employment and Immigration Commission*, [1985] 2 S.C.R. 417, at p. 426, Beetz J. observed that an ordinary unsecured creditor with a claim provable in bankruptcy can only obtain payment of that claim subject to and in accordance with the terms of the *BIA.* The procedure laid down by that Act completely excluded any other remedy or procedure.

[36] Section 168.1 and following of the *BIA* address the discharge procedures. Subsection 178(2) provides that "[s]ubject to subsection (1), an order of discharge releases the bankrupt from all claims provable in bankruptcy." Examples of subsection (1) exceptions include debts arising from "any enactment of a province that provides for loans or guarantees of loans to students" and debts arising from an order or agreement for child or spousal support. No exception is specified for provincial driving or vehicle licensing debts generally or ETR toll debts specifically.

[37] Not surprisingly, the regime results in hardship for many creditors. In *Schreyer v. Schreyer*, 2011 SCC 35, [2011] 2 S.C.R. 605, a wife argued that her equalization claim survived her husband's bankruptcy. Writing for the Supreme Court, LeBel J. described the nature of the insolvency regime and the application of s. 178(2) at paras. 19-21:

> The very design of insolvency legislation raises difficult policy issues for Parliament. Legislation that establishes an orderly liquidation process for situations in which reorganization is not possible, that averts races to execution and that gives debtors a chance for a new start is generally viewed as a wise policy choice. Such legislation has become part of the legal and economic landscape in modern societies. But it entails a price, and those who might have to pay that price sometimes strive mightily to avoid it. Despite the proven wisdom of the policies underpinning the insolvency legislation, it is understandable that few appreciate the "haircuts" or even outright losses that bankruptcies trigger. So creditors seek to obtain security or third-party guarantees. In other cases, statutory exemptions from the application of the *BIA* may apply. For a long time, governments took care to protect their own interests, but they now generally accept, albeit with some reluctance, that they should share the fate of ordinary creditors (*Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379). Other types of exemptions that seem fair or even necessary are set out in the *BIA.* However, the more exemptions there are, the less likely it is that the basic policy objectives of insolvency legislation can be achieved.
>
> As a consequence, the interpretation of the *BIA* requires the acceptance of the principle that every claim is swept into the bankruptcy and that the bankrupt is released from all of them upon being discharged unless the law sets out a clear exclusion or exemption.

...

> For creditors, the discharge means that they "cease to be able to enforce claims against the bankrupt that are provable in bankruptcy" (L. W. Houlden, G. B. Morawetz and J. Sarra, *Bankruptcy and Insolvency Law of Canada* (4th ed. (loose-leaf)), vol. 3, at p. 6-283).

[38] In that case, the Supreme Court determined that a provable claim under the *BIA* was to be broadly defined. The Court upheld the decision that the wife's equalization claim was provable in her husband's bankruptcy and was therefore released by his discharge.

[39] Section 72 of the *BIA* touches on the effect of provincial legislation. It provides that:

> 72. (1) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by that law or statute as supplementary to and in addition to the rights and remedies provided by this Act.
>
> (2) No bankruptcy order, assignment or other document made or executed under the authority of this Act shall, except as otherwise provided in this Act, be within the operation of any legislative enactment in force at any time in any province relating to deeds, mortgages, hypothecs, judgments, bills of sale, chattel mortgages, property or registration of documents affecting title to or liens of charges on real or personal property or immovables or movables.

[40] Lastly, the *BIA* constitutes a complete code governing the bankruptcy process. In *Husky Oil*, at para. 85, Gonthier J. stated:

> Parliament has enacted a complete code in the *Bankruptcy Act*, one which necessarily calls upon provincial law for its operation. But Parliament's invitation stipulates an important limitation at the threshold of its domain, namely, that provincial law simply cannot apply when to do so would entail subverting the federal order of priorities in the *Bankruptcy Act*.

[41] There are sound policy reasons in support of Parliament's decision to enact such a comprehensive code:

- creditors are placed on an equal footing, in a single proceeding;
- the trustee in bankruptcy may collect all of the bankrupt's available assets for the benefit of his or her creditors;
- the exemptions in the *BIA* will ensure that the bankrupt has enough to live on;
- once the bankrupt is discharged, he or she is released from all claims provable and can embark on a "fresh start" in life, or put differently, financial rehabilitation;
- uncertainty about which claims or debts are not released by a discharge is limited, as the exceptions are expressly described in the *BIA*.

E. MOTIONS JUDGE'S REASONS

[42] Having discussed the applicable legislation, I will now turn to the motions judge's reasons.

[43] The motions judge commenced his analysis by identifying the purpose of ss. 16 to 25 of the *407 Act*. In describing s. 22, at para. 14, he said that "its purpose is directed to the collection of a debt." ETR did not quarrel with the proposition that the purpose of s. 22(4) is to enforce payment of a debt. In a footnote, the motions judge stated that ETR pointed out that the collection of debts was in the public interest as well as in the interest of ETR, to ensure that the partnership flourishes.

[44] The motions judge noted the presumption of constitutionality. He then proceeded to observe that s. 178(2) of the *BIA* does not extinguish indebtedness; rather, it releases bankrupts from claims provable in bankruptcy. He stated that the first goal of the bankruptcy system is to ensure the equitable distribution of a bankrupt's assets among the estate's creditors. That said, a motor vehicle licence is not an asset belonging to the debtor; it is a privilege granted by a government authority and does not affect the equitable distribution of a bankrupt's assets. Accordingly, s. 22(4) of the *407 Act* did not conflict with the scheme of the *BIA*. Furthermore, it did not affect in any way the equitable distribution of the bankrupt's property. As a result of these observations, the

motions judge held that there was no operational conflict between s. 22(4) of the *407 Act* and the *BIA*.

[45] As mentioned, the motions judge did not consider the second branch of the paramountcy doctrine. This would have involved an analysis of whether the legislative purpose of the *BIA* was thwarted by the operation of s. 22(4). As part of his paramountcy analysis, the motions judge did not consider whether the collection of pre-bankruptcy indebtedness impeded Moore's ability as a discharged bankrupt to have a "fresh start" post-bankruptcy or resulted in unequal treatment of unsecured creditors.

F. STANDARD OF REVIEW

[46] As the issue on appeal is a question of law, the standard of review is correctness: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para 8.

G. POSITIONS OF THE PARTIES

(i) The Appellant's Position

[47] In brief, the appellant Superintendent submits that when s. 22(4) of the *407 Act* is used to enforce claims provable in bankruptcy against discharged bankrupts, it is in operational conflict with the *BIA*. Relying on *Schreyer*, the appellant argues that while a discharge does not extinguish a claim, creditors "cease to be able to enforce claims against the bankrupt that are provable in bankruptcy." ETR, like other unsecured creditors, is prohibited from enforcing its

monetary claim after discharge, but s. 22(4) permits it to do indirectly that which it is prohibited from doing directly, thus bringing the operation of the subsection into direct conflict with s.178(2) of the *BIA* in the case of a discharged bankrupt.

[48] The appellant also submits that s. 22(4) of the *407 Act* frustrates the two main purposes of the bankruptcy regime: the financial rehabilitation of insolvent individuals (also referred to as the “fresh start” principle) and the equal treatment of all unsecured creditors. Firstly, the motion judge erred in failing to properly direct his attention to the fresh start objective. Section 22(4) frustrates this objective in that it permits ETR to coerce a bankrupt into satisfying debts released by a discharge in bankruptcy. Secondly, the only exceptions to the *pari passu* distribution of property among equal ranking creditors are listed in s. 178(1). ETR’s debt does not fall within any such exception. The effect of the motion judge’s decision is to create a new class of debts that survives bankruptcy. Based on the motion judge’s decision, ETR need not participate in the bankruptcy process at all but can recover its entire debt nonetheless.

[49] The appellant concludes by noting that s. 22(4) is valid provincial legislation and was not drafted to conflict with the *BIA*. However, when that subsection is applied in a bankruptcy situation, it conflicts with the *BIA* and frustrates the two main purposes of the bankruptcy system. To that extent, s. 22(4) is inoperable based on the doctrine of paramountcy.

(ii) **The Respondent's Position**

[50] The respondent ETR answers by submitting that no federal head of power enables Parliament to require provinces to grant vehicle permits or to require third parties to extend credit to a discharged bankrupt.

[51] Operational conflict is only engaged where dual statutory compliance is impossible. This is not the case in this appeal.

[52] As for purposive conflict, the respondent submits that provincial laws should only be declared inoperative due to frustration of a federal purpose in the clearest of cases. Inoperability arises where there is just one reasonable interpretation of the provision in issue and that interpretation frustrates the purpose of the federal law. In ETR's submission, s. 22 of the *407 Act* does not frustrate the financial rehabilitation of the bankrupt, reorganize the priorities of creditors, or reorder how the bankrupt's assets are to be distributed. Section 178(2) does not extinguish indebtedness; it simply releases the debtor from claims provable in bankruptcy. The MTO's right to suspend vehicle permits is unaffected by bankruptcy. Moreover, the object of financial rehabilitation must be balanced against the creditor's interest in protecting itself. If allowed, this appeal would force the Province of Ontario to grant vehicle permits to discharged bankrupts thereby empowering them to accumulate additional debt to ETR.

[53] The respondent also submits that certain provincial highway traffic and other legislation will be affected if this appeal is allowed.

(iii) **The Interveners' Position**

[54] The interveners agree with ETR that there is no operational conflict between the two statutes, but argue that there is a purposive conflict.

[55] The interveners submit that the central issue in this appeal is whether ETR may use the vehicle permit denial remedy in the face of a stay of proceedings pre-discharge, and enforce payment of pre-bankruptcy indebtedness post-discharge. The procedure in the *BIA* precludes any other remedy or procedure to obtain payment of a claim provable in bankruptcy. The remedy at issue in this appeal operates to allow ETR to recover its debts in another manner; it is a method of debt collection and nothing more.

[56] Section 69.2(1) of the *BIA* excludes "any remedy against the debtor or the debtor's property." The denial of the vehicle permit is against the debtor, regardless of whether the permit is a privilege or property. The effect of the denial is to prevent a bankrupt from driving anywhere in Ontario, not just on Highway 407. The *BIA* stay of proceedings prohibits the exercise of the remedy.

[57] The interveners distinguish the other legislation relied upon by ETR. They argue that in instances where provincial highway traffic legislation allows for the suspension of licences, the legislation specifically provides that the release of

debts through bankruptcy has no effect on licence denial. The *407 Act* contains no such provision.

H. ANALYSIS

[58] Before embarking on an analysis of the interaction between the *BIA* and the *407 Act*, certain basic principles should be addressed.

[59] Firstly, where there is an inconsistency between validly enacted but overlapping provincial and federal legislation, the provincial legislation is inoperative to the extent of the inconsistency: *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, 2005 SCC 13, [2005] 1 S.C.R. 188, at para. 11. The remainder of the provincial legislation is unaffected. This is the doctrine of federal paramountcy.

[60] Secondly, there are two ways in which a claim of paramountcy may arise. These were described by McLachlin C.J. in *Quebec (Attorney General) v. Canadian Owners and Pilots Association,* 2010 SCC 39, [2010] 2 S.C.R. 536, at para. 64:

> (i) where there is an operational conflict between federal and provincial laws such that dual compliance is impossible; and
>
> (ii) where dual compliance is possible, but the provincial law is incompatible with, or frustrates the purpose of, the federal legislation. As stated in *Canadian Western Bank*, at para. 73,

> [T]here will be cases in which imposing an obligation to comply with provincial legislation would in effect frustrate the purpose of a federal law even though it did not entail a direct violation of the federal law's provisions.

[61] Thirdly, the party seeking to invoke the doctrine of paramountcy bears the burden of proof: *British Columbia (Attorney General) v. Lafarge Canada Inc.*, 2007 SCC 23, [2007] 2 S.C.R. 86, at para. 77.

[62] The invocation of federal paramountcy on the basis of frustration of purpose requires clear proof of purpose and the standard is high. Mere permissive federal legislation does not suffice: *Canadian Owners and Pilots Association*, at paras. 67 and 68.

[63] Fourthly, in considering a potential conflict, a court should first decide whether the two laws in issue are validly enacted. This involves an examination of the pith and substance of the impugned legislation. The analysis may concern the legislation as a whole or only certain of its provisions: *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 25.

[64] To determine the pith and substance, the purpose of the enacting body and the legal effect of the law should both be examined: *Canadian Western Bank*, at para. 27. The dominant purpose of the legislation is decisive and incidental effects do not disturb the constitutionality of an otherwise *intra vires* law: *Canadian Western Bank*, at para. 28.

[65] Lastly, Canada's federal system must balance flexibility and predictability. As such, when addressing the validity of statutes, there is a presumption of constitutionality. Based on this presumption, a government is presumed to have enacted a law that does not exceed its powers. Judicial restraint is the operative principle. As Professor Peter Hogg describes in his book, *Constitutional Law of Canada*, 5th ed. (Scarborough: Thomson Carswell, 2007) vol. 1, at p. 449, due to this presumption, "in choosing between competing, plausible characterizations of a law, the court should normally choose that one that would support the validity of the law." As stated in *Canadian Western Bank*, at para. 37, and reiterated in *Chatterjee v. Ontario (Attorney General)*, 2009 SCC 19, [2009] 1 S.C.R. 624, at para. 2, "a court should favour, where possible, the ordinary operation of statutes enacted by *both* levels of government" (emphasis in original). Co-operative federalism should be facilitated, not impeded. This approach is consistent with the "dominant tide" of modern federalism: *Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837, at para. 57.

[66] In keeping with this approach, 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 an alternative construction which would bring about a conflict between the two statutes: *Canadian Western Bank*, at para. 75; and *Marine Services*, at para. 69. The fact that Parliament has legislated in respect of a matter does not lead to the presumption that in so doing it intended

to rule out any possible provincial action in respect of that subject: *Canadian Western Bank*, at para. 74; and *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, at para. 57.

(a) Operational Conflict

[67] The first issue to consider is whether there is an operational conflict between s. 22(4) of the *407 Act* and s. 178(2) of the *BIA*. In this regard, the appellant relies on dicta in *Husky Oil* to argue that an operational conflict exists between the two statutes. In response, ETR submits that the majority position in *Husky Oil* has been overtaken by subsequent jurisprudence such as *Canadian Western Bank* and *Chatterjee*.

(i) Applicable Test

[68] The test for operational conflict was established in *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at p. 191. On behalf of the majority, Dickson J. explained that an operational conflict exists “where one enactment says ‘yes’ and the other says ‘no’; ‘the same citizens are being told to do inconsistent things’; compliance with one is defiance of the other.”

[69] Early case law limited the application of the doctrine of paramountcy to cases of operational conflict. The frustration of purpose branch of paramountcy had not yet been developed.

[70] However, in *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121, La Forest J. appeared to broaden the test from *Multiple Access.* He stated at p. 154 that "dual compliance will be impossible when application of the provincial statute can fairly be said to frustrate Parliament's legislative purpose." Although not so identified at the time, this decision would later come to be viewed as establishing a separate branch of federal paramountcy, namely, frustration of purpose.

[71] *Husky Oil* followed on the heels of *Hall* in 1995. In dealing with paramountcy, the majority relied on *Hall* and did not cite the test from *Multiple Access*. The Court addressed the issue of conflict between the *Bankruptcy Act* and a provincial statute which purported to allow a creditor to recover a debt outside of the bankruptcy process. The impugned provincial legislation made the principal of a defaulting contractor personally liable to Saskatchewan's workers' compensation fund. A principal who was required to make a payment to the fund was then permitted to set that amount off against any amount the principal owed to the bankrupt contractor's estate. At para. 39, Gonthier J., on behalf of the majority, observed that the form of a provincial interest must not be allowed to triumph over its substance:

> The provinces are not entitled to do indirectly what they are prohibited from doing directly; ... there need not be any provincial intention to intrude into the exclusive federal sphere of bankruptcy and to conflict with the order of priorities of the *Bankruptcy Act* in order to render the provincial law inapplicable. It is sufficient

> that the effect of provincial legislation is to do so. [Emphasis in original.]

[72] In that case, the majority found that the effect of the provincial legislation in securing the Board's debt against the bankrupt's estate conflicted with Parliament's intention to establish priorities as described in the *Bankruptcy Act,* R.S.C., 1985, c. B-3. The offending provincial statutory provisions were therefore determined to be inapplicable in a bankruptcy context.

[73] The majority summarized the Court's jurisprudence in the "bankruptcy quartet" (*Deputy Minister of Revenue v. Rainville*, [1980] 1 S.C.R. 35; *Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board*, [1985] 1 S.C.R. 785; *Federal Business Development Bank v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 1061; *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24), concluding at paras. 32-39 that the quartet stands for six propositions:

> (1) provinces cannot create priorities between creditors or change the scheme of distribution on bankruptcy under s. 136(1) of the *Bankruptcy Act*;
>
> (2) while provincial legislation may validly affect priorities in a non-bankruptcy situation, once bankruptcy has occurred, section 136(1) of the *Bankruptcy Act* determines the status and priority of the claims specifically dealt with in that section;
>
> (3) if the provinces could create their own priorities or affect priorities under the *Bankruptcy Act* this would invite a different scheme of distribution on bankruptcy

> from province to province, an unacceptable situation; and
>
> (4) the definition of terms such as "secured creditor", if defined under the *Bankruptcy Act*, must be interpreted in bankruptcy cases as defined by Parliament, not the provincial legislatures. Provinces cannot affect how such terms are defined for purposes of the *Bankruptcy Act*;
>
> ...
>
> (5) in determining the relationship between provincial legislation and the *Bankruptcy Act*, the form of the provincial interest created must not be allowed to triumph over its substance. The provinces are not entitled to do indirectly what they are prohibited from doing directly; and
>
> (6) there need not be any provincial intention to intrude into the exclusive federal sphere of bankruptcy and to conflict with the order of priorities of the *Bankruptcy Act* in order to render the provincial law inapplicable. It is sufficient that the effect of provincial legislation is to do so. [Emphasis in original.]

[74] The Court did remark at para. 36 that for a provincial law to be inapplicable, the Court must find a “clear conflict, that is, an inconsistent or mutually exclusive result.” Applying the six propositions to the facts of *Husky Oil*, the Court found a conflict. In contrast, the dissent applied the strict *Multiple Access* test and found that there was no conflict because the *Bankruptcy Act* did not prohibit that which the provincial legislation authorized.

[75] Although not so described in the case, in my view, the majority in *Husky Oil* is best understood as a decision involving frustration of a federal purpose rather

than an operational conflict. Firstly, the majority did not rely on *Multiple Access* but on *Hall*, a case which is now viewed as a frustration of purpose decision. Secondly, the majority relied on the effect of the provincial legislation and indirect conflict to ground its paramountcy analysis and not the strict operational conflict test found in *Multiple Access*.

[76] The treatment accorded *Husky Oil* is seen in the Supreme Court's subsequent insolvency decisions and particularly in the dicta of Deschamps J. in *GMAC Commercial Credit Corporation - Canada v. T.C.T. Logistics Inc.*, 2006 SCC 35, [2006] 2 S.C.R. 123. The majority's decision did not turn on the paramountcy doctrine, however, Deschamps J. invoked paramountcy in dissent, stating:

> In *Husky Oil*, Gonthier J., writing for the majority, … not only noted that provinces may not *directly* affect priorities under the *Bankruptcy Act*, but also stated propositions that permit the paramountcy doctrine to be applied where provincial legislation *indirectly* conflicts with the *BIA*…
>
> Although the propositions enunciated in *Husky Oil* relate more specifically to conflicts between provincial statutes and the scheme of distribution established in the *BIA*, they have a scope that extends beyond that specific context, and they demonstrate how the paramountcy doctrine applies in the context of bankruptcy. [Emphasis in original.]

[77] In 2012, Deschamps J. again cited the majority in *Husky Oil,* holding that provinces cannot affect the order of priorities set out in the *BIA* (see

Newfoundland and Labrador v. AbitibiBowater Inc., 2012 SCC 67, [2012] 3 S.C.R. 443, at para. 19).

[78] However, in *Indalex*, the Supreme Court again had the opportunity to apply the doctrine of paramountcy in an insolvency context. Deschamps J. cited *Husky Oil*, at para. 56, to the effect that the "provincial legislature cannot, through measures such as a deemed trust, affect priorities granted under federal legislation". She did not repeat the six propositions enunciated in *Husky Oil*. Rather, she went on to apply the *Multiple Access* test as restated in *Canadian Western Bank*. Based on that test, she found that there was a direct conflict between the provincial legislation and an order made under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 such that, at para. 60, "compliance with the provincial law necessarily entails defiance of the order made under federal law."

[79] It is therefore clear that for the purposes of operational conflict, the *Multiple Access* test is applicable and not the principles described in *Husky Oil*.

[80] Moreover, the Supreme Court has consistently cited the *Multiple Access* test in other cases. See *Canadian Western Bank*, at para 71; *Chatterjee*, at para. 36; *Lafarge*, at para. 76; *Rothmans*, at para. 11; *Law Society of British Columbia v. Mangat*, 2001 SCC 67, [2001] 3 S.C.R. 113, at para. 69; *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40, [2001] 2

S.C.R. 241, at para. 34; *M & D Farm Ltd. v. Manitoba Agricultural Credit Corp.*, [1999] 2 S.C.R. 961, at para. 40.

[81] Most recently, in *Marine Services International Ltd. v. Ryan Estate*, 2013 SCC 44, at para. 68, the Supreme Court restated the test in the following terms: “Where the federal statute says “yes” and the provincial statute says “no”, or vice versa, compliance with one statute means a violation of the other statute. It is the archetypical operational conflict.”

[82] In its recent jurisprudence, the Supreme Court has applied the test from *Multiple Access* narrowly to find an operational conflict only where it was impossible to comply with both statutes: see *Indalex*.

[83] Where the federal legislation was merely permissive, the Court did not find a conflict because it was possible to comply with both laws: see *Quebec (Attorney General) v. Canada (Human Resources and Social Development)*, 2011 SCC 60, [2011] 3 S.C.R. 635 and *Canadian Owners and Pilots Association*. Where the legislation could be interpreted to avoid a conflict, or where there were other means of avoiding a conflict, the Court did not find a conflict: see *Marine Services International Ltd.*; *Chatterjee* and *Canadian Western Bank*. As such, the test for operational conflict is to be strictly applied and is engaged only where dual compliance is impossible.

(ii) **Application**

[84] Turning then to the facts that underlie this appeal, there is no issue that both the *BIA* and the *407 Act* are validly enacted, the former falling under federal authority and the latter under provincial authority. The purpose of the *BIA* is to establish an organized system for the distribution of a bankrupt's estate, and to provide for the financial rehabilitation of the bankrupt. The purpose of the *407 Act* is to establish a private toll highway with open access to the public, and to set out how the highway will operate. However, as noted by the motions judge, the purpose of s. 22(4) of the *407 Act* is to collect ETR's debt. The legal effect of the *407 Act* is to permit ETR to operate the highway and to establish, collect and enforce toll debt from users regardless of their bankruptcy status. As noted in para. 33 of the motions judge's reasons, ETR does not quarrel with the proposition that the purpose of s. 22(4) of the *407 Act* is to enforce payment of a debt. It also cannot be seriously contested that ETR's claim to toll debt is a claim provable in bankruptcy. The insertion of the province's licensing authority does not alter this conclusion.

[85] I must then consider the approach established by the Supreme Court in *Multiple Access,* as restated most recently in *Marine Services*: can there be dual compliance?

[86] It is fair to conclude that Moore could be in compliance with both statutes. While he would not be able to drive his own car, he could forego obtaining a vehicle permit and not pay the toll debt to ETR. Alternatively, he could pay the debt and obtain a vehicle permit. As he is not required to pay the debt and the *BIA* does not require him to obtain a vehicle permit, there is no impossibility of dual compliance insofar as he is concerned.

[87] What of ETR? Can it be in compliance with both statutes?

[88] The alleged conflict in this case is between s. 178(2) of the *BIA*, which releases the discharged bankrupt from most claims, and s. 22(4) of the *407 Act*, which permits ETR to initiate a process by which the debtor will be denied a vehicle permit until he or she discharges the debt to ETR.

[89] As indicated in *Schreyer*, at para. 21, s. 178(2) of the *BIA* bars creditors from enforcing their claims after discharge. Section 124 of the *BIA* provides that before an unsecured creditor is entitled to share in the distribution of the bankrupt's property, it must file a proof of claim. Under s. 178(2) of the *BIA*, such claims are then released on discharge unless they fall within one of the exceptions clearly set out in s. 178(1). Pursuant to s. 22(4) of the *407 Act*, ETR need not file a proof of claim and may collect all of its debt from a bankrupt in the absence of an exception. It can opt to ignore the regime established for all other creditors of the bankrupt.

[90] That said, the provincial legislation in this case is permissive in that it does not require ETR to initiate the collection process. ETR could comply with both statutes by declining to pursue its remedy under s. 22. But, can ETR rely on s. 22(4) to enforce its claim against Moore? ETR asserts that it relies heavily on the collection process embodied in s. 22 as it cannot deny access to users who refuse to pay their bills, and other means of debt collection are costly. If ETR has the choice of declining to enforce, but routinely chooses to enforce, is there still no operational conflict?

[91] In substance, s. 22(1) provides ETR with the choice of causing the collection of a debt from a discharged bankrupt, a choice which the *BIA* expressly abrogates. In this sense, the *BIA* says “no” and the *407 Act* says “yes.”

[92] However, to find an operational conflict where it is possible to comply with both laws would not be in keeping with the strict test for operational conflict which the Supreme Court has consistently applied. Furthermore, to take a more substantive approach to operational conflict would also render the “frustration of federal purpose” branch of the paramountcy test largely superfluous.

[93] On a strict reading of the test for operational conflict, there is no impossibility of dual compliance. Section 22 of the *407 Act* gives ETR the choice to notify the Registrar of a failure to pay. ETR may comply with both laws by declining to initiate the enforcement procedure. Where bankruptcy occurs after

the ETR has initiated the enforcement procedure, compliance depends on the debtor. He is not required to obtain vehicle permits and is not required to pay his debt. Similarly, the Registrar cannot compel him to do so. I conclude that there is no operational conflict between s. 22(4) of the *407 Act* and s. 178(2) of the *BIA*.

(b) Conflict of Purpose

[94] The next issue to consider is whether the operation of s. 22(4) of the *407 Act* conflicts with the purpose of the *BIA*. As mentioned, the purpose of s. 22(4) is to collect toll debt. There are two *BIA* purposes in issue: the fresh start principle and the equal treatment of unsecured creditors. Given my conclusion on the former, it is unnecessary to address the latter.

(i) **Applicable Test**

[95] In 2010, in *Canadian Owners and Pilots Association*, at para. 64, the Supreme Court described frustration of federal purpose as a "second branch" of the doctrine of paramountcy.

[96] At para. 66, McLachlin C.J. described the test for frustration of purpose as follows:

> The party seeking to invoke the doctrine of federal paramountcy bears the burden of proof. That party must prove that the impugned legislation frustrates the purpose of a federal enactment. To do so, it must first establish the purpose of the relevant federal statute,

> and then prove that the provincial legislation is incompatible with this purpose. The standard for invalidating provincial legislation on the basis of frustration of federal purpose is high; permissive federal legislation, without more, will not establish that a federal purpose is frustrated when provincial legislation restricts the scope of the federal permission. [Citations omitted.]

[97] The Supreme Court cited this articulation of the test in its most recent paramountcy decision, *Marine Services*, at para. 69.

[98] As discussed above, in assessing whether the provincial legislation frustrates a federal purpose, it must be recalled that 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 an alternative construction which would bring about a conflict between the two statutes. The fact that Parliament has legislated in respect of a matter does not lead to the presumption that in so doing it intended to rule out any possible provincial action in respect of that subject.

(i) **Fresh Start Principle**

(a) The Fresh Start Purpose of the *BIA*

[99] I have already referred to the fresh start principle which underlies the *BIA* and which permeates the jurisprudence on bankruptcy legislation. From a debtor's perspective, and indeed society's, financial rehabilitation is a primary goal of the bankruptcy regime. At its heart, permitting a creditor to insist on

payment of pre-bankruptcy indebtedness after a bankruptcy discharge frustrates a bankrupt's ability to start life afresh unencumbered by his or her past indebtedness. As often repeated in United States bankruptcy jurisprudence, one of the purposes of bankruptcy legislation is to give debtors "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt." See for example *Local Loan Co. v. Hunt*, 292 U.S. 234 at 244 (1934); *Perez v. Campbell*, 402 U.S. 637 at 648 (1971); *Grogan v. Garner*, 498 U.S. 279 at 286 (1991). Indeed, although obviously inapplicable in Canada, the Supreme Court of the United States held in *Perez* that state laws that attempted to enforce payment of a bankrupt's indebtedness through licence denial were invalid because they conflicted with the fresh start principle.

[100] In Canada, there are some claims that constitute exceptions to the fresh start principle. As mentioned, there are those claims that are expressly excluded from the ambit of s. 178(2). They are described in s. 178(1) of the *BIA*. One such claim was described by this court as the kind "which society (through the legislators) considers to be of a quality which outweighs any possible benefit to society in the bankrupt being released of these obligations": *Buland Empire Development Inc. v. Quinto Shoes Imports Ltd*. (1999), 123 O.A.C. 288 (C.A.), at para. 18. The claims excepted in s. 178(1) include certain specified provincial programmes. There is no exception for toll debt owing to ETR.

[101] In *Schreyer*, LeBel J. observed, at para. 19, that giving debtors a chance for a new start is generally viewed as a wise policy choice. He went on to state that exemptions that seem fair or even necessary are set out in the *BIA*. However, “the more exemptions there are, the less likely it is that the basic policy objectives of insolvency legislation can be achieved.”

[102] In my view, the appellant has satisfied its burden of establishing the fresh start purpose of the *BIA*.

(b) Incompatibility of s. 22(4) of the *407 Act*

[103] The parties addressed two competing lines of cases in support of their respective positions. I do not propose to review all of the cases cited. Some deal with the operational conflict branch of the paramountcy analysis or the validity of certain provincial legislation as a whole. (The 407 Act as a whole is not in question in this case.) Moreover, many of the cases relied upon were decided before the frustration of federal purpose branch of the paramountcy doctrine was solidified in Supreme Court jurisprudence.

[104] There is limited provincial appellate commentary on comparable legislative regimes. *KPMG Inc. v. Alberta Dental Association (Re Hover)*, 2005 ABCA 101, 363 A.R. 170 was a decision of the Alberta Court of Appeal. It involved a case of professional misconduct by a dentist and the enforcement of disciplinary requirements consisting of the payment of a fine and associated costs. Due to

the disciplinary objective of the underlying provincial regulatory authority, the court found that requiring a suspended licensee to pay outstanding fines in order to have his license reinstated did not conflict with the *BIA* even though the payor was a discharged bankrupt. The power to suspend was founded not on non-payment of a debt but on a finding of professional misconduct. If professional sanctions or conditions on licences were no longer operable in the case of a discharged bankrupt, self-regulating bodies would lose the ability to regulate their members' conduct once in bankruptcy. Further, the purpose of the dental licence suspension was not to enforce a debt but to impose conditions on licences which should be withheld from irresponsible individuals.

[105] That said, at para. 58, Paperny J.A. distinguished the case from others where "[t]he suspension of a driver's licence was motivated for an improper purpose, that is, to obtain payment that the licensing authority would not otherwise be entitled to in a bankruptcy." This suggests that where the purpose of the suspension is to collect a debt, there would be a conflict with the *BIA*.

[106] I will also address *Re Caporale*, [1970] 1 O.R. 37-38 (S.C.), a decision of Houlden J. (as he then was), which was relied upon by ETR. That case simply involved an application to discharge a bankrupt. The bankrupt had been involved in a motor vehicle accident and the judgment had been assigned to the MTO. The MTO appears to have disputed the application for a discharge. In a very brief oral endorsement, Houlden J. granted the discharge noting that the bankrupt had

been making payments to the MTO and the MTO would not be prejudiced by the granting of the discharge. He stated that the MTO had an effective remedy in that it could refuse the debtor the privilege of driving in Ontario until he had repaid the full amount of damages awarded against him arising from a motor vehicle accident that had been paid out of the Unsatisfied Judgment Fund. Houlden J. did not perform any paramountcy analysis, and it would appear that the decision was rendered in the context of a contested discharge application.

[107] I do not view these cases as being akin to the appeal before this court. The purpose of the legislation in those cases was directed at the province's regulatory responsibilities and the public interest in establishing and enforcing standards of professional conduct for dentists, and presumably the promotion of safe and responsible driving.

[108] Although public safety is not at stake in this appeal, ETR argues that the collection of debts arising from the use of Highway 407 is in the public interest, as well as in ETR's interest, so as to ensure that the public private partnership flourishes. I note in this regard that the Province did not advance such a position on this appeal. Furthermore, as noted by the motions judge, the purpose and effect of s. 22(4) are to enforce the collection of debts. This is the substance of the subsection.

[109] I would also observe that s.198 of the *Highway Traffic Act* expressly states that, where a person has failed to satisfy a judgment for damages occasioned by a motor vehicle, his or her driver's licence shall be suspended and remain suspended until judgment is satisfied or discharged "otherwise than by a discharge in bankruptcy". No such language is found in the *407 Act*. Arguably, this reflects a provincial intention that the collection of ETR's indebtedness would be affected by bankruptcy. In *Section 270 of the Highway Traffic Act* (Report 97) (Winnipeg: Manitoba Law Reform Commission, 1997), the Manitoba Law Reform Commission discussed the provincial counterpart to Ontario's s. 198 at p. 7:

> In those jurisdictions whose statutes are silent on the effect of bankruptcy, it is presumably arguable that bankruptcy would be held to discharge the debt within the meaning of the motor vehicle statute, thus clearing the way for a reinstatement of the suspended licence and registration.

[110] In any event, this decision only addresses the legislation in issue on this appeal and does not purport to encompass statutes that reflect their own individualized legislative objectives.

[111] It must also be recalled that the appellant does not seek a declaration that s. 22(4) of the *407 Act* is invalid, but only that it is inoperable in relation to discharged bankrupts. Discharged bankrupts do not represent a large segment of the adult population in Canada or in Ontario, and there was no evidence that would suggest that they are disproportionate users of Highway 407. Typically, all

unsecured creditors are negatively affected by bankruptcy and, as noted by LeBel J. in *Schreyer*, at para. 19, few appreciate the “haircuts” or losses that bankruptcies trigger. The introduction into the mix of a private commercial participant in a public-private enterprise is inadequate in my view to remove the evident inconsistency with such a fundamental purpose of the *BIA* as financial rehabilitation of the discharged bankrupt. The *407 Act* should not be used to permit ETR to occupy the collector’s lane.

[112] While co-operative federalism should be the goal, it should not serve to undermine one of the two key rationales for the bankruptcy regime.

[113] I also agree with the appellant that it is no answer to say that a vehicle permit is a privilege. Denial of a vehicle permit may constitute a significant deprivation. The non-renewal of a vehicle permit does not just affect a discharged bankrupt’s ability to drive his or her own vehicle on Highway 407 but on any road in Ontario. Frequently it is essential to employment as well as family transportation requirements and responsibilities. Ontario is a vast province. Denial of a vehicle permit has the potential to result in great hardship to a discharged bankrupt struggling to start anew. The importance of a motor vehicle is recognized in the assets identified by Parliament and the Legislature as being exempt from execution or seizure.

[114] I accept that as Highway 407 is an open-access road, ETR cannot stop a bankrupt from using the highway. That said, if ETR had filed a claim in Moore's bankruptcy, its concerns could have been raised at a discharge hearing. Additionally and significantly, a vehicle permit may be denied based on debts incurred after an individual's discharge from bankruptcy.

[115] In my view, the appellant has established that s. 22(4) of the *407 Act* is incompatible with the fresh start or financial rehabilitation purpose of the *BIA*. Indeed, it frustrates the *BIA*'s heart and the very foundation on which insolvency legislation stands.

[116] In conclusion, in keeping with a restrained approach to paramountcy and recognizing the presumption of constitutionality, I am of the view that there is a clear conflict between s. 22(4) of the *407 Act* and the fresh start purpose of the bankruptcy system.

(ii) **Equitable Treatment of Unsecured Creditors**

[117] The appellant also argues that the enforcement of ETR's claim pursuant to s. 22(4) frustrates the purpose of the bankruptcy and insolvency system by creating a new class of debt that survives bankruptcy and which frustrates Parliament's intention to treat all unsecured creditors equitably. As mentioned, given my conclusion on the fresh start purpose, there is no need to address this submission.

I. DISPOSITION

[118] For these reasons, I would allow the appeal and, as requested by the appellant, set aside the order of the motions judge. In its place, I would substitute an order that:

> (1) the discharge of Moore dated June 21, 2011 released him from all claims provable in bankruptcy, including the debt of the 407 ETR as at November 10, 2007 and
>
> (2) the Ministry of Transportation is hereby directed to issue license plates to Moore upon payment of the usual licensing fees.

Further, I would declare that s. 22(4) of the *407 Act* is inoperative to the extent that it thwarts the purpose of providing a discharged bankrupt with a fresh start.

[119] As agreed, the respondent shall pay the appellant $36,000 in partial indemnity costs inclusive of disbursements and applicable taxes. The interveners shall bear their own costs.

Released:

"DEC 19 2013"
"DD"

"S.E. Pepall J.A."
"I agree Doherty J.A."
"I agree Janet Simmons J.A."