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Curry sees 'very dramatic shift' in handling of paramountcy law

'It's likely to have significant impact on future constitutional cases,' says Lenczner Slaght counsel

CRISTIN SCHMITZ
OTTAWA

Counsel say the Supreme Court has made it easier for federal laws to trump overlapping provincial ones—possibly tilting the delicate balance of co-operative federalism a bit toward Ottawa in some cases.

In a pair of Nov. 13 judgments by Justice Clément Gascon that arguably tweak the first branch of the federal paramountcy test, the top court unanimously declared inoperative Ontario and Alberta driver and vehicle licensing provisions to the extent that they purport to enforce debts that were discharged by motorists' bankruptcies.

They thus conflict with s. 178(2) of the federal *Bankruptcy and Insolvency Act* (BIA). The cases are *Alberta (A.G.) v. Moloney*, 2015 SCC 51 and *407 ETR Concession Co. v. Canada (Superintendent of Bankruptcy)*, 2015 SCC 52.

Andrew Parley, left, and Tom Curry of Lenczner Slaght in Toronto, counsel for the appellant 407 ETR Concession Company Ltd. before the Supreme Court of Canada, see substantial fallout for federal-provincial paramountcy law interpretations given a recent top court ruling. TIM FRASER FOR THE LAWYERS WEEKLY

Tom Curry of Toronto's Lenczner Slaght, who represents the appellant 407 ETR Concession Company Ltd., which owns a private toll highway spanning greater Toronto, said the court has made it easier to demonstrate that a federal law should prevail over an overlapping provincial one pursuant to the first branch of the paramountcy test (i.e. that there is an operational conflict between the federal and provincial laws because it is impossible to comply with both).

"They breathed new life into that branch," Curry said. "It had previously been extremely limited in its application...I think it's a very dramatic shift, and it's likely to have significant impact on future constitutional cases concerning paramountcy."

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Judge frozen out of getting any new cases

CRISTIN SCHMITZ
OTTAWA

Federal Court Justice Robin Camp—under review by the Canadian Judicial Council (CJC) for his handling of a sexual assault trial last year—is no longer being assigned cases by the court, *The Lawyers Weekly* has learned.

The news emerged after the Federal Court initially stated Nov. 10 the judge would only be kept off cases in which there was an implication of sexual matters.

However Federal Court executive officer Andrew Baumberg said by email Nov. 16 "the Chief Justice [Paul Crampton] has informed Justice Camp that his priority for the weeks ahead is to follow the [gender sensitivity] counseling program referred to in the November 10 court statement, and that no assignment will be made until further notice."

The court's Nov. 10 statement "welcomes" the CJC's review. It was issued one day after University of Calgary associate law dean Alice Woolley and three other law professors complained to the council of chief justices about Justice Camp's handling of a sexual assault case while he was still with the

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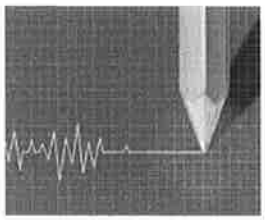

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Added Curry's co-counsel, Andrew Parley, "I think lawyers who are looking at provincial legislation that is, for whatever reason, inconvenient to their client may now have another tool at their disposal to argue that those provincial laws are not constitutional and should be read down, or held inoperative, to the extent that they are in conflict with federal statutes. Previously that was a difficult argument to put forward because of the narrow reading that the Supreme Court had placed on that aspect of the test. Now it's going to be easier, and that will be something I think we're going to see a lot more of in the future."

On the other hand, a companion 6-1 judgment by Justices Gascon and Rosalie Abella in favour of the appellant province of Saskatchewan is seen as boosting the principle of cooperative federalism by taking a strict approach to the second, alternate branch of the federal paramountcy test, i.e. that the federal law prevails over the provincial law when the latter frustrates the purpose of the federal enactment.

The court held (Justice Suzanne Côté dissenting) that the paramountcy doctrine did not apply in the Saskatchewan case because there is no conflict between the scheme for appointing a national receiver under s. 243(1) of the BIA and a provincial law which protects farmland, for example by requiring a secured creditor who wishes to enforce a security interest against farm land to wait 150 days, rather than the 10 days imposed under the federal bankruptcy law.

The majority held that the provincial law does not frustrate the purpose of s. 243(1), which the judges construed narrowly as being to enable the appointment of a national receiver. Reversing the Saskatchewan Court of Appeal, the majority restored the operation of provisions in *The Saskatchewan Farm Security Act* that protect farmers from having their land seized by creditors without certain safeguards and conditions which go beyond those provided by the federal bankruptcy statute: *Saskatchewan (A.G) v. Lemare Lake Logging Ltd.*, 2015 SCC 53.

Thomson Irvine, a senior Crown counsel for Saskatchewan, told *The Lawyers Weekly*, "We're...very pleased with the court's emphasis on cooperative federalism because we've long been of the view that both levels of government have legitimate interests in farm matters and in commercial matters, so it's good to see that the court is recognizing that."

Irvine said the judgment of Justices Abella and Gascon indicates that the "frustration of federal purpose" standard for the second branch of the paramountcy test "is going to be a difficult one to meet."

"They've made it clear that there's a strict evidential standard that has to be met respecting the purpose of the federal statute, and they've also re-emphasized that the courts should be careful to interpret a federal statute to avoid a conflict, if that's at all possible," Irvine explained.

He added that the province "is encouraged by both of those results because that gives leeway — and flexibility in the joints, so to speak — for both the federal government and provincial governments to carry out their policy objectives."

The constitutional doctrine of federal paramountcy states that federal law prevails if there is a genuine inconsistency between valid federal and provincial legislation — i.e. when the operational effects of provincial legislation are incompatible with the federal legislation.

Justice Gascon focuses on the pivotal question of how to determine whether such an operational conflict exists.

The paramountcy test says an operational conflict arises in one of two situations: (1) when it is impossible to comply with both laws, or (2) although it is possible to comply with both laws, the operation of the provincial law frustrates the purpose of the federal enactment.

Curry said the court previously set the test for the first branch very clearly. One statute had to say 'yes' and the other statute had to say 'no' on their face — literally, he explained. But "the focus is now on the effect of the provincial law. And to understand the effect of the provincial law you look at the [law's] substance, not the form. And previously the review was really as to the express language — in other words the form. So I think it's a very significant change in the paramountcy analysis."

"What Justice Gascon does is arguably an expansion — [although] he says it's not an expansion," remarked David Thompson of Scarfone Hawkins in Hamilton, Ont. "But he goes further than just looking at the two statutes on their face. He looks at the actual operation of the provisions — sort of the real world effect of the law. And not being a constitutional scholar, I don't know if that constitutes an expansion of the test for the [first] branch, or whether it constitutes a clarification of it. But it certainly seems to me that it goes further than some of the other case law."

The *407 ETR* decision effectively gives a green light to Thompson's clients to proceed with a class action against the owner of the open-access toll highway in Ontario. The class members are discharged bankrupts who were denied vehicle permits, pursuant to s. 22(4) Ontario's *Highway 407 Act* which empowers the highway's owner to enforce payment of toll debts by requiring the provincial registrar of motor vehicles to refuse to issue, or renew, the debtor's vehicle permit until the debt, related fees, and interest are paid.

The Supreme Court held that s. 22(4) is constitutionally inoperative to the extent that it is used to enforce the collection of toll debts that are claims provable in bankruptcy discharged pursuant to s. 178(2) of the BIA. It is impossible for ETR to use that remedy while also complying with s. 178(2), the court held. "One law allows what the other precisely prohibits," Justice Gascon observed. "The operational conflict offends the doctrine of federal paramountcy."

He noted the operation of the provincial law also frustrates Parliament's purpose of providing discharged bankrupts with the ability to financially rehabilitate themselves.

Thompson said the decision "largely resolves the main substantive issue in the class action case in favour of the class and against 407"-- that issue being whether or not ETR could use its vehicle permit renewal denial remedy in the face of the bankruptcy.

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> **David Thompson**
> Scarfone Hawkins

Penney: Question is how narrowly to focus

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with which society views the inappropriate use of medical records and accident reports," Justice O'Ferrall noted.

Several legal observers say those arguments for the exclusion of the records are compelling.

"The vulnerability of the accused, as well as the circumstances in which consent was apparently obtained and through which the documents were given all would make most people very uncomfortable about what happened here, I think," said Shannon Prithipaul, an Edmonton lawyer and president of the province's Criminal Trial Lawyers Association.

Allowing police to make use of information collected improperly from an injured, medicated and unrepresented victim lying in a hospital bed does bring the administration of justice into disrepute, she said.

"You don't have to be legally trained to feel that this is a very problematic situation and it was just very unfair."

Justice O'Ferrall's dissent is also in keeping with a long-standing line of Supreme Court of Canada decisions identifying a substantial privacy interest in bodily substances, says David Porter, who heads McCarthy Tétrault's white collar defence and investigations practice.

"I think it's been well established in the jurisprudence that a violation of s.8 in this context is so significant that it has generally resulted in the exclusion of evidence under s. 24(2)," said Porter, pointing to cases going back as far as 1988 with *R. v. Dyment*, [1988] 2 S.C.R. 417.

The Kiene case highlights the question of how narrowly *Charter* violations should be considered in the context of a s. 24(2) analysis, said University of Alberta law professor Steven Penney.

"Do we want to focus primarily on the individual actors and their conduct in the particular case at hand, or do we want to shine the spotlight more broadly in terms of the way that systems and institutions operate, and hold them to a standard of reasonableness in having proactive measures to minimize the possibility of Charter violations?"

While a question that the courts "haven't really come to grips with," it's the basis of the cleavage between the opinions in this case, he adds.

"It's tricky with 24(2) because appellate courts do give the trial judge a fair amount of deference in assessing the factors, and the factors themselves are fairly amorphous in many ways."

That highly deferential approach in this case is something Prithipaul calls "unfortunate." "Decisions that really hinge on standard of review just leave you feeling a little unsatisfied and worried."

Kiene is not intending to pursue an appeal of the decision to the Supreme Court of Canada, according to counsel Eliza Maynes.