SUPREME COURT OF CANADA

CITATION: 407 ETR Concession Co. *v.* Canada (Superintendent of Bankruptcy), 2015 SCC 52

DATE: 20151113
DOCKET: 35696

BETWEEN:

407 ETR Concession Company Limited
Appellant
and
Superintendent of Bankruptcy
Respondent
- and -
Attorney General of Ontario, Attorney General of Quebec, Attorney General of British Columbia, Attorney General for Saskatchewan, Attorney General of Alberta, Michael Dow, Gwendolyn Miron and Peter Teolis
Interveners

CORAM: McLachlin C.J. and Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon and Côté JJ.

REASONS FOR JUDGMENT: (paras. 1 to 33): Gascon J. (Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ. concurring)

REASONS CONCURRING IN THE RESULT: (paras. 34 to 41): Côté J. (McLachlin C.J. concurring)

407 ETR Concession Company Limited *Appellant*

v.

Superintendent of Bankruptcy *Respondent*

and

Attorney General of Ontario,
Attorney General of Quebec,
Attorney General of British Columbia,
Attorney General for Saskatchewan,
Attorney General of Alberta,
Michael Dow, Gwendolyn Miron and Peter Teolis *Interveners*

Indexed as: 407 ETR Concession Co. *v.* Canada (Superintendent of Bankruptcy)

2015 SCC 52

File No.: 35696.

2015: January 15; 2015: November 13.

Present: McLachlin C.J. and Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon and Côté JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law — Division of powers — Federal paramountcy — Bankruptcy and insolvency — Property and civil rights — Highway toll debt owed to creditor constituted claim provable in debtor's bankruptcy — Debtor obtained absolute discharge in bankruptcy — Federal legislation governing bankruptcy providing for debtor's release from all claims provable in bankruptcy upon discharge — Whether provincial legislation providing for continuing suspension of debtor's driver's permit until payment of toll debt constitutionally inoperative by reason of doctrine of federal paramountcy — Test for determining whether operational conflict exists — Whether federal and provincial legislation can operate side by side without conflict — Whether operation of provincial law frustrates purpose of federal law — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 178(2) — Highway 407 Act, 1998, S.O. 1998, c. 28, ss. 22(1), 22(4).

Ontario's Highway 407 is an open-access private highway operated by 407 ETR Concession Company Limited ("ETR"). The *Highway 407 Act ("407 Act*") governs the operation of Highway 407 and 4 empowers ETR to enforce the payment of tolls. Under s. 22(1) of the *407 Act*, if a person fails to pay a toll debt, ETR may notify the Registrar of Motor Vehicles. Under s. 22(4), upon receipt of this notice, the Registrar must refuse to issue or renew the debtor's vehicle permit until he or she is notified by ETR that the debt and related fees and interest have been paid.

As a result of M's failure to pay his toll debt, ETR notified the Registrar and the Registrar refused to renew M's permits. M obtained a discharge from bankruptcy. His Statement of Affairs listed ETR as an unsecured creditor. Pursuant to s. 178(2) of the *Bankruptcy and Insolvency Act* ("*BIA*"), a discharge from bankruptcy releases a debtor from claims that are provable in bankruptcy. M sought an order that his toll debt had been released by his discharge and an order compelling the Ministry of Transportation to issue his vehicle permits. The motions judge concluded that s. 22(4) of the *407 Act* was not in conflict with the *BIA* and he had no jurisdiction, absent a conflict, to order the reinstatement of M's vehicle permits. M settled his dispute with ETR but the Superintendent of Bankruptcy filed an appeal. Applying the doctrine of federal paramountcy, the Court of Appeal] declared s. 22(4) inoperative to the extent that it conflicted with the *BIA*'s purpose of giving a discharged bankrupt a fresh start.

Held: The appeal should be dismissed. Section 22(4) of the *407 Act* is constitutionally inoperative to the extent that it is used to enforce a provable claim that has been discharged pursuant to s. 178(2) of the *BIA*.

Per Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner and **Gascon** JJ.: The companion appeal, *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, contains full discussion of the principles of the doctrine of federal paramountcy, as well as the purposes and relevant provisions of the *BIA*. Like in the companion appeal, there is no dispute here concerning the independent validity of the

provincial and federal laws. Section 22 of the *407 Act* and s. 178 of the *BIA* were validly enacted by their respective governments. The only question before the Court is whether their concurrent operation results in a conflict.

The operational conflict branch of the paramountcy test requires determining whether it is possible to apply the provincial law while complying with the federal law. Here, the purpose and the effect of s. 22(4) of the *407 Act* are to allow a creditor, ETR, to enforce the collection of toll debts, which in the context of this appeal constitutes a claim provable in bankruptcy. Pursuant to s. 178(2) of the *BIA*, creditors cease to be able to enforce their provable claims upon the bankrupt's discharge. ETR is faced with a clear prohibition under s. 178(2). Since s. 22(4) provides the creditor with an administrative enforcement scheme, it is impossible for ETR to use that remedy while also complying with s. 178(2). ETR's toll debt is not listed as an exemption under s. 178(1), and the resulting financial liability of the debtor cannot survive his or her discharge. As a result, the *407 Act* says "yes" to the enforcement of a provable claim, while s. 178(2) of the *BIA* says "no". Both laws cannot apply concurrently or operate side by side without conflict. The inconsistency is clear and definite. One law allows what the other precisely prohibits. This operational conflict offends the doctrine of federal paramountcy.

The language of s. 22(1) of the *407 Act* does not provide a possibility for there to be no operational conflict. Once notified, the Registrar has no choice but to refuse to validate the debtor's vehicle permits and no discretion to terminate the

enforcement process. It is not valid to suggest that, to negate the operational conflict that exists here, the debtor can renounce his right under the *BIA* by paying the released debt or by accepting the debt collection mechanism and foregoing his right to a vehicle permit. This would be a situation of single compliance with one of the laws, and renunciation of the operation of the other law by one of the actors involved.

The operation of s. 22(4) also frustrates Parliament's purpose of providing discharged bankrupts with the ability to financially rehabilitate themselves. While the intent of s. 178(2) is that the debtor will no longer be encumbered by the burden of pre-bankruptcy indebtedness, s. 22(4) allows ETR to continue burdening the discharged bankrupt until full payment of the debt. Had Parliament wished to exempt ETR's toll debt from the bankruptcy process, as well as from the consequences of a discharge, it would have done so expressly in s. 178(1). It did not.

Per McLachlin C.J. and **Côté** J.: Section 22(1) of the *407 Act* allows Ontario to do indirectly what it is implicitly prohibited from doing under s. 178(2) of the *BIA*. This frustrates the federal purpose of financial rehabilitation that underlies s. 178(2) and is sufficient to trigger the application of the doctrine of federal paramountcy. However, there is no operational conflict. The relevant standard is impossibility of dual compliance and express conflict. In the present case, it is possible to comply with s. 22(1) without defying s. 178(2) in the literal sense of its words. The two laws have different contents and provide for different remedies. They can operate side by side without operational conflict, although there is a frustration of

purpose. If a debtor chooses not to drive, the province cannot enforce its claim. If 407 ETR opts not to notify the Registrar, s. 22(4) does not apply. Dual compliance is not impossible.

Cases Cited

Cited by Gascon J.

Referred to: *Alberta (Attorney General) v. Moloney*, 2015 SCC 51; *407 ETR Concession Co. v. Ontario (Registrar of Motor Vehicles)* (2005), 82 O.R. (3d) 703; *Schreyer v. Schreyer*, 2011 SCC 35, [2011] 2 S.C.R. 605; *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453; *Marine Services International Ltd. v. Ryan Estate*, 2013 SCC 44, [2013] 3 S.C.R. 53; *British Columbia (Attorney General) v. Lafarge Canada Inc.*, 2007 SCC 23, [2007] 2 S.C.R. 86; *M & D Farm Ltd. v. Manitoba Agricultural Credit Corp.*, [1999] 2 S.C.R. 961; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161.

Cited by Côté J.

Referred to: *Alberta (Attorney General) v. Moloney*, 2015 SCC 51.

Statutes and Regulations Cited

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 178.

Highway 407 Act, 1998, S.O. 1998, c. 28, ss. 1, 13(3), 15(1), 16(1), 22.

Highway Traffic Act, R.S.O. 1990, c. H.8, s. 51.

APPEAL from a judgment of the Ontario Court of Appeal (Doherty, Simmons and Pepall JJ.A.), 2013 ONCA 769, 314 O.A.C. 152, 118 O.R. (3d) 161, 369 D.L.R. (4th) 385, 7 C.B.R. (6th) 167, 53 M.V.R. (6th) 169, [2013] O.J. No. 5837 (QL), 2013 CarswellOnt 17670 (WL Can.), setting aside the decision of Newbould J., 2011 ONSC 6310, 30 M.V.R. (6th) 137, [2011] O.J. No. 6476 (QL), 2011 CarswellOnt 15701 (WL Can.), and restoring the initial order of the Registrar in Bankruptcy. Appeal dismissed.

J. Thomas Curry, *Andrew Parley*, *Jon Laxer* and *Gregory William MacKenzie*, for the appellant.

Peter Southey and *Michael Lema*, for the respondent.

Josh Hunter and *Daniel Huffaker*, for the intervener the Attorney General of Ontario.

Alain Gingras, for the intervener the Attorney General of Quebec.

Richard M. Butler, for the intervener the Attorney General of British Columbia.

Thomson Irvine, for the intervener the Attorney General for Saskatchewan.

Lillian Riczu, for the intervener the Attorney General of Alberta.

David Thompson and *Matthew G. Moloci*, for the interveners Michael Dow, Gwendolyn Miron and Peter Teolis.

The judgment of Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner and Gascon JJ. was delivered by

GASCON J. —

I. Introduction

[1] Like its companion case, *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, this appeal concerns an alleged conflict between overlapping federal and provincial laws. The question at issue is whether Ontario's *Highway 407 Act, 1998*, S.O. 1998, c. 28 ("*407 Act*"), which sets out a debt enforcement mechanism in favour of the private owner and operator of an open-access toll highway, conflicts with the federal *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), which provides that a discharged bankrupt is released from all provable claims.

[2] For the reasons that follow, I find that, like in the companion appeal, the provincial law conflicts with the *BIA*. As a result, it offends the doctrine of federal paramountcy and is inoperative to the extent of the conflict.

II. Facts

[3] Highway 407 is an open-access private highway. The highway was privatized in 1999 and has since been operated by 407 ETR Concession Company Limited ("ETR"). The *407 Act* governs the operation of Highway 407. While Highway 407 is a toll highway, its use is unrestricted. ETR cannot prevent anyone from accessing the highway. There is an electronic system that reads licence plates at the points of entry onto and exit from the highway. Alternatively, highway users can lease a toll device, which is affixed to the vehicle and is read instead of the licence plates. This electronic system records all trips made on the highway. The toll amount is then calculated. A corresponding invoice is delivered to the person in whose name the licence plates for the vehicle are issued, or if there is a toll device, to the lessee of the device.

[4] The *407 Act* defines ETR as the "owner" (s. 1) and empowers ETR to establish, collect and enforce the payment of tolls, administration fees and interest. This process begins with ETR delivering an invoice setting out the amount due. The amount becomes payable on the day the invoice is mailed, delivered by hand or sent by any other prescribed method: s. 15(1). If a person fails to pay the toll debt within 35 days, ETR may send that person a notice of failure to pay: s. 16(1). If the debt is

not paid within 90 days of the debtor receiving that notice, s. 22(1) allows ETR to notify the Registrar of Motor Vehicles ("Registrar"):

> **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 may notify the Registrar of Motor Vehicles of the failure to pay.

[5] Upon receipt of this notice, the Registrar must ("shall") refuse to issue or renew the debtor's vehicle permit. As a result, the debtor is incapable of having a vehicle registered in his or her name. The Registrar has no discretion in that regard:

> **22.** . . .
>
> (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] This provision is effective until the Registrar receives notice that the debt and related fees and interest have been paid. Upon payment, ETR must ("shall") notify the Registrar:

> **22.** . . .
>
> (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 shall immediately notify the Registrar of the payment.
>
> (7) If the Registrar of Motor Vehicles is notified by the owner 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).

[7] Matthew David Moore drove two cars, each registered under his name: a 1993 Pontiac and a 2002 Mercedes-Benz. Between August 1998 and March 2007, he had used Highway 407 1,973 times. As a result, he had accumulated a toll debt of $34,977.06. In March 2005, and then later in December 2006, ETR notified the Registrar of Mr. Moore's failure to pay the toll debt relating to his numerous trips on Highway 407, using both the Mercedes-Benz and the Pontiac. When the registration of the former vehicle expired, the Registrar refused to renew Mr. Moore's licence plates. Mr. Moore nonetheless continued to drive his Mercedes-Benz on Highway 407 for 18 months, without valid licence plates, contravening s. 51 of the *Highway Traffic Act*, R.S.O. 1990, c. H.8.

[8] On November 10, 2007, Mr. Moore made an assignment in bankruptcy. His Statement of Affairs listed ETR as an unsecured creditor. Although ETR was notified of Mr. Moore's assignment, it did not file a proof of claim and chose not to participate in the bankruptcy proceeding. On February 1, 2011, Mr. Moore obtained a discharge from bankruptcy, conditional on the payment of an amount of $1,210. As a result of paying that amount, he obtained an absolute discharge on June 21, 2011.

[9] Subsequently, Mr. Moore moved before the Registrar in Bankruptcy for an order that ETR's claim had been discharged in bankruptcy and that the Ministry of Transportation was compelled to issue him a permit upon payment of the usual fees. The order was granted but was later set aside before the matter was heard *de novo* in the Superior Court. At the hearing before the Superior Court, Mr. Moore contended that ETR could not use s. 22(4) of the *407 Act* to collect and enforce the toll debt because it had been discharged pursuant to s. 178 of the *BIA*. He claimed that s. 22(4) conflicted with s. 178 and offended the doctrine of federal paramountcy such that the federal bankruptcy provision should prevail over the *407 Act*. He sought an order that his debt had been released by his discharge and an order compelling the Ministry of Transportation to issue his vehicle permits.

III. Judicial History

A. *Ontario Superior Court of Justice, 2011 ONSC 6310, 30 M.V.R. (6th) 137*

[10] Newbould J. stated that an operational conflict occurs when "compliance with the provincial legislation [is] rendered impossible by either directly conflicting with an express provision of the BIA, having the intent or effect of changing the order of priorities or changing the scheme of distribution on bankruptcy stipulated by the BIA" (para. 12). According to him, s. 22(4) is part of the "process by which tolls and other charges are collected and enforced" (para. 14). Its purpose, in his view, "is directed to the collection of a debt" (*ibid.*).

[11] The judge described the "first goal" of bankruptcy as the "equitable distribution of a bankrupt debtor's assets among the estate's creditors inter se" (para. 20). He then noted that s. 178(2) of the *BIA* does not extinguish debts, but merely releases the bankrupt from all provable claims (paras. 16 and 24). He also observed that a vehicle permit is not property of the debtor, but is a "privilege granted by a government authority and is not affected by the bankruptcy" (para. 21). Unlike garnishment or execution, the suspension of a driver's permit "in no sense can be taken to be a step in the seizure of property of a bankrupt" (para. 25). Newbould J. concluded that s. 22(4) was not in conflict with the *BIA*, since it did not affect the equitable distribution of a bankrupt's property (paras. 22 and 24). Finally, while acknowledging briefly that the *BIA* also aims to permit the financial rehabilitation of bankrupts, he found that he had no jurisdiction, absent a conflict, to order the reinstatement of Mr. Moore's vehicle permits (paras. 34-35).

B. *Ontario Court of Appeal, 2013 ONCA 769, 118 O.R. (3d) 161*

[12] Having settled his dispute with ETR, Mr. Moore did not appeal the order. The Superintendent of Bankruptcy, concerned with the impact of the Superior Court's order on the bankruptcy system, filed an appeal. He argued that s. 22(4) of the *407 Act* conflicted with the operation of s. 178(2) of the *BIA* and that it frustrated the purposes of bankruptcy.

[13] Pepall J.A., writing for a unanimous court, noted that the motions judge had not considered whether s. 22(4) frustrated the rehabilitative purpose of the *BIA* or

resulted in unequal treatment of creditors (paras. 13 and 45). According to her, the *BIA* furthers two distinct purposes: the equitable distribution of assets and the financial rehabilitation of the bankrupt (para. 29). She also identified two types of legislative conflicts: operational conflict and frustration of purpose (para. 60). She stated that the purpose and effect of s. 22(4) are to enforce payment of a debt and that ETR's claim was provable in bankruptcy (paras. 26 and 84).

[14] Pepall J.A. concluded that there was no operational conflict. On a "strict reading" of the first branch of the paramountcy test, she opined that the debtor can choose not to seek a vehicle permit while ETR can decline to use the remedy set out in s. 22 of the *407 Act* (paras. 86, 90 and 92-93). She held, however, that s. 22(4) frustrated the rehabilitative purpose of the *BIA*. The purpose of bankruptcy is to give a debtor the "ability to start life afresh unencumbered by his or her past indebtedness" (para. 99). Since the purpose and effect of the provincial law were to collect debts (para. 108), and given that the denial of a vehicle permit can result in great hardship to a discharged bankrupt, the Court of Appeal held that s. 22(4) was incompatible with the *BIA*'s purpose of financial rehabilitation (paras. 113 and 115-16). In light of this conclusion, the Court of Appeal refrained from addressing whether the provincial law also frustrated Parliament's intention to treat all unsecured creditors equitably (para. 117). Since ETR's debt had been discharged, it ordered that the Ministry of Transportation issue licence plates to Mr. Moore upon payment of the applicable licensing fees. It declared s. 22(4) inoperative to the extent that it conflicted with the purpose of giving a discharged bankrupt a fresh start (para. 118).

IV. Issue

[15] The Chief Justice formulated the following constitutional question:

> Is s. 22(4) of the *Highway 407 Act, 1998*, S.O, 1998, c. 28, constitutionally inoperative under the doctrine of federal legislative paramountcy, having regard to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3?

V. Analysis

[16] In the companion appeal, I fully discuss the principles of the doctrine of federal paramountcy, as well as the purposes and relevant provisions of the *BIA*. Like in the companion appeal, there is no dispute here concerning the independent validity of the provincial and federal laws. Section 22 of the *407 Act* and s. 178 of the *BIA* were validly enacted by their respective governments. The only question before the Court is whether their concurrent operation results in a conflict. Building on my comments in the companion appeal, I need only examine s. 22(4) of the *407 Act* and ascertain its true meaning and substantive effect in the context of bankruptcy before applying the doctrine of paramountcy.

A. *The 407 Act*

[17] There is no question that the *407 Act* creates, in substance, a debt enforcement scheme. This was the legislative purpose identified by the motions judge and the Court of Appeal. Section 13(3) of the *407 Act* is also unequivocal:

> **13.** . . .
>
> (3) Sections 16 to 25 apply to the enforcement and collection of tolls and related fees and interest payable under this Act by a person described in subsection (1) but do not apply to the enforcement and collection of such tolls, fees and interest if,
>
> (a) the person is responsible for the payment of such tolls, fees and interest under clause (1) (b); and
>
> (b) the toll device that was affixed to the vehicle in question was obtained without providing information identifying the plate portion of a vehicle permit.

[18] In *407 ETR Concession Co. v. Ontario (Registrar of Motor Vehicles)* (2005), 82 O.R. (3d) 703 (S.C.J.), the Ontario Divisional Court analyzed the *407 Act* in detail, describing its purpose as well as the nature of the process it establishes:

> As noted above, the purpose of the Act was to privatize the operation of Highway 407 and, given its open-access character, to provide the owner 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. . . .
>
> . . .
>
> Sections 16 to 25 of the Act describe the process by which tolls and other charges are collected and enforced. [Emphasis added; paras. 27 and 29.]

[19] The appellant concedes that s. 22(4) is a debt collection and enforcement mechanism. The appellant also does not dispute that, in the context of this appeal, the toll debt being enforced is a claim provable in bankruptcy. However, the appellant argues that the Court of Appeal erred in its analysis of the purpose of s. 22 and the

merits of the public-private partnership that the provision implements. It says the purpose of the provincial law, and thus the merits of the public-private partnership, are irrelevant to the paramountcy analysis, which focuses on the operation of the provincial law. In its opinion, the provincial purpose is relevant only at the division of powers stage of the analysis.

[20] I disagree with the appellant's assertions. In the companion appeal, I explain that, while the focus of paramountcy is the effect of the provincial law, its purpose cannot be ignored. It forms part of the interpretative exercise that allows the substantive effect of the provincial law to be ascertained. In any event, I do not think the Court of Appeal considered the "merits" of the public-private partnership themselves to be "inadequate". The Court of Appeal merely stated that the "introduction into the mix of a private commercial participant in a public-private enterprise is inadequate . . . to remove the evident inconsistency with . . . the *BIA*" (para. 111 (emphasis added)). Before the Court of Appeal, ETR was arguing that the enforcement scheme was in the public interest, in that it ensured that the private-public partnership for the operation of the highway flourished. Responding to that argument, the Court of Appeal held that the purpose and effect of s. 22(4) were to enforce the collection of toll debts (para. 108). It rejected the appellant's argument that the private-public partnership, and the fact that it could further the public interest, could somehow erase the conflict caused by the substantive effect of the scheme. It was in that sense that the public-private partnership was "inadequate . . . to remove the evident inconsistency" between the provincial scheme and the *BIA*.

[21] I consequently agree with the Court of Appeal that the purpose and the effect of s. 22(4) of the *407 Act* are to allow a creditor, ETR, to enforce the collection of toll debts, which in the context of this appeal constitutes a claim provable in bankruptcy. The remaining issue is whether this enforcement scheme conflicts with s. 178(2) of the *BIA*.

B. *Operational Conflict*

[22] In the companion appeal, I describe what I consider to be a proper application of the operational conflict branch of the paramountcy test: Is it possible to apply the provincial law while complying with the federal law? Here, the Court of Appeal held that there was no operational conflict. In its view, the debtor was not required to pay the toll debt and could forego his right to a vehicle permit (para. 86), while ETR could comply with both laws by declining to pursue its remedy under s. 22 of the *407 Act* (para. 90). Although the Court of Appeal acknowledged that, with respect to the collection of a debt from a discharged bankrupt, the *BIA* said "no", while the *407 Act* said "yes" (para. 91), it nonetheless concluded that, on a strict reading of the test, there was no operational conflict.

[23] The appellant does not argue this point before us, agreeing with the Court of Appeal that there is no operational conflict. The respondent takes the position that there is such a conflict, as s. 178(2) of the *BIA* prohibits the enforcement of provable claims after the bankrupt's discharge, while s. 22(4) of the *407 Act* allows ETR to enforce its provable claim despite the discharge. In her concurring reasons, my

colleague Côté J. agrees with the Court of Appeal and the appellant. In the companion appeal, I explain why I disagree with her understanding of the application of this first branch of the paramountcy test in a situation like this one.

[24] In my view, the respondent is correct on this issue of operational conflict. Pursuant to s. 178(2) of the *BIA*, creditors cease to be able to enforce their provable claims upon the bankrupt's discharge: *Schreyer v. Schreyer*, 2011 SCC 35, [2011] 2 S.C.R. 605, at para. 21. As I indicate in the companion appeal, it is undisputed that a discharge under s. 178 of the *BIA* releases a debtor, thus preventing creditors from enforcing claims that are provable in bankruptcy. They are deemed to give up their right to enforce those claims. This includes both civil and administrative enforcement. In this case, ETR, the creditor, is faced with a clear prohibition under s. 178(2) of the *BIA*. It cannot enforce its provable claim, which has been released by an order of discharge. Since the debt collection mechanism put in place by s. 22(4) provides the creditor with an administrative enforcement scheme, it is impossible for ETR to use that remedy while also complying with s. 178(2): *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 72; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, at para. 46. Indeed, ETR's toll debt is not listed as an exemption under s. 178(1), and the resulting financial liability of the debtor cannot survive his or her discharge. As a result, the *407 Act* says "yes" to the enforcement of a provable claim, while s. 178(2) of the *BIA* says "no", such that the operation of the provincial law makes it impossible to comply with the federal law.

[25] In other words, while the provincial scheme has the effect of maintaining the debtor's liability beyond his or her discharge, the federal law expressly releases him or her from that same liability. Both laws cannot "apply concurrently" (*Western Bank*, at para. 72) or "operate side by side without conflict" (*Marine Services International Ltd. v. Ryan Estate*, 2013 SCC 44, [2013] 3 S.C.R. 53, at para. 76); a debtor cannot be found liable under the provincial law after having been released from that same liability under the federal law: *British Columbia (Attorney General) v. Lafarge Canada Inc.*, 2007 SCC 23, [2007] 2 S.C.R. 86, at para. 82; *M & D Farm Ltd. v. Manitoba Agricultural Credit Corp.*, [1999] 2 S.C.R. 961, at para. 41; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at p. 191. I respectfully disagree with my colleague that this conflict is "indirect" or concerns something that is merely "implicitly" prohibited by s. 178(2) of the *BIA* (*Moloney*, para. 92), or that I am resorting to a broad interpretation of s. 178(2) in order to find that an operational conflict exists (para. 36). Under the federal law, the debt is not enforceable; under the provincial law, it is. The inconsistency is clear and definite. One law allows what the other precisely prohibits.

[26] In that regard, unlike my colleague, I do not believe that the language of s. 22(1) provides a possibility for there to be no operational conflict (para. 39). Once the Registrar is notified by ETR, as was the case on the facts on this appeal, s. 22(4) uses mandatory language ("shall"), such that the Registrar has no choice but to refuse to validate the debtor's vehicle permits. From that point in time, the Registrar is left with no discretion to terminate the enforcement process after, for instance, the

debtor's discharge in bankruptcy. The Registrar is only required to reinstate the debtor's permits once notified that the debt is paid: ss. 22(6) and 22(7). To suggest that dual compliance with both laws remains possible if ETR declines to pursue its remedy under s. 22 of the *407 Act* would be to turn a blind eye to the factual reality of this case, on the basis of which it was argued. In addition, as I explain in the companion appeal, to suggest that an operational conflict can be avoided in circumstances in which the provincial law does not operate leads, with respect, to a circular reasoning that removes a key condition for consideration of either of the two branches of the paramountcy doctrine, that is, the existence of two valid laws that operate side by side. Nor, as in the companion appeal, is it in my view valid to suggest that, to negate the operational conflict that exists here, the debtor can renounce his right under the *BIA* by paying the released debt or by accepting the debt collection mechanism of the *407 Act* and foregoing his right to a vehicle permit. If that were the case, the situation would no longer be one of a possibility of dual compliance with both laws. Rather, it would be one of "single" compliance with one of the laws, and renunciation of the operation of the other law by one of the actors involved. When the two laws operate side by side, ETR cannot comply with both at the same time, and the provincial law denies the debtor the benefit of the federal law.

[27] I therefore conclude that the operation of s. 22(4) to enforce a debt that was discharged in bankruptcy is in conflict with s. 178(2) of the *BIA*. Section 178 is a complete code in that it sets out which debts are released on the bankrupt's discharge and which debts survive the bankruptcy. Through s. 22(4), the province creates a new

class of exempt debts that is not listed in s. 178(1). This operational conflict offends the doctrine of federal paramountcy.

C. *Frustration of Federal Purpose*

(a) *Financial Rehabilitation*

[28] That said, I consider that the operation of s. 22(4) also frustrates Parliament's purpose of providing discharged bankrupts with the ability to financially rehabilitate themselves. In the companion appeal, I explain this purpose of the *BIA* and its close relationship with the language of s. 178(2), which is aimed precisely at providing the bankrupt with a fresh start. While the intent of s. 178(2) is that the debtor will no longer be encumbered by the burden of pre-bankruptcy indebtedness, s. 22(4) allows ETR to continue burdening the discharged bankrupt until full payment of the debt, as if the discharge in bankruptcy had never occurred.

[29] When making his assignment in bankruptcy, Mr. Moore was indebted to ETR in the amount of $34,977.06. This was in November 2007. At the time of the hearing in the Superior Court, that is, in October 2011, the debt had more than doubled to $88,767.83. As time passes, the burden of ETR's debt gets heavier as interest accrues. In early 2011, the interest alone amounted to almost $1,400 per month. This is a crushing financial liability. Yet the more Mr. Moore delays payment of the toll debt, the more unlikely it is that he will ever be able to pay it and recover his vehicle registration privileges.

[30] If s. 22(4) is allowed to operate despite the debtor's bankruptcy and subsequent absolute discharge, this effectively creates an ever-increasing financial burden on the debtor. This burden attaches to the debtor despite a discharge in bankruptcy, even though the debtor will most likely never be able to pay ETR's debt in full. The debtor will be forever burdened by a pre-bankruptcy financial liability. This is contrary to Parliament's intention to give discharged bankrupts a fair opportunity to rehabilitate financially, freeing them from past indebtedness.

[31] ETR was notified of Mr. Moore's bankruptcy. It chose not to participate in the proceeding. It did not file a proof of claim, nor did it oppose Mr. Moore's discharge. In order to enforce its provable claim, ETR was required to take part, like any creditor, in the bankruptcy process. Had Parliament wished to exempt ETR's toll debt from that process, as well as from the consequences of a discharge, it would have done so expressly in s. 178(1) of the *BIA*. It did not. Therefore, I conclude that s. 22(4), if allowed to operate with respect to toll debts that are discharged in bankruptcy, frustrates the financial rehabilitation purpose of bankruptcy pursuant to s.178(2).

(b) *Equitable Distribution*

[32] The Court of Appeal did not comment on the issue of the equitable distribution purpose of the *BIA* (para. 117). The appellant argues that this purpose is not frustrated, because the provincial law does not affect the order of priorities. It further submits that a vehicle permit is not an asset belonging to the bankrupt and is

thus unaffected by bankruptcy. According to the respondent, however, s. 22(4) frustrates this purpose of the *BIA*, since ETR is allowed to collect assets or income unavailable to other creditors and to act outside the single collective proceeding. For the same reasons as set out in the companion appeal, I am not convinced that s. 178(2) furthers the purpose of equitable distribution of assets to creditors, or that this purpose of bankruptcy is frustrated by the operation of s. 22(4).

VI. Disposition

[33] In my view, s. 22(4) of the *407 Act* is inoperative to the extent that it conflicts with s. 178(2) of the *BIA*. The provision cannot be used by ETR to enforce an otherwise discharged provable claim contrary to s. 178(2) of the *BIA*. In any event, the operation of s. 22(4) frustrates the financial rehabilitation purpose of s. 178(2). I would dismiss the appeal with costs and answer the constitutional question as follows:

> Is s. 22(4) of the *Highway 407 Act, 1998*, S.O. 1998, c. 28, constitutionally inoperative under the doctrine of federal legislative paramountcy, having regard to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3?
>
> Answer: Yes, to the extent that it is used to enforce a provable claim that has been discharged pursuant to s. 178(2) of the *Bankruptcy and Insolvency Act*.

The reasons of McLachlin C.J. and Côté J. were delivered by

CÔTÉ J. —

[34] As in my concurrence in this appeal's companion case, *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, I do not see any operational conflict in the case at bar.

[35] My view of the operational conflict branch of the federal paramountcy test is set out in my reasons in *Moloney*, and in the instant case, it is supported by the analysis of Pepall J.A., writing for the Ontario Court of Appeal: 2013 ONCA 769, 314 O.R. (3d) 161, at paras. 67-93.

[36] The relevant standard is impossibility of dual compliance and express conflict. In the case at bar, it is possible to comply with s. 22(1) of Ontario's *Highway 407 Act, 1998*, S.O. 1998, c. 28 ("*407 Act*"), without defying s. 178(2) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), in the literal sense of its words. My colleague interprets s. 178(2) of the *BIA* broadly on the basis of Parliament's intent to foster the financial rehabilitation of the bankrupt, and this results in a conflict.

[37] Yet, as in *Moloney*, the two laws have different contents and provide for different remedies. Thus, this is not a situation in which one law says "yes" while the other says "no". Since one of them does not allow something that the other specifically prohibits, there is no express conflict. To conclude otherwise would be to

add to the literal requirement of s. 178(2) of the *BIA* despite a possible interpretation of the two statutes that results in a finding of compatibility.

[38] Section 22(1) of the *407 Act* allows Ontario to withhold a vehicle permit because of a failure to pay a claim that has since been discharged. Since s. 178(2) of the *BIA* provides only that a bankrupt is discharged from claims provable in bankruptcy, the two laws can operate side by side without conflict.

[39] If a debtor chooses not to drive, the province simply cannot enforce its claim. The same is true if 407 ETR Concession Company Limited opts not to notify the Registrar of Motor Vehicles of the debtor's failure to pay, in which case s. 22(4) does not apply. As a result of how the two legislatures decided to exercise their respective powers, it is plain that dual compliance is not impossible here.

[40] However, as in *Moloney*, s. 22(1) of the *407 Act* allows Ontario to do indirectly what it is implicitly prohibited from doing under s. 178(2) of the *BIA*. In light of the indirect nature of the conflict, this issue is properly dealt with in the second branch of the federal paramountcy test. This appeal must therefore be decided on the basis of a frustration of federal purpose analysis.

[41] For the rest, I agree with Gascon J. to the extent that he finds that s. 22 of the *407 Act* frustrates the federal purpose of financial rehabilitation that underlies s. 178(2) of the *BIA*. As the frustration of one federal purpose is sufficient to trigger

the application of the doctrine of federal paramountcy, I need not address the second proposed ground for frustration of purpose, that of equitable distribution.

Appeal dismissed with costs.

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