FRESH START PRINCIPLE: HOW BANKRUPTCY DISCHARGES OPERATE WITHIN PROVINCIAL DEBTS

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The Supreme Court of Canada has long held that provinces are entitled under the constitution to create regulatory provisions to ensure compliance with their laws. But what happens when a debtor cannot afford to pay his or her debts and declares bankruptcy under the federal *Bankruptcy and Insolvency Act* ("*BIA*")? Shouldn't a discharge from bankruptcy discharge all debts and give the debtor a fresh start? Or, can the province continue to deny a licence to participate in a regulated activity, for example, until the debt is fully satisfied? Two separate provincial Courts of Appeal have recently addressed this issue. In both cases, the court invoked the doctrine of federal paramountcy and held that the enforcement mechanisms in the provincial legislation frustrated the "fresh start" principle of the federal *BIA* and were therefore inoperative.

Ontario

In *Re Moore*[1] the Ontario Court of Appeal ruled that 407 Electronic Toll Route highway debts are discharged in bankruptcy, the way most other debts would be.

In that case, the debtor was a truck driver who owed debts to the 407 ETR Concession Company Limited (the "Company") for his use of the highway. He lost his permit to use the 407 for non-payment of tolls, but he still used the 407. He declared bankruptcy, and the Company was listed as a creditor. The debtor subsequently had a car accident and was unable to continue to work as a truck driver. He re-qualified as a car salesman and needed a car for work. He applied for a permit but was unable to obtain one as a result of s. 22(4) of the *Highway 407 Act,*[2] which requires the Registrar of Motor Vehicles to refuse to issue a vehicle permit to any person who has failed to pay tolls owing to the Company.

After fulfilling his requirements under the *BIA,* the debtor received a discharge from bankruptcy, and he brought a motion in the Bankruptcy Court for his debt to the Company to be extinguished under the discharge. The Registrar granted the motion and directed the Ministry of Transportation to issue plates to him. The Company then brought a motion in the Superior Court before a judge to set aside the Registrar's order. The judge ruled there was no operational conflict. The debtor's permit was cancelled, and the debt was recalled. Moore then settled the matter out of court with the Company. However, the Superintendent in Bankruptcy continued the action, challenging the validity of the decision and its direction on a bankruptcy discharge.

According to the Court of Appeal, the debtor was entitled to be issued a vehicle permit without paying his tolls. Section 22(4) of the *Highway 407 Act* was inoperative under the doctrine of federal paramountcy insofar as it upset the purpose of the *BIA* to provide a bankrupt with a fresh start after his discharge.

[1] 2013 ONCA 769 (Ont. C.A.),
[2] 1998, S.O. 1998, c. 28.

There are two ways in which the doctrine of federal paramountcy can arise[3]. Firstly, where there is an operational conflict between federal and provincial laws such that dual compliance is impossible, or secondly, where dual compliance is possible, but the provincial law is incompatible or frustrates the purpose of the federal legislation. As described in the *Canadian Western Bank* case, "There 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."[4]

The Ontario Court of Appeal declared that this section of the *Highway 407 Act* was incompatible with the purpose of the *BIA*, but it did not find that there was an operational conflict with the *BIA* and the *Highway 407 Act.* This is because there was no obligation to obtain a vehicle permit by paying the 407 debt, and the 407 wasn't under a requirement to enforce its collection remedies. It was only that he could not obtain the permit because of his unpaid debt: something which ran contrary to the purpose of the *BIA*.

Alberta

The Alberta Court of Appeal reached a similar conclusion in *Moloney v. Alberta (Administrator, Motor Vehicle Accident Claims Act)*,[5] unanimously concluding that a debt to the Province under the *Motor Vehicle Accident Claims Act* is discharged under bankruptcy.

In *Moloney,* the debts dated back to 1989, when the debtor was responsible for a driving accident while he was driving an uninsured motor vehicle. Seven years later, the Administrator of the Motor Vehicle Accident Claims Act (the "MVAC"), took action and attained a default judgment against the debtor in the amount of $194,875.00, the amount paid to accident victim. The debtor then filed for bankruptcy and three years later was discharged.

Despite his discharge, the Government of Alberta, through the Director, Driver Fitness and Monitoring, and the Attorney General, demanded payment of the monies: failing which his driving privileges would be revoked. The debtor was a truck driver, and this was tantamount to denying him the ability to work.

The Alberta Court of Appeal went further than the Ontario Court of Appeal did in *Moore*. The Court ruled that the Traffic Safety Act[6] (the "*TSA*") had an "unacceptable impact on the rehabilitative purposes of the bankruptcy regime, and an adverse impact on the objective of providing fair and equal distribution to the creditors." Since there was an operational conflict between the *TSA* and the federal *BIA*, the doctrine of federal paramountcy applied and the *BIA* prevailed over the provincial legislation.

The Alberta Court of Appeal specifically went on to say that this section of the Act was not designed to preserve traffic safety, but rather debt recovery. Under the terms of the *BIA*, a bankrupt is entitled to presume that if he is discharged, he will be free from all debts not covered under the exceptions listed.

Implications

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[3] *Quebec (Attorney-General) v. Canadian Owners and Pilots Association*, 2010 SCC 39 CanLii, 2010 SCC 39.
[4] *Canadian Western Bank v. Alberta*, 2007 SCC 22 (CanLII), 2007 SCC 22, [2007] 2 S.C.R. 3
[5] [2014] A.J. No. 155.
[6] RSA 2000, c. T-6.

Both *Moore and Moloney* draw attention to provincial legislation and the purposes of the federal bankruptcy and insolvency regime.[7]

The *Highway 407 Act*, while exclusively concerned with a toll highway, was written in such a way as to emphasize the question of pith and substance, which gave the Company the exclusive ability to stop a person from being able to renew their vehicle permits, without paying off a private liability. This is contrary to the *BIA*, which permits unsecured creditors to file proofs of claim in bankruptcy, and to be reimbursed on a pro rata basis by the Trustee in Bankruptcy. Although the *BIA* has a specific list of circumstances where a debt will not be discharged, debts under the *Highway 407 Act* are not among them.

The Court of Appeal's decision in *Moore* will likely only impact debts owing to the 407 in Ontario.,The Court of Appeal found that there was a conflict between certain creditors in its application of the statute, but didn't go farther than this. This case is currently under appeal to the Supreme Court of Canada and has been granted leave.

The *Moloney* case is more concerning, as this legislation exists in quite a few other Canadian jurisdictions. This Attorney General of Alberta has applied for leave to appeal to the Supreme Court of Canada.

While the Alberta government could ask the Federal government to amend the *BIA*, and the *BIA* does have certain exceptions which are similar to this (restitutions orders surviving, alimony, fraud etc.), it may open the gates for many different provincial requests for the amendment of the federal legislation. However, the fact that Moloney was able to essentially 'get away' with a debt to the government for not having insurance and being in an accident, may appear frightening to some observers; of course, Alberta could have opposed his discharge more rigorously, and asked for a larger penalty.

Similar orders of courts are not dischargeable in bankruptcy. Orders, such as Securities Commission restitution orders, judgments encapsulating findings of fraud, and Excise Tax orders cannot be discharged because of the public policy ramifications behind them. They survive bankruptcy and have their own mechanisms for appeal. However, this type of order, an order that is essentially granting restitution to the government for paying for an innocent accident victim, can be discharged. This might allow for anyone who drives without insurance to simply declare bankruptcy and walk away. This is something that the Government of Canada should review. Provincial governments may be able to avoid this issue, however, by changing their legislation or by tailoring the effect of the legislation. For instance, if they were to change the underlying behaviour to a Provincial Offence for future cases, then this would not be contrary to the *BIA*, as a person charged with a Provincial Offence falls under a different category, and restitution is applied differently.

[7] There was a third Provincial case heard in Saskatchewan, ***Gorguis v. Saskatchewan Government Insurance [2011] S.J. No. 188***. But on appeal to the Court of Appeal of Saskatchewan, the Court denied any appeal on the basis that the Attorney-General of Canada and Saskatchewan were not served, and therefore it should be reheard at the trial court level