THE SUPREME COURT OF CANADA CONFIRMED TODAY THE PARAMOUNTCY OF THE*BANKRUPTCY AND INSOLVENCY ACT* OVER LICENSE DENIAL REGIMES

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The Supreme Court of Canada ("SCC") released today its much awaited decision in 407 ETR,[1] in which it upheld the decision of the Ontario Court of Appeal, and ruled that Section 22(4) of the Highway 407 Act is constitutionally inoperative to the extent that it is used to enforce a provable claim that has been discharged pursuant to section 178(2) of the Bankruptcy and Insolvency Act.

License denial regimes and their interaction with the Bankruptcy and Insolvency Act ("***BIA***") have been the subject of a long-lasting debate in Canadian jurisprudence, with decisions falling on both sides of the fence. Today, the SCC released *407 ETR*, discussed below, and the companion case of *Alberta v. Moloney*,[2] two decisions providing welcome clarification of the state of the law.

In *407 ETR* the SCC ruled, by a majority of seven and with two concurring in the result, in favour of the Superintendent of Bankruptcy (the "**Superintendent**").

The majority found an operational conflict between the enforcement scheme of section 22 of the Highway *407 Act* ("***407 Act***") and section 178(2) of the *BIA*. Gascon J., writing for the majority, said that the toll debts collected by 407 ETR Concession Company Limited ("**ETR**") constitute a claim provable in bankruptcy and that pursuant to section 178(2) of the *BIA*, creditors cease to be able to enforce their provable claims upon the bankrupt's discharge. The majority held that it is impossible for ETR to use the administrative enforcement scheme of section 22(4) of the *407 Act* while also complying with s. 178(2) of the *BIA*.

The majority also held that compliance could not be achieved by the debtor's paying the released debt or by foregoing his right to a vehicle permit, saying that this would be a situation of compliance with one law, and renunciation of the operation of the other, by one of the actors involved.

The majority and minority agreed that the operation of section 22(4) of the *407 Act* also frustrates Parliament's purpose of providing discharged bankrupts with the ability to financially rehabilitate themselves, which purpose underlies section 178(2) of the *BIA*. The majority said that it is the intent of this section that "the debtor

will no longer be encumbered by the burden of pre-bankruptcy indebtedness."[3] Section 22(4) of the *407 Act* frustrates this purpose by allowing ETR to continue burdening a discharged bankrupt.

Accordingly, the SCC dismissed ETR's appeal.

Background

Highway 407, one of Toronto's arterial roads, is a public-private partnership between the Government of Ontario and ETR. Matthew David Moore ("**Moore**"), a truck driver, incurred a large debt ($34,977.06) to ETR in relation to the toll applicable to the use of Highway 407. As a result of Moore's failure to pay his indebtedness, ETR sent notices of the non-payment to the Registrar of Motor Vehicles, which in turn refused to renew Moore's vehicle permits, all pursuant to section 22(4) of the *407 Act*.

Subsequently, Moore made an assignment into bankruptcy in November 2007 and received his absolute discharge in June 2011. After receiving an absolute discharge, Moore obtained from the Registrar in Bankruptcy (the "**Registrar**") a declaration that the debt to ETR was released in order to be able to retrieve his vehicle permit.

However, ETR contested and the motions judge set aside the Registrar's order on the basis that there was no operational conflict between s. 22(4) of the *407 Act* and section 178(2) of the *BIA*.

Despite the fact that Moore settled his debt with ETR and forfeited his right to appeal, the Superintendent took over the case in order to seek clarification from the higher courts on this long-lasting debate over license denial regimes in the context of bankruptcy.

The Court of Appeal

The Court of Appeal concluded that the order of the motions judge should be set aside. In its decision, the Court addressed the question of whether the two statutory schemes could co-exist in the limited context of a discharged bankrupt, holding that they could not and that federal paramountcy applied.

On the first branch of the paramountcy test, the Court of Appeal held that there was no operational conflict between the two statutes. Moore could forego obtaining a vehicle permit and not pay the toll debt to ETR, or he could pay the debt and obtain a vehicle permit. Because Moore is not required to pay the debt and the *BIA* does not require him to obtain a vehicle permit, the Court said, there is no impossibility of dual compliance. With respect to ETR, although section 178(2) of the *BIA* bars creditors from enforcing their claims after discharge, the *407 Act* is permissive: it does not require ETR to enforce its claims. ETR, said the Court, could comply with both statutes by declining to pursue its remedy under section 22 of the *407 Act*.

On the second branch of the test, however, the Court concluded that section 22(4) of the *407 Act* did frustrate

the purpose of the BIA. As stated by the Court, "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."[4]

The Supreme Court

At the Supreme Court, ETR submitted that the Court of Appeal erred in its approach to and analysis of the paramountcy doctrine, and that its decision placed the Court of Appeal at odds with Supreme Court jurisprudence on paramountcy in three ways, by (a) evaluating the relative merit of the federal and provincial schemes; (b) identifying a purpose for the *BIA* that was both too broad and too vague; and (c) holding that the *BIA* required vehicle permits be granted to discharged bankrupts even though it would be *ultra vires* for the Federal Parliament to enact a law to such effect. The Supreme Court disagreed with ETR's assertions. It bears mentioning in particular that the SCC's own articulation of the purpose of the *BIA* is by and large consonant with that identified by the Court of Appeal.

Happy Ending

CAIRP welcomes this decision, along with the finding in *Alberta v. Moloney*, as providing a long-sought resolution to the uncertainty created by the interaction of license denial regimes and the *BIA*. In the latter case, the SCC examined the interaction between section 102 of Alberta's *Traffic Safety Act* in the context of a discharged bankrupt's driver's license being suspended as a result of an unpaid amount owed due to causing a car accident while uninsured, finding section 102 inoperative to an extent similar to its finding regarding section 22(4) of the *407 Act*.

The SCC's rulings in *407 ETR* and *Alberta v. Moloney* make clear that administrative enforcement regimes structured in the manner of the *407 Act* and *Alberta's Traffic Safety Act* conflict with the *BIA*, and that federal paramountcy applies to the extent that such regimes make compliance with the *BIA* impossible and frustrate its purpose.

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1 *407 ETR Concession Co. v. Canada (Superintendent of Bankruptcy)*, 2015 SCC 52 [407 ETR].

2 *Alberta (Attorney General) v. Moloney*, 2015 SCC 51 [*Alberta v. Moloney*].

3 *407 ETR* at para 28.

4 *See Canada (Superintendent of Bankruptcy) v. 407 ETR Concession Company Limited*, 2013 ONCA 769 at para 99.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.