Financial Services Flash

Aird & Berlis LLP
Barristers and Solicitors

Highway 407 Toll Indebtedness: The Benefits of Being Discharged from Bankruptcy

By Mat Goldstein and Jeremy Nemers*

April 9, 2014

On December 19, 2013, the Ontario Court of Appeal held that the Registrar of Motor Vehicles (the "**RMV**") cannot deny vehicle permits to individuals on account of pre-bankruptcy debts owing to the ETR Concession Company Limited (the "**ETR**"). Based on the intent and purpose of federal bankruptcy law to permit debtors to obtain a "fresh start," it was concluded that the provincial act establishing the ETR conflicts with bankruptcy law and was, as a result, unconstitutional in part.

Background

Matthew David Moore (the "**Debtor**") was a truck driver whose debts to the ETR resulting from his use of Highway 407 amounted to approximately $35,000 at the time of his assignment into bankruptcy. Although listed as a creditor on the Debtor's statement of affairs, the ETR did not file a proof of claim. Instead, the ETR followed the procedures set forth in section 22(1) of the *Highway 407 Act* (the "**407 Act**"), which provides that the ETR may notify the RMV of a driver's failure to pay ETR tolls, fees and related interest. Pursuant to section 22(4) of the 407 Act, the RMV is then required by law to refuse to issue a new vehicle permit to the indebted driver. Upon receiving a discharge from his bankruptcy, the Debtor applied to the RMV for a new vehicle permit. Following Section 22(4) of the 407 Act, the RMV denied the Debtor's request.

Subsequently, the Debtor moved before a Registrar in Bankruptcy, seeking a declaration that his debt to the ETR was released as a result of his bankruptcy discharge. The Registrar ordered that, pursuant to section 178(2) of the *Bankruptcy and Insolvency Act* (the "**BIA**"), the Debtor's discharge from bankruptcy released all provable claims, including the ETR debt, and a vehicle permit should be issued upon payment of the customary licensing fee. The ETR then successfully moved before a judge to set aside the order of the Registrar. The Superintendent of Bankruptcy ("**Superintendent**"), believing there to be an inconsistency between the provincial 407 Act and the federal BIA, sought and received leave to appeal the decision of the motion judge. As the doctrine of paramountcy dictates, where there is an inconsistency between validly enacted but overlapping provincial and federal legislation, the provincial legislation is inoperative to the extent of such inconsistency.

The Court of Appeal's Decision

In a unanimous decision, the Ontario Court of Appeal confirmed that an inconsistency between federal and provincial laws may arise in one of two ways: (i) where there is an operational conflict, such that dual compliance with both a federal and a provincial law is impossible; or (ii) where dual compliance is possible, but the operation of the provincial law is incompatible with, or frustrates, the purpose of the federal law.

Under the first branch of the test, the Court determined that there was no operational conflict between the impugned elements of the BIA and the 407 Act, because while the BIA bars creditors from enforcing their claims after a discharge, the 407 Act merely *permits* (but does not require) the ETR to enforce its claims by obliging the RMV to withhold vehicle permits. Technically, the ETR could comply with both statutes by choosing not to notify the RMV.

However, under the second branch, the Court found that the purpose of section 22(4) of the 407 Act was to collect toll debt, which was effectuated by requiring the RMV to deny vehicle permits to anyone who had not paid his or her debts to the ETR, subject to due notice, whether or not such person had received a discharge in bankruptcy. As the Court found, *"…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."* Given this conclusion, it was unnecessary to examine whether the 407 Act frustrated the BIA's other chief purpose, the equal treatment of a debtor's unsecured creditors.

As a result of the Court's decision, section 22(4) of the 407 Act is now inoperative to the extent of its application against a discharged bankrupt.

The Financial Services Group at Aird & Berlis LLP has wide-ranging experience in proceedings under the *Bankruptcy and Insolvency Act* and *Companies' Creditors Arrangement Act*. For more information, please contact any member of the Financial Services Group. Details can be found on our **Financial Services, Insolvency and Restructuring web page**, by clicking on **members**.

Click here to view our other newsletters
or visit **www.airdberlis.com**

*Jeremy Nemers is an articling student at Aird & Berlis LLP.