Recent Cases and Current Developments

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Recent Cases and Current Developments

by: Mervyn D. Abramowitz and Jeffrey B. Rosekat[1]

Paramountcy: Provincial Deemed Trusts (by Mervyn D. Abramowitz)

Royal Bank of Canada v. Atlas Block Co. Limited, 2014 ONSC 3062 (Penny J.)

Three entities (collectively "Atlas") manufactured and sold concrete paving stones, concrete blocks and other concrete/landscaping products. The products were sold to industrial and commercial construction contractors, residential builders, and large retailers, among others.

Holcim supplied Atlas with cement powder that was used in virtually all of Atlas' products. However, neither Atlas nor Holcim were in a position to determine which Holcim shipment went into which finished product from Atlas, when that product was produced or sold, or to whom it was sold.

When the three Atlas entities went into receivership (and certain became bankrupt), despite all of the facts above, Holcim took the position that it had a trust claim under s. 8 of the *Construction Lien Act* and that the amounts owing to it therefore did not form part of the assets of Atlas. Further, its trust claim was not for pre-receivership funds collected directly by Atlas, but only for the funds collected by the receiver. In particular, Holcim argued that the receiver had an obligation to segregate those funds from the others it collected.

The Receiver took the position that only deemed trusts that would otherwise meet the requirements for a common law trust (the three certainties) could be excluded from Atlas' assets, that a common law trust could not be made out because there was no certainty of subject matter, and that the relevant funds were therefore divisible among Atlas' creditors.

In his decision on the motion, Penny J. held that to establish a trust under the *Construction Lien Act*, Holcim had to establish that: (a) Atlas was a contractor/subcontractor; (b) Holcim supplied Atlas for projects where Atlas was a contractor/subcontractor; (c) Atlas received or was owed money for materials supplied to the improvement; and, (d) Atlas owed Holcim money for those materials. Penny J. also held that it was possible for Holcim to assert such a claim over amounts related to sales to specific projects, even if (a) not all

[1] With thanks to Stephen Wolpert (an associate at Kronis, Rotsztain, Margles, Cappel LLP) and Bill Michelson (an articling student at Gardiner Roberts LLP) for their able and much-appreciated assistance in preparing this paper.

of Atlas' sales were to such projects and (b) not all of the funds paid to Atlas on those projects are traceable back to Holcim's materials.

However, Penny J. held that even if Holcim could establish that it had a valid CLA trust claim, in order for that deemed CLA trust to result in property being excluded from Atlas' assets, Holcim had to also be able to establish that the trust that they were asserting met the common law requirements (certain of intent, object and subject matter).

In this case, based on the facts, Holcim could not establish certainty of subject matter because funds were not segregated either pre- or post-receivership. Further, in this case, neither Atlas nor the receiver had any positive statutory obligation to segregate funds.

As a result, the court found that the funds in issue were not trust funds and were not excluded from the bankrupt's estate.

Grant Forest Products Inc., 2013 ONSC 5933 (Campbell J.)

This case dealt with the competing claims of Grant Forest Product Inc's ("GFPI") secured creditors and the administrator of the company's pension plan, and was among the first cases to consider the Supreme Court of Canada's decision in Indalex (indeed, the motions were delayed until the decision in Indalex was released). In particular, Justice Campbell considered whether a provincial deemed trust under the Pension Benefits Act could arise in the circumstances.

GFPI obtained an Initial Order under the CCAA in June 2009, after one of its secured creditors commenced an application for a bankruptcy order against GFPI. At the time that GFPI obtained the Initial Order, there were a number of important facts which distinguished the case from the situation in Indalex, in particular: (a) the pension plans weren't in windup prior to the Initial Order, (b) no DIP request was made prior to a post-initial Order asset sale, (c) the plan at the time of the Initial Order was for the debtor to continue on its business while it arranged for the orderly disposition of assets (i.e. a liquidating CCAA), (d) no one objected to the language in the Initial Order that permitted GFPI to make ongoing payments towards, among other things, pension contributions, and (e) the pension plan administrator did not oppose any sales of assets.

Following the sale of the majority of assets, certain proceeds of sale were retained and not distributed until the priority dispute between the administrator and the secured creditors was resolved. Further, the court ordered the wind up of the pension plans. At that stage, the pension plan administrator brought a motion seeking to have the funds paid to it to reduce wind up deficiencies in the pension plan, while the secured creditors brought a motion to lift the stay and bankrupt GFPI. Justice Campbell found that the CCAA proceeding had run its course and that the amounts owing to secured creditors exceeded the amount of the sale proceeds.

Justice Campbell held that the provincial deemed trust that arises upon wind up of a pension plan only prevails when the windup occurs before the insolvency, but not after it. In his view, this approach creates certainty and predictability for stakeholders regarding the CCAA proceeding and whether they should support the proceeding or apply for a bankruptcy order. As a result, GRPI was not required to pay the remaining sale funds towards wind up deficiencies. Further, the need for predictability also underpinned Justice Campbell's decision to order the lifting of the stay and adjudging GFPI bankrupt. To do otherwise would result in the plans having de facto priority, as GFPI was required to make deficiency payments during the CCAA proceedings.

The court further found that its order to wind up the pension plan did not trigger the deemed trust and that the order was silent with respect to deemed trusts.

Held: the administrator's motion was dismissed, the secured creditors' motion was granted, and the secured creditors received the proceeds in priority to the pension plan administrator.

Professional Fees in Insolvency Proceedings: Is the Bell Tolling for the Billable Hour? (by Jeffrey B. Rosekat)

The Court approval of professional fees in insolvency or restructuring proceedings has generally proceeded as a routine motion. Controversy has raised its dragon-like head from time to time—one of the more notorious examples in recent memory being Justice Farley's decision in *Confectionately Yours* (2001 CanLII 28453) and the resulting appeal (2002 CanLII 45059)—but for the most part, the approval of fees is tacked on to more substantive motions and dealt with largely as a matter of course with most approval motions involving small skirmishes over reasonably small proportions of the total professional fees.

This trend appears to be changing. The appointment of Costs Counsel to the Court—an appointment aimed at assisting the Court in keeping a handle on professional fees— has been a feature of several large-scale CCAA proceedings in recent history. The USD 1,000,000,000 in professional fees in the Nortel CCAA and USD 2,200,000,000 in the Lehman Brothers Chapter 11 may have been a tipping point as far as the public perception of professional fees in restructuring proceedings. Whatever the reason, there is no question that high bills and high rates are attracting more and more attention from the Courts.

The principles involved in evaluating fees do not seem to have varied: the recent decisions still cite the Court of Appeal decision in *Confectionately Yours* and the factors discussed in that decision when determining whether or not to approve fees. Determining that fees are "fair and reasonable" is still the guiding principle in determining whether a Court will approve professional fees or not. However, in short, the recent spate of cases suggests the following trends:

- Courts will look into who is doing what at which rate. The failure to delegate clerical and administrative tasks to lower rate staff will lead to criticism from the Courts and a possible reduction in the amount of fees approved.

- As well, Courts will look at the complexity of the proceeding in deciding whether heavy involvement by senior professionals is warranted.

- Courts may be receptive to—and in fact may be expecting professionals to explore—alternative billing arrangements, although what this means is not exactly clear.

- Proportionate charges for "administrative expenses" (i.e. a percentage charge on top of each account) may not be accepted by the Courts.

- A bird in the hand is not necessarily better than two in the bush where fee approvals are concerned.

Alternative billing arrangements, clarity in docketing, delegation of simple tasks to lower billing professionals, and the overall efficient administration of insolvency proceedings all seem to be in the minds of the Courts reviewing professional fees for fairness and reasonableness, and insolvency professionals and their lawyers should bear these elements in mind when bringing motions for the approval of fees. Where there is substantial involvement of senior professionals on a file, counsel should consider ensuring that fee affidavits and Court reports include justifications for such involvement.

While "fair and reasonable" will continue to be the standard of review by the Courts for the foreseeable future, counsel should be prepared for criticism if it is not clear to the Court from the approval motion materials that the professionals have at all times kept in mind the need for efficiency in the administration of the insolvency or restructuring proceeding.

TNG Acquisition 2014 ONSC 2754 (Commercial List)

TNG went through a CCAA in 2006. A second CCAA application was brought a year later, at which point the company was assigned into bankruptcy. The motion in question was brought by the trustee to authorise payment to the Monitor and counsel of the first CCAA proceeding for work performed in response to a request for information from the bankruptcy trustee. The Monitor sought approval for $63,819 for itself and $9,306 for its counsel. Justice Brown approved $28,417 for the Monitor and $3,000 for its counsel.

The Court examined the actual work done by the Monitor and its counsel[2] and found that it was largely clerical or administrative and did not justify having partners (at $750 per hour) and senior managers (at $630 an hour) doing a large proportion of the work. Justice Brown in his decision stated that if senior staff are doing clerical work, they should only bill at the clerical rates.

Justice Brown concludes his decision with the following passage:

> *"…we are reaching the end of the era where the fees for professional services, such as the giving of legal or insolvency advice, are calculated and billed on an hourly rate basis. I think court-appointed officers, such as the Trustee or the Monitor, when called upon to perform routine clerical or administrative tasks, must explore, as part of the prudent*

[2] Bear in mind that the Monitor and counsel must file detailed accounts setting out in the narrative what was done for the time billed.

discharge of their duties, alternative billing arrangements, including capped fees, instead of persisting in employing the hourly rate fee-billing system which has been popular for the last half century."

HSBC Bank Canada v. Lechcier-Kimel – 2014 ONSC 1960 (Commercial List); 2014 ONCA 721

This case involved the sale of a high-end residential property in the Bridle Path in Toronto. The property was listed for sale by the Receiver for a long time without achieving a sale. The Receiver then decided to proceed with an auction, and sought and obtained an order approving the auction. Prior to the auction, a party put in an offer that was at the high end of the appraisals obtained for the property, that was unconditional, and that was in the opinion of the auctioneer, higher than would likely be obtained at auction. The Receiver brought a motion to approve that "bird in the hand" offer.

The second mortgagee (at risk of suffering a significant shortfall in any event) objected to that motion, and the Court did not approve the late offer, requiring the auction to proceed. Justice Brown found that although the inclination of the Receiver to take the bird in hand was understandable, deviating from the court-approved auction process at that stage would damage the integrity of the sale process.

Later on, the Receiver came to Court for approval of its fees, and the second mortgagee objected to the approval of the fees relating to the motion for approval of the bird in hand offer. Justice Brown found that when a Receiver puts forward a certain course of action for approval, it must "ride that horse to the commercially logical end … unless some material event intervenes which affords the prospect of significantly enhanced realization" (at para. 17). He goes on to explain that an offer 50 or 60 percent higher than the court-approved reserve might have been understandable. The bird in hand offer was only 20 percent higher. Justice Brown refused to approve fees associated with the negotiation and motion for approval of the bird in hand offer.

The Court of Appeal in upholding the decision did so without, unfortunately, offering any more guidance than did Justice Brown on how to determine what is "a material event … which affords the prospect of a significantly enhanced realization" other than it is somewhere between 20 percent and 50 percent more than the Court-approved auction reserve.

Bank of Nova Scotia v. Diemer (c.o.b. Cornacre Cattle Co.) 2014 ONCA 851

A farm with about $4.9 million in debt and valued at approximately $8.3 million went into receivership. At a motion brought in London for, among other things, the approval of the fees of the

Receiver and its counsel, the Court refused to approve the Receiver's counsel's fees of $255,955. The Receiver's fees of $138,297 were approved.

The motions judge applied the principles set out in *Confectionately Yours* and other cases. He took issue with the need for senior counsel at high rates to bill on routine matters. He found a significant amount of inefficiency, and work done at high rates which should have been done at lower rates, saying that "…the rates greatly exceed what I view as fair and reasonable." (cited at para. 25) concluding that the legals were "nothing short of excessive." To correct this perceived injustice, he adjusted the fees by reducing counsel's rate to the average London rate of $475 for lawyers of similar experience.

The Court of Appeal upheld the decision of the motions judge, finding that his mathematical approach of applying London rates was flawed but not fatally so. Justice Pepall, in her decision, states that value—an examination of what was accomplished—should be the predominant orienting principle when determining what is fair and reasonable as opposed to what she refers to as the "mathematical calculation reflected in the hours times hourly rate equation."

Justice Pepall includes language in her decision such as "…docketing may become more of an art than a science, and the objective of transparency is sometimes elusive" and "[t]his segmenting of the hour to be docketed [into six minute increments] does not necessarily encourage accuracy or docketing parsimony" which, in combination with her comments about the importance of value over rate multiplied by hours docketed appears to be an indication that the Courts may be looking for insolvency professionals to engage in a more robust exploration of alternative billing arrangements.

Lessons from Nortel (by Mervyn D. Abramowitz)

Re Nortel Networks Corporation et al. 2014 ONSC 4777 (Newbould J.)

In 2014, Nortel was in the midst of a liquidating CCAA. The Initial Order had been granted in June 2009, though at that time, Nortel had sought to restructure its business and there was no intent to liquidate.

This motion addressed whether unsecured bondholders also had valid claims for post-filing interest. The issue was of considerable importance given that Nortel had generated sale proceeds of US$7.3 billion, following the sale of substantially all of its assets, the bondholders claims for principal and pre-filing interest totaled some US$4.1 billion and their claims for post-filing interest – which were at issue on this motion – totaled an additional US$1.6 billion. Further, since the bonds had higher interest rates that the interest rate accruing on the sale proceeds, the bondholders claim would increase (as a percentage of all claims) with time.

Newbould J. reviewed the applicable principles with respect to payment of interest in insolvency proceedings. He noted that the "Interest Stops Rule", which provides that interest stops accruing at the date of insolvency, had been applied in numerous cases, even though the rule had not been codified in the applicable legislation. As a result, he held that, even though the CCAA did not specifically provide for it, it was open to the court to apply it in a CCAA proceeding.

Further, Newbould J. held that the Interest Stops Rule is related to and developed from the fundamental tenets of insolvency law that all debts shall be paid pari passu as of the date of insolvency and that all unsecured creditors shall receive equal treatment.

Newbould J. then went on to consider whether it was appropriate to apply the Interest Stops Rule in this particular case, where the CCAA proceeding was a liquidating CCAA, and where only one of the two main competing claimants – the unsecured bondholders, but not the pensioners – had a contractual right to interest.

Newbould J. held that in light of recent Supreme Court of Canada decisions regarding the inter-relationship between the BIA and CCAA, particularly in Century Services and Indalex, there was no reason not to apply the Interest Stops Rule in the CCAA in the same way as was done in the cases under the BIA (or the *Winding Up Act*). Further, maintaining the status quo (as of the insolvency date) is an important policy reason to adopt the use of the Interest Stops Rule in the CCAA. This is true whether it is a liquidating or non-liquidating CCAA.

Nortel Networks Corporation (Re), 2013 ONCA 599 (Goudge, MacPherson and Juriansz JJ.A.)

After Nortel obtained an Initial Order under the CCAA in 2009, the Ministry of the Environment (the "MOE") issued orders requiring Nortel to remediate properties it once or still owned, in accordance with the Environmental Protection Act. At first instance, Morawetz J. (a) declared that the MOE's remediation orders were subject to the stay granted by the Initial Order, (b) declared that all proceedings against Nortel (and its former officers and directors) before the Ontario Environmental Review Tribunal in relation to the EPA orders were subject to the stay of proceedings (c) authorized Nortel to cease performing remediation of property; (d) declared that any claims in relation to current or future remediation requirements were subject to the insolvency claims process; and (e) authorized Nortel to repudiate all contractual obligations to carry out remediation at the properties.

Following Morawetz J's decision, but before the hearing of this appeal, the Supreme Court of Canada released its decision in AbitibiBowater. As a result, and following the filing of fresh facta, the Court of Appeal applied AbitibiBowater to this case. In AbitibiBowater, the Supreme Court held that a CCAA judge had the discretion to determine whether an environmental order that is not framed in monetary terms is in fact a "provable claim", and should look at the substance, rather than the form, of the order to do so. Further, the court must assess whether it is sufficiently certain that the regulatory body will perform the remediation work and, as a result, have a monetary claim, and should consider (a) whether the polluting activities are ongoing, (b) whether the debtor is in control of the property, (c) whether the debtor has the means to comply with the order, and (d) the effect that requiring the debtor to comply with the order would have on the insolvency process. As Juriansz J.A summarized the test: "ongoing environmental remediation obligations may be reduced to monetary claims that can be compromised in CCAA proceedings only where the province has performed the remediation work and advances a claim for reimbursement, or where the obligation may be considered a contingent or future claim because it is 'sufficiently certain' that the province will do the work and then seek reimbursement".

Applying that test to the present case, the Court of Appeal held that it was not sufficiently certain that the MOE would do the remediation work in this case and seek reimbursement from Nortel in respect of most of the properties. In particular, the Court noted that the remediation orders were also sent to other current or former owners of the properties, each of whom was jointly and severally liable to remediate the properties, the inference being that one of these other owners may pay to have the remediation work performed.

Nortel Networks Corporation (Re), 2009 CanLII 39492 (ON SC) (Morawetz J.)

One of the earlier decisions in the Nortel saga, this case involved the question of whether the CCAA affords the court jurisdiction to approve a sale process in the absence of a formal plan of arrangement and corresponding creditor vote.

By the time this question found its way to the court, there had already been numerous decisions that dealt with the skeletal and flexible nature of the CCAA, the scope of a judge's discretion when making orders in CCAA proceedings, and the importance of giving the CCAA a broad and liberal interpretation to facilitate its underlying purpose, including the preservation of the going concern for the benefit of all stakeholders. There had also already been a number of prior cases in which sales had been ordered in the absence of a formal plan of arrangement. Based on his review of the jurisprudence, Morawetz J. confirmed that the court does have jurisdiction to approve a sale process in the absence of a formal plan.

Morawetz J. then set out the test for approving such a sale process in the absence of a plan. The factors to be considered are:

a) is a sale transaction warranted at this time?

b) will the sale benefit the whole "economic community"?

c) do any of the debtors' creditors have a bona fide reason to object to a sale of the business?

d) is there a better viable alternative?

Based on his analysis of the facts as they applied to those factors, Morawetz J. approved Nortel's sale process.

This test has since been applied in a number of large CCAA proceedings, including Sino-Forest and Canwest.

Fraudulent Conveyances (by Jeffrey B. Rosekat)

For litigators, it is not uncommon to come across situations in which parties have transferred assets to third parties (arm's length or not) after proceedings are threatened or commenced. Litigators are often called upon to advise clients that such transfers ought not to be done. The *Fraudulent Conveyances Act* has been around for a while: the concept of unwinding fraudulent transactions dates back to the Statute of Elizabeth of 1571. The current Ontario Act reads, in section 2,

> *Every conveyance of real property or personal property and every bond, suit, judgment and execution made … with intent to defeat, hinder, delay, or defraud creditors … are void against such persons.*

The crucial difference between the fraudulent conveyance and the prudent managing of assets by entrepreneurs and lawyers (for example) is of course, the question of intent. As illustrated in the cases, absent a confession from the defendant, intent must be inferred from the circumstances, including an examination of the "badges of fraud" which may be present in a given transaction. Depending on the facts of the case, the presence of badges of fraud may establish *prima facie* that there was an intent to defraud, particularly where a transfer was to a non-arm's-length party. The defendant then has an evidentiary burden to rebut the presumption of such an intention.

Carrying out an analysis of suspicious circumstances is not simply a matter of counting how many badges of fraud were present at the time of the transaction, although certainly the more badges there are the stronger will be the possibility of the Court drawing an inference. The badges of fraud must be considered in the overall factual matrix of the case, including the consideration of all evidence regarding the defendant's intention in entering into the transaction.

Much of the development of recent cases in the area of fraudulent conveyance surround the understandably difficult judicial analysis of defendants' intentions in the absence of full confessions. The analysis of the evidence and the principles which a Court can consider form the bulk of the decisions in this area.

Indcondo Building Corp. v. Sloan 2014 ONSC 4018

Of cases involving attempts to delay creditors, *Indcondo* is certainly a leading example. This decision was the culmination of 23 years of litigation—with an intervening bankruptcy, two dismissal orders, and at least three Court of Appeal decisions (including one (2012 ONCA 502) with some interesting discussions about actions commenced pursuant to an order under section 28 of the *Bankruptcy and Insolvency Act*)—involving four transactions which took place between 1987 and 1993 in which the defendant, Robin Sloan (a former business partner of Frank Stronach), transferred property to his wife, Valerie or companies owned by her. The plaintiff sought to set aside the transactions on the basis that they were fraudulent conveyances. Ultimately, the Court found that two of the four transactions were fraudulent conveyances.

Although this decision is not particularly earth-shattering in terms of the development of the law of fraudulent conveyances (some may argue that earth-shattering developments in a 543-year-old area of the law may, at this point, be difficult to come by), the case is nonetheless very useful. Justice Penny engages in a detailed review of the relevant jurisprudence. Some of the more useful points of law in his decision include:

- the *Fraudulent Conveyances Act* is remedial legislation aimed at preventing fraud, and must therefore be given a broad interpretation;

- the relevant time for considering intent is the time of the conveyance;

- the fact that a claim for fraud may involve more serious consequences than other civil claims does not alter the standard of proof in a civil case, being that of a balance of probabilities (referring to the Supreme Court of Canada decision in *C. (R.) v. McDougall*, [2008] 3 S.C.R. 41); and

- the analysis of the badges of fraud is not a mechanical process involving a tally of how many badges were present in a given transaction, but rather is one part of the overall consideration of the factual matrix of a case in light of the intention of the defendant in entering into the transaction.

Some of the badges of fraud which Justice Penny mentions include transactions which are carried out in secrecy or in unusual haste, in the face of threatened legal proceedings, for grossly inadequate consideration, or to someone with a close relationship to the transferor. As well, when the transferor continues to have possession of the subject property following the transaction, continues to use it as his own, or retains some benefit, such circumstances will be considered to be suspicious. As well, a pattern of conduct by a defendant in making these types of transactions can weigh into the consideration of intent. Justice Penny refers to badges of fraud as “evidentiary rules” enabling the Court to make inferences as to fraudulent intent, unless they can be adequately explained by the defendants.

As an extra bonus, Justice Penny also examines the issue of piercing the corporate veil in the circumstances of a fraudulent conveyances case—two issues which frequently find themselves being considered in the same case. Justice Penny considers as definitive the decision from *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996 CanLII 7979 Gen. Div.) which involves an analysis of two elements: whether the corporation was "completely controlled" by another such that it does not function independently, and whether the corporation was used as a shield for fraudulent or improper conduct. This decision relied on the earlier Court of Appeal decision in *Gregorio v. Intrans Corp.* (1994 CanLII 2241) which articulates the alter ego principle.

Fresh Starts and Licensing Requirements: The 407 ETR Case (by Mervyn D. Abramowitz)

Canada (Superintendent of Bankruptcy) v. 407 ETR Concession Company Limited, 2013 ONCA 769 (Doherty, Simmons and Pepall JJ.A)

The 407 highway that travels across southern Ontario is a public-private partnership between the respondent, 407 ETR Concession Company Limited ("ETR"), and the Government of Ontario. The Highway 407 Act, 1998, S.O. 1998, c. 28 (the "407 Act"), permits ETR to establish, collect and enforce tolls, administration fees and interest ("toll debt") charged to members of the public who use the highway.

Pursuant to s. 22(4) of the 407 Act, toll debt owing to ETR may be enforced against a discharged bankrupt through the suspension of his or her vehicle permit by Ontario's Registrar of Motor Vehicles. In other words, even if a bankrupt individual has been discharged, the statute permits the Registrar of Motor Vehicles to suspend the individual's vehicle permit, until such time as the toll debt is paid.

Matthew Moore was a truck driver who owed ETR approximately $35,000 in toll debt. Moore subsequently made an assignment into bankruptcy, in respect of which ETR did not file a proof of claim. However, ETR used the enforcement mechanism in s.22 of the 407 Act, and refused to renew Moore's vehicle permit. Following Moore's discharge from bankruptcy, he obtained an order stating that he was released from all claims provable in bankruptcy, including the debt owed to ETR, and the Ministry of Transportation was directed to issue him a vehicle permit. ETR brought a motion and successfully set aside the order obtained by Moore.

The Superintendent of Bankruptcy (not Moore) appealed the decision and argued that the doctrine of federal paramountcy rendered s. 22(4) inoperative with respect to a discharged bankrupt, as s. 22(4): first, conflicts with the operation of s. 178(2) of the Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3 ("BIA"), which provides that a discharge releases a bankrupt from all claims provable in bankruptcy, and, second, frustrates the purposes of the bankruptcy and insolvency system.

On appeal, the Court of Appeal held that s.22(4) is incompatible with and frustrates the fresh start/financial rehabilitation purpose of the BIA, and that there was therefore a conflict between s.22(4) and the BIA. Section 22(4) was therefore held to be inoperative as against discharged bankrupts, Mr. Moore was released from all provable claims, including ETR's, and was therefore entitled to his vehicle permit.

In its decision, the court of appeal provides a summary of principles governing the interrelationship between the BIA (federal) and 407 Act (provincial). The court concludes that there is no operational conflict between the acts, as Moore could comply with both statutes (by not paying his debt but also not obtaining a vehicle permit or by paying the debt and obtaining a permit) and so could ETR (if it chose not to employ its enforcement procedure).

However, the court found that the operation of s. 22(4) of the 407 Act (the purpose of which is to collect toll debts) conflicts with the purposes of the BIA (being the "fresh start" principle and the equal treatment of unsecured creditors) because it would permit ETR to collect debts that are otherwise released upon the bankruptcy discharge.

Other interesting notes: (1) The Superintendent was given leave to appeal in light of the exceptional circumstances. Moore himself was offered a settlement by ETR and did not want to appeal. (2) Some proposed class action plaintiffs for an action against ETR, all of whom were discharged bankrupts, were given intervenor status.