CITATION: Ontario (Finance) v. Clarke and Superintendent of Insurance for Ontario, 2013 ONSC 1920
COURT FILE NO: 90-CU-402495
DATE: 20130412

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
MINISTER OF FINANCE	)	*Stan Sokol & Hart Schwartz,*
	)	for the Plaintiff
Plaintiff	)	
	)	
- and -	)	
	)	
	)	
SANDRA CLARKE AND SUPERINTENDENT OF INSURANCE FOR ONTARIO	)	*Sandra Clarke,*
	)	On her own behalf
	)	
Defendants	)	
	)	
	)	
SUPERINTENDENT OF BANKRUPTCY	)	*Mark Taggart,*
	)	for the Intervener
	)	
Intervener	)	
	)	
	)	
	)	
	)	
	)	**HEARD**: November 15, 2012

GOLDSTEIN J.:

[1] Many people become indebted to the government of Ontario or its agencies. The provincial government, like any other creditor, may take steps to enforce payment of those debts, including judgment debts. The provincial government also has other means to enforce the payment of debts that are not available to other creditors. It may, for example, refuse to renew a licence, such as a driver's licence, if a debtor does not pay. But what happens where a debtor becomes bankrupt, or makes a consumer proposal under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B.3 ("**BIA**")? Bankruptcy is a federal matter. When the provincial government refuses to renew a driver's licence unless a bankrupt pays something towards a judgment debt

incurred as a result of an automobile accident, is it unconstitutionally trenching on the federal power over bankruptcy? Or is it simply regulating highways and automobile insurance, which are areas of provincial jurisdiction?

[2] Authorities from different courts in different provinces come down on both sides of the issue. In my view, the Supreme Court of Canada's recent decision in *Her Majesty The Queen In Right of Newfoundland and Labrador v. AbitibiBowater*, [2012] S.C.J. No. 67, 352 D.L.R. (4th) 399, 95 C.B.R. (5th) 200 does not provide a complete answer but it tips the scale in favour of the Superintendent. The denial of a driver's licence to a bankrupt who has not fulfilled a judgment debt incurred as a result of an automobile accident is debt collection and therefore in violation of the BIA. The federal BIA takes precedence over the provincial legislation.

[3] In this case, the provincial Minister of Finance Master Hawkins tried to renew an expired writ in relation to a judgment against Sandra Clark, an uninsured motorist who had a motor vehicle accident. The Minister moved before Master Hawkins, seeking an order permitting renewal of the writ. That Master dismissed the motion on the grounds that to do so would violate the BIA. The Master further found that the Minister had no remedy against Ms. Clarke, including the suspension of her driver's licence. The Minister appeals to this Court. I think that the Master was correct in deciding against renewal of the writ. The appeal is dismissed.

Background

[4] In 1989 Ms. Clarke was involved in an automobile accident. She lost control of her car and smashed into a guardrail on the Allen Road in Toronto. She was uninsured. Her passenger, Diane Biggart, was injured. Ms. Biggart successfully sued Ms. Clarke.

[5] Where an accident victim obtains a judgment against an uninsured motorist he or she may obtain payment from the Motor Vehicle Accident Claims Fund ("**the Fund**"). The Fund is assigned the judgment and may collect from the uninsured motorist. The *Motor Vehicle Accident Claims Act*, R.S.O. 1990, c. M.41 ("**the MVA Claims Act**") governs this process.

[6] That is what happened in this case. In March 1995 Ms. Biggart obtained a judgment for $55,000.00 against Ms. Clarke. Ms. Clarke could not pay the judgment, so the Fund paid Ms. Biggart and then sought to collect from Ms. Clarke.

[7] Under s. 10(1) of the MVA Claims Act the driver's licence of an uninsured motorist will be suspended unless the judgment is either paid in full or instalment payments are made:

> 10. (1) Where the Minister pays out of the Fund any amount in satisfaction of a judgment, the driver's licence of the judgment debtor on whose behalf such payment is made shall forthwith be suspended by the Registrar and shall not be reinstated and no further licence or renewal shall be issued until the judgment debtor has,
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> (a) repaid in full to the Fund the amount paid out; or

> (b) commenced instalment repayments in accordance with the regulations made under section 11.

[8] Ms. Clarke entered into an arrangement with the Fund whereby she paid $50 per month. The amount was based on her gross monthly earnings and adjusted from time to time in accordance with the regulations. Effectively, as long as Ms. Clarke continued to pay something towards the judgment, she would not lose her driver's licence.

[9] In August 2009 Ms. Clarke made a consumer proposal under the BIA. A consumer proposal is a form of bankruptcy that regulates the debts and property of a consumer debtor whose aggregate debts are less than $250,000.00. An administrator is akin to a trustee in bankruptcy. Ms. Clarke listed the Fund as an unsecured creditor in her statement of affairs although the Fund did not file a proof of claim. Ms. Clarke commenced making payments of $400 per month to the administrator under her consumer proposal. She also continued to make instalment payments to the Fund.

[10] The Fund, represented by the Minister, registered a writ against Ms. Clarke in 1995. The writ expired in October 2001. Due to an administrative error, the Minister did not renew the writ. The error was not discovered until several years later. In March 2012 the Minister brought a motion seeking an order renewing the writ. Master Hawkins dismissed the motion, finding that s. 69.2(1) of the BIA prevents the Fund from enforcing a judgment debt against a bankrupt or someone who has filed a consumer proposal:

> **69.2** (1) Subject to subsections (2) to (4) and sections 69.4 and 69.5, on the filing of a consumer proposal under subsection 66.13(2) or of an amendment to a consumer proposal under subsection 66.37(1) in respect of a consumer debtor, no creditor has any remedy against the debtor or the debtor's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy until:
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> (a) the consumer proposal or the amended consumer proposal, as the case may be, has been withdrawn, refused, annulled or deemed annulled;
>
> or,
>
> (b) the administrator has been discharged.

[11] The Minister appeals to this Court. The Superintendent of Bankruptcy participates in this appeal as a party pursuant to s. 5(4)(a) of the BIA: see *Superintendent in Bankruptcy v. 407 ETR Concession Co.*, [2012] O.J. No. 4089, 2012 ONCA 569 at paras. 31-34.

The Issue

[12] The Minister and the Superintendent agree that the issue on this appeal is well defined by paragraph 4 of the Minister's factum:

> The issue before this Court is whether the provisions of the MVA Claims Act (or for that matter, section 198 of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 ["**the HTA**"]), which permits the Fund to suspend the driver's licence under the factual circumstances of this case, conflict with the provisions of the BIA, which release an insolvent debtor from unsecured claims and prevent proceedings against the debtor upon the filing of a consumer proposal under the BIA?

[13] Section 198 of the HTA operates much like the MVA Claims Act.

[14] There is no doubt about the following:

- Section 91.21 of the *Constitution Act, 1867* gives the federal government jurisdiction over bankruptcy;
- The BIA binds Her Majesty in Right of Ontario: see s. 4.1.
- The HTA and the MVA Claims Act are *intra vires* the provincial legislature.

[15] The Master's finding on a question of law is reviewable on a standard of correctness: *Zeitoun v. Economical Insurance Group* (2008), 91 O.R. (3d) 131 (Div.Ct.).

[16] The Minister argues that the definition of "property" found in subsection 2(1) does not include a driver's licence. A driver's licence is a privilege. It is not the property of a bankrupt or a consumer debtor. It is not property that can pass to the trustee of a bankrupt's estate, or be available to the administrator of a consumer debtor. Since the MVA Claims Act and the HTA do not re-order priorities amongst debtors, or affect the payment scheme under a consumer proposal, or in any way affect the bankrupt's property, there is no conflict between the BIA and the provincial legislation. The Minister also argues that the MVA Claims Act (and the HTA) is part of the overall provincial scheme to regulate public safety and security on public highways through the issuance and suspension of driver's licences.

[17] The Superintendent argues that there is an operational conflict between the provisions of the HTA and the MVA Claims Act and the BIA because those provincial acts are used to enforce the payment of debts. The Superintendent argues that the Minister's argument that the BIA does not apply because a driver's licence is not property founders on the assumption that the property at issue is a driver's licence. The property at issue is not the licence, but the funds used by the consumer debtor or the bankrupt to pay the province. Those funds vest in the trustee or the administrator. Claims are stayed upon bankruptcy and released on discharge. To continue to recognize a debt to the provincial government would amount to re-ordering priorities among creditors. It also undermines a key purpose of the BIA, which is to give insolvent individuals a "fresh start" upon discharge from bankruptcy; and undermines the policy of the BIA that creditors are to be treated equally.

[18] The issue of whether a provincial regulator may continue to collect funds from a bankrupt *after* bankruptcy has generated much controversy. Given that many provincial regulatory and

licensing schemes are structured in a manner similar to that of the MVA Claims Act and the HTA, this question has important implications. There are two lines of authority in this country: one line supports the Minister's position, and one line supports the Superintendent's position. Each forthrightly argues that the line of authority supporting the other is not good law. The leading authority in the United States supports the Superintendent's position.

Cases In Support of The Minister's Position

[19] The leading authority in Ontario is *Re Caporale*, [1970] 1 O.R. 37 (H.C.). Houlden J., as he then was, dealt with an application to discharge a bankrupt. Caporale had been involved in a motor vehicle accident prior to bankruptcy and was successfully sued. The Minister of Transport paid the judgment debt out of the Unsatisfied Judgment Fund and was assigned the judgment debt. Justice Houlden, who, of course, was well known for his expertise in the area of bankruptcy law, noted the following:

> This is not a case where the debtor has made an assignment for the sole purpose of avoiding the payment of a judgment arising out of a motor vehicle accident but is similar to the situation in *Re White* (1964), 7 C.B.R. (N.S.) 111. The Minister of Transport as a result of the bankruptcy cannot take proceedings to enforce his judgment but he has the very effective remedy that he can refuse the debtor the privilege of driving in this Province until he repays in full the amount which has been paid out of the Fund.

[20] In *Cooke v. Pilot Insurance Co.*, [1996] O.J. No. 4693 (O.C.G.D.) the defendant Machado was an uninsured motorist who was involved in an automobile accident with Cooke. Pilot was Cooke's insurance company. Cooke sued Machado as well as Pilot for the uninsured portion of his insurance policy. Pilot filed a cross-claim against Machado. Machado subsequently went bankrupt and was discharged nine months later. Pilot obtained a default judgment on the cross-claim after the discharge, which Machado did not pay. The Registrar of Motor Vehicles subsequently suspended Machado's driver's licence pursuant to s. 198 of the HTA. Machado moved to set aside the default judgment. Philp J. observed that s. 198 provides for a measure of retaliation for non-payment of a judgment debt arising out of a motor vehicle accident. Philp J. commented that a licence is not property of the bankrupt, and observed:

> 21 I agree with Fleury J. in *Caligiuri (Caligiuri v. Co-operators Insurance Association* (1984), 53 C.B.R. (N.S.) 37) where he states at p. 43 that the purpose of s. 198 of the *Highway Traffic Act* was "to prevent irresponsible drivers from having the continued privilege of driving in Ontario without being made to account for the normal consequences of their vast irresponsibilities." In that case a discharged bankrupt applied to the court for reinstatement of his driving privileges which had been suspended pursuant to what is now s. 198 of the *Highway Traffic Act*. The issue arose as to the conflict between the applicable Federal and Provincial legislation being the *Bankruptcy Act* and the *Highway Traffic Act*. The

discharge of the bankrupt results in a release of the bankrupt from all debts. (s. 168.1(1)(f) of the B.I.A.) At page 41 Fleury J. states as follows:

> "I am satisfied that the licensing provisions contemplated by [s .198] of *the Highway Traffic Act* clearly do not purport to reinstate a debt which may have been extinguished as a result of the operation of the *Bankruptcy Act*, and that in fact, all that is being done in [s. 198] is to impose a prerequisite prior to any license being given and that that is a matter that the provincial authorities have every right to do."

* * *

> 24 I rule therefore that regardless of Machado's bankruptcy and subsequent discharge therefrom and the automatic stay of the action and cross-claim, the Registrar of Motor Vehicles has the right to suspend Machado's driver's licence because of the judgment against him for damages on account of injuries sustained in the motor vehicle accident. The effect of the judgment however is only applicable in suspending Machado's driving licence. Because of the bankruptcy, no further action on the judgment can be taken by Pilot to recover the amount of the judgment whether by garnishee, execution, or otherwise. The judgment does not affect the equal distribution amongst creditors nor does Pilot obtain any unfair advantage over other creditors.

[21] In addition to *Caligiuri v. Co-operators Insurance Association, supra*, see also *Allstate Insurance Company v. Batt*, [1993] O.J. No. 2606 (O.C.G.D.).

[22] In *Moore v. 407 ETR Concession*, [2011] O.J. No. 6476, 2011 ONSC 6310, 30 M.V.R. (6th) 137 (Sup.Ct.) Moore took thousands of trips in his two vehicles on the 407 highway, which is a toll road. Moore received invoices from the operator of the 407 highway, but did not pay them. Where the owner of a vehicle does not pay, the operator notifies the Registrar of Motor Vehicles. Pursuant to s. 22 of the *Highway 407 Act, 1998* S.O. 1998 C.28 the Registrar shall not renew a motor vehicle licence until the invoice is paid. Moore eventually accumulated a debt to the operator of $88,000.00 in fees, penalties, and interest. He eventually made an assignment in bankruptcy, and was subsequently discharged. Despite his discharge, the Registrar refused to issue a new vehicle permit as the debt to the operator was still unsatisfied. Mr. Moore applied for a declaration that he had been released from the debt as a result of the discharge, and a *mandamus* directing the Minister of Transport to issue a vehicle licence upon payment of the usual licensing fees. Moore argued that there was an operational conflict between the 407 Act and the BIA. Newbould J. rejected that argument. He observed that discharge from bankruptcy does not extinguish debts, but rather releases the bankrupt from all claims provable in bankruptcy: *In Re Handelman*, [1997] O.J. No. 3559 (G.D.); *Re Kryspin* (1983), 40 O.R. (2d) 424 (H.C.). He then found, following Philp J. in *Cook*, that since a licence is not property that vests in the trustee for the purpose of distribution to the creditors, it follows that it does not affect the scheme of distribution set out by the BIA. He dismissed Mr. Moore's application.

[23] *Moore* has been appealed to the Ontario Court of Appeal, but has not yet been argued. The Superintendent has been granted leave to intervene.

[24] In *Re Hover*, 2005 CarswellAlta 267, 251 D.L.R. (4th) 263, 363 A.R. 170 (C.A.), Dr. Hover was a dentist. The Alberta Dental Association found him guilty of several counts of professional misconduct and imposed fines. Dr. Hover was permitted to continue to practice dentistry as long as he made instalment payments on those fines. In November 1999, Dr. Hover filed a proposal in bankruptcy. The trustee in bankruptcy took the view that fines were extinguished by the bankruptcy. The Registrar in Bankruptcy found that the Dental Association was an unsecured creditor and could not suspend Dr. Hover's dental licence for non-payment. The Alberta Queen's Bench agreed. The ADA appealed to the Alberta Court of Appeal.

[25] The main issue was whether there was an operational conflict between the BIA and Alberta's *Dental Profession Act*, S.A. 1983, c. D-9.5. The Dental Association conceded that it could not collect fines and costs levied against Dr. Hover but argued that it still had the authority to suspend his dental licence. The Dental Association also conceded that it could not withhold his licence as a means to force Dr. Hover to pay the fines and the costs. Ultimately, Paperny J.A., on behalf of the Court, found that the source of the power to suspend Dr. Hover's licence was not the failure to pay a debt, but a finding of professional misconduct. Since the order of priorities was not affected there was no operational conflict between the federal and provincial legislation. Paperny J.A. reviewed some cases that the Minster relies on, including Ontario cases respecting the suspension of driver's licences. She found that they were consistent with the principles she applied in *Hover*. The Dental Association's appeal was allowed.

Cases In Support of The Superintendent's Position

[26] In *Re Lucar*, [2001] O.J. No. 5795, 32 C.B.R. (4th) 270 (Ont.Sup.Ct.), Lucar was involved in an automobile accident with Kehkashan in 1999. Belair Direct was Kehkashan's insurer. Belair Direct paid benefits to Kehkashan and sought to recover from Lucar. In 2000 Lucar filed an assignment in bankruptcy. At the time of the motion before Deputy Registrar Sproat he was un-discharged. Belair Direct and Kehkashan sought leave to continue the action against Lucar pursuant to s. 69.4 of the BIA, which permits a court to allow an action to continue notwithstanding that actions by creditors are stayed. Deputy Registrar Sproat characterized the actions of the moving parties in this way:

> **5** On this motion, the moving parties admit that the primary purpose of the Action is to obtain judgment against the bankrupt, which in turn permits the moving parties to use the threat of licence suspension to force the bankrupt to pay some amount to Belair on account of its losses. I would venture to say that it is the sole purpose. Counsel for the moving parties candidly admitted that an order to continue the Action for the purposes of establishing liability and quantum of their claims (with no right to use the judgment for the purpose of licence suspension) was unsatisfactory.

[27] The Deputy Registrar found that s. 198(1) of the HTA offended the doctrine of paramountcy:

> 8 I have come to the conclusion that the Action should not be permitted to continue. I am not satisfied that there are "sound reasons" which exist to relieve against the stay of proceedings. I have reached this conclusion for the following reasons:
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> 1. Subsection 198(1) of the HTA offends the doctrine of paramountcy since it alters the distribution scheme of the BIA and creates a new class or type of debt which survives bankruptcy;
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> 2. The discretion of the bankruptcy court is undermined by the ordinary court's determination of applications for reinstatement of a driver's licence brought pursuant to ss. 198(3) of the HTA;
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> 3. There is no material prejudice to the moving parties if the stay remains in effect. The moving parties, as unsecured creditors, will remain entitled to share ratably with other unsecured creditors, should there be any distribution of dividends;
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> 4. There are no equities which would compel the grant of leave to continue…

[28] In *Moore*, Newbould J. rejected *Lucar*:

> 27 On behalf of Mr. Moore, it is argued that Houlden J. did not consider the constitutional paramountcy issue and therefore his statement should be disregarded. It is true that the reported reasons of Houlden J., which are very short, make no reference to any paramountcy issue and it may be that he did not expressly consider the matter. However, Houlden J. was a very experienced bankruptcy judge and it would be surprising if he were not alive to such an issue. In any event, I agree with the statement of Houlden J.
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> 28 In Houlden, Morawetz and Sara, Bankruptcy and Insolvency Law of Canada, 4th ed., p. 6-289, it is stated:
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> > If a bankrupt is given a discharge, it does not follow that he or she is entitled to reinstatement of his or her privilege of operating a motor vehicle. A province may decide as part of its licensing power that an operator of a motor vehicle will not be permitted to drive. There is no conflict between the provisions of the *Bankruptcy and Insolvency Act* and provincial legislation that prohibits a person who has an unsatisfied judgment arising out of a motor accident from receiving a licence to operate a motor vehicle.

> 29 This statement is directly contrary to the statements of the Deputy Registrar in *Re Lucar* and in my view represents the state of law in Canada. I would not follow the statements of Deputy Registrar in *Re Lucar*.

[29] I note that the quote from Houlden, Morawetz and Sara does not state that the province is entitled to collect on the judgment debt, only that the province may suspend the driver's licence of the bankrupt.

[30] In the recent case of *Moloney v. Alberta (Administrator, Motor Vehicle Accident Claims Act)*, [2012] A.J. No. 1094, 2012 ABQB 644 Moloney had a motor vehicle accident in 1989. He was uninsured. The Administrator obtained a default judgment against him in 1996. Moloney paid some amounts toward the judgment. In 2008 Moloney filed for bankruptcy. He was discharged in 2011. The Alberta government then demanded payment of the judgment, failing which his driver's licence would be suspended. Moloney sought an order staying enforcement of the judgment, and an order staying the suspension of his driving privileges. The Administrator conceded that it had no claim on the property of Moloney as a result of the bankruptcy and discharge, but contended that he was merely trying to enforce the statutory to suspend driving privileges until the judgment was satisfied.

[31] Moen J. of the Alberta Court of Queen's Bench found that there was an operational conflict between the BIA and the provincial legislation:

> 45 The Government of Alberta's actions are not disciplinary measures but a method of debt collection, and a colourable attempt to circumvent the provisions of the *BIA*. They therefore constitute an improper purpose and are in operational conflict with the *BIA*. Under the doctrine of paramountcy, to the extent of the inconsistency, they are ineffective.
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> 46 There is also the additional factor of the phrase "otherwise than by a discharge in bankruptcy" contained in the impugned provision: *TSA*, s 102(2). I interpret the effect of the phrase as follows: If a person is subject to the suspension provisions, the suspension shall not be removed until the judgment is satisfied or discharged, otherwise than by a discharge in bankruptcy - i.e. a bankruptcy discharge does not constitute a discharge within the meaning of s. 102(2) of the *TSA*. This specific language referencing a bankruptcy scenario directly offends the powers of Parliament, and engages the doctrine of paramountcy. In regards to the same phrase used in similar licence suspension legislation, the Ontario Superior Court of Justice reached the same conclusion: *Lucar, Re* (2001), 32 C.B.R. (4th) 270 at para. 13 (Ont. S.C.J.).

[32] It is not clear whether Newbould J.'s decision in *Moore* disavowing *Lucar* was brought to Moen J.'s attention. What is clear is that Moen J. carefully distinguished the facts in *Hover* from the facts before her. Given her detailed analysis, she was obviously aware that Paperny J.A. commented on Deputy Registrar Sproat's judgment in *Lucar*.

[33] Moen J. distinguished *Hover* for the following reasons:

- Dr. Hover's suspension arose from a finding of professional misconduct whereas Moloney's suspension arose from a failure to pay a judgment debt;

- The Court in *Hover* itself distinguished those cases where the licence suspension was motivated for an improper purpose, such as the payment of an outstanding debt;

- The government suspended Moloney's licence solely for the purpose of collecting on the 1996 judgment debt.

[34] In *Gorguis v. Saskatchewan Government Insurance*, [2011] S.J. No. 188, 2011 SKQB 132, [2011] 6 W.W.R. 372 (Q.B.) In 2003 Gorguis had an at-fault accident. He was uninsured. Saskatchewan Government Insurance paid his $9,400.69 debt arising from the accident and required him to provide an undertaking to pay the debt. In 2004 Gorguis went bankrupt. Saskatchewan Government Insurance filed a proof of claim, received $123.26, and did not contest the subsequent discharge. When Gorguis re-applied for his driver's licence in 2007, the government refused. He applied for a declaration that the Saskatchewan government could not refuse to issue the driver's licence until the undertaking was paid. In granting the application, Currie J. explicitly disagreed with the approach taken by Paperny J.A. in *Hover*:

> **24** Applied to Mr. Gorguis, this approach to operational inconsistency would characterize the operation of s. 80.2(2) of *The Automobile Accident Insurance Act* as not automatically conflicting with the *Bankruptcy and Insolvency Act*. Section 80.2(2) does not automatically result in Mr. Gorguis having to pay the debt that has been released under the federal law. In fact, it may be that Mr. Gorguis never will pay the debt - if he decides to give up on having a driver's licence in Saskatchewan. If Mr. Gorguis is never required to pay the debt, goes the approach, there can be no inconsistency with or conflict with the federal law.
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> **25** With respect, this approach turns a blind eye to the fact that the debt is being used as a tool for enforcement of the provincial law. If Mr. Gorguis pays the debt, then the provincial law will have required him to pay a debt that has been released by the federal law. If Mr. Gorguis does not pay the debt, then the provincial law will have punished him - by withholding his driver's licence - for failing to pay a debt that has been released by the federal law.

[35] After the argument of this appeal counsel drew my attention to the fact that the Saskatchewan Court of Appeal subsequently overturned *Gorguis* on the basis that the appropriate Attorneys General had not been given notice of a constitutional issue. The matter was remitted back to the Saskatchewan Court of Queen's Bench for a re-hearing: [2013] S.J. No. 148, 2013 SKCA 32. Accordingly, although the case was not overturned on the direct issue of whether there is an operational conflict, it has only limited authority.

[36] Counsel on this appeal have confirmed that the Attorney General of Canada has elected not to intervene.

The American Position

[37] According to the Superintendent, state licence suspension schemes such as those in the MVA Claims Act and the HTA are unconstitutional in the United States, as they offend the federal Supremacy Clause. In *Perez v. Campbell*, 402 U.S. 637 (1971) the United States Supreme Court examined an Arizona statute that denied a driver's licence to uninsured motorists who failed to satisfy judgments arising out of vehicle accidents. The statute specifically held that such judgments survived bankruptcy. As in Canada, in the United States bankruptcy is a federal responsibility, while the regulation of highways and the licensing of drivers is a state responsibility. The Supremacy Clause ensures that state laws inconsistent with federal laws are unconstitutional to the extent of the inconsistency.

[38] White J., for the majority, set out the framework for the analysis and examined the two statutes:

> Deciding whether a state statute is in conflict with a federal statute and hence invalid under the Supremacy Clause is essentially a two-step process of first ascertaining the construction of the two statutes and then determining the constitutional question whether they are in conflict. In the present case, both statutes have been authoritatively construed. In *Schecter* v. *Killingsworth,* 93 Ariz. 273, 380 P. 2d 136 (1963), the Supreme Court of Arizona held that "[t]he Financial Responsibility Act has for its principal purpose the protection of the public using the highways from financial hardship which may result from the use of automobiles by financially irresponsible persons."
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> * * *
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> Turning to the federal statute, the construction of the Bankruptcy Act is similarly clear. This Court on numerous occasions has stated that "[o]ne of the primary purposes of the Bankruptcy Act" is to give debtors "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt."

[39] White J. found that since the purpose and effect of the Arizona statute was to render compliance with federal bankruptcy legislation impossible, it was unconstitutional. White J. also rejected the argument that the legislation would encourage responsible driving:

> The majority of opinions in both cases assumed, without citation of state court authority or any indication that such precedent was unavailable that the purpose of the state financial responsibility laws there under attack was not provision of relief to creditors but rather deterrence of irresponsible driving. The assumption was, in effect, that all state legislatures which had enacted provisions such as § 28-1163

> (B) had concluded that an uninsured motorist about to embark in his car would be more careful on the road if he did not have available what the majority in *Kesler* cavalierly characterized as an "easy refuge in bankruptcy."

The AbitibiBowater Case

[40] After the argument of this motion, but prior to the release of my reasons, the Supreme Court of Canada decided *AbitibiBowater*. Given that the Superintendent relied heavily on the lower court decisions in that case, I requested that counsel make further submissions as to the impact of this decision. They provided me with very helpful written submissions.

[41] AbitibiBowater owned a pulp and paper mill in Newfoundland and Labrador. In 2008 it was in financial difficulty. It announced that it was closing the mill. The provincial legislature immediately passed legislation expropriating AbitibiBowater's property. Abitibi filed for insolvency protection in the United States in 2009, and for a stay under the *Company Creditor's Arrangement Act*, R.S.C. 1985, c. C-36 ("**the CCAA**") in the Superior Court of Quebec in April 2009. The provincial government issued environmental clean-up orders to AbitibiBowater in November 2009. It then brought a motion in the Superior Court seeking a declaration that since the orders were not monetary in nature, they were not "claims" and therefore not subject to the CCAA process. Gascon J. of the Superior Court dismissed the motion and found that the environmental orders were "claims" since they were, in substance, "financial and monetary" in nature. The Quebec Court of Appeal dismissed the provincial government's application for leave to appeal.

[42] The appeal to the Supreme Court of Canada turned on the issue of whether orders not framed in monetary terms were, in fact, monetary claims. Relying on *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, Deschamps J., for the majority, found that a province cannot disturb the priority scheme established by federal insolvency legislation. A CCAA court must look behind the form of the order to determine whether, in substance, it is actually a monetary claim:

> **37** The exercise by the *CCAA* court of its jurisdiction to determine whether an order is a provable claim entails a certain scrutiny of the regulatory body's actions. This scrutiny is in some ways similar to judicial review. There is a distinction, however, and it lies in the object of the assessment that the *CCAA* court must make. The *CCAA* court does not review the regulatory body's exercise of discretion. Rather, it inquires into whether the facts indicate that the conditions for inclusion in the claims process are met.

[43] Deschamps J. found that since the Superior Court judge determined that it was "sufficiently certain" that the orders would eventually result in monetary claims, he was ultimately correct in finding that they were "claims" under the CCAA process.

[44] McLachlin C.J.C. dissented on the basis that the environmental orders were not "claims". She would have found that the appropriate test for determining whether an environmental clean-

up order was a claim was whether there was a "likelihood approaching certainty" that the regulatory body would perform the work itself. LeBel J. agreed with Deschamps J.'s test of "sufficiently certain" but dissented on the basis that the orders did not meet the test of sufficient certainty that they would eventually result in monetary claims.

[45] In her analysis Deschamps J. made observations that are applicable to this case:

> 26 These provisions highlight three requirements that are relevant to the case at bar. First, there must be a debt, a liability or an obligation to a *creditor*. Second, the debt, liability or obligation must be incurred *before the debtor becomes bankrupt*. Third, it must be possible to attach a *monetary value* to the debt, liability or obligation. I will examine each of these requirements in turn.
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> 27 The *BIA*'s definition of a provable claim, which is incorporated by reference into the *CCAA*, requires the identification of a creditor. Environmental statutes generally provide for the creation of regulatory bodies that are empowered to enforce the obligations the statutes impose. Most environmental regulatory bodies can be creditors in respect of monetary or non-monetary obligations imposed by the relevant statutes. At this first stage of determining whether the regulatory body is a creditor, the question whether the obligation can be translated into monetary terms is not yet relevant. This issue will be broached later. The only determination that has to be made at this point is whether the regulatory body has exercised its enforcement power against a debtor. When it does so, it identifies itself as a creditor, and the requirement of this stage of the analysis is satisfied.
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> 28 The enquiry into the second requirement is based on s. 121(1) of the *BIA*, which imposes a time limit on claims. A claim must be founded on an obligation that was "incurred before the day on which the bankrupt becomes bankrupt"…
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> * * *
>
> 30 With respect to the third requirement, that it be possible to attach a monetary value to the obligation, the question is whether orders that are not expressed in monetary terms can be translated into such terms. I note that when a regulatory body claims an amount that is owed at the relevant date, that is, when it frames its order in monetary terms, the court does not need to make this determination, because what is being claimed is an "indebtedness" and therefore clearly falls within the meaning of "claim" as defined in s. 12(1) of the *CCAA*. [Emphasis added.]

Analysis

[46] The Minister's argument can be summarized as follows:

- There is no operational conflict between the provincial and federal legislation because no priorities are re-ordered – the province cannot collect on the outstanding debt. A driver's licence is not property available to other creditors.

- The "fresh start" principle is not one of super-ordinate importance. It does not include returning a driver's licence to a bankrupt person. In fact, the Superintendent's position would effectively require a court to issue a *mandamus* order to provincial authorities to return a driver's licence. The Minister gives the example of a lawyer or securities trader who has gone bankrupt. It would unconstitutionally trench on provincial jurisdiction if the result of the BIA would be to force the Law Society or Securities Commission to licence a bankrupt lawyer or securities trader. The Minister cites the *Hover* case as an example.

- The provincial licensing regime gives the Director of the Fund a discretion regarding the issuing of a licence. It is appropriate for the Director to take into account the fact of a bankruptcy. The Minister argues that the Director can ask for a nominal payment of $1 per month, not as a discharge of the debt to the Minister of Finance, but rather as an indication of taking responsibility for the harm that the debtor has previously caused.

- Finally, Ms. Clarke can comply with provincial legislation simply by not driving.

[47] Professor Hogg described the doctrine of paramountcy as follows:

> The rule that has been adopted by the courts is the doctrine of "federal paramountcy": where there are inconsistent (or conflicting) federal and provincial laws, it is the federal law which prevails. A similar rule has been adopted in the United States and Australia, and apparently by all modern federal constitutions. The doctrine of paramountcy applies where there is a federal law and a provincial law which are (1) each valid, and (2) inconsistent…

[48] In *Husky Oil, supra*, Gonthier J. set out the analytical framework where federal and provincial legislation potentially conflict:

> 87 … One must first determine whether the laws are respectively valid federal or provincial legislation. If so, the actual operation of the laws must be examined to determine whether they are in operational conflict, that is, inconsistent or incapable of being fully complied with in a given situation. If they are in operational conflict, the federal legislation prevails and the provincial legislation is without effect to the extent of this conflict. If the operational conflict is in a field of exclusive federal jurisdiction, the provincial legislation will be inapplicable as being *ultra vires* to that extent. If the conflict is in an area of concurrent or overlapping jurisdictions, the provincial legislation will remain *intra vires* but be inoperative. To the extent

> that there is operational conflict, there is no room for an incidental or ancillary effect of provincial legislation. If, on the other hand, there is no operational conflict, then both laws continue to operate and both continue to have effect to the extent that operational conflict does not arise. Short of operational conflict, provincial law may validly have an effect on bankruptcy, as I have indeed acknowledged in observing that there is no bankruptcy "bottom line" without provincial law (at para. 30). In the present case, I have found clear operational conflict in that ss. 133(1) and (3) in their operation together entail a reordering or subverting of the federal order of priorities under the Bankruptcy Act. Such an intrusion into an exclusive federal sphere necessarily goes far beyond an incidental and ancillary effect…

[49] In *Hover*, Paperny J.A. set out analytical factors for determining whether paramountcy will apply in the bankruptcy context:

> 23 In *Husky Oil Operations Ltd. v. M.N.R.*, [1995] 3 S.C.R. 453, the majority of the Supreme Court of Canada reviewed the law of paramountcy in a bankruptcy situation and concluded that the provinces do not have the power to entrench on the order of distribution of property in bankruptcy. They listed a number of principles to be applied in determining whether a provincial statute is inoperative at paras. 32 and 39:
>
> (1) provinces cannot create priorities between creditors or change the scheme of distribution on bankruptcy under the BIA;
>
> (2) while provincial legislation may validly affect priorities in a non-bankruptcy situation, once bankruptcy has occurred, the BIA determines the status and priority of the claims specifically dealt with in that section;
>
> (3) if the provinces could create their own priorities or affect priorities under the BIA, this would invite a different scheme of distribution on bankruptcy from province to province, an unacceptable situation;
>
> (4) the definition of terms such as "secured creditor", if defined under the BIA, must be interpreted in bankruptcy cases as defined by the federal parliament, not the provincial legislatures; provinces cannot affect how such terms are defined for the purposes of the BIA;
>
> (5) in determining the relationship between provincial legislation and the BIA, the form of the provincial interest created must not be allowed to triumph over its substance; provinces are not entitled to do indirectly what they are prohibited from doing directly; and

> (6) there need not be any provincial intention to intrude into the exclusive federal sphere of bankruptcy and to conflict with the order of priorities of the BIA in order to render the provincial law inapplicable; it is sufficient that the effect of provincial legislation is to do so.

[50] The parties agree, and it is obvious, that the purposes of the MVA Claims Act and the HTA are not in conflict with the purpose of the BIA.

[51] In my view, however, the effect of *Husky Oil* and *AbitibiBowater* is to confirm that a monetary claim must be dealt with through the bankruptcy process. These cases are consistent with the American position as set out in *Perez v. Campbell.* In applying the three-part test set out by Deschamps J. in *AbitibiBowater*, I note: First, there is no doubt that Ms. Clarke became a judgment debtor and the Minister a judgment creditor for the purposes of the BIA. Second, that relationship crystallized prior to Ms. Clarke's consumer proposal. And third, there is obviously a monetary value to the claim. As the Minister conceded, it has no further power to collect the judgment from Ms. Clarke, although the debt itself is not extinguished. Thus, Ms. Clarke's debt is *prima facie* caught by the BIA scheme. That is all conceded by the Minister, but it does not end the argument. The real question is whether the MVA Claims Act is being used to enforce a judgment debt or promote responsible driving.

[52] A court must look at the substance of the provincial order rather than the form. In my view, if the Minister's argument is accepted it would amount to creating a carve-out for provincial regulatory or licensing schemes to permit debt enforcement after discharge. In my view, the effect of *AbitibiBowater* in the context of this case is to confirm that regulatory bodies with provable claims that can be reduced to a monetary amount are subject to the bankruptcy process. Thus, the cases of *Re Caporale* and *Moore* have been overtaken. Regulatory bodies cannot claim a "carve-out" from bankruptcy legislation in order to carry out their duties. No such carve-out exists except where Parliament specifically creates one. Indeed, carve-outs, such as those for provincial student loan schemes, do exist in the BIA. The presence of statutory carve-outs indicates that Parliament intended that claims not specifically carved out in the BIA will be subject to insolvency legislation, as Deschamps J. noted in *AbitibiBowater*:

> 33 If Parliament had intended that the debtor always satisfy all remediation costs, it would have granted the Crown a priority with respect to the totality of the debtor's assets. In light of the legislative history and the purpose of the reorganization process, the fact that the Crown's priority under s. 11.8(8) *CCAA* is limited to the contaminated property and certain related property leads me to conclude that to exempt environmental orders would be inconsistent with the insolvency legislation. As deferential as courts may be to regulatory bodies' actions, they must apply the general rules.

[53] I also agree with the Superintendent that the Minister and the cases in support of the Minister's position focus on the wrong property. In this case, the property is not Ms. Clarke's driver's licence, but the funds used to make the instalment payments. Those funds are not

available to other judgment creditors. The *effect* of the licensing scheme is to alter the scheme of distribution and re-arrange priorities among creditors by taking funds that would otherwise be available to other judgment creditors, *because* the Minister obtains funds outside the bankruptcy process. As Gonthier J. noted in *Husky Oil*, even if it is not the intent of the MVA Claims Act or the HTA to re-arrange priorities, there is no room for an incidental or ancillary effect of provincial legislation if it alters the priorities of creditors or affects the scheme of distribution. I also agree that the licensing scheme offends the "fresh start" principle. Ms. Clarke listed the Fund as creditor when she made her proposal, but the Fund took no steps to file a proof of claim.

[54] Finally, with great respect to those with a contrary view, I also believe that there are logical flaws in the Minister's position:

- The Minister seeks to renew a writ of execution in relation to a judgment. Since the Minister concedes that it cannot take further steps to actually enforce the judgment, why seek to renew the writ? A writ of execution is notice to the world that Ms. Clarke is a judgment debtor and the Minister is a judgment creditor. This has nothing to do with safe driving, or the regulation of highways and roads.

- The record shows that virtually all of the correspondence with Ms. Clarke consists of financial disclosure made by Ms. Clarke and letters threatening to suspend her licence unless she makes payments. I excerpt an example of correspondence from the Fund to Ms. Clarke dated October 26, 2010, after the date of her consumer proposal. I do not see how this can be anything other than a collection notice:

> On checking your account, it is noted that you are now in arrears. The sum of $60.00 is required by return mail in order to bring your account up to date.
>
> Failure to bring your repayments up to date by November 5, 2010 will result in the request for an automatic suspension of your driver's licence and the possibility of legal proceedings without further notice.

- I do not see any evidence of rational connection between paying a judgment debt and good driving habits. In a different context, where the government seeks to uphold a law that is not in compliance with the *Canadian Charter of Rights And Freedoms*, it must actually demonstrate (as part of the analysis) a rational connection: *R. v. Oakes*, [1986] 1 S.C.R. 103.

- More important, even if a rational connection could be demonstrated, every judgment debtor still has the opportunity to obtain their licence as long as they pay something. This discretion undoubtedly exists so that people of modest means will not be unduly penalized, but it means that even the most irresponsible drivers also have an opportunity to regain their licence – not by taking a driving test or driver education, but by paying a judgment debt. In the case before me, Ms. Clarke has been able to keep her driver's licence by making instalment payments. In the *Moore* case, Mr.

Moore, hardly the most sympathetic litigant, would have had the opportunity to keep a vehicle permit as long as he was able to pay something to operator of the 407 highway and a judge approved the payment schedule.

- The Minister's argument that paying something toward the judgment debt promotes responsibility also suffers from a logical flaw: once the debt is paid off, the driver is subject to the same conditions for obtaining a licence as any other driver. It is true, as the Minister argues, that a motorist like Ms. Clarke is subject to monitoring by the Director of the Fund to ensure that she has the financial ability to maintain insurance. That part of the regime is unobjectionable, of course. Once the debt is paid, however, the Minister has no more leverage. In other words, the Minister assumes that an uninsured motorist will always be irresponsible until he or she pays the judgment. A driver shifts from "irresponsible" to "responsible" based only on the fulfillment of the judgment. There is no evidence that a driver shifts from "irresponsible" to "responsible" based on anything else. If Ms. Clarke had won the lottery and paid off the debt, that would have fulfilled the critical condition for renewing the licence without conditions. Obviously serendipitous winning of the lottery does not make a driver more responsible.

- This judgment is not *mandamus* by other means. There are many other ways for the Minister to promote responsibility other than by requiring a payment. The Minister can require ongoing financial disclosure, as it does, or compulsory driver education.

- I do not agree that withholding a driver's licence is similar to withholding a professional licence. The Minister need not issue a licence to an irresponsible driver, any more than the Law Society must permit a bankrupt lawyer who has engaged in professional misconduct lawyer to practice law. Although I found the analysis of Paperny J.A. in *Hover* to be extremely helpful, like Moen J. in *Moloney*, I distinguish the result on the basis that the underlying source of the fines in *Hover* was professional misconduct, rather than a judgment debt. A professional, like Dr. Hover, is denied a licence as punishment for professional misconduct. Ms. Clarke is not being punished for irresponsible driving but for failing to pay a judgment debt.

- Section 11(2) of the MVA Claims Act permits the making of regulations for the restoration of driver's licences. Ontario Regulation 208/04 made under the MVA Claims Act provides for the financial terms and conditions for the restoration of a licence, including the application form to be approved by the Director of the Fund. The Regulation is directed entirely towards repayment of judgment debts. Several examples of the form filled out by Ms. Clarke are in evidence. The forms are also exclusively directed towards her financial situation. No doubt financial disclosure is important and appropriate, but there are no other terms (such as driver education) related to Ms. Clarke's fitness for driving.

Disposition

[55] Section 10(1) of the MVA Claims Act is in conflict with the BIA and is inoperative to the extent of the inconsistency. The appeal is dismissed. No costs shall be payable.

GOLDSTEIN, J.

Released: April 12, 2013

CITATION: Ontario (Finance) v. Clarke and Superintendent of Insurance for Ontario, 2013 ONSC 1920
COURT FILE NO: 90-CU-402495
DATE: 20130412

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

MINISTER OF FINANCE

Plaintiff

- and -

SANDRA CLARKE AND SUPERINTENDENT OF INSURANCE FOR ONTARIO

Defendants

SUPERINTENDENT OF BANKRUPTCY

Intervener

JUDGMENT

GOLDSTEIN J.

Released: April 12, 2013