

# ***407 ETR, Moloney & Hover: Limits on the Scope of Bankruptcy's Rehabilitative Power***

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*The Constitution in the Insolvency Tool Box*

Presented by:

**Dr. Anna Lund**

**Faculty of Law, University of Alberta**

**Edmonton, Alberta**

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## 407 ETR, MOLONEY & HOVER: LIMITS ON THE SCOPE OF BANKRUPTCY'S REHABILITATIVE POWER

### 1. INTRODUCTION

Constitutional analysis of insolvency law often raises questions about the equitable distribution of a debtor's property amongst creditors holding competing claims.<sup>1</sup> The recent Supreme Court of Canada (SCC) decisions of *Alberta (Attorney General) v. Moloney* ("Moloney") and *407 ETR Concession Co v. Canada (Superintendent of Bankruptcy)* ("407 ETR") were different.<sup>2</sup> The central question in these cases was about the extent to which insolvency legislation can rehabilitate an individual or, as a government report once mused, "how "fresh" the "fresh start" should be for debtors."<sup>3</sup> Provincial legislation purported to deny an individual the regulatory approvals necessary for driving (e.g., drivers licences, vehicle permits) on the basis of debts, which had been discharged in bankruptcy. The SCC ruled that the provincial legislation was inoperative because it conflict with federal insolvency legislation.

One might wonder what the cases of *Moloney* and *407 ETR* mean for the ability of the discharge in bankruptcy to release individuals from the consequences of past misconduct, and pending a discharge, the scope of the stay to protect them from those consequences. In particular, it bears considering how these decisions might impact the ability of a professional regulatory body to use fines to regulate the conduct of its members. In the 2005 case of *KPMG Inc v. Alberta Dental Association* ("*Hover*"), the Alberta Court of Appeal held that a misbehaving dentist could not avoid the financial consequences of professional disciplinary proceedings by starting insolvency proceedings under the *BIA*.<sup>4</sup> In this paper, I argue that the decision in *Hover* has been overtaken by the SCC's decisions in *407 ETR* and *Moloney*: an individual found guilty of professional misconduct likely can avoid fines and costs imposed by a professional regulator by making use of insolvency proceedings. However, the degree to which insolvency proceedings impede a professional

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<sup>1</sup> See e.g., the series of Supreme Court of Canada ("SCC") cases known as the "quintet": *Deputy Minister of Revenue v. Rainville*, [1980] 1 SCR 35, 33 CBR (ns) 301; *Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board*, [1985] 1 SCR 785, 38 Alta LR (2d) 169; *Federal Business Development Bank v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 SCR 1061, 50 DLR (4th) 577; *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 SCR 24, 59 DLR (4th) 726; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 SCR 453, 137 Sask R 81.

<sup>2</sup> *407 ETR Concession Co v. Canada (Superintendent of Bankruptcy)*, 2015 SCC 52 ("*407 ETR* (SCC)") aff'g 2013 ONCA 769, 118 OR (3d) 161 ("*407 ETR* (CA)") rev'g 2011 ONSC 6310, 30 MVR (6th) 137, Newbould J ("*407 ETR* (SC)"); *Alberta (Attorney General) v. Moloney*, 2015 SCC 51 ("*Moloney* (SCC)") aff'g 2014 ABCA 68, 569 AR 177 ("*Moloney* (CA)") aff'g 2012 ABQB 644, 550 AR 257, Moen J ("*Moloney* (QB)")

<sup>3</sup> Senate, Standing Senate Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (November 2003) (Chair: The Honourable Richard H Kroft) at 199 ("*Sharing the Burden*").

<sup>4</sup> *KPMG Inc. v. Alberta Dental Association*, 2005 ABCA 101, 363 AR 170 ("*Hover* (CA)") rev'g *Re Hover*, 2003 ABQB 355, 337 AR 275, Romaine J ("*Hover* (QB)").

regulator's powers is limited in three important ways: the professional regulator can oppose a misbehaving individual's discharge (or proposal), the discharge only releases provable claims, and – unless the court orders otherwise - the stay only applies to the monetary claims of a regulator. Further, I suggest that the division of powers in the constitution may impose a fourth limit to the scope of the stay and the discharge.

My analysis is structured as follows. In Part 2, I outline the SCC decisions in *407 ETR* and *Moloney* and the Alberta Court of Appeal decision in *Hover*. In Part 3, I consider how *Hover* might be decided differently if it were heard today. In Part 4, I explore how the legal system limits the degree to which insolvency can impede a professional regulator's power to police its members and protect the public. I consider mechanisms internal to insolvency law, as well as the constitutional division of powers.

## **2. AN INTRODUCTION TO THE CASES: MOLONEY, 407 ETR, AND HOVER**

In this section, I provide an introduction to the factual matrix behind, and legal outcome in each of the three cases central to this paper: *Moloney*, *407 ETR* and *Hover*.

### **2.1 Moloney and 407 ETR**

The provincial legislation at issue in *407 ETR* and *Moloney* purportedly empowered the provincial government to deny driving privileges to individuals on the basis of traffic-related debts, even after those debts were discharged through bankruptcy. In *407 ETR* the individual had incurred a debt by repeatedly using a toll-road, without paying the toll. The Ontario legislation, which governed the toll road, provided that the individual would be denied a vehicle permit until the outstanding toll debt was paid.<sup>5</sup> In *Moloney*, the individual had caused a motor vehicle accident while driving without insurance. The injured party was granted judgment against the driver, and received compensation from the provincial government in exchange for assigning the judgment to the provincial government.<sup>6</sup> The Alberta legislation provided that the individual would be disqualified from driving a motor vehicle in the province until the debt was paid, or the individual was making payments towards it.<sup>7</sup> The SCC held that both pieces of provincial legislation were valid exercises of the provincial power over property and civil rights, but inoperative to the extent that they conflicted with the federal *BIA*.<sup>8</sup>

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<sup>5</sup> *Highway 407 Act*, 1998, SO 1998, c 28, s 22.

<sup>6</sup> See *Motor Vehicle Accident Claims Act*, RSA 2000, c M-22, s 5.

<sup>7</sup> *Traffic Safety Act*, RSA 2000 c T-6, s 102-03 ("TSA").

<sup>8</sup> *Moloney* (SCC), *supra* note 2 at para 90; *407 ETR* (SCC), *supra* note 2 at para 33.

The paramountcy doctrine was central to the SCC’s decisions in *Moloney* and *407 ETR*. The paramountcy doctrine provides that when there is a conflict between validly enacted provincial legislation and validly enacted federal legislation, the latter will be inoperative to the extent of the conflict. The paramountcy doctrine recognizes two different types of conflicts: “(1) there is an operational conflict because it is impossible to comply with both laws, or (2) although it is possible to comply with both laws, the operation of the provincial law frustrates the purpose of the federal enactment.”<sup>9</sup>

Each court that heard the cases of *Moloney* and *407 ETR*, with the exception of the Ontario Superior Court, held the legislation to be inoperative; however, they did not all agree on how the paramountcy doctrine should be applied. Justice Moen of the Alberta Court of Queen’s Bench held there was an operational conflict between the provincial and federal legislation. The Ontario and Alberta Courts of Appeal both held that the provincial legislation frustrated the purpose of the *BIA*, but the Ontario focused on how the provincial provision frustrated the rehabilitative purpose of the federal legislation, whereas the Alberta court thought the provincial legislation also frustrated the *BIA*’s goal of equitable distribution amongst creditors. A majority of the SCC found that the provincial legislation was rendered inoperative under both the first and the second branch of the paramountcy doctrine, whereas Justice Côté and Chief Justice McLachlin would only have found the legislation inoperative under the second branch. This diversity of applications of the paramountcy doctrine is represented visually below in Table 1.

**Table 1 Varying Applications of the Paramountcy Doctrine in *Moloney* and *407 ETR***

Case	Bankruptcy Registrar	Section 96 Court	Court of Appeal	Supreme Court of Canada
<i>Moloney</i> (Alberta)	N/A	Legislation inoperative. <sup>10</sup>	Legislation inoperative, frustrates rehabilitative purpose & equitable distribution (2 <sup>nd</sup> branch)	Legislation inoperative, operational conflict (1 <sup>st</sup> branch) & frustrates rehabilitative purpose (2 <sup>nd</sup> branch)
<i>407 ETR</i> (Ontario)	Legislation inoperative	Legislation operative, no conflict <sup>11</sup>	Legislative inoperative, frustrates rehabilitative purpose (2 <sup>nd</sup> branch). <sup>12</sup>	

<sup>9</sup> *Moloney* (SCC), *ibid*, at para 18.

<sup>10</sup> *Moloney* (QB), *supra* note 2 at paras 45-47.

<sup>11</sup> *407 ETR* (SC), *supra* note 2.

<sup>12</sup> *407 ETR* (CA), *supra* note 2.