
CANADA / JUDGMENT

Deloitte Haskins & Sells v. Workers' Comp. Board

[1985] 1 SCR 785

COURT

Supreme Court of Canada

DECIDED

13 June 1985

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Deloitte Haskins & Sells v. Workers' Comp. Board

Collection

Supreme Court Judgments

Date

1985-06-13

Report

[1985] 1 SCR 785

Case number

17587

Judges

Laskin, Bora; Dickson, Robert George Brian; Beetz, Jean; Estey, Willard Zebedee; McIntyre, William Rogers; Chouinard, Julien; Lamer, Antonio; Wilson, Bertha

On appeal from

Alberta

Subjects

Constitutional law

Notes

SCC Case Information: 17587

Decision Content

Deloitte Haskins & Sells v. Worker's Comp. Board, [1985] 1 S.C.R. 785

Deloitte Haskins and Sells Limited Appellant;

and

The Workers' Compensation Board Respondent;

and

Attorney General of Canada, Attorney General for Alberta, Attorney General of Nova Scotia, Workers' Compensation Board of New Brunswick, Workers' Compensation Board of Ontario, Workers' Compensation Board of British Columbia and Workers' Compensation Board of the Yukon Interveners.

File No.: 17587.

1983: December 14; 1985: June 13.

Present: Laskin C.J.* and Ritchie*, Dickson, Beetz, Estey, McIntyre, Chouinard, Lamer and Wilson JJ.

*Laskin C.J. and Ritchie J. took no part in the judgment.

on appeal from the court of appeal for alberta

Constitutional law -- Bankruptcy -- Assessments owed provincial board given secured status by provincial statute -- Lesser status and priority accorded under Bankruptcy Act -- Whether or not conflict -- Whether or not provincial provision inoperative -- Bankruptcy Act, R.S.C. 1970, c. B-3, ss. 50(6), 107(1)(h) -- The Workers' Compensation Act, 1973 (Alta.), c. 87, s. 78(4).

Respondent Board claimed unpaid assessments owing under The Workers' Compensation Act from an employer and filed a proof of claim as secured creditor following the employer's declaration in bankruptcy. Appellant, which was the trustee in bankruptcy, sold the assets, settled a bank claim and applied the balance to its own fees rather than to the Board's claim. Both lower court's accepted the Board's argument that the Board was a secured creditor, with a higher priority than a trustee's fees, because of the operation of the provincial statute which created a charge on the employer's property to the extent of the moneys owed. The trustee contended that, notwithstanding the provincial statute, the Board should be accorded the status of preferred creditor pursuant to the Bankruptcy Act and therefore have a lower priority than the fees of a trustee in bankruptcy. The constitutional question before this Court was whether or not s. 107(1)(h) of the Bankruptcy Act conflicted with s. 78(4) of The Workers' Compensation Act, such as to render inoperative s. 78(4).

Held (Estey J. dissenting): The appeal should be allowed.

Per Dickson, Beetz and Chouinard JJ.: Section 78(4) of The Workers' Compensation Act is valid legislation that can stand alone and have its own legitimate spheres of influence independent of that of s. 107(1)(h) of the Bankruptcy Act.

In the case of bankruptcy s. 107(1)(h) disposes of the matter.

The constitutional question must be answered in the affirmative: s. 78(4) is inoperative in a bankruptcy situation.

Per McIntyre, Lamer and Wilson JJ.: A claimant in bankruptcy cannot claim by virtue of a provincial Act to be a secured creditor within the opening words of s. 107(1) of the Bankruptcy Act and thereby avoid the priority accorded by s. 107(1). A contrary interpretation of s. 107(1) would effectively allow the provinces to determine priorities on bankruptcy--a matter within exclusive federal jurisdiction. Since the provincial legislation does not purport to deal with a bankruptcy situation it can and should be construed in accordance with the presumption of constitutionality as inapplicable to such a situation. The paramountcy doctrine only applies if there is direct conflict between the federal and provincial laws. When properly construed s. 78(4) of The Workers' Compensation Act does not conflict with s. 107(1)(h) of the Bankruptcy Act. Absent such direct conflict both provisions can stand and have their own proper spheres of influence.

Per Estey J. dissenting: The distribution scheme of a debtor's estate, as adopted by Parliament, did not affect the legal consequences and status of the secured charge created by provincial legislation. A claimant is excepted from the distribution of s. 107 of the Bankruptcy Act by the opening words in subs. (1) if the provincial legislation creates a charge which falls within the definition of s. 2 and if the appropriate paragraph under s. 107(1) does not reduce the status of secured creditor to that of preferred creditor. Parliament, while it has the exclusive authority to determine priorities in the event of bankruptcy and while it can relegate a secured creditor to a lesser status if it chooses to do so, has not reduced respondent's status in these circumstances. Respondent therefore ranks as a secured creditor.

Cases Cited

By the majority

Workmen's Compensation Board v. Provincial Treasurer of Alberta (1967), 59 W.W.R. 298; Royal Bank of Canada v. Larue, [1928] A.C. 187; Produits Caoutchouc Marquis Inc. v. Trottier (Re Gingras Automobile Ltée), [1962] S.C.R. 676; Deputy Minister of Revenue v. Rainville (Re Bourgault), [1980] 1 S.C.R. 35; Director of Labour Standards of Nova Scotia and Workers' Compensation Board of Nova Scotia v. Trustee in Bankruptcy (1981), 38 C.B.R. (N.S.) 253, affirming Re Black Forest Restaurant Ltd. (1981), 37 C.B.R. (N.S.) 176, considered; Davis v. Workers' Compensation Board, [1980] 2 W.W.R. 349; Re Clemenshaw; Workers' Compensation Board v. Canadian Credit Men's Trust Association Ltd. (1963), 4 C.B.R. (N.S.) 238; Re R. A. Nelson Construction Ltd. (1966), 8 C.B.R. (N.S.) 221; Re Trinel Office Products Ltd.; Workers' Compensation Board of Alberta v. Davis (1971), 14 C.B.R. (N.S.) 248; L'écoute Compensation Board

v. Kinross Mortgage Corporation, [1982] 1 W.W.R. 87; Smith v. The Queen, [1960] S.C.R. 776; Construction Montcalm Inc. v. Minimum Wage Commission, [1979] 1 S.C.R. 754; Multiple Access Ltd. v. McCutcheon, [1982] 2 S.C.R. 161; Quebec North Shore Paper Co. v. Canadian Pacific Ltd., [1977] 2 S.C.R. 1054, referred to.

By the minority

Workmen's Compensation Board v. Provincial Treasurer of Alberta (1967), 59 W.W.R. 298; Deputy Minister of Revenue v. Rainville (Re Bourgault), [1980] 1 S.C.R. 35; Re Clemenshaw; L'écoute Compensation Board v. Canadian Credit Men's Trust Association Ltd. (1963), 4 C.B.R. (N.S.) 238; Produits Caoutchouc Marquis Inc. v. Trottier (Re Gingras Automobile Ltée), [1962] S.C.R. 676; Director of Labour Standards of Nova Scotia and L'écoute Compensation Board of Nova Scotia v. Trustee in Bankruptcy (1981), 38 C.B.R. (N.S.) 253, affirming Re Black Forest Restaurant Ltd. (1981), 37 C.B.R. (N.S.) 176.

Statutes and Regulations Cited

Bankruptcy Act, R.S.C. 1970, c. B-3, ss. 2, 50(6), 107(1)(h), (j).

Retail Sales Tax Act, R.S.Q. 1964, c. 71, s. 30.

L'écoute Compensation Act, 1973 (Alta.), c. 87, s. 78(4)(a), (b).

Authors Cited

Hogg, Peter W. Constitutional Law of Canada, Toronto, Carswells, 1977.

APPEAL from a judgment of the Alberta Court of Appeal, [1983] 3 W.W.R. 587, 144 D.L.R. (3d) 525, 25 Alta. L.R. (2d) 57, 43 A.R. 241, dismissing an appeal from a judgment of Hope J. Appeal allowed, Estey J. dissenting.

L. N. Boddy and M. J. McCabe, for the appellant.

J. Douglas Carr, for the respondent.

T. B. Smith, Q.C., and Susan Clarke, for the intervener the Attorney General of Canada.

William Henkel, Q.C., for the intervener the Attorney General for Alberta.

Gordon D. Gillis, for the intervener the Attorney General of Nova Scotia.

Levi E. Clain and Catherine Walsh, for the intervener Workers' Compensation Board of New Brunswick.

A. M. Austin, for the intervener Workers' Compensation Board of Ontario.

Gerald Massing, for the intervener Workers' Compensation Board of British Columbia.

Don Kidd, for the intervener Workers' Compensation Board of the Yukon.

The judgment of Dickson, Beetz and Chouinard JJ. was delivered by

1. Chouinard J.--I agree with Madame Justice Wilson that s. 78(4) of The L'écoute Compensation Act [1973 (Alta.), c. 87] and s. 107(1)(h) of the Bankruptcy Act [R.S.C. 1970, c. B-3] can stand and have their own legitimate spheres of operation.
2. That section 78(4) is perfectly valid legislation is, in my view, beyond dispute.
3. There is nothing in the Act however to suggest that s. 78(4) would not apply in a bankruptcy situation. Were it not for the Bankruptcy Act it would undoubtedly apply. It is not because of anything inherent in s. 78(4) that it has no application in a bankruptcy but because of s. 107(1)(h) of the Bankruptcy Act which disposes of the matter.
4. In the result I am of the view, with respect, that the constitutional question must be answered in the affirmative: s. 78(4) is inoperative in a bankruptcy situation.
5. I would otherwise dispose of the appeal in the manner proposed by Madame Justice Wilson.

The following are the reasons delivered by

6. Estey J. (dissenting)--As the judgment of my colleague Wilson J. has set out the facts and the relevant provisions in the provincial and federal legislation, it is not necessary to repeat those matters here. The following constitutional question was stated by order of the Chief Justice of Canada dated May 19, 1983:

Does s. 107(1)(h) of the Bankruptcy Act, R.S.C. 1970, c. B-3 conflict with s. 78(4) of the L'écoute Compensation Act, 1973 (Alta) c. 87, such as to render inoperative s. 78(4)?

I would dismiss the appeal on the basis of interpretation of the bankruptcy statute and therefore find it unnecessary to answer the constitutional question or indeed to inquire into the constitutional basis under either the Bankruptcy Act, *supra*, or The L'écoute Compensation Act, *supra*. The issue is not whether the Parliament of Canada could regulate the effect in law of the Alberta statute for the purposes of bankruptcy procedures but rather, has the Parliament of Canada done so with reference to a charge arising under the provincial compensation statute. The result of course amounts to the same thing as answering the constitutional question in the negative.

7. The provincial Act, s. 78(4)(a) clearly and validly establishes a charge against the property of a delinquent employer. The section in part states:
 78. ...
 - (4) ... the amount due to the Board by an employer upon any assessment made under this Act...
 - (a) is a charge upon the property or proceeds of property of the employer....

The reach of that charge in law is further elaborated on in para. (b) of this section where it is given priority over all "... liens, charges, mortgages or other encumbrances whatsoever" The nature of this charge having been clearly established in the law, the second and determinative question is: how is this charge treated by the Parliament of Canada in the Bankruptcy Act, *supra*, as regards the distribution of the estate of a bankrupt? Section 2 of the Bankruptcy Act defines a secured creditor as follows:

"secured creditor" means a person holding a mortgage, hypothec, pledge, charge, lien or privilege on or against the property of the debtor or any part thereof as security for a debt due or accruing due to him from the debtor, or a person whose claim is based upon, or secured by, a negotiable instrument held as collateral security and upon which the debtor is only indirectly or secondarily liable;

It is to be noted at once that in defining a secured creditor Parliament has not made any exception for charges or other security established by provincial statute either generally or specifically with reference to those statutes of the provinces which are named in s. 107 of the Act.

8. In section 107 Parliament has established a "Scheme of Distribution" for the assets of the estate of a bankrupt. The detailed scheme is introduced as follows:

107. (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:

(Emphasis added.)

The scheme of distribution is entirely predicated upon the prior rights of secured creditors. There is nothing in the use of the term "secured creditors" in the opening of this plan of distribution of a bankrupt's assets to indicate that Parliament did not intend to incorporate into s. 107 the statutory definition of that term.

9. The priorities of claimants other than secured creditors is then established by paras. (a) to (j) of s. 107(1). We are here concerned with para. (h) which provides as follows:

(h) all indebtedness of the bankrupt under any Workmen's Compensation Act, under any Unemployment Insurance Act, under any provision of the Income Tax Act or the Income War Tax Act creating an obligation to pay to Her Majesty amounts that have been deducted or withheld, *pari passu*;

It will be noted again that this paragraph does not refer to charges created under The L'écoute Compensation Act, nor does the paragraph make any reference such as "notwithstanding any secured claim arising thereunder". Nor does Parliament refer back to the exception of secured creditors in the opening of the subsection or to the definition of "secured creditor" in s. 2, *supra*. The issue, in my respectful view, is not whether the Workers' Compensation Board of a province can create the status of secured creditor which can be recognized in bankruptcy proceedings, but whether the bankruptcy procedures as laid out by the Parliament of Canada recognize a secured creditor status as created under The L'écoute Compensation Act of Alberta. The natural

sequence, in my view, is that the provincial statute is examined to determine the character of the status of the claim in provincial law. The federal Act is then examined to determine whether the provincial claim so established will be recognized as a secured claim or otherwise in the bankruptcy scheme adopted by Parliament.

10. The Alberta Court of Appeal some time ago in *Workmen's Compensation Board v. Provincial Treasurer of Alberta* (1967), 59 W.W.R. 298, concluded that the then equivalent of s. 78(4) of the Alberta statute established a floating charge covering all of the employers' property which crystallized into a fixed charge upon perfection pursuant to the terms of the statute. Such a fixed charge created by valid legislation is clearly included in s. 2, *supra*. Here the Board did indeed perfect its secured claim by placing a Distress Warrant in the hands of the appropriate Sheriff, and further by registration in the Land Titles Office in Edmonton, prior to the assignment in bankruptcy under which the appellant has been appointed as trustee.
 11. It is not surprising to find a statement by Parliament in the Bankruptcy Act which recognizes the continued existence of substantive provisions in other law. I refer to s. 50(6):
50. ...
- (6) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by such law or statute as supplementary to and in addition to the rights and remedies provided by this Act.

The reference to the entitlement of the trustee to avail himself of such other laws cannot be read as an indirect directive from Parliament that creditors may not do likewise.

12. It is said that this Court in *Deputy Minister of Revenue v. Rainville (Re Bourgault)*, [1980] 1 S.C.R. 35, has so construed s. 107 as to reduce the respondent's charge to a preferred claim. With respect I do not believe such to be the case. The Court was there concerned with s. 107(1)(j) which read as follows:
107. (1)...
- (j) claims of the Crown not previously mentioned in this section, in right of Canada or of any province, *pari passu* notwithstanding any statutory preference to the contrary.

Parliament was there concerned with claims of the Crown not previously mentioned. The claim of the Board here was, of course, mentioned in para. (h) ranking in priority to para. (j). The principal distinguishing feature between these two paragraphs is, however, the rider at the end of para. (j) which expressly mandates that distribution shall be "*pari passu* notwithstanding any statutory preference to the contrary". There is, of course, no such directive, express or implicit, in para. (h) with reference to indebtedness under any workmen's compensation legislation. Pigeon J., writing for the majority in *Re Bourgault*, explicitly stated, at p. 44, that "the case turns upon the interpretation of para. 107(1)(j)". Later in the judgment His Lordship stated, at pp. 44-45:

There is of course a contradiction between the reservation at the outset of the rights of secured creditors which include privileges and "notwithstanding any statutory preference ..." However, it is certainly clear that the reservation is a general rule and the "notwithstanding" an exception which takes precedence wherever applicable.

There may be comments in the majority judgment which can be extended to refer to a broader base for the disposition there made by the Court but, in my view, those comments are unnecessary to the decision of the case and are clearly disavowed by Pigeon J. in his several references to the precise and unique wording of para. (j). For example, at p. 44:

It is abundantly clear that this was intended to put on an equal footing all claims by Her Majesty in right of Canada or of a province except in cases where it was provided otherwise, namely, para. (c), the levy, and para. (h), workmen's compensation or unemployment insurance assessments and withholdings for income tax.

and at p. 43:

Due to the "notwithstanding", I find it even clearer in para. 107(1)(j) that the federal Parliament intended to deal with the preferential rights of the federal and provincial tax collectors, just as it intended in para. 107(1)(e) and (f) to define those of municipal corporations and of lessors.

13. Paragraph (h) was before the British Columbia Court of Appeal in *Re Clemenshaw; L'écoute Compensation Board v. Canadian Credit Men's Trust Association Ltd.* (1963), 4 C.B.R. (N.S.) 238. Wilson J.A., speaking for a unanimous court, held at p. 244:

The argument is that this allocation by Parliament to the Workmen's Compensation Board of the status of a preferred creditor of the eighth class deprives it of the position given it by provincial law as the holder of the senior charge on the property involved. I cannot accept this as correct. The rights stated in s. 95 are expressly made subject to the primary rights of secured creditors. If Parliament had intended to deprive the Workmen's Compensation Board of the position of secured creditor which is given it by s. 2(r) of the Bankruptcy Act, Parliament would have said so in explicit language. No member of any of the classes of persons listed in the scheme of distribution in s. 95 is to be taken, by reason of his being named in that section, as deprived of the benefit of any security he may hold.

In *Re Bourgault*, supra, Pigeon J. commented on that case by noting that the British Columbia court made no reference to an earlier case of this Court (*Produits Caoutchouc Marquis Inc. v. Trottier (Re Gingras Automobile Ltée)*, [1962] S.C.R. 676, dealing with a landlord's privilege under the Quebec Civil Code), and then added: "... and the wording of the paragraph [para. (h)] is also quite different", that is from para. (j) then before the Court. It should be noted in passing that *Re Gingras Automobile Ltée*, supra, was concerned with the status of a claim by a landlord for arrears of rent under the secured creditor definition in the Bankruptcy Act. The Court came to the conclusion that the landlord's claim under the Quebec Civil Code was not a secured interest which fell within the definition of secured creditor in the Bankruptcy Act. This, of course, is very different from the nature of the charge held by the respondent in these proceedings.

14. The Nova Scotia courts in *Re Black Forest Restaurant Ltd.* (1981), 37 C.B.R. (N.S.) 176, (on appeal *Director of Labour Standards of Nova Scotia and L'écoute Compensation Board of Nova Scotia v. Trustee in Bankruptcy* (1981), 38 C.B.R. (N.S.) 253) concluded that a charge under the *L'écoute Compensation Act* of Nova Scotia did not qualify under s. 107(1) of the *Bankruptcy Act* as a secured claim. With reference to that decision, I respectfully adopt the comments of Lieberman J. in the court below in the case at bar:

In my view *Re Bourgault* and *Re Black Forest* are distinguishable from the case at bar and are not authority for the proposition that a claimant whose claim falls within s. 107 cannot be a "secured creditor" even if the claim satisfies the requirements of s. 2. The *L'écoute Compensation Act* of Nova Scotia provides that the claim of the Board establishes a lien against the assets of the employer without the Board having to perform an overt act, whereas in the Alberta legislation (s. 78(4)) a floating charge is created which becomes a proprietary interest only after the Board has performed overt acts of filing the certificate and initiating distress proceedings. The Board in this case has performed those overt acts and in my view it has caused a floating charge to be crystallized in accordance with s. 78(4) of the *L'écoute Compensation Act*. The claim thus comes within the definition of "secured creditor" in s. 2 of the *Bankruptcy Act*.

15. The Nova Scotia case and the comments upon it in the court below further illustrate the proper interrelationship between the provincial and the federal legislation where bankruptcy takes place. It is not a case where provincial legislation, by creating a secured and fixed charge, defeats a scheme of distribution under the *Bankruptcy Act*. It is quite the reverse. The relevant question is whether the scheme of distribution of a debtor's estate as adopted by Parliament affects the legal consequences and status of a secured charge created by provincial legislation. If the provincial legislation creates a charge which falls within the definition of s. 2, and if the appropriate paragraph under s. 107(1) does not reduce the status of the secured creditor to that of a preferred creditor, then the claimant is excepted from the distribution of s. 107 by the opening words in subs. (1). It is not because the provincial legislature has defeated or subverted the federal statutory scheme. It is because the federal scheme recognizes the provincially legislated charge which gives the claimant the status of a secured creditor. It is, in my view, quite contrary to law to translate this interrelationship between the provincial and the federal statutes as elevating the provinces to the position where they may determine priorities in the event of a bankruptcy. This is undoubtedly the exclusive domain of the Parliament of Canada. Parliament can, as it did in para. (j), relegate a secured creditor to a lesser status if it chooses so to do. It has not chosen to do so in para. (h) and until Parliament does so, persons claiming, in the circumstances of the respondent, in my view, rank as secured creditors.
16. Accordingly I would dismiss the appeal with costs.

The reasons of McIntyre, Lamer and Wilson JJ. were delivered by

17. Wilson J.--The issue on this appeal is the interaction of s. 78(4) of The L'écoute Compensation Act, 1973 (Alta.), c. 87, and s. 107(1)(h) of the Bankruptcy Act, R.S.C. 1970, c. B-3.
18. Section 78(4) of The L'écoute Compensation Act provides:
78. ...
- (4) Notwithstanding anything in any other Act, the amount due to the Board by an employer upon any assessment made under this Act or in respect of any amount that the employer is required to pay to the Board under any of its provisions or upon any judgment for that assessment or amount,
 - (a) is a charge upon the property or proceeds of property of the employer, including moneys payable to, for or on account of the employer, within Alberta, and
 - (b) has priority over all assignments by way of security, debts, liens, charges, mortgages or other encumbrances whatsoever, whenever created or to be created, except wages due to workers by their employer in cases where the exercise of the priority would deprive the workers of their wages.

(Emphasis added.)

19. Section 107(1)(h) of the Bankruptcy Act provides:
107. (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:
 - ...
 - (h) all indebtedness of the bankrupt under any Workmen's Compensation Act, under any Unemployment Insurance Act, under any provision of the Income Tax Act or the Income War Tax Act creating an obligation to pay to Her Majesty amounts that have been deducted or withheld, *pari passu*;

(Emphasis added.)

20. The question arising under these two provisions is whether the charge created by s. 78(4) makes the respondent Board a secured creditor of the bankrupt employer for purposes of the opening words of s. 107(1) of the Bankruptcy Act or whether the respondent Board's claim falls under para. (h) of the subsection and is postponed to the claims listed in paras. (a) to (g). The appeal proceeded upon an agreed statement of fact as follows:
 1. At all material times to this action Jacs Jackets & Crests Ltd. was an employer in an industry within the scope of The L'écoute Compensation Act, c. 87, S.A. 1973, and amendments thereto and was liable to pay assessments to the Board.

2. On or about January 9, 1980 the Board placed a Distress Warrant in the hands of the Sheriff of the Judicial District of Edmonton claiming unpaid assessments by Jacs Jackets & Crests Ltd. in the amount of \$3,646.18 under the provisions of The L'écoute Compensation Act.
3. On January 15, 1980 the Board also registered a Certified Statement at the Land Titles Office at Edmonton in the amount of \$3,648.68 under the provisions of The L'écoute Compensation Board [sic].
4. On January 28, 1980 Jacs Jackets & Crests Ltd. made an assignment into bankruptcy and Deloitte Haskins and Sells Limited was appointed Trustee of the Estate.
5. On February 6, 1980 the Board filed a Proof of Claim in the sum of \$3,657.08 as a secured creditor of Jacs Jackets & Crests Ltd. under the provisions of Section 78(4) of The L'écoute Compensation Act.
6. The Trustee admittedly made a search of the Bankrupt's creditors under the name of "Jack's" rather than the proper name of "Jacs", both at the Land Titles Office and at the Sheriff's Office Edmonton, which revealed no creditors.
7. The Trustee then sold the assets of the Bankrupt in the amount of \$11,700.00 and settled a claim of the Bank of British Columbia under a Chattel Mortgage in the amount of \$8,950.00, the balance being applied to the Trustee's fees.
8. The Board filed an Objection to the final Statement of Receipts and Disbursements and the discharge of the Trustee alleging the monies received by the Trustee were distributed contrary to law and established practice.
9. The Trustee had refused or declined to pay the Board's claim and the Board applied to The Court of Queen's Bench of Alberta for Direction of Judgment in this matter.
10. There are sufficient funds available for distribution so that the question of priorities between the Board and the claimant Bank will not arise if the Judgment of the Chambers Judge is affirmed.
21. The learned Chambers judge who heard the application held that the Board was a secured creditor within the definition of s. 2 of the Bankruptcy Act. That section reads as follows:

2. In this Act

"secured creditor" means a person holding a mortgage, hypothec, pledge, charge, lien or privilege on or against the property of the debtor or any part thereof as security for a debt due or accruing due to him from the debtor, or a person whose claim is based upon, or secured by, a negotiable instrument held as collateral security and upon which the debtor is only indirectly or secondarily liable;

Accordingly, the Board had priority over the claims of the trustee in bankruptcy. The Court of Appeal agreed. The trustee was granted leave to appeal to this Court.

22. By order of the Chief Justice of Canada dated May 19, 1983 a constitutional question was stated as follows:

Does s. 107(1)(h) of the Bankruptcy Act, R.S.C. 1970, c. B-3 conflict with s. 78(4) of the L'écoute Compensation Act, 1973 (Alta) c. 87, such as to render inoperative s. 78(4)?

The Attorney General of Canada and the other interveners were granted leave to intervene on the appeal.

23. The main ground of appeal is that the Court of Appeal was wrong in according the Board secured, as opposed to preferred, status in bankruptcy. Although s. 78(4) of The L'écoute Compensation Act gave the Board the status of a secured creditor in a non-bankruptcy situation, the provisions of the Bankruptcy Act had to be looked to for its status in bankruptcy. Section 107(1) of that Act, a provision establishing priorities among non-secured creditors, specifically included claims such as the claim of the Board in para. (h). In face of that specific reference, how can it be argued that such claims are secured and covered by the opening words of s. 107(1)? Counsel submits that para. (h) is conclusive evidence of Parliament's intention to treat such claims as unsecured. If effect is given to s. 78(4) in a bankruptcy context it will change the priority given to workers' compensation claims from priority (h) to a first priority as secured claims.
24. Counsel for the trustee submits that the Court of Appeal fell into error because it approached the problem of the interaction of the federal and provincial legislation in the wrong way. The federal statute, he submits, must be looked at first because it discloses Parliament's intention with respect to priorities in a bankruptcy context. If the provincial legislation is looked at first in order to establish the nature of the claim, then the policy of the Bankruptcy Act with respect to priorities could be completely defeated. Moreover, there would be no guarantee of consistency in the treatment of claims arising in different provinces. Their ranking for bankruptcy purposes would be controlled by the provincial legislatures instead of by the federal Parliament to which exclusive legislative jurisdiction in relation to "Bankruptcy and Insolvency" was given under s. 91(21) of the Constitution Act, 1867. There are two valid laws, counsel submits, one federal and one provincial and they are in operational conflict. In such circumstances the rule is that the federal law must prevail.
25. Counsel for the Board responds that the Alberta legislature, acting within its constitutional authority in relation to "Property and Civil Rights in the Province", has conferred on the Board in s. 78(4) a first charge on the property of the employer. In *Workmen's Compensation Board v. Provincial Treasurer of Alberta* (1967), 59 W.W.R. 298, the Alberta Court of Appeal held that the Board's charge under s. 78(4) is a floating charge on all the employer's property which, upon registration, crystallizes into a fixed legal charge. Accordingly, the Board, if it has perfected its security by registration prior to the bankruptcy, has a secured claim. If it has not perfected its security in time, then it has a preferred claim under s. 107(1)(h): see *Davis v. L'écoute Compensation Board*, [1980] 2 W.W.R. 349.

26. Counsel for the Board relies further on s. 50(6) of the Bankruptcy Act which provides:

50. ...

- (6) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by such law or statute as supplementary to and in addition to the rights and remedies provided by this Act.

Counsel submits that this provision clearly recognizes the application and effect of provincial statutes relating to property and civil rights. The Bankruptcy Act, he says, merely defines secured creditors, it does not create them, the latter being the constitutional prerogative of the provinces.

27. Some assistance on the interaction of the federal and provincial legislation is to be derived from the authorities. The seminal case is the decision of the Privy Council in *Royal Bank of Canada v. Larue*, [1928] A.C. 187. In that case the Privy Council held that the exclusive legislative jurisdiction conferred on the federal legislature in relation to Bankruptcy and Insolvency enabled it to legislate the relative priorities of creditors on a bankruptcy. Although it was competent to a provincial legislature under the head of Property and Civil Rights to secure certain debts on property of the debtor, as soon as such provincial legislation came into conflict with federal bankruptcy legislation, the federal bankruptcy legislation prevailed. Quoting from the judgment of Viscount Cave L.C., at p. 197:

In *Attorney-General of Ontario v. Attorney-General for Canada* ([1894] A.C. 189, 200), Lord Herschell observed that a system of bankruptcy legislation might frequently require various ancillary provisions for the purpose of preventing the scheme of the Act from being defeated, and added: "It may be necessary for this purpose to deal with the effect of executions and other matters which would otherwise be within the legislative competence of the Provincial Legislature. Their Lordships do not doubt that it would be open to the Dominion Parliament to deal with such matters as part of a bankruptcy law, and the Provincial Legislature would doubtless be then precluded from interfering with this legislation inasmuch as such interference would affect the bankruptcy law of the Dominion Parliament." Taking these observations as affording assistance in the construction of s. 91, head 21, of the Act of 1867, their Lordships are of opinion that the exclusive authority thereby given to the Dominion Parliament to deal with all matters arising within the domain of bankruptcy and insolvency enables that Parliament to determine by legislation the relative priorities of creditors under a bankruptcy or an authorized assignment.

28. In *Produits Caoutchouc Marquis Inc. v. Trottier (Re Gingras Automobile Ltée)*, [1962] S.C.R. 676, Abbott J. followed *Royal Bank of Canada v. Larue*, supra. He said, at p. 678:

The present Act, like its predecessor acts, provides that subject to the Act all debts proved in bankruptcy shall be paid *pari passu*. To that rule of absolute equality, certain exceptions are made including those provided for by s. 95. The exclusive authority given to Parliament by s.

91(21) of the British North America Act to deal with all matters arising within the domain of bankruptcy and insolvency, enables Parliament to determine the relative priorities of creditors under a bankruptcy: *Royal Bank v. Larue*. To the extent that such priorities may be in conflict with provincial law, the federal statute must prevail.

29. In *Deputy Minister of Revenue v. Rainville (Re Bourgault)*, [1980] 1 S.C.R. 35, this Court had to consider the interaction of s. 30 of the Retail Sales Tax Act, R.S.Q. 1964, c. 71, and s. 107(1)(j) of the Bankruptcy Act. Section 30 of the Quebec statute made any sums due to the Crown under the Act "a privileged debt" ranking immediately after law costs. Section 107(1)(j) of the Bankruptcy Act provided:

107. (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:

...

(j) claims of the Crown not previously mentioned in this section, in right of Canada or of any province, *pari passu* notwithstanding any statutory preference to the contrary.

30. The Deputy Minister alleged that he was a "secured creditor" within the definition of s. 2 of the Act and therefore did not fall within the purview of para. (j). Pigeon J., writing for the majority, found otherwise. He said, at p. 44:

Accordingly, I find that the case turns upon the interpretation of para. 107(1)(j). When s. 95 (now 107) of the 1949 Bankruptcy Act is compared with s. 51 of the 1919 Bankruptcy Act, it is apparent that by the new Act, Parliament has established a much more elaborate "Scheme of Distribution". Its power to legislate concerning the provincial as well as federal Crown privilege, in the case of bankruptcy, having been established by *In re Silver Brothers Ltd.* ([1932] A.C. 514), the provision clearly indicates its intention to do so and the only question remaining is as to the scope of the provision. It is abundantly clear that this was intended to put on an equal footing all claims by Her Majesty in right of Canada or of a province except in cases where it was provided otherwise, namely, para. (c), the levy, and para. (h), workmen's compensation or unemployment insurance assessments and withholdings for income tax. Paragraph (j) ends with the following words "notwithstanding any statutory preference to the contrary". The purpose of this part of the provision is obvious. Parliament intended to put all debts to a government on an equal footing; it therefore cannot have intended to allow provincial statutes to confer any higher priority. In my opinion, this is precisely what is being contended for when it is argued that, because the Quebec statute creates a privilege on immovable property effective from the date of registration, the Crown thereby becomes a "secured creditor" and thus escapes the effect of the provision which gives it only a lower priority.

31. Estey J. dissented in *Re Bourgault* on the basis that the Deputy Minister was a secured creditor by virtue of the provincial legislation and s. 107 of the Bankruptcy Act elevated his claim over the preferred claims listed in the scheme of distribution in s. 107. Although he does not refer to the case in his reasons, the approach taken by Estey J. is similar to that

taken by the British Columbia Court of Appeal in *Re Clemenshaw; L'écoute Compensation Board v. Canadian Credit Men's Trust Association Ltd.* (1963), 4 C.B.R. (N.S.) 238, and adopted in *Re R. A. Nelson Construction Ltd.* (1966), 8 C.B.R. (N.S.) 221 (B.C.S.C.), in *Re Trinel Office Products Ltd.*; *L'écoute Compensation Board of Alberta v. Davis* (1971), 14 C.B.R. (N.S.) 248 (Alta. S.C.), and *Davis v. L'écoute Compensation Board (Alberta)* (1979), 33 C.B.R. (N.S.) 146 (Alta. Q.B.)

32. Counsel for the appellant submits that *Re Bourgault* is a judgment of this Court directly in its favour. Counsel for the Board distinguishes *Re Bourgault* on the basis it was dealing with a claim under para. (j) of s. 107(1) as opposed to para. (h) and para. (j) ends with the phrase "notwithstanding any statutory preference to the contrary". This, he submits, makes it clear that the provincial legislation yields to the scheme of distribution under s. 107(1) as far as claims under para. (j) are concerned. No such overriding language appears in para. (h).
33. With respect, it seems to me that the "notwithstanding" language in para. (j) was a second string to the Court's bow in *Re Bourgault*. I think this is the significance of Pigeon J.'s comment at p. 43 of his reasons:

Due to the "notwithstanding", I find it even clearer in para. 107(1)(j) that the federal Parliament intended to deal with the preferential rights of the federal and provincial tax collectors, just as it intended in para. 107(1)(e) and (f) to define those of municipal corporations and of lessors.

(Emphasis added.)

The "notwithstanding" language reinforced the principle in *Royal Bank of Canada v. Larue* and *Re Gingras Automobile Ltée*, that provincial legislation yields to federal in the event of bankruptcy. I do not think the majority reasons in *Re Bourgault* can be divorced from the wider principle and made to rest solely on the "notwithstanding" provision. I am supported in this view by the judgment of Cowan C.J. in *Re Black Forest Restaurant Ltd.* (1981), 37 C.B.R. (N.S.) 176. The Chief Justice said at p. 191:

The claim of the Worker's Compensation Board is specifically referred to in s. 107(1)(h) and is not removed from the scope of that paragraph by the opening words of s. 107(1) preserving the rights of secured creditors. It is entitled to the priority provided for by s. 107(1)(h) and is not entitled to the statutory security or priority which s. 125 of the Workers' Compensation Act purports to create, and which would be valid and effective in the absence of bankruptcy of the employer.

And at p. 192:

The result, in my opinion, is that so long as there is no bankruptcy, full effect must be given to statutory provisions such as those contained in the Labour Standards Code of this province and in the Workers' Compensation Act of this province, which create liens and charges on property ranking ahead of pre-existing interests such as those created by mortgages or assignments of book debts, affecting the property said to be subject to the statutory liens and charges. However, when bankruptcy occurs, the provisions of s. 107 of the Bankruptcy Act take effect and the scheme of distribution of the property of the bankrupt coming into the hands of the trustee must

be followed. The statutory liens and charges, to the extent to which they are affected by the provisions of s. 107, cease to be of any force and effect. The rights of secured creditors, whose security arises apart from such statutes, are preserved and may be enforced against the property charged by way of security. The creditors for whose benefit the statutory liens and charges were created are no longer entitled to enforce those statutory liens and charges, except to the extent permitted by s. 107, and their claims are dealt with in the priority set out in s. 107.

34. The Chief Justice was affirmed in the Nova Scotia Court of Appeal sub nom. *Director of Labour Standards of Nova Scotia and L'écoute Compensation Board of Nova Scotia v. Trustee in Bankruptcy* (1981), 38 C.B.R. (N.S.) 253. Jones J. speaking for the court said, at p. 260:

In view of these remarks I fail to see how it can be argued that *Re Clemenshaw* can still be considered a valid interpretation of s. 107(1) of the Bankruptcy Act. Mr. Justice Pigeon made it abundantly clear that priorities of provincial claims must be determined in accordance with s. 107(1) of the Bankruptcy Act notwithstanding any statutory preference to the contrary. Debts under the Workers' Compensation Act fall under s. 107(1)(h) of the Act. Claims for wages are governed by s. 107(1)(d). With deference, it is not open to the province to provide any higher or more extensive priority for wages in view of the express provisions contained in that clause. It is clear from *Rainville* that the provincial Crown cannot claim as a secured creditor under the Bankruptcy Act, notwithstanding the form of the provincial legislation, where the claim is governed by s. 107(1) of the Bankruptcy Act. In my view, the claims in the present case fall under s. 107(1) and accordingly the appeals must be dismissed with costs.

35. The Court of Appeal of British Columbia, sitting as a panel of five, followed *Re Black Forest Restaurant Ltd. in L'écoute Compensation Board v. Kinross Mortgage Corporation*, [1982] 1 W.W.R. 87, and agreed with the Nova Scotia courts that its own earlier decision in *Re Clemenshaw* must be taken to have been overruled by this Court in *Re Bourgault*.
36. I believe that these authorities are determinative of the issue before us on this appeal and that the basis on which the Alberta Court of Appeal sought to distinguish them is an untenable one. I refer to the following excerpt from the reasons of Lieberman J.:

In my view *Re Bourgault* and *Re Black Forest* are distinguishable from the case at bar and are not authority for the proposition that a claimant whose claim falls within s. 107 cannot be a "secured creditor" even if the claim satisfies the requirements of s. 2. The L'écoute Compensation Act of Nova Scotia provides that the claim of the Board establishes a lien against the assets of the employer without the Board having to perform an overt act, whereas in the Alberta legislation (s. 78(4)) a floating charge is created which becomes a proprietary interest only after the Board has performed overt acts of filing the certificate and initiating distress proceedings. The Board in this case has performed those overt acts and in my view it has caused a floating charge to be crystallized in accordance with s. 78(4) of the L'écoute Compensation Act. The claim thus comes within the definition of "secured creditor" in s. 2 of the Bankruptcy Act.

37. With respect, the issue in *Re Bourgault* and *Re Black Forest Restaurant Ltd.* was not whether a proprietary interest has been created under the relevant provincial legislation. It was whether provincial legislation, even if it did create a proprietary interest, could defeat the scheme of distribution under s. 107(1) of the Bankruptcy Act. These cases held that it could not, that while the provincial legislation could validly secure debts on the property of the debtor in a non-bankruptcy situation, once bankruptcy occurred s. 107(1) determined the status and priority of the claims specifically dealt with in the section. It was not open to the claimant in bankruptcy to say: By virtue of the applicable provincial legislation I am a secured creditor within the meaning of the opening words of s. 107(1) of the Bankruptcy Act and therefore the priority accorded my claim under the relevant paragraph of s. 107(1) does not apply to me. In effect, this is the position adopted by the Court of Appeal and advanced before us by the respondent. It cannot be supported as a matter of statutory interpretation of s. 107(1) since, if the section were to be read in this way, it would have the effect of permitting the provinces to determine priorities on a bankruptcy, a matter within exclusive federal jurisdiction.
38. How then should the constitutional question stated by the Chief Justice be answered? Does s. 107(1)(h) of the Bankruptcy Act conflict with s. 78(4) of The L'écoute Compensation Act so as to render the latter provision inoperable? I do not believe so. Section 78(4) does not purport to deal with a bankruptcy situation and, by virtue of the presumption of constitutionality, the provincial legislature is presumed to be legislating within its competence rather than outside it. Faced with the choice of construing the provincial legislation in a way which would cause it to invade the federal sphere, thereby attracting the doctrine of paramountcy, or construing it in accordance with the presumption of constitutionality, I prefer the latter course. I believe also that it accords better with the more recent authorities on the scope of the paramountcy doctrine.
39. In *Smith v. The Queen*, [1960] S.C.R. 776, Martland J. expressed the view at p. 800 that the doctrine of paramountcy only applies so as to render provincial legislation inoperative when "compliance with one law involves breach of the other". This approach was continued in *Construction Montcalm Inc. v. Minimum Wage Commission*, [1979] 1 S.C.R. 754, where Beetz J. stated at p. 780 that "it was incumbent upon Montcalm to establish that it could not comply with provincial law without committing a breach of the federal Act" and that "Montcalm had to prove that federal and provincial law were in actual conflict for the purposes of this case". In Beetz J.'s view a person challenging provincial legislation on the basis of the paramountcy doctrine must establish an inevitable conflict between the two pieces of legislation in the particular situation: it was not enough that the two provisions might on one reading conflict.
40. This approach has most recently been re-affirmed by Dickson J. (as he then was) in *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161. He states, at p. 191:

In principle, there would seem to be no good reasons to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says "yes" and the other says "no"; "the same citizens are being told to do inconsistent things"; compliance with one is defiance of the other.

I do not believe that this is the case here. I think rather that the applicable principle is the one stated by Laskin C.J. in *Quebec North Shore Paper Co. v. Canadian Pacific Ltd.*, [1977] 2 S.C.R. 1054, at p. 1065, to the effect that "if the provincial legislation is of general application, it will be construed so as not to apply to such enterprises", i.e., those within federal competence.

41. As Professor Hogg points out in his text *Constitutional Law of Canada*, the narrower the definition of conflict, the broader the scope within which valid provincial legislation can operate: the broader the definition of conflict, the greater the impact of the paramountcy doctrine to cut it down. He states, at p. 103:

When are two laws deemed to be inconsistent (or conflicting) so as to attract the doctrine of paramountcy? The question has profound implications for the scope of judicial review and for the balance of power in the federal system. Given the overriding force of federal law, a wide definition of inconsistency will result in the defeat of provincial laws in "fields" which are "covered" by federal law; a narrow definition, on the other hand, will allow provincial laws to survive so long as they do not "expressly contradict" federal law. The wide definition is the course of judicial activism in favour of central power; the narrow definition is the course of judicial restraint, leaving all but the irreconcilable conflicts to be resolved in the political arena.

42. I believe that the trend of the more recent authorities favours a restrictive approach to the concept of "conflict" and a construction of impugned provincial legislation, where this is possible, so as to avoid operational conflict with valid federal legislation. Where this is done both provisions can stand and have their own legitimate spheres of operation. In this sense I find no conflict between s. 107(1) of the Bankruptcy Act and s. 78(4) of The L'écoute Compensation Act. I would accordingly answer the question as framed by stating that s. 107(1)(h) of the Bankruptcy Act applies to determine priorities on a bankruptcy and s. 78(4) of The L'écoute Compensation Act has no application in such a situation.
43. I would allow the appeal and grant the appellant its costs throughout to be taxed on the appropriate scale.

Appeal allowed with costs, Estey J. dissenting.

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