Should Paramountcy Protect Secured Creditor Rights? *Saskatchewan v Lemare Lake Logging* in Historical Context

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This paper offers a critical and historical analysis of the 2015 Supreme Court of Canada case Saskatchewan v Lemare Lake Logging.[1] *It draws on the history and development of Canadian insolvency law within a federalist framework and the influence of secured creditors in law-making in order to offer a textured socio-legal analysis of this decision.*

The constitutional issue in this case was whether or not receivership provisions applicable to farmer-debtors under the Saskatchewan Farm Security Act, 1988 *conflicted with the general receivership provision added to the federal* Bankruptcy and Insolvency Act in 2009.[2] *The Majority found no conflict, whereas Justice Côté (in dissent) found the provincial legislation frustrated an implicit purpose of the federal receivership provisions. This paper argues — contrary to the Majority's disposition — the decision may actually curtail provincial jurisdiction over receiverships in the future. Although the Majority found no conflict, its reasoning implies that provincial legislation could frustrate the federal provisions if the federal law included an express "efficiency"*

L'auteure de cet article propose une analyse critique et historique d'une affaire entendue à la Cour suprême du Canada en 2015 : Saskatchewan c. Lemare Lake Logging.[1] *Elle puise dans l'histoire et le développement du droit de l'insolvabilité canadien à l'intérieur d'un cadre fédéraliste et l'influence des créanciers garantis sur le processus législatif afin de présenter une analyse sociologique et juridique texturée de cette décision.*

La question constitutionnelle de cette affaire fut de savoir si les dispositions relatives aux mises sous séquestre applicables aux fermiers débiteurs en vertu de la Saskatchewan Farm Security Act, 1988 *étaient en conflit avec la disposition générale relative aux mises sous séquestre ajoutée à la* Loi sur la faillite et l'insolvabilité *fédérale en 2009.[2] La majorité reconnut aucun conflit, tandis que le juge Côté (étant en dissidence) trouva que la loi provinciale entrava un des objets implicites des dispositions fédérales relatives aux mises sous séquestre. L'auteure soutient que — contraire à la disposition de la majorité — la décision pourrait en fait restreindre la compétence*

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1 *Saskatchewan (AG) v Lemare Lake Logging Ltd*, 2015 SCC 53, [2015] 3 SCR 419 [*Lemare Lake*].

2 *Saskatchewan Farm Security Act*, SS 1988-89, c S-17.1 [*SFSA*]; *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*].

purpose. To secured creditors, the Majority's decision is likely to read like a blueprint for federal law reform in order to trigger the paramountcy doctrine in a future case, and thus avoid provincial receivership regimes that provide leniency for debtors. The paper further argues that Justice Côté's dissenting judgement implicitly accepted forum shopping by the secured creditor, which would lead to the strange result whereby paramountcy could be used to protect secured creditor rights.

provinciale sur les séquestres à l'avenir. Bien que la majorité reconnût aucun conflit, son raisonnement laisse entendre que la loi provinciale pourrait entraver les dispositions fédérales si la loi fédérale comprit un objectif « d'efficacité » délibéré. Pour les créanciers garantis, il est probable que la décision de la majorité sera interprétée comme un projet de réforme du droit fédéral afin de provoquer la doctrine de la prépondérance dans un cas éventuel et ainsi éviter des régimes provinciaux relatifs aux séquestres qui se montrent cléments envers les débiteurs. De plus, l'auteure soutient que le jugement dissident du juge Côté accepta implicitement la recherche de commissaires plus accommodants par le créancier garanti, ce qui aurait occasionné le résultat étrange par quoi la prépondérance pourrait être utilisée pour sauvegarder les droits de créanciers garantis.

1. Introduction

In Canada, legislative jurisdiction to regulate credit and debt is divided between the federal government and the provinces. Depending on the specific type of regulation in question, matters related to credit and debt potentially fall under one or more federal or provincial heads of power under sections 91 and 92 of *The Constitution Act, 1867*.[3] The federal heads of power include the public debt,[4] banking,[5] interest,[6] bankruptcy and insolvency,[7] and criminal law.[8] Provincial heads of power used to legislate in respect of debtor-creditor issues include jurisdiction over municipal institutions and local works and undertakings,[9] property and civil rights,[10] and generally all matters of a merely local or private nature in the province.[11]

3 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act*].
4 *Ibid*, s 91(1A).
5 *Ibid*, s 91(15).
6 *Ibid*, s 91(19).
7 *Ibid*, s 91(21).
8 *Ibid*, s 91(27).
9 *Ibid*, ss 92(8), 92(10). See e.g. *The City of Windsor (Amalgamation) Act*, SO 1935, c 74; *Ladore v Bennett*, [1939] UKPC 33, [1939] AC 468.
10 *Constitution Act, supra* note 3, s 92(13).
11 *Ibid*, s 92(16). See e.g. *An Act to relieve L'Union St. Jacques de Montreal*, SQ 1870, c 58; *Union St Jacques de Montreal v Belisle*, [1874] UKPC 53, 6 LR PC 31.

Since Confederation, various federal heads of power have bumped up against areas of provincial jurisdiction and vice versa. In the area of bankruptcy and insolvency law, contemporary thinking tends to frame the constitutional question as a contest between section 91(21) "bankruptcy and insolvency" and section 92(13) "property and civil rights." This perspective is informed by the past 60 or so years of case law, which has generally adopted this constitutional frame in the area of bankruptcy and insolvency law. More broadly, this perspective is reinforced by a longstanding theme in Canadian division of powers disputes in which the provinces' section 92(13) jurisdiction has challenged a number of different federal heads of power.

In contemporary constitutional jurisprudence, the 1978 Supreme Court of Canada's (SCC) decision in *Robinson v Countrywide Factors Ltd* marked a turning point in the Court's approach to resolving conflicts between provincial statutes and federal bankruptcy and insolvency law.[12] In that case, a 5-4 Majority upheld the validity of provincial legislation that dealt with certain private law rights on the occasion of insolvency as within the province's jurisdiction under section 92(13). Since then, the Court has tended to resolve constitutional disputes under the paramountcy rule.[13] The SCC affirmed this new approach by applying the paramountcy rule to resolve conflicts between provincial law and federal bankruptcy and insolvency law in a quintet of cases decided shortly after *Robinson v Countrywide Factors Ltd.*[14] These developments track a broader trend in constitutional jurisprudence over this time period, in which the SCC moved away from doctrines like interjurisdictional immunity and "watertight compartments" and toward "pith and substance" and paramountcy.[15]

12 *Robinson v Countrywide Factors Ltd*, [1978] 1 SRC 753, 72 DLR (3d) 500. See generally Roderick J Wood, "The Incremental Evolution of National Receivership Law and the Elusive Search for Federal Purpose" (2017) 26:1 Const Forum Const 1 [Wood, "Incremental Evolution"] at 1.

13 Roderick J Wood, "The Paramountcy Principle in Bankruptcy and Insolvency Law: The Latest Word" (2016) 58 Can Bus LJ 27 [Wood, "The Paramountcy Principle"].

14 *Deputy Minister of Revenue v Rainville*, [1980] 1 SCR 35, 105 DLR (3d) 270; *Deloitte Haskins and Sells Ltd v Workers' Compensation Board*, [1985] 1 SCR 785, 19 DLR (4th) 577; *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; *Worker' Compensation Board v Husky Oil Operations Ltd*, [1995] 3 SCR 453, 128 DLR (4th) 1.

15 See e.g. Bruce Ryder, "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations" (1991) 36 McGill LJ 308 [Ryder, "The Demise and Rise of Federalism"]; *Ontario Public Service Employees' Union v Ontario (AG)*, [1987] 2 SCR 2 at 17-18, 59 OR (2d) 671 [*OPSEU*], cited in *Canadian Western Bank v Alberta*, 2007 SCC 22, [2007] 2 SCR 3 at paras 36-37, where the court also cited Paul Weiler, "The Supreme Court and the Law of Canadian Federalism" (1973) 23 U Toronto LJ 307 at 308:

> the court should refuse to try to protect alleged, but as yet unoccupied, enclaves of governmental power against the intrusions of another representative legislature which has ventured into the area. Instead, the court should try to restrict itself to

Parliament's slow, and often piecemeal, approach to exercising its jurisdiction over bankruptcy and insolvency has helped to solidify this constitutional frame. During the period in which there was no federal bankruptcy or insolvency law (e.g., 1880-1919), provincial legislatures were left as the only law-making bodies that regulated debtor-creditor relations. The provinces accordingly addressed different social, commercial, and legal issues stemming from overindebtedness. Thus, from an historical standpoint, there is actually a longer tradition of provincial regulation of overindebtedness under section 92(13), than of federal regulation of bankruptcy and insolvency under section 91(21).

As a result, provincial law plays an important role within the current federal bankruptcy regime and in scholarly discourse on the subject.[16] For instance, provincial law helps determine which of the debtor's property is "exempt" from bankruptcy (i.e., what property the debtor gets to keep).[17] As Thomas Telfer notes, the contemporary provincial exemptions in bankruptcy remain consistent with the original, nineteenth-century legislation by which they were established.[18] Another example is the parallel provincial and federal regimes governing preferences. A "preference" is a payment by an insolvent debtor to a creditor in which the creditor receives more money than it would under a bankruptcy distribution. Under current law, a bankruptcy trustee has a choice between using the *Bankruptcy and Insolvency Act* (*BIA*) preference provision or provincial preferences law to attack these transactions.[19]

Although the prevailing constitutional frame is partly attributable to the lack of a federal bankruptcy and insolvency law during a period of Canadian history, it also reflects the malleability of legal interpretations of sections 91(21)

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the lesser but still important role of interpreting statutes of different jurisdictions in the same area, in order to avoid conflict, and applying a doctrine of paramountcy in the few situations which are left.

16 See e.g. *BIA*, *supra* note 2, ss 67(1)(b) (stating that property which is exempt from seizure under provincial law does not form part of the debtor's property divisible amongst creditors in bankruptcy), 95 (dealing with preferences).

17 There are also federal exemptions set out in *BIA*, *supra* note 2, s 67(1).

18 See Thomas GW Telfer, "The Evolution of Bankruptcy Exemption Law in Canada 1867-1919: The Triumph of the Provincial Model" in Janis P Sarra, ed, *Annual Review of Insolvency Law: 2007* (Toronto: Thomson & Carswell 2008) 577.

19 The *vires* of provincial legislation to impeach preferential transactions in bankruptcy proceedings was affirmed in *Robinson v Countrywide Factors Ltd*, *supra* note 12. See also Saskatchewan, Law Reform Commission of Saskatchewan, "Reform of Fraudulent Conveyances and Fraudulent Preferences Law, Part II: Preferential Transfers", by Tamara M Buckwold (Saskatoon: Uniform Law Conference of Canada Civil Law Section, August 2008) at paras 4, 7-18, excerpted in Anthony Duggan et al, *Canadian Bankruptcy and Insolvency Law: Cases, Text, and Materials*, 3rd ed (Toronto: Emond Montgomery, 2015) at 265-268.

and 92(13). The dividing line between these two heads of power has shifted over time.

Using *Saskatchewan v Lemare Lake Logging* as a case study, this article argues that a by-product of Canada's historically impermanent and piecemeal approach to bankruptcy law-making is that it has tended to diminish constitutional scrutiny of new exercises of Parliament's section 91(21) power. Over the past 60 years, lawyers, scholars, and judges have increasingly tended to accept the constitutional validity of *any* addition to federal bankruptcy and insolvency law because it is tacitly seen as part of Parliament's protracted approach to bankruptcy law-making and law reform.[20] This tacit assumption obscures the fact that prevailing conceptions of the terms "bankruptcy and insolvency" have actually changed over time. This article then considers the significance of the *Lemare Lake* case in light of the division of powers jurisprudence and its potential impact on provincial autonomy.

The rest of this paper is arranged as follows: Section 2 provides an overview of the legal constitutional background. It adopts an historical perspective that is sensitive to the way bankruptcy and insolvency law has operated in practice.[21] Section 3 summarizes the SCC's decision in *Lemare Lake*. Section 4 analyzes the *Lemare Lake* case in light of broader historical trends in bankruptcy and

20 This phenomenon might help explain why Canada's highest court has never declared a federal bankruptcy law *ultra vires*. See Thomas GW Telfer, *Ruin and Redemption: The Struggle for a Canadian Bankruptcy Law, 1867-1919* (Toronto: University of Toronto Press, 2014) at 95 [Telfer, *Ruin and Redemption*], where the author notes that he found only one instance of an *ultra vires* ruling (a dissent) concerning federal bankruptcy and insolvency law. See *McLeod v Wright* (1877), 17 NBR 68, 1877 CarswellNB 20 (WL Can) (SC) at paras 149-151, Wetmore J, dissenting.

The *Lemare Lake* decision is somewhat anomalous in this respect because although the Dissent accepted a characterization of receivership as part of a system of insolvency law, the Majority stopped short of doing so. See Wood, "Incremental Evolution", *supra* note 12.

21 This approach is similar to that used by constitutional law scholars such as Hester Lessard, "Jurisdictional Justice, Democracy and the Story of Insite" (2011) 19:2 Const Forum Const 93. It also draws on socio-legal approaches to understanding bankruptcy law developments and history, such as those employed by e.g. Telfer, *Ruin and Redemption*, *supra* note 20; Thomas GW Telfer, "Rediscovering the Bankruptcy and Insolvency Power: Political and Constitutional Challenges to the Canadian *Bankruptcy Act*, 1919-1929" (2017) 80 Sask L Rev 37; Virginia Erica Torrie, "Protagonists of Company Reorganisation: A History of the *Companies' Creditors Arrangement Act (Canada)* and the Role of Large Secured Creditors" (PhD Dissertation, Kent Law School, 2016) [unpublished] [Torrie, "Company Reorganisation"]; David A Skeel Jr, *Debt's Dominion: A History of Bankruptcy Law in America* (Princeton, NJ: Princeton University Press, 2004); Bruce G Carruthers & Terence C Halliday, *Rescuing Business: The Making of Corporate Bankruptcy Law in England and the United States* (Oxford: Clarendon Press, 1998); Terence C Halliday & Bruce G Carruthers, *Bankrupt: Global Lawmaking and Systemic Financial Crisis* (Stanford: Stanford University Press, 2009); Terence C Halliday & Bruce G Carruthers, "The Recursivity of Law: Global Norm Making and National Lawmaking in the Globalization of Corporate Insolvency Regimes" (2007) 112:4 American J Sociology 1135.

insolvency law and their impact on constitutional analyses, highlighting some of the broader questions the decision raises about how the court has interpreted section 91(21). Section 5 provides a conclusion.

2. Background

A "secured creditor" is a creditor that has been granted a property interest in collateral ("security") as part of the terms of a lending agreement. With a few notable exceptions, the giving and taking of security, as well as the rules governing secured lending, fall under section 92(13) as "property rights".[22] The appointment of a receiver (or "receiver and manager") is a creditor remedy known as "receivership," and is often employed in cases of default by a corporate debtor.[23] Until 2009, receivers were generally appointed and regulated by provincial law, as an extension of the provinces' jurisdiction over secured creditor rights.[24] Yet despite Parliament's novel exercise of its "bankruptcy and insolvency" jurisdiction by adding section 243 to the *BIA* in 2009, there appears to have been no constitutional controversy (or even scrutiny) concerning this new provision. This is remarkable in light of the fact that it is only in the past 30 years or so that the application of federal insolvency law to secured creditors gained widespread acceptance in Canada.

It is a longstanding tradition under Canadian bankruptcy law that secured creditors can continue to exercise their rights and remedies as secured creditors (including receivership) irrespective of a debtor's bankruptcy. In other words, the legal process of bankruptcy (i.e., liquidating the debtor's assets, distributing the proceeds to creditors, and discharging the remaining debt) only applies to creditors that have *not* taken security (unsecured creditors).[25] This tradition continues to be reflected in the current *BIA* bankruptcy provisions. Rather than resort to bankruptcy, secured creditors usually enforce debts by seizing and selling collateral or placing the debtor in receivership, which are activities governed by provincial law.

22 One exception is security taken by banks pursuant to *Bank Act*, SC 1991, c 46, s 427.

23 Receivership is usually used by secured creditors, but is occasionally used by unsecured creditors.

24 There are some exceptions, *Bank Act*, *supra* note 22.

25 Secured creditors can "opt in" to bankruptcy proceedings but are not compelled to participate. See *BIA*, *supra* note 2, ss 69.3 (stating that the bankruptcy stay of proceedings does not apply to secured creditors' efforts to enforce their security), 71 (the property of the debtor which vests in the bankruptcy trustee does not include property which is the subject of a security interest), 72(1) (the *BIA* does not abrogate or supersede the provisions of any other law relating to property and civil rights which is not in conflict with the Act), 121 (including secured claims in the definition of claims provable under the *BIA* in order to facilitate secured creditor's ability to "opt in" to bankruptcy proceedings).

Until the 1930s, the prevailing interpretation of section 92(13) vis-à-vis section 91(21) held that secured creditor rights remained within provincial jurisdiction irrespective of a debtor's bankruptcy or insolvency.[26] In other words, Parliament's bankruptcy and insolvency jurisdiction was implicitly circumscribed by the province's exclusive jurisdiction over property and civil rights. Two federal statutes enacted during the Great Depression fundamentally changed this interpretation. The *Companies' Creditors Arrangement Act, 1933* (*CCAA*) and *Farmers' Creditors Arrangement Act, 1934* (*FCAA*) both provided for the possibility that secured creditors could be compulsorily bound by federal insolvency law.[27] Both Acts were designed to help facilitate debt restructuring (a debt compromise between a debtor and its creditors) as opposed to bankruptcy proceedings, which are concerned with liquidating the debtor's assets and discharging debts.

At the time that these statutes were passed, the Canadian legal community widely regarded both as *ultra vires* Parliament for trenching on the provinces' exclusive jurisdiction over property and civil rights, and existing practices for facilitating debt compromises. To the astonishment of many commentators, both statutes were upheld in constitutional references.[28] Unfortunately, however, neither decision engaged in a fulsome analysis of provincial jurisdiction over secured creditor rights, despite this being the main reason for seeking the references.[29] The *CCAA* and *FCAA* remained the only federal insolvency stat-

26 See e.g. HE Manning, "Companies Reorganization and the Judicature Amendment Act 1935" (1935-1936) 5 Fortnightly LJ 23 at 23:

> [secured creditor rights] being property of creditors duly conveyed to them and established under Provincial law, no *ex post facto* event … could deprive such property owners of their vested rights and those rights were not property of the debtor divisible amongst his creditors and were not subject to the legislative interference of Parliament under the head of Bankruptcy and Insolvency.

See discussion in Torrie , "Company Reorganisation", *supra* note 21 at 108-111.

27 *Companies' Creditors Arrangement Act*, SC 1933, c 36 [*CCAA*]; *Farmers' Creditors Arrangement Act*, SC 1934, c 53 [*FCAA*]. See discussion in Torrie, "Company Reorganisation", *supra* note 21 at 87-127. See also Stephanie Ben-Ishai & Virginia Torrie, "Farm Insolvency in Canada" (2013) 2 J Insolvency Can 33.

28 *Reference Re Companies' Creditors Arrangement Act (Canada)*, [1934] SCR 659, [1934] 4 DLR 75 [*CCAA Reference*]; *Reference Re Farmers' Creditors Arrangement Act (Canada)*, [1937] AC 391, [1937] 1 DLR 695 (JCPC) [*FCAA Reference*].

29 *CCAA Reference, ibid* (Factum of the Attorney-General for Quebec, Ottawa: King's Printer, 1934) Ottawa, Supreme Court of Canada Records Centre [*CCAA Reference,* (Factum of AG of Québec)]; *CCAA Reference, ibid* (Factum of the Attorney-General for Canada, Ottawa: King's Printer, 1934) Ottawa, Supreme Court of Canada Records Centre [*CCAA Reference* (Factum of AG of Canada)]; *CCAA Reference*, *ibid*; see discussion in Torrie, "Company Reorganisation", *supra* note 21.

*FCAA Reference, ibid (*Factum of the Attorney-General for British Columbia Ottawa: King's Printer, 1936) Ottawa, Supreme Court of Canada Records Centre; *FCAA Reference, ibid* (Factum of the Attorney-General for Québec, Ottawa: King's Printer, 1936) Ottawa, Supreme Court of Canada

utes that could compulsorily bind secured creditors until 1992. In that year, Parliament added provisions which could compulsorily bind secured creditors to restructuring proceedings under the *BIA*.

The 1992 amendments also added a new Part XI to the *BIA* titled "Secured Creditors and Receivers."[30] This marked the first time that the federal government purported to legislate receivership through bankruptcy and insolvency law. This initial receivership provision was intended to facilitate interim (read: temporary) receivership appointments. However, it came to be used much more broadly, to carry out receiverships generally, under a national appointment.[31] This presented a problem because the federal regulatory provisions applicable to receivers did not extend to interim receivers. Parliament addressed this issue as part of the 2005/2007 insolvency law amendments by ensuring that interim receiverships could only be used as a temporary measure, as originally intended. Parliament also added a new section 243 to facilitate national receiverships. Section 243, which came into force in 2009, provides that "on application by a secured creditor, a court may appoint a receiver." This receivership provision can only be invoked in cases where the debtor is "insolvent" within the meaning of the *BIA*, and the commonly relied upon definition for this purpose is the inability to pay one's debts as they become due.[32] *Saskatchewan v Lemare Lake Logging Ltd* is the first case to consider the potential conflict between the national receivership provision in the *BIA* and provincial receivership law.

3. Saskatchewan v Lemare Lake Logging[33]

Saskatchewan v Lemare Lake Logging arose out of an application by Lemare Lake Logging Ltd (Lemare) to the Saskatchewan Court of Queen's Bench

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Records Centre; *FCAA Reference, ibid* (Factum of the Attorney-General for Ontario, Ottawa: King's Printer, 1936) Ottawa, Supreme Court of Canada Records Centre; *FCAA Reference, ibid* (Factum of the Attorney-General for Canada, Ottawa: King's Printer, 1936) Ottawa, Supreme Court of Canada Records Centre; *Reference Re Farmers' Creditors Arrangement Act*, [1936] SCR 384, 17 CBR 359.

The JCPC upheld the Majority SCC decision declaring the *FCAA intra vires*. The materials filed in connection with the appeal are much briefer and do not flesh out the constitutional arguments as fully as those filed with the SCC. The materials filed with the JCPC, including the factums filed by British Columbia, Ontario, and Canada are available at: "The Judicial Committee of the Privy Council Decisions" online: BAILII <www.bailii.org/uk/cases/UKPC/1937/1937_10.html>.

30 *BIA*, *supra* note 2, Part XI Secured Creditors and Receivers, s 243, as amended by RSC 1992, c 27, s 89; SC 2005, c 47, s 115; SC 2007, c 36, s 58.

31 See discussion in Roderick J Wood, "The Regulation of Receiverships" in Janis P Sarra, ed, *Annual Review of Insolvency Law: 2009* (Toronto: Carswell 2010) 243.

32 *BIA*, *supra* note 2, s 2, "insolvent person."

33 This section draws on Virginia Torrie, "*Saskatchewan (AG) v Lemare Lake Logging Ltd"*, Case Comment, (2016) 31:2 BFLR 403.

(SKQB) for the appointment of a receiver and manager of 3 L Cattle Company Ltd (3 L Cattle), pursuant to section 243 of the *BIA*. Unlike receivers appointed under provincial law, a receiver appointed under the *BIA* has authority to operate nationally. In addition, a secured creditor must give the debtor 10 days' notice before the court will appoint a receiver under the *BIA*.[34] From the secured creditor's perspective, the relatively short notice period before making an application, and the national scope of *BIA* receivership orders, are key advantages of this regime.[35]

Saskatchewan has a special receivership regime to help protect farmers from losing their farms. This regime has been in place since 1988. (Manitoba is the only other province with a similar statutory regime).[36] The *Saskatchewan Farm Security Act* imposes a 150-day notice requirement before a secured creditor can have a receiver appointed in respect of a farmer.[37] The *SFSA* also requires that the secured creditor and debtor engage in a debt mediation process.[38]

The secured creditor in the *Lemare Lake* case held a mortgage over the debtor's assets. The debtor defaulted on its mortgage, and the secured creditor subsequently made an application to the court for the appointment of a receiver under the *BIA*. The debtor contended that in making its application, the secured creditor had failed to comply with Part II of the *SFSA* by not first acquiring leave from the court before making the application. The debtor argued that doing so was a precondition for the appointment of a receiver under the *BIA*, and as a result of this omission the application for a receiver was a nullity.[39]

The parties agreed that the two statutes were valid. However, the secured creditor pleaded that sections 9 and 11 of Part II of the *SFSA* were constitutionally inoperable due to the doctrine of federal paramountcy. The secured creditor argued that there was an irresolvable conflict between the provincial

34 *BIA*, *supra* note 2, s 244.

35 See e.g. Michael W Milani, "Corralling the Ability to Appoint National Receivers: A Commentary on 3L Cattle Company" (2015) 4 J Insolvency Can 6 [Milani, "Commentary on 3L Cattle Company"]; Christian Lachance & Hugo Babos-Marchand, "The 'Impractical Effect' of *Lemare Lake Logging Ltd* in the Enforcement of Security in Quebec" (2016) 28:3 Commercial Insolvency Reporter 25; Jonathan Milani, "Frustrating the Purpose of the Receivership Remedy: Federal Paramountcy in *Saskatchewan (Attorney General) v Lemare Lake Logging Ltd*" (2017) 80 Sask L Rev 253; Jeffrey M Lee, "'The Glorious Uncertainty of the Law': Taking and Enforcing Security in Saskatchewan" in Janis P Sarra, ed, *Annual Review of Insolvency Law*: *2017* (Toronto: Thomson Reuters 2018) 983.

36 *SFSA, supra* note 2; *Family Farm Protection Act*, SM 1986-87, c 6, CCSM c F15.

37 *SFSA*, *supra* note 2, s 9.

38 *Ibid*.

39 *Lemare Lake Logging Ltd v 3 L Cattle Company Ltd*, 2013 SKQB 278 at paras 1-2, [2013] 12 WWR 176.

and federal legislation, rendering the provincial statute inoperative with respect to its stipulation of a mandatory 150-day waiting period following a service of intention upon a debtor.[40]

The trial judge found no conflict between the two statutes, holding for the debtor, and resulting in the application for a receiver being a nullity.[41] The secured creditor appealed to the Saskatchewan Court of Appeal (SKCA), which reversed the determination of the constitutional issue. The SKCA found the *SFSA* frustrated the purpose of the *BIA* receivership provisions.[42] However, in considering the application on its merits, the SKCA decided against granting the application for a receiver under the *BIA*. Following the SKCA decision, the secured creditor and the debtor settled their dispute.[43] The Attorney General for Saskatchewan appealed the decision to the SCC for a determination of the constitutional issue. The SCC appointed former counsel for the secured creditor as *amicus curiae* to respond to the submissions of the Attorney General.[44] The Attorneys General for British Columbia and Ontario were interveners at the SCC. Neither the Superintendent of Bankruptcy, nor the Attorney General for Canada intervened.

The issue before the SCC was whether or not Part II of the *SFSA* conflicts with section 243(1) of the *BIA*. There are two branches of the paramountcy test for finding a conflict, either of which will render the provincial statute inoperative to the extent of the conflict. The first type of conflict is an "operational conflict," which refers to a situation where it is impossible to comply with both the federal and provincial statutes.[45] The second is a "frustration of purpose" conflict, in which the provincial statute frustrates the purpose of the federal statute.[46]

The SCC followed both lower courts in holding that there was no operational conflict between the federal and provincial legislation in issue. Six of the seven presiding justices also held that there was no conflict on the "frustration of purpose" basis. Justice Côté dissented and would have found a frustration of the purpose of the federal provision.

40 *Ibid.*
41 *Ibid.*
42 *Lemare Lake Logging Ltd v 3 L Cattle Company Ltd*, 2014 SKCA 35, 371 DLR (4th) 663.
43 *Lemare Lake*, *supra* note 1 at para 13.
44 *Ibid.*
45 *Multiple Access Ltd v McCutcheon*, [1982] 2 SCR 161 at 191, 138 DLR (3d) 1.
46 *Canadian Western Bank v Alberta*, 2007 SCC 22 at para 73, [2007] 2 SCR 3; *Bank of Montreal v Hall*, [1990] 1 SCR 121, 65 DLR (4th) 361.

Writing for the Majority, Justices Abella and Gascon found that the purpose of the *BIA* receivership provision was to create a regime for appointing a national receiver, thereby making it simpler for businesses that conduct operations in multiple provinces. The main effect of this provision is to impose a 10-day waiting period on the creditor. The Majority found the purpose of Part II of the *SFSA* was to help protect Saskatchewan farmers from the loss of farmland in the event of insolvency, with the main effect being the imposition of a 150-day waiting period on creditors.

The Majority concluded that the purpose of the federal provision was not frustrated by compliance with the provincial one. They viewed the 10-day waiting period contained in the federal statute as a minimum and permissive — secured creditors may wait much longer to make an application for the appointment of a receiver. The Majority declined to draw an inference from the comparatively short waiting period that Parliament's purpose had been to ensure promptness or timeliness in such proceedings. The Majority found no other evidence upon which to construe the purpose of the federal provision more broadly.

In Justice Côté's dissent, she accepted the opposite position — that the purpose of the federal provision was frustrated. She conceived that the purpose of the federal legislation included an emphasis on the timely resolution of insolvency issues for secured creditors. In her view, compelling a secured creditor in Saskatchewan to wait 150 days for the appointment of a receiver over an insolvent farmer's land is inconsistent with this purpose.

4. Analysis

Lemare Lake illustrates that one's understanding of the purpose of a federal provision or statute significantly influences one's determination of a paramountcy issue in the field of bankruptcy and insolvency law. While the trial court and the Majority of the SCC found a narrow purpose and no frustration, the SKCA and Justice Côté found a broader purpose and frustration. Yet, neither the courts nor the parties questioned whether federal bankruptcy and insolvency law should apply to receiverships in the first place. The paramountcy analysis instead rested on an implicit view of section 91(21) that actually represents a *break* with the traditional interpretation of that provision. The traditional interpretation held that federal bankruptcy and insolvency law could not adjust secured creditor rights. The *Lemare Lake* case has effectively redrawn the constitutional boundary between sections 91(21) and 92(13) without addressing one of the main constitutional issues. Interestingly, this

echoes the performance of the high courts in the *CCAA* and *FCAA* Reference decisions of the 1930s.

The risk that relying on the paramountcy doctrine poses to an appropriate balancing of federal and provincial powers with respect to insolvency, and the related balance between the interests of secured creditors and debtors, is clearly demonstrated by considering the implications of the decision of the SKCA and the dissenting opinion of Justice Côté at the SCC. Both effectively would have used the doctrine of federal paramountcy to help protect secured creditor rights. This is an odd outcome from both a constitutional and historical perspective, because secured creditor remedies are generally matters of exclusive provincial jurisdiction under section 92(13), even when the debtor is insolvent.[47] Writing about the federal receivership provisions, Justice Côté stated:

> … I see a federal purpose drawn in broad strokes, namely to establish a process for applying for a national receiver that is timely, adaptable in case of emergency and sensitive to the totality of circumstances. If a province wishes to legislate in a way that will affect the federal receivership regime — which, by this Court's jurisprudence, is paramount in cases of conflict — then it must do so in a manner consistent with that purpose. If the province does so, its regime will dovetail seamlessly with the federal regime and produce no frustration.[48]

The effect of Justice Côté's reasoning is that provincial receivership legislation must be at least as "creditor friendly" as the *BIA* receivership provisions. This would significantly limit a province's ability to adopt policies aimed at doing anything besides promoting secured creditor rights, such as helping protect the property and civil rights of debtors. Should a province fail to offer receivership legislation that is as "creditor friendly" as the *BIA*, Justice Côté's approach would encourage "forum shopping" on the part of creditors in opting for receivership under federal legislation.

Although it upheld the *SFSA*, the Majority's decision in *Lemare Lake* does not go much further in safeguarding provincial jurisdiction. Their reasoning implies that "timeliness" is an acceptable purpose of federal receivership provisions. To secured creditors and their representatives, which are likely to be dissatisfied with the SCC's decision,[49] this reads like a blueprint for law re-

47 Most secured credit is regulated by the provinces under *PPSA*s, see e.g. *Personal Property Security Act*, SM 1993, c 14. Secured creditors do not have to participate in *BIA* bankruptcies, see *BIA, supra* note 2, ss 71, 121.

48 *Lemare Lake, supra* note 1 at para 114, Côté J, dissenting.

49 See e.g. Milani, "Commentary on 3L Cattle Company", *supra* note 35 ("[i]f the Court of Appeal's decision is overturned on appeal, then other provincial legislation may be brandished by debtors seeking to avoid the appointment of a receiver under section 243(1) of the *BIA*" at 6).

form when Parliament conducts its next review of bankruptcy and insolvency legislation. The Majority decision in *Lemare Lake* implies that if Parliament amends the *BIA* to make it clear that the receivership provisions are intended to facilitate timely receivership proceedings, the *SFSA* receivership regime will frustrate this federal purpose. The likely result of such a conflict is that the *SFSA* will be inoperable to the extent that it conflicts with the *BIA* receivership regime.

It is hard to reconcile the SCC's tacit acceptance of timeliness and efficiency concerns as potentially valid purposes of a federal receivership regime with the Court's express circumspection of these same principles when it comes to other federal legislation that overlaps with section 92(13). For example, in the *Securities Reference* the Court found that the main thrust of the federal legislation went beyond Parliament's legislative jurisdiction under section 91(2) "trade and commerce."[50] The court acknowledged that there might be room for federal regulation of the securities market which was "qualitatively different from what the provinces can do."[51] But the court went on to say that the policy concerns raised by the federal government did not "justify a wholesale takeover of the regulation of the securities industry which is the ultimate consequence of the proposed federal legislation."[52]

Applying this reasoning to the constitutional issue in the *Lemare Lake* case, federally appointed receivers enjoy a national appointment, enabling them to operate in multiple provinces and territories, which is something that the provinces cannot do. However, there is no condition in the *Act* which limits the applicability of *BIA* receiverships to cases where a receiver needs to operate in multiple jurisdictions (e.g., because the debtor's assets are located in two or more provinces). In other words, a secured creditor can apply for a *BIA* receiver, instead of a provincially appointed receiver, even if there is no jurisdictional reason for seeking a federal appointment. This is different from the "cooperative approach" proposed by the SCC in the *Securities Reference* which would permit "a scheme that recognizes the essentially provincial nature of securities regulation [or receivership] while allowing Parliament to deal with genuinely national concerns …"[53]

On the other hand, integrating timeliness and efficiency as policy objectives of receivership regimes is within provincial jurisdiction under section

50 *Reference Re Securities Act*, 2011 SCC 66 at paras 128-129, [2011] 3 SCR 837.
51 *Ibid* at para 128.
52 *Ibid*.
53 *Ibid* at para 130.

92(13). In this regard, the federal receivership provisions are not qualitatively different from what the provinces *can* do; they are qualitatively different from what two provinces — Saskatchewan and Manitoba — *are doing*. This reflects a difference in policy, not legislative ability, between the provinces and federal government.

In the extreme, timeliness and efficiency can amount to arguments against federalism and in favour of a single law-making body. This is at odds with the modern paradigm's view of "interplay and … overlap" [54] as the "ultimate in harmony"[55] in a federal state. Thus, the principle of federalism requires that federal policy objectives that are inherently geared toward greater centralization, such as timeliness and efficiency, be weighed carefully against the importance of giving effect to the broader scheme of the Division of Legislative Powers in general, and provincial heads of power in particular.

Since Parliament only added a national receivership provision to the *BIA* in 2009 — *after* Saskatchewan enacted the *SFSA* — it is noteworthy that the validity of the *BIA* provisions has never been raised as a constitutional issue, or even attracted controversy. The constitutional issue in *Lemare Lake* only arose because of this novel exercise of Parliament's jurisdiction under section 91(21). From an historical perspective, it is paradoxical that the main reason that Parliament historically avoided regulating receiverships through insolvency law until this point was because this was regarded as *ultra vires* its section 91(21) power.[56] Until relatively recently, prevailing interpretations of the Division of Powers held that the "pith and substance" of secured creditor rights fell almost exclusively under the provinces' section 92(13) jurisdiction. So the *BIA* receivership provisions represent a fairly recent, novel exercise of Parliament's section 91(21) jurisdiction; one which rests on an expanded definition of bankruptcy and insolvency than that which had prevailed earlier in Canadian history.[57] Now, "insolvency" is seen as a dividing line between much provincial and federal jurisdiction concerning the regulation of credit and debt, but historically this notional line carried much less constitutional significance.

Contemporary scholars reflect the shift toward construing bankruptcy as dealing with the debtor's insolvency when critiquing some of the oldest provi-

54 *OPSEU*, *supra* note 15 at 18, Dickson CJC, quoted in Ryder, *supra* note 15 at 309, 311-313, 334-335.

55 *Multiple Access Ltd v McCutcheon*, [1982] 2 SCR 161 at 188, 138 DLR (3d) 1, Dickson J, citing Peter Hogg, *Constitutional Law of Canada* (Toronto: Carswell Company, 1977) at 110. See WR Lederman, "Concurrent Operation of Federal and Provincial Laws in Canada" (1963) 9 McGill LJ 185 at 195. See also Ryder 1991, *supra* note 15 at 325.

56 *CCAA Reference*, *supra* note 28; *FCAA Reference*, *supra* note 28.

57 "Company Reorganisation", *supra* note 21 at 108.

sions of federal bankruptcy and insolvency laws. For example, when reviewing the "Acts of Bankruptcy" contained in the *BIA*, Roderick J Wood and David J Bryan remarked that

> Canadian bankruptcy law … contemplates that a solvent debtor may be forced into bankruptcy by the creditors. This seems out of step with the objectives of modern bankruptcy law which is primarily concerned with insolvent debtors.[58]

Conceptions of bankruptcy have changed since these provisions were introduced to the *BIA* in 1919, and the lack of comprehensive bankruptcy reforms underscores this point. Evolving views of Canadian bankruptcy are related to changing interpretations of section 91(21), which have significantly redrawn the lines dividing provincial and federal jurisdiction. As a result, one could argue that the "Acts of Bankruptcy" that were necessary to bring proceedings against a debtor in 1919 are now *ultra vires* Parliament because they extend to solvent debtors.[59] But this sort of argument is unlikely to come up because these provisions of the *BIA* are almost never used in practice. Nevertheless, this hypothetical example illustrates that the shift in conceptualizations of bankruptcy may profoundly affect constitutional interpretation and analyses.

On the other hand, arguments to extend bankruptcy and insolvency law into areas of provincial jurisdiction under section 92(13) come up fairly routinely. For example, in 2003 the Standing Senate Committee on Banking, Trade and Commerce wrote:

> There should be a uniform system nationwide for the examination of fraudulent and reviewable transactions in situations of insolvency. At present, there is a lack of fairness, uniformity and predictability by virtue of both federal and provincial/territorial legislation addressing fraudulent and reviewable transactions. We feel that a national standard is needed … Provincial/territorial legislation would continue to exist for transactions not occurring in the context of insolvency.[60]

It is hard to imagine a situation outside of insolvency where a preference issue would arise, and therefore preserving provincial jurisdiction over solvent

58 Roderick J Wood & David J Bryan, "Creeping Statutory Obsolescence in Bankruptcy Law" (2014) 3 J Insolvency Can 1 at 3, citing *Century Services Inc v Canada (AG)*, 2010 SCC 60, [2010] 3 SCR 379.

59 At the time they were introduced it appears no one challenged the "Acts of Bankruptcy" provisions on the constitutional ground that they could be applied to solvent debtors. See Telfer, *Ruin and Redemption*, *supra* note 20.

60 Canada, 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*, Catalogue No YC11-0/372-15E-PDF (Ottawa: November 2003) at 122.

preferences law is probably meaningless in practice.[61] Thus, although this recommendation appears to leave some jurisdiction to the provinces, the effect of its implementation would likely be the replacement of provincial preferences law with federal preferences law.

These types of arguments are often raised in favour of comprehensive reform and modernization of Canadian bankruptcy and insolvency laws, which would create more uniformity by imposing a single national standard.[62] Underpinning this argument is a keen awareness of Parliament's historically impermanent and piecemeal approach to exercising its section 91(21) jurisdiction. Due to a confluence of factors, including a lack of political will, Parliament continues to let comprehensive bankruptcy and insolvency law reform languish.[63] But, stalled reform efforts obscure the fact that conceptions of what can constitute federal bankruptcy and insolvency law are changing. In some cases, the reason that certain components of "modern" bankruptcy and insolvency law were "missing" from earlier statutes is that they did not used to be considered part of bankruptcy and insolvency law. Receivership is a case in point. Hence, part of the reason that Parliament did not historically exercise its section 91(21) jurisdiction over some matters which are now considered "bankruptcy and insolvency" is because doing so would have been *ultra vires*.

The combination of piecemeal reforms and changing ideas about bankruptcy and insolvency has tended to lend implicit *vires* to any exercise of Parliamentary jurisdiction under section 91(21). This helps to explain why receivership, an area of longstanding and exclusive provincial jurisdiction, was added to federal bankruptcy and insolvency law without any constitutional controversy. We need to avoid the tendency to let "pith and substance" drop

61 Some provincial preferences legislation includes an express insolvency requirement. See e.g. *Assignments and Preferences Act*, RSO 1990, c A.33, s 4(2). See also *Fraudulent Conveyances Act*, RSM 1987 c F160, s 2 (which does not include an insolvency requirement).

62 Report of the Standing Senate Committee on Banking, Trade and Commerce, *supra* note 60 at 122, cited in Anthony Duggan et al, *Canadian Bankruptcy and Insolvency Law: Cases, Text, and Materials*, 3rd ed (Toronto: Emond Montgomery, 2015) at 269. See further, Tamara M Buckwold, "Reforming the Law of Fraudulent Conveyances and Fraudulent Preferences" (2012) 52 Can Bus LJ 333.

63 See discussion in Jacob Ziegel, "Canada's Dysfunctional Insolvency Reform Process and the Search for Solutions" (2010) 26:1 BFLR 63; Thomas GW Telfer, "Canadian Insolvency Law Reform and 'Our Bankrupt Legislative Process'" in Janis P Sarra, ed, *Annual Review of Insolvency Law: 2010* (Toronto: Carswell, 2011) 583; Ben-Ishai & Duggan, *supra* note 62. In 2005, Parliament added a provision requiring a review of the *BIA* in five years' time: *BIA*, *supra* note 2, as amended by SC 2005, c 47, s 122, adding Part XIV "Review of Act." The statutorily mandated review was carried out in 2014. (The delay was due to a time lag between the date that the amendments received Royal Asset and the date that they came into force). There is no indication of when the next review of bankruptcy and insolvency law might occur.

out of constitutional analyses. The potential for federal dominance inherent in the constitution necessitates scrutiny of new exercises of Parliamentary jurisdiction, including under section 91(21). Greater centralization may be necessary to a certain extent in order to give effect to modern ideas about bankruptcy and insolvency, but we should be mindful that it is likely to be a one-way street in favour of more federal jurisdiction. Thus, it must be balanced with the need to preserve real and meaningful jurisdiction for the provinces under section 92, and give effect to the Division of Legislative Powers as a whole.

It is worth briefly reflecting on a few of the ways that greater centralization of law-making authority under section 91(21) has played out in practice, and the impact it has had on provincial jurisdiction under section 92(13). For instance, the SCC's decision in *Re Validity of Orderly Payment of Debts Act, 1959 (Alberta)*[64] essentially reversed the Judicial Committee of the Privy Council's (JCPC) earlier holding in *Reference Re: An Act respecting Assignments and Preferences by Insolvent Persons (Ontario)*.[65] As a result, the provinces are unable to legislate in respect of voluntary schemes of debt compromises, and these were subsequently incorporated into the *BIA*.[66] In the *CCAA Reference*[67] the SCC upheld the validity of a federal scheme for restructuring secured debts, despite the prevailing view that the statute was *ultra vires* for purporting to adjust secured creditor rights. By upholding the validity of the *CCAA*, the SCC limited similar provincial receivership legislation to "solvent" restructurings and significantly limited their usefulness in practice.[68] The JCPC's ruling in the *FCAA Reference* that federal farm insolvency law — including unilateral adjustment of secured creditor rights — was *intra vires* limited the scope of

64 [1960] SCR 571, 23 DLR (2d) 449.

65 [1894] AC 189, 11 CRAC 13 [*Voluntary Assignments Reference*].

66 See *BIA*, *supra* note 2, Part III, Division II Consumer Proposals, and Part X "Orderly Payment of Debts."

67 *CCAA Reference* (Factum of AG of Québec), *supra* note 29; *CCAA Reference* (Factum of AG of Canada), *supra* note 29. See discussion in "Company Reorganisation", *supra* note 21 at 118-127.

68 As a corollary of the SCC's 1934 decision upholding the constitutional validity of the *CCAA* to adjust secured creditor rights in cases of insolvency, the JCPC, in effect, affirmed that provincial legislation that provided for receivership-restructurings was limited to cases in which the debtor was technically "solvent." Curtailing receivership restructuring to cases where the debtor was solvent significantly limited the usefulness of these provincial regimes in practice. In the case of Abitibi Power & Paper Co. the debtor company was insolvent by the time it came for court approval of the restructuring plan under Ontario legislation. Since the debtor company was insolvent, the court held that the Ontario legislation could not be used, since insolvent restructurings now fell within the purview of the *CCAA*. The restructuring had to be re-done under the *CCAA*, which took several more years. Abitibi Power & Paper Co was in receivership for 14 years, due in part to the constitutional uncertainty around the jurisdictional issue of adjusting secured claims in insolvency; an issue which was ultimately resolved by the JCPC in 1943. See *Judicature Act*, RSO 1914, c 56, s 16 as amended by *Statute Law Amendment Act*, SO 1917, c 27, s 17; *Judicature Amendment Act*, SO 1935,

the provinces' jurisdiction to legislate in respect of matters such as foreclosure and debt adjustment. This loss of jurisdiction was felt particularly acutely in Manitoba after Parliament amended the *FCAA* to make it non-applicable throughout Canada except in Alberta and Saskatchewan.[69] Under the classic paradigm of constitutional analysis that prevailed at the time, the practical effect of passing this restrictive amendment was that Parliament "covered the field" by creating a vacuum. It is hard to imagine a worse outcome from the standpoint of provincial autonomy! The Premier of Manitoba's only recourse was to lobby Parliament to have the *FCAA* reinstated in the province.[70]

The constitutional case law bears out a pattern of expanding interpretations of bankruptcy and insolvency, facilitated in part by little substantive discussion of what bankruptcy and insolvency law actually means.[71] Instead, tacit ideas about bankruptcy and insolvency have often carried the day, demonstrating their malleability when discussed in the abstract, even though the extent to which they have changed attests to how embedded in social context they also are. Thus, the most significant impact of the *Lemare Lake* case is unlikely to be the ratio of the Majority's decision, but rather the open door it leaves for greater centralization of law-making under section 91(21).[72]

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c 32; *Montreal Trust Company v Abitibi Power and Paper Company Ltd*, [1943] UKPC 37, [1943] 2 All ER 311; Torrie, "Company Reorganisation", *supra* note 21 at 58-87.

The restructuring of federal companies under the *Canada Business Corporations Act*, RSC 1985, c C-44, s 192, on the other hand, is an area of contemporary interest with respect to the notion of solvent restructuring regimes. This section of the *CBCA* makes no mention of a solvency or insolvency requirement, although there is some debate over whether insolvent companies should be required to use the *CCAA*. The division of powers issue around "insolvency" as a potential dividing line is more muted between these two regimes because both are areas of federal jurisdiction. See Martin McGregor & Paul Casey, "*CBCA* Section 192 Restructurings: A Streamlined Restructuring Tool of a Statutory Loophole?" in Janis P Sarra, ed, *Annual Review of Insolvency Law: 2013* (Toronto: Carswell 2014) 683.

69 *An Act to Amend the Farmers' Creditors Arrangement Act, 1934*, SC 1938, c 47, s 9. See discussion in Ben-Ishai & Torrie, *supra* note 27 at 45-47.

70 Letter to the Prime Minister and Members of the Federal Government from the Premiers of Alberta, Saskatchewan, and Manitoba (1942) and Unanimous Resolution of the Inter-Provincial Debt Conference, Saskatoon (30 June 1942) in "Adjustment and Settlement of Farm Debts" United Farmers of Alberta, 1905-1966 (Glenbow Archives, Calgary: M-1749-34).

The *FCAA* was repealed and replaced with a new statute with the same name in 1943. The new *FCAA* applied in Alberta, Saskatchewan, and Manitoba. See *Farmers' Creditors Arrangement Act*, RSC 1952, c 111, Preamble, s 7. See discussion in Ben-Ishai & Torrie, *supra* note 27 at 46-47.

71 See discussion in Anna J Lund, "Lousy Dentists, Bad Drivers and Abandoned Oil Wells: A New Approach to Reconciling Provincial Regulatory Regimes with Federal Insolvency Law" (2017) 80:1 Sask L Rev 157 at 169-173.

72 Wood, "Incremental Evolution", *supra* note 12 at 5-6, noting the likelihood that receivership will be codified in federal insolvency law in the future.

The forum of law-making is not neutral to policy development in the area of insolvency law. Greater centralization of receivership law is likely to benefit secured creditors, both because creditors are an organized interest group in insolvency law-making (unlike most debtors), and because federal politicians and political parties tend to be less concerned with debtor interests and regional constituencies (e.g., Prairie farmers) than their provincial counterparts. Furthermore, "timeliness" and "efficiency" are not neutral policy objectives in the area of receivership law. They are inherently geared toward advancing the interests of secured creditors over those of debtors, just as they inherently promote greater exercises of federal jurisdiction. The potential for more centralization of bankruptcy and insolvency law is compounded by the SCC's tendency to decide jurisdictional disputes through the doctrine of federal paramountcy. If "timeliness" and "efficiency" are accepted as purposes of federal bankruptcy and insolvency law, then much provincial legislation seems likely to conflict with these objectives.[73] Efficiency and timeliness alone provide insufficient reasons to undermine provincial jurisdiction and autonomy over policy choices. In this sense, paramountcy should not protect secured creditor rights.

The reasoning of the SKCA and Justice Côté is particularly noteworthy in this regard. In their decisions, these justices used the doctrine of federal paramountcy effectively to protect secured creditor rights. The main reason that the secured creditor in *Lemare Lake* relied on the *BIA* receivership provisions was in order *to avoid* the applicable provincial law, and the reasoning of the SKCA and Justice Côté implicitly accepted this "forum shopping."

Justice Côté suggested that the federal purpose she identified in the receivership provisions of the *BIA* "leaves a wide legislative space open to the provinces,"[74] but this rings hollow for two reasons. First, a federal receivership regime — even one that is limited to insolvent debtors — encroaches on an area that was (formerly) within the exclusive jurisdiction of the provinces. Therefore, the provinces are actually left with *less* legislative space than they had before the introduction of *BIA* receiverships. If some secured creditors opt for federal receivership, as opposed to provincial receivership, the *BIA* receivership provisions will reduce provincial jurisdiction in practice as well.

73 See Janis Sarra, "The Evolution of the Companies' Creditors Arrangement Act in Light of Recent Developments" (2011) 50 Can Bus LJ 211 at 213-214; Wade K Wright, "Courts as Facilitators of Intergovernmental Dialogue: Cooperative Federalism and Judicial Review" (2016) 72 SCLR (2d) 365 at 411, both cited in Lund, *supra* note 71 at 173.

74 *Ibid* at para 116, Côté J, dissenting.

In order to maintain provincial jurisdiction over receivership in practice, provinces must "compete" with federal receivership provisions. However, the constitutional playing field for this kind of legislative competition is uneven. For instance, a federally appointed receiver can operate nationally, but provincially appointed receivers can only operate within the province of their appointment. Secured creditors see the national appointment as a key advantage of *BIA* receiverships. Thus, one of the most attractive features of a federally-appointed receiver from a secured creditor's standpoint is something which provincial receivership regimes cannot offer.

Second, the federal receivership provisions constrain the policy of provincial legislation due to the operation of the doctrine of federal paramountcy. Provincial receivership legislation must replicate or dovetail with the policy of the *BIA* receivership provisions to a significant extent so that it does not frustrate the purpose of federal legislation. This diminishes provincial autonomy over policy choices. This phenomenon may be especially pronounced in "zero-sum" situations such as insolvency, where helping one group (e.g., debtors) tends to come at a direct cost to another group (e.g., creditors). As a result, the more controversial the policy debate, the more constrained provincial autonomy over policy choices is likely to be. For example, one of the reasons that the secured creditor in *Lemare Lake* preferred to rely on the *BIA* receivership provisions was that the process was less onerous for creditors than the process under the *SFSA*. The process of appointing a receiver under the *SFSA*, on the other hand, is more favourable from the perspective of farmer-debtors.

Bruce Ryder's framework for promoting provincial autonomy sheds light on the mechanisms by which the modern paradigm of constitutional interpretation can diminish provincial jurisdiction.[75] Ryder suggests that the "interplay and overlap" advanced by the modern paradigm can pose a threat to provincial autonomy when federal jurisdiction is interpreted broadly so as to overlap with provincial jurisdiction.[76] This poses a threat to provincial autonomy because it extends the potential for federal dominance, which is already inherent in the paramountcy rule. In other words, since any conflict is decided in favour of Parliamentary legislation, broad interpretations of federal heads of power that overlap with provincial heads of power can render provincial jurisdiction meaningless in practice. Ryder notes that, in the extreme, this phenomenon

75 Ryder, "The Demise and Rise of Federalism", *supra* note 15. See further, Bruce Ryder, "Equal Autonomy In Canadian Federalism: The Continuing Search for Balance in the Interpretation of the Division of Powers" (2011) 54 SCLR (2d) 566.

76 Ryder, "The Demise and Rise of Federalism", *ibid* note 15 at 313, 314, 358-359.

has the potential to make a mockery of provincial autonomy.[77] In the area of bankruptcy and insolvency, Roderick J Wood notes that the continually expanding scope of federal law greatly increases the prospect of further constitutional challenges of provincial legislation; disputes which are likely to be decided through the paramountcy rule.[78]

Applying Ryder's framework to the *Lemare Lake* case, Justice Côté's approach to division of powers analysis seems to undermine provincial jurisdiction in deed, if not word, because it leaves little room for the provinces to legislate in a way that conforms with the Constitution. Provinces are unable to "compete" effectively with federal legislation because some of the key advantages of federal legislation are *ultra vires* provincial jurisdiction. In addition, provincial policy choices are largely restricted to replicating federal legislation. Taken together, these constraints mean the "best" a province may offer is a geographically bounded version of the federal law. This essentially makes provincial law a less powerful version of the federal law. Furthermore, if the provincial law essentially parallels the federal law, then the substance of the underlying policy — and resulting "law" — has been established by Parliament, rather than provincial legislatures.

Thus, one effect of this approach to division of powers analysis is that much of the policy- and law-making authority shifts to Ottawa, not only in the current round of law-making, but for subsequent rounds as well. This is a fundamental point of distinction between Parliament regulating receiverships through insolvency law and the provinces regulating secured transactions under *Personal Property Security Act*s (*PPSA*s), for example. Although most provinces have *PPSA*s which are substantially similar, each province had a choice over whether or not to adopt such a statute and whether and how to modify it in light of province-specific policy considerations and constituencies.[79] Since *PPSAs* were enacted (or not) provincially, each province maintains the autonomy to repeal or amend its *PPSA* in the future. Although there may be forum shopping, "competition" between provincial secured transactions regimes is on

77 Ryder, "The Demise and Rise of Federalism", *ibid* note 15 at 313-314, 355-356.

78 Wood, "The Paramountcy Principle", *supra* note 13.

79 Québec did not adopt a PPSA, and relies instead on the *Civil Code of Quebec*, CQLR c CCQ-1991. See discussion in Aline Grenon, "Major Differences between PPSA Legislation and Security over Movables in Quebec under the New Civil Code" (1996) 26 Can Bus LJ 391; Ontario's and Yukon's *PPSA*s were based on a different model than those of the other provinces and territories, and thus these statutes remain somewhat "unharmonized" with other *PPSA*s. There are also a number of more minor differences between provincial *PPSA*s, see discussion in Ronald CC Cumming, Catherine Walsh & Roderick J Wood, *Personal Property Security Law,* 2nd ed (Toronto: Irwin Law, 2012) at 64-70.

a more level playing field because it is between one province and another province, not between a province and Parliament. As a result, a constitutionally valid secured transaction regime is not in danger of being declared inoperable to the extent it differs from that of a neighbouring province. Forum shopping is also curtailed by the fact that the geographic boundaries of a province serve as jurisdictional boundaries as well.

The differences between the *BIA* receivership provisions and the *SFSA* suggest that the law-making forum can significantly affect the substance of receivership law. The *SFSA* was enacted during the farm debt crisis of the 1980s by a Saskatchewan government that was proximate to Prairie farming and sensitive to the concerns of its farmer constituents. On the other hand, the 2009 amendments to the *BIA* do not reflect concern for farmers, nor debtors generally. This suggests that the forum of law-making can be a significant factor in terms of the influence of different interest groups and the relative importance of certain policies in law-making. With the exception of farmers, debtors tend not to be an organized interest group (unlike creditors) and this amplifies the power imbalance between debtors and creditors in terms of law-making and law reform.[80] In political terms, a wider variety of political parties have formed provincial governments, some of which have been especially sensitive to debtor rights.[81] On balance, it appears that debtors' interests and rights are more likely to be taken into account in provincial, as opposed to federal, law-making. Thus, the shift of more *de facto* policy making to Ottawa has the effect of reducing debtors' impact as a constituency as well as narrowing the spectrum of policy choices in a way that also tends to benefit of creditors.

5. Conclusion

Lemare Lake raises important questions about the "purposes" of bankruptcy and insolvency law, and their relationship to judicial interpretations of Parliamentary jurisdiction under section 91(21). Drawing on the history of Canadian bankruptcy and insolvency legislation, this article has offered some

80 See e.g. Iain DC Ramsay, "Interest Groups and the Politics of Consumer Bankruptcy Reform in Canada" (2003) 53 UTLJ 379; Anna Lund, "Engaging Canadians in Commercial Law Reform: Insights and Lessons from the 2014 Industry Canada Consultation on insolvency Legislation" (2016) 58 Can Bus LJ 123.

81 See e.g. New Democratic Party, United Farmers of Alberta, Social Credit, Co-operative Commonwealth Federation, Saskatchewan Party. The Social Credit and the United Farmers of Alberta were especially sensitive to debtor rights. For instance, the United Farmers of Alberta government introduced debt adjustment legislation in the 1920s, which the JCPC later struck down as *ultra vires*: *The Debt Adjustment Act*, SA 1937, c 9; *Re Debt Adjustment Act (Alberta)*, [1943] UKPC 5, [1943] AC 356.

preliminary thoughts as to how temporary legislation and piecemeal reforms in this area of law may have contributed to implicit changes in prevailing views of section 91(21) over time. By situating *Lemare Lake* in historical context, it has shown that this decision rests on an interpretation of section 91(21) vis-à-vis section 92(13), which is broader than the interpretation that prevailed earlier in Canadian history. This case accordingly affirms a significant shift in Canadian understandings of federal bankruptcy and insolvency law relative to provincial jurisdiction over property and civil rights and opens the door to greater exercises of Parliament's section 91(21) jurisdiction in the future.

This shift carries significant ramifications in terms of provincial autonomy and the relative ability of different groups to engage in the law-making process. Like other SCC decisions, *Lemare Lake* is a reflection of the highest court's interpretation of Canadian federalism. Its precedential value, and the reasoning on which it is based, has the potential to impact law-making and adjudication at every level. Based on the Court's analysis and decision in *Lemare Lake*, this article has argued that this decision is likely to serve as a blueprint for federal reforms which will trigger the paramountcy doctrine in a future case, and thereby circumvent provincial receivership regimes which are less "creditor friendly." In effect, this would diminish provincial autonomy over both law and policy concerning "property and civil rights", and lead to the strange result whereby paramountcy is used to protect the rights of secured creditors. The strangeness of this outcome from a constitutional perspective should prompt us to be more critical in scrutinizing novel exercises of federal jurisdiction, particularly under section 91(21), and not allow "pith and substance" to drop out of our constitutional analyses.