The Intersection of Constitutional and Insolvency Law in Canada

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INTRODUCTION

The intersection of Canadian constitutional and insolvency law is not a simple stop-light zone where, on a debtor's insolvency, provincial property and civil rights laws are halted *en masse* and exhaustive federal laws take the road. Many such provincial laws continue to operate through a debtor's bankruptcy or insolvency. Some continue because they have no bearing on debtor-creditor relations, some because they do not conflict with the federal law, and others are expressly adopted by the federal law, to help accomplish its purposes. On the other hand, provincial laws conflicting with the federal insolvency law cease to operate, yielding under the doctrine of paramountcy. Conflict exists where it is impossible to comply with both laws or the provincial law would frustrate the purpose(s) of the federal law[1]. As the Privy Council noted in *Cushing v. Dupuy*:

> It would be impossible to advance a step in the construction of a scheme for the administration of insolvent estates without interfering with and modifying some of the ordinary rights of property, and other civil rights ....[2]

The multi-faceted nature of provincial law in insolvency circumstances – sometimes running in parallel with federal law, sometimes supporting it, and sometimes being upended by it – is reflected in ss. 72(1) of the *Bankruptcy and Insolvency Act*[3]:

> 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 or 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 that law or statute as supplementary to and in addition to the rights and remedies provided by this Act.

The Canadian courts have often had to explore the interplay between federal insolvency and provincial property and civil rights laws. This paper aims to outline the various "points of contact" and what the courts have concluded about the co-existence, or otherwise, of those laws. While some older cases are examined, the focus is largely on current law.

[1] *Alberta (Attorney General) v. Moloney*, 2015 SCC41 (*Moloney*) at paras. 18-29

[2] (1880), 5 App. Cas. 409, per Sir Montague E. Smith

[3] I will refer to the *Bankruptcy and Insolvency Act* and its predecessors as the *BIA*.

POINTS OF CONTACT BETWEEN FEDERAL AND PROVINCIAL LAW

Priorities

One of the most explored points of contact with provincial law is s. 136 *BIA*, which (after confirming the first rank of secured creditors) lists various preferred claims (currently 13 categories), in descending priority. These claims have priority to realizations from the bankrupt's non-exempt property over the claims of unsecured creditors. Crown claims are currently governed by ss. 86 and 87 BIA, which (subject to certain exceptions) deem them to be unsecured. Before 1992, such claims were on the preferred-creditor list, albeit at, or close to, the bottom. Provinces attempted, in various ways, to bolster the priority of provincial Crown and other provincial entities (e.g. workers' compensation boards), including deeming such claims to be secured, hoping to move to the top of the s. 136 ladder.

Another priority-enhancing technique was to deem a trust to protect a provincial claim, seeking refuge in ss. 67(1) *BIA*, which removes property held in trust by the bankrupt from the property made available for creditors.

The Supreme Court of Canada has had many opportunities to gauge whether such attempts were successful. In a series of decisions between 1980 and 1995, known as "the quintet", the Court consistently rejected attempts to improve the priority of the provincial Crown and related entities beyond their ranking under the *BIA*, whether by deeming secured status, deeming a trust, or creating rights against third parties.

Province cannot improve its priority by deeming claim to be privileged: Deputy *Minister of Revenue v. Rainville (a.k.a. Re Bourgault)* [4]

In pursuit of unpaid provincial sales tax, Quebec registered a privilege against the debtor's property. Quebec law provided that the claim was a "privileged debt ranking immediately after law costs." The debtor later became bankrupt, and Quebec claimed secured-creditor status. The Supreme Court (per Pigeon J.) rejected that position on the basis of s. 136's predecessor (s. 107):

> The purpose of [para. 107(1)(j)], which accorded Crown claims tenth position on the priority ladder] 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.[5]

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[4] [1980] 1 S.C.R. 35

[5] *Re Bourgault* at 44