

The Incremental Evolution of National Receivership Law and the Elusive Search for Federal Purpose

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INTRODUCTION

There was a period during which provincial legislation that trespassed too deeply into the federal field of bankruptcy and insolvency law was likely to be declared to be *ultra vires* as an invasion of the exclusive federal power in relation to that field.¹ The five to four split in the 1978 Supreme Court of Canada decision in *Robinson v. Countrywide Factors Ltd.*² was very much a turning point. Thereafter, the constitutionality of provincial legislation was almost invariably determined through the application of the paramountcy principle.³ Pursuant to this principle, a provincial statute is rendered inoperative to the extent that it conflicts with the federal statute. The Supreme Court of Canada has created a two branched test for determining the presence of a conflict. Under the first branch, there is an operational conflict when it is impossible to comply with both the federal and the provincial statute.⁴ Under the second branch, a there is a conflict when the operation of the provincial statute frustrates the purpose of the federal statute.⁵ Either type of conflict will render the provincial statute inoperative.

In November 2015, the Supreme Court of Canada in *Saskatchewan (Attorney General) v Lemare Lake Logging Ltd.*⁶ considered a constitutional challenge to provincial farm protection legislation that imposed significant delay on the enforcement remedies of secured creditors on the ground that it conflicted with federal legislation that empowers a court to appoint a national receiver under the Bankruptcy and Insolvency Act (*BIA*).⁷ The first branch was not engaged since the secured creditor could comply with both laws by waiting the longer period and satisfying the more stringent provisions of the provincial statute. The matter therefore fell to be decided on the basis of the second branch of the paramountcy principle.

¹Reference as to Validity of The Debt Adjustment Act, Alberta, [1942] SCR 315 (provincial debt adjustment legislation found to be *ultra vires*); *Canadian Bankers' Association v Attorney-General of Saskatchewan*, [1956] SCR 315 (provincial moratorium legislation found to be *ultra vires*); *Validity of Orderly Payment of Debts Act (Alta)*, [1960] SCR 571 (provincial orderly payment of debts legislation found to be *ultra vires*).

² [1978] 1 SCR 753 (*Countrywide Factors*).

³ A quintet of Supreme Court of Canada decisions applied the paramountcy principle to resolve conflicts between provincial law and the bankruptcy scheme of distribution followed closely on the heels of *Countrywide Factors*, *ibid*. See *Deputy Minister of Revenue v Rainville*, [1980] 1 SCR 35; *Deloitte Haskins and Sells Ltd v Workers' Compensation Board*, [1985] 1 SCR 785; *Federal Business Development Bank v Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 SCR 1061; *British Columbia v Henfrey Samson Belair Ltd*, [1989] 2 SCR 24; *Husky Oil Operations Ltd v Minister of National Revenue*, [1995] 3 SCR 453.

⁴ *Multiple Access Ltd v McCutcheon*, [1982] 2 SCR 161 at 191.

⁵ *Canadian Western Bank v Alberta*, [2007] 2 SCR 3 at para 73; *Bank of Montreal v Hall*, [1990] 1 SCR 121.

⁶ 2015 SCC 53 ("*Lemare Lake*").

⁷ RSC 1985, c B-3, as amended SC 2005, c 47, s 115; SC 2007, c 36, s 58.

Determining the purpose and objectives has not proven to be a difficult in the case of the long-standing and established federal insolvency systems. For example, the purpose of the bankruptcy system has been described in a series of Supreme Court of Canada decisions.⁸ However, the federal receivership provisions are of a different character. The provisions have been aptly described as “the product of an incremental evolution.”⁹ The search for a federal purpose behind the provisions has proven to be more problematic. The Supreme Court of Canada in *Lemare Lake* has undertaken a search for the purpose behind these provisions. The majority decision has brought into question the relevance of one the fundamental dynamic elements of receivership law, and has cast doubt on whether it should be characterized as a federal insolvency system at all. In this article I will seek to explain how and why this has come to pass.

THE BACKGROUND

3L Cattle Company Ltd. (3L Cattle) had given a security interest to Lemare Lake Logging Ltd. (Lemare Lake) in its land and in its goods other than inventory to secure an obligation. Following a default, Lemare Lake applied to the Saskatchewan Court of Queen’s Bench for the appointment under the *BIA* of a national receiver of the assets of 3L Cattle excluding the livestock. 3L Cattle argued that the court was required to dismiss the application because the procedural requirements of the Saskatchewan Farm Security Act¹⁰ (SFSA) had not been satisfied. Lemare Lake argued that the provisions of the SFSA were inoperative by virtue of the principle of federal paramountcy. The chambers judge held that the provincial statute was not constitutionally inoperative by virtue of the paramountcy principle¹¹, but the Saskatchewan Court of Appeal held that it was inoperative because it frustrated the purpose of the federal legislative provisions.¹² The Saskatchewan Attorney-General was granted leave to appeal to the Supreme Court of Canada and the court appointed the former counsel of Lemare Lake as *amicus curiae* to respond.

The SFSA imposes significant procedural hurdles on a secured creditor who seeks to enforce its security. It prohibits any action against farm land unless a court order is obtained. The creditor cannot apply for the order until after the expiry of 150 days, and a mandatory review and mediation process must be engaged.¹³ A court is required to presume that the farmer is making sincere and

⁸ *Industrial Acceptance Corp v Lalonde*, [1952] 2 SCR 109; *Vachon v. Canada Employment and Immigration Commission*, [1985] 2 SCR 417; *Alberta (Attorney General) v Moloney*, 2015 SCC 51.

⁹ *Lemare Lake*, *supra* note 6 at para 95, per Côté, J.

¹⁰ SS 1988-89, c S-17.1.

¹¹ *Lemare Lake Logging Ltd. v. 3 L Cattle Company Ltd.*, 2013 SKQB 278.

¹² *Lemare Lake Logging Ltd. v. 3L Cattle Company Ltd.*, 2013 SKCA 90.

¹³ *Ibid* s 12.