SASKATCHEWAN LAW REVIEW

Frustrating the Purpose of the Receivership Remedy: Federal Paramountcy in *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*

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In 2015, the Supreme Court of Canada rendered its decision in *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*[1] The majority of the Court held that Part II of *The Saskatchewan Farm Security Act*[2] did not frustrate the purpose of s. 243 of the federal *Bankruptcy and Insolvency Act*.[3] Subsection 243(1) of the *BIA* provides that a court may appoint a national receiver to take control of the assets of an insolvent debtor.[4] Part II of the *SFSA*, by contrast, creates a procedural regime governing secured creditors pursuing actions in respect of farm land. In *Lemare*, a secured creditor brought an application under s. 243(1) to appoint a receiver over a farm debtor's assets. The debtor contested the application, arguing that the creditor must satisfy procedures in the *SFSA*. Answering the paramountcy question raised in the appeal, the majority of the Supreme Court held that the provincial law was constitutionally operative, overruling the Saskatchewan Court of Appeal. As a result, the Supreme Court enabled the *SFSA*'s onerous requirements to substantially delay receivership appointments under the *BIA*, potentially creating unreasonable hurdles for creditors to realize on their security interests.

In rendering its decision, the Supreme Court declined to recognize the timeliness of receivership appointments as a federal purpose of

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1 2015 SCC 53, [2015] 3 SCR 419 [*Lemare*].

2 SS 1988-89, c S-17.1 [*SFSA*].

3 RSC 1985, c B-3 [*BIA*].

4 *Ibid*, s 243(1).

s. 243 of the *BIA*. The Court's decision is commercially unpalatable.[5] The majority's narrow interpretation of the purpose of s. 243 does not accord with the time-sensitive nature of receivership law. I argue the Court's decision can be explained by closely examining two other decisions rendered alongside *Lemare*: *Alberta (Attorney General) v. Moloney*,[6] and *407 ETR Concession Co. v. Canada (Superintendent of Bankruptcy)*.[7] In *Moloney*, the Supreme Court considered the conflict between the discharge provisions of the *BIA* and provisions of Alberta's *Traffic Safety Act*[8] that enabled the suspension of a driver's licence for unsatisfied debts. In *407 ETR*, the Court considered provisions of the Ontario *Highway 407 Act, 1998*[9] that mandated the denial of a vehicle permit to a driver with a toll debt. In holding the provincial laws inoperative, the Court altered the federal paramountcy doctrine by expanding the impossibility of dual compliance branch of the test. This approach allowed the Court to narrow the frustration of federal purpose branch, enabling the majority in *Lemare* to ascribe a narrow purpose to s. 243.

In Part I of this paper, I review the facts of *Moloney*, *407 ETR* and *Lemare*. In Part II, I examine the relevant provisions of the competing legislative regimes at issue in the decisions. In Part III, I review the impossibility of dual compliance and frustration of federal purpose branches of the paramountcy test, noting their differing purposes. In Part IV, I review the decisions of the courts in *Moloney*, *407 ETR* and *Lemare*. In the analysis in Part V, I examine the Supreme Court's approach to the paramountcy doctrine in these decisions, and show that the Court's changes to the paramountcy test are predicated on unsound reasoning. I further show that the expansion of the first branch of the paramountcy test does not compensate for the ground lost by the second branch. The unbalanced shift in the doctrine explains the incongruous holding in *Lemare* that the purpose of s. 243 of the *BIA* does not include the timely appointment of receivers. I conclude by considering the consequences of the majority's approach for the viability of the federal paramountcy doctrine and the *BIA*'s receivership remedy.

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5 See e.g. Michael W Milani, "Corralling the Ability to Appoint National Receivers: A Commentary on *3L Cattle Company*" (2015) 4 J Insolvency Institute Can 101 (in anticipation of the Supreme Court decision); 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; Roderick J Wood, "The Paramountcy Principle in Bankruptcy and Insolvency Law: The Latest Word" (2016) 58:1 Can Bus LJ 27 [Wood, "The Latest Word"].

6 2015 SCC 51, [2015] 3 SCR 327 [*Moloney*].

7 2015 SCC 52, [2015] 3 SCR 397 [*407 ETR*].

8 RSA 2000, c T 6, s 102 [*TSA*].

9 SO 1998, c 28, ss 22(1), (4) [*407 Act*].

I. FACTS

A. *MOLONEY* AND *407 ETR*

The bankrupt in *Moloney* was an uninsured driver that caused a car accident in 1989, injuring another motorist. As a result of the accident, a judgment was obtained against him by the injured driver in the amount of $194,875.[10] The Administrator of the *Motor Vehicle Accident Claims Act*[11] (the "Administrator") attempted to recover the judgment from the uninsured driver. The uninsured driver entered a payment arrangement with the Administrator but failed to pay down the debt.[12] In 2008, the uninsured driver made an assignment in bankruptcy.[13] In 2011, he obtained an absolute discharge. Later in the same year, he received a letter from the Director of Driver Fitness and Monitoring of Alberta Transportation, notifying him that, by application of s. 102(1) of the *TSA*, his operator's licence and vehicle registration privileges were suspended until he paid the outstanding amount of the judgment debt. The letter suggested he make a new arrangement to pay the outstanding debt, otherwise the suspension of his driving privileges would remain in effect.[14] The bankrupt applied to the court for a stay of the order.[15]

The bankrupt in *407 ETR* was a truck driver who incurred a debt of $34,977.06 by driving on a public-private toll highway operated by 407 ETR Concession Company ("407 ETR") under statutory authority granted by the Ontario government.[16] The toll highway was governed by the *407 Act*, which allowed 407 ETR to report the non-payment of a toll debt to the Registrar of Motor Vehicles (the "Registrar").[17] The Registrar was mandated to refuse to issue a vehicle permit to the debtor.[18] Unable to pay the toll debt, the debtor made an assignment into bankruptcy, eventually receiving a conditional discharge.[19] The debtor retrained as an automotive salesperson, but he was denied a permit by the Ministry of Transportation on the basis of the unpaid toll debt.[20] The debtor subsequently received an absolute discharge.[21]

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10 *Moloney*, *supra* note 6 at para 4.
11 RSA 2000, c M-22 [*Motor Vehicle Act*].
12 *Moloney v Alberta (Administrator, Motor Vehicle Accident Claims Act)*, 2014 ABCA 68 at para 3, 370 DLR (4th) 267 [*Moloney* CA].
13 *Moloney*, *supra* note 6 at para 4.
14 *Ibid* at para 5.
15 *Ibid* at para 6.
16 *407 ETR*, *supra* note 7 at paras 3, 7.
17 *407 Act*, *supra* note 9, s 22(1); *407 ETR*, *ibid* at para 3.
18 *Canada (Superintendent of Bankruptcy) v 407 ETR Concession Company Limited*, 2013 ONCA 769 at para 24, (*sub nom Moore, Re*) 369 DLR (4th) 385 [*407 ETR* CA].
19 *407 ETR*, *supra* note 7 at para 8.
20 *407 ETR* CA, *supra* note 18 at paras 8-9.
21 *Ibid* at para 10.

The debtor applied for, and was granted, an order from the Registrar in Bankruptcy releasing his toll debt, and requiring the Registrar to issue him a vehicle permit.[22]

B. *LEMARE*

Conventionally, a receiver is appointed to allow a secured creditor, typically a financial institution, to realize on its security interest where a debtor defaults on its payments.[23] The situation in *Lemare* was very different. The debtor and the secured creditor were corporations owned by members of the same family, and the security interest held by one corporation took the form of an indemnification of a loan obtained from a financial institution by the other corporation.[24]

Lemare Lake Logging ("Lemare Lake"), a forestry company in British Columbia, was granted a $10 million loan by Concentra Financial Services Association ("Concentra") to finance a trust account created for the benefit of the owner of Lemare Lake.[25] The loan was indemnified by 3L Cattle Company Ltd. ("3L Cattle"), a cattle operation in Saskatchewan, which later assumed the primary obligation to repay the loan.[26] As security for its obligation to repay the Concentra loan, 3L Cattle granted Lemare Lake a mortgage in respect of its interest in 120 parcels of land in Saskatchewan and a security interest in its personal property, excluding its cattle inventory.[27] The loan to Concentra matured and became due and payable. 3L Cattle failed to repay the loan, and Concentra served notice of default.[28] Its failure to repay Concentra meant 3L Cattle defaulted on its agreement with Lemare Lake. Lemare Lake served 3L Cattle with a demand to make good on its indemnity.[29] At the same time, Lemare Lake sought protection under the *Companies' Creditors Arrangement Act*[30] because of a dispute with the British Columbia government.[31] To exit CCAA protection, Lemare Lake sought to enforce its security against the assets of 3L Cattle.[32]

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22 *Ibid* at para 11.
23 *Lemare Lake Logging Ltd. v 3L Cattle Co.*, 2013 SKQB 278 at para 3, [2013] 12 WWR 176 [*Lemare* QB].
24 *Ibid* at para 4.
25 *Lemare Lake Logging Ltd. v 3L Cattle Co.*, 2014 SKCA 35 at paras 6-8, 371 DLR (4th) 663 [*Lemare* CA].
26 *Ibid* at paras 11-12.
27 *Ibid* at para 13.
28 *Ibid* at para 14.
29 *Ibid*.
30 RSC 1985, c C-36 [*CCAA*].
31 Lemare Lake owed its creditors approximately $34.8 million. The Concentra loan comprised $10 million of the total amount (*Lemare* CA, *supra* note 25 at para 16).
32 *Lemare* CA, *ibid* at paras 16-17.

II. COMPETING LEGISLATIVE REGIMES

A. *MOLONEY* AND *407 ETR*

The courts in *Moloney* and *407 ETR* considered the interaction of the provincial licensing regimes—provisions of the Alberta *TSA* and the Ontario *407 Act*, respectively—and the discharge provisions under s. 178 of the *BIA*.

1. Section 178 of the *BIA*

Where an individual makes an assignment in bankruptcy, the individual turns over most of his or her assets to a licensed trustee in bankruptcy.[33] The trustee sells the property and liquidates investments to realize value from the bankrupt's assets. The proceeds of the sale are then distributed to the creditors.[34] At the conclusion of this process, s. 178(2) of the *BIA* provides for a discharge order, which ordinarily releases a bankrupt from all claims provable in bankruptcy.[35] This does not extinguish claims that are provable in bankruptcy, but releases the debtor from an obligation to repay the debts.[36] Subsection 178(1) provides a list of claims that are not released by a bankruptcy discharge.[37] These exemptions are meant to recognize instances where the fresh start policy of bankruptcy law must yield to overriding policy objectives that require certain claims to be protected against the discharge.[38] Neither the provisions of the *TSA* nor the *407 Act* are listed among the recognized exceptions to the discharge in s. 178(1).[39]

2. Section 102 of the Alberta *TSA*

Where a licence-holder fails to satisfy a judgment for damages arising out of a motor vehicle accident, s. 102(1) of the *TSA* provides that the Administrator may disqualify that person from driving a motor vehicle in the province and suspend the registration of any motor vehicle registered in that person's name.[40] The suspension remains in place until the judgment is satisfied or discharged, "otherwise than by a discharge in bankruptcy," to the extent of the mandatory

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33 *BIA*, *supra* note 3, s 71.
34 *Ibid*, ss 136-54.
35 *Ibid*, s 178(2).
36 See e.g. *Schreyer v Schreyer*, 2011 SCC 35 at para 21, [2011] 2 SCR 605.
37 *BIA*, *supra* note 3, s 178(1).
38 See Roderick J Wood, *Bankruptcy & Insolvency Law*, 2nd ed (Toronto: Irwin Law, 2015) at 312-13 [Wood, *Bankruptcy & Insolvency Law*]. This list has not changed substantially since 1919 (see Stephanie Ben-Ishai, "Discharge" in Stephanie Ben-Ishai & Anthony Duggan, eds, *Canadian Bankruptcy & Insolvency Law: Bill C-55, Statute c.47 and Beyond* (Markham: LexisNexis Canada, 2007) 357 at 360).
39 *Moloney*, *supra* note 6 at para 79; *407 ETR*, *supra* note 7 at para 24.
40 *TSA*, *supra* note 8, s 102(1).

minimum insurance required at the time of the accident.[41] In the Administrator's view, pursuant to s. 102(2), a judgment debtor "remain[s] indebted" despite receiving a discharge in bankruptcy, and the suspension remains in place.[42] A judgment debtor is entitled to apply for the "privilege" of paying the debt in instalments, in which case the driver's licence can be restored.[43] Driving while suspended also risks penalties under the *TSA*, including fines and, in default of payment, terms of imprisonment.[44]

3. The Ontario *407 Act*

The *407 Act* enables 407 ETR, the owner and operator of Highway 407, to collect and enforce payments of highway tolls.[45] Highway 407's use by motorists is unrestricted.[46] An electronic system reads licence plates of vehicles entering and exiting the highway.[47] A toll amount is calculated and an invoice is delivered to the registrant of the vehicle.[48] The toll debt is payable on the day the invoice is sent.[49] If the toll debt is not paid within thirty-five days, 407 ETR may send the debtor a notice of failure to pay.[50] If the debt is not paid within ninety days of receiving the notice, 407 ETR may send notice of failure to pay to the debtor and the Registrar of Motor Vehicles.[51] Once the Registrar is notified of a failure to pay, the Registrar is required to refuse to validate the debtor's vehicle permit and may not issue any other vehicle permit to the debtor.[52] Once the debtor has satisfied the debt, 407 ETR must notify the Registrar, and the Registrar must validate and issue the vehicle permit.[53]

B. *LEMARE*

The courts in *Lemare* considered whether the procedural and substantive regime governing actions in respect of farm land under Part II of the *SFSA* inappropriately interfered with the right of secured creditors to realize on a farm debtor's assets by appointing a receiver under s. 243 of the *BIA*.

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41 *Ibid*, s 102(2). The primary issue in *Moloney* was whether an act of bankruptcy constituted a discharge of the obligation to repay the debt under the *TSA*.
42 *Moloney* CA, *supra* note 12 at para 6.
43 *TSA*, *supra* note 8, s 103.
44 *Moloney* CA, *supra* note 12 at para 5.
45 *407 Act*, *supra* note 9, ss 1, 14(1).
46 *407 ETR*, *supra* note 7 at para 3.
47 *Ibid*.
48 *Ibid*.
49 *407 Act*, *supra* note 9, s 15(1).
50 *Ibid*, s 16(1).
51 *Ibid*, ss 22(1)-(3). See also *ibid*, s 16(2)(d).
52 *Ibid*, s 22(4).
53 *Ibid*, s 22(7).

1. Section 243 of the *BIA*

The *BIA* confers discretionary authority on a court to appoint a national receiver over the assets of an insolvent debtor.[54] Section 243 developed out of the pre-2009 interim receiver provisions under s. 47 of the *BIA*.[55] At that time, interim receivers were being used broadly (and effectively) to manage receiverships.[56] The national receiver "grew out of uncertainties rooted in…broad interpretations of the interim receiver provisions."[57] With the 2009 amendments to the *BIA*,[58] the role of the interim receiver was returned to an *interim* status, and the national receiver was created.[59] Where the court deems it "just or convenient," the national receiver may take possession of, and exercise control over, the property of the insolvent person used in relation to the business, or take any other action that the court considers advisable.[60] A secured creditor seeking to enforce a security interest on substantially all of the insolvent debtor's property must give notice to the insolvent debtor.[61] The court may not appoint a receiver before the expiry of a ten-day notice period, unless the

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54 *BIA*, *supra* note 3, s 243(1). Contrast the national receivership remedy with the appointment of receivers under Saskatchewan law. See Ronald CC Cuming, *Overview of Saskatchewan Real Property Law* (Regina: Office of the Queen's Printer, 2016) at §11.13.

55 *BIA*, *ibid*, s 47.

56 *Railside Developments Ltd. (Re)*, 2010 NSSC 13, 286 NSR (2d) 285 [*Railside Developments*]. See also Paul Macdonald & Brett Harrison, "Receivership Orders: Where Do We Go From Here?" (2001) 21 Nat'l Insol Rev 65; Kevin P McElcheran, *Commercial Insolvency in Canada*, 3rd ed (Toronto: LexisNexis Canada, 2015) at 189; Robert I Thornton & Gregory R Azeff, "The Interim Receiver under Section 47 of the *Bankruptcy and Insolvency Act* (Canada)" (Paper delivered at the Insolvency Institute of Canada, 13th Annual Conference, Victoria, British Columbia, 24-27 October 2002) [unpublished], online: <http://www.tgflegal.com/Libraries/Publications/The_Interim_Receiver_Under_Section_47_Of_The_Bankrupcty_and_Insolvency_Act_Canada.sflb.ashx>, archived: <https://perma.cc/DT8E-LH5H>.

57 *Lemare* CA, *supra* note 25 at para 47.

58 The 2009 amendments to the *BIA* are the combined result of the coming into force of two pieces of legislation: *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts* (SC 2005, c 47) and *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada* (SC 2007, c 36).

59 See e.g. McElcheran, *supra* note 56 at 188-89.

60 *BIA*, *supra* note 3, s 243(1). The language of "any other action that the court considers advisable" allows the court to make the same broad orders that it formerly made in respect of interim receivers (Wood, *Bankruptcy & Insolvency Law*, *supra* note 38 at 510).

61 *BIA*, *ibid*, s 244(1).

debtor consents to an earlier enforcement or the court considers it appropriate to act sooner.[62]

2. Part II of the *SFSA*

The *SFSA* protects farm debtors by imposing hurdles that secured creditors must clear before commencing an action respecting a mortgage on farm land.[63] According to Part II of the *SFSA*, the secured creditor must serve notice of an intention to realize on the security under provisions of the *Farm Debt Mediation Act*;[64] serve notice of an intention to commence a foreclosure action on the farmer and the Farm Land Security Board; participate in a mandatory (non-binding) mediation process;[65] and, if the collateral subject to the enforcement is all or substantially all of the debtor's inventory, accounts receivable or other property, serve notice under the *BIA*.[66] After serving notice under the *SFSA* and completing mediation, the creditor must wait for the expiry of a 150-day moratorium before seeking an order permitting the commencement of a foreclosure action.[67] In order to allow the action, the court must be satisfied that the farmer "has [no] reasonable possibility" of meeting the obligation, or is not making a "sincere and reasonable effort" to meet it.[68] In sum, Part II of the *SFSA* operates to protect farm debtors by substantially interfering with the rights of creditors to realize on the debtors' assets.[69]

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62 *Ibid*, s 243(1.1). If a secured creditor is concerned that the debtor may dissipate the collateral during the ten-day period, the secured creditor may seek the appointment of an interim receiver under s. 47 of the *BIA*.

63 *SFSA*, *supra* note 2, s 4. The *SFSA* defines an "action" as a court action by a mortgagee including foreclosure of the equity of redemption, the sale or possession of the mortgage farm land, or recovery of any money payable under a mortgage (*ibid*, s 3(a)). The requirements of Part II of the *SFSA* are given binding effect by s. 132 of *The Land Titles Act, 2000* (SS 2000, c L-5.1 [*LTA*]). Although s. 132 of the *LTA* contains permissive language, such that proceedings "may be brought in the court," the case law has established that proceedings must be brought to a court (see *Smith v National Trust Co.* (1912), 45 SCR 618, 1 DLR 698).

64 SC 1997 c 21, s 21 [*FDMA*].

65 *SFSA*, *supra* note 2, ss 12(5)-(10). See also *ibid*, s 9.

66 *BIA*, *supra* note 3, s 244.

67 *SFSA*, *supra* note 2, s 12(1).

68 *Ibid*, s 13.

69 It is the *SFSA*'s express purpose to protect farmer debtors at the expense of the rights of creditors. The legislation was enacted to respond to the risk of farmers losing their land due to loan defaults. See Donald H Layh, *A Legacy of Protection*: The Saskatchewan Farm Security Act: *History, Commentary & Case Law* (Langenburg: Twin Valley Books, 2009) at 54-57 (now the Honourable Justice Donald H. Layh of the Saskatchewan Court of Queen's Bench).

III. THE DOCTRINE OF FEDERAL PARAMOUNTCY

The doctrine of federal paramountcy holds that where conflicts arise between valid federal and provincial legislation, the federal law is paramount and the provincial law is inoperative to the extent of its inconsistency.[70] The opposing statutes must be within the jurisdiction of their enacting bodies, as set out under ss. 91 and 92 of the *Constitution Act, 1867*.[71] The doctrine applies where a province has legislated pursuant to its ancillary power to intrude on an area of federal jurisdiction or where Parliament legislates pursuant to its ancillary powers to intrude on an area of provincial jurisdiction.[72] Federal paramountcy recognizes that, in pursuing valid objectives, federal and provincial laws "will impact occasionally on the sphere of power of the other level of government."[73] The paramountcy test decides whether the intruding provincial law will yield to its federal counterpart. The test comprises two branches. The first branch asks whether it is impossible to simultaneously comply with the federal and provincial laws.[74] Where dual compliance is possible, the second branch asks whether the federal law's broader purpose is frustrated by the operation of the provincial law.[75]

A. IMPOSSIBILITY OF DUAL COMPLIANCE

The first branch of the paramountcy test—the impossibility of dual compliance branch—asks whether there is an operational conflict or

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70 See e.g. *Rothmans, Benson & Hedges Inc. v Saskatchewan*, 2005 SCC 13 at para 11, [2005] 1 SCR 188 [*Rothmans*]; *Canadian Western Bank v Alberta*, 2007 SCC 22 at para 69, [2007] 2 SCR 3 [*Canadian Western Bank*]; *Quebec (Attorney General) v Canadian Owners and Pilots Association*, 2010 SCC 39 at paras 62-66, [2010] 2 SCR 536 [*COPA*]; *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 at para 71, [2011] 3 SCR 134 [*PHS*]. See also Peter W Hogg, *Constitutional Law of Canada*, 5th ed, vol 1 (Toronto: Thomson Carswell, 2007) at 483-85 [Hogg, *Constitutional Law*].

71 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.

72 *Canadian Western Bank*, *supra* note 70 at para 69.

73 *Husky Oil Operations Ltd. v Minister of National Revenue*, [1995] 3 SCR 453 at para 121, 128 DLR (4th) 1 [*Husky Oil*], quoting *General Motors of Canada Ltd. v City National Leasing*, [1989] 1 SCR 641 at 669, 58 DLR (4th) 255. This view dispenses with prior jurisprudence holding that the federal legislation could "occupy the field," denying any place for the province to legislate (see generally Hogg, *Constitutional Law*, *supra* note 70 at 491-96).

74 *M & D Farm Ltd. v Manitoba Agricultural Credit Corp.*, [1999] 2 SCR 961 at para 41, 176 DLR (4th) 585 [*M & D Farm*], quoting Peter W Hogg, *Constitutional Law of Canada*, 4th ed (Toronto: Carswell, 1997) at 428-29 [Hogg, *Constitutional Law*, 4th ed].

75 See e.g. *Multiple Access Ltd. v McCutcheon*, [1982] 2 SCR 161, 138 DLR (3d) 1 [*Multiple Access* cited to SCR]; *Bank of Montreal v Hall*, [1990] 1 SCR 121, 65 DLR (4th) 361 [*Bank of Montreal* cited to SCR]; *Law Society of British Columbia v Mangat*, 2001 SCC 67, [2001] 3 SCR 113 [*Mangat*].

inconsistency between competing, but validly enacted, federal and provincial legislation.[76] An operational conflict exists where it is impossible to comply simultaneously with the provincial and federal laws.[77] This branch was first articulated in *Smith v. The Queen*.[78] In *Smith*, the Supreme Court was asked whether the provincial securities law offence of furnishing false information in a prospectus under s. 63 of *The Securities Act*[79] conflicted with the comparable federal offence under s. 343 of the *Criminal Code*.[80] Rendering one of two concurring opinions of the Court, Justice Martland set out to define the scope of an operational conflict:

> The fact that both provisions prohibit certain acts with penal consequences does not constitute a conflict. It may happen that some acts might be punishable under both provisions and [it is] in this sense that these provisions overlap. However, even in such cases, there is no conflict in the sense that compliance with one law involves breach of the other. It would appear, therefore, that they can operate concurrently.[81]

Under Martland J.'s articulation, only an "express contradiction" would amount to an impossibility of dual compliance and trigger federal paramountcy.[82] Recognizing it was possible to comply simultaneously with both laws, the majority of the Court found that there was no operational conflict between the statutes.[83]

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76 The validity test concerns the "pith and substance" of the laws. See e.g. *Canadian Western Bank*, *supra* note 70 at para 27; *Reference re* Firearms Act *(Can.)*, 2000 SCC 31 at para 16, [2000] 1 SCR 783.

77 *Smith v The Queen*, [1960] SCR 776, 25 DLR (2d) 225 [*Smith* cited to SCR]; *M & D Farm*, *supra* note 74 at para 41, quoting Hogg, *Constitutional Law*, 4th ed, *supra* note 74 at 428-29.

78 *Smith*, *ibid* at 800. See also *O'Grady v Sparling*, [1960] SCR 804, 25 DLR (2d) 145; *Mann v The Queen*, [1966] SCR 238, 56 DLR (2d) 1; *Ross v Registrar of Motor Vehicles*, [1975] 1 SCR 5, 42 DLR (3d) 68. Legal scholars have traced deeper roots of the express contradiction test (see e.g. Bora Laskin, "Occupying the Field: Paramountcy in Penal Legislation" (1963) 41:2 Can Bar Rev 234 at 238, 243; WR Lederman, "The Concurrent Operation of Federal and Provincial Laws in Canada" (1963) 9:3 McGill LJ 185 at 190-91).

79 RSO 1950, c 351.

80 SC 1953-54, c 51.

81 *Smith*, *supra* note 77 at 800.

82 Peter W Hogg, "Paramountcy and Tobacco" (2006), 34 SCLR (2d) 335 at 337 [Hogg, "Paramountcy and Tobacco"]. The test from *Multiple Access* was described as the "express contradiction test" by L'Heureux-Dubé J. for the majority of the Supreme Court in *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)* (2001 SCC 40 at para 34, [2001] 2 SCR 241 [*Spraytech*]).

83 *Smith*, *supra* note 77 at 782, 801.

Martland J.'s conception of impossibility of dual compliance was adopted in *Multiple Access Ltd. v. McCutcheon*.[84] It remains the preeminent decision on the first branch of the paramountcy test. In that case, shareholders of Multiple Access Limited pursued an action against McCutcheon, the president and director of the corporation, for alleged insider-trading activities.[85] The Supreme Court was asked to determine whether the insider-trading provisions of *The Securities Act*[86] of Ontario were in conflict with comparable insider-trading provisions of the *Canada Corporations Act*.[87] The provincial regime made unscrupulous insiders who benefitted from confidential information liable to the corporation, and allowed recovery by the shareholders.[88] The federal regime created the same liability and remedy.[89] Writing for the majority of the Court, Justice Dickson began his paramountcy analysis by reasoning that "[i]n 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."[90] Deciding the matter before him, Dickson J. held that there was "no true repugnancy" between the federal and provincial laws, and that "the legislative purpose of Parliament [was] fulfilled regardless of which statute [was] invoked by a remedy-seeker."[91] He concluded that the *Ontario Securities Act* was operative.[92]

There are few examples of operational conflicts under the first branch of the paramountcy test.[93] It is rare to find laws that expressly contradict each other because even the possibility of superficial dual compliance rules out a finding of an operational conflict.[94] In support of co-operative federalism, where it is possible to interpret the laws as operating harmoniously, courts tend to do so.[95]

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84 *Supra* note 75.
85 *Ibid* at 169.
86 RSO 1970, c 426 [*Ontario Securities Act*].
87 RSC 1970, c C-32, as amended by RSC 1970, c 10 (1st Supp).
88 *Ontario Securities Act*, *supra* note 86, ss 113, 114.
89 *Canada Corporations Act*, *supra* note 87, ss 100.4, 100.5.
90 *Multiple Access*, *supra* note 75 at 191.
91 *Ibid* at 190. Although Dickson J. speaks of the legislative purpose of Parliament, his words should not be construed as referring to the frustration of federal purpose branch of the paramountcy test. At the time that *Multiple Access* was decided, the Supreme Court had not contemplated the frustration of federal purpose branch of the test.
92 *Ibid* at 190-91.
93 Hogg, "Paramountcy and Tobacco", *supra* note 82 ("cases where the provincial law expressly contradicts the federal law are few and far between" at 338).
94 See e.g. *Mangat*, *supra* note 75 at para 72. See also *Moloney*, *supra* note 6 at para 109, Côté J, dissenting.
95 See e.g. *Marine Services International Ltd. v Ryan Estate*, 2013 SCC 44 at paras 71-83, [2013] 3 SCR 53 [*Ryan Estate*]; *Husky Oil*, *supra* note 73 at para 120, Iacobucci J, dissenting.

B. FRUSTRATION OF FEDERAL PURPOSE

As Multiple Access demonstrates, a provincial law is not rendered inoperative merely because it duplicates a federal law.[96] The "resulting 'untidiness' or 'diseconomy'" of provincial duplications of federal laws is the price of a co-operative federal system that grants autonomy to the provinces.[97] There must be what amounts to an express contradiction that makes dual compliance impossible. Anything less will not offend the first branch of the paramountcy test. However, even where it creates no express contradiction, the imposition of a provincial statute may still be "incompatible with the purpose of a federal law."[98] This broader conflict is contemplated by the second branch of the paramountcy test. Where the operation of a provincial law frustrates the purpose of a federal law, the federal law prevails and the provincial law is rendered inoperative to the extent of the inconsistency.[99] The provincial law is rendered inoperative, even if superficial dual compliance is possible under the first branch of the test.[100] In sum, the court must consider "the compatibility of the provincial law with the literal requirements of the federal law [under the first branch], but also the compatibility of the provincial law with the purpose of the federal law [under the second branch]."[101]

Bank of Montreal v. Hall[102] is the first Supreme Court decision to contemplate the frustration of federal purpose as a second branch of the paramountcy test.[103] In *Bank of Montreal*, a Saskatchewan farmer contracted loans from the Bank of Montreal in exchange for mortgages on his real property and a security interest on his personal property in favour of the bank.[104] When the farmer defaulted, the bank seized the personal property and commenced foreclosure proceedings under the *Bank Act*.[105] The farmer defended against the seizure of the personal property by asserting that the bank failed to serve notice under Saskatchewan's *The Limitation of Civil Rights*

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96 *Supra* note 75 at 185-91.

97 *Ibid* at 190. Hogg frames the duplication as "untidy, wasteful and confusing" (*Constitutional Law*, *supra* note 70 at 498). See also Lederman, *supra* note 78 at 199, n 39.

98 *Canadian Western Bank*, *supra* note 70 at para 73.

99 See e.g. *Bank of Montreal*, *supra* note 75; *Mangat*, *supra* note 75; *Rothmans*, *supra* note 70; *M & D Farm*, *supra* note 74; *Canadian Western Bank*, *ibid* at para 69.

100 *Mangat*, *ibid* at para 72. The second branch of the paramountcy test exists separately from the first branch of the test. Where superficial compliance under the first branch is possible, the provincial law may still frustrate the purpose of the federal law.

101 Hogg, *Constitutional Law*, *supra* note 70 at 496.

102 *Supra* note 75.

103 See Hogg, *Constitutional Law*, *supra* note 70 at 488.

104 *Bank of Montreal*, *supra* note 75 at 126-27.

105 RSC 1985, c B-1, ss 178, 179.

Act.[106] In considering the paramountcy question, Justice La Forest recognized that "the bank might very well be able to realize on its security if it defers to the provisions of the provincial legislation."[107] However, the Court still held that the provincial law was inoperative.[108] La Forest J. explained:

> A showing that conflict can be avoided if a provincial Act is followed to the exclusion of a federal Act can hardly be determinative of the question whether the provincial and federal acts are in conflict, and, hence, repugnant…The focus of the inquiry, rather, must be on the broader question whether operation of the provincial Act is compatible with the federal legislative purpose. Absent this compatibility, dual compliance is impossible.[109]

The provincial regime prescribed the procedure, and terms and conditions under which a creditor could seize property.[110] By contrast, the *Bank Act* granted creditors an immediate right of seizure.[111] Accordingly, La Forest J. held there was an "'actual conflict in operation'…in the sense that the legislative purpose of Parliament [was] displaced" by the provincial law.[112]

Although La Forest J.'s language of "actual conflict in operation" accords with the impossibility of dual compliance branch of the paramountcy test from *Multiple Access*, his reasons in *Bank of Montreal* have been recognized as prototypically describing the frustration of federal purpose branch of the test.[113] This interpretation was adopted in *Law Society of British Columbia v. Mangat*.[114] In *Mangat*, the Supreme Court examined the conflict between provincial legislation that prohibited non-lawyers from appearing for a fee before a tribunal and federal legislation that authorized such appearances.[115] Justice Gonthier recognized that "a person who seeks to comply with both enactments can succeed either by becoming a member in good standing of the Law Society of British Columbia or by not charging a

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106 RSS 1978, c L-16, s 21.
107 *Bank of Montreal*, *supra* note 75 at 155.
108 This decision came as some surprise because it upset law that appeared to be settled by *Multiple Access* (see Hogg, "Paramountcy and Tobacco", *supra* note 82 at 339).
109 *Bank of Montreal*, *supra* note 75 at 155.
110 *Ibid* at 152.
111 *Ibid*.
112 *Ibid* at 151-52.
113 *Ibid* at 152-53. See also Hogg, *Constitutional Law*, *supra* note 70 at 489.
114 *Supra* note 75.
115 *Ibid* at paras 71-73. See also Hogg, *Constitutional Law*, *supra* note 70 at 489.

fee."[116] However, he noted that in *Bank of Montreal* "[t]he Court put a gloss…on the argument that compliance with both laws was possible by obeying the stricter one."[117] Gonthier J. concluded that the provincial law frustrated the federal purpose by complicating the "informal, accessible…and expeditious process" envisaged by Parliament in enacting the federal law.[118]

In decisions after *Mangat*, the Supreme Court has restrained its application of the second branch of the paramountcy test.[119] To harmonize federal and provincial legislation, the Court generally prefers narrow interpretations of the purposes of federal laws.[120] Where a provincial law restricts the ambit of a permissive federal regime, the federal legislative purpose will generally not be frustrated by the encroaching provincial law.[121] Relaxing the second branch of the test to allow the concurrent operation of provincial laws reflects the Supreme Court's support of co-operative federalism. The Court affirmed its support for the concurrent operation of federal and provincial laws when, in *Canadian Western Bank v. Alberta*,[122] it decided to limit the operation of interjurisdictional immunity.[123] The Court's decision to recognize the doctrine's reciprocal application to protect the core of provincial powers reinforces the notion of a balanced approach to co-operative federalism.[124] Ultimately, the desire to encourage provincial participation may lead to the recognition of a doctrine of provincial paramountcy.[125]

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116 *Mangat*, *supra* note 75 at para 72.

117 *Ibid* at para 70.

118 *Ibid* at para 72.

119 See e.g. *Canadian Western Bank*, *supra* note 70 at para 72; *British Columbia (Attorney General) v Lafarge Canada Inc.*, 2007 SCC 23 at para 86, [2007] 2 SCR 86 [*Lafarge*]; *COPA*, *supra* note 70 at para 66; *Ryan Estate*, *supra* note 95 at para 69; *Bank of Montreal v Marcotte*, 2014 SCC 55 at para 72, [2014] 2 SCR 725 [*Marcotte*].

120 *Lemare*, *supra* note 1 at para 20, citing *Canadian Western Bank*, *ibid* at para 74. See also comments on federal paramountcy and the regulation of securities markets in Anita Indira Anand & Peter Charles Klein, "Inefficiency and Path Dependency in Canada's Securities Regulatory System: Towards a Reform Agenda" (2005) 42:1 Can Bus LJ 41 at 57.

121 *COPA*, *supra* note 70 at para 66.

122 *Supra* note 70.

123 *Ibid* at paras 33-34. For applications, see e.g. *Quebec (Attorney General) v Lacombe*, 2010 SCC 38 at para 106, [2010] 2 SCR 453, Deschamps J, dissenting [*Lacombe*]; *COPA*, *supra* note 70 at para 58; *PHS*, *supra* note 70 at para 65; *Ryan Estate*, *supra* note 95 at para 50.

124 Michelle Biddulph, "Shifting the Tide of Canadian Federalism: The Operation of Provincial Interjurisdictional Immunity in the Post-*Canadian Western Bank Era*" (2014) 77:1 Sask L Rev 45 at 65.

125 Dwight Newman, "Canada's Re-emerging Division of Powers and the Unrealized Force of Reciprocal Interjurisdictional Immunity" (2011) 20:1 Constitutional Forum 1 at 5.

IV. DECISIONS OF THE COURTS

A. *MOLONEY* AND *407 ETR*

1. The Lower Courts

The lower courts in *Moloney* and *407 ETR* applied the doctrine of federal paramountcy, and for varying reasons held that the provincial regimes were inoperative to the extent that they were inconsistent with discharge provisions of the *BIA*.

At the Alberta Court of Queen's Bench, Justice Moen found an operational conflict between the *TSA* and the *BIA* to the extent that the provincial government used its power to suspend driver's licences as a method of collecting a debt that was discharged in bankruptcy.[126] The trial judge held that the *TSA* was "a colourable attempt to circumvent the provisions of the *BIA*."[127] She further held that the *TSA*'s attempt to deny the effect of a discharge "offends the powers of Parliament."[128] The provincial legislation was declared inoperative.[129] The decision of the Alberta Court of Queen's Bench was affirmed by the Alberta Court of Appeal.[130] Justice Slatter for the Court held that imposing the payment of pre-discharge obligations on a debtor frustrated the rehabilitative purpose of the *BIA*.[131] He also held that the *TSA* disrupted the equitable distribution of the bankrupt's property to creditors, which was "inconsistent with the overall objective of the [*BIA*] to treat all creditors of the same class equally."[132]

The Attorney General sought and was granted leave to appeal the decision to the Supreme Court.[133]

The procedural history of *407 ETR* is more complicated. 407 ETR attempted to set aside the order of the Registrar in Bankruptcy by seeking relief from a motions judge.[134] The debtor brought an amended motion seeking to be released from the toll debt and granted a licence.[135] The motions judge granted relief to 407 ETR by setting aside the order of the Registrar in Bankruptcy.[136] In reaching his decision, the motions judge completed only the first branch of the paramountcy analysis, and found the provincial legislation was operative.[137] The

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126 *Moloney v Alberta (Administrator of the Motor Vehicle Accident Claims Act)*, 2012 ABQB 644 at paras 46-48, 73 Alta LR (5th) 44 [*Moloney* QB].
127 *Ibid* at para 45.
128 *Ibid* at para 46.
129 *Ibid* at para 49.
130 *Moloney* CA, *supra* note 12.
131 *Ibid* at para 42.
132 *Ibid* at para 50.
133 *Ibid*, leave to appeal to SCC granted, 35820 (12 June 2014).
134 *407 ETR* CA, *supra* note 18 at para 12.
135 *Ibid*.
136 *Ibid* at para 13.
137 *Ibid*.

debtor subsequently settled with 407 ETR.[138] However, the Superintendent of Bankruptcy was concerned about the correctness of the motions judge's decision, and sought leave to appeal the order.[139] Leave to appeal was granted by the Ontario Court of Appeal.[140] Justice Pepall for the Court of Appeal held that the provincial law frustrated the rehabilitative purpose of the *BIA* by "permitting a creditor to insist on payment of pre-bankruptcy indebtedness after a bankruptcy discharge."[141] She granted an order releasing the debtor from his debt to 407 ETR, and directed the Ministry of Transportation to issue a licence to the debtor.[142]

407 ETR sought and was granted leave to appeal to the Supreme Court.[143]

2. The Supreme Court

The Supreme Court released its reasons in *Moloney* and *407 ETR* (and *Lemare*) on November 13, 2015.

In *Moloney*, Justice Gascon, for the majority, determined that s. 178(2) of the *BIA* released the debtor from all claims provable in bankruptcy, which prevented creditors from enforcing a claim provable in bankruptcy.[144] By contrast, he found that s. 102(1) of the *TSA* empowered the province to withhold driving privileges until the judgment was satisfied or discharged, even where the debtor was discharged in bankruptcy.[145] He rejected the view that a debtor could avoid the conflict by either opting not to drive or voluntarily paying the discharged debt.[146] He concluded that the operation of both laws created a "true incompatibility."[147] Although he found an express contradiction, Gascon J. also agreed with the Court of Appeal that the *TSA* frustrated the rehabilitative purpose of the *BIA*.[148] However, Gascon J. held that the *BIA*'s broader purpose of equitable distribution of a bankrupt's assets was not expressed by s. 178, and, therefore, not frustrated by the *TSA*.[149] As a result of his conclusion that the *TSA* was operationally in conflict with s. 178 and frustrated its rehabilitative purpose, Gascon J. held that s. 102 of the *TSA* was inoperative.[150]

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138 *Ibid* at para 14.
139 *Ibid*.
140 *Ibid* at para 15.
141 *Ibid* at paras 99, 115-16.
142 *Ibid* at para 118.
143 *Ibid*, leave to appeal to SCC granted, 35696 (8 May 2014).
144 *Moloney*, *supra* note 6 at para 61.
145 *Ibid* at para 62.
146 *Ibid* at para 60.
147 *Ibid* at para 63.
148 *Ibid* at para 77.
149 *Ibid* at para 89.
150 *Ibid* at para 90.

Justice Côté (with Chief Justice McLachlin concurring) wrote the dissenting opinion. Côté J. agreed that the *TSA* frustrated the purpose of the *BIA* under the second branch of the paramountcy test, but disagreed that there was an operational conflict under the first branch of the test.[151]

The Supreme Court rendered significantly shorter reasons in *407 ETR*. Gascon J. again wrote the majority opinion, relying on his analysis of the paramountcy doctrine and the purpose of s. 187 of the *BIA* in *Moloney*.[152] He found that the *407 Act* created a debt enforcement scheme, and that the collection of toll debts constituted a claim provable in bankruptcy.[153] In view of his conclusions about the *BIA* in *Moloney*, Gascon J. held that it was impossible to "use [the *407 Act*'s remedy] while also complying with s. 178(2)."[154] He found that there was an operational conflict.[155] Gascon J. also held that the *407 Act* frustrated the rehabilitative purpose of the *BIA*.[156] He concluded by deeming s. 22(4) of the *407 Act* inoperative to the extent of its conflict with s. 178 of the *BIA*.[157]

As in *Moloney*, Côté J. (with McLachlin C.J.C. concurring) dissented on the question of an operational conflict, finding no such express conflict.[158] The dissent agreed, however, that the *407 Act* frustrated the rehabilitative purpose of s. 178 of the *BIA*.[159]

B. *LEMARE*

1. The Lower Courts

To enforce its security interest against the land and inventory of 3L Cattle Co., Lemare Lake sought the appointment of a receiver under s. 243 of the *BIA*.[160] Lemare Lake hoped to avoid the procedural and substantive requirements of Part II of the *SFSA*, and argued that Part II conflicted with the ten-day notice requirement under the *BIA*.[161] At the Court of Queen's Bench, Justice Rothery (in Chambers) held

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151 *Ibid* at para 91.
152 *407 ETR*, *supra* note 7 at para 16.
153 *Ibid* at paras 17, 21.
154 *Ibid* at para 24.
155 *Ibid* at para 27.
156 *Ibid* at para 28. Gascon J. deferred to his reasons in *Moloney* for the conclusion that s. 178 did not express the *BIA*'s broader purpose of the equitable distribution of the assets of the bankrupt (*ibid* at para 32).
157 *Ibid* at para 33.
158 *Ibid* at para 37.
159 *Ibid* at para 41. The Court ascribed one federal purpose to s. 178 of the *BIA*. Côté J. did not consider whether s. 178 had an additional purpose of equitable distribution of the debtor's assets, nor whether such a purpose was frustrated by the *407 Act* (*ibid*).
160 *Lemare* QB, *supra* note 23 at para 1.
161 *Ibid* at para 2.

that there was no operational conflict between Part II of the *SFSA* and s. 243 of the *BIA*.[162] She found that "it [was] possible for [Lemare Lake] to comply with the prohibitive legislation of the *SFSA*, and once it [had] obtained the requisite court order, to apply for the appointment of a receiver under s. 243(1)."[163] She also held that the *SFSA* did not frustrate the purpose of the *BIA*, reasoning that the *BIA* "does not create a 'complete code' for the realization of security."[164] Finally, she held that even if Part II of the *SFSA* was inoperative, the circumstances at bar did not warrant the appointment of a receiver.[165]

Lemare Lake sought and was granted leave to appeal to the Saskatchewan Court of Appeal. Chief Justice Richards for the Court found no operational conflict.[166] However, he found that Part II of the *SFSA* frustrated the purpose of s. 243(1) of the *BIA*.[167] Richards C.J.S. observed that receivership appointment proceedings are "self-evidently" time sensitive.[168] He reasoned that the ten-day restriction on the appointment of a receiver under s. 243(1) was a provision of expediency, "designed to allow the debtor a brief time, but only a brief time," to take steps to obviate the need for a receivership.[169] The hurdles created by Part II of the *SFSA*, including the 150-day notice period, were, by contrast, "designed to fetter and slow Lemare Lake's ability to resort to remedies such as a receivership order."[170] He concluded that Part II frustrated s. 243(1) in two ways: it dramatically displaced the ten-day notice period contemplated by the *BIA*, and it interfered with the discretion of the court by creating additional procedural requirements, even if the court deemed it "just and convenient" to appoint the receiver.[171]

The Court of Appeal ultimately dismissed the appeal, agreeing with the court below that it was inappropriate to appoint a receiver.[172] Lemare Lake was left to resolve its dispute with 3L Cattle without a receiver. However, the Court of Appeal's decision rendered Part II of the *SFSA* ineffective where a farmer was insolvent and a secured creditor sought to appoint a receiver under s. 243 of the *BIA*. To clarify the status of the provincial law, the Attorney General for

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162 *Ibid* at para 18.
163 *Ibid*.
164 *Ibid* at paras 25-26.
165 *Ibid* at para 27.
166 *Lemare* CA, *supra* note 25 at para 42.
167 *Ibid* at para 53.
168 *Ibid* at para 51.
169 *Ibid* at para 52.
170 *Ibid* at para 53. Richards C.J.S. aptly summarized the procedural and substantive hurdles created by Part II of the *SFSA* (*ibid*).
171 *Ibid* at paras 56-62.
172 *Ibid* at para 5.

Saskatchewan sought and was granted leave to appeal to the Supreme Court to settle the paramountcy question.[173]

2. The Supreme Court

Justices Abella and Gascon coauthored the decision of the majority of the Supreme Court. They began by noting that the principle of co-operative federalism meant that paramountcy must be "narrowly construed" and the court should prefer "harmonious interpretations" of the opposing legislation.[174] Abella and Gascon JJ. accepted the Court of Appeal's conclusion that there was no operational conflict between the *SFSA* and the *BIA*.[175] Their analysis focused exclusively on the second branch of the paramountcy test. Abella and Gascon JJ. held that the *SFSA*'s purpose was to erect procedural hurdles "to afford protection to farmers against the loss of their farm land."[176] In respect of the *BIA*, they found a narrow purpose: s. 243 allowed the appointment of national receivers, eliminating the inefficiency of appointing receivers in multiple jurisdictions.[177] Notwithstanding evidence supplied by *amicus curiae*, Abella and Gascon JJ. concluded that "[t]here [was] no evidentiary basis for concluding that [s. 243] was meant to circumvent the procedural and substantive requirements of the provincial laws where the appointment is sought."[178] In other words, they declined to recognize timeliness as a purpose of s. 243.[179]

Côté J. alone dissented. She endorsed the timeliness purpose of s. 243 of the *BIA*: the ten-day notice period evinced "urgency"; the permissive "just or convenient" language reflected the "demands and realities of real-time litigation";[180] and the time limits on interim receiver appointments under s. 47 of the *BIA* supported the conclusion that Parliament expected the prompt appointment of national receivers under s. 243.[181] She concluded that s. 243 balanced the right of debtors to time to commence restructuring or arrange their financial affairs and the right of secured creditors to a timely remedy.[182] In respect of Part II of the *SFSA*, Côté J. determined that it "made pre-action proceedings upon mortgage default so time-exhaustive, and the burden of seeking a court order prior to commencing an action so burdensome, that mortgagees would be forced to seek

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173 *Ibid*, leave to appeal to SCC granted, 35923 (25 September 2014).
174 *Lemare*, *supra* note 1 at para 21.
175 *Ibid* at para 25.
176 *Ibid* at paras 34-38.
177 *Ibid* at paras 1, 45.
178 *Ibid* at para 68.
179 *Ibid* at para 45.
180 *Ibid* at para 89.
181 *Ibid* at para 98. Côté J. countered several other points raised by the majority in respect of the timeliness question (*ibid* at paras 101-121).
182 *Ibid* at para 82.

alternatives to court proceeding[s]."[183] Côté J. concluded that Part II of the *SFSA* frustrated the purpose of s. 243.[184]

V. ANALYSIS

A. MODIFYING THE PARAMOUNTCY TEST

1. Expanding the Impossibility of Dual Compliance Branch

Although *Lemare* did not concern the first branch of the paramountcy test, the result in that decision is related to the majority of the Supreme Court's expansive interpretation of operational conflict in *Moloney* and *407 ETR*.

In *Moloney*, Gascon J. approached the first branch of the paramountcy test by employing "a proper reading of the provisions based on the modern approach to statutory interpretation."[185] He found that s. 178(2) of the *BIA* discharged the debtor and, thus, prevented creditors from enforcing claims that were provable in bankruptcy.[186] By contrast, he found that s. 102 of the *TSA* empowered the province to continue to pressure a debtor to pay the debt by withholding driving privileges.[187] Gascon J. reasoned that "the test for operational conflict [could not] be limited to asking whether the respondent can comply with both laws by renouncing the protection [of the *BIA* or forgoing the privilege provided by the *TSA*]."[188] In Gascon J.'s view, "[o]ne law consequently provide[d] for the release of all claims provable in bankruptcy and prohibit[ed] creditors from enforcing them, while the other disregard[ed] this release and allow[ed] for the use of a debt enforcement mechanism on such a claim by precisely excluding a discharge in bankruptcy."[189] He found this constituted a "true incompatibility."[190] He reached the same conclusion in respect of the *407 Act*.[191]

Gascon J. located support for his expansive approach to the first branch of the paramountcy test by relying, in the main, on the Supreme Court's prior decisions in *M & D Farm Ltd. v. Manitoba Agricultural Credit Corp.*[192] and *Husky Oil Operations Ltd. v. Minister of National Revenue*.[193]

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183 *Ibid* at para 122, citing Layh, *supra* note 69 at 43.
184 *Lemare*, *supra* note 1 at paras 125-27.
185 *Moloney*, *supra* note 6 at para 23. See also *407 ETR*, *supra* note 7 at para 16.
186 *Moloney*, *ibid* at para 61.
187 *Ibid* at para 62.
188 *Ibid* at para 60.
189 *Ibid* at para 63.
190 *Ibid*.
191 *407 ETR*, *supra* note 7 at para 24.
192 *Supra* note 74.
193 *Supra* note 73. See also *Moloney*, *supra* note 6 at paras 20-21, 24; *407 ETR*, *supra* note 7 at paras 24-25.

In *M & D Farm*, mortgagee Manitoba Agricultural Credit Corporation ("MACC") commenced proceedings under the federal *Farm Debt Review Act*[194] to recover against M & D Farm Limited. In response, the farm corporation obtained a 120-day stay of proceedings under the federal Act.[195] MACC then sought leave and was granted an order by the Manitoba Court of Queen's Bench authorizing the commencement of immediate foreclosure proceedings under the provincial *Family Farm Protection Act*.[196] At the Supreme Court, Justice Binnie held that the orders were contradictory: the stay issued under the federal law prohibited any proceeding authorized under the provincial law.[197] Paramountcy required the federal stay to prevail. Accordingly, the provincial order was rendered inoperative.[198] In *Moloney*, Gascon J. reasoned that an operational conflict was found in *M & D Farm* because "the provincial law expressly authorized the very proceedings that the federal stay precluded."[199] In his view, the conflict was not averted by the fact that "the debtors could choose to voluntarily pay the mortgage debt…[n]or was conflict avoided because the creditor could have chosen not to seek leave to commence foreclosure proceedings."[200]

Gascon J. seemed to take a similar view of the decision of the majority in *Husky Oil*,[201] wherein the Supreme Court considered the conflict between provisions of the then *Bankruptcy Act*[202] and *The Workers' Compensation Act, 1979* of Saskatchewan.[203] In that case, Metal Fabricating & Construction Ltd. ("Metal Fab") and Husky Oil Operations Ltd. ("Husky") entered into several construction contracts.[204] During the project, Metal Fab made an assignment in bankruptcy.[205] At that time, it became known that Metal Fab had failed to pay its contribution to the Workers' Compensation Fund for the employees on its payroll.[206] The Workers' Compensation Board sought recovery from Husky directly, pursuant to s. 133(1) of *The Workers' Compensation Act*.[207] In turn, s. 133(3) would allow Husky to recover

194 RSC, 1985, c 25 (2nd Supp), s 23.
195 *M & D Farm*, *supra* note 74 at paras 1-2.
196 CCSM, c F15, ss 8(1), (4).
197 *M & D Farm*, *supra* note 74 at paras 43-46.
198 *Ibid* at paras 41-42.
199 *Moloney*, *supra* note 6 at para 71.
200 *Ibid*.
201 *Ibid* at paras 20-23.
202 *BIA*, *supra* note 3, ss 97(3), 136. The *Bankruptcy Act* was renamed the *Bankruptcy and Insolvency Act (An Act to amend the Bankruptcy Act and to amend the Income Tax Act in consequence thereof*, SC 1992, c 27, s 2).
203 SS 1979, c W-17.1, ss 133(1), (3) [*The Workers' Compensation Act*].
204 *Husky Oil*, *supra* note 73 at para 94.
205 *Ibid*.
206 *Ibid* at para 95.
207 *Ibid*.

from Metal Fab.[208] Gonthier J., for the majority, held that there was a "clear operational conflict in that ss. 133(1) and (3) in their operation together entail[ed] a reordering or subverting of the federal order of priorities under the *Bankruptcy Act*."[209] He declined to recognize means of superficial dual compliance identified by the dissent.[210] The *Bankruptcy Act* prevailed.[211]

The results in *M & D Farm* and *Husky Oil* suggest that superficial dual compliance is insufficient to avert an operational conflict under the first branch of the paramountcy test.[212] However, the decisions approached the first branch of the paramountcy test by relying on the Supreme Court's decision in *Bank of Montreal*.[213] As I discussed above, *Bank of Montreal* concerned the frustration of federal purpose.[214] The matter was decided by weighing "the specific purpose of Parliament in creating the *Bank Act* security interest,"[215] and determining "whether operation of the provincial Act [was] compatible with the federal legislative purpose."[216] This is unequivocally the language of the second branch of the paramountcy test.[217] Given their reliance on *Bank of Montreal*, *M & D Farm* and *Husky Oil* do not properly reflect the scope of the first branch of the paramountcy test. In respect of *Husky Oil*, the Court of Appeal in *407 ETR* concluded that "[the case] is best understood as a decision involving frustration of a federal purpose [under the second branch] rather than an operational conflict [under the first branch]."[218] I suggest that the same is true of *M & D Farm*.

Gascon J. uncritically applied *M & D Farm* and *Husky Oil* to identify the "true meaning and substantive effect" of the opposing

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208 *Ibid*.
209 *Ibid* at para 87.
210 *Ibid* at paras 115-22, 153, 158, Iacobucci J, dissenting.
211 *Ibid* at para 91.
212 See also *Lafarge* (*supra* note 119 at paras 77, 82), wherein the Supreme Court came to the same conclusion after relying on *M & D Farm* to discover an operational conflict by denying superficial compliance.
213 *M & D Farm*, *supra* note 74 at para 41; *Husky Oil*, *supra* note 73 at para 84.
214 Gascon J. noted, apparently without considering its implication, that *Bank of Montreal* was a decision concerning the frustration of federal purpose branch of the paramountcy test (*Moloney*, *supra* note 6 at para 25).
215 *Bank of Montreal*, *supra* note 75 at 147.
216 *Ibid* at 155. The fact that *M & D Farm* was rendered in respect of the second branch of the paramountcy test was tacitly pointed out by Côté J. in *Moloney* (*supra* note 6 at para 118).
217 Hogg recognizes that *Bank of Montreal* is a case concerning the second branch of the paramountcy test (*Constitutional Law*, *supra* note 70 at 489), but classifies *M & D Farm* as a case concerning the first branch of the paramountcy test (*ibid* at 487-88). The same treatment is observed in the treatise by Guy Régimbald and Dwight Newman (*The Law of the Canadian Constitution*, 1st ed (Markham: LexisNexis Canada, 2013) at 191-93).
218 *407 ETR* CA, *supra* note 18 at para 75.

laws, finding an operational conflict.[219] In dissent, Côté J. criticized the majority for "[relying] on cases that were decided before 'frustration of purpose' was recognized as a separate branch of the [paramountcy] test."[220] She observed that the majority's broad approach "conflate[d] the two branches of the [test], or at a minimum blur[red] the difference between them and return[ed] the jurisprudence to the state it was at before the second branch was recognized as a separate branch."[221] In Côté J.'s view, dual compliance was possible. She found no express contradiction between s. 178 of the *BIA* and s. 102 of the *TSA* within the narrow meaning of the first branch.[222] The federal and provincial laws had different content and remedies: "[o]ne…[did] not permit what the other specifically prohibit[ed]."[223] Although the province was barred from enforcing a claim against the discharged bankrupt, it could suspend a driver's licence to compel payment of the debt, "if the driver decides to drive."[224] A debtor could comply with both laws by "either opt[ing] not to drive or voluntarily pay[ing] the discharged debt."[225]

2. Narrowing the Frustration of Federal Purpose Branch

By widening the ambit of express contradiction under the first branch of the paramountcy test to exclude instances of superficial dual compliance, the majority of the Supreme Court created the scaffolding that enabled it to justify narrowing (and potentially eliminating) the second branch of the test.[226] In *Moloney*, the majority adopted a narrow approach to the federal purpose, based on a close examination of the words of the provision. The restrictive approach to the federal purpose was employed in *Lemare* and the majority's examination of s. 243.

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219 Gascon J. described his approach to the first branch this way in *407 ETR* (*supra* note 7 at para 16).

220 *Moloney*, *supra* note 6 at para 94.

221 *Ibid* at para 93.

222 *Ibid* at para 97; *407 ETR*, *supra* note 7 at paras 37-39.

223 *Moloney*, *supra* note 6 at para 95. See also *407 ETR*, *ibid* at para 37.

224 *Moloney*, *ibid* at para 97 [emphasis omitted]. See also *407 ETR*, *ibid* at 39.

225 *Moloney*, *ibid* at para 123. See also *407 ETR*, *ibid* at paras 38-39; Craig E Jones, "Taking the 'Fresh Start' Seriously: A Case Comment on *Canada (Superintendent of Bankruptcy) v 407 ETR Concession Company Limited* and *Moloney v Alberta (Administrator, Motor Vehicle Accident Claims Act)*" in Janis P Sarra & The Honourable Barbara Romaine, eds, *Annual Review of Insolvency Law, 2014* (Toronto: Carswell, 2015) 405 at 410 [C Jones, "Fresh Start"] (in respect of the Court of Appeal decisions in *Moloney* and *407 ETR*).

226 The implicit rationale is that by widening the ambit of express contradiction under the first branch of the paramountcy test, the first branch can fill the void left by circumscribing the ambit of the second branch of the test. The result in *Lemare* suggests this is a chimera.

In *Moloney*, Gascon J. approached the frustration of federal purpose branch of the paramountcy test by ascribing two broad purposes to the *BIA*: "the equitable distribution of the bankrupt's assets among his or her creditors and the bankrupt's financial rehabilitation."[227] The Alberta Court of Appeal in *Moloney* found that the operation of s. 102 of the *TSA* frustrated both purposes.[228] Gascon J. agreed that the purpose of s. 178 was to "ensure the financial rehabilitation of the debtor."[229] Section 178 gives the discharged bankrupt a fresh start by releasing the bankrupt from all provable claims, and sets limits on that fresh start by excluding specific debts from being released by the discharge order.[230] Gascon J. found that the provincial licensing regimes frustrated this purpose.[231] However, Gascon J. declined to recognize equitable distribution of the bankrupt's assets as a second purpose of s. 178, reasoning that the purpose "is undoubtedly served by other provisions of the *BIA*."[232] He repeated this determination in *407 ETR*.[233]

Gascon J.'s approach to the federal purpose is restrictive. In *Moloney*, he cautioned against giving "too broad a scope to paramountcy on the basis of [the second branch]."[234] He stated that "it is…always essential to ascertain the exact purpose of the specific provision of the federal law."[235] The presumption of constitutionality meant that "[w]hen a federal statute [could] be properly interpreted so as not to interfere with a provincial statute, such an interpretation [was] to be applied in preference to another applicable construction which would bring about a conflict between the two statutes."[236] Gascon J. located the federal purpose of s. 178 in the words of the provision. He reasoned that "the language of s. 178(2) makes it clear that the purpose of this provision is to give effect to…the financial rehabilitation of

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227 *Moloney*, *supra* note 6 at para 32, citing *Husky Oil*, *supra* note 73 at para 7. See also *407 ETR*, *supra* note 7 at para 28. These purposes have long been ascribed to the *BIA* (Canada, Advisory Committee on Bankruptcy and Insolvency, *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency*, 2nd ed (Ottawa: Minister of Supply and Services, January 1986) at 18 (Chair: Gary F Colter) [Colter Report]).

228 *Moloney* CA, *supra* note 12 at paras 42, 50, 53.

229 *Moloney*, *supra* note 6 at para 41.

230 *Ibid* at para 85.

231 *Ibid* at para 89; *407 ETR*, *supra* note 7 at para 31.

232 *Moloney*, *supra* note 6 at para 89. See also *407 ETR*, *ibid* at para 32.

233 *407 ETR*, *ibid*.

234 *Moloney*, *supra* note 6 at para 86, citing *Lemare*, *supra* note 1 at para 23, quoting *Marcotte*, *supra* note 119 at para 72. See also *Ryan Estate*, *supra* note 95 at para 69; *Canadian Western Bank*, *supra* note 70 at para 74.

235 *Moloney*, *ibid*.

236 *Ibid*, citing *Canadian Western Bank*, *supra* note 70 at para 75, quoting *Attorney General of Canada v Law Society of British Columbia*, [1982] 2 SCR 307 at 309, 137 DLR (3d) 1.

the debtor."[237] Gascon J. reinforced his restrictive approach to the second branch when he declined to recognize the equitable distribution of the bankrupt's assets as a federal purpose of s. 178 on the basis that such a purpose was not evinced by the words of the provision.[238]

Although it made no mention of *Moloney* or *407 ETR*, it is clear that the majority in *Lemare* replicated the approach to the second branch of the paramountcy test by locating the federal purpose in the words of the provision. Abella and Gascon JJ. began their analysis of the statutory interplay of Part II of the *SFSA* and s. 243 of the *BIA* by reasoning that the paramountcy doctrine created no presumption that the federal law eliminated the operation of the provincial law, insofar as Parliament did not "occupy the field" by enacting the *BIA*.[239] In deference to the principle of co-operative federalism, they reasoned that courts should prefer an interpretation of the federal law that creates harmony between the opposing laws, and accept some amount of overlap.[240] Accordingly, Abella and Gascon JJ. held that "absent clear evidence that Parliament intended a broader statutory purpose, courts should avoid an expansive interpretation of the purpose of federal legislation which will bring it into conflict with [the] provincial [law]."[241] They explained that the federal purpose "should not be artificially broadened beyond its intended scope."[242] Abella and Gascon JJ. concluded that nothing short of "clear proof" could evince a federal purpose.[243]

The parties to the appeal in *Lemare* presented differing interpretations of the purpose of s. 243 of the *BIA*. The Attorney General asserted that s. 243's purpose was to allow the appointment of a national receiver "with authority to act throughout the country…and to provide a uniform set of standards for all receivers of an insolvent [debtor]."[244] *Amicus* agreed with the Attorney General, but submitted that the broader purpose of s. 243 included providing creditors with "prompt

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237 *Moloney*, *supra* note 6 at para 77. See also *407 ETR*, *supra* note 7 at para 28.

238 *Moloney*, *ibid* at para 85. See also *407 ETR*, *ibid* at para 32. Notwithstanding this determination, Gascon J. concluded that the operation of s. 102 of the *TSA* did not impact the distribution of the bankrupt's assets (*Moloney*, *ibid* at paras 86-88). He reached the same conclusion in respect of the *407 Act* (*407 ETR*, *ibid*). The dissent did not consider the issue, reasoning that it was sufficient to dispose of the matter on the frustration of the fresh start purpose of s. 178 (*Moloney*, *ibid* at para 133).

239 *Lemare*, *supra* note 1 at paras 20, 27. For a discussion of occupying the field, see Hogg, *Constitutional Law*, *supra* note 70 at 491-96.

240 *Lemare*, *ibid* at paras 20-22.

241 *Ibid* at para 23.

242 *Ibid*.

243 *Ibid* at para 26.

244 *Ibid* at para 39.

and timely access to remedies such as a receivership."[245] *Amicus* furnished extrinsic evidence to support the claim that s. 243 expressed the federal purpose of timely appointments of receivers.[246] However, Abella and Gascon JJ. concluded that *amicus*'s use of "case law and secondary sources [to show] the importance of timeliness in insolvency proceedings"[247] was "insufficient evidence for casting s. 243's purpose so widely."[248] In the absence of direct evidence in the words of the provision, they declined to recognize timeliness as a purpose of s. 243, and restricted the provision's purpose to establishing "a regime allowing for the appointment of a national receiver."[249]

To support their determination that the purpose of s. 243 of the *BIA* did not contemplate the *timely* appointment of receivers, Abella and Gascon JJ. appealed to the permissive wording of the provision. They observed that "a court 'may' appoint a receiver if it is 'just or convenient' to do so," such that "[a] secured creditor is not entitled to appointment of a receiver."[250] Furthermore, they observed, s. 243(1.1) set a minimum waiting period of ten days but did not preclude the imposition of a longer waiting period under provincial law.[251] They also noted that s. 243 recognized receivers appointed under a security agreement or other provincial or federal law.[252] Abella and Gascon JJ. concluded that the permissive construction of s. 243 supported its limited purpose of enabling the appointment of a national receiver.[253] The operation of the *SFSA* did not frustrate this narrow purpose.[254] In support, Abella and Gascon JJ. quoted from *Quebec (Attorney General) v. Canadian Owners and Pilots Association*[255] that "permissive federal legislation, without more, will not establish that a federal purpose is frustrated when provincial legislation restricts the scope of the federal permission."[256]

B. THE PURPOSE OF SECTION 243 OF THE *BIA*

1. Timeliness and Receivership Law

Receivership law has three objectives: the enforcement of a secured creditor's security interest; the replacement of inefficient management;

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245 *Ibid* at para 40.
246 *Ibid* at paras 41-43.
247 *Ibid* at para 41.
248 *Ibid* at para 45.
249 *Ibid* at para 45. See also *ibid* at paras 46-47.
250 *Ibid* at para 47.
251 *Ibid* at para 46.
252 *Ibid* at para 48.
253 *Ibid* at para 47.
254 *Ibid* at paras 47, 73.
255 *Supra* note 70.
256 *Lemare*, *supra* note 1 at para 48, quoting *COPA*, *ibid* at para 66. See also *Ryan Estate*, *supra* note 95 at para 69.

and the facilitation of going-concern sales.[257] These objectives are self-evidently time-sensitive.[258] As Frank Bennett explains, "[a]t the time of the appointment of a receiver, the debtor is in most cases on the brink of insolvency."[259] In respect of an insolvent business, restructuring proceedings under the *CCAA* are a "hothouse of real-time litigation."[260] Concern for timeliness logically extends to the activities of receivers appointed under the *BIA*. When faced with an insolvent debtor, "[lengthy] notice periods…might harm the [creditors'] potential recovery."[261] A recalcitrant debtor may dissipate his or her assets, or the passage of time may destroy the value of the collateral.[262] This can prejudice the recovery of the secured creditor, as well as subordinate secured and unsecured creditors.[263] It is apparent that "timeliness and real time responsiveness to changing dynamics are…animating features of receivership law."[264] The concern for timely receiver appointments is evinced by the development and mechanics of s. 243, which encapsulate the palpable but unwritten purpose of timeliness.[265]

To fully appreciate the time-sensitive nature of s. 243 of the *BIA*, it is necessary to understand its predecessor—s. 47.[266] Section 47 gives the court the power to appoint an interim receiver, where a secured creditor sends or intends to send notice of its intention to enforce the security.[267] To militate against the debtor dissipating the collateral, the court may permit a creditor to apply for a receiver

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257 Wood, *Bankruptcy & Insolvency Law*, *supra* note 38 at 512-14. See also McElcheran, *supra* note 56 at 243.

258 See Richard B Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law" in Janis P Sarra, ed, *Annual Review of Insolvency Law, 2005* (Toronto: Thomson Carswell, 2006) 481 at 484 [R Jones, "Evolution"]; *Century Services Inc. v Canada (Attorney General)*, 2010 SCC 60 at para 58, [2010] 3 SCR 379 [*Century Services*]. The majority in *Lemare* acknowledged that "considerations of promptness and timeliness" are "valid concern[s] in any bankruptcy or receivership process," but were not willing to recognize this concern for timeliness as a purpose in s. 243 (*Lemare*, *supra* note 1 at para 68).

259 Frank Bennett, *Bennett on Receiverships*, 2nd ed (Scarborough: Thomson Canada, 1999) at 10.

260 R Jones, "Evolution", *supra* note 258 at 484, cited in *Century Services*, *supra* note 258 at para 58. See also Madam Justice BE Romaine, "Conflicting Policy Objectives and the *CCAA* Court: Lessons Learned and Future Challenges" in Janis P Sarra, ed, *Annual Review of Insolvency Law, 2013* (Toronto: Carswell, 2014) 35 at 36-37.

261 Lachance & Babos-Marchand, *supra* note 5 at 26.

262 Milani, *supra* note 5 at 119-21.

263 *Ibid* at 120.

264 Wood, "The Latest Word", *supra* note 5 at 52.

265 *Lemare*, *supra* note 1 (Factum of *Amicus Curiae* at paras 37-51) [*Amicus Curiae*].

266 See generally *Railside Developments*, *supra* note 56 at paras 40-66.

267 *BIA*, *supra* note 3, s 47(1). The court must deem the appointment necessary for the protection of the debtor's estate or the interests of the creditor seeking enforcement (*ibid*, s 47(3)).

before the expiry of the ten-day notice period.[268] The expediency of s. 47 is also useful in going-concern sales, "where it is desirable to sell all or substantially all of the debtor's assets quickly and with a minimum impact on the ongoing operations of the debtor company."[269] Section 47 of the *BIA* was originally intended to be limited in scope and duration.[270] However, the courts interpreted s. 47 to be "rather flexible," granting interim receivers the same broad powers ordinarily reserved for court-appointed receivers.[271] The wide grant of authority "effectively gave rise to a national receivership."[272] When the *BIA* was amended in 2009, the scope of s. 47 was returned to its intended interim function.[273] At the same time, the amendments created the national receiver under s. 243, which gave the courts the power "to make the same wide-ranging orders that [they] formerly made in respect of interim receivers."[274]

The interim receivership under s. 47 of the *BIA* expires after thirty days, unless the court grants an extension.[275] Section 47, therefore, creates a "brief period between the time when a secured creditor delivers a notice that it intends to exercise its rights under a security agreement and the time when it can exercise that right."[276] As Côté J. reasoned in her dissent, "[i]f the interim receivership is meant to preserve debtors' property until a national full receiver [under s. 243] is appointed, this…suggests that Parliament intended a receiver to be appointed promptly."[277] Similar to s. 47, the provisions of s. 243 recognize the timeliness of receiver appointments.[278] To make an

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268 *Ibid*, ss 243(1.1)(a) (where the debtor consents), (b) (where the court considers it appropriate).

269 Thornton & Azeff, *supra* note 56 at 4.

270 Wood, *Bankruptcy & Insolvency Law*, *supra* note 38 at 505.

271 *Canada (Minister of Indian Affairs and Northern Development) v Curragh Inc.* (1994), 114 DLR (4th) 176 at 180, 27 CBR (3d) 148 (Ont Gen Div). See generally Wood, *Bankruptcy & Insolvency Law*, *ibid* at 505-506, 524; Jeffrey C Carhart, "The Decision of the Supreme Court of Canada in *TCT Logistics* and the Future of Receiverships in Canada" (2007) 44:3 Can Bus LJ 376 at 380-82.

272 Wood, *Bankruptcy and Insolvency Law*, *ibid* at 506.

273 This change was recommended by the Senate in a Report of the Standing Senate Committee on Banking, Trade and Commerce ("Debtors and Creditors Sharing the Burden: A Review of the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act* (November 2003) at 144-145 (Chair: The Honourable Richard H Kroft)). See also Janis Sarra, "Judicial Discretion" in Ben-Ishai & Duggan, *supra* note 38, 199 at 205.

274 Wood, *Bankruptcy & Insolvency Law*, *supra* note 38 at 510.

275 *BIA*, *supra* note 3, s 47(1)(c).

276 Lloyd W Houlden, Geoffrey B Morawetz & Janis P Sarra, *The 2015 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 2015) at 174.

277 *Lemare*, *supra* note 1 at para 98.

278 See e.g. Colter Report, *supra* note 227 at 40, 43-44. Receivers appointed under s. 243 are still bound by the duties and protections imposed by Part XI of the *BIA* (*supra* note 3) and duties imposed on "receivers appointed pursuant to provincial legislation" (see *Amicus Curiae*, *supra* note 265 at para 45).

application for an order appointing a receiver, a secured creditor must serve the debtor notice of its intention to enforce the security, and await the expiry of a (short) ten-day notice period.[279] In the interest of expediency, the *BIA* contemplates circumstances where notice is not required.[280] The secured creditor can also ask the court to deem it necessary to appoint a receiver prior to expiry of the ten-day notice period.[281] Finally, the secured creditor can petition the court to appoint an interim receiver under s. 47 before or during the ten-day notice period.[282] In sum, the regime is a coherent expression of timeliness.

2. Frustrating a Permissive Federal Regime

In *Lemare*, the majority reasoned that the permissiveness of s. 243 of the *BIA* foreclosed the possibility that Part II of the *SFSA* frustrated the appointment of receivers.[283] The proposition that a permissive federal law cannot be frustrated by a restrictive provincial law originates from the Supreme Court's decision in *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*.[284] The Court was asked to decide whether a town bylaw restricting the use of pesticides conflicted with federal standards that regulated the importation, manufacture, sale, and distribution of pesticides in Canada.[285] The provincial bylaw banned the use of pesticides that were approved by the federal law.[286] Justice L'Heureux-Dubé for the majority held that there was no express contradiction between the opposing federal and provincial laws.[287] Following a discussion of the express contradiction test, L'Heureux-Dubé J. concluded that "[the federal] legislation is permissive, rather than exhaustive, and there is no operational conflict [such that]…[n]o one is placed in an impossible situation by the legal imperative of complying with both regulatory regimes."[288] After concluding that dual compliance was possible, L'Heureux-Dubé J. also held that "[t]here [was], moreover, no concern…that application

279 *BIA*, *supra* note 3, ss 243(1.1), 244.
280 *Ibid*, ss 244(3)-(4).
281 *Ibid*, s 243(1.1)(b).
282 *Ibid*, s 47(1). The court must be convinced that the appointment is necessary for the protection of the bankrupt's estate or the interests of the creditors, where notice is sent under s. 244(1) (*ibid*, s 47(3)).
283 *Lemare*, *supra* note 1 at para 48, citing *COPA*, *supra* note 70 at para 66. See also *Ryan Estate*, *supra* note 95 at para 69.
284 *Supra* note 82.
285 *Ibid* at paras 1-7. Peter Hogg has brought much needed clarity to *Spraytech* (see "Paramountcy and Tobacco", *supra* note 82 at 338-39).
286 *Spraytech*, *supra* note 82 at paras 5-7.
287 *Ibid* at para 35.
288 *Ibid*.

of [the provincial bylaw] displace[d] or frustrate[d] 'the legislative purpose of Parliament.'"[289]

A close reading of *Spraytech* suggests that the permissive character of the federal law was used to deny the assertion of an express contradiction under the first branch of the paramountcy test, as opposed to a frustration of federal purpose under the second branch.[290] This result is logical. Absent some other operational conflict, the parallel operation of a permissive federal law and a restrictive provincial law will not create an operational conflict under the first branch of the test.[291] This proposition was endorsed by the majority in *Moloney*, when it concluded that *Rothmans, Benson & Hedges Inc. v. Saskatchewan*[292] and *COPA* revealed no express contradictions because the decisions "merely involved one law that imposed stricter conditions in allowing activities that were also permitted by the government at the other level."[293] Where the federal and provincial laws share the same object, it is unlikely the provincial law will cause an operational conflict.[294] In such cases, compliance with the stricter provincial law is not defiance of the permissive federal law.[295]

Although its application may be misplaced, the Supreme Court applied the permissive rule from *Spraytech* to the second branch of the paramountcy test in *COPA* and reaffirmed that approach more recently in *Marine Services International Ltd. v. Ryan Estate*.[296] In this respect, *Lemare* is not a departure from prior jurisprudence supporting the operability of provincial laws that restrict the ambit of permissive federal regimes.[297] Moreover, the application of *Spraytech*'s permissive rule to the second branch of the test is not necessarily inappropriate. The courts' approach to paramountcy "affect[s] both the agenda and the tenor of intergovernmental relations."[298] A balanced application of the paramountcy doctrine can facilitate co-operative federalism.[299] Parliament rarely legislates in a vacuum, and federal laws should

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289 *Ibid*.
290 See LeBel J.'s characterization of the majority's conclusion (*ibid* at para 46).
291 *Ibid* at para 34.
292 *Supra* note 70.
293 *Moloney*, *supra* note 6 at para 74. See also *ibid* at para 109, Côté J, dissenting.
294 See e.g. *Rothmans*, *supra* note 70; *Spraytech*, *supra* note 82.
295 See *Multiple Access*, *supra* note 75 at 191.
296 *Supra* note 95.
297 Bruce Ryder, "Equal Autonomy in Canadian Federalism: The Continuing Search for Balance in the Interpretation of the Division of Powers" (2011) 54 SCLR (2d) 565 at 567.
298 Katherine Swinton, "Federalism under Fire: The Role of the Supreme Court of Canada" (1992) 55:1 Law & Contemp Probs 121 at 138.
299 See *Canadian Western Bank*, *supra* note 70 at paras 21-47.

not in all cases override provincial interests.[300] In respect of the *BIA*, federal authority operates against the backdrop of provincial jurisdiction over property and civil rights.[301] It is incumbent on the courts to recognize that "federal and provincial regulation of the same subject matter can coexist harmoniously."[302] This affords provinces latitude to effect policy.[303] In effecting policy, a provincial law may circumscribe the scope of a federal permission. However, it is going too far to conclude that a restrictive provincial law *cannot* frustrate a permissive federal regime.[304]

The *BIA*'s receivership remedy does not create a "complete code" that ousts provincial law.[305] There is a role for provincial legislation to protect vulnerable classes of debtors.[306] The *SFSA* "afford[s] protection to farmers against loss of their farm land."[307] However, the extent to which Part II of the *SFSA* impedes the operation of s. 243 is inappropriate. In addition to the 150-day moratorium and other requirements under Part II, where the creditor has discharged the burden of demonstrating that the debtor farmer cannot or will not meet his or her obligations, the *SFSA* permits a judge to grant leave only if granting the order would be "just and equitable according to the purpose and spirit of [the *SFSA*]."[308] It is, therefore, not a foregone conclusion that a judge can grant a receivership order under s. 243

300 See e.g. Jean Leclair, "The Supreme Court of Canada's Understanding of Federalism: Efficiency at the Expense of Diversity" (2003) 28:2 Queen's LJ 411. Respect for provincial legislative participation offers many benefits (see generally Richard E Simeon, "Criteria for Choice in Federal Systems" (1982-83) 8 Queen's LJ 131).

301 *Husky Oil*, *supra* note 73 at para 81.

302 C Jones, "Fresh Start", *supra* note 225 at 408.

303 For commentary in support of the result in *Lemare* see Virginia Torrie, "*Attorney General for Saskatchewan v. Lemare Lake Logging Ltd.*" (2016) 31:2 BFLR 403 at 408.

304 A blanket deference to co-operative federalism that in all cases subordinates the federal law risks "diluting" federal paramountcy (Anand & Klein, *supra* note 120 at 57).

305 *BIA*, *supra* note 3, s 72(1). See also *GMAC Commercial Credit Corporation - Canada v T.C.T. Logistics Inc.*, 2006 SCC 35 at paras 46-47, [2006] 2 SCR 123; *Bank of Montreal*, *supra* note 75 at 155.

306 See *Canadian Western Bank*, *supra* note 70 at para 72. It is an open question whether the *SFSA* strikes the appropriate balance between the rights of debtors and the interests of creditors. See Clayton Darryl Bangsund, "A Critical Examination of Recently Proposed Amendments to the *Bank Act* Security Provisions" (2012) 75:2 Sask L Rev 211 at 234-35, n 84.

307 *SFSA*, *supra* note 2, s 4. The protection of farmers has historical relevance in Saskatchewan (see e.g. Bill Waiser, *Saskatchewan: A New History* (Calgary: Fifth House, 2005) at 281-82, cited in Ronald CC Cuming, "Section 18 of the Saskatchewan *Limitation of Civil Rights Act*: A Good Idea or Troublesome Relic?" (2015) 78:1 Sask L Rev 1 at 3-4). The *SFSA* is not alone in providing protection to farmers; the federal government has also proffered successive protective regimes (*Farm Debt Review Act*, SC 1986, c 33; *Farm Debt Mediation Act*, SC 1997, c 21).

308 *SFSA*, *ibid*, s 19.

where it is "just or convenient."[309] Part II makes pursuing an order "so time exhaustive…[that] mortgagees [are] forced to seek alternatives to court proceedings."[310] This part of the *SFSA* is "specifically designed to fetter and slow [creditors'] ability to resort to remedies such as a receivership order."[311] It is only by artificially restricting the purpose of s. 243 to exclude timely appointments that the majority of the Supreme Court avoided the conclusion that the *SFSA* frustrates the receivership remedy.

C. THE AFTERMATH OF *MOLONEY*, *407 ETR* AND *LEMARE*

1. The Operation of Federal Paramountcy

The paramountcy test contains an internal logic. The ambit of the first branch of the test is intentionally narrow.[312] The first branch is designed to target "incompatibility that is evident on the face of the provisions themselves."[313] Express contradictions are rare because superficial compliance with both statutes is enough to avert an operational conflict.[314] It is unlikely that one legislative enactment says "yes" where the other says "no."[315] The first branch's narrow scope is consistent with the principle of co-operative federalism, which requires courts to accept overlap between the exercise of federal and provincial competencies.[316] It permits provincial legislation to "pour into the gaps of federal legislation, and in some cases to cover over them."[317] Recognizing the restrictive nature of the first branch, the Supreme Court developed a second branch, expanding the inquiry to "the broader question whether operation of the provincial [law] is compatible with the federal legislative purpose."[318] The second branch recognizes that opposing laws that are not in direct conflict may indirectly conflict, such that the purpose (i.e. effectiveness) of the federal regime is overwhelmed by the operation of the provincial law.

The majority's treatment of the paramountcy doctrine in *Moloney*, *407 ETR* and *Lemare* betrays the internal logic of the paramountcy test. The approach to the first branch of the test inappropriately enlarges the ambit of express contradiction. This caused the majority to find express contradictions between s. 178 of the *BIA* and the

309 *Lemare* CA, *supra* note 25 at para 56.
310 Layh, *supra* note 69 at 43.
311 *Lemare* CA, *supra* note 25 at para 53. See also Layh, *ibid* at 43.
312 Hogg, *Constitutional Law*, *supra* note 70 at 485-86.
313 *Moloney*, *supra* note 6 at para 108, Côté J, dissenting.
314 See e.g. *Mangat*, *supra* note 75 at para 72.
315 *Multiple Access*, *supra* note 75 at 191.
316 *NIL/TU,O Child and Family Services Society v B.C. Government and Service Employees' Union*, 2010 SCC 45 at para 42, [2010] 2 SCR 696, Abella J.
317 C Jones, "Fresh Start" *supra* note 225 at 408.
318 *Bank of Montreal*, *supra* note 75 at 155.

provincial licensing regimes.[319] As Côté J. explained in dissent in *Moloney*, an expansive first branch may increase instances in which the federal law is found to pre-empt the provincial law, "even though there is an interpretation of the two laws that results in a finding of compatibility."[320] This overbroad approach to express contradiction may, therefore, upset the balance of co-operative federalism. However, this will only occur where dual compliance is not deemed possible at the outset.[321] The concomitant narrowing of the second branch of the test to require "clear evidence" of a federal purpose—located in the words of the provision—reduces the likelihood that substantial provincial interference will be deemed to frustrate the purpose of the federal law. In the absence of clear evidence, provincial laws that are expressly designed to fetter the operation of federal regimes will survive. An expansive first branch may avert such frustrations, but only if the true meaning and substantive effect of the opposing provisions are cast sufficiently wide.[322]

2. The Viability of Receivership Orders Under the *BIA*

The result in *Lemare* weakens the appointment of national receivers under s. 243 of the *BIA* in and outside of Saskatchewan. *Lemare* heightens a longstanding concern that the *BIA* is subject to the notice period created by the *Civil Code of Quebec*,[323] potentially fettering the effectiveness of the s. 243 remedy in Quebec in respect of all commercial financing (not merely farm financing as in Saskatchewan).[324] The

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319 A conventional approach to the first branch of the paramountcy test leads to the conclusion that dual compliance with s. 178 of the *BIA* and the provincial licencing regimes is possible. In *Moloney*, the Alberta Court of Appeal conflated the analysis of the first and second branches of the paramountcy test, but ultimately concluded that the provisions of the *TSA* were inoperative for frustrating the rehabilitative purpose of s 178 (*Moloney* CA, *supra* note 12 at paras 36-53). In *407 ETR*, the Ontario Court of Appeal applied a "strict reading" of the first branch of the test and concluded that dual compliance was possible (*407 ETR* CA, *supra* note 18 at para 93).

320 *Moloney*, *supra* note 6 at para 112.

321 In *Lemare*, the lower courts approached the first branch of the paramountcy test by applying a conventionally narrow construction of the first branch of the test (*Lemare* QB, *supra* note 23 at paras 14-18; *Lemare* CA, *supra* note 25 at paras 30-42). Notwithstanding the alteration to the first branch in *Moloney* and *407 ETR*, the Supreme Court accepted the conclusion of the lower courts without substantive commentary (*Lemare*, *supra* note 1 at para 25).

322 *Lemare* demonstrates that an expansive approach to the first branch of the paramountcy test will not necessarily fill the void left by depreciating the second branch of the test. It is not clear that the majority's construction of the true meaning and substantive effect of s. 243 would have been broad enough to identify the operational conflict under the first branch of the test.

323 CCQ.

324 Lachance & Babos-Marchand, *supra* note 5 at 25-30. The notice period is twenty days for movable property and sixty days for immovable property (art 2758 CCQ).

Quebec issue reveals the broader concern with *Lemare*. The majority's construction of the federal purpose implies that Parliament created a national receivership remedy under the *BIA* but did not contemplate the effectiveness of the remedy.[325] It is logical to conclude from *Lemare* that no delay period imposed by provincial legislation can frustrate the purpose of s. 243.[326] A provincial law that interferes with the appointment of a receiver to any extent will survive as long as it does not expressly disallow the appointment. Côté J. surmised that, in response to *Lemare*, creditors may return to relying on interim receivers.[327] Although this remains a possibility, it is not clear that interim receivers can be effective in place of their national counterparts, who enjoy a broader grant of authority under the *BIA*.[328] Ultimately, *Lemare* may provide the impetus for the codification of receivership law—a prospect that Professor Roderick Wood describes as "both desirable and inevitable."[329]

However, the possibility of amending the *BIA* must be measured against the events following the result in *Bank of Montreal v. Marcotte*[330] and its companion decisions.[331] The *Marcotte* cases concerned the application of disclosure requirements of Quebec's *Consumer Protection Act*[332] to credit card issuing banks.[333] The Supreme Court held that the provincial consumer protection laws applied to the federally regulated banks.[334] In response to the ruling, the federal government proposed changes to the *Bank Act* to protect the federal jurisdiction over the banking sector.[335] The province of Quebec and some

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325 See the comments of Côté J. on this point (*Lemare*, *supra* note 1 at paras 112-17).

326 This issue was raised by Michael Milani in commentary supporting the Saskatchewan Court of Appeal's decision in *Lemare* (*supra* note 5 at 121).

327 *Lemare*, *supra* note 1 at para 100, Côté J, dissenting.

328 See Milani, *supra* note 5 at 119-21; Wood, "The Latest Word", *supra* note 5 at 55. It is not clear that Part II of the *SFSA* cannot also fetter interim receiver appointments under s. 47 of the *BIA*. Although the majority in *Lemare* recognized the "promptness and timeliness" of s. 47, these comments are *obiter dicta*. The language of "immediate possession" in s. 46 of the *BIA* may, however, be sufficient evidence for the Court to find a purpose of timeliness in the interim receiver provisions. In any case, the majority concluded that "[t]he potential conflict…is not…at issue in this appeal" (*Lemare*, *supra* note 1 at para 50).

329 Wood, "The Latest Word", *ibid* at 54. See also Roderick J Wood, "The Regulation of Receiverships" in Janis P Sarra, ed, *Annual Review of Insolvency, 2009* (Toronto: Carswell, 2010) 243.

330 *Supra* note 119.

331 *Amex Bank of Canada v Adams*, 2014 SCC 56, [2014] 2 SCR 787; *Marcotte v Fédération des caisses Desjardins du Québec*, 2014 SCC 57, [2014] 2 SCR 805.

332 *Consumer Protection Act*, CQLR, c P-40.1 [*CPA*].

333 *Marcotte*, *supra* note 119 at paras 4-8. See generally Shirley Chen, "Consumer Protection Initiatives Across the Globe" (2014) 27:1 Loyola Consumer L Rev 178 at 179-82.

334 *Marcotte*, *ibid* at para 3.

335 Bill C-29, *A second Act to implement certain provisions of the budget tabled in Parliament on March 22, 2016 and other measures*, 1st Sess, 42nd Parl, 2015-2016.

members of the Senate opposed the amendments.[336] Ultimately, the federal government capitulated to pressure and withdrew support for the proposed amendments, ensuring that the federal banking regime remains subject to Quebec's consumer protection laws.[337] The result in *Marcotte* reinforces the notion that federal regimes are vulnerable to provincial regulation.[338] More importantly, the subsequent legislative abnegation suggests that successfully amending a federal regime to protect against provincial incursions is not guaranteed to succeed. Amending the *BIA* to insulate s. 243 from frustrating provincial legislation, such as the *SFSA* or the Quebec *CPA*, may prove unsuccessful if federal legislative will fails to materialize.

VI. CONCLUSION

In *Lemare*, Abella and Gascon JJ. opined that "[a]t some point in the future, it may be argued that the two branches of the paramountcy test are no longer analytically necessary or useful, but that is a question for another day."[339] The expansive approach to the first branch of the paramountcy test employed by the majority in *Moloney* and *407 ETR* leaves little doubt about the direction that Abella and Gascon JJ. envisage for the paramountcy test: a wide reading of operational conflict that eliminates the need to query whether the broader federal purpose is frustrated by the provincial law. In this paper, I have attempted to demonstrate that the moves of the majority in *Moloney*, *407 ETR* and *Lemare* are analytically unsound. The expansion of the first branch of the test is predicated on the misapplication of decisions concerning the second branch. The restriction of the second branch rests on its own unstable support. Given the result in *Lemare*, it is not clear that a single-branch paramountcy test—one that is based on an expansive conception of impossibility of dual compliance—can protect a federal regime that is fettered by the operation of an invasive (but constitutionally operative) provincial law. The operation of the *BIA*'s receivership remedy requires the timely appointment of receivers. Substantial provincial interference will frustrate s. 243's purpose. It remains to be seen whether Parliament has the legislative will to intervene to protect the integrity of the remedy.

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336 Bill Curry, "Quebec takes issue with Bank Act changes in Morneau's Bill C-29", *The Globe and Mail* (8 December 2016), online: <http://www.theglobeandmail.com/news/politics/morneaus-budget-bill-under-fire-in-senate-while-quebec-warns-of-challenge/article33268944>, archived: <https://perma.cc/94XR-Y4K9>.

337 Bill Curry, "Morneau pulls Bank Act changes from budget bill after objections from Quebec, Senate", *The Globe and Mail* (12 December 2016), online: <http://www.theglobeandmail.com/news/politics/morneau-pulls-bank-act-changes-from-budget-bill-after-objections-from-quebec-senate/article33303437>, archived: <https://perma.cc/2U9T-RWUV>.

338 Chen, *supra* note 333 at 182.

339 *Lemare*, *supra* note 1 at para 23.