
CANADA / JUDGMENT

Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.

2015 SCC 53

COURT

Supreme Court of Canada

DECIDED

13 November 2015

Source: decisions.scc-csc.ca · Research copy typeset by Esheria. Not court-issued or certified.

Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.

Collection

Supreme Court Judgments

Date

2015-11-13

Neutral citation

2015 SCC 53

Report

[2015] 3 SCR 419

Case number

35923

Judges

Abella, Rosalie Silberman; Cromwell, Thomas Albert; Moldaver, Michael J.; Karakatsanis, Andromache; Wagner, Richard; Gascon, Clément; Côté, Suzanne

On appeal from

Saskatchewan

Subjects

Constitutional law

Notes

SCC Case Information: 35923

Decision Content

SUPREME COURT OF CANADA

Citation: Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd., 2015 SCC 53, [2015] 3 S.C.R. 419

Date: 20151113 Docket: 35923

Between:

Attorney General for Saskatchewan

Appellant

and

Lemare Lake Logging Ltd.

Respondent

- and -

Attorney General of Ontario and

Attorney General of British Columbia

Interveners

Coram: Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon and Côté JJ.

Joint Reasons for Judgment: (paras. 1 to 74)

Dissenting Reasons: (paras. 75 to 129)

Abella and Gascon JJ. (Cromwell, Moldaver, Karakatsanis and Wagner JJ. concurring)

Côté J.

Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd., 2015 SCC 53, [2015] 3 S.C.R. 419

Attorney General for Saskatchewan Appellant

v.

Lemare Lake Logging Ltd. Respondent

and

Attorney General of Ontario and

Attorney General of British Columbia Interveners

Indexed as: Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.

2015 SCC 53

File No.: 35923.

2015: May 21; 2015: November 13.

Present: Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon and Côté JJ.

on appeal from the court of appeal for saskatchewan

Constitutional law — Cooperative federalism — Division of powers — Bankruptcy and insolvency — Property and Civil Rights — Receiver — Federal paramountcy — Federal legislation authorizes court, upon application of secured creditor, to appoint receiver with power to act nationally — Provincial legislation imposes other procedural and substantive requirements before commencing an action with respect to farm land — Whether provincial legislation constitutionally inoperative when application made to appoint national receiver under federal legislation, by reason of doctrine of federal paramountcy — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 243 — The Saskatchewan Farm Security Act, S.S. 1988-89, c. S-17.1, ss. 9 to 22.

A secured creditor brought an application pursuant to s. 243(1) of the Bankruptcy and Insolvency Act for the appointment of a receiver over substantially all of the assets of its debtor, a “farmer” within the meaning of The Saskatchewan Farm Security Act. The debtor contested the appointment and argued that the creditor had to comply with Part II of The Saskatchewan Farm Security Act, which requires that before commencing an action with respect to farm land, a person must submit a notice of intention, await the expiry of a 150-day notice period, and engage in a mandatory review and mediation process. The chambers judge found that the provisions in Part II of The Saskatchewan Farm Security Act did not conflict with s. 243(1) of the Bankruptcy and Insolvency Act. The Court of Appeal found that Part II of The Saskatchewan Farm Security Act frustrated the purpose of s. 243(1) of the Bankruptcy and Insolvency Act and was therefore inoperative in circumstances where an application is made to appoint a receiver.

Held (Côté J. dissenting): The Court of Appeal’s conclusion that Part II of The Saskatchewan Farm Security Act is constitutionally inoperative where an application is made to appoint a receiver pursuant to s. 243(1) of the Bankruptcy and Insolvency Act, is set aside.

Per Abella, Cromwell, Moldaver, Karakatsanis, Wagner and Gascon JJ.: The paramountcy analysis requires consideration of whether any overlap between the federal and provincial laws constitutes a conflict sufficient to render the provincial law inoperative. Two kinds of conflict are at play: (1) an operational conflict, where compliance with both the federal and provincial law is impossible; and (2) frustration of purpose, where the provincial law thwarts the purpose of the federal law. The operational conflict branch of the paramountcy doctrine requires that there be “actual conflict” between the federal and provincial legislation. Here, there is no operational conflict because it is possible to comply with both statutes. The issue therefore centres on

whether the provincial legislation frustrates the purpose of the federal legislation.

Given the guiding principle of cooperative federalism, which allows for some interplay and overlap between both federal and provincial legislation, paramountcy must be narrowly construed. Courts must take a restrained approach, and harmonious interpretations of federal and provincial legislation should be favoured. If a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to a construction which would bring about a conflict between the two statutes. 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 provincial legislation. Clear proof of purpose is required. The burden a party faces in successfully invoking paramountcy is accordingly a high one; provincial legislation restricting the scope of permissive federal legislation is insufficient on its own.

In this case, what the evidence shows is a simple and narrow purpose for s. 243 of the Bankruptcy and Insolvency Act : the establishment of a regime allowing for the appointment of a national receiver, thereby eliminating the need to apply for the appointment of a receiver in multiple jurisdictions.

Section 243(1) of the Bankruptcy and Insolvency Act authorizes a court, upon the application of a secured creditor, to appoint a receiver where such appointment is “just or convenient”. Under s. 244(1), a secured creditor who intends to enforce a security on all or substantially all of the inventory, accounts receivable or other property of an insolvent debtor that was acquired for, or used in relation to, a business carried on by the insolvent person, is generally required to send a notice of that intention to the insolvent person. Section 243(1.1) states that, where notice is to be sent under s. 244(1), the appointment of a national receiver cannot be made before the expiry of 10 days after the day on which the secured creditor sends the notice. The national receivership regime under s. 243(1) does not oust a secured creditor’s power to have a receiver appointed privately, or by court order under provincial law or any other federal law.

Part II of The Saskatchewan Farm Security Act is aimed at affording protection to farmers against loss of their farm land. Subject to ss. 11 to 21, s. 9(1)(d) of The Saskatchewan Farm Security Act prohibits commencement of any “action” with respect to farm land. This includes an application for the appointment of a receiver under s. 243(1) of the Bankruptcy and Insolvency Act . Section 11(1)(a), however, states that, where a mortgagee makes an application with respect to a mortgage on farm land, the court may, on any terms and conditions that it considers just and equitable, order that s. 9(1)(d) does not apply. Before a mortgagee can bring an application under s. 11, a number of preconditions must be fulfilled, including a compulsory and non-waivable 150-day waiting period during which a mandatory review and mediation process occurs. Once the 150-day waiting period is over, the mortgagee may then make an application for an order granting leave to commence the action. On hearing the application, the court must presume that the farmer has a reasonable possibility of meeting his or her obligations under the mortgage, and that he or she is making a sincere and reasonable effort to meet those obligations.

As a result of the concurrent operation of s. 243(1) of the Bankruptcy and Insolvency Act and Part II of The Saskatchewan Farm Security Act, a secured creditor wishing to enforce its security interest against farm land must wait 150 days, rather than the 10 days imposed under federal law. The creditor must also comply with the various additional requirements of The Saskatchewan Farm Security Act, such as the statutory presumptions described above. That interference with s. 243(1), however, does not, in and of itself, constitute a conflict. A conflict will only arise if such interference frustrates the purpose of the federal regime.

Section 243's purpose is simply the establishment of a regime allowing for the appointment of a national receiver, thereby eliminating the need to apply for the appointment of a receiver in multiple jurisdictions. There is insufficient evidence for casting s. 243's purpose more widely.

There is nothing in the words of s. 243 suggesting that the 10-day waiting period imposed by the provision should be treated as a ceiling rather than a floor. The discretionary nature of the s. 243 remedy — as evidenced by the fact that the provision provides that a court “may” appoint a receiver if it is “just or convenient” to do so — lends further support to a narrower reading of the provision's purpose. A secured creditor is not entitled to appointment of a receiver. Rather, s. 243 is permissive, allowing a court to appoint a receiver where it is just or convenient. Interference with a discretion granted under federal law is not, by itself, sufficient to establish frustration of federal purpose. Nothing in the text of the provision or the Bankruptcy and Insolvency Act more generally suggests that s. 243 is meant to be a comprehensive remedy exclusive of provincial law.

Any uncertainty about whether s. 243 was meant to displace provincial legislation like The Saskatchewan Farm Security Act is further mitigated by s. 72(1) of the Bankruptcy and Insolvency Act, which explicitly recognizes the continued operation of provincial law in the bankruptcy and insolvency context, except to the extent that it is inconsistent with the Bankruptcy and Insolvency Act. Moreover, other provisions of the Bankruptcy and Insolvency Act further support a more narrow reading of s. 243's purpose. Notably, s. 47 provides a mechanism for the appointment of an interim receiver where there is an urgent need for the appointment of a receiver.

The legislative history of s. 243 of the Bankruptcy and Insolvency Act further supports a narrow construction of the provision's purpose — i.e., to avoid a multiplicity of proceedings and the inefficiency resulting from them. Vague and imprecise notions like timeliness or effectiveness cannot amount to an overarching federal purpose that would prevent coexistence with provincial laws.

It is notable that Parliament has recognized that the receivership provision under s. 243 can be subordinated to potentially longer delays in other federal legislation (including the federal Farm Debt Mediation Act). Given the presumption that Parliament does not enact related statutes that are inconsistent with one another, courts should avoid an interpretation of a federal statute which does not accommodate similar limitations imposed under a provincial statute. It follows that Parliament intended neither to preclude all notice periods longer than the 10-day notice period in the Bankruptcy and Insolvency Act nor to oust legislation which is intended to favour

mediation between creditors and farmers.

Furthermore, on this record, there is simply no evidence to support the argument that the 150-day delay or the other conditions in The Saskatchewan Farm Security Act frustrate any effectiveness or timeliness concerns. It is the burden of the party invoking paramountcy to not only establish that these are, in fact, the purposes of s. 243, but also that the evidence supports a finding that the provincial law frustrates them in some way. The record is silent in that regard. Parliament's purpose of providing bankruptcy courts with the power to appoint a national receiver is not frustrated by the procedural and substantive conditions set out in the provincial legislation.

There is, as a result, 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. The general goals of bankruptcy or receivership cannot be used to trump the specific purpose of s. 243 and to artificially extend the provision's purpose to create a conflict with provincial legislation. Construing s. 243's purpose more broadly in the absence of clear evidence, is inconsistent with the requisite restrained approach to paramountcy.

The conclusion that Part II of The Saskatchewan Farm Security Act is constitutionally inoperative where an application is made to appoint a receiver pursuant to s. 243(1) of the Bankruptcy and Insolvency Act, is accordingly set aside.

Per Côté J. (dissenting): A yearning for a harmonious interpretation of both federal and provincial legislation cannot lead courts to disregard obvious purposes that are pursued in federal legislation. In the case of s. 243 of the Bankruptcy and Insolvency Act ("BIA"), Parliament intended to establish a process for appointing national receivers, and intended that process to be timely, sensitive to the totality of circumstances and capable of responding to emergencies. These federal purposes are plainly evident in s. 243 BIA, understood in light of the realities and demands of real-time insolvency practice, s. 243's statutory context and its legislative history. To the extent that The Saskatchewan Farm Security Act ("SFSA") is incompatible with these purposes, there is a frustration of purpose.

Given the often frenzied rush of insolvency proceedings, secured creditors will frequently have an acute need to have a receiver appointed promptly. Implicit in the 10-day notice period of s. 243 BIA is the very notion of urgency.

In addition, Parliament permits secured creditors to apply for receivership before the expiry of the 10-day notice period in certain circumstances. This is evidence of Parliament's intention to provide secured creditors with a remedy capable of adapting to the often dramatic circumstances of insolvency. The significant discretion vested in the courts suggests that Parliament wished courts to respond to each application on a case-by-case basis in light of the full factual matrix before them. Moreover, the BIA's interim receivership regime confirms the vital importance of timeliness for the national full receivership.

This federal purpose of timeliness can also be discerned from the legislative history of the statutory notice provision. A full purposive analysis must account for the federal objectives that were originally given effect in the statutory scheme. While s. 243 BIA 's introduction was prompted by a need for a national full receiver, s. 243 is the product of an incremental evolution. The foundational purposes that have animated federal receivership law since 1992 must form part of any credible account of the federal purpose underlying today's s. 243. If this Court disregards these foundational purposes in its frustration of purpose analysis, the provinces will be left free to mangle the receivership scheme.

On the argument that the special treatment afforded to farmers by the BIA must be included in any purposive analysis of s. 243 BIA , given that Parliament expressly excluded farmers from involuntary bankruptcy proceedings, one would expect that Parliament would have enacted a similar provision with regard to the appointment of a national receiver under Part XI of the BIA. However, there is no such provision in Part XI. In addition, there are stark differences between the federal Farm Debt Mediation Act ("FDMA ") and the SFSA, both in their operation and the policy preferences they embody. As a result, the existence of the former cannot be taken as evidence that Parliament intended the BIA to coexist with the latter. The scheme of the FDMA is quite compatible with the balance struck in s. 243 BIA ; if the provincial legislation had mirrored the FDMA , the conclusion as to frustration of federal purpose would have been different.

Although Part XI of the BIA contemplates some degree of interaction and overlap with provincial legislation, the essential question remains whether the operation of Part II of the SFSA undermines to a sufficient extent the federal purpose underlying s. 243 BIA . Here, if understood in more general terms, the federal purpose is clearly drawn in broad strokes, namely to establish a process for applying for a national receiver that is timely, adaptable in case of emergency and sensitive to the totality of circumstances. If a province wishes to legislate in a way that will affect the federal receivership regime, then it must do so in a manner consistent with that purpose.

In the instant case, the federal purpose has been frustrated by the important obstacles the province has deliberately placed in the way. The notice period in the SFSA is far longer, and is absolute. The SFSA also establishes a series of evidentiary hurdles that are incompatible with Parliament's purpose. It is clear that the provincial legislation cannot operate in real time, and is in fact intended to hinder the timely appointment of a receiver, thereby triggering the application of the doctrine of federal paramountcy.

Cases Cited

By Abella and Gascon JJ.

Distinguished: *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121; referred to: *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342; *Reference re Objection by Quebec to a Resolution to amend the Constitution*, [1982] 2 S.C.R. 793; *R. v. Laba*, [1994] 3 S.C.R. 965; *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, 2005 SCC 13, [2005] 1 S.C.R. 188; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3; *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257; *Canadian Western Bank v. Alberta*, 2007 SCC

22, [2007] 2 S.C.R. 3; Quebec (Attorney General) v. Canadian Owners and Pilots Association, 2010 SCC 39, [2010] 2 S.C.R. 536; Quebec (Attorney General) v. Canada (Human Resources and Social Development), 2011 SCC 60, [2011] 3 S.C.R. 635; Marine Services International Ltd. v. Ryan Estate, 2013 SCC 44, [2013] 3 S.C.R. 53; Bank of Montreal v. Marcotte, 2014 SCC 55, [2014] 2 S.C.R. 725; Multiple Access Ltd. v. McCutcheon, [1982] 2 S.C.R. 161; M & D Farm Ltd. v. Manitoba Agricultural Credit Corp., [1999] 2 S.C.R. 961; Law Society of British Columbia v. Mangat, 2001 SCC 67, [2001] 3 S.C.R. 113; Attorney General of Canada v. Law Society of British Columbia, [1982] 2 S.C.R. 307; Reference re Securities Act, 2011 SCC 66, [2011] 3 S.C.R. 837; OPSEU v. Ontario (Attorney General), [1987] 2 S.C.R. 2; General Motors of Canada Ltd. v. City National Leasing, [1989] 1 S.C.R. 641; Westbank First Nation v. British Columbia Hydro and Power Authority, [1999] 3 S.C.R. 134; Quebec (Attorney General) v. Lacombe, 2010 SCC 38, [2010] 2 S.C.R. 453; Quebec (Attorney General) v. Canada (Attorney General), 2015 SCC 14, [2015] 1 S.C.R. 693; 114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town), 2001 SCC 40, [2001] 2 S.C.R. 241; Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927; British Columbia (Attorney General) v. Lafarge Canada Inc., 2007 SCC 23, [2007] 2 S.C.R. 86; Century Services Inc. v. Canada (Attorney General), 2010 SCC 60, [2010] 3 S.C.R. 379; Cadillac Fairview Inc., Re (1995), 30 C.B.R. (3d) 17; Edgewater Casino Inc., Re, 2009 BCCA 40, 265 B.C.A.C. 274; Transglobal Communications Group Inc., Re, 2009 ABQB 195, 4 Alta. L.R. (5th) 157; GMAC Commercial Credit Corp. — Canada v. T.C.T. Logistics Inc., 2006 SCC 35, [2006] 2 S.C.R. 123; Gentra Canada Investments Inc. v. Lehndorff United Properties (Canada) (1995), 169 A.R. 138.

By Côté J. (dissenting)

Century Services Inc. v. Canada (Attorney General), 2010 SCC 60, [2010] 3 S.C.R. 379; Canadian Western Bank v. Alberta, 2007 SCC 22, [2007] 2 S.C.R. 3; Quebec (Attorney General) v. Canadian Owners and Pilots Association, 2010 SCC 39, [2010] 2 S.C.R. 536; Law Society of British Columbia v. Mangat, 2001 SCC 67, [2001] 3 S.C.R. 113; Reference re Securities Act, 2011 SCC 66, [2011] 3 S.C.R. 837; Quebec (Attorney General) v. Canada (Attorney General), 2015 SCC 14, [2015] 1 S.C.R. 693; Railside Developments Ltd., Re, 2010 NSSC 13, 62 C.B.R. (5th) 193; GMAC Commercial Credit Corp. — Canada v. T.C.T. Logistics Inc., 2006 SCC 35, [2006] 2 S.C.R. 123; Jacob's Hold Inc. v. Canadian Imperial Bank of Commerce (2000), 52 O.R. (3d) 776; Bank of Montreal v. Hall, [1990] 1 S.C.R. 121; Marine Services International Ltd. v. Ryan Estate, 2013 SCC 44, [2013] 3 S.C.R. 53; Rothmans, Benson & Hedges Inc. v. Saskatchewan, 2005 SCC 13, [2005] 1 S.C.R. 188.

Statutes and Regulations Cited

Act to amend the Bankruptcy Act and to amend the Income Tax Act in consequence thereof, S.C. 1992, c. 27, ss. 89, 92.

Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act, S.C. 1997, c. 12, s. 114.

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, 2005, Bill C-12, 2nd Sess., 39th Parl., 2007 (assented to December 14, 2007), S.C. 2007, c. 36.

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, Bill C-55, 1st Sess., 38th Parl., 2005 (assented to November 25, 2005), S.C. 2005, c. 47, ss. 30 to 33, 115, 141.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 43 to 46, 47, 48, 72(1), Part XI, 243, 244.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Constitution Act, 1867, ss. 91(21), 92(13).

Farm Debt Mediation Act, S.C. 1997, c. 21, ss. 5 to 14, 7(1) (b), 12, 13(1), 14(2), 16, 20(1), 21.

Farm Debt Mediation Regulations, SOR/98-168, s. 3.

Saskatchewan Farm Security Act, S.S. 1988-89, c. S-17.1, Part II, ss. 3, 4, 9 to 22, 11 to 21, 12, 13(a), (b), 18(1), 19, 20.

Supreme Court Act, R.S.C. 1985, c. S-26, s. 40.

Authors Cited

Ben-Ishai, Stephanie, and Anthony Duggan, eds. *Canadian Bankruptcy and Insolvency Law: Bill C-55, Statute c.47 and Beyond*. Markham, Ont.: LexisNexis, 2007.

Bennett, Frank. *Bennett on Receiverships*, 3rd ed. Toronto: Carswell, 2011.

Canada. Advisory Committee on Bankruptcy and Insolvency. *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency*. Ottawa: Minister of Supply and Services Canada, 1986.

Canada. House of Commons. *House of Commons Debates*, vol. IV, 3rd Sess., 34th Parl., October 29, 1991, pp. 4177-78 and 4180.

Canada. House of Commons. *House of Commons Debates*, vol. 140, No. 128, 1st Sess., 38th Parl., September 29, 2005, p. 8215.

Canada. House of Commons. *Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, No. 7, 3rd Sess., 34th Parl., September 4, 1991, p. 12.

Canada. House of Commons. *Standing Committee on Industry, Natural Resources, Science and Technology. Evidence*, No. 064, 1st Sess., 38th Parl., November 17, 2005, p. 7.

Canada. Industry Canada. *Corporate, Insolvency and Competition Law Policy. Bill C-55: clause by clause analysis* (online: www.ic.gc.ca).

Canada. Industry Canada. Marketplace Framework Policy Branch, Policy Sector. Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act. Ottawa: Corporate and Insolvency Law Policy Directorate, 2002.

Canada. Industry Canada. Office of the Superintendent of Bankruptcy Canada. Bill C-12: Clause by Clause Analysis (online: www.ic.gc.ca).

Canada. Industry Canada. Office of the Superintendent of Bankruptcy Canada. Summary of Legislative Changes: Summary of Key Legislative Changes in Chapter 47 of the Statutes of Canada, 2005, and Chapter 36 of the Statutes of Canada, 2007 (online: www.ic.gc.ca).

Canada. Library of Parliament. Parliamentary Information and Research Service. Bill C-12: 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, 2005, Legislative Summary LS-584E, by Marcia Jones, Law and Government Division, December 14, 2007.

Canada. Senate. Journals of the Senate, No. 12, 2nd Sess., 37th Parl., October 29, 2002, p. 122.

Canada. Senate. Journals of the Senate, No. 57, 2nd Sess., 37th Parl., May 15, 2003, p. 841.

Canada. Senate. Proceedings of the Standing Senate Committee on Banking, Trade and Commerce, No. 2, 2nd Sess., 39th Parl., November 29, 2007, p. 25.

Canada. Senate. Proceedings of the Standing Senate Committee on Banking, Trade and Commerce, No. 19, 1st Sess., 38th Parl., November 23, 2005, p. 55.

Canada. Senate. 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. Ottawa: Senate of Canada, 2003.

Farley, J. M. "A Judicial Perspective on International Cooperation in Insolvency Cases" (March 1998), 17 Am. Bankr. Inst. J. 12 (available on WL Can.).

Jones, Richard B. "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.

Layh, Donald H. A Legacy of Protection: The Saskatchewan Farm Security Act: History, Commentary & Case Law. Langenburg, Sask.: Twin Valley Books, 2009.

Myers, Fred. "Justice Farley in Real Time", in Janis P. Sarra, ed., Annual Review of Insolvency Law 2006. Toronto: Thomson Carswell, 2007, 19.

Sarra, Janis P., Geoffrey B. Morawetz and L. W. Houlden. The 2015 Annotated Bankruptcy and Insolvency Act. Toronto: Carswell, 2015.

United Nations. Commission on International Trade Law. Legislative Guide on Insolvency Law. New York: United Nations, 2005.

Walton, Luanne A. "Paramountcy: A Distinctly Canadian Solution" (2003-2004), 15 N.J.C.L. 335.

Wood, Roderick J. *Bankruptcy and Insolvency Law*. Toronto: Irwin Law, 2009.

APPEAL involving a decision of the Saskatchewan Court of Appeal (Richards C.J. and Ottenbreit and Whitmore JJ.A.), 2014 SKCA 35, 433 Sask. R. 266, 371 D.L.R. (4th) 663, 11 C.B.R. (6th) 245, [2014] 6 W.W.R. 440, 602 W.A.C. 266, [2014] S.J. No. 164 (QL), 2014 CarswellSask 179 (WL Can.), affirming a decision of Rothery J., 2013 SKQB 278, [2013] 12 W.W.R. 176, [2013] S.J. No. 477 (QL), 2013 CarswellSask 531 (WL Can.). The Court of Appeal's conclusion that Part II of The Saskatchewan Farm Security Act, S.S. 1988-89, c. S-17.1, is constitutionally inoperative where an application is made to appoint a receiver pursuant to s. 243(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, is set aside, Côté J. dissenting.

Thomson Irvine and Katherine Roy, for the appellant.

No one appeared for the respondent.

Michael S. Dunn and Daniel Huffaker, for the intervener the Attorney General of Ontario.

Written submissions only by R. Richard M. Butler and Jean M. Walters, for the intervener the Attorney General of British Columbia.

Jeffrey M. Lee, Q.C., and Kristen MacDonald, for the amicus curiae.

The judgment of Abella, Cromwell, Moldaver, Karakatsanis, Wagner and Gascon JJ. was delivered by

- [1] Abella and Gascon JJ. — Prior to 2005, receivership proceedings involving assets in more than one province were complicated by the simultaneous appointment of different receivers in different jurisdictions. Because of the inefficiency resulting from this multiplicity of proceedings, the federal government amended its bankruptcy legislation to permit their consolidation through the appointment of a national receiver. This appeal involves a constitutional challenge to provincial farm legislation on the grounds that it conflicts with this national receivership regime. For the reasons that follow, we see no such conflict.

Background

- [2] Lemare Lake Logging Ltd., a secured creditor, brought an application pursuant to s. 243(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (BIA), for the appointment of a receiver over substantially all of the assets except livestock of its debtor, 3L Cattle Company Ltd., a “farmer” within the meaning of The Saskatchewan Farm Security Act, S.S. 1988-89, c. S-17.1 (SFSA). 3L Cattle contested the appointment and argued that Lemare Lake had to comply with Part II of the SFSA before seeking the appointment of a receiver under s. 243(1).

- [3] Part II of the SFSA provides that, before starting an action with respect to farm land, a creditor must serve a “notice of intention”, engage in mandatory mediation, and prove that the debtor has no reasonable possibility of meeting its obligations or is not making a sincere and reasonable effort to meet its obligations. This includes an action for a receivership order pursuant to s. 243(1) of the BIA .
- [4] Lemare Lake argued that the doctrine of paramountcy rendered certain provisions of the SFSA constitutionally inoperative where an application is made to appoint a receiver pursuant to s. 243(1) of the BIA .
- [5] Lemare Lake and 3L Cattle were incorporated by David Dutcyvich in the 1980s. As a result of disagreements beginning in January 2010 between Mr. Dutcyvich and his two sons, the businesses were restructured, with Mr. Dutcyvich retaining the sole interest in 3L Cattle, and his two sons retaining the sole interest in Lemare Lake.
- [6] In connection with the restructuring, 3L Cattle assumed the primary obligation to repay a loan of \$10 million to Concentra Financial Services Association. Lemare Lake, however, remained contingently liable for the debt. By written agreement dated December 21, 2010, 3L Cattle indemnified Lemare Lake from any liability in respect of the Concentra loan.
- [7] To secure the payment and performance of its obligations to Lemare Lake, 3L Cattle gave Lemare Lake a mortgage dated January 21, 2011 in respect of its interest in 120 parcels of land in Saskatchewan, and a security interest in all non-inventory goods and equipment of 3L Cattle, including machinery, fixtures and tools, by means of a security agreement dated January 19, 2011.
- [8] When 3L Cattle failed to repay the Concentra loan when it became due on January 29, 2013, Concentra sought repayment from both 3L Cattle and Lemare Lake. In turn, Lemare Lake, which was experiencing its own financial problems and had secured a protection order under the Companies’ Creditors Arrangement Act , R.S.C. 1985, c. C-36 , attempted to realize on its security over 3L Cattle’s assets. It accordingly applied to the Saskatchewan Court of Queen’s Bench for the appointment of a national receiver pursuant to s. 243(1) of the BIA over substantially all of the assets of 3L Cattle, except livestock.
- [9] 3L Cattle argued that because it was a “farmer” within the meaning of the SFSA, Lemare Lake had to comply with Part II of the SFSA before applying for the appointment of a national receiver. Part II requires, in part, that before commencing an action with respect to farm land, a person must submit a notice of intention, await the expiry of a 150-day notice period, and engage in a mandatory review and mediation process.
- [10] The chambers judge found that the provisions in Part II of the SFSA did not conflict with s. 243(1) of the BIA and dismissed Lemare Lake’s application: [2013] 12 W.W.R. 176. She found no operational conflict between the federal and provincial legislation, because a secured creditor can comply with both the federal and provincial legislation by obtaining a court order under the SFSA permitting it to commence an action before applying for the

appointment of a receiver under s. 243(1) of the BIA . Nor did she find any conflict in purpose. In her view, the purpose of s. 243(1) was to allow for the appointment of a national receiver, a purpose that was not frustrated by compliance with Part II of the SFSA. This means that a secured creditor must comply with the provisions of Part II of the SFSA before making an application pursuant to s. 243(1) of the BIA , which Lemare Lake had failed to do. The chambers judge's alternative view was that even if she had found Part II of the SFSA to be inoperative, she would not have appointed a receiver.

- [11] The Court of Appeal dismissed Lemare Lake's appeal, agreeing with the chambers judge that a receiver should not be appointed: (2014), 433 Sask. R. 266. Nevertheless, although it was not necessary to do so in view of its conclusions on the merits of appointing a receiver, the Court of Appeal addressed the constitutional argument, not only because it had been fully argued, but because it would likely arise in the future.
- [12] The Court of Appeal agreed with the chambers judge that there was no operational conflict between the federal and provincial statutes: a creditor could comply with both statutes by obtaining an order pursuant to the SFSA before asking to have a national receiver appointed under the BIA . It disagreed, however, about whether Part II of the SFSA frustrated the purpose of s. 243(1) of the BIA , stating:

... Part II of the SFSA would undermine or frustrate the purpose of s. 243 of the BIA in at least two significant ways. First, Part II would dramatically displace the ten-day delay contemplated by the BIA by obliging a creditor like Lemare Lake to wait at least 150 days before applying for a receivership order. ...

Second, Part II of the SFSA would effectively layer on new criteria for the granting of a receivership order under the BIA . [Emphasis added in original; paras. 55-56.]

In the Court of Appeal's view, the purpose of s. 243 was not only to authorize the appointment of national receivers, it was to ensure that such receivers be able to act effectively in the context in which they are appointed — insolvency — where events move quickly and proceedings are time-sensitive. It accordingly concluded that "Part II of the SFSA is inoperative in circumstances where an application is made to appoint a receiver pursuant to s. 243(1) of the BIA ": para. 67.

- [13] The Attorney General for Saskatchewan was granted leave to appeal to this Court. Subsequent to the decision of the Court of Appeal, however, Lemare Lake and 3L Cattle settled their dispute. The Court appointed former counsel for Lemare Lake as *amicus curiae* to respond to the submissions of the Attorney General. *Amicus* was content to have the matter heard by this Court despite its mootness. In our view, the ongoing importance of resolving this issue in Saskatchewan supports our deciding this appeal: see *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, at pp. 353 and 358-63; *Reference re Objection by Quebec to a Resolution to amend the Constitution*, [1982] 2 S.C.R. 793, at p. 806. Moreover, it is worth noting that this is an appeal from the reasons, not the disposition, of the Court of Appeal, which is fully authorized by s. 40 of the Supreme Court Act , R.S.C. 1985, c. S-26 : see *R. v. Laba*, [1994] 3 S.C.R. 965. Neither the Attorney General of Canada nor the

Superintendent of Bankruptcy intervened.

- [14] Before this Court, the submissions were focussed on whether ss. 9 to 22 in Part II of the SFSA are constitutionally inoperative when an application is made to appoint a national receiver under s. 243(1) of the BIA by reason of the doctrine of paramountcy. For the following reasons, we agree with the chambers judge that there is no conflict, and therefore that ss. 9 to 22 of the SFSA are not constitutionally inoperable.

Analysis

- [15] The guiding mantra of the paramountcy analysis is that “where there is an inconsistency between validly enacted but overlapping provincial and federal legislation, the provincial legislation is inoperative to the extent of the inconsistency”: *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 S.C.R. 188, at para. 11; see also *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at para. 98; Luanne A. Walton, “Paramountcy: A Distinctly Canadian Solution” (2003-2004), 15 N.J.C.L. 335, at p. 335.
- [16] The first step in the analysis is to determine whether the federal and provincial laws are validly enacted. This requires looking at the pith and substance of the legislation to determine whether the matter comes within the jurisdiction of the enacting legislature. Assuming both laws are validly enacted, the second step requires consideration of whether any overlap between the two laws constitutes a conflict sufficient to render the provincial law inoperative. A provincial law will be deemed to be inoperative to the extent that it conflicts with or is inconsistent with the federal law: see *Tsilhqot’in Nation v. British Columbia*, [2014] 2 S.C.R. 257, at paras. 128-30; *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, at paras. 25-26 and 32.
- [17] Two kinds of conflict are at play: (1) an operational conflict, where compliance with both the federal and provincial law is impossible; and (2) frustration of purpose, where the provincial law thwarts the purpose of the federal law (*Quebec (Attorney General) v. Canadian Owners and Pilots Association*, [2010] 2 S.C.R. 536 (COPA), at para. 64; *Rothmans, Benson & Hedges Inc.*, at paras. 11-12; *Quebec (Attorney General) v. Canada (Human Resources and Social Development)*, [2011] 3 S.C.R. 635, at para. 17; *Marine Services International Ltd. v. Ryan Estate*, [2013] 3 S.C.R. 53, at paras. 68-69; *Bank of Montreal v. Marcotte*, [2014] 2 S.C.R. 725, at para. 80).
- [18] The operational conflict branch of the paramountcy doctrine requires that there be “actual conflict” between the federal and provincial legislation, that is, “the same citizens are being told to do inconsistent things”: *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at p. 191. Stated otherwise, operational conflict arises “where one enactment says ‘yes’ and the other says ‘no’, such that ‘compliance with one is defiance of the other’”: COPA, at para. 64, citing *Multiple Access Ltd.*, at p. 191; see also *Ryan Estate*, at para. 68; *Rothmans, Benson & Hedges Inc.*, at para. 11. In *M & D Farm Ltd. v. Manitoba Agricultural Credit Corp.*, [1999] 2

S.C.R. 961, for example, an order granting leave to commence foreclosure proceedings under provincial legislation in circumstances where a stay had been granted under a federal statute, was found to be operationally inconsistent because the order made under the provincial statute purported to authorize the very litigation that the federal stay prohibited: paras. 39-42.

- [19] Under the second branch of the paramountcy analysis, provincial legislation will be found to be inoperative when it frustrates the purpose of a federal law: *Canadian Western Bank*, at para. 73. In *Law Society of British Columbia v. Mangat*, [2001] 3 S.C.R. 113, for example, this Court held that provincial legislation prohibiting non-lawyers from practising law for a fee before a tribunal, conflicted with federal legislation providing that a non-lawyer could represent a party before the Immigration and Refugee Board, even for a fee. Acknowledging that dual compliance was not strictly impossible because a person could either join the Law Society or not charge a fee, the Court nonetheless found the provincial law to be “contrary to Parliament’s purpose”: para. 72.
- [20] Significantly, against the background of the two paramountcy paradigms of operational conflict and frustration of purpose, this Court cautioned in *Canadian Western Bank* that “[t]he fact that Parliament has legislated in respect of a matter does not lead to the presumption that in so doing it intended to rule out any possible provincial action in respect of that subject”: para. 74. The fundamental rule of constitutional interpretation is, instead, that “[w]hen a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes”: *Canadian Western Bank*, at para. 75, citing *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307, at p. 356; see also *Ryan Estate*, at para. 69.
- [21] Given the guiding principle of cooperative federalism, paramountcy must be narrowly construed. Whether under the operational conflict or the frustration of federal purpose branches of the paramountcy analysis, courts must take a “restrained approach”, and harmonious interpretations of federal and provincial legislation should be favoured over interpretations that result in incompatibility: *Reference re Securities Act*, [2011] 3 S.C.R. 837, at paras. 59-60, citing *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, at p. 18, per Dickson C.J. (concurring); see also *Canadian Western Bank*, at paras. 37 and 75.
- [22] Constitutional doctrine should give due weight to the principle of cooperative federalism: *Canadian Western Bank*, at para. 24. This principle allows for some interplay, and indeed overlap, between both federal and provincial legislation: see *OPSEU*, at p. 18; see also *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, at p. 669; *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 S.C.R. 134, at para. 18. Cooperative federalism accordingly “normally favours — except where there is an actual conflict — the application of valid rules adopted by governments at both levels as opposed to favouring a principle of relative inapplicability designed to protect powers assigned exclusively to the federal government or to the provinces”: *Quebec (Attorney*

General) v. Lacombe, [2010] 2 S.C.R. 453, at para. 118, per Deschamps J. (dissenting).

- [23] While the principle of cooperative federalism cannot be seen as imposing limits on the otherwise valid exercise of legislative competence, it may be invoked to “facilitate interlocking federal and provincial legislative schemes and to avoid unnecessary constraints on provincial legislative action”: *Quebec (Attorney General) v. Canada (Attorney General)*, [2015] 1 S.C.R. 693, at paras. 17-19. In line with this principle, 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 provincial legislation. As this Court said in *Marcotte*, “care must be taken not to give too broad a scope to paramountcy on the basis of frustration of federal purpose”: para. 72; see also *Canadian Western Bank*, at para. 74. This means that the purpose of federal legislation should not be artificially broadened beyond its intended scope. To improperly broaden the intended purpose of a federal enactment is inconsistent with the principle of cooperative federalism. At 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.
- [24] The litigation in this case proceeded on the assumption that s. 243 of the BIA and Part II of the SFSA were validly enacted. Section 243 of the BIA falls within Parliament’s exclusive power to enact laws in relation to bankruptcy and insolvency, while Part II of the SFSA falls within Saskatchewan’s power to enact laws in relation to property and civil rights: *Constitution Act, 1867*, ss. 91(21) and 92(13).
- [25] The parties essentially accepted the conclusion of the chambers judge and the Court of Appeal about the absence of operational conflict because it is possible to comply with both statutes by obtaining an order under the SFSA before seeking the appointment of a receiver under s. 243 of the BIA. The creditor can comply with both laws by observing the longer periods required by provincial law. In that regard, the federal law is permissive and the provincial law, more restrictive. This has been regularly considered not to constitute an operational conflict: *Ryan Estate*, at para. 76; *COPA*, at para. 65; *Canadian Western Bank*, at para. 100; *Rothmans, Benson & Hedges Inc.*, at paras. 22-24; 114957 *Canada Ltée (Spraytech, Société d’arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241, at para. 35; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 964. The issue before this Court therefore centres on whether the Court of Appeal was right to conclude that the provincial legislation frustrates the purpose of the federal legislation.
- [26] To prove that provincial legislation frustrates the purpose of a federal enactment, the party relying on the doctrine “must first establish the purpose of the relevant federal statute, and then prove that the provincial legislation is incompatible with this purpose”: *COPA*, at para. 66; *Marcotte*, at para. 73; see also *Canadian Western Bank*, at para. 75; *British Columbia (Attorney General) v. Lafarge Canada Inc.*, [2007] 2 S.C.R. 86, at para. 77. Clear proof of purpose is required: *COPA*, at para. 68. The burden a party faces in successfully invoking paramountcy is accordingly a high one; provincial legislation restricting the scope of

permissive federal legislation is insufficient on its own: COPA, at para. 66; see also Ryan Estate, at para. 69.

- [27] And, as previously noted, paramountcy must be applied with restraint. In the absence of “very clear” statutory language to the contrary, courts should not presume that Parliament intended to “occupy the field” and render inoperative provincial legislation in relation to the subject: Canadian Western Bank, at para. 74, citing Rothmans, Benson & Hedges Inc., at para. 21. As this Court explained in advocating a similar restrained approach to interjurisdictional immunity in Canadian Western Bank, at para. 37:

The “dominant tide” [of allowing for a fair amount of interplay and indeed overlap between federal and provincial powers] finds its principled underpinning in the concern that a court should favour, where possible, the ordinary operation of statutes enacted by both levels of government. In the absence of conflicting enactments of the other level of government, the Court should avoid blocking the application of measures which are taken to be enacted in furtherance of the public interest. Professor Paul Weiler wrote over 30 years ago that

the court should refuse to try to protect alleged, but as yet unoccupied, enclaves of governmental power against the intrusions of another representative legislature which has ventured into the area. Instead, the court should try to restrict itself to the lesser but still important role of interpreting statutes of different jurisdictions in the same area, in order to avoid conflict, and applying a doctrine of paramountcy in the few situations which are left.

(“The Supreme Court and the Law of Canadian Federalism” (1973), 23 U.T.L.J. 307, at p. 308) [Emphasis in original.]

- [28] It is in light of the above principles that we turn to the federal and provincial provisions at issue.
- [29] Section 243(1) is found in Part XI of the BIA, dealing with secured creditors and receivers. It authorizes a court, upon the application of a secured creditor, to appoint a receiver where such appointment is “just or convenient”:
243. (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:
- (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
 - (b) exercise any control that the court considers advisable over that property and over the insolvent person’s or bankrupt’s business; or
 - (c) take any other action that the court considers advisable.

- [30] In s. 243, courts are given the authority to appoint a receiver with the power to act nationally, thereby eliminating the need to apply to courts in multiple jurisdictions for the appointment of a receiver.
- [31] Under s. 244(1), a secured creditor who intends to enforce a security on all or substantially all of the inventory, accounts receivable or other property of an insolvent debtor that was acquired for, or used in relation to, a business carried on by the insolvent person, is generally required to send a notice of that intention to the insolvent person. Section 243(1.1) states that, where notice is to be sent under s. 244(1), the appointment of a national receiver cannot be made before the expiry of 10 days after the day on which the secured creditor sends the notice:
- (1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless
- (a) the insolvent person consents to an earlier enforcement under subsection 244(2); or
- (b) the court considers it appropriate to appoint a receiver before then.
- [32] The national receivership regime does not oust a secured creditor's power to have a receiver appointed privately, or by court order under provincial law or any other federal law. Where, however, that receiver takes possession or control of all or substantially all of the inventory, accounts receivable or other property of the insolvent debtor or bankrupt, he or she is a "receiver" for purposes of Part XI of the BIA and must comply with the provisions in that part: see s. 243(2).
- [33] The provincial scheme at issue, the SFSA, was enacted in 1988, with roots in legislation governing Saskatchewan farm land dating back several decades: see Donald H. Layh, A Legacy of Protection: The Saskatchewan Farm Security Act: History, Commentary & Case Law (2009), at pp. 54-57.
- [34] Part II of the SFSA is entitled "Farm Land Security". Its purpose is "to afford protection to farmers against loss of their farm land": s. 4.
- [35] Subject to ss. 11 to 21, s. 9(1)(d) of the SFSA prohibits commencement of any "action" with respect to farm land. "[A]ction" is defined in s. 3 to include an action in court by a mortgagee with respect to farm land for the sale or possession of mortgaged farm land: s. 3(a)(ii). It includes an application for the appointment of a receiver under s. 243(1) of the BIA. Section 11(1)(a) states that, where a mortgagee makes an application with respect to a mortgage on farm land, the court may, on any terms and conditions that it considers just and equitable, order that s. 9(1)(d) does not apply. Where such an order is made, the mortgagee may then commence or continue an action with respect to that mortgage: s. 11(2). Failure to seek an order pursuant to s. 11 renders any action commenced without an order a nullity: s. 11(3).

- [36] Before a mortgagee can bring an application under s. 11, however, s. 12 sets out a number of preconditions. Most notably, the mortgagee must serve a notice of intention on the Farm Land Security Board and on the farmer: s. 12(1). There is then a compulsory and non-waivable 150-day waiting period required before an application can be made: s. 12(1). This notice triggers a mandatory review and mediation process between the mortgagee and the farmer, conducted with the assistance of the board: s. 12(2) to (5). Prior to the expiry of the 150-day waiting period, the board must prepare a report to consider as part of the mortgagee's application to begin the action: ss. 12(12), (13) and 13(b). Once the 150-day waiting period is over, the mortgagee may then make an application for an order granting leave to commence the action: see s. 12(1).
- [37] On hearing the application, the court must presume that the farmer has a reasonable possibility of meeting his or her obligations under the mortgage, and that he or she is making a sincere and reasonable effort to meet those obligations: s. 13(a). The mortgagee, in turn, has the statutory burden of proving that either the farmer has no reasonable possibility of meeting these obligations or that he or she is not making a sincere and reasonable effort to do so: s. 18(1). Ultimately, the court must dismiss the application if it is satisfied that it is not "just and equitable" according to the purpose and spirit of the SFSA to make the order: s. 19. If the application is dismissed, no further application pursuant to s. 11 or notice pursuant to s. 12 may be made with respect to the mortgage on that farm land for one year: s. 20.
- [38] As a result of the concurrent operation of s. 243(1) of the BIA and Part II of the SFSA, a secured creditor wishing to enforce its security interest against farm land must wait 150 days, rather than the 10 days imposed under federal law. The creditor must also comply with the various additional requirements of the SFSA, such as the statutory presumptions described above. That interference with s. 243(1), however, does not, in and of itself, constitute a conflict. A conflict will only arise if such interference frustrates the purpose of the federal regime. This requires inquiring into the purpose of s. 243(1).
- [39] In this case, the parties disagree about the purpose of s. 243 of the BIA and whether it is frustrated by the SFSA. According to the Attorney General for Saskatchewan, the main purpose of the receivership power under s. 243 is to allow for a national receiver. In its view, the purpose of Part XI of the BIA is to provide for the appointment of a single receiver with authority to act throughout the country, rather than requiring a creditor to apply for a receiver in each province, and to provide a uniform set of standards for all receivers of an insolvent, regardless of the authority for the appointment.
- [40] Amicus, on the other hand, submits that the appointment of a national receiver is only part of s. 243's broader purpose. According to amicus, effective insolvency law requires flexibility and prompt and timely access to remedies such as a receivership, without regard to the idiosyncrasies of provincial law. Section 243 was intended to provide secured creditors with an entitlement to apply for the appointment of a receiver within a certain period of time, and to obtain such appointment exclusively in accordance with the substantive

requirements found in the federal law.

- [41] Citing no parliamentary debates or reports concerning the amendments to s. 243 which created the national receivership remedy in 2005, amicus relies instead on case law and secondary sources about the importance of timeliness in insolvency proceedings more generally to support his contention that Parliament must have intended to grant secured creditors the right to apply to a court for an order appointing a national receiver subject only to a 10-day notice period, a right which provincial legislatures should not be allowed to qualify or restrict: e.g., *Century Services Inc. v. Canada (Attorney General)*, [2010] 3 S.C.R. 379, at para. 58; *Cadillac Fairview Inc., Re* (1995), 30 C.B.R. (3d) 17 (Ont. Ct. (Gen. Div.)), at para. 7; Hon. Justice J. M. Farley, “A Judicial Perspective on International Cooperation in Insolvency Cases” (March 1998), 17 *Am. Bankr. Inst. J.* 12; Fred Myers, “Justice Farley in Real Time”, in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2006* (2007), 19; United Nations Commission on International Trade Law, *Legislative Guide on Insolvency Law* (2005), at p. 12. We note that these cases and sources for the most part relate to restructurings conducted under the Companies’ Creditors Arrangement Act . The restructuring proceedings under this Act, not proceedings under Canadian bankruptcy and insolvency law in general, have been referred to as the “hothouse of real-time litigation”: 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* (2006), 481, at p. 484. “Real-time litigation” is a judicially developed phrase used primarily in restructuring cases: *Edgewater Casino Inc., Re* (2009), 265 B.C.A.C. 274, at para. 21; *Transglobal Communications Group Inc., Re* (2009), 4 Alta. L.R. (5th) 157 (Q.B.), at para. 48. A judicially coined expression, however magnetically phrased, that describes judicial practices in the context of restructurings, can hardly be said to be evidence of the legislative purpose of a national receivership regime.
- [42] Amicus also relies on a 1986 report from the Advisory Committee on Bankruptcy and Insolvency which emphasized the need for prompt access to courts as part of its analysis of specific recommendations stemming from a more general proposal to amend Canada’s bankruptcy legislation at that time for the purpose of controlling the appointment and conduct of a receiver of an insolvent debtor: *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986), at pp. 40 and 43-44. This report was issued some 20 years before the 2005 amendments to s. 243 and did not deal with the national receiver.
- [43] Finally, amicus asserts that timeliness is critical to achieving the particular objectives of receivership in general, which include not only enforcement of the secured party’s security interest, but also replacing inefficient management and facilitating the sale of the business as a going concern: see Roderick J. Wood, *Bankruptcy and Insolvency Law* (2009), at pp. 467-69. In his book, however, Professor Wood does not mention timeliness as one of the purposes of s. 243, either in his discussion of the foundations of receivership law generally (c. 17) or in his specific comments on the 2005 and 2007 legislative reforms that led to the

amendments to s. 243: pp. 466-67.

- [44] It is against this backdrop that amicus submits that s. 243 must be read. According to amicus, this evidence proves that the purpose of s. 243 is to establish an effective national receivership remedy, one which is timely and flexible, and applies uniformly across the country.
- [45] This is, in our respectful view, insufficient evidence for casting s. 243's purpose so widely. As the Court explained in *COPA*, at para. 68, "clear proof of purpose" is required to successfully invoke federal paramountcy on the basis of frustration of federal purpose. The totality of the evidence presented by amicus does not meet this high burden. While cases and secondary sources can obviously be helpful in identifying a provision's purpose, the sources cited by amicus merely establish promptness and timeliness as general considerations in bankruptcy and receivership processes. The absence of sufficient evidence supporting amicus's claim about the broad purpose of s. 243 is fatal to his claim. What the evidence shows instead is a simple and narrow purpose: the establishment of a regime allowing for the appointment of a national receiver, thereby eliminating the need to apply for the appointment of a receiver in multiple jurisdictions.
- [46] Section 243(1.1) states that, in the case of an insolvent person in respect of whose property a notice is to be sent under s. 244(1), the court may not appoint a receiver under s. 243(1) before the expiry of 10 days after the day on which the secured creditor sends the notice, unless the insolvent person consents or the court considers it appropriate to appoint a receiver sooner. The effect of the provision is to set a minimum waiting period. This does not preclude longer waiting periods under provincial law. There is nothing in the words of the provision suggesting that this waiting period should be treated as a ceiling, rather than a floor, nor is there any authority that supports treating the waiting period as a maximum.
- [47] In fact, the discretionary nature of the s. 243 remedy — as evidenced by the fact that the provision provides that a court "may" appoint a receiver if it is "just or convenient" to do so — lends further support to a narrower reading of the provision's purpose. A secured creditor is not entitled to appointment of a receiver. Rather, s. 243 is permissive, allowing a court to appoint a receiver where it is just or convenient. Provincial interference with a discretion granted under federal law is not, by itself, sufficient to establish frustration of federal purpose: *COPA*, at para. 66; see also 114957 *Canada Ltée*.
- [48] This case is thus easily distinguishable from *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121, where the Court held that a security interest created pursuant to federal law could not, constitutionally, be subjected to the procedures for enforcement of security interests prescribed by provincial legislation. Unlike the self-executing remedy at issue in that case, where the bank could seize the chattel upon default without the need to go to court, the appointment of a s. 243 receiver is not mandatory. More importantly, in contrast with *Hall*, the s. 243 receivership remedy cannot be said to create a "complete code": p. 155. Nothing in the text of the provision or the BIA more generally suggests that s. 243 is meant to be a

comprehensive remedy, exclusive of provincial law. The provision itself recognizes that a receiver may still be appointed under a security agreement or other provincial or federal laws, and creates no right to the appointment of a national receiver: s. 243(2)(b). As this Court observed in COPA, at para. 66, “permissive federal legislation, without more, will not establish that a federal purpose is frustrated when provincial legislation restricts the scope of the federal permission”.

[49] Any uncertainty about whether s. 243 was meant to displace provincial legislation like the SFSA is further mitigated by s. 72(1) of the BIA, which states:

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

This too demonstrates that Parliament has explicitly recognized the continued operation of provincial law in the bankruptcy and insolvency context, except to the extent that it is inconsistent with the BIA : see *GMAC Commercial Credit Corp. — Canada v. T.C.T. Logistics Inc.*, [2006] 2 S.C.R. 123, at paras. 46-47.

[50] Other provisions of the BIA further support a more narrow reading of s. 243’s purpose. Notably, s. 47 of the BIA empowers a court to appoint an interim receiver where a notice of intention to enforce a security was sent or is about to be sent under s. 244(1). Where there is an urgent need for the appointment of a receiver, the BIA thus provides a mechanism for the appointment of an interim receiver. As Bennett has observed:

In practice, a secured creditor may apply for an interim receiver under subsection 47(1) for a short term, and then apply under section 243 for a full receivership and, before the appointment of the interim receiver expires or, alternatively, apply for an extension under subsection 47(1)(c).

(Frank Bennett, *Bennett on Receiverships* (3rd ed. 2011), at p. 883)

While s. 48 of the BIA provides that ss. 43 to 46 do not apply to individuals whose principal occupation is farming, the provision does not exempt farmers from the operation of s. 47. This shows that Parliament thinks farmers generally warrant special consideration, but not in cases where an interim receiver under s. 47 is found to be warranted. Promptness and timeliness is a concern that Parliament appears to have addressed precisely through the interim receivership regime. The potential conflict, if any, between s. 47 of the BIA and Part II of the SFSA is not, however, at issue in this appeal.

[51] The legislative history of s. 243 of the BIA further supports a narrow construction of the provision’s purpose focussed on the establishment of a national receivership regime. The purpose of a court-appointed receiver, generally, “is to preserve and protect the property in question pending resolution of the issues between the parties”: Bennett, at p. 6, citing *Gentra Canada Investments Inc. v. Lehndorff United Properties (Canada)* (1995), 169 A.R. 138

(C.A.). While historically receivership law was primarily a remedy for secured creditors, the legislative regulation of receiverships has resulted in many significant rights also being given to the debtor and other interested parties as well: Wood, at p. 459.

- [52] Part XI of the BIA was added to the Act in 1992, bringing under federal law various aspects of receivership law that had previously applied to insolvent debtors at common law or under provincial legislation: S.C. 1992, c. 27, s. 89. In discussing the rationale for Part XI's adoption, Pierre Blais, the then-Minister of Consumer and Corporate Affairs and Minister of State (Agriculture), suggested that Part XI was enacted "to impose duties of disclosure and good faith on secured creditors and receivers and to require that a secured creditor give a debtor notice before enforcing its security": House of Commons Debates, vol. IV, 3rd Sess., 34th Parl., October 29, 1991, at pp. 4177-78. He further noted, in the context of a discussion about the legislation more generally, that he had "made a point of consulting closely with [his] provincial counterparts to ensure [the federal] regime meshes smoothly with existing or planned provincial ones": p. 4180.
- [53] Although the 1992 legislation did not create a national receivership remedy, it amended the BIA in two ways that are particularly relevant to this appeal. First, it codified a 10-day notice period under s. 244 for secured creditors seeking to enforce a security on all or substantially all of the inventory, accounts receivable or other property of a business debtor. As Professor Wood explains, the requirement of a notice period developed initially at common law as a way to protect against the potential abuse of power by secured creditors: p. 474. The introduction in 1992 of a statutory notice period largely eliminated uncertainty associated with the common law rule: Wood, at p. 476. The purpose of the s. 244 notice requirement is "to provide an insolvent person with an opportunity to negotiate and reorganize financial affairs": Janis P. Sarra, Geoffrey B. Morawetz and L. W. Houlden, *The 2015 Annotated Bankruptcy and Insolvency Act (2015)*, at p. 1054; see also House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, No. 7, 3rd Sess., 34th Parl., September 4, 1991, at p. 12, Ron MacDonald (Vice-chairman of the Committee). Second, the 1992 amendments gave the courts expanded authority when appointing interim receivers under the BIA : Wood, at pp. 461-62; Bennett, at pp. 841-42. This new regime was intended "to prevent the prejudice that might otherwise be caused by the imposition of [the] new statutory notice period": Wood, at p. 461.
- [54] The 1992 legislation provided for parliamentary review of the BIA in three years' time: s. 92. In 1993, an advisory committee was established to identify further necessary amendments: Stephanie Ben-Ishai and Anthony Duggan, eds., *Canadian Bankruptcy and Insolvency Law: Bill C-55, Statute c.47 and Beyond (2007)*, at p. 3. Although s. 243 remained unchanged when Parliament enacted legislation amending the BIA in 1997, the 1997 amendments called for further parliamentary review in five years' time: S.C. 1997, c. 12, s. 114.

- [55] In anticipation of this review, Industry Canada engaged in a consultation process with stakeholders, culminating in a report published in 2002 summarizing many issues that stakeholders identified as concerns with regard to the operation and administration of the BIA : Marketplace Framework Policy Branch, Policy Sector, Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act. In its report, Industry Canada noted that Part XI of the BIA had not been effective and had not been used as intended in many areas of the country: p. 20.
- [56] For its part, the Standing Senate Committee on Banking, Trade and Commerce, which was ultimately charged with examining and reporting to Parliament on the administration and operation of the BIA ,^[1] identified problems with the operation of the interim receivership regime in the legislation: Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act (2003), at pp. 144-45. The Committee observed that in many jurisdictions, courts had extended the powers of interim receivers to such an extent that they closely resembled those of court-appointed receivers. The problem was that, while exercising similar powers, interim receivers were not bound by the duties and responsibilities of court-appointed receivers. The Committee therefore recommended that the role and powers of interim receivers as well as the duration of their appointment be clarified, suggesting that interim receivers be the "temporary watchdog[s]" that they were initially intended to be: pp. 144-45.
- [57] Professor Wood, at p. 462, discussed what impelled the expansive approach to interim receivership in some jurisdictions:

One of the reasons for conferring such wide powers on interim receivers was that it effectively gave rise to a national receivership. Prior to this, receivers were appointed pursuant to provincial law and it was necessary to seek the assistance of courts of other provinces to give effect to the order there. The availability of a national receivership [through the interim receivership regime] meant that an order had full force and effect in every Canadian province and territory.

- [58] In 2005, Parliament responded by passing Bill C-55: S.C. 2005, c. 47. Bill C-55 not only clarified the scope and powers of interim receivers, but also amended Part XI of the BIA and introduced a national receivership remedy: ss. 30 to 33 and 115.
- [59] In describing the rationale for the 2005 amendments, Industry Canada explained that courts in some jurisdictions had undermined the original intention of the interim receivership remedy by granting interim receivers wide-ranging powers for indefinite periods. The purpose of the reforms to s. 47 was to limit the period of an interim receiver appointment and the powers that may be granted to interim receivers, while s. 243(1) was intended to "allow the bankruptcy court to appoint a receiver with the power to act nationally", thereby "eliminating the need to apply to the courts in multiple jurisdictions for the appointment of a receiver": Industry Canada, Bill C-55: clause by clause analysis (online), Bill Clause Nos. 30 and 115.

[60] There is little in the legislative debate surrounding Bill C-55's adoption. While not decisive in itself, Don Boudria, a member of Parliament, commented that the national receivership remedy was aimed at "cover[ing] the gap" caused by changes to the interim receivership regime and that a national receiver "would be able to operate in any province": House of Commons Debates, vol. 140, No. 128, 1st Sess., 38th Parl., September 29, 2005, at p. 8215. Professor Wood echoes this view and explains:

Instead of using an interim receiver as a means of appointing a receiver who can operate nationally, the amendments give the bankruptcy courts the power to appoint a national receiver. The court may give the receiver the power to take possession of the debtor's property, exercise control over the debtor's business, and take any other action that the court thinks advisable. This gives the court the ability to make the same wide-ranging orders that it formerly made in respect of interim receivers, including the power to sell the debtor's property out of the ordinary course of business by way of a going-concern sale or a break-up sale of the assets. A court is directed not to appoint a receiver in respect of a debtor who has been given a notice of intention to enforce until the ten-day notice period has expired, unless the debtor consents to an earlier appointment or the court considers it appropriate to do so. If the secured creditor is concerned that the debtor may dissipate the assets, the secured creditor may seek the appointment of an interim receiver. [Emphasis added; footnotes omitted; p. 466.]

(See also Bennett, at p. 886.)

[61] Andrew Kent, then a director of the Insolvency Institute of Canada, explained to members of a committee studying the Bill that creation of a national receivership remedy would be "more efficient" given that "many . . . businesses now are on a national scale": Standing Committee on Industry, Natural Resources, Science and Technology, Evidence, No. 064, 1st Sess., 38th Parl., November 17, 2005, at p. 7. Similarly, Jerry Pickard, the then-Parliamentary Secretary to the Minister of Industry, emphasized that the "creation of a national receiver, with the power to act across the country", would "greatly streamline" the bankruptcy process: Proceedings of the Standing Senate Committee on Banking, Trade and Commerce, No. 19, 1st Sess., 38th Parl., November 23, 2005, at p. 55.

[62] Although Bill C-55 received royal assent on November 25, 2005, it was not immediately proclaimed in force: s. 141; see also Marcia Jones, Legislative Summary LS-584E, Bill C-12: 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, 2005 (2007), at p. 2. In the interim, Parliament passed Bill C-12, which further amended the BIA : S.C. 2007, c. 36.

[63] During the legislative debate on Bill C-12, Colin Carrie, a member of Parliament and then-Parliamentary Secretary to the Minister of Industry, explained that the further amendments to s. 243 were aimed in part at addressing shortfalls identified with the national receivership remedy, whose "goal was to improve efficiency in the insolvency system by allowing one person to deal with all of the debtor's property, wherever the property is located in Canada":

Proceedings of the Standing Senate Committee on Banking, Trade and Commerce, No. 2, 2nd Sess., 39th Parl., November 29, 2007, at p. 25.

[64] The Legislative Summary of the Bill states that a receiver appointed under s. 243 has “the authority to act throughout Canada” and confirms that a “court may not appoint a receiver until 10 days after the date the notice is sent — unless the debtor consents to an earlier enforcement of the security, or the court considers it appropriate to appoint a receiver before then”: p. 43. In its analysis of the legislation, Industry Canada further explains that the national receivership remedy is aimed at increasing efficiency while the purpose of the notice period more specifically is to give time to the debtor to repay the liability:

Section 243 sets out the rules related to the appointment of a receiver. Chapter 47 created the ability to appoint a receiver under the Act. This differs from current practice, in which receivers are appointed under provincial law. The new BIA receiver will be entitled to act across the country, increasing efficiency by removing the need to have a receiver appointed in each jurisdiction in which the debtor’s assets are located. Creditors will still be entitled to have a provincially appointed receiver act on their behalf under the Act.

...

Subsection (1.1) mandates that a notice of an intention to enforce security (a section 244 notice) must be provided before a receiver may be appointed. The intention of the section 244 notice is to provide the debtor with an opportunity to repay the liability that underlies the security being enforced. The waiting period is not necessary where the debtor consents or the court determines that it is appropriate to appoint a receiver. [Emphasis added.]

(Bill C-12: Clause by Clause Analysis (online), Bill Clause No. 58)

[65] In its summary of the key legislative changes under both Bill C-12 and Bill C-55, Industry Canada highlighted s. 243:

Judges exercising their powers under the BIA may, on application of a secured creditor, appoint a “national” receiver under section 243 of the BIA if it is “just or convenient to do so”. A receiver appointed under section 243 of the BIA will have the authority to act throughout Canada. Such an appointment eliminates the need to obtain separate appointments in every province/territory where the debtor has assets.

...

If a notice to enforce security is to be sent under section 244(1) of the BIA , the court may not appoint a receiver until the 10-day notice period has expired unless the debtor consents to an earlier enforcement or the court considers it appropriate to appoint a receiver before then. [Emphasis added.]

(Summary of Legislative Changes: Summary of Key Legislative Changes in Chapter 47 of the Statutes of Canada, 2005, and Chapter 36 of the Statutes of Canada, 2007 (online), Part B)

- [66] Bill C-12 received royal assent on December 14, 2007. The amendments to s. 243 under both Bill C-12 and Bill C-55 came into force on September 18, 2009: SI/2009-68. There have been no further amendments to s. 243 since that time.
- [67] The preceding review confirms that s. 243's purpose is simply the establishment of a regime allowing for the appointment of a national receiver, thereby eliminating the need to apply for the appointment of a receiver in multiple jurisdictions: see Wood, at pp. 466-67. The 2005 and 2007 amendments to the BIA made clear that interim receivers were to be temporary in nature and have more limited powers, as originally intended, but gave courts the power to appoint a receiver with authority to act nationally, thereby increasing efficiency and removing the need to seek the appointment of a receiver in each jurisdiction where the debtor has assets. Sarra, Morawetz and Houlden have explained:

Section 243 grants authority to the court, defined in s. 2 to include a judge exercising jurisdiction under the BIA , to appoint a receiver with the power to act nationally, thereby eliminating the need to apply to the courts in multiple jurisdictions for the appointment of a receiver. The national receiver under the BIA is entitled to act across the country, increasing efficiency by removing the need to have a receiver appointed in each jurisdiction in which the debtor's assets are located. [Emphasis added; p. 1037.]

- [68] Section 243 was thus aimed at the establishment of a national receivership regime. Its purpose was to avoid a multiplicity of proceedings and the inefficiency resulting from them. There is no evidentiary basis for concluding that it was meant to circumvent the procedural and substantive requirements of the provincial laws where the appointment is sought. General considerations of promptness and timeliness, no doubt a valid concern in any bankruptcy or receivership process, cannot be used to trump the specific purpose of s. 243 and to artificially extend the provision's purpose to create a conflict with provincial legislation. Construing s. 243's purpose more broadly in the absence of clear evidence that Parliament intended a broader statutory purpose, is inconsistent with the requisite restrained approach to paramountcy and with the fundamental rule of constitutional interpretation referred to earlier in our reasons: paras. 20-21. Vague and imprecise notions like timeliness or effectiveness cannot amount to an overarching federal purpose that would prevent coexistence with provincial laws like the SFSA.
- [69] Our conclusion is further bolstered by the operation of the federal Farm Debt Mediation Act , S.C. 1997, c. 21 (FDMA), legislation which allows an insolvent farmer to bring an application to stay proceedings by the farmer's creditors in order to engage in mediation and a review of the farmer's financial affairs: ss. 5 to 14. Under the FDMA, a security holder must give a farmer at least 15 business days' notice before seeking either to enforce any remedy against the property of a farmer or to commence any proceedings or any action, execution or other proceedings for the recovery of a debt, the realization of any security or the taking of any property of a farmer: s. 21. Before or after receiving such notice, the farmer may apply for a 30-day stay of proceedings against all creditors, a review of the farmer's financial affairs, and mediation between the farmer and all the farmer's creditors for the purpose of

assisting them to reach a mutually acceptable arrangement: ss. 5(1)(a) and 7(1)(b); see also Bennett, at p. 135. Where extension of the 30-day period is essential to the formulation of an arrangement between the farmer and the farmer's creditors, the stay can be extended for up to an additional 90 days: s. 13(1). When the stay is in effect, no creditor can enforce any remedy against the property of a farmer or commence or continue any proceedings or any action, execution or other proceedings for the recovery of a debt, the realization of any security or the taking of any property of a farmer, notwithstanding any other law: s. 12.

- [70] In describing the FDMA's predecessor legislation in *M & D Farm*, this Court explained that the legislation was "intended to create a standstill period or moratorium of short duration" to give a farmer "a breathing space in which to attempt to reorganize his or her financial affairs" with "the assistance of a neutral panel to mediate with creditors": para. 18.
- [71] While the federal FDMA and the provincial SFSA have different substantive and procedural requirements, they have similar purposes, and are aimed at the protection of farmer debtors. It is notable that Parliament has recognized that the receivership provision under s. 243 can be subordinated to similar delays in other legislation (including a 120-day stay under the FDMA, in comparison with 150 days under the SFSA), to allow for mediation and review of a farmer's financial situation. Given the presumption that Parliament does not enact related statutes that are inconsistent with one another, courts should avoid an interpretation of a federal statute which does not accommodate similar limitations imposed under a provincial statute: *Ryan Estate*, at paras. 80-81. In light of the FDMA, it follows that Parliament intended neither to preclude all notice periods longer than the 10-day notice period provided in the BIA nor to oust legislation which is intended to favour mediation between creditors and farmers regarding the enforcement of a security.
- [72] Given these considerations and this analysis, we do not agree with the Court of Appeal's finding that the purpose of s. 243 was to afford a timely remedy to secured creditors. What seemed "self-evident" to the Court of Appeal (paras. 51-52), and led to its conclusion that the 10-day waiting period under s. 243(1.1) was a ceiling, is, with respect, neither supported by the evidence, nor compatible with a restrained approach to paramountcy. Furthermore, on this record, there is simply no evidence to support amicus's argument that the 150-day delay or the other conditions in the SFSA frustrate any effectiveness or timeliness concerns. It is the burden of amicus to not only establish that these are, in fact, the purposes of s. 243, but also that the evidence supports a finding that the provincial law frustrates them in some way. The record is silent in that regard. That a recourse may take longer, or may have additional requirements, does not render it automatically ineffective or untimely, particularly when the assets at stake are farm lands.

Conclusion

- [73] Amicus has, with respect, been unable to satisfy his burden to prove that ss. 9 to 22 of the SFSA conflict with the purpose of s. 243 of the BIA. Parliament's purpose of providing bankruptcy courts with the power to appoint a national receiver is not frustrated by the

procedural and substantive conditions set out in the provincial legislation. While these conditions require a secured creditor to seek leave before bringing an application for the appointment of a receiver under s. 243 — a process which takes at least 150 days and imposes other procedural and substantive requirements — they do not hinder the purpose of allowing for the appointment of a national receiver. The purpose of permissive federal legislation is not frustrated simply because provincial legislation restricts the scope of that permission: COPA, at para. 66; Ryan Estate, at para. 69; see also Rothmans, Benson & Hedges Inc. The “high standard” for applying the paramountcy doctrine on the basis of frustration of federal purpose has accordingly not been met: Ryan Estate, at para. 84.

- [74] The Court of Appeal’s conclusion that Part II of the SFSA is constitutionally inoperative where an application is made to appoint a receiver pursuant to s. 243(1) of the BIA, is accordingly set aside. In view of the agreement of the parties, there will be no further order with respect to costs.

The following are the reasons delivered by

- [75] Côté J. (dissenting) — It may be an old cliché, but in Canadian bankruptcy and insolvency law, its wisdom is unavoidable: time is of the essence. In the past, this Court has acknowledged that restructuring proceedings are a “hothouse of real-time litigation”: *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 58, quoting R. B. Jones, “The Evolution of Canadian Restructuring: Challenges for the Rule of Law”, in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005 (2006)*, 481, at p. 484. Timeliness is no less important for the appointment of a receiver — whether interim or full — as the receiver at once preserves and manages property while enforcing a secured creditor’s rights.
- [76] In light of this, I am of the view that a balance has been struck by Parliament in s. 243 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (“BIA”), between the competing interests of secured creditors and insolvent debtors in the often dramatic circumstances surrounding a debtor’s insolvency. While I agree with the majority’s conclusion that Parliament’s intention in enacting s. 243 BIA was to enable a secured creditor to apply for the appointment of an effective national receiver, I must dissent, because I do not believe that a full purposive account of s. 243 can end there. I am of the mind that Parliament also intended to establish a process for appointing national receivers that is timely, sensitive to the totality of circumstances and capable of responding to the emergencies that are known to occur in practice. In my view, these purposes are clearly on display in s. 243 BIA. To the extent that the operation of Part II of The Saskatchewan Farm Security Act, S.S. 1988-89, c. S-17.1 (“SFSA”), is incompatible with these purposes and with the federally calibrated balance that s. 243 represents, I see a frustration of purpose.

I. Doctrine of Federal Paramountcy

[77] It is now well established that one of the ways in which the doctrine of federal paramountcy is triggered is when the operation of validly enacted provincial legislation frustrates the purpose of federal legislation: *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 73. The party invoking the doctrine must provide clear proof of the federal purpose and must then establish that “the provincial legislation is incompatible with this purpose”: *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 S.C.R. 536 (“COPA”), at para. 66; see also para. 68. The burden of proving this frustration is high.

[78] My colleagues, following the clarion call of co-operative federalism, stress the need to take a “restrained approach” in frustration of purpose analysis. But while co-operative federalism is undoubtedly an important principle, a yearning for a harmonious interpretation of both federal and provincial legislation cannot lead this Court to disregard obvious purposes that are pursued in federal legislation and that are, by this Court’s jurisprudence, paramount. Gonthier J., for the Court, stressed the following in *Law Society of British Columbia v. Mangat*, 2001 SCC 67, [2001] 3 S.C.R. 113, at para. 66:

... I consider irrelevant the principle of statutory interpretation whereby a statute should be read in a manner that will uphold the constitutionality of the relevant legislative provisions. This principle only applies when both competing interpretations are reasonably open to the court: *R. v. Zundel*, [1992] 2 S.C.R. 731, at p. 771. In this case, to adopt the interpretation consistent with the constitutional norms would be repugnant to the text and context of the federal legislation.

[79] It is also worth noting this Court’s own warning in *Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837, at paras. 61-62:

While flexibility and cooperation are important to federalism, they cannot override or modify the separation of powers. . . .

... The “dominant tide” of flexible federalism, however strong its pull may be, cannot sweep designated powers out to sea, nor erode the constitutional balance inherent in the Canadian federal state.

See also *Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14, [2015] 1 S.C.R. 693, at para. 19.

[80] With this said, I will now discuss what I believe to be the purpose of s. 243 BIA .

II. Federal Purpose Underlying Section 243 BIA

A. Balance Struck by Parliament: A Timely and Flexible Remedy for Secured Creditors

[81] I will begin by reproducing the relevant portions of s. 243:

243. (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

- (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
- (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
- (c) take any other action that the court considers advisable.

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

- (a) the insolvent person consents to an earlier enforcement under subsection 244(2); or
- (b) the court considers it appropriate to appoint a receiver before then.

(2) Subject to subsections (3) and (4), in this Part, "receiver" means a person who

- (a) is appointed under subsection (1); or
- (b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under
- (i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or
- (ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

[82] For the reasons that I elaborate below, I believe that through s. 243 Parliament intended to establish a process for appointing national receivers that would be effective, timely, capable of responding to emergencies (or, in a word, flexible) and sensitive to the totality of circumstances. In part, this reflects a balance struck by Parliament between the interest of secured creditors in obtaining a timely remedy and that of insolvent debtors in being afforded enough time either to commence restructuring proceedings or to arrange their financial affairs and pay their creditors. I believe these federal purposes are plainly evident in s. 243, understood in light of the realities and demands of real-time insolvency practice, s. 243's statutory context and its legislative history.

- [83] To begin, the BIA prescribes a 10-day notice period between the time a secured creditor issues a notice of intention to enforce a security and the time a court may appoint a national receiver: s. 243(1.1). This period coincides with the 10-day period after notice is given during which s. 244(2) prevents the creditor from enforcing the security.
- [84] The majority sees s. 243's 10-day notice period as a mere minimum, designed to work in concert with longer provincial waiting periods. Respectfully, I do not believe this reading is supported by the context of insolvency practice into which the 10-day period was initially introduced. Such a reading would upset the balance that Parliament intended to strike.
- [85] In my view, implicit in this short 10-day notice period is the very notion of urgency, connected to the need for receivership law to operate effectively in real time. Secured creditors will often have an acute need to have a receiver appointed promptly. In the often frenzied rush of insolvency proceedings, court-appointed receivers perform the important functions of taking over control of the insolvent debtor's assets, assuming management of the debtor's business and enforcing rights for the recovery of money through the sale of the debtor's property: F. Bennett, *Bennett on Receiverships* (3rd ed. 2011), at pp. 1 and 6. It is important that this be done quickly. Secured creditors are often rightly concerned that the insolvent debtor may dissipate its assets: R. J. Wood, *Bankruptcy and Insolvency Law* (2009), at p. 461. Time will also be of the essence if the current managers of the insolvent debtor are incompetent, are acting fraudulently or are prone to take senseless risks, or if a part or the whole of the business needs to be sold as a going concern: Wood, at pp. 467-69. As Richards C.J. stated in the judgment on appeal, the insolvency context "is self-evidently one where events move quickly and where, by their nature, proceedings are time sensitive": 2014 SKCA 35, 433 Sask. R. 266, at para. 51.
- [86] Such is the importance of time for creditors that, before the 10-day standstill for enforcing a security on all or substantially all of the debtor's assets under s. 244 was introduced into the BIA, secured creditors would often move to appoint a receiver mere hours after making a demand for payment: Wood, at p. 474. In order to prevent secured creditors from riding roughshod over the interests of insolvent debtors in this way, Canadian courts developed the reasonable notice doctrine, later replaced by the BIA's 10-day statutory notice requirement.
- [87] Timeliness is so critical that s. 47 BIA allows secured creditors to apply for the immediate appointment of an interim receiver in order to preserve the debtor's property. And instead of demonstrating any intention that this statutory notice period could be extended pursuant to provincial law, Parliament permits secured creditors to apply for receivership before the expiry of the 10-day period in certain circumstances. Section 243(1.1) (b) BIA provides that a court may appoint a receiver before the expiry of the notice period if it considers it appropriate. Furthermore, an insolvent debtor can consent to an earlier appointment of a receiver under s. 243(1.1)(a). These provisions evidence Parliament's intention to provide secured creditors with a remedy capable of adapting to the often dramatic circumstances of insolvency.

- [88] This federal purpose of timeliness can also be discerned from the legislative history of the statutory notice provision. As my colleagues explain, this statutory notice period was introduced into the BIA in s. 244 in 1992, and applied to secured creditors seeking to enforce their security under provincial legislation on all or substantially all of an insolvent debtor's assets. Because this 10-day notice requirement has since been incorporated into the federal receivership regime, in which it serves a similar purpose, I am of the view that a full purposive analysis of that scheme must account for the federal objectives that were originally given effect in s. 244.
- [89] Finally, Parliament appears to have intended that a court, in assessing an application, consider the totality of the circumstances and make an equitable judgment sensitive to the full factual matrix. This is clear from s. 243(1) BIA , which provides that a court may appoint a receiver "if it considers it to be just or convenient to do so". The secured creditor is not required to surmount massive evidentiary hurdles. The court's discretion is not restrained in any meaningful way. It must be borne in mind that, historically, receivership was an equitable remedy designed to protect the rights of implicated parties and to preserve property, and this remedy was applied expansively wherever it was deemed necessary: Bennett, at p. 2. The standard provided for in s. 243(1) BIA flows from this origin and purpose, and is commensurate with the demands and realities of real-time litigation.
- [90] In sum, s. 243 BIA is a typical bankruptcy and insolvency provision designed to operate in real time. It seeks to balance the interests of secured creditors and debtors through a process for applying for a national receiver that is adaptable and sensitive to the circumstances, and that can be launched quickly if need be.

B. Narrow Construction of the Federal Purpose Endorsed by the Majority

- [91] The majority sees in s. 243 only one purpose: to enable secured creditors to apply for the appointment of a national receiver, thereby eliminating the need to undertake the lengthy and cumbersome process of applying for a receiver in multiple jurisdictions. Respectfully, I cannot subscribe to so narrow a reading.
- [92] I agree with my colleagues' assessment of the problem that prompted Parliament to introduce the national receivership scheme in what is now s. 243 BIA . Before that section was introduced, many had expressed concerns that the absence of a national receivership regime required secured creditors to undertake the cumbersome process of applying for a receiver in each province. In addition, a practice had emerged in some provinces of appointing interim receivers under s. 47 BIA and conferring broad nation-wide powers on them for indefinite periods, often lasting through to the final liquidation of a debtor's assets and displacing the intended role of a receiver appointed under the auspices of provincial law: J. P. Sarra, G. B. Morawetz and L. W. Houlden, *The 2015 Annotated Bankruptcy and Insolvency Act* (2015), at p. 174; *Railside Developments Ltd., Re*, 2010 NSSC 13, 62 C.B.R. (5th) 193, at paras. 50-51. Indeed, in 2006 this Court waded into the controversy. Abella J., for a majority of the Court, cautioned against an "open-ended" reading of s. 47 based on

“jurisdictional largesse” in regard to unilateral declarations regarding third party rights: *GMAC Commercial Credit Corp. — Canada v. T.C.T. Logistics Inc.*, 2006 SCC 35, [2006] 2 S.C.R. 123, at paras. 45-46.

- [93] The amendments passed in 2005 (c. 47) and 2007 (c. 36), both brought into force in 2009, aimed to bring clarity and consistency to the system of receivership under the BIA . First, the amendments limited the powers of interim receivers appointed under s. 47 BIA as well as the duration of their appointments, which clearly became “interim” in nature. Second, Parliament reworked Part XI of the BIA so that s. 243 provided for the appointment of a national receiver over all or substantially all of an insolvent debtor’s assets. This receivership regime is not exclusive; s. 243(2) BIA makes it clear that a national receiver may also be appointed by private agreement or under another Act, whether provincial or federal.
- [94] I do not dispute that s. 243 BIA ’s introduction was prompted by a need for a national full receiver, which would ensure that a secured creditor did not have to undertake the process of applying for a receiver in every province and would limit the need to have recourse to an interim receiver over indefinite periods. I also agree that receivers appointed under Part XI are subject to a uniform set of standards and duties.
- [95] However, my colleagues have, in construing the federal purpose, focused principally on the specific mischief that prompted Parliament to amend Part XI of the BIA in 2005 and 2007, while largely overlooking the federal purposes related to receivership law that were given effect when Part XI was introduced in 1992 and that have carried through to modern day s. 243. It must be remembered that s. 243 is the product of an incremental evolution. The prescribed 10-day notice period for secured creditors seeking to enforce a security on all or substantially all of the inventory, accounts receivable or other property of a business debtor was among the first rules codified in Part XI of the BIA in 1992. It was designed to apply to receivers governed by the common law or by provincial legislation. In my view, it was then that Parliament struck a balance between the interest of secured creditors in a timely remedy and that of insolvent debtors in being afforded enough time to arrange their financial affairs. The 2005 and 2007 amendments — the latest steps in this legislative evolution — were specifically intended to provide secured creditors with access to a national receivership. However, I am convinced that the foundational purposes that have animated federal receivership law since 1992 must form part of any credible account of the federal purpose underlying today’s s. 243. I fear that if this Court disregards these foundational purposes in its frustration of purpose analysis, the provinces will be left free to mangle the receivership scheme such that it no longer functions as Parliament intended it to.
- [96] I will now attempt to address more specifically a number of arguments raised by my colleagues. In short, they argue that a narrow construction of s. 243’s purpose is supported by the text of the BIA , by extrinsic evidence regarding its legislative history and by the purpose and operation of the Farm Debt Mediation Act , S.C. 1997, c. 21 (“FDMA ”). Respectfully, I do not agree.

(1) Interim Receivership

- [97] It is argued that, to the extent that timeliness is an important concern, it has been addressed through the interim receivership regime under s. 47 BIA , and that any constitutional conflict between Part II of the SFSA and that section should be left for another day.
- [98] If anything, the BIA ’s current interim receivership regime confirms the vital importance of timeliness for the national full receivership. It is generally accepted that interim receivership was “created to protect the interests of secured creditors during the 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 under s. 244”: Sarra, Morawetz and Houlden, at p. 174. However, as my colleagues document in their reasons, following the 2005 and 2007 amendments the interim receivership was intended to be time-limited. The interim receivership now expires after 30 days unless another period is specified by the court: s. 47(1) (c) BIA . If the interim receivership is meant to preserve debtors’ property until a national full receiver is appointed, this 30-day expiration date suggests that Parliament intended a receiver to be appointed promptly.
- [99] Furthermore, the interim receiver does not possess all the powers that a national receiver does. For instance, s. 243(1)(c) provides that a court may appoint a receiver to “take any other action that the court considers advisable”, which may include disposing of the debtor’s property and distributing the proceeds. While it will often be important that this be done quickly, the BIA does not permit courts to grant that power to interim receivers: Wood, at pp. 477-78. Moreover, interim receivers appointed under Part II of the BIA are not subject to all the rules imposed by Part XI. As a result, I do not share the majority’s view that the existence of the interim receivership regime negates the importance of timeliness for the appointment of a receiver under Part XI.
- [100] Lastly, I am concerned that the majority’s reading of s. 243(1.1) risks undermining the intended effect of the 2005 and 2007 amendments to the BIA . As the majority thoroughly documents, the amendments were designed in part to return the interim receivership to its appropriate role, limited in both power and time. The majority’s interpretation of s. 243 BIA has the potential to once again open the door to periods of indefinite interim receivership, since under the majority’s understanding the appointment of receivers under s. 243 may be stalled for extended periods of time by excessive notice periods imposed by provincial laws.

(2) Discretionary Nature of the National Receivership Regime

- [101] My colleagues find support in the fact that the s. 243 remedy is discretionary. As I explained above, the section does not compel courts to appoint a receiver, but instead recognizes courts’ discretion to do so if it is “just or convenient”. In my colleagues’ view, this means that a secured creditor is not entitled to a national full receiver. If secured creditors are not so entitled, they argue, there can be no frustration of federal purpose when the SFSA adds additional requirements before secured creditors are permitted to have recourse to the s.

243 remedy.

[102] However, this interpretation seems to misrepresent what Parliament intended to provide secured creditors in the circumstance of debtor insolvency. It is clear that, under the BIA , secured creditors are not, per se, entitled as of right to a receiver. Rather, Parliament intended to confer on them the right to apply for the appointment of a national full receiver on very short notice. I fail to see how this residual discretion undermines Parliament's evident intention to enable timely access to receivership. Rather, the significant discretion vested in the courts suggests that Parliament wished courts to respond to each application on a case-by-case basis in light of the full factual matrix before them.

(3) The Special Case of Farmers

[103] It is argued that the special treatment afforded to farmers by the BIA must be included in any purposive analysis of s. 243 BIA . Specifically, s. 48 BIA excludes farmers from involuntary bankruptcy proceedings. On this argument, I share the view articulated by Richards C.J. in the Court of Appeal's reasons (see para. 63). Given that Parliament expressly excluded farmers from involuntary bankruptcy proceedings, one would expect that Parliament would have enacted a similar provision to exclude farmers from s. 243 BIA if it intended to extend special treatment to farmers with regard to the appointment of a national receiver. However, there is no such provision in Part XI.

[104] My colleagues also argue that the federal FDMA amounts to parliamentary recognition that the receivership regime in Part XI of the BIA can be subjected to additional provincial delays in the context of a farmer's insolvency. Unfortunately, I can read no such implication into the FDMA . For one, there are stark differences between the FDMA and the SFSA, both in their operation and the policy preferences they embody. As a result, the existence of the former cannot be taken as evidence that Parliament intended the BIA to coexist with the latter.

[105] For instance, the FDMA provides that a security holder is only required to give a farmer-debtor 15 business days' notice before attempting to obtain any remedy or institute any proceeding to recover its debt or to take any property of the farmer: s. 21. And while it is true that a farmer may apply for a 30-day stay of proceedings (s. 5(1)(a)) and that the stay may be renewed up to three times, those renewals are subject to strict conditions. A renewal of the stay is only to be granted where it is essential to the formulation of an arrangement between the farmer and his or her creditors: s. 13(1). Otherwise, a stay will only be renewed where it will neither diminish the value of the farmer's assets nor unduly prejudice the farmer's creditors, and where there is no indication of bad faith on the farmer's part: Farm Debt Mediation Regulations, SOR/98-168, s. 3. Furthermore, an administrator may terminate the stay of proceedings at any time for any of a wide variety of reasons, including that mediation will not lead to an arrangement between the parties or that the farmer has jeopardized his or her assets: s. 14(2).

- [106] Unlike the SFSA, the FDMA does not impose an automatic and absolute 150-day moratorium on an application for the appointment of a receiver. Moreover, the FDMA does not entitle every insolvent farmer to apply for a stay of proceedings: s. 20(1). In addition, where a stay has been issued, an administrator must appoint a guardian of the farmer's assets (s. 16), and the stay does not preclude the appointment of an interim receiver under the BIA : *Jacob's Hold Inc. v. Canadian Imperial Bank of Commerce* (2000), 52 O.R. (3d) 776 (S.C.J.). That protection is not extended to secured creditors under the SFSA. Also, as I mentioned above, the stay under the FDMA can be terminated by the administrator whenever it has become evident that mediation will not result in an arrangement between the farmer-debtor and the majority of the creditors: s. 14(2). And once the stay has been terminated or has expired, the FDMA does not require an application for leave or impose a high burden of proof on secured creditors.
- [107] In my view, the special treatment for farmers prescribed by the FDMA displays many of the same qualities — timeliness, adaptability and sensitivity to the totality of circumstances — that are shared by s. 243 BIA . Briefly stated, the FDMA is still highly time-sensitive: only 15 business days' notice is required and the stay lasts but 30 days and can be renewed only if strict conditions are met. The FDMA also demonstrates a remarkable degree of oversight and adaptability to circumstances, given that the stay of proceedings can be terminated or extended where necessary. From the standpoint of efficacy, a stay can be extended only for the purpose of fostering an arrangement between the parties, and may be suspended if an arrangement is not possible, if the value of the farmer's assets is threatened or if bad faith is evident.
- [108] The scheme of the FDMA is thus quite compatible with the balance struck in s. 243 BIA , providing a prompt and circumstance-sensitive remedy that is tailored to the commercial realities of farming. As a result, if the provincial legislation had mirrored the FDMA , my conclusion as to frustration of federal purpose would have been different.
- (4) Exhaustiveness
- [109] I agree with my colleagues that Part XI of the BIA contemplates some degree of interaction and overlap with provincial legislation. This is made clear in s. 243(2), which includes all receivers of an insolvent debtor in the definition of "receiver". More broadly, s. 72(1) states that the provisions of the BIA "shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act".
- [110] This conclusion is consonant not only with the evidence concerning the legislative context, but also with this Court's jurisprudence. Parliament should not be presumed to intend to occupy or cover the field simply because it has legislated in regard to a particular matter: *Canadian Western Bank*, at para. 74.

- [111] However, my colleagues appear to have concluded that since the federal regime is not exhaustive, it necessarily contemplates the possibility of being supplemented by Part II of the SFSA. In this vein, Abella and Gascon JJ. distinguish the instant case from *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121, by noting that, unlike in *Hall*, the receivership regime of the BIA is not a complete or exhaustive code that necessarily excludes provincial legislation. Respectfully, their argument would benefit from a more nuanced approach.
- [112] The essential question in this appeal is not whether Parliament intended to be exhaustive or not. It is whether the operation of Part II of the SFSA undermines to a sufficient extent the federal purposes underlying s. 243 BIA .
- [113] It is worth noting that the federal purpose given effect through s. 243 does not impose an absolute bright line over which provinces may not tread. I do not believe that Parliament intended that the right of secured creditors to apply for a national receiver would be subject only to a 10-day notice period and that any provincial qualification or restriction, no matter how minor, would frustrate the federal purpose. This would assume that Parliament intended to cover the field, a proposition I would not adopt.
- [114] Instead, I see a federal purpose drawn in broad strokes, namely to establish a process for applying for a national receiver that is timely, adaptable in case of emergency and sensitive to the totality of circumstances. If a province wishes to legislate in a way that will affect the federal receivership regime — which, by this Court’s jurisprudence, is paramount in cases of conflict — then it must do so in a manner consistent with that purpose. If the province does so, its regime will dovetail seamlessly with the federal regime and produce no frustration.
- [115] This has happened before. In *Marine Services International Ltd. v. Ryan Estate*, 2013 SCC 44, [2013] 3 S.C.R. 53, federal legislation regarding maritime liability provided a right of action for workplace injury for dependants of a deceased. The language used in the legislation was not exhaustive, and the question was whether a provincial regime, which denied the right of action but established a no-fault compensation system, frustrated the federal purpose. LeBel and Karakatsanis JJ., for the Court, ruled that the federal legislation “was enacted to expand the range of claimants who could start an action in maritime negligence law” and that, since the provincial legislation simply provided a “different regime” of compensation, it did not frustrate the federal purpose: para. 84. Thus, the province had respected the federal purpose while fashioning its own scheme, and in doing so had avoided triggering the doctrine of federal paramountcy.
- [116] In the case at bar, the federal purpose I outlined above leaves a wide legislative space open to the provinces. For instance, I have already mentioned that, were the provincial legislation to mirror the FDMA , there would be no frustration of purpose. This is because the FDMA largely embodies the BIA ’s purpose of providing creditors with a timely, effective and adaptable remedy in the specific context of a farmer’s insolvency.

- [117] As a province strays from this federal purpose, however, there will come a point where frustration simply cannot be ignored. This is in keeping with this Court's insistence that the burden to be discharged by a party asserting frustration of a federal purpose is high: COPA, at para. 66. Where federal legislation is non-exclusive, the frustration of federal purpose must be particularly stark to dispense of that burden.
- [118] This may be where my approach departs from that of my colleagues. In the name of co-operative federalism, they have opted for a very narrow construction of the federal purpose. My colleagues may understandably be concerned that, if the federal purpose is construed as specifically providing secured creditors with a right to apply for a receiver that is subject only to a 10-day notice period, any provincial qualification or restriction of that right would amount to frustration. However, if the federal purpose is understood in more general terms (as I believe I am doing), then it will be difficult for any party to meet the high burden of proving frustration unless the provincial legislation deviates significantly from the purposes of the overlapping federal legislation.
- [119] For the reasons that I outline below, I believe that this high burden of proof has been discharged in the instant case: the federal purpose of providing a timely, flexible and context-sensitive remedy for secured creditors has been frustrated by the important obstacles the province has deliberately placed in the way of secured creditors.
- (5) Role of Extrinsic Evidence in Establishing the Federal Purpose
- [120] Before embarking on the final frustration of purpose analysis, it is worth commenting on my colleagues' reliance on extrinsic evidence, including the remarks of individual members of Parliament, in support of their narrow construction of s. 243's purpose. Resorting to extrinsic evidence is certainly not necessary. Indeed, as far as I can tell, this Court has generally not done so in seeking to discern federal purpose in its frustration of purpose jurisprudence. In *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, 2005 SCC 13, [2005] 1 S.C.R. 188, Major J., for the Court, construed the federal purpose of s. 30 of the Tobacco Act, S.C. 1997, c. 13, with reference simply to the "the context of the Tobacco Act as a whole", including the legislation's own statement of purpose: para. 17; see also paras. 18-21. Nor was extrinsic evidence relied on in *Mangat*, widely accepted as a foundational decision regarding the frustration of federal purpose branch of paramouncy analysis.
- [121] In certain circumstances, a judicious use of extrinsic evidence of this sort may prove useful. In other cases it may risk yielding an incomplete picture. The matter before us may serve as a case in point. While the remarks cited at length by my colleagues explain what served as an impetus for legislative amendments in 2005 and 2007, they do not explain what destiny Parliament intended for the Part XI receivership remedy more generally. Even my colleagues acknowledge, with regard to Bill C-55 (i.e. the 2005 amendments), that "[t]here is little in the legislative debate surrounding [its] adoption": para. 60.

III. Operation of Part II of the SFSA and Frustration of the Federal Purpose

[122] I will now turn to examine how the operation of Part II of the SFSA frustrates the underlying federal purpose of s. 243. In *A Legacy of Protection: The Saskatchewan Farm Security Act: History, Commentary & Case Law* (2009), D. H. Layh (now a justice of the Saskatchewan Court of Queen's Bench) writes at p. 43 that

Part II of the SFSA, borrowing the basic premise of The Farm Land Security Act enacted four years earlier, 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 alternatives to court proceeding[s] to resolve mortgage defaults respecting farm land. And Part II rather handily provided the alternative to court proceedings: mandatory mediation with penalties for not participating in good faith.

[123] Part II of the SFSA operates so as to prevent a mortgagee from taking any “action”, broadly defined, in regard to a mortgaged farm before receiving leave from the court: ss. 9 and 11. Before applying for leave, the mortgagee must first serve a notice of intention on the debtor and on the Farm Land Security Board and wait, without exception, for the expiry of a 150-day period (s. 12(1)) during which time the parties are required to participate in mandatory mediation in good faith: s. 12(5) to (10). Following mediation, the Board will prepare a report in which it will assess, among other things, whether there is a reasonable possibility that the farmer will meet his or her obligations and whether the farmer is making a sincere and reasonable effort to do so: s. 12(12). Once the mortgagee is allowed to apply for leave, he or she bears the statutory burden of proving either that there is no reasonable possibility that the farmer will meet those obligations or that the farmer is not making a sincere and reasonable effort to meet them; the court must dismiss the application if this burden is not discharged: s. 18(1). Even if the burden is discharged, the court must dismiss the application if it finds that it is not just and equitable according to the purpose and spirit of the SFSA to make an order: s. 19. This purpose is specified in s. 4 as being “to afford protection to farmers against loss of their farm land”. Finally, if the application is dismissed, the mortgagee is prohibited from serving a further notice of intention for one year: s. 20.

[124] On the subject of the operation of Part II of the SFSA, I do not think the amicus curiae is indulging in hyperbole when he describes the provisions as “unapologetically pro-debtor”: *factum*, at para. 59. Although the purpose of the provincial legislation is not usually considered in a frustration of federal purpose analysis, in the case of the SFSA, its purpose — to protect farmers — is raised to the level of a substantive standard by ss. 4 and 19. In other words, the provincial legislation imposes a very different balance between the interests of debtors and creditors than the one struck by the BIA, even if the special considerations for farmers that are incorporated into federal law by the FDMA are taken into account. The question is whether the province's legislative balance can operate swiftly in real time, in a manner consistent with the federal purpose, and thus dovetail with the federal regime. Ultimately, I conclude that it cannot.

- [125] When I consider the operation of Part II of the SFSA alongside the purpose of s. 243 BIA to provide secured creditors with receivership proceedings that are timely, flexible in an emergency and sensitive to the totality of the circumstances, I cannot disregard what in my view is a patent frustration of the federal purpose. Keeping in mind that s. 243 is not exhaustive, leaving a fairly wide range of legislative action open to the provinces, I nonetheless think the disparity between the two schemes is so stark that the SFSA must be found to frustrate Parliament's purpose. First, the 150-day notice period provided for in Part II of the SFSA far outstrips the brief 10-day period provided for in s. 243 BIA , or even the notice period of 15 business days in favour of farmers under s. 21 FDMA . Given the frenzied rush that typically characterizes insolvency proceedings, the difference between a few weeks and five months is galactic. The federal purpose of providing secured creditors with prompt recourse to a national receiver is therefore frustrated.
- [126] Second, the 150-day notice period provided for in Part II of the SFSA is absolute, as it cannot be waived or judicially terminated in any circumstances. In eliminating any possible flexibility or oversight for such a long period, Part II of the SFSA frustrates the federal purpose of providing a recourse that can adapt to the emergencies that are known to occur, from time to time, in insolvency cases. By contrast, s. 243 BIA allows for the appointment of a receiver before the expiry of the notice period if that is appropriate, and the stay of proceedings provided for in the FDMA can be terminated at any time or extended as necessary under ss. 13 and 14.
- [127] Finally, Part II of the SFSA establishes a series of evidentiary hurdles that are incompatible with Parliament's intention of making the federal receivership regime an equitable, circumstance-sensitive remedy. The most problematic of these hurdles, in my view, is the burden the mortgagee must discharge of proving either that there is no reasonable possibility that the farmer will meet his or her obligations or that the farmer is not making a sincere and reasonable effort to meet those obligations: s. 18(1) SFSA. Given the historical roots of receivership as an equitable remedy, imposing a high burden of proof on a creditor is far from compatible with the purposes and the effective operation of s. 243 BIA . Additionally, even if this burden is discharged, a judge must still be satisfied that granting a receivership order will be "just and equitable according to the purpose and spirit" of the SFSA: s. 19. It is specified in the SFSA that this purpose is to protect against the loss of farmland: s. 4. I would add that there are no such hurdles in the FDMA . The net effect is clearly to frustrate Parliament's purpose, namely that an application by a mortgagee for a national receiver be decided by a court on an equitable basis, in a manner that is sensitive to the circumstances.

[128] I stress that in my view none of these factors is, on its own, determinative of the issue. Taking the operation of Part II of the SFSA as a whole, however, it is clear to me that the provincial legislation cannot operate in real time, and is in fact intended to hinder the timely appointment of a receiver over mortgaged farmland. It is therefore clear that Part II of the SFSA frustrates the purpose of s. 243 BIA , thereby triggering the application of the doctrine of federal paramountcy.

IV. Disposition

[129] I thus conclude that the operation of Part II of the SFSA frustrates the purpose of s. 243 BIA . I would therefore declare that Part II of the SFSA is inoperative to the extent of its conflict with the federal receivership scheme.

Judgment accordingly, Côté J. dissenting.

Solicitor for the appellant: Attorney General for Saskatchewan, Regina.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Victoria.

Solicitors appointed by the Court as amicus curiae: MacPherson Leslie & Tyerman, Saskatoon.

[1] Canada, Senate, Journals of the Senate, No. 12, 2nd Sess., 37th Parl., October 29, 2002, at p. 122, and No. 57, May 15, 2003, at p. 841.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/15624/index.do>

CASE PAGE <https://chat.esheria.ai/case-law/canada/saskatchewan-attorney-general-v-lemare-lake-logging-ltd-2015>

Prepared on 30 October 2026 · Esheria