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

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Abstract

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

The constitutional issue in this case was whether or not receivership provisions applicable to farmer-debtors under the *Saskatchewan Farm Security Act, 1988* conflicted with general receivership provisions added to the federal *Bankruptcy and Insolvency Act* in 1992.[2] The Majority found no conflict, whereas Justice Côté (in dissent) found the provincial legislation frustrated an implicit purpose of the federal receivership provisions. I argue that – contrary to the Majority's disposition – the decision may actually curtail provincial jurisdiction over receiverships in the future. Although the Majority found no conflict, its reasoning implies that provincial legislation could frustrate the federal provisions if the federal law included an express "efficiency" purpose. To secured creditors, the Majority's decision is likely to read like a blueprint for federal law reform in order to trigger the paramountcy doctrine in a future case, and thus avoid provincial receivership regimes that provide leniency for debtors. I further argue that Justice Côté's dissenting judgment implicitly accepted forum shopping by the secured creditor, which would have led to the strange result whereby paramountcy was used to protect secured creditor rights, in effect.

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

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

1. Introduction

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

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

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

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

regime as well as scholarly discourses on the subject.[12] For instance, provincial law still determines which of the debtor's property is "exempt" from bankruptcy (i.e. what property the debtor gets to keep). As Thomas Telfer notes, the contemporary provincial exemptions in bankruptcy remain consistent with the original, nineteenth-century legislation by which they were established.[13] Another example is the parallel provincial and federal regimes governing preferences. A "preference" is a payment by an insolvent debtor to a creditor in which the creditor receives more money than it would under a bankruptcy distribution. Under current law, a bankruptcy trustee has a choice between using the *BIA* preference provision or provincial preferences law to attack these transactions.[14]

Although the prevailing constitutional frame is partly attributable to the lack of a federal bankruptcy and insolvency law during certain periods of Canadian history, it also reflects the broad scope of the provinces' property and civil rights power to regulate matters pertaining to credit and debt. More importantly, however, the constitutional case law illustrates the malleability of legal interpretations of both sections 91(21) and 92(13) by demonstrating that the dividing line between the two heads of power has shifted over time. This in turn underscores the significance of judicial interpretations of these heads of power as well as the constitutional analyses on which judges base their decisions.

Using *Saskatchewan v Lemare Lake Logging* as a case study, I argue that a by-product of Canada's historically impermanent and piecemeal approach to bankruptcy lawmaking is that it has tended to diminish constitutional scrutiny of new exercises of Parliament's section 91(21) power. In essence, I posit that over roughly the past 60 years lawyers, scholars, and judges have increasingly tended to accept the constitutional validity of *any* addition to federal bankruptcy and insolvency law because it is tacitly seen as part of Parliament's protracted approach to bankruptcy lawmaking and law reform.[15] I submit that this tacit assumption obscures the fact that prevailing conceptions of the terms "bankruptcy and insolvency" have actually changed over time. I then consider the potential significance of the *Lemare Lake* case in light of the broader framework of Canada's Division of Legislative Powers and it potential impact on provincial autonomy.

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

[13] See Thomas GW Telfer, "The Evolution of Bankruptcy Exemption Law in Canada 1867-1919: The Triumph of the Provincial Model" [2007] ARIL 593.

[14] See Tamara M Buckwold, "Reform of Fraudulent Conveyances and Fraudulent Preferences Law, Part II: Preferential Transfers", Report prepared for the Uniform Law Conference of Canada, Civil Law Section (August 2008) at paras 4, 7-18, excerpted in Anthony Duggan *et al.*, *Canadian Bankruptcy and Insolvency Law: Cases, Text, and Materials*, 3rd ed (Toronto: Emond Montgomery, 2015) at 265-269.

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

The rest of this paper is arranged as follows. Section 2 provides a big picture overview of the legal and constitutional background regarding sections 91(21) and 92(13). I add texture to this overview by adopting an historical perspective that is sensitive to the way bankruptcy and insolvency law tends to operate in practice.[16] Section 3 summarizes the SCC's decision in *Lemare Lake*. In section 4, I analyze the *Lemare Lake* case in light of broader historical trends in bankruptcy and insolvency law and their impact of constitutional analyses. I highlight some of the broader questions that this decision raises about the way that the highest court has interpreted section 91(21) over time, and explore the potential wider significance of these phenomena. Section 5 provides a conclusion.

2. Background

A "secured creditor" is a creditor that has taken collateral ("security") as part of the terms of a lending agreement. With a few notable exceptions, the giving and taking of security, as well as the rules governing secured lending, fall under section 92(13) as "property rights".[17] The appointment of a receiver (or "receiver and manager") is a creditor remedy known as "receivership", and is often employed in cases of default by a corporate debtor.[18] Until 1992, receivers were generally appointed and regulated by provincial law, as an extension of the provinces' jurisdiction over secured creditor rights.[19] Yet despite Parliament's novel exercise of its "bankruptcy and insolvency" jurisdiction by adding section 243 to the *BIA*, there appears to have been no constitutional controversy (or even scrutiny) concerning the new *BIA* receivership provision. This is remarkable in light of the fact that it is only in the past 30 years or so that the application of federal insolvency law to secured creditors has gained widespread acceptance in Canada.

It is a longstanding tradition under Canadian bankruptcy law that secured creditors can continue to exercise their rights and remedies as secured creditors (including receivership) irrespective of a debtor's bankruptcy. In other words, the legal process of

[16] This approach is similar to that used by constitutional law scholars such as Hester Lessard, "Jurisdictional Justice, Democracy and the Story of Insite" (2010) 19 Const F 93. It also draws on socio-legal approaches to understanding bankruptcy law developments and history, such as those employed by e.g. Telfer 2014, *supra* note 15; Thomas GW Telfer, "Rediscovering the Bankruptcy and Insolvency Power: Political and Constitutional Challenges to the Canadian *Bankruptcy Act*" Sask L Rev [forthcoming]; Virginia Erica Torrie, "Protagonists of Company Reorganisation: A History of the *Companies' Creditors Arrangement Act (Canada)* and the Role of Large Secured Creditors" Ph.D. Dissertation, Kent Law School, University of Kent, UK (2016) [Torrie 2016] [unpublished]; David A Skeel Jr, *Debt's Dominion: A History of Bankruptcy Law in America* (Princeton, NJ: Princeton University Press, 2004); Bruce G Carruthers & Terence C Halliday, *Rescuing Business: The Making of Corporate Bankruptcy Law in England and the United States* (Oxford: Clarendon Press, 1998); Terence C Halliday & Bruce G Carruthers, *Bankrupt: Global Lawmaking and Systemic Financial Crisis* (Stanford: Stanford University Press, 2009); Terence C Halliday & Bruce G Carruthers, "The Recursivity of Law: Global Norm Making and National Lawmaking In the Globalization of Corporate Insolvency Regimes" (2007) 112:4 Am J Soc 1135.

[17] E.g. security taken by banks pursuant to *BIA, supra* note 2, s 427.

[18] Sometimes unsecured creditors, but usually secured creditors.

[19] There are some exceptions, see e.g. note 17.

bankruptcy (i.e. liquidating the debtor's assets, distributing the proceeds to creditors, and discharging the remaining debt) only applies to creditors that have *not* taken security (unsecured creditors).[20] This tradition continues to be reflected in the current *BIA* bankruptcy provisions. Rather than resort to bankruptcy, secured creditors usually enforce debts by seizing and selling collateral or placing the debtor in receivership, which are activities governed by provincial law.

Until the 1930s the prevailing interpretation of section 92(13) vis-à-vis section 91(21) held that secured creditor rights remained within provincial jurisdiction irrespective of a debtor's bankruptcy or insolvency.[21] In other words, Parliament's bankruptcy and insolvency jurisdiction was implicitly circumscribed by the province's exclusive jurisdiction over property and civil rights. Two federal statutes passed during the Great Depression fundamentally changed this interpretation. The *Companies' Creditors Arrangement Act, 1933* (*CCAA*) and *Farmers' Creditors Arrangement Act, 1934* (*FCAA*) both provided for the possibility that secured creditors could be compulsorily bound by federal insolvency law.[22] Both Acts were designed to help facilitate debt restructuring (a type of debt compromise between the debtor and its/her/his creditors) as opposed to bankruptcy proceedings which are concerned with liquidating the debtor's assets and discharging debts. At the time that these statutes were passed, the Canadian legal community widely regarded both as *ultra vires* Parliament for trenching on the provinces' exclusive jurisdiction over property and civil rights, and existing practices for facilitating debt compromises. To the astonishment of many commentators, upon constitutional reference both statutes were upheld. Rather unfortunately, however, neither decision engaged in a substantive analysis of the constitutional issue of provincial jurisdiction over secured creditor rights, although this was the main reason for referring the statutes for constitutional reference in the first place.[23] The *CCAA* and

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

[21] See e.g. Harold Ernest Manning, "Companies Reorganization and the Judicature Amendment Act 1935" (1935-1936) 5 Fortnightly LJ 23 at 23:

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

See discussion in Torrie 2016, *supra* note 16 at 108-111.

[22] *Companies' Creditors Arrangement Act*, SC 1933, c 36 [*CCAA*]; *Farmers' Creditors Arrangement Act*, SC 1934, c 53 [*FCAA*]. See discussion in Torrie 2016, *supra* note 16 at 87-127. See also Stephanie Ben-Ishai & Virginia Torrie, "Farm Insolvency in Canada" (2013) 2 J Insol Inst Can 33 [Ben-Ishai & Torrie].

[23] Regarding the *CCAA*, see Factum on behalf of the Attorney-General for Quebec (Ottawa: King's Printer, 1934); Factum on behalf of the Attorney-General for Canada (Ottawa: King's Printer, 1934); *Reference re Companies' Creditors Arrangement Act*, [1934] SCR 659, [1934] 4 DLR 75; see discussion in Torrie 2016, *supra* note 16.

FCAA remained the only federal insolvency statutes that could compulsorily bind secured creditors until 1992. In that year, as part of amendments to the *BIA*, Parliament added provisions which could compulsorily bind secured creditors to restructuring proceedings under that *Act*.

In 1992 Parliament also added a new Part XI to the *BIA* titled "Secured Creditors and Receivers".[24] This marked the first time that the federal government purported legislate receivership. The new receivership provisions provide that "on application by a secured creditor, a court may appoint a receiver". The *BIA* receivership provisions can only be invoked in cases where the debtor is "insolvent" within the meaning of the *Act*, and the commonly relied upon definition for this purpose is the inability to pay one's debts as they become due.[25] *Saskatchewan v Lemare Lake Logging Ltd.* is the first case to consider the potential conflict between the new *BIA* receivership provisions and provincial receivership law.

3. *Saskatchewan v Lemare Lake Logging*[26]

Saskatchewan v Lemare Lake Logging arose out of an application by Lemare Lake Logging Ltd. (Lemare) to the Saskatchewan Court of Queen's Bench (SKQB) for the appointment of a receiver and manager of 3 L Cattle Company Ltd. (3 L Cattle), pursuant to section 243 of the *BIA*. Unlike receivers appointed under provincial law, a receiver appointed under the *BIA* has authority to operate nationally, and only may be appointed in respect of a debtor that is "insolvent" within the meaning of that *Act*. In addition, a secured creditor must give the debtor 10 days notice before the court will appoint a receiver under the *BIA*.[27] From the secured creditor's perspective, the relatively short notice period before making an application, and the national scope of *BIA* receivership orders are key advantages of this regime.[28]

Regarding the *FCAA* see Factum on behalf of the Attorney-General for British Columbia (Ottawa: King's Printer, 1936); Factum on behalf of the Attorney-General for Quebec (Ottawa: King's Printer, 1936); Factum on behalf of the Attorney-General for Ontario (Ottawa: King's Printer, 1936); Factum on behalf of the Attorney-General for Canada (Ottawa: King's Printer, 1936); *British Columbia (AG)* v *Canada (AG)*, [1936] SCR 384, 17 CBR 359.

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

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

[25] *BIA*, *supra* note 2,s 2, "insolvent person".

[26] This section draws on Virginia Torrie, "*Saskatchewan (AG) v Lemare Lake Logging Ltd.*", Case Comment on 2015 SCC 53, (2016) 31.2 BFLR 403.

[27] *BIA*, *supra* note 2, s 244.

[28] See e.g. Michael W Milani, "Corralling the Ability to Appoint National Receivers: A Commentary on 3L Cattle Company" (2015) 4 J Insol Inst Can 6; Christian Lachance & Hugo Babos-Marchand, "The 'Impractical Effect' of *Lemare Lake Logging Ltd.* in the Enforcement of Security in Quebec" (February 2016) 28 Comm Insol R 25.

Saskatchewan has a special receivership regime to help protect farmers from losing their farms, which has been in place since 1988 (Manitoba is the only other province with a similar statutory regime).[29] The *Saskatchewan Farm Security Act* imposes a 150-day notice requirement before a secured creditor can have a receiver appointed in respect of a farmer.[30] The *SFSA* also requires that the secured creditor and debtor engage in a debt mediation process.[31]

The secured creditor in the *Lemare Lake* case held a mortgage over the debtor's assets. The debtor defaulted on its mortgage, and the secured creditor subsequently made an application to the court for the appointment of a receiver under the *BIA*. The debtor contended that in making its application for appointment of a receiver under the *BIA*, the secured creditor had failed to comply with Part II of the *SFSA* by not first acquiring leave from the court before making the application. The debtor argued that doing so was a precondition for the appointment of a receiver in bankruptcy, and as a result of this omission the application for a receiver was a nullity.[32]

The secured creditor pleaded that sections 9 and 11 of Part II of the *SFSA* were constitutionally inoperable. Relying on the federal paramountcy doctrine, the secured creditor argued that there was an irresolvable conflict between the provincial and federal legislation, and that this conflict rendered the provincial statute inoperative. The secured creditor argued that this conflict allowed it to avoid the *SFSA*'s stipulations with respect to a mandatory 150-day waiting period following a service of intention upon a debtor.[33] Both parties agreed that the two statutes were valid.

The trial judge found no conflict between the two statutes, holding for the debtor, and resulting in the application for a receiver being a nullity.[34] The secured creditor appealed to the Saskatchewan Court of Appeal (SKCA), which reversed the determination of the constitutional issue. The SKCA found the *SFSA* frustrated the purpose of the *BIA* receivership provisions, making it permissible for the secured creditor to avoid the provincial legislation.[35] However, in considering the application on its merits, the SKCA decided against granting the application for a receiver under the *BIA*. The secured creditor appealed the decision to the SCC for a determination of the constitutional issue – the Attorney General for Saskatchewan replaced the debtor, 3 L Cattle, as the respondent. The Attorneys General for British Columbia and Ontario were interveners at the SCC.

The issue before the SCC was whether or not Part II of the *SFSA* conflicts with section 243(1) of the *BIA*, rendering the provincial legislation inoperative in this case.

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[29] *SFSA, supra* note 2; *Family Farm Protection Act*, SM 1986-87, c 6, CCSM c F15.
[30] *SFSA*, *supra* note 2, s 9.
[31] *Ibid.*
[32] *Lemare Lake Logging Ltd v 3 L Cattle Ltd*, 2014 SKQB 278 at paras 1-2,[2013] 12 WWR 176.
[33] *Ibid.*
[34] *Ibid*.
[35] *Lemare Lake Logging Ltd v 3 L Cattle Company Ltd*, 2014 SKCA 35, 371 DLR (4th) 663.

The SCC followed both lower courts in holding that there was no operational conflict between the federal and provincial legislation in issue. So only a finding that the provincial legislation frustrated the purposes of the *BIA* receivership provisions could render the provincial *Act* inoperative. Six of the seven presiding justices held that there was no conflict between the statutes, and so did not render the provincial statute inoperable. Justice Côté dissented, and would have found a frustration of the purpose of the federal provision.

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

The Majority concluded that the purpose of the federal provision was not stifled by compliance with the provincial one. The 10-day waiting period contained in the federal statute is a minimum and permissive – secured creditors may wait much longer to make an application for the appointment of a receiver. The Majority saw no necessary inference that the comparatively short waiting period meant that Parliament intended promptness or timeliness to be a significant legislative purpose behind the provision. The Majority found no evidence upon which to construe the purpose of the federal provision more broadly.

In Justice Côté's dissent, she accepts the opposite position – that the purpose of the federal provision was frustrated. She conceives of the purpose of the federal legislation more broadly than the Majority and found that it must also include an emphasis on the timely resolution of insolvency issues for secured creditors. As a result of the broader conception of the purpose of the federal provision, a conflict does arise – compelling a secured creditor in Saskatchewan to wait 150 days for the appointment of a receiver over an insolvent farmer's land is inconsistent with this purpose.

4. Analysis

Lemare Lake illustrates that one's understanding of the purpose of a federal provision or statute significantly influences one's determination of a paramountcy issue in the field of bankruptcy and insolvency law. While the trial court and the Majority of the SCC found a narrow purpose and no frustration, the SKCA and Justice Côté found a broader purpose and frustration. Yet neither the courts, nor the parties questioned whether federal bankruptcy and insolvency law should properly apply to receiverships, nor did they raise the issue of the *vires* of the *BIA* receivership provisions. Their paramountcy analysis instead rests on an implicit view of section 91(21), which actually represents a break with traditional interpretations of that provision. The traditional interpretation held that federal bankruptcy and insolvency law could not adjust secured creditor rights.

Echoing the *CCAA* and *FCAA* reference decisions, the *Lemare Lake* case has effectively redrawn the constitutional boundary between sections 91(21) and 92(13) without addressing one of the main constitutional issues.

A. Dissent

The reasoning of the SKCA and Justice Côté is particularly noteworthy in this regard. In their decisions, these justices used the doctrine of federal paramountcy to help protect secured creditor rights, in effect. This outcome strikes one as odd from both a constitutional and historical perspective because secured credit and secured creditor remedies are generally matters of exclusive provincial jurisdiction under section 92(13), even when the debtor is insolvent.[36] Furthermore, the main reason that the secured creditor in *Lemare Lake* relied on the *BIA* receivership provisions in order *to avoid* the applicable provincial law, and the reasoning of the SKCA and Justice Côté implicitly accepted this "forum shopping".

Writing about the federal receivership provisions, Justice Côté stated:

> I see a federal purpose drawn in broad strokes, namely to establish a process for applying for a national receiver that is timely, adaptable in case of emergency and sensitive to the totality of circumstances. If a province wishes to legislate in a way that will affect the federal receivership regime — which, by this Court's jurisprudence, is paramount in cases of conflict — then it must do so in a manner consistent with that purpose. If the province does so, its regime will dovetail seamlessly with the federal regime and produce no frustration.[37]

Justice Côté suggested that the federal purpose she identified in the receivership provisions of the *BIA* "leaves a wide legislative space open to the provinces",[38] but this rings hollow for two reasons. First, a federal receivership regime – even one that is limited to insolvent debtors – encroaches on an area that was (formerly) within the exclusive jurisdiction of the provinces. Therefore, the provinces are actually left with *less* legislative space than they had before the introduction of *BIA* receiverships. Provided at least some secured creditors opt for federal receivership, as opposed to provincial receivership, the *BIA* receivership provisions will reduce provincial jurisdiction in practice as well. In order to maintain provincial jurisdiction over receivership in practice, provinces must "compete" with federal receivership provisions. However, the constitutional playing field for this kind of legislative competition is uneven. For instance, a federally appointed receiver can operate nationally, but provincially appointed receivers can operate only within the province of their appointment. Secured creditors see the national appointment as a key advantage of the *BIA* receiverships, yet the provinces' ability to regulate receiverships under section 92(13) is expressly confined to provincial boundaries. Thus, one of the most attractive features of a

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

[37] *Lemare Lake, supra* note 1 at para 114, Côté J, dissenting.

[38] *Ibid* at para 116, Côté J, dissenting.

federally-appointed receiver from a secured creditor's standpoint, is something which provincial receivership regimes cannot offer because they lack constitutional jurisdiction.

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

Bruce Ryder's framework for promoting provincial autonomy sheds light on the mechanisms by which the modern paradigm of constitutional interpretation can diminish provincial jurisdiction.[39] Ryder suggests that the "interplay and overlap" advanced by the modern paradigm can pose a threat to provincial autonomy when federal jurisdiction is interpreted broadly so as to overlap with provincial jurisdiction.[40] This poses a threat to provincial autonomy because it extends the potential for federal dominance, which is already inherent in the paramountcy rule.[41] In other words, since any conflict is decided in favour of Parliamentary legislation, broad interpretations of federal heads of power that overlap with provincial heads of power can render provincial jurisdiction meaningless in practice. Ryder notes that in the extreme, this phenomenon has the potential to make a mockery of provincial autonomy.[42]

Applying Ryder's framework to the *Lemare Lake* case, Justice Côté's approach to Division of Powers analysis seems to undermine provincial jurisdiction in deed, if not word, because it leaves little room for the provinces to legislate in a way that conforms with the constitution. Provinces are unable to "compete" effectively with federal

[39] Bruce Ryder, "The Demise and Rise of the Classic Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations" (1991) 36 McGill LJ 308 [Ryder 1991]. See further, Bruce Ryder, "Equal Autonomy In Canadian Federalism: The Continuing Search for Balance in the Interpretation of the Division of Powers" (2011) 54 SCLR (2d) 566.
[40] Ryder 1991, *supra* note 39 at 313, 314, 358-359.
[41] *Ibid* at 313-314, 355-356.
[42] *Ibid* at 313-314.

legislation because some of the key advantages of federal legislation are *ultra vires* provincial jurisdiction. In addition, provincial policy choices are largely restricted to replicating federal legislation. Taken together, these constraints mean that the "best" a province may be able to offer is a geographically bounded version of the federal law. This essentially makes provincial law a less powerful version of the federal law. Furthermore, if the provincial law essentially parallels the of the federal law, then the substance of the underlying policy – and resulting "law" – has been established by Parliament, rather than provincial legislatures.

Thus, one effect of this approach to Division of Powers analysis is that much of the policy- and lawmaking authority shifts to Ottawa, not only in the current round of lawmaking, but for subsequent rounds as well. This is a fundamental point of distinction between Parliament regulating receiverships through insolvency law and the provinces regulating secured transactions under *Personal Property Security Acts* (*PPSAs*), for example. Although most provinces have *PPSAs* which are substantially similar, each province had a choice over whether or not to adopt such a statute and whether and how to modify it in light of province-specific policy considerations and constituencies.[43] Since *PPSAs* were enacted (or not) province by province, each province maintains the autonomy to repeal or amend its *PPSA* in the future. Although there may be forum shopping, "competition" between provincial secured transactions regimes is on a more level playing field because it is between one province and another province, not between a province and Parliament. As a result, a constitutionally valid secured transaction regime is not in danger of being declared inoperable to the extent it differs from that of a neighbouring province. Forum shopping is also curtailed by the fact that the geographic boundaries of a province serve as jurisdictional boundaries as well.

The differences between the *BIA* receivership provisions and the *SFSA* themselves suggest that the lawmaking forum can significantly affect the substance of receivership law. For example, the *SFSA* was enacted during the farm debt crisis of the 1980s by a Saskatchewan government that was proximate to Prairie farming and sensitive to the concerns of its farmer constituents. On the other hand, the 1992 amendments to the *BIA* do not reflect concern for farmers, nor debtors generally. This suggests that the forum of lawmaking can be a significant factor in terms of the influence of different interest groups and the relative importance of certain policies in lawmaking. With the exception of farmers, debtors tend not to be an organized interest group (unlike creditors) and this amplifies the power imbalance between debtors and creditors in terms of lawmaking and law reform. In political terms, a wider variety of political parties have formed provincial governments, some of which have been especially sensitive to

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

debtor rights.[44] So, on balance, it would appear that debtors' interests and rights are more likely to be taken into account in provincial, as opposed to federal, lawmaking. Thus, the shift of more *de facto* policy making to Ottawa has the effect of reducing debtors' impact as a constituency as well as narrowing the spectrum of policy choices in a way that also tends to benefit of creditors.

B. Majority

Although it upheld the *SFSA*, the Majority's decision in *Lemare Lake* does not safeguard provincial jurisdiction. Their reasoning implies that "timeliness" is an acceptable purpose of federal receivership provisions. To secured creditors and their representatives, which are likely to be dissatisfied the SCC's decision,[45] this reads like a blueprint for law reform when Parliament conducts its next mandatory review of bankruptcy and insolvency legislation.[46] The Majority decision in *Lemare Lake* implies that if Parliament amends the *BIA* to make it clear that the receivership provisions are intended to facilitate timely receivership proceedings, the *SFSA* receivership regime will frustrate this federal purpose. The likely result of such a conflict is that the *SFSA* will be inoperable to the extent that it conflicts with the *BIA* receivership regime.

It is hard to reconcile the SCC's tacit acceptance of timeliness and efficiency concerns as potentially valid purposes of a federal receivership regime with the court's express circumspection of these same principles when it comes to other federal legislation that overlaps with section 92(13). For example, in the *Securities Reference* the court found that the main thrust of the federal legislation went beyond Parliament's legislative jurisdiction under section 91(2) "trade and commerce".[47] The court acknowledged that there might be room for federal regulation of the securities market which was "qualitatively different from what the provinces can do."[48] But the court went on to say that the policy concerns raised by the federal government did not "justify a wholesale takeover of the regulation of the securities industry which is the ultimate consequence of the proposed federal legislation."[49]

Applying this reasoning to the constitutional issue in the *Lemare Lake* case, federally appointed receivers enjoy a national appointment, enabling them to operate in multiple

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

[45] See e.g. Michael W Milani, "Corralling the Ability to Appoint National Receivers: A Commentary on 3L Cattle Company" (2015) 4 J Insol Inst Can 6. Milani, discussing the SKCA decision, states "[i]f the Court of Appeal's decision is overturned on appeal, then other provincial legislation may be brandished by debtors seeking to avoid appointment of a receiver under section 243(1) of the *BIA*."

[46] *BIA*, *supra* note 2, s 285.

[47] *Reference re Securities Act*, 2011 SCC 66 at paras 128-129, [2011] 3 SCR 837.

[48] *Ibid* at para 128.

[49] *Ibid*.

provinces and territories, which is something that the provinces cannot do. However, there is no condition in the *Act* which limits the applicability of *BIA* receiverships to cases where a receiver needs to operate in multiple jurisdictions, e.g. because the debtor's assets are located in two or more provinces. In other words, a secured creditor can apply for a *BIA* receiver, instead of a provincially appointed receiver, even if there is no jurisdictional reason for seeking a federal appointment. This is different from the "cooperative approach" proposed by the SCC in the *Securities Reference* which would permit "a scheme that recognizes the essentially provincial nature of securities regulation [or receivership] while allowing Parliament to deal with genuinely national concerns."[50]

On the other hand, integrating timeliness and efficiency as policy objectives of receivership regimes is well within provincial jurisdiction under section 92(13). In this regard, the federal receivership provisions are not qualitatively different from the provinces *can do*; they are qualitatively different from what two provinces – Saskatchewan and Manitoba – *are doing*. This reflects a difference in policy, not legislative ability, between the provinces and federal government.

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

Since Parliament only added receivership provisions to the *BIA* in 1992 – *after* Saskatchewan enacted the *SFSA* – it is noteworthy that the validity of the *BIA* provisions has never been raised as a constitutional issue, or even attracted controversy. The constitutional issue in *Lemare Lake* only arose because of this novel exercise of Parliament's jurisdiction under section 91(21). From an historical perspective it is paradoxical that the main reason that Parliament avoided regulating receiverships through insolvency law until this point was because this was widely regarded as *ultra vires* its section 91(21) power.[51] Until relatively recently, prevailing interpretations of the Division of Powers held that the "pith and substance" of secured creditor rights fell almost exclusively under the provinces' section 92(13) jurisdiction. So the *BIA* receivership provisions represent a fairly recent, novel exercise of Parliament's section 91(21) jurisdiction; one which rests on an expanded definition of bankruptcy and insolvency than that which prevailed earlier in Canadian history.[52] Now "insolvency" is seen as a dividing line between much provincial and federal jurisdiction concerning the

[50] *Ibid* at para 130.
[51] *Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] SCR 659, [1934] 4 DLR 75 [*CCAA Reference*]; *British Columbia (AG) v Canada (AG)*, [1937] AC 391, [1937] 1 DLR 695 (JCPC) [*FCAA Reference*].
[52] Torrie 2016, *supra* note 16 at 108.

regulation credit and debt, but historically this notional line carried less constitutional significance.

Contemporary scholars reflect the shift toward construing bankruptcy as dealing with the debtor's insolvency when critiquing some of the oldest provisions of federal bankruptcy and insolvency laws. For example, when reviewing the "Acts of Bankruptcy" contained in the *BIA*, Roderick J. Wood and David J. Bryan remark that

> Canadian bankruptcy law … contemplates that a solvent debtor may be forced into bankruptcy by its creditors. This seems out of step with the objectives of modern bankruptcy law which is primarily concerned with insolvent debtors.[53]

Conceptions of bankruptcy have changed since these provisions were introduced to the *BIA* in 1919, and the lack of comprehensive bankruptcy reforms underscores this point. Evolving views of Canadian bankruptcy are related to changing interpretations of section 91(21), which have significantly redrawn the lines dividing provincial and federal jurisdiction. As a result one could argue that the "Acts of Bankruptcy" that were necessary to bring proceedings against a debtor in 1919 are now *ultra vires* Parliament because they extend to solvent debtors.[54] But this sort of argument is unlikely to come up because these provisions of the *BIA* are almost never used in practice. Nevertheless, this hypothetical illustrates that the shift in conceptualizations of bankruptcy may profoundly affect constitutional interpretation and analyses.

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

> There should be a uniform system nationwide for the examination of fraudulent and reviewable transactions in situations of insolvency. At present, there is a lack of fairness, uniformity and predictability by virtue of both federal and provincial/territorial legislation addressing fraudulent and reviewable transactions. We feel that a national standard is needed … Provincial/territorial legislation would continue to exist for transactions not occurring in the context of insolvency.[55]

It is hard to imagine a situation outside of insolvency where a preference issue would arise, and therefore preserving provincial jurisdiction over solvent preferences law is probably meaningless in practice.[56] Thus, although this recommendation appears to

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

[54] At the time they were introduced it appears no one challenged the "Acts of Bankruptcy" provisions on the constitutional ground that they could be applied to solvent debtors. See Telfer 2014, *supra* note 14.

[55] 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: November 2003) at 122.

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

leave some jurisdiction to the provinces, the effect of its implementation would likely be the replacement of provincial preferences law with federal preferences law.

These types of arguments are often raised in favour of comprehensive reform and modernization of Canadian bankruptcy and insolvency laws, which would create more uniformity by imposing a single national standard.[57] Underpinning this argument is a keen awareness of Parliament's historically impermanent and piecemeal approach to exercising its section 91(21) jurisdiction. Due to a confluence of factors, including a lack of political will, Parliament continues to let bankruptcy and insolvency law reform languish.[58] But stalled reform efforts obscure the fact that conceptions of what can constitute federal bankruptcy and insolvency law are also changing. In some cases, the reason that certain components of "modern" bankruptcy and insolvency law were "missing" from earlier statutes is that they did not used to be considered part of bankruptcy and insolvency law. Receivership is a case in point. Hence, part of the reason that Parliament did not historically exercise its section 91(21) jurisdiction over some matters which are now considered "bankruptcy and insolvency" is because doing so would have been *ultra vires*.

The combination of piecemeal reforms and changing ideas about bankruptcy and insolvency has tended to lend implicit *vires* to any exercise of Parliamentary jurisdiction under section 91(21). This helps to explain why receivership, an area of longstanding and exclusive provincial jurisdiction, was added to federal bankruptcy and insolvency law without any constitutional controversy. As a scholar, I submit that we need to avoid the tendency to let "pith and substance" drop out of constitutional analyses. The potential for federal dominance inherent in the constitution necessitates careful scrutiny of new exercises of Parliamentary jurisdiction, including under section 91(21). Greater centralization may be necessary to a certain extent in order to give effect to modern ideas about bankruptcy and insolvency, but we should be mindful that it is likely to be a one-way street in favour of more federal jurisdiction. Thus, it must be balanced with the need to preserve real and meaningful jurisdiction for the provinces under section 92, and give full effect to the Division of Legislative Powers as a whole.

It is worth briefly reflecting on a few of the ways that greater centralization of lawmaking authority under section 91(21) has played out in practice, and the impact it has on provincial jurisdiction under section 92(13). For instance, the SCC's decision in *Re*

[57] 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: November 2003) at 122, cited in Stephanie Ben-Ishai and Anthony Duggan, *Canadian Bankruptcy and Insolvency Law: Bill C-55, Statute c.47 and Beyond* (Markham, ON: LexisNexis, 2007) [Dugan *et al*] at 269. See further, Tamara M Buckwold, "Reforming the Law of Fraudulent Conveyances and Fraudulent Preferences" (2012) 52 Can Bus LJ 333.

[58] See discussion in Jacob Ziegel, "Canada's Dysfunctional Insolvency Reform Process and the Search for Solutions" (2010) 26:1 BFLR 63; Dugan *et al*, *supra* note 57.In 2005 Parliament added a provision requiring a review of the *BIA* every five years: BIA, *supra* note 2, as amended by SC 2005, c 47, s 122, adding Part XIV "Review of Act".

Validity of Orderly Payment of Debts Act, 1959 (Alta)[59] essentially reversed the Judicial Committee of the Privy Council's (JCPC) earlier holding in *Ontario (Attorney General) v Canada (Attorney General)*.[60] As a result, the provinces are unable to legislate in respect of voluntary schemes of debt compromises, which have instead been added to the *BIA*.[61] In *the CCAA Reference*[62] the SCC upheld the validity of a federal scheme for restructuring secured debts, despite the prevailing view that the statute was *ultra vires* for purporting to adjust secured creditor rights. By upholding the validity of the *CCAA*, the SCC limited similar provincial legislation to "solvent" restructurings and rendered them useless by implication.[63] The JCPC's ruling in the *FCAA Reference* that federal farm insolvency law – including unilateral adjustment of secured creditor rights – was *intra vires* limited the scope of the provinces' jurisdiction to legislate in respect of matters such as foreclosure and debt adjustment. This loss of jurisdiction was felt particularly acutely in Manitoba after Parliament amended the *FCAA* to make it non-applicable throughout Canada except in Alberta and Saskatchewan.[64] Under the classic paradigm of constitutional analysis that prevailed at the time, the practical effect of passing this restrictive amendment was that Parliament "covered the field" by creating a vacuum. It is hard to imagine a worse outcome from the standpoint of provincial autonomy! The Premier of Manitoba's only recourse was to lobby Parliament to have the *FCAA* reinstated.[65]

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

[59] [1960] SCR 571, 23 DLR (2d) 449.

[60] *Reference re: An Act respecting Assignments and Preferences by Insolvent Persons (Ont.)*, [1894] AC 189, 11 CRAC 13 [*Voluntary Assignments Reference*].

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

[62] *CCAA Reference*, *supra* note 51; Factum on behalf of the Attorney-General for Quebec, filed with the Supreme Court of Canada (Ottawa: King's Printer, 1934); Factum on behalf of the Attorney-General for Canada, filed with the Supreme Court of Canada (Ottawa: King's Printer, 1934). See discussion in Torrie 2016, *supra* note 16 at 118-127.

[63] *Judicature Act*, RSO 1917, c 56; *Judicature Amendment Act*, SO 1935, c 32; *Montreal Trust Company v Abitibi Power & Paper Co.*, [1943] UKPC 37, [1943] 2 All ER 311. See also discussion in Torrie 2016, *supra* note 16 at 58-87.

[64] *An Act to Amend the Farmers' Creditors Arrangement Act, 1934*, SC 1938, c 47, s 9. See discussion in Ben-Ishai & Torrie, *supra* note 22 at 45-47.

[65] Letter to the Prime Minister and Members of the Federal Government from the Premiers of Alberta, Saskatchewan, and Manitoba (1942) and Unanimous Resolution of the Inter-Provincial Debt Conference, Saskatoon (30 June 1942) in "Adjustment and Settlement of Farm Debts" United Farmers of Alberta Fonds, 1905-1970 (Glenbow Archives, Calgary: M-1749-34).

The *FCAA* was repealed and replaced with a new statute with the same name in 1943. The new *FCAA* applied in Alberta, Saskatchewan, and Manitoba. See *Farmers' Creditors Arrangement Act*, RSC 1952, c 111, Preamble, s 7. See discussion in Ben-Ishai & Torrie, *supra* note 22 at 46-47.

thus policymaking) under section 91(21). It is therefore worth pausing to ask where this might lead – should paramountcy protect secured creditor rights?

5. Conclusion

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

This shift carries significant ramifications in terms of provincial autonomy and the relative ability of different groups to engage in the lawmaking process. Like other SCC decisions, *Lemare Lake* is a reflection of the highest court's interpretation of Canadian federalism. Its precedential value, and the reasoning on which it is based, has the potential to impact lawmaking and adjudication at every level. Based on the court's analysis and decision in *Lemare Lake*, I have argued that the decision is likely to serve as a blueprint for federal reforms which will trigger the paramountcy doctrine in a future case, and thereby circumvent provincial receivership regimes which are less "creditor friendly". In effect, this would diminish provincial autonomy over both law and policy concerning "property and civil rights", and lead to the strange result whereby paramountcy is used to protect the section 92(13) rights of secured creditors. As scholars, I submit that the strangeness of this outcome from a constitutional perspective should prompt us to be more critical in scrutinizing novel exercises of federal jurisdiction, particularly under section 91(21), and not allow "pith and substance" drop out of our constitutional analyses.