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Farmers, drivers and debtors: The Supreme Court considers the conflicts between the *Bankruptcy and Insolvency Act* and several provincial statutes

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On November 14, 2015, the Supreme Court of Canada rendered three decisions on the application of the *the Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 (BIA) and its interaction with certain provincial statutes.

OVERVIEW OF THE FACTS

In *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.* Ltd., 2015 SCC 53 (*Lemare*), the Court, sitting as a bench of seven judges, considered the conflict between a provincial statute, which imposes a 150-day notice period before instituting any action relating to farm land, and the BIA, which permits a secured creditor to apply for the appointment of a receiver for the property of a debtor upon the expiry of a 10-day notice period under section 244 BIA.

In *Alberta (Attorney General) v. Moloney*, , 2015 SCC 51 (*Moloney*), and *407 ETR Concession Co. v. Canada (Superintendent of Bankruptcy)*, 2015 SCC 52 (*ETR*), the nine judges considered the conflict between a provincial statute which allowed for the revocation or suspension of the motor vehicle permits or driver's licences of persons who failed to pay certain driving-related debts, even where these drivers were discharged bankrupts and the debt targeted by the provincial statute was a provable claim in bankruptcy.

APPLICABLE RULES

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In these three cases, the Court had to determine whether the BIA and the provincial statutes could coexist or whether they were in conflict, in which case the provincial statutes had to be declared inoperative and give way to the BIA, which would take precedence pursuant to the principle of the paramountcy of federal law over provincial law.

The Supreme Court noted that when reviewing the interaction between different laws of different jurisdictions, the courts must be careful, in that they should favour an interpretation seeking to reconcile the two laws in question, and only declare the provincial law inoperative where the inconsistency with the federal law is inescapable. In this regard, a conflict may be operational, i.e. where one law prohibits what the other imposes, or in the purpose, where the effects of one frustrate the purposes of the other. Since a conflict could arise both with respect the effects or the purposes, to resolve the alleged conflicts at bar, the Court had to assess the rationale behind the BIA and the provincial laws in question, as well as their respective mechanisms.

APPLICATION

In *Lemare*, the review was limited to the purposes which underlie the existence of the 150-day notice period in favour of the debtor/ owner of farm land under the provincial statute, which protects farms and farming operations, and to the purposes of the 10-day notice period provided in section 244 BIA before the appointment of a receiver can be required under section 243 BIA. For the majority of the Court, the time period in the provincial statute constitutes a grace period, whereas the purpose of the 10-day notice period in section 244 BIA is to avoid the multiplication of proceedings. The BIA does not require the appointment of a receiver upon the expiry of the 10 days. Moreover, this time period can be extended or abridged, depending on the circumstances. The creditor's right to obtain the appointment of a receiver is in all cases subject to court authorization. According to the majority of the Court, there is therefore no inconsistency between the two regimes: in complying with the 150-day time period under the provincial statute, one is by the same token also only exercising one's option to apply to the courts beyond the 10-day time period under the BIA. Justice Côté dissented: for her, timeliness and effectiveness were also purposes of the BIA and the objective of protecting farm land must therefore yield to this imperative. She would have declared the provincial law inoperative.

In *Moloney* and *ETR*, the Court considered the purposes of the BIA as a whole. In this regard, the Court was unanimous: on the one hand, the bankruptcy and insolvency regime lays down the principle of the equitable distribution of the bankrupt's assets among his creditors and, on the other hand, the principle of the financial rehabilitation of the bankrupt, which is achieved through his discharge from all provable claims at the end of the process. The Court also unequivocally found that there was a conflict between the fact that the bankrupt could be discharged of his debts under the BIA and the fact that a provincial statute could continue to attach sanctions to one of these debts. However, the seven majority judges diverged from their two dissenting colleagues on how this conflict was to be characterized. For the majority, there was a true operational conflict between the BIA and the provincial statutes because the BIA neutralizes the debt while the provincial statutes continued to give some effect to the debt. Since one statute prohibited what the other required, the inconsistency was direct. According to Justices McLachlin and Côté, there was no operational conflict between the BIA and the provincial statutes because it was still possible for a bankrupt to renounce the privilege which the provincial statute sought to deprive him of by giving up his driver's licence or willingly paying his debt. However, since the provincial statutes frustrated the purpose of the BIA, they were inoperative in the insolvency context.

EFFECTS AND LESSONS

In *Moloney* and *ETR*, the Supreme Court reaffirmed known concepts (bankrupt's discharge and rehabilitation), and these decisions therefore do not revolutionize insolvency practice. However, the Court's decision in *Lemare* could potentially change practice by making the appointment of a

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receiver under section 243 BIA subject to the time periods provided in provincial statutes. For instance, in Quebec, one can easily imagine that debtors might attempt to convince the courts that a receiver cannot be appointed under the BIA until the time limits provided for in the *Civil Code of Québec* for the exercise of a hypothecary recourse have expired (20 days for movable property and 60 days for immovable property).

Lavery has the knowledge and experience necessary to assist you in any bankruptcy and insolvency matters and protect your assets and property. Do not hesitate to contact us.

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