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PETROWEST, PARAMOUNTCY, AND THE SINGLE PROCEEDING MODEL

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ABSTRACT

The single proceeding model ("SPM") in insolvency law seeks to make insolvency proceedings faster and more efficient by concentrating claims related to one insolvency into one single legal proceeding. The SPM is not explicitly included in Canada's two federal insolvency statutes, the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act*, but is instead a principle that courts have developed through case law and justified through provisions that give judges discretionary power in insolvency proceedings. However, the SPM occasionally conflicts with provincial legislation. This notably occurred in the Supreme Court of Canada case *Peace River Hydro Partners v Petrowest Corp* where British Columbia's *Arbitration Act* collided with the single proceeding model. Instead of applying paramountcy to have the federal insolvency statute prevail over the *Arbitration Act*, the Supreme Court of Canada sidestepped the issue by interpreting the *Arbitration Act* in a manner that avoided any conflict between the *Arbitration Act* and the SPM, but also allowed them to follow the SPM. This is not an isolated incident as other courts have also avoided applying paramountcy when using the SPM as a justification for overriding provincial legislation.

This paper argues that this approach is unsustainable in the long term and eventually the courts will have to rely on paramountcy to implement the SPM in a scenario where the SPM conflicts with provincial legislation. In the context of the *Bankruptcy and Insolvency Act*, the SPM would likely not prevail as the two provisions used to implement it, sections 183(1) and 243, have been interpreted in a manner that make their success in a paramountcy analysis questionable. The paper concludes by arguing that codification of the SPM would be desirable to ensure that the single proceeding model would prevail in a paramountcy analysis.

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INTRODUCTION

The single proceeding model (the "SPM") is a crucial component of Canadian insolvency law. It centralizes legal actions related to an insolvency into either a *Bankruptcy and Insolvency Act* ("*BIA*") or *Companies' Creditors Arrangement Act* ("*CCAA*") proceeding.[1] This allows for more efficient insolvency proceedings by preventing each individual stakeholder from starting a separate action against the debtor to realize their claim.[2] Traditionally, the SPM was seen as being a "shield" to protect a debtor from creditors; however, recently it has also acted as a "sword" allowing debtors to initiate claims within the insolvency proceedings against third parties as long as that third party is not a "stranger" to the insolvency proceedings.[3]

Despite the SPM's importance in Canadian insolvency law, it is not expressly included in any provision of the *BIA* or the *CCAA*; instead, it is a "judicial construct."[4] This lack of explicit inclusion means judges must rely on various discretionary provisions to provide statutory backing to their decisions relating to the SPM. Sections 183(1) and 243 of the *BIA* and section 11 of the *CCAA* have all been used to provide backing to the SPM.[5] These sections are discretionary relief provisions that allow courts to provide relief not explicitly considered in the statutes.[6]

Recently, the SPM has been invoked in three *BIA* decisions to override provincial statutes and bring legal actions into the insolvency proceedings. The most prominent of these decisions is the Supreme Court of Canada's ("SCC") decision in *Peace River Hydro Partners v Petrowest Corp* ("*Petrowest*") where the SPM prevailed over a provincial arbitration act.[7] *Re Mundo Media Ltd* ("*Mundo*") is an Ontario Court of Appeal ("ONCA") decision which mirrors *Petrowest* as it also has the SPM prevailing over a provincial arbitration act.[8] Finally, in the Saskatchewan Court of King's Bench's ("SKKB") decision *Re Tron Construction* ("*Tron*"), the SPM was used to overide provincial lien legislation.[9]

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1 *Sam Lévy & Associés Inc v Azco Mining Inc*, 2001 SCC 92 at paras 26–27; *Peace River Hydro Partners v Petrowest Corp*, 2022 SCC 41 at paras 54–55 [*Petrowest*]; *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*]; *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [*CCAA*].

2 *Petrowest*, *supra* note 1 at para 55.

3 *Mundo Media Ltd (Re)*, 2022 ONCA 607 at para 52 [*Mundo*]; *Petrowest*, *supra* note 1 at paras 34–35; *Tron Construction (Re)*, 2022 SKKB 203 at para 53 [*Tron*].

4 *Mundo*, *supra* note 3 at para 40. The stay provisions found in *BIA*, *supra* note 1, s 69(1) and *CCAA*, *supra* note 1, s 11.02 do provide statutory support for the "shield" view of the SPM as they explicitly prevent creditors from commencing actions against the debtor outside the insolvency proceedings if a stay is in place. However, these provisions only relate to creditors claiming against the debtor and provide no statutory support for allowing the debtor to centralize other types of legal proceedings, like claims against third parties, within insolvency proceedings.

5 *BIA*, *supra* note 1, ss 183(1), 243; *CCAA*, *supra* note 1, s 11.

6 Eamonn Watson, Gray Monczka & Jordan Schultz, "Anything You Can Do, I Can Do Better: Does the CCAA Provide Broader Discretionary Relief than the BIA?" (2022) 20 Annual Rev Insolvency L at 12–13, 41–43 (CanLII PDF).

7 *Petrowest*, *supra* note 1.

8 *Mundo*, *supra* note 3.

9 *Tron*, *supra* note 3.

The most interesting aspect of these cases is their avoidance of paramountcy.[10] The paramountcy doctrine holds that where there is a conflict between federal and provincial law and both laws are *intra vires*, the federal law will prevail, and the provincial law will be inoperative to the extent of the conflict.[11] As a federal statute, the *BIA* can override provincial statutes that come into meaningful conflict with it, but in all three cases the courts avoided invoking paramountcy. In *Petrowest* and *Mundo*, the courts avoided the use of paramountcy through clever interpretation of the provincial arbitration acts. In *Tron*, the court did not conduct a paramountcy analysis as it seems that no party seriously contested the court's jurisdiction to override the provincial act.[12]

This paper demonstrates that courts will, at some point, have to turn to paramountcy to give effect to the SPM in the *BIA* context, and there will be significant issues in using section 183(1) as the statutory backing for the SPM. I conclude by proposing that the SPM be codified into the *BIA* to provide greater certainty and enforceability to an important insolvency law concept. First, I will briefly summarize *Petrowest, Mundo,* and *Tron* to illustrate where the SPM conflicted with provincial legislation and how courts have avoided relying on paramountcy to deal with these conflicts thus far.

I. RECENT DEVELOPMENTS IN THE USE OF THE SPM

A. *Peace River Hydro Partners v Petrowest Corp*

In *Petrowest,* a receiver brought a claim within *BIA* proceedings against the debtor's former clients for amounts owing for previously completed work.[13] However, the debtor and their client had an arbitration agreement specifying that all disputes must be settled through arbitration.[14] Under section 15(1) of the British Columbia *Arbitration Act* ("*BCAA*"), if an arbitration agreement applies to a claim, a court must stay the claim so arbitration can occur—in a process called an "arbitration stay."[15] There is a carveout in section 15(2) that states a court does not have to order an arbitration stay if the arbitration agreement is "void, inoperative or incapable of being performed."[16] The debtor's client applied to stay the proceedings to allow arbitration to occur, and thus put the SPM into conflict with the *BCAA*.

To resolve this conflict between a federal and provincial statute, the SCC did not employ paramountcy. Instead, the Court stated that sections 243(1)(c) and 183(1) of the *BIA* provide

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10 It is also somewhat concerning as it circumvents the requirement that notice be given to the Federal and Provincial Attorney Generals before a provincial act is made inapplicable by a federal act. For examples see *Constitutional Question Act*, RSBC 1996, c 68, s 8(2); *Courts of Justice Act*, RSO 1990, c C.43, s 109(1); *The Constitutional Questions Act*, 2012, SS 2012, c C-29.01, s 13.

11 *Alberta (AG) v Moloney*, 2015 SCC 51 at paras 15–16, 90 [*Moloney*].

12 *Tron*, *supra* note 3 at para 15.

13 *Petrowest*, *supra* note 1 at para 3.

14 *Ibid.*

15 *Arbitration Act*, RSBC 1996, c 55, s 15(1) [*BCAA*]. In 2020, British Columbia adopted a new Arbitration Act, *Arbitration Act*, SBC 2020, c 2. *Petrowest* was litigated under the previous act, but s 15 of the old act remains substantially unchanged in s 7 of the new act.

16 *Ibid*, s 15(2).

statutory jurisdiction for a court to find an arbitration agreement "inoperative" thereby allowing the application of the stay exception in section 15(2) of the *BCAA*.[17] The SCC specified that this is a discretionary power that a judge should only invoke when the arbitration would "compromise the orderly and efficient resolution of insolvency proceedings."[18] In this case, the Court concluded it was appropriate to exercise that discretion to enforce the SPM, as this would increase the efficiency and lower the cost of the insolvency process.[19]

B. *Mundo Media Ltd (Re)*

As *Petrowest* was being decided by the SCC, *Mundo* was undergoing its own proceedings. The situation mirrored *Petrowest*: a receiver was claiming against a third party to collect funds owed, and the third party sought to rely on an arbitration agreement to move the proceedings from *BIA* proceedings into arbitration.[20] Unlike *Petrowest*, which dealt with the *BCAA,* the relevant statute in *Mundo* was the Ontario *International Commercial Arbitration Act* ("*ICAA*"), as this was an Ontario proceeding dealing with an international arbitration agreement.[21]

The *ICAA* has nearly identical wording to the *BCAA* in that it requires a court to order a stay if an arbitration agreement applies unless the agreement "is null and void, inoperative or incapable of being performed." [22] Using nearly the exact same logic as *Petrowest,* the ONCA concluded that *BIA* section 243 could be utilized to render an arbitration agreement inoperative to advance the objectives of the SPM.[23]

C. *Tron Construction (Re)*

Tron differs in that it was a *BIA* proposal proceeding and involved a provincial statute unrelated to arbitration. In this case, a party applied to the court overseeing the proceedings to replace the lien claims process prescribed by the Ontario *Construction Act* ("*OCA*") with an alternative process to be administered by the overseeing judge.[24] To support their application, the applicant cited the SPM as a justification for overriding the *OCA*.[25]

For the sake of costs, efficiency, and adherence to the SPM, the SKKB utilized *BIA* section 183(1) to supplant the *OCA* process and ordered an alternative process.[26] In taking this action, the court overrode a provincial statute, yet—surprisingly—paramountcy was not discussed at all.

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17 *Petrowest*, *supra* note 1 at para 149.
18 *Ibid* at para 155.
19 *Ibid* at paras 173–180.
20 *Mundo*, *supra* note 3 at paras 3–4.
21 *International Commercial Arbitration Act*, 2017, SO 2017, c 2, Sched 5 [*ICAA*].
22 *Ibid*, art 8.
23 *Mundo*, *supra* note 3 at para 37.
24 *Tron*, *supra* note 3 at paras 1–11; *Construction Act*, RSO 1990, c C.30.
25 *Tron*, *supra* note 3 at para 22.
26 *Ibid* at paras 11, 18, 47–55, 60, 68. The alternate process was the creation of a summary claims process administered by the proposal trustee, instead of the usual procedure under the *OCA*.

It appears that no party made any forceful arguments on this point, which might explain why the court did not discuss paramountcy.[27] Nevertheless, it is surprising that the court would be willing to override a provincial statue without even a cursory paramountcy analysis.[28]

II. DISCUSSION

As demonstrated from these decisions, courts have used *BIA* sections 183(1) and 243 to give effect to the SPM when confronted with provincial statutes that would impede its application. So far, they have managed to do this without conducting a paramountcy analysis. However, the current avoidance of paramountcy is likely not sustainable in the long term.

A. Other Provincial Arbitration Acts

In *Petrowest* and *Mundo*, the SCC and the ONCA preserved the SPM despite conflicts with provincial arbitration acts by leveraging statutory exceptions allowing a judge to not order an arbitration stay if the arbitration agreement is "void, inoperative or incapable of being performed."[29] In both cases, the courts relied on the term "inoperative" to exercise their statutory discretion to render the arbitration agreements inoperative.[30] This method enabled them to enforce the SPM while avoiding a direct conflict between the *BIA* and the arbitration acts. By avoiding a conflict, the courts avoided paramountcy analyses that would normally have to be conducted for the *BIA* to prevail over the provincial arbitration acts.[31]

However, this approach is likely not applicable nationwide because other provincial arbitration acts have stricter standards than the *BCAA* and *ICAA* for when a judge can decline to order an arbitration stay.[32] For example, instead of "void, inoperative or incapable of being performed," the Alberta and Ontario arbitration acts only allow a judge to decline to order an arbitration stay if the arbitration agreement is "invalid."[33] This stricter standard likely means that the same approach taken in *Petrowest* and *Mundo* cannot be applied to situations involving the Alberta and Ontario arbitration acts.[34]

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27 *Ibid* at para 14.

28 For another example of where a court overrode provincial lien legislation in insolvency proceedings without providing a paramountcy analysis see *Royal Bank of Canada v M&L General Contracting Ltd* (17 March 2015), Winnipeg CI14-01-90850 (MBQB). This case was discussed in *Tron*, *supra* note 3 at para 75. No reasons were provided, but in this case, the Manitoba Court of Queen's Bench granted an order creating a procedure for determining claims against trusts created under Manitoba's *Builder's Liens Act* even though the *Builder's Liens Act* did not contemplate such a procedure.

29 *BCAA*, *supra* note 15, s 15; *ICAA*, *supra* note 21, art 8.

30 *Mundo*, *supra* note 3 at para 37; *Petrowest*, *supra* note 1 at para 152.

31 *Petrowest*, *supra* note 1 at para 129.

32 Virginia Torrie & Laurent Crépeau, "Peace River Hydro Partners v. Petrowest: Arbitration and Insolvency – Two Solitudes?" (2023) 67:2 Can Bus LJ 213 at 227–228 (Physical Copy); Ari Y Sorek & Benjamin Dionne, "Peace River Hydro Partners v Petrowest Corp: Opening the Floodgates for Forum Selection Clauses, or a Meandering Return to the Headwaters of the 'Single-Control Doctrine'?" (2023) 21 Annual Rev Insolvency L at 13–14 (CanLII PDF).

33 *Arbitration Act*, RSA 2000, c A-43, s 7(2); *Arbitration Act*, 1991, SO 1991, c 17, s 7(2).

34 Torrie & Crépeau, *supra* note 32 at 227–228; Sorek & Dionne, *supra* note 32 at 13–14.

This is supported by the definition of "invalid" and the SCC's statements in *Petrowest*. Black's Law Dictionary defines "invalid agreement" as being synonymous with "void or voidable" agreement.[35] In *Petrowest*, the SCC stated that an arbitration agreement will only be found void if it was "'intrinsically defective' (and therefore void *ab initio*) according to the usual rules of contract law."[36] Section 183(1) or 243 of the *BIA* would not be able to make an agreement void at conception, and therefore, under the Alberta or Ontario arbitration acts, judges seem to be mandated to provide the arbitration stay regardless of ongoing insolvency proceedings.

B. Paramountcy

This opens the door for paramountcy to play a role in resolving SPM conflicts between the *BIA* and provincial arbitration acts. Paramountcy will also have to be considered if someone challenges a court's jurisdiction to issue an order overriding a provincial statute—similar to what happened in *Tron*. Paramountcy applies when either "(1) there is an operational conflict because it is impossible to comply with both laws, or (2) although it is possible to comply with both laws, the operation of the provincial law frustrates the purpose of the federal enactment."[37] If paramountcy applies, then the provincial law is made inoperative to the extent of the conflict.

The SPM is a "judicial construct," meaning it needs statutory backing to be successful in a paramountcy analysis as a court's inherent jurisdiction cannot override provincial statues.[38] There is no explicit *BIA* section that codifies the SPM, so judges will have to rely on discretionary sections of the *BIA* to give effect to the SPM.[39]

The primary source of discretionary power in the *BIA* is section 183(1).[40] Section 183(1) vests in the superior courts of each province "such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction."[41] The courts have interpreted this provision as constituting a broad grant of powers allowing them to make various types of orders that further the objectives of the *BIA* and that are not explicitly contemplated within

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35 Bryan A Garner, *Black's Law Dictionary*, (St. Paul, Minn: Thomson West, 2019) sub verbo "invalid agreement."

36 *Petrowest*, *supra* note 1 at para 136.

37 *Moloney*, *supra* note 11 at para 18.

38 *Baxter Student Housing Ltd v College Housing Co-operative Ltd*, 1975 CanLII 164 (SCC) at 480–481; Sam Babe, "Recent Use of Statutory Discretion and Inherent Jurisdiction in Insolvency and Restructuring", (2020) Annual Rev Insolvency L at 25–26 (CanLII PDF); *Mundo*, *supra* note 3 at para 40; *Alderbridge Way GP Ltd (Re)*, 2023 BCSC 1718 at para 46, *Alderbridge* is in the *CCAA* context but it confirms that the SPM itself is not a jurisdictional basis to issue an order.

39 See *Tron*, *supra* note 3 at para 15 where the court states "[a]bsent s. 183(1), it is doubtful that this Court would have jurisdiction" to issue an order circumventing the *OCA*." It can be argued that the *BIA* stay sections are a codification of the SPM. However, that only applies to creditor claims against the debtor and not the expanded "sword" basis the SPM is now understood as encompassing.

40 Watson, Monczka & Schultz, *supra* note 6 at 25.

41 *BIA*, *supra* note 1, s 183.

the *BIA*, such as reverse vesting orders ("RVO").[42] However, the exact scope of the powers that Parliament intended to grant through section 183(1) remains unclear, and section 183(1) has not previously been considered in a paramountcy analysis.[43] This vague purpose and lack of precedent makes it difficult to imagine how a court would conduct a paramountcy analysis involving section 183(1).

Fortunately, the SCC has considered an alternative source of discretion within the *BIA* in a paramountcy analysis—section 243. Section 243 provides courts with discretion to appoint a receiver over the debtor and order the receiver to, among other things, "take any other action that the court considers advisable."[44] Section 243 has been interpreted to give courts the jurisdiction to make orders not explicitly contemplated within the *BIA*, such as granting a vesting order that transfers property free and clear of encumbrances.[45]

In *Saskatchewan (Attorney General) v Lemare Lake Logging Ltd* ("*Lemare*"), the SCC considered section 243 in the context of a paramountcy analysis.[46] As will be discussed, the SCC's decision in *Lemare* precludes using section 243 to enforce the SPM in a conflict with provincial legislation. However, the SCC's consideration of section 243 in a paramountcy analysis can provide insight into how courts would consider a similar issue involving section 183(1).

In *Lemare*, the SCC considered paramountcy in a conflict between section 243 and the *Saskatchewan Farm Security Act* ("*SFSA*").[47] The *SFSA* stipulated that a receiver could not be appointed over a farmer's land until the expiry of a 150-day grace period. As section 243 provides that a receiver can be appointed after a ten-day waiting period, this discrepancy created a potential conflict between the *BIA* and *SFSA*.

The SCC determined that there was no operational conflict between the laws that would require paramountcy because creditors could choose not to appoint a receiver until the conditions in the *SFSA* were met.[48] Additionally, the SCC concluded that the *SFSA* did not conflict with the purpose of section 243 because the SCC narrowly defined section 243's

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42 *PaySlate Inc (Re)*, 2023 BCSC 608 at paras 82–85 [*PaySlate*]; *KW Capital Partners Limited v Vert Infrastructure Ltd* (8 June 2021), Toronto CV-20-00642256-00CL (ONSC (CL)); *Proposition de Brunswick Health Group Inc*, 2023 QCCS 4643 at paras 48–52; Victor Olusegun, "The Journey of Reverse Vesting Orders from "Extraordinary" to Ordinary: Is it Time for Parliamentary Intervention?" (2024) Annual Rev Insolvency L at 8–11 (CanLII PDF).

43 Thomas GW Telfer, "Equitable Subordination Redux? Section 183 of the *Bankruptcy and Insolvency Act* and Respecting the 'Legislative Will' of Parliament" (2021) 64:3 Can Bus LJ 316 at 325 (Physical Copy).

44 *BIA*, *supra* note 1, s 243.

45 *Third Eye Capital Corporation v Ressources Dianor Inc/Dianor Resources Inc*, 2019 ONCA 508 at paras 76, 84, 87.

46 *Saskatchewan (Attorney General) v Lemare Lake Logging Ltd*, 2015 SCC 53 [*Lemare*].

47 *Ibid* at paras 1–4.

48 *Ibid* at para 25. This statement is consistent with previous SCC jurisprudence that when there is a provincial act that is stricter than a federal act no operational conflict will be found unless the provincial act frustrates the federal act's purpose. See *Rothmans, Benson & Hedges Inc v Saskatchewan*, 2005 SCC 13 at paras 22–24.

purpose as allowing for the appointment of a national receiver.[49] Such an interpretation is logical considering the history of section 243. Prior to the 2009 amendments that added section 243 to the *BIA*, courts had used section 47 of the *BIA* to create national receiverships.[50] One could argue that invoking section 47 for this purpose was somewhat tenuous, as the provision was intended to apply only to interim receiverships of limited duration.[51] The enactment of section 243 gave national receiverships a stronger legal justification. However, the SCC's narrow interpretation of section 243's purpose in *Lemare*—to only allowing for national receiverships—means that it would not be able to serve as statutory backing for the SPM in a paramountcy analysis.

In making their decision, the majority stated that "[v]ague and imprecise notions like timeliness or effectiveness cannot amount to an overarching federal purpose that would prevent coexistence with provincial laws like the *SFSA*."[52] The Court also stated that "[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."[53]

Applying *Lemare* to a potential paramountcy conflict between the SPM effected through section 183(1) and a provincial act leads to the conclusion that the provincial act is likely to prevail. The SCC's statement that an operational conflict between a discretionary *BIA* section and a provincial statute can be resolved by a party refraining from applying for the discretionary remedy appears to preclude any success for section 183(1) under the operational conflict branch of paramountcy.[54] For example, applying this principle to *Tron*, there would be no operational conflict as the applicant could have avoided the conflict by not applying to the court for an order under section 183(1) to override the *OCA*.

This suggests that the only path for section 183(1) to prevail in a paramountcy analysis would be through the frustration of federal purpose branch. The issue here is that the legislative purpose of section 183(1) is unclear. When section 183(1) was originally enacted, its purpose

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49 *Ibid* at para 68.

50 Kevin P McElcheran, *Commercial Insolvency in Canada*, 4th ed (Toronto: LexisNexis, 2019) at paras 4.185–4.186.

51 Roderick J Wood, "The Incremental Evolution of National Receivership Law and the Elusive Search for Federal Purpose" (2017) 26:1 *Const Forum* at 2 (CanLII PDF).

52 *Lemare*, *supra* note 46 at para 68.

53 *Ibid* at para 41, here the SCC was making specific reference to the phrases "real-time litigation" and the "hothouse of real-time litigation" that are often used to explain why judges are given such discretionary power in insolvency proceedings.

54 *Ibid* at paras 25, 47, 48. There is a potential alternative argument that the paramountcy issue could be solved by preventing a party from applying for a stay order under an arbitration act similarly to how the SCC prevented a party from applying under the *BIA* to appoint a receiver in *Lemare*. However, this would be a misunderstanding of the nature of the stay provisions contained in arbitration acts. Stay provisions in arbitration acts are mandatory provisions that judges must follow unless a statutory exception applies, see *TELUS Communications Inc v Wellman*, 2019 SCC 19 at paras 63–65. Therefore, the approach taken in *Lemare* could not be applied to arbitration stay applications as arbitration stay provisions are not discretionary provisions in contrast to *BIA* receivership applications which are discretionary.

was to empower the newly created and short-lived Bankruptcy Courts.[55] Parliament kept section 183(1) after the demise of the Bankruptcy Courts suggesting that the provision represents some grant of jurisdiction, but the scope of that grant is unclear.[56] There is no evidence that Parliament's purpose in enacting section 183(1) was to provide statutory backing for the SPM.

In *Lemare,* the SCC stated that phrases like "timeliness or effectiveness" are too vague to serve as the federal purpose in a paramountcy analysis.[57] Previously, the SCC identified the SPM's purpose as providing efficiency and orderliness to the insolvency system.[58] This suggests that using the SPM's purpose as the federal purpose of section 183(1) would not help in a paramountcy analysis as the SPM's purpose is too vague to be used as a federal purpose. Also in *Lemare*, the SCC stated that a "judicially coined expression" cannot substitute for evidence of the legislative purpose of a provision.[59] The SPM itself is a judicially coined expression and, as such, would not be able to act as a federal purpose for section 183(1).[60] Therefore, there would likely be significant difficulties in using section 183(1) to uphold the SPM in a scenario where paramountcy is required.

C. Discretion in the *CCAA* and Paramountcy

In comparison to the *BIA*, the *CCAA* jurisprudence is very clear that orders made under section 11 of the *CCAA* have paramountcy over provincial legislation, including provincial arbitration acts.[61] This is because courts have identified section 11's purpose as being to grant courts "broad and liberal powers" to preserve and enhance an insolvent corporation's value.[62]

The courts' treatment of *CCAA* section 11 is important to understanding how a court may interpret *BIA* section 183(1) because there is currently a strong trend of harmonization between the *BIA* and the *CCAA*, particularly in regards to the discretionary powers available under each statute.[63] This follows from the SCC's statement in *Century Services Inc v Canada (AG)* that the two statutes should be considered in a harmonious fashion.[64] In *Tron*, the court pointed to harmonization when using section 183(1) to override the *OCA* because in

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55 Telfer, *supra* note 43 at 321–325.

56 *Ibid* at 325.

57 *Lemare*, *supra* note 46 at para 68.

58 *Century Services Inc v Canada (AG)*, 2010 SCC 60 at para 22 [*Century Services*].

59 *Lemare*, *supra* note 46 at para 41.

60 *Tron*, *supra* note 3 at para 15.

61 See *Hy Bloom inc v Banque Nationale du Canada*, 2010 QCCS 737 at paras 116–117; *Chef Ready Foods Ltd v Hongkong Bank of Canada*, 1990 CanLII 529 (BCCA); *Pacific National Lease Holding Corp v Sun Life Trust Co*, 1995 CanLII 2575 (BCCA) at paras 40–43; for arbitration acts see *Luscar Ltd v Smoky River Coal Limited*, 1999 ABCA 179 at paras 73–75.

62 *Sulphur Corporation of Canada Ltd*, 2002 ABQB 682 at paras 25–33 [*Sulphur*].

63 Watson, Monczka & Schultz, *supra* note 6 at 38–40; Roderick J Wood, "'Come a Little Bit Closer': Convergence and its Limits in Canadian Restructuring Law" (2021) J Insolvency Institute Can at 1 (Westlaw PDF).

64 *Century Services*, *supra* note 58 at para 24.

Re Comstock a *CCAA* court had used its discretion to override provincial lien legislation.[65] This suggests that a paramountcy analysis could be resolved by arguing that the goal of consistent application requires section 183(1) to be able to override provincial statutes. Similar logic has led to RVOs being ordered under section 183(1).[66]

However, this harmonization argument has two weaknesses. Firstly, it can be argued that the two statutes can be distinguished by the greater extrinsic evidence of Parliament's intention in enacting the *CCAA* than in enacting *BIA* section 183(1).[67] It may be justified to say that Parliament's purpose in section 11 was to grant courts broad discretionary power without being limited by provincial statutes.[68] However, as previously discussed, section 183(1)'s legislative purpose is unclear. The SCC has stated, "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."[69] The lack of clear evidence on what jurisdiction Parliament meant to grant courts through section 183(1) precludes section 183(1) from being applied in the same manner as *CCAA* section 11. The SCC's statements about harmonization are not enough to substitute for this lack of clear evidence as "judicially coined" expressions cannot substitute for evidence of the legislative purpose of a provision.[70]

Secondly, the SCC has repeatedly identified the *CCAA* as providing greater judicial discretion than the *BIA*.[71] Logically, this means harmonization has limits, and that there are orders that can be ordered under section 11 that cannot be ordered under section 183(1). This could include orders that override provincial statutes.

CONCLUSION: NEED FOR CODIFICATION

I have shown that implementing the SPM through section 183(1) is not sustainable long-term. Both the unclear legislative purpose of section 183(1) and the ability of judges to avoid operational conflict with provincial statutes by not exercising their discretion complicate the paramountcy analysis of section 183(1). Additionally, harmonization of the *BIA* and the *CCAA* will likely not be sufficient to justify section 183(1) prevailing over provincial statutes.

Even if the SPM could be enforced through section 183(1) through judicial pragmatism, this is undesirable. The SPM is a crucial part of insolvency law and should be enforced through a Parliament-created mechanism that is clear on when and where the SPM applies. Codifying the SPM into the *BIA* would provide this certainty. This provision should grant judges the discretion to stay the enforcement of provincial statutes that disrupt the orderly and efficient

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65 *Tron*, *supra* note 3 at para 22; John Margie, "Comstock Canada Ltd. (Re), A Model of Efficiency" (2015) 63 J Can College Construction Lawyers at 13–16 (Westlaw PDF).

66 *PaySlate*, *supra* note 42 at paras 81–85.

67 Wood, *supra* note 51 at 5.

68 *Sulphur*, *supra* note 62 at paras 35–37.

69 *Lemare*, *supra* note 46 at para 23.

70 *Ibid* at para 41.

71 *Century Services*, *supra* note 58 at para 14; *9354-9186 Québec inc v Callidus Capital Corp*, 2020 SCC 10 at para 73.

resolution of an insolvency matter by creating a parallel proceeding.[72] This would centralize all appropriate legal actions into the insolvency proceedings, thereby achieving the goal of the SPM. There is precedent for codifying concepts that developed in the jurisprudence into the *BIA* to provide greater certainty, and the SPM would benefit from this approach as well.[73]

72 This is more or less an adoption of the SCC's test in *Petrowest* for where it is appropriate to make an arbitration agreement inoperative, see *Petrowest*, *supra* note 1 at para 155. Parliament could also consider whether to provide powers related to federal statutes, which would not be subject to the paramountcy issue but still require clear guidance from Parliament regarding which statute is to take precedence and in what circumstances.

73 For example, see the development of interim financing in the case law and later its explicit amendment into the *BIA* in 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*, 2nd Sess, 39th Parl, 2007, cl 18 (assented to 14 December 2007), SC 2007, c 36.