SASKATCHEWAN LAW REVIEW

Rediscovering the Bankruptcy and Insolvency Power: Political and Constitutional Challenges to the Canadian *Bankruptcy Act*, 1919-1929

Thomas G.W. Telfer*

> [A]ll these questions—that is the rights of the parliament of Canada as against the provincial legislature to legislate in matters of bankruptcy—will in due course come before the judicial committee of the Privy Council.
>
> *S.W. Jacobs, House of Commons Debates, 26 March 1923*[1]

I. INTRODUCTION

The enactment of the Canadian *Bankruptcy Act*[2] in 1919 created a great deal of optimism in the business and legal communities. The new statute finally enabled Canada to join other nations, such as England and the United States, that had embraced bankruptcy law as a permanent commercial statute.[3] The idea of using a federal law to deal with debtors and creditors was new to the Canadian legal world in 1919. Although s. 91(21) of the *Constitution Act, 1867*[4] granted

---

* Professor, Western University, Faculty of Law. A version of this paper was originally presented at the Commercial Law Conference Honouring Professor Ronald C.C. Cuming, University of Saskatchewan, November 2016. I am indebted to Anna Lund, Virginia Torrie, and Wade Wright who provided comments on an earlier draft. Research assistance was provided by Courtney Davis, Meghan Loughry, and Oliver Hutchison.

1 *House of Commons Debates*, 14th Parl, 2nd Sess, Vol 2 (26 March 1923) at 1519 (Samuel William Jacobs).

2 SC 1919, c 36 [*Bankruptcy Act*].

3 For examples of optimism in the business community see Book Review of *The Law and Practice of Bankruptcy in Canada* by Lewis Duncan, (1922) 34:2 Jurid Rev 193; "Canada's Bankruptcy Act", *The Globe* (7 January 1920) 6 ["Canada's Act"]; "Bankruptcy Act will Help Business World: New Measure Wipes out Variety of Provincial Laws", *Financial Post* (5 July 1919) 16; FM Moffat, "Bankruptcy in Canada", *Financial Post* (25 March 1927) 28; "Bankruptcy Act in Force July 1", *The Globe* (6 January 1920) 2.

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

Parliament exclusive jurisdiction over "Bankruptcy and Insolvency," the Dominion largely abandoned[5] this federal power by repealing the *Insolvent Act*[6] in 1880,[7] thereby enabling the provinces to pass debtor-creditor legislation. In 1919, there was an assumption that the new national bankruptcy law would improve upon non-uniform provincial law.[8] In the early 1920s, many lawyers believed that the federal power was meant to be read broadly, such that it would allow the Dominion to interfere with provincial jurisdiction over property and civil rights to make the *Bankruptcy Act* more workable.[9]

From today's perspective, the legal and business communities' optimism was well placed. The *Bankruptcy Act* became Canada's founding bankruptcy statute and established a permanent bankruptcy regime. On the constitutional side, if we look at the evolution of the bankruptcy and insolvency power from 1919, "there has been a progressive expansion of the federal presence in the field."[10] However, the permanency of the *Bankruptcy Act* and a broad interpretation of the bankruptcy power were not inevitable or predictable outcomes in 1920. Some questioned Parliament's ability to pass legislation that interfered with decades-old provincial debtor-creditor law.[11] Indeed,

---

5 Parliament did not completely abandon the field. It enacted legislation in 1882 to deal with insolvent trading companies and banks (Thomas GW Telfer & Bruce Welling, "The *Winding-Up and Restructuring Act*: Realigning Insolvency's Orphan to the Modern Law Reform Process" (2008) 24:1 BFLR 233 at 235).

6 *An Act respecting Insolvency*, SC 1875, c 16.

7 *An Act to Repeal the Acts respecting Insolvency now in force in Canada*, SC 1880, c 1. For the reasons for repeal and the 1919 revival of bankruptcy law, 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) [Telfer, *Ruin and Redemption*].

8 "Dominion Association of Chartered Accountants", *The Monetary Times* 65:12 (17 September 1920) 5 at 8. See also Moffat, *supra* note 3. One aspect of the new Act was not uniform. Section 25 of the *Bankruptcy Act* relied upon provincial exemption law to determine exempt property in a bankruptcy (*supra* note 2). See Thomas GW Telfer, "The Evolution of Bankruptcy Exemption Law in Canada 1867-1919: The Triumph of the Provincial Model" in Janis P Sarra, ed, *Annual Review of Insolvency Law, 2007* (Toronto: Carswell, 2008) 577.

9 See e.g. Lewis Duncan, *The Law and Practice of Bankruptcy in Canada* (Toronto: Carswell, 1922) at ix [Duncan, *Bankruptcy in Canada*].

10 Roderick J Wood, "The Paramountcy Principle in Bankruptcy and Insolvency Law: The Latest Word" (2016) 58:1 Can Bus LJ 27 at 29 [Wood, "Paramountcy Principle"].

11 Perhaps this is not surprising. Peter Hogg and Wade Wright note that the enumerated federal bankruptcy and insolvency power was a subject matter that would "otherwise have come within property and civil rights" jurisdiction of the provinces (Peter W Hogg & Wade K Wright, "Canadian Federalism, the Privy Council and the Supreme Court: Reflections on the Debate About Canadian Federalism" (2005) 38:2 UBC L Rev 329 at 335).

many Québec legal thinkers did not welcome the new federal statute, as they believed it to be a threat to the "purity of civil law."[12]

During 1922 and 1923, there were calls from inside and outside Parliament to repeal the *Bankruptcy Act*. Those seeking repeal sought to preserve provincial law from federal interference. This provincial rights perspective ultimately surfaced in constitutional cases where litigants sought to protect the property and civil rights jurisdiction of the provinces from the intrusion of the *Bankruptcy Act*. In the 1928 case of *A.-G. Que. v. Larue*,[13] the Privy Council ended the debate by reaffirming a broad federal bankruptcy and insolvency power. Looking back from a long-term perspective, the outcome in *Larue* might seem inevitable. However, until *Larue* there was a great deal of uncertainty over the relationship between the federal bankruptcy power and provincial jurisdiction. After nearly forty years of provincial rule, the shift to a federal statute was an abrupt change for the provinces. The new federal bankruptcy order challenged entrenched provincial law, and provincial rights advocates saw it as an attack on carefully crafted provincial law that was more in tune with local needs.

This study examines the political and constitutional challenges to the *Bankruptcy Act* from 1919 to 1929. The paper focuses on the 1920s for several reasons. The *Bankruptcy Act* and the creation of the Superintendent of Bankruptcy in 1932[14] are important legislative milestones but in the literature there is little discussion of bankruptcy law during the 1920s. This decade provides an opportunity to study how the legal and business communities responded to Parliament's rediscovery of the federal bankruptcy and insolvency power. The *Bankruptcy Act* provided a new constitutional battleground for those seeking to preserve provincial law from federal interference. Since the Privy Council ruled in favour of a broad bankruptcy power in *Larue*, it provides the end-point of the study. The Great Depression is a distinct and separate chapter in the life of Canadian bankruptcy law and federalism.[15]

---

12 Sylvio Normand, "Un thème dominant de la pensée juridique traditionnelle au Québec: La sauvegarde de l'intégrité du droit civil" (1987) 32:3 McGill LJ 559 at 588 [translated by author]. Original French: "Au Québec, les juristes accueillent froidement la nouvelle loi, y voyant une menace évidente à la pureté du droit civil." See also Louis-A Pouliot, "La Loi de Faillite et les Lois Provinciales" (1926) 5:2 R du D 104 at 110, 114 [Pouliot, "La Loi de Faillite" I]. See also Louis-A Pouliot, "La Loi de Faillite et les Lois Provinciales" (1926) 5:3 R du D 142 at 146 [Pouliot, "La Loi de Faillite" II].

13 [1928] 1 DLR 945, [1928] 1 WWR 534 (PC) [*Larue* cited to DLR].

14 *The Bankruptcy Act Amendment Act, 1932*, SC 1932, c 39.

15 Parliament responded to the Great Depression with *The Companies' Creditors Arrangement Act, 1933* (SC 1933, c 36) and *The Farmers' Creditors Arrangement Act, 1934* (SC 1934, c 53). On the constitutional litigation during the Great Depression legislation, see Virginia Torrie, "Protagonists of Company Reorganization: A History of the Companies' Creditors Arrangement (Canada) and the Role of Large

The paper is divided into seven Parts. Part II discusses the economic context of the 1920s and the official bankruptcy statistics for the decade. Part III sets out the necessary constitutional law background by highlighting key nineteenth-century cases on the bankruptcy power. In Part IV, the paper considers how the legal and business communities defended a broad federal bankruptcy power. In contrast, Part V examines the provincial rights response to the *Bankruptcy Act* found in the political debates of the Québec National Assembly and the House of Commons. Part VI details the constitutional challenges to the federal bankruptcy power through an examination of reported case law from the 1920s. Part VII concludes.

II. THE ECONOMIC CONTEXT AND THE BRAVE NEW WORLD OF BANKRUPTCY LAW

To better understand the challenges to the bankruptcy regime in the 1920s, some economic context is necessary. The economy struggled during the "Stuttering Twenties," with a depression causing severe unemployment.[16] For some areas of the country, economic devastation started during the First World War. Southeastern Alberta and southwestern Saskatchewan faced a severe drought in the decade following 1916.[17] In 1921, the *Queen's Quarterly* reported that Canada was "somewhere near the middle of the business depression."[18] The severe downturn lasted until 1925.[19]

Secured Creditors" (PhD Thesis, University of Kent, 2015) [unpublished] at 118-27. See also *Reference re Companies' Creditors Arrangement Act*, [1934] SCR 659, [1934] 4 DLR 75 [*CCAA Reference*]; *Reference re Farmers' Creditors Arrangement Act, 1934, and its Amending Act, 1935*, [1936] SCR 384, [1936] 3 DLR 610, aff'd [1937] 1 DLR 695, [1937] 1 WWR 320 (PC).

16 Michael Bliss, *Northern Enterprise: Five Centuries of Canadian Business* (Toronto: McClelland and Stewart, 1987) at 381, 384. In 1923, the Home Bank of Canada, with seventy branches, failed (Lawrence Kryzanowski & Gordon S Roberts, "Canadian Banking Solvency, 1922-1940" (1993) 25:3 J Money, Credit & Banking 361 at 364). See *Re Home Bank of Canada*, [1923] 4 DLR 891, [1923] 54 OLR 606 (HC), cited in Stephanie Ben-Ishai, "Bank Bankruptcy in Canada: A Comparative Perspective" (2009) 25:1 BFLR 59 at 60.

17 See David C Jones, *We'll All be Buried Down Here: The Prairie Dryland Disaster, 1917-1926* (Calgary: Historical Society of Alberta, 1986) at xxix. See also David C Jones, *Empire of Dust: Settling and Abandoning the Prairie Dry Belt* (Calgary: University of Calgary Press, 2002); Curtis R McManus, *Happyland: A History of the "Dirty Thirties" in Saskatchewan, 1914-1937* (Calgary: University of Calgary Press, 2011).

18 WC Clark, "Business Cycles and the Depression of 1920-1" (1921) 29:1 Queen's Quarterly 60 at 60. See also Angus Lyell, "The Bankruptcy Act in Operation", *The Monetary Times* 66:2 (14 January 1921) 26 [Lyell, "In Operation"]; HP Grundy, "Bankruptcy Act a Real Benefit", *The Monetary Times* 78:24 (17 June 1927) 14.

19 James Struthers, "Prelude to Depression: The Federal Government and Unemployment, 1918-29" (1977) 58:3 Can Historical Rev 277.

The depression in the early 1920s is reflected in official bankruptcy statistics from the Department of Trade and Commerce.[20] In 1922, the number of bankruptcies peaked at 3,925. Bankruptcies never reached this level during the Great Depression.[21] The bankruptcy statistics did not go unnoticed. In 1923, a Member of Parliament ("MP") referred to the rising bankruptcy numbers as "an enormous total in a land of unlimited resources, a land whose people are willing workers, a land…which offers every possible stimulus to progress."[22] Within two years of the *Bankruptcy Act* coming into force, Canada experienced a significant bankruptcy crisis. This may have contributed to the belief that there was something inherently wrong with the bankruptcy regime.

Table 1: Total Number of Reported Bankruptcies in Canada (1921-1929)[23]

Year	Total Number of Bankrupcties
1921	2,364
1922	3,925
1923	3,408
1924	2,319
1925	1,996
1926	1,773
1927	1,841
1928	2,037
1929	2,167

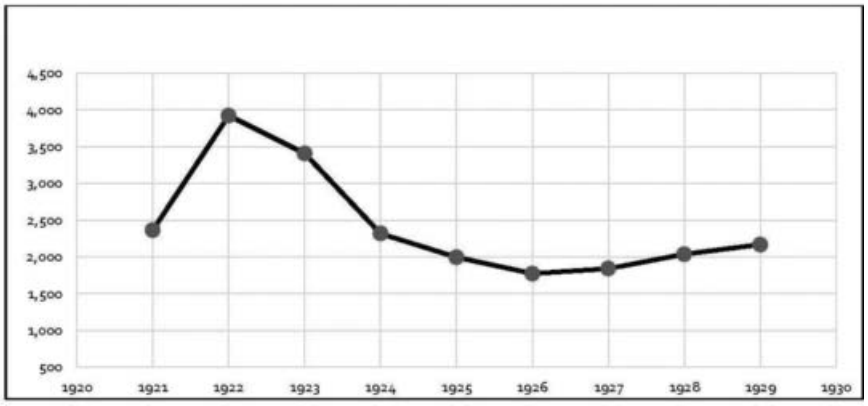
20 1921 was the first full year under the new bankruptcy regime since it came into effect on July 1, 1920. For bankruptcy statistics for the calendar year 1921, see *House of Commons Debates*, *supra* note 1, Vol 1 (8 March 1923) at 937-38. For bankruptcy statistics from 1922 to 1924, see Canada, Department of Trade and Commerce, Dominion Bureau of Statistics, *Commercial Failures in Canada December, 1925* (Ottawa: DTC, 1926) at 7. For 1925 to 1931, see Canada, Department of Trade and Commerce, Dominion Bureau of Statistics, *Commercial Failures in Canada for December 1931 with Totals for the Calendar Year 1931*, vol 8, no 12 (Ottawa: DTC, 1932) at 8.

21 For bankruptcy statistics for 1932 to 1941, see Canada, Department of Trade and Commerce, Dominion Bureau of Statistics, *Commercial Failures in Canada in the Calendar Year 1941 and in December 1941*, vol 18, no 12 (Ottawa: DTC, 1942) at 3.

22 *House of Commons Debates*, *supra* note 1, Vol 1 (26 February 1923) at 648 (William Irvine).

23 See *supra* note 20.

Figure 1: Total Number of Bankruptcies in Canada (1921-1929)[24]



Rising numbers of bankruptcies in the early 1920s occurred at a time when the provisions of the *Bankruptcy Act* were only just becoming known. The absence of a national bankruptcy law for nearly forty years meant that there was a lack of expertise among lawyers and trustees in bankruptcy. A *Canadian Law Times* book review acknowledged that "[f]ew in the Legal Profession of Canada [knew] anything of Bankruptcy Law in operation."[25] Lawyers "owing to the novelty of the Law, [were] just familiarizing themselves with it."[26]

The new legislation created interpretative challenges. The legal community understood that the *Bankruptcy Act* was not a self-contained code and that to discover the meaning of the statute one had to resort to case law.[27] But early commentary lamented that little case law had yet emerged.[28] The uncertainty ushered in by the new Act is best illustrated by a 1921 book review of an English[29]

---

24 *Ibid*.

25 Book Review of *A Short View of Bankruptcy Laws* by Edward Mason, (1920) 40:12 Can LT 1058 at 1058. See also Angus Lyell, "The Bankruptcy Act and its Defects" *Saturday Night* 33:10 (20 December 1919) 27 [Lyell, "Defects"].

26 Bram Thompson, Book Review of *The Law and Practice of Bankruptcy Law in Canada* by Lewis Duncan, (1922) 42:3 Can LT 215 at 215 [Thompson, Book Review].

27 Professor JT Hebert, "An Unsolicited Report on Legal Education in Canada" (1921) 41: 10 Can LT 593 at 615.

28 Book Review of *The Law and Practice in Bankruptcy*, 12th ed, by Right Hon Sir Roland L Vaughan-Williams & Edward William Hansell, (1921) 57:12 Can LJ (NS) 286 at 287 [Book Review of *The Law and Practice in Bankruptcy*].

29 The Canadian *Bankruptcy Act* of 1919 was based upon the English *Bankruptcy Act, 1914* ((UK), 4 & 5 Geo V, c 59), however, there were significant differences. Duncan, in his text, made no apologies for relying upon English case law (*Bankruptcy in Canada*, *supra* note 9 at viii).

bankruptcy text published in the *Canada Law Journal*. The reviewer suggested that the English book might offer some interpretative assistance: "We of this Dominion are now again paddling our little canoe in the troubled waters of insolvency, and will be glad of any assistance for our new venture as set forth in the Dominion Statutes of 1920, in the Act which came into force on July 1st of this year."[30] Lawyers practicing in the French language faced a further problem. In January 1922, Lewis Duncan reported in his bankruptcy text that "owing to prevailing prices, the publishers had not seen their way clear to print the French text of the Act and Rules."[31] Parliament added to the chaos by amending the Act three times by the end of 1922.[32] This caused Justice Greenshields of the Québec Court of Appeal to state that during the "short period of life of the Act"[33] Parliament had amended the Act such that "it is scarcely recognisable in its present form."[34] Greenshields J.A. urged that other amendments could be made "making clear what is evidently ambiguous."[35]

The rising number of bankruptcies and the uncertain state of the law left the legislation open to widespread criticism. Months after Parliament proclaimed the Act, the Toronto weekly, *Saturday Night*, published an article entitled "The Bankruptcy Act and its Defects."[36] The author described the Act as "cumbersome" and lamented its many "loopholes."[37] *Saturday Night* later published a follow up article entitled "Present Canadian Bankruptcy Act will not Do."[38] The article called for amendments to "clarify the obscurity which now hangs in a cloud" over the Act.[39] One author predicted "radical amendments" after one or two years of experience with the new Act.[40] The lack of government supervision of trustees in bankruptcy,

---

30 Book Review of *The Law and Practice in Bankruptcy*, *supra* note 28 at 286-87.

31 *Supra* note 9 at ix.

32 *The Bankruptcy Act Amendment Act, 1920*, SC 1920, c 34 [*Amendment Act, 1920*]; *The Bankruptcy Act Amendment Act, 1921*, SC 1921, c 17 [*Amendment Act, 1921*]; *The Bankruptcy Act Amendment Act, 1922*, SC 1922, c 8 [*Amendment Act, 1922*].

33 *John W Danforth Co. v The Riordon Co. Ltd.* (1922), [1923] 1 DLR 843 at 852, 34 BR 504 [Danforth KB], rev'd on other grounds *Riordon Company Limited v John W. Danforth Company*, [1923] SCR 319, [1923] 2 DLR 788 [*Danforth* SCC cited to SCR].

34 *Danforth* KB, *ibid*.

35 *Ibid*.

36 Lyell, "Defects", *supra* note 25. During this era *Saturday Night* represented the views of "upper middle-class English-speaking Torontonians" ("Index to *Saturday Night*, 1899-1945", *Libris Canadiana*, online: <http://www.libris.ca/cgi21/getsrc.exe?ejdhjgmlnu&00000&23330401&sc=satnite>, archived: <https://perma.cc/49UK-9HNG>.

37 Lyell, "Defects", *ibid* at 27.

38 Terence Sheard, "Present Canadian Bankruptcy Act Will Not Do", *Saturday Night* 40:9 (17 January 1925) 13.

39 *Ibid* at 18.

40 Lyell, "In Operation", *supra* note 18 at 26. See also the call for amendments in "The Bankruptcy Act" (1921) 57:2 Can LJ (NS) 41 at 44.

who were responsible for administering bankrupt estates, also provided a source of opposition to the new legislation.[41] One author suggested that bankrupt estates "were actually administered by persons who had been convicted of offences or who were bankrupt."[42]

In the 1920s, critics of the *Bankruptcy Act* also drew upon the nineteenth-century belief that debtors had a moral obligation to repay debts.[43] Saskatchewan businesses raised concerns about the ease with which insolvent debtors could "pass through the Bankruptcy Court and escape their obligations."[44] The Regina *Leader* reported complaints that, in Saskatchewan, debtors could declare bankruptcy every three months and then quickly resume business again after each bankruptcy filing. Too many debtors were getting back into bankruptcy "before they had spent sufficient time on the penitent bench."[45] Thus, the "whole moral fabric of business [was] being endangered" by debtor practices.[46] The Québec government complained that the *Bankruptcy Act* was too lenient and prevented farmers from obtaining credit in the province.[47] Conversely, the legislation was criticized for making it too hard for debtors to access relief. In "drought-stricken prairie areas," insolvent farmers had difficulty obtaining their discharge due to high fees and because the Act required them to keep proper books.[48] These beliefs cultivated popular feelings of mistrust in the new federal legislation.

Professor John Falconbridge published a powerful critique of the *Bankruptcy Act* in the *Canadian Bar Review* in 1926. The article, simply entitled "Why?",[49] posed seventeen detailed and largely technical interpretive questions that had emerged as Falconbridge prepared bankruptcy lectures for his Osgoode Hall class. Falconbridge called for a serious effort to improve the drafting of the Act.[50] Parliament

---

41 See generally Bram Thompson, "Canadian Bankruptcy Act: Monopoly of the Trusteeship and of the Law" (1921) 41:2 Can LT 96. The trustee problem will be considered in a future study: Thomas GW Telfer, "The New Bankruptcy 'Detective Agency'? The Origins of the Superintendent of Bankruptcy in Great Depression Canada" (Paper to be delivered at the Canadian Confederation: Past, Present, and Future Conference, Université de Montréal, 16-18 May 2017) [unpublished].

42 Lewis Duncan, "The Bankruptcy Amendment Act of 1932" (1932) 2:5 Fortnightly LJ 83 at 83.

43 "Creditors Given Absolute Control under Bankruptcy", *Financial Post* (1 June 1923) 13. See also "Repeated Bankruptcies" (1923) 3 CBR 721.

44 "Bankruptcy Should be Unprofitable", *Financial Post* (9 March 1923) 10.

45 *Ibid*, citing Regina *Leader* [undated].

46 *Ibid*.

47 Hector B McKinnon, "Bankruptcy Act Warmly Attacked", *The Globe* (18 July 1924) 3.

48 *Ibid*.

49 (1926) 4:10 Can Bar Rev 695.

50 *Ibid* at 695.

sought to remedy the numerous defects by passing six amending Acts between 1920 and 1927.[51] However, such legislation could not forestall the provincial rights movement and constitutional litigation that would eventually end up before the Privy Council in 1928.

III. THE BANKRUPTCY AND INSOLVENCY POWER IN THE NINETEENTH CENTURY

To provide context for the political and constitutional challenges to the *Bankruptcy Act* in the 1920s, it is necessary to briefly review nineteenth-century jurisprudence on the bankruptcy and insolvency power.[52] Two key nineteenth-century decisions of the Privy Council influenced the direction of case law in the 1920s. In 1880, the Privy Council provided a very clear answer to the question of the relationship between the federal bankruptcy power and provincial jurisdiction over property and civil rights. In *Cushing v. Dupuy*,[53] they concluded:

> It would be impossible to advance a step in [bankruptcy proceedings] without interfering with and modifying some of the ordinary rights of property, and other civil rights…It is therefore to be presumed, indeed it is a necessary implication, that the Imperial statute, in assigning to the Dominion Parliament the subjects of bankruptcy and insolvency, intended to confer on it legislative power to interfere with property, civil rights, and procedure within the Provinces, so far as a general law relating to those subjects might affect them.[54]

The Privy Council effectively recognized that "the federal power over bankruptcy and insolvency could not be effective if it did not authorize substantial modifications of the ordinary rights of property and contract."[55]

With the repeal of the federal *Insolvent Act* in 1880, questions arose about the constitutionality of the provincial assignments and preferences legislation in the absence of a federal bankruptcy

---

51 *Amendment Act, 1920*, *supra* note 32; *Amendment Act, 1921*, *supra* note 32; *Amendment Act, 1922*, *supra* note 32; *The Bankruptcy Act Amendment Act, 1923*, SC 1923, c 31 [*Amendment Act, 1923*]; *The Bankruptcy Act Amendment Act, 1925*, SC 1925, c 31; *Bankruptcy Act*, RSC 1927, c 11.

52 See also Telfer, *Ruin and Redemption*, *supra* note 7 at 94-95, 116-26.

53 (1880), 5 App Cas 409, 8 CRAC 355 (PC) [*Cushing* cited to App Cas].

54 *Ibid* at 415-16. In 1883, the Supreme Court of Canada followed the lead of *Cushing* and adopted the principle that Parliament had a broad right under its bankruptcy power to interfere with property and civil rights. See *Shields v Peak* (1883), 8 SCR 579.

55 Peter W Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 2007) (loose-leaf updated 2016, release 1) ch 25 at 3.

statute.[56] In 1894, the Privy Council upheld a provision of an Ontario Act[57] in the *Voluntary Assignments Case*.[58] The decision had two immediate impacts. First, it enabled the provincial era of debtor-creditor regulation to continue unscathed.[59] Second, the decision effectively stalled federal bankruptcy reform efforts. However, in the long term, the case also had significant constitutional consequences for the interpretation of the federal bankruptcy power.

Given that the Privy Council did not find the provincial provision *ultra vires*, one might argue that the *Voluntary Assignments Case* interpreted the bankruptcy power narrowly.[60] Further, one might align the outcome in the case with a broader trend in federalism jurisprudence at the end of the nineteenth century that saw the Privy Council, under Lord Watson, limit the powers of Parliament.[61] However, a portion of the judgment supported a broad reading of the bankruptcy power.

In 1894, leading constitutional scholar A.H.F. Lefroy[62] concluded that the *Voluntary Assignments Case* "possesses much constitutional interest by reason of the *dicta* in the concluding portions" of the decision.[63] In the second-last paragraph of the judgment, the Lord

---

56 Telfer, *Ruin and Redemption*, *supra* note 7 at 116-26.

57 *An Act respecting Assignments and Preferences by Insolvent persons*, RSO 1887, c 124, s 9.

58 *Attorney-General of Ontario v Attorney-General for the Dominion of Canada*, [1894] AC 189, 11 CRAC 13 (PC) [*Voluntary Assignments Case* cited to AC].

59 Telfer, *Ruin and Redemption*, *supra* note 7 at 121-26.

60 Albert Bohémier, *Faillite et Insolvabilité*, vol 1 (Montreal: Éditions Thémis, 1992) at 24, cited in Albert Bohémier, "Bankruptcy and Insolvency" (7 January 2015) (Study delivered to the Civil Law Section of the Department of Justice of Canada), n 8 and accompanying text [Bohémier, "Bankruptcy and Insolvency"], online: Canada, Department of Justice <http://www.justice.gc.ca/eng/rp-pr/csj-sjc/harmonization/bohemier/bankr-failli.html>, archived: <https://perma.cc/2K6M-CKL2>. See also W Ivor Jennings, "Constitutional Interpretation: The Experience of Canada" (1937) 51:1 Harv L Rev 1 at 13. John T. Saywell's analysis of Lord Watson's interjections during arguments demonstrates that the Board favoured allowing the provinces to act while the Dominion did not exercise its bankruptcy power. See *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism* (Toronto: University of Toronto Press for The Osgoode Society for Canadian Legal History, 2002) at 130-32.

61 JR Mallory, *Social Credit and the Federal Power in Canada* (Toronto: University of Toronto Press, 1954) at 29. See also Hogg & Wright, *supra* note 11 at 339; Saywell, *ibid* at 114-16.

62 See RCB Risk, "AHF Lefroy: Common Law Thought in Late-Nineteenth-Century Canada: On Burying One's Grandfather" in G Blaine Baker & Jim Phillips, eds, *A History of Canadian Legal Thought: Collected Essays* (Toronto: University of Toronto Press for The Osgoode Society for Canadian Legal History, 2006) 66.

63 "The Privy Council on Bankruptcy" (1894) 30:6 Can LJ (NS) 182 at 186 [Lefroy, "The Privy Council"]. Lord Herschell's statement has also been characterized as *obiter* by a modern authority (Pierre Carignan, "La Competence Legislative en Matiere de Faillite et d'Insolvabilite" (1979) 57:1 Can Bar Rev 47 at 61).

Chancellor,[64] Lord Herschell,[65] took the opportunity to restate the breadth of the federal bankruptcy power:

> [A] system of bankruptcy legislation may frequently require various ancillary provisions for the purpose of preventing the scheme of the Act from being defeated. It may be necessary for this purpose to deal with the effect of executions and other matters which would otherwise be within the legislative competence of the provincial legislature. Their Lordships do not doubt that it would be open to the Dominion Parliament to deal with such matters as part of a bankruptcy law, and the provincial legislature would doubtless be then precluded from interfering with this legislation inasmuch as such interference would affect the bankruptcy law of the Dominion Parliament.[66]

Lefroy reasoned that this Privy Council statement was one of "the first instances of the Dominion Parliament 'scoring' before the Privy Council."[67] Confident of the importance of this *dictum*, Lefroy concluded that in considering how much provincial jurisdiction might be "incidentally invaded"[68] by Parliament: "[T]heir lordships seem to have left it, in its relation to the provincial legislatures, almost in as happy a position as a man occupied towards his wife in the good old days, when he could say, 'What is yours is mine, but what is mine's my own.'"[69]

Lord Herschell's statements on the scope of Dominion power in 1894 did not have an immediate impact since there was no federal bankruptcy statute at that time. But his *dictum* and the finding in *Cushing* were locked away in the books, ready to be used whenever

---

64 See RFV Heuston, *The Lives of the Lord Chancellors, 1885-1940* (Oxford: Clarendon Press, 1964) at 102.

65 Perhaps it is not surprising that Lord Herschell took the opportunity to emphasize the federal bankruptcy power. Before becoming Lord Chancellor, Farrer Herschell served as Solicitor General at the time England enacted comprehensive bankruptcy legislation in 1883 (*The Bankruptcy Act, 1883*, (UK) 46 & 47 Vict, c 52), with many crediting his leading role in obtaining the passage of the Bill. See The Right Hon Lord James of Hereford, "The Late Lord Herschell, In Memoriam" (1899) 1:2 J Society Comparative Legislation 201 at 202. See also Patrick Polden, "Farrer Herschell" in HCG Matthew & Brian Harrison, eds, *Oxford Dictionary of National Biography* (Oxford: Oxford University Press, 2004); EM, "Builders of Our Law: Lord Herschell" (1902) 2:2 Can L Rev 88 at 90. For a summary of a realist vision of statutory interpretation see Randal Graham, "What Judges Want: Judicial Self-interest and Statutory Interpretation" (2009) 30:1 Stat L Rev 38 at 41-51.

66 *Voluntary Assignments Case*, *supra* note 58 at 200-201.

67 "The Privy Council", *supra* note 63 at 193.

68 *Ibid*.

69 *Ibid*.

federal bankruptcy law was revived.[70] After Parliament enacted a new bankruptcy law in 1919, Lord Herschell's *dictum* ultimately became entrenched as part of Canadian law.

IV. THE BANKRUPTCY POWER AT THE OUTSET OF THE 1920S

Defenders of a broad federal bankruptcy power at the beginning of the 1920s relied upon nineteenth-century constitutional case law to address any concerns about the validity of the federal law and the possibility of encroaching upon provincial property and civil rights jurisdiction.[71] The drafter of the *Bankruptcy Act*, H.P. Grundy,[72] published a "Synopsis of the Canadian Bankruptcy Act"[73] in 1920. To answer the question of the constitutionality of the new Act, Grundy quoted from *Cushing* and the *Voluntary Assignments Case* and stated:

> It would accordingly appear that in case any conflict should arise between the Dominion Act and any provincial Act on the subject of bankruptcy and insolvency or matters ancillary thereto, even if such ancillary matters would ordinarily be within the powers of the provincial legislation, the provisions of the Dominion Act would prevail.[74]

J.A.C. Cameron, a Master in Chambers of the Supreme Court of Ontario,[75] published the first Canadian bankruptcy text in 1920.[76] Citing *Cushing* and the *Voluntary Assignments Case*, Cameron concluded that the *Bankruptcy Act* directly interfered with provincial jurisdiction over property and civil rights. He asked, "has the Dominion Parliament jurisdiction to enact the present legislation? It is submitted that it has."[77] Certain provisions of the *Bankruptcy Act* directly related to civil procedure and "would repeal by implication any conflicting provincial statutes."[78] Specifically referring to Lord Herschell's *dictum* in the *Voluntary Assignments Case* (although by 1920 the passage was

---

70 See WHP Clement, *The Law of the Canadian Constitution*, 3rd ed (Toronto: Carswell, 1916) at 804-809. See also AHF Lefroy, *Canada's Federal System: Being a Treatise on Canadian Constitutional Law under the British North America Act* (Toronto: Carswell, 1913) at 288, 293-94.

71 Justice Fisher, "The Bankruptcy Law of Canada", *The Monetary Times* 73:3 (18 July 1924) 18.

72 For Grundy's role in the drafting of the Act, see Telfer, *Ruin and Redemption*, *supra* note 7 at 146.

73 (1920-21) 1 CBR 325.

74 *Ibid* at 327.

75 "Law of Bankruptcy in Canada" (1920) 31:6 Trust Companies 627 at 627.

76 *The Law of Bankruptcy in Canada* (Toronto: Canada Law Book, 1920).

77 *Ibid* at 3.

78 *Ibid* at 7.

embraced as a general principle and it was no longer referred to as a *dictum*), Cameron reasoned that if provincial legislation had an effect of interfering with the *Bankruptcy Act* then such provincial legislation would be *ultra vires*.[79]

In 1922, Lewis Duncan, a Toronto lawyer,[80] published *The Law and Practice of Bankruptcy in Canada*.[81] He also cited *Cushing* and the *Voluntary Assignments Case* to support a broad federal bankruptcy power. To Duncan, the *Voluntary Assignments Case* was of "considerable importance"[82] since it enabled Parliament to "pass complete and fully rounded legislation."[83] Duncan opined that "Dominion provisions which are truly ancillary or…necessarily incidental to a general bankruptcy or insolvency law may effect a virtual repeal of provincial legislation. There can be no direct repeal, but if the two are in conflict the Dominion enactment must prevail."[84]

It was inevitable that defense of the federal power also involved direct attacks on provincial law and provincial jurisdiction since there were many provincial statutes that might infringe upon the newly exercised federal bankruptcy power. Proponents argued that federal law would do away with "cumbersome and unsatisfactory" provincial law that involved "tedious delays and heavy expenses."[85] However, criticisms of provincial law went beyond claims of inefficiency. On July 5, 1919, a *Financial Post* headline read, "Bankruptcy Act will Help Business World: New Measure Wipes out Variety of Provincial Laws."[86] In 1921, *The Monetary Times* stated that "there is no doubt that the Dominion statute rides across provincial enactments here and there."[87] *The Globe* proclaimed that the *Bankruptcy Act* would "abrogate and annul existing Provincial laws."[88]

---

79 *Ibid* at 8.

80 Duncan later challenged Lord Haldane's view of Confederation in constitutional arguments before the Privy Council. See Saywell, *supra* note 60 at 163-64, 168, 179.

81 *Supra* note 9. Unlike Cameron's work, Duncan's was a substantial text of more than 700 pages. See Thompson, Book Review, *supra* note 24. The reviewer claimed that the need for such a "reliable work" had become "urgent" (*ibid* at 215).

82 *Bankruptcy in Canada*, *supra* note 9 at 24.

83 *Ibid*.

84 *Ibid*. *Cushing*'s reliability as a statement of the broad bankruptcy power was not accepted by all (see Pouliot, "La Loi de Faillite" I, *supra* note 12 at 114).

85 "Canada's Act", *supra* note 3.

86 *Supra* note 3.

87 "Bankruptcy Act still in Process", *The Monetary Times* 66:5 (4 February 1921) 8 at 8 ["Still in Process"].

88 "New Bankruptcy Bill would Give Uniformity: Provide Against Preferences Between Creditors and Give Advantage to Honest Man: Difficulties in the Way", *The Globe* (3 April 1919) 12. While these business articles took the position that federal law overrode provincial law there was no express reference to the paramountcy doctrine. At best these articles sought to express the idea that federal law was

V. THE PROVINCIAL RESPONSE TO THE *BANKRUPTCY ACT*

The attack on provincial law did not go unnoticed. In 1921, *The Monetary Times* reported that some of the provincial governments had complained that the *Bankruptcy Act* "overrides a good deal of provincial legislation."[89] In that same year, the *Canada Law Journal* published an article calling for the amendment of the *Bankruptcy Act* to make it clear that the administration of voluntary assignments and receiving orders were "to be governed by the general laws of the Province affecting the transfer of property."[90]

Two provinces forged ahead with their own means of debtor relief legislation. In response to the economic devastation in the West, Alberta and Saskatchewan passed debt adjustment legislation[91] designed to "relieve the distress of resident farmers."[92] The legislation protected farmers from "execution and foreclosure" and gave administrative boards the "power to prevent a creditor from using oppressively the machinery provided by law to enable a creditor to assert his rights against his debtor."[93] Although the Alberta *Debt Adjustment Act*[94] was ultimately ruled *ultra vires* by the Privy Council in 1943,[95] the debt adjustment legislation of the 1920s marked an aggressive move by two Prairie provinces that must have considered the *Bankruptcy Act* "insufficient or poorly suited to their regional needs."[96]

Politicians in the Québec National Assembly and some Québec Liberal MPs launched political attacks against the *Bankruptcy Act*. In challenging the new federal statute, politicians also raised constitutional arguments against the federal bankruptcy power, which they claimed

---

paramount in more popular language. On paramountcy, see Wood, "Paramountcy Principle", *supra* note 10.

89 "Still in Process", *supra* note 87 at 8.

90 "The Bankruptcy Act", *supra* note 40 at 43.

91 *The Drought Area Relief Act*, SA 1922, c 43; *The Debt Adjustment Act*, SA 1923, c 43; *The Debt Adjustment Act, 1929*, SS 1928-29, c 53. For an overview of the operation of this legislation, see Roderick J Wood, "Enforcement Remedies of Creditors" (1996) 34:4 Alta L Rev 783 at 785-86; S David Cohen, "Law, Order and Democracy: An Analysis of the Judiciary in a Progressive State: The Saskatchewan Experience" (1992) 56:1 Sask L Rev 23 at 31. Debt adjustment legislation is also covered by Ronald C.C. Cuming in his comprehensive article, "Protection of Consumer-Borrowers: Limitations on the Remedies of Consumer-Lenders" ((1968) 33:2 Sask L Rev 58 at 83-84).

92 *Reference re Debt Adjustment Act, 1937 (Alberta)*, [1943] 2 DLR 1 at 3, 24 CBR 129 (PC) [*Debt Adjustment Reference*].

93 *Mutual Life Assurance Co. v Levitt*, [1939] 2 DLR 324 at 329, [1939] 1 WWR 530 (Alta SC (AD)).

94 *Supra* note 91.

95 *Debt Adjustment Reference*, *supra* note 92 at 14.

96 Bohémier, "Bankruptcy and Insolvency", *supra* note 60 at Part I-A.

interfered with provincial jurisdiction. These constitutional arguments, perhaps strategically raised in the political arena, eventually found their way into lower court constitutional judgments in Québec. In December 1922, the National Assembly of Québec adopted a resolution inviting the federal government to revoke the *Bankruptcy Act*. According to the resolution, the Act invited dishonesty and fraud, and ruined credit.[97] Members of the National Assembly were also concerned about the intrusiveness of the federal law and sought to defend Québec civil law. Louis Létourneau claimed that the federal bankruptcy law "makes litter of the spirit and letter of our codes."[98] The forty-year experience of provincial jurisprudence under the *Civil Code of Lower Canada*[99] "was set to zero and replaced by federal legislation."[100] Québec law relating to the transfer of property "was abolished and became a dead letter."[101] Létourneau claimed that the *Bankruptcy Act* "violated the constitution of the country since it trampled underfoot the rights and prerogatives of the legislatures in matters of civil law."[102] Québec's Liberal Premier, Louis-Alexandre Taschereau[103] opened his speech with a direct attack on the federal bankruptcy law, claiming it was "an *ultra vires* act."[104] He announced that he would convene a committee of Québec jurists to study the *Bankruptcy Act*. If the committee concluded that the bankruptcy legislation was unconstitutional, the government of Québec would challenge the legislation at the Supreme Court of Canada and the Privy Council. Taschereau promised to do everything possible to have the *Bankruptcy Act* set aside "and have the province return to the provisions of the Civil Code in regard bankruptcy, and, once again, be master at home."[105]

---

97 Québec, *Debates of the National Assembly*, 15th Leg, 4th Sess, Vol 57 (5 December 1922) (M Létourneau); *ibid*, (18 December 1922).

98 *Ibid*, (5 December 1922) (M Létourneau) [translated by author]. Original French: "la loi de faillite fait litière de l'esprit et de la lettre de nos Codes."

99 CCLC [*Civil Code*].

100 *Debates of the National Assembly*, *supra* note 97, (5 December 1922) (M Létourneau) [translated by author]. Original French: "notre Code civil, était mise à néant et était remplacée par une législation fédérale."

101 *Ibid*, (5 December 1922) (M Létourneau) [translated by author]. Original French: "toute notre loi de cession de biens était supprimée et devenait lettre morte."

102 "Quebec Opposed to Bankruptcy Law", *The Monetary Times* 70:5 (2 February 1923) 12 at 12.

103 For Taschereau's provincial rights perspective, see Bernard L Vigo, *Quebec before Duplessis: The Political Career of Louis-Alexandre Taschereau* (Montreal: McGill-Queen's University Press, 1986) at 144-45. For Taschereau's opposition to the *Bankruptcy Act*, see *ibid* at 110.

104 *Debates of the National Assembly*, *supra* note 97, (18 December 1922) (M Taschereau) [translated by author]. Original French: "C'est une loi *ultra vires*."

105 "Quebec Opposed to Bankruptcy Law", *supra* note 102 at 12.

Provincial rights arguments also surfaced in the House of Commons in 1923.[106] A number of Québec Liberal MPs opposed the *Bankruptcy Act*.[107] On March 26, 1923, Québec Liberal MP Pierre-François Casgrain moved that the *Bankruptcy Act* should be amended or repealed.[108] While Casgrain criticized the law for being too easy on debtors and doing little to regulate trustees, he also took the position that the *Bankruptcy Act* "encroaches on our provincial law, on our civil code and procedure."[109] The federal Act had been the source of trouble in Québec, with Casgrain claiming that "we have been forced to spend large sums to ensure the maintenance of our rights" under provincial law.[110] Casgrain proposed that if the federal statute was not repealed then the *Bankruptcy Act* should not apply in Québec. In this way, the rights of Québec would be protected, and the *Civil Code* and *Code of Civil Procedure*[111] could be "maintained in integrity."[112] A fellow Liberal MP from Québec, Jean-Joseph Denis, urged the House not to force the federal legislation on Québec, which "does not desire to accept" the law.[113]

Legislators questioned the need for federal bankruptcy legislation given that provincial debtor-creditor legislation had worked for forty years. Joseph Archambault, a Québec Liberal MP, reminded the House that Québec civil law had adequately dealt with debtors but had now been practically "abolished by the federal *Bankruptcy Act*."[114] Archambault advocated for a return to provincial law, as there was "no necessity for uniformity in a bankruptcy law."[115] In his concluding

---

106 This was not a new topic, as Parliament had debated the constitutionality of the bills that led to the *Bankruptcy Act* in 1918 and 1919 (Telfer, *Ruin and Redemption*, *supra* note 7 at 150-55).

107 Some of these Québec MPs had been Laurier Liberals in the divisive federal election of 1917. Laurier had opposed joining the wartime Union coalition as he did not accept conscription (Robert Craig Brown & Ramsay Cook, *Canada 1896-1921: A Nation Transformed* (Toronto: McClelland & Stewart, 1974) at 269; J Murray Beck, *Pendulum of Power: Canada's Federal Elections* (Scarborough: Prentice-Hall Canada, 1968) at 136-46). MPs Casgrain, Denis and Archambault, who are quoted in the text below, are all listed as Laurier Liberals in 1917 by the Library of Parliament (Library of Parliament, "PARLINFO", online: <http://www.lop.parl.gc.ca/parlinfo/>, archived: <https://perma.cc/XWQ6-HMW3>).

108 *House of Commons Debates*, *supra* note 1, Vol 2 (26 March 1923) at 1490 (Pierre-François Casgrain). See "Bankruptcy Act Maybe Amended", *The Globe and Mail* (27 March 1923) 9.

109 *House of Commons Debates*, *ibid*, Vol 2 (26 March 1923) at 1496 (Pierre-François Casgrain).

110 *Ibid*, Vol 2 (26 March 1923) at 1499 (Pierre-François Casgrain).

111 CCP.

112 *House of Commons Debates*, *supra* note 1, Vol 2 (26 March 1923) at 1500 (Pierre-François Casgrain).

113 *Ibid*, Vol 2 (26 March 1923) at 1522 (Jean-Joseph Denis).

114 *Ibid*, Vol 2 (26 March 1923) at 1504 (Joseph Archambault).

115 *Ibid*.

remarks, Archambault strongly defended provincial jurisdiction: "I do submit that when the law of bankruptcy is so closely related to civil rights, the Dominion parliament should be very chary about legislating in this area."[116] Paul Mercier, another Liberal MP from Québec, supported the retention of provincial law. Provincial law "had been enacted according to provincial necessities and customs."[117] In contrast, Parliament had constructed a bankruptcy law "for the whole Dominion, without consulting the provincial attorneys-general and the legislatures."[118] There was a fear in Québec that the bankruptcy legislation was part of a larger trend to centralize law at the expense of provincial jurisdiction: "The tendency to centralize and unify legislation is becoming more and more visible…and there seems to be an admitted attempt to encroach on provincial rights and attack our civil laws."[119]

In Québec, there was also a belief that Parliament was seeking to impose English law on the province. In 1923, *The Monetary Times* published an editorial that stated the following: "Quite probably Quebec would also be better satisfied were it not for the fact that an attempt has been made to represent that the bankruptcy legislation is an effort to impose English law, and that this may be but the first effort for much other legislation of a like nature."[120]

Denis gave voice to this idea in the House of Commons in 1923 during the repeal debate. He pointed out that the *Bankruptcy Act* had been transplanted from England and stated that he opposed "the importation of laws from England."[121] The Act was a "replica of an English law, passed some forty years ago. We have had too much copying of English laws in this country."[122] Denis argued that conditions in Europe were much different than the situation in Canada. He objected to the bankruptcy law because it was "not suited to the people of Canada."[123] In particular, the *Bankruptcy Act* was "not suited to the requirements" of the Québec people.[124] Casgrain, who had moved the motion for repeal, concluded the debate by noting

116 *Ibid*, Vol 2 (26 March 1923) at 1506 (Joseph Archambault).
117 *Ibid*.
118 *Ibid*, Vol 2 (26 March 1923) at 1508 (Paul Mercier).
119 Mr. Galipeault, Quebec Minister of Public Works, Remarks at the Opening of City of Quebec Courts, September 1922, quoted in *ibid*, Vol 2 (26 March 1923) at 1499 (Pierre-François Casgrain).
120 "Important Changes in Bankruptcy Now", *The Monetary Times* 70:22 (1 June 1923) 5 at 5.
121 *House of Commons Debates*, *supra* note 1, Vol 2 (26 March 1923) at 1520 (Jean-Joseph Denis).
122 *Ibid*.
123 *Ibid*.
124 *Ibid*.

that Québec "is afraid of any invasion of English law under the new system."[125] Casgrain ultimately withdrew his repeal motion.[126]

The concerns raised by Québec politicians were consistent with "traditional legal thought in Quebec."[127] Sylvio Normand's study of *Revue du Droit* articles published during the 1920s demonstrates that there was "a dominant theme" of protecting "the integrity of civil law."[128] Québec authors opposed the unification of Canadian law, appeals to the Privy Council, and the spread of federal statutes.[129] Bankruptcy law allowed the *Civil Code* to be infiltrated by "foreign law" through the use of jurisprudence from other provinces.[130] The *Bankruptcy Act* could "not cause a creditor to lose any rights or privileges" acquired under provincial law.[131] More importantly, the new bankruptcy regime permitted bankrupts to obtain a discharge from their debts. Before 1919, this remedy was not available under provincial law. The *Bankruptcy Act*, therefore, interfered with Québec civil law by introducing a new means of debt relief.[132] The only solution was repeal.[133]

In the House of Commons, federalists responded to the Québec position.[134] S.W. Jacobs, also a Québec Liberal MP,[135] challenged the Québec perspective on the Constitution offered by his colleagues in the House: "It is wrong for our people in…Quebec to say that the act which the Parliament of Canada has a right to impose on the whole of the Dominion of Canada, is an attempt to take from the people of the province of Quebec their civil rights and their civil law."[136] Jacobs argued that it was not for the House of Commons to "sit in judgment

---

125 *Ibid*, Vol 2 (26 March 1923) at 1528 (Pierre-François Casgrain).
126 *Ibid*.
127 Normand, *supra* note 12 at 559.
128 *Ibid* at 568.
129 *Ibid* at 578, 581.
130 *Ibid*.
131 Pouliot, "La Loi de Faillite" I, *supra* note 12 at 114.
132 Normand, *supra* note 12 at 588. See also "Ouverture des tribunaux" (1923) 2:2 R du D 91; Léo Pelland, "L'Injustice dans les affaires" (1926) 4:9 R du D 513 at 524-25; Catherine Valcke, "Quebec Civil Law and Canadian Federalism" (1996) 21:1 Yale J Intl L 67 at 94.
133 W Deschênes, "La loi Canadienne des faillites" (1924) 26:11 R du N 321 at 335.
134 *House of Commons Debates*, *supra* note 1, Vol 2 (26 March 1923) at 1501 (Hugh Guthrie).
135 Jacobs had staunchly defended the original bankruptcy bill in 1918. See Canada, *Report of the Study Committee on Bankruptcy and Insolvency Law* (Ottawa: Queen's Printer, 1970) at 16. See also SW Jacobs, "A Canadian Bankruptcy Act: Is it a Necessity" (1917) 37:8 Can LT 604. Jacobs was an expert in civil procedure. See e.g. SW Jacobs & Léon Garneau, *Code of Civil Procedure of the Province of Quebec* (Montreal: Carswell, 1903).
136 *House of Commons Debates*, *supra* note 1, Vol 2 (26 March 1923) at 1515-16 (Samuel William Jacobs).

and declare whether it was unconstitutional."[137] Rather, Jacobs argued, that was the role of the courts.[138] He maintained that "all these questions—that is the rights of the parliament of Canada as against the provincial legislature to legislate in matters of bankruptcy—will in due course come before the judicial committee of the Privy Council."[139]

Jacobs was correct in his prediction, with the Privy Council finally ruling in 1928 in favour of a broad bankruptcy power. However, before 1928, several lower court decisions challenged the federal intrusion into provincial matters. Some of the constitutional arguments found in the debates of the Québec National Assembly and in Parliament eventually found their way into Québec lower court judgments.

VI. THE BANKRUPTCY POWER INTERPRETED: CONSTITUTIONAL LITIGATION DURING THE 1920S

The question of whether to repeal the *Bankruptcy Act* soon gave way to constitutional litigation over the scope of the federal bankruptcy power. Perhaps this is not surprising. J.R. Mallory argued that new legislation inevitably produces litigation which seeks "to exploit the federal division of legislative powers in the constitution" as a way of "minimizing the change" created by the statute.[140] The change in this context involved the end of a near forty-year period of provincial regulation of debtor-creditor matters without federal interference. After the long provincial era, the *Bankruptcy Act* marked "a very radical change."[141] Those who hoped for an eventual Privy Council ruling in favour of the Dominion in the 1920s had to contend with the possibility that Lord Haldane, who served on the Privy Council until 1928, would hear an appeal on the scope of the bankruptcy power. Lord Haldane had played a dominant role in reshaping Canadian constitutional law. In his judgments he "subordinat[ed]...federal power to provincial power, whenever the language of the 1867 Act allowed."[142] From Québec, there was an attempt to use Lord

---

137 *Ibid*, Vol 2 (26 March 1923) at 1517 (Samuel William Jacobs).

138 *Ibid*.

139 *Ibid*, Vol 2 (26 March 1923) at 1519 (Samuel William Jacobs).

140 Mallory, *supra* note 61 at 37.

141 FGT Lucas, "The New 'Bankruptcy Act'" (1920) 40:8 Can LT 668 at 668. See also "Bankruptcy", Editorial Comment, (1920) 40:7 Can LT 546.

142 David Schneiderman, "Harold Laski, Viscount Haldane, and the Law of the Canadian Constitution in the Early Twentieth Century" (1998) 48:4 UTLJ 521 at 554. See e.g. Mallory, *supra* note 61 at 47-49; Frederick Vaughan, *Viscount Haldane: The Wicked Step-father of the Canadian Constitution* (Toronto: University of Toronto Press for The Osgoode Society for Canadian Legal History, 2010) at 182-83; Saywell, *supra* note 60 at 175-82.

Haldane's federalism jurisprudence to challenge the Privy Council's nineteenth-century characterization of a broad bankruptcy power. One Québec lawyer suggested that Privy Council jurisprudence had evolved since the 1880 decision of *Cushing*.[143] Relying upon a 1925 Lord Haldane judgment,[144] the lawyer claimed that "the power of the provincial legislatures to regulate civil and property rights cannot easily be impeded."[145] As the decade drew to a close, R.C.B. Risk notes that "the Dominion's powers seemed to many Canadians to be a pale image of what had been contemplated at Confederation."[146] Would the bankruptcy power suffer the same fate? Some early decisions on the bankruptcy power did not favour the Dominion. The Québec Superior Court found a provision of the *Bankruptcy Act* to be *ultra vires* and several other decisions cast doubt on the federal ability to interfere with property and civil rights.

A. EARLY CONSTITUTIONAL JURISPRUDENCE

Although nineteenth-century jurisprudence favoured an extensive bankruptcy power, there was little consensus in early court rulings on the relationship between the *Bankruptcy Act* and provincial jurisdiction over property and civil rights. Some cases emphasized the priority of federal law.[147] Thus, Justice Fisher of the Ontario Supreme Court characterized the 1880 decision of *Cushing* to mean "that the Parliament of Canada had the right to pass legislation pertaining to the subject of bankruptcy and insolvency and in doing so had the right to override provincial legislation."[148] However, not all courts initially accepted this premise, with many decisions of the 1920s adopting a perspective that focused on preserving provincial law.[149]

---

143 Pouliot, "La Loi de Faillite" I, *supra* note 12 at 114.

144 *Toronto Electric Commissioners v Snider*, [1925] 2 DLR 5, [1925] 1 WWR 785. For discussion, see Saywell, *supra* note 60 at 179-82.

145 Pouliot, "La Loi de Faillite" II, *supra* note 12 at 145.

146 "The Scholars and the Constitution: POGG and the Privy Council" in Baker & Phillips, *supra* note 62, 233 at 237.

147 *Royal Bank of Canada v Kuproski*, [1925] 4 DLR 334, [1925] 3 WWR 417 (Alta SC (AD)) (the *Bankruptcy Act* was intended to "deal completely with the winding-up of the debtor's estate" at 340-41), aff'd on other grounds in *Kuproski v Royal Bank of Canada* [1926] SCR 532, [1926] 3 DLR 801; *Hamilton v Vipond* (1921), 61 DLR 466 at 467, 1 CBR 483 (Ont SC) (an assignment for the benefit of creditors under provincial law was void under the *Bankruptcy Act*).

148 *Re Electrical Fittings*, [1926] 1 DLR 752 at 756, 7 CBR 265 (Ont SC) [*Re Electrical Fittings*].

149 See e.g. *In re Churchill*, [1919] 2 WWR 541 (Man KB) (provincial *Assignments Act* did not "trench on Dominion rights" and was not "in any sense a bankruptcy law" at 543). See also *Re St. Thomas Cabinets, Ltd.* (1921), 61 DLR 487, 1 CBR 521 (Ont SC) (nothing in the Ontario *Bulk Sales Act* which brings it within "the field of bankruptcy legislation" at 490).

Whether the *Bankruptcy Act* overrode[150] provincial legislation was the essential issue before the Québec Court of Appeal—then known as the Court of King's Bench—in *Hart v. Goldfine Ltd., Re Rosenzweig*[151] in 1921. Under provisions of the Québec *Civil Code*, an unpaid seller was entitled to the right of rescission against an insolvent trader.[152] In this case, the seller sold goods for an immediate cash payment of half of the selling price with the balance due within thirty days. On the day of the delivery the buyer became bankrupt, leading the unpaid seller to assert a right of rescission under the *Civil Code*. The trustee refused to recognize the seller's right of rescission and retained the goods for the benefit of the estate. The conflicting positions of the trustee and the seller forced the Court to consider whether the bankruptcy of the buyer affected the right of the unpaid seller under provincial law. Chief Justice Lamothe asked the question this way: "Has the new bankruptcy law made away with the privileged right conferred to the seller by art. 1543"?[153] He answered the question by proclaiming that "[t]here is no text of the Bankruptcy Act…which says so."[154] The trustee argued that the *Bankruptcy Act* "abolished by implication"[155] the unpaid seller's right of rescission. Lamothe C.J. concluded that "[a]brogation by implication, in civilized countries, is not easily admitted."[156] Abrogation of rights arising under provincial law was "not to be presumed."[157] In a concurring opinion, Justice Tellier offered a similar sentiment: "The Bankruptcy Act…has effected no change in our former laws concerning sale. The privileged rights of the unpaid seller are still the same, they have not been affected."[158] The Court of Appeal concluded that the unpaid seller's right of rescission survived the bankruptcy.[159]

---

150 Fisher J. in *Re Electrical Fittings* used the language of overriding provincial law (*supra* note 148 at 756). This tracks the language found in the popular press. However, in an earlier passage in the case Fisher J. refers to federal law being paramount. Citing *Tennant v. Union Bank of Canada* ([1894] AC 31 (PC)), he reasoned that "legislation of the Dominion Parliament, so long as it strictly relates to the subjects enumerated in sect. 91, is of paramount authority even though it trenches upon the matters assigned to the provincial Legislature by sect. 92" (*Re Electrical Fittings*, *ibid* at 756).

151 (1921), 70 DLR 174, 2 CBR 255 (Qc KB) [*Re Rosenzweig*].

152 In order to exercise this remedy, art. 1543 provided that the goods had still to be in the possession of the trader and that the remedy had to be exercised within thirty days of delivery (*Re Rosenzweig*, *ibid* at 174).

153 *Ibid*.

154 *Ibid*.

155 *Ibid*.

156 *Ibid*.

157 *Ibid* at 175.

158 *Ibid* at 178.

159 For a similar result, see *Re Prima Skirt Co., Ltd.; Thompson's Claim* (1921), 61 DLR 133, 1 CBR 438 (Qc Sup Ct).

In 1923, the Québec Superior Court ruled that a provision of the *Bankruptcy Act* was *ultra vires*. In *In Re Stober*,[160] the terms of a commercial lease provided that in the event of the insolvency of the lessee, the lease became null and void. It was a further term of the agreement that the lease could not be assigned without the consent of the landlord. On the bankruptcy of the tenant, the landlord provided the trustee with notice claiming that the lease was null and void. The trustee relied on s. 52 of the *Bankruptcy Act* to retain the leased premises for the remainder of the unexpired term. Specifically, the trustee relied upon s. 52(5) which gave the trustee rights "notwithstanding the legal effect of any provision or stipulation in any lease." According to the trustee, this subsection allowed him to ignore the terms of the lease and obtain possession of the premises for the purposes of an assignment of the lease to a third party.

The landlord argued that s. 52 of the *Bankruptcy Act* interfered with "contractual rights" and allowed "the annulment of private contracts." Thus, s. 52 "legislate[d] on matters affecting civil rights and property…which [were] constitutionally within the sole jurisdiction of the province."[161] The landlord took the position that s. 52(5) of the *Bankruptcy Act* was "illegal and unconstitutional and…*ultra vires* of the powers of the Federal Parliament."[162] Therefore, under Québec civil law the lease was valid and the decision of the trustee was "illegal and void."[163]

Without citing any authority, the Court admitted that the Privy Council had established that Parliament may pass legislation which encroaches upon provincial jurisdiction "if such legislation is ancillary" to the federal power. In these circumstances the federal legislation "must prevail."[164] However, the Court concluded that s. 52(5) was "not legislation ancillary nor necessary to the proper and efficacious working of *The Bankruptcy Act*."[165] The object of bankruptcy legislation was the distribution of property and the discharge of the debtor. Here, the provision allowed the trustee to expropriate the landlord's right so as to increase the assets of the bankrupt at the landlord's expense.[166] The provision was "outside of the bankruptcy domain."[167] The Court ruled that s. 52(5) of the *Bankruptcy Act* was "unconstitutional, *ultra vires* of the powers of the Federal Parliament [and] null."[168] Shortly after *Stober*, Parliament

160 (1923), 4 CBR 34 (Qc Sup Ct) [*Stober*].
161 *Ibid* at 36.
162 *Ibid*.
163 *Ibid*.
164 *Ibid* at 39.
165 *Ibid*.
166 *Ibid* at 40.
167 *Ibid*.
168 *Ibid*. See Pouliot, "La Loi de Faillite" I, *supra* note 12 at 113.

conceded victory to the provinces on this issue by repealing s. 52(5). The section that replaced it stated that in the event of a lessee's bankruptcy the rights and priorities of the landlord would be governed by the laws of the province in which the leased premises were located.[169] The amending Act went further, stating that nothing in the *Bankruptcy Act* should be deemed to limit the legislative authority of any province to regulate landlords' rights.[170] An article in *La Revue Du Notariat* welcomed the repeal of the provision, noting that s. 52(5) of the *Bankruptcy Act* had interfered with Québec law.[171]

The outcomes in *Re Rosenzweig* and *Stober* demonstrated an intention to protect provincial law from federal interference. A third decision of the Ontario Court of Appeal also took issue with the scope of the federal bankruptcy power.[172] In *Re Canadian Western Steel Corporation Limited*,[173] Chief Justice Meredith[174] offered a critical perspective on the *Bankruptcy Act*. He suggested that there were provisions of the Act that required amendment.[175] In *obiter*, he challenged the *Bankruptcy Act*'s interference with the administration of the courts in the provinces. He pointed to the provisions that allowed the Minister of Justice to assign judges of provincial courts to exercise their powers under the *Bankruptcy Act*. This enabled the federal government to "cast upon the provinces"[176] the expense of providing courts to carry on work under the *Bankruptcy Act*. He asked: "Is this not an interference with what is by the British North America Act sec. 92(14), within the exclusive legislative authority of the Provinces,—the administration of Justice in the Provinces?"[177] Finally, again in *obiter*, he suggested that there were some provisions "that are probably *ultra vires* of the Dominion Parliament."[178]

---

169 See *Amendment Act, 1923*, *supra* note 51, s 31.

170 *Ibid*. See also The Honourable LW Houlden, The Honourable GB Morawetz & Janis Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed (Toronto: Carswell, 2009) (loose-leaf revision 2011:2), ch 5 at 245. On the provincial legislation that followed this amendment, see WJ Tremeear, "Rent Priorities in Bankruptcy" (1924-25) 5 CBR 407.

171 Deschênes, *supra* note 133 at 333.

172 For a discussion of Ontario relations with the federal government during the 1920s, see Christopher Armstrong, *The Politics of Federalism: Ontario's Relations with the Federal Government, 1867-1942* (Toronto: University of Toronto Press, 1981) at 135-46.

173 (1922), 69 DLR 689, 2 CBR 494 (Ont SC (AD)) [*Canadian Western Steel* cited to DLR].

174 Meredith C.J.'s decisions have been analyzed by R.C.B. Risk ("Sir William R. Meredith, CJO: The Search for Authority" in Baker & Phillips, *supra* note 62, 179).

175 *Canadian Western Steel*, *supra* note 173 at 696.

176 *Ibid*.

177 *Ibid* at 697.

178 *Ibid* at 696. While not finding any provision of the *Bankruptcy Act* to be outside of the bankruptcy and insolvency power, Meredith C.J. did find that Rule 13 was *ultra vires* the federal statute (*ibid*). See also *Interprovincial Flour Mills Ltd. v Western*

B. RIGHTS OF JUDGMENT CREDITORS

The rights of judgment creditors in a bankruptcy demonstrated another critical intersection of the *Bankruptcy Act* and provincial law. As a fundamental principle, s. 11 of the *Bankruptcy Act* established that every assignment and receiving order had precedence over garnishments, attachments, executions or other processes against property.[179] However, the Act carved out an important exception for the rights of secured creditors who had the power "to realize or otherwise deal with [their] security" notwithstanding the bankruptcy.[180] Could a judgment creditor who had taken some enforcement steps, such as registration of a judgment against the land of the debtor under provincial law, be considered a "secured creditor" in the bankruptcy? In some provinces, the registration of a judgment entitled the creditor to a proprietary interest in the land. In a bankruptcy, would this judgment creditor be able to rely upon provincial law to assert secured creditor status, or would the trustee in bankruptcy defeat the creditor's claim under s. 11 of the *Bankruptcy Act*? Having secured creditor status was essential as it provided priority over the trustee in bankruptcy and ranking ahead of unsecured creditors. The scenario provided a classic conflict between provincial law, which gave rise to the proprietary interest, and the *Bankruptcy Act*, which took precedence over execution processes.

A 1927 *Canadian Bar Review* article articulated a policy perspective in favour of defeating provincial priority claims. The author argued that the "destruction of judgments as preferred claims"[181] was necessary for an equitable distribution of the bankrupt's assets and *intra vires* Parliament:

> [T]he provisions of the Bankruptcy Act in this regard are therefore well within the powers of the Dominion Parliament. Every fictitious lien based on a judgment set up by provincial statutes must necessarily go down before the paramount federal legislation and it is difficult to see how

---

Trust Co., [1923] 2 DLR 361 at 364, 16 Sask LR 401 (CA) (Rule 117 was *ultra vires* the federal statute). *Cf Eastern Trust Co. v Lloyd Manufacturing Co.*, [1923] 2 DLR 852, 3 CBR 710 (NSSC) (upholding validity of Rule 120); *In re Nipigon Fibre and Paper Mills Limited* (1922), 3 CBR 408 at 410 (Ont SC) (upholding validity of Rule 13). Parliament does not have the power "to make rules that are contrary to or inconsistent with the *Act*" (Houlden, Morawetz & Sarra, *supra* 170 (loose-leaf revision 2009:9), ch 7 at 221). A rule found to be inconsistent with the statute can be declared *ultra vires* (*ibid*). See also Ruth Sullivan, *Construction of Statutes*, 6th ed (Toronto: LexisNexis, 2014) at 484.

179 *Supra* note 2. For early recognition of this problem, see "Seizure by Judgment Creditor after Assignment by Judgment Debtor" (1921-22) 2 CBR 549.

180 *Bankruptcy Act*, *supra* note 2, s 6.

181 G Gavan Duffy, "The Value of a Judgment" (1927) 5 Can Bar Rev 405 at 407.

> the Act could have been differently drawn to carry out its manifest purposes more effectually.[182]

However, in the early 1920s it was not clear that the courts would adopt this view.

In 1922, the Nova Scotia Supreme Court, in *In re Fader*,[183] heard one of the first cases to consider the status of registered judgments in a bankruptcy. Rather than dismissing the judgment creditor's claim for secured creditor status in the bankruptcy, the Court gave leave to the judgment creditors to return to court to argue for a declaration of priority on the basis that their registered judgments entitled them to secured creditor status in the bankruptcy.[184] The following year, the Alberta Court of Appeal indicated the uncertainty caused by *Re Fader*: "There has been some question raised as to whether a lienholder, whose lien is created by virtue of a provincial statute and not by contract, should be treated as coming within the meaning of a 'secured creditor,' as defined by the [*Bankruptcy Act*]."[185] However, this issue was not raised in argument and the Court of Appeal proceeded on the assumption that the plaintiff was a secured creditor.

The meaning of "secured creditor" became a matter of contention in Nova Scotia and New Brunswick. Prior to the enactment of the *Bankruptcy Act*, those provinces had passed legislation providing that a registered judgment became "as effective a lien on the debtor's lands as a registered mortgage."[186] If the courts recognized the holder of a registered judgment as a secured creditor then they would have priority over the trustee. In *Parker-Eakins Co. Ltd. v. Royal Bank of Canada*,[187] the creditor had obtained a judgment and registered a certificate of judgment in the registry of deeds. When the debtor made an authorized assignment, the creditor argued that he was a secured creditor with valid security that bound the debtor's lands notwithstanding the effect of the *Bankruptcy Act*. In addition to asserting secured creditor status, the creditor also argued that the *Bankruptcy Act* destroyed the effect of his registered judgment under provincial law. According to the creditor, s. 11 of the *Bankruptcy Act*, which gave bankruptcy proceedings priority over execution processes, was "beyond the legislative powers of the Parliament of Canada."[188]

---

182 *Ibid*.
183 (1922), 3 CBR 203 (NSSC) [*Re Fader*].
184 *Ibid* at 205.
185 *Imperial Lumber Co. v Johnson*, [1923] 1 DLR 1125 at 1125, [1923] 1 WWR 920 (Alta SC (AD)).
186 *Parker-Eakins Co. v Royal Bank of Canada* (1922), 65 DLR 679 at 685, 3 CBR 211 (NSSC) [*Parker-Eakins*].
187 *Supra* note 186.
188 *Ibid* at 684.

Justice Chisholm did not accept the creditor's arguments and concluded that the assignment in bankruptcy took precedence over a registered judgment binding lands. A registered judgment against land was not a charge or lien under the Act's definition of secured creditor. A lien mentioned in the definition of secured creditor only meant consensual arrangements between the parties and not a lien created by "recovering and recording a judgment."[189] On the constitutional argument, Chisholm J. reasoned that s. 11 of the *Bankruptcy Act* was constitutional. Given that the main purpose of the *Bankruptcy Act* was to distribute assets, Chisholm J. reasoned that "at every step...there must be interference with the subject-matter of property and civil rights within the Province."[190] Parliament had the power "to enact, not as ancillary merely to its right to legislate on the subject-matter of bankruptcy but as indispensable to effective legislation laws as to how creditors' claims shall rank and how debtors' assets shall be distributed."[191] Justice Russell, in dissent, concluded that the holder of the registered judgment was a secured creditor and therefore had priority over the trustee. However, in reaching his decision, Russell J. expressed his view on the federalism question: "The policy of the Bankruptcy Act is generally…to pay respect to existing provincial legislation. Should we not then say that...the lien of the secured creditor shall be preserved? I think this is the proper answer."[192]

While the majority in *Parker-Eakins* had given precedence to the *Bankruptcy Act*, a subsequent decision of the Nova Scotia Supreme Court rejected that approach and reached the opposite conclusion. In *In Re Rhodenizer Estate and Nova Scotia Trust Co.*,[193] the Court concluded that a creditor holding a registered judgment was a secured creditor and was therefore entitled to priority in the bankruptcy. The Court emphasized that in this case there was a consent judgment obtained as security for the loan, meaning that the loan and judgment were obtained at a time when the debtor was solvent. Justice Mellish held as follows:

> [The *Bankruptcy Act*] has to do with the estates of insolvents. Its object is clearly, I think, not to avoid or postpone securities given by solvent persons for present *bona fide* consideration...Legislation with such an object in view would, I think, come under the exclusive jurisdiction of the local authority and cannot, I think, be said to be

189 *Ibid* at 685.
190 *Ibid* at 686.
191 *Ibid*.
192 *Ibid* at 682.
193 (1923), 56 NSR 179, 3 CBR 609 (SC) [*Rhodenizer* cited to NSR].

> ancillary or incidental to legislation on the subject of bankruptcy or insolvency.[194]

It appears that the Court was seeking to preserve the local practice of using consent judgments in the province. Mellish J. noted that a consent judgment was an "effective and usual form of security taken by those loaning money to solvent people"[195] in Nova Scotia. The decisions in *Re Fader* and *Rhodenizer* raised doubts about the interface between provincial legislation, which treated judgment creditors like secured creditors, and a bankruptcy. A 1927 article cast doubt on the reasoning of these decisions. Only a proper understanding of the *Bankruptcy Act* would help "clear away the imaginary difficulties"[196] raised by the cases. The author also offered practical advice for prospective lenders: "[M]oney lenders who advance money on a judgment which may be destroyed by bankruptcy instead of insisting on mortgage which will survive, do so with full knowledge and have no grievance."[197] These early lower court decisions did not resolve the issue of registered judgments in a bankruptcy. A Québec case would ultimately provide the Privy Council with its first opportunity to make a twentieth-century constitutional pronouncement on the question of whether the *Bankruptcy Act* "infringe[d] upon the exclusive power given…to a Provincial Legislature to make laws in respect of 'property and civil rights.'"[198]

C. *LARUE*

On January 19, 1928, the Privy Council released its judgment in *Larue*. Although still a member of the Privy Council, Lord Haldane did not participate in the *Larue* decision and the overall result emphasized a broad reading of the bankruptcy and insolvency power.[199] The Privy Council relied upon Lord Herschell's statement in the *Voluntary Assignments Case* and ruled that the Dominion had the right under the *Bankruptcy Act* to postpone creditors' rights established by provincial law. The case began in 1922 and went on for six years before the Privy Council ruled. The lower court rulings in *Larue* demonstrate that a broad reading of the federal bankruptcy power was not a foregone conclusion. The Québec Superior Court,

---

194 *Ibid* at 189.
195 *Ibid*.
196 Duffy, *supra* note 181 at 407.
197 *Ibid*.
198 *Larue*, *supra* note 13 at 950.
199 Viscount Cave, Lord Buckmaster, Lord Carson, Lord Darling, and Lord Warrington of Clyffe were the members of the Privy Council that issued *Larue* on January 19, 1928 (*ibid* at 945). Lord Haldane's last judgment was issued on June 12, 1928. See *Tiny Separate School Trustees v The King*, [1928] 3 DLR 753, [1928] 2 WWR 641. Lord Haldane died August 19, 1928 (Saywell, *supra* note 60 at 182-83).

the Québec Court of Appeal, and a dissenting judge in the Supreme Court of Canada sought to preserve the *Civil Code* from federal interference. Many of the arguments initially raised in the Québec National Assembly and in the House of Commons can be found in these three judgments.

In March of 1922, the Royal Bank ("the Bank") obtained a judgment against the debtor and subsequently registered it. The registration referred to the debtor's real estate and established a judicial hypothec on that property in accordance with the *Civil Code*. Before the Bank took any steps to enforce the judicial hypothec, the debtor made an assignment under the *Bankruptcy Act*.[200] The Bank subsequently filed a claim with the trustee claiming a "privilege in the nature of a judicial hypothec upon the real estate of the debtor."[201] The trustee rejected the Bank's claim, taking the position that it had no privileged claim and that an assignment in bankruptcy had precedence over the Bank's claim. The trustee relied upon s. 11(10) of the *Bankruptcy Act*, which specifically referred to judgments operating as hypothecs.[202] The subsection provided that after the registration of the debtor's assignment in bankruptcy "such…assignment shall have precedence of all certificates of judgment, *judgments operating as hypothecs*, executions and attachments against land (except such thereof as have been completely executed by payment)."[203]

In the Québec Superior Court, the Bank argued that the trustee had misinterpreted s. 11(10) or, in the alternative, claimed that the provision was unconstitutional as it interfered with the Bank's rights under Québec civil law.[204] Chief Justice Lemieux ultimately ruled that the Bank was entitled to proceeds from the bankrupt estate up to the amount of its hypothec. His conclusion rested upon an interpretation of s. 11(10). Lemieux C.J. held that s. 11(10) gave the trustee the power to realize upon the property affected by the hypothec, but that the creditor holding the hypothec would have a charge over the proceeds.[205]

Given his conclusion on the interpretation of the *Bankruptcy Act*, Lemieux C.J. did not rule that the provision was *ultra vires*. However, he did go further and stated that if the subsection were intended to avoid the priority of the bank under the *Civil Code*, it would fail as it would go beyond the scope of the bankruptcy and insolvency power.[206]

---

200 *Larue*, *supra* note 13 at 945.
201 *Ibid* at 946.
202 *Ibid*.
203 *Bankruptcy Act*, *supra* note 2, s 11(10) [emphasis added].
204 *In Re P. E. Emile Belanger* (1924), 5 CBR 560 at 561, 63 CS 338 (Qc SC) [*Larue* CS].
205 This position is summarized by the Privy Council in *Larue* (*supra* note 13 at 948-49).
206 *Larue v Royal Bank of Canada*, [1926] SCR 218 at 220, [1926] 2 DLR 929 [*Larue* SCC] (summarizing the Québec Superior Court decision).

In several bold statements, Lemieux C.J. echoed the provincial rights sentiment found in the Québec National Assembly debates and the repeal debates in the House of Commons. First, he reasoned that the *Bankruptcy Act* did not allow a creditor to be "stripped of his rights" and Parliament did not have the "power to deprive a citizen" of rights acquired under civil law. Neither "the sovereign nor the British Parliament, nor any empire's parliament will have the power to remove an inch or right, however small it is to a citizen."[207]

The Court of Appeal upheld the decision of the trial judge, thus allowing the Bank to keep the proceeds from the sale of the property.[208] Like the trial judge, Chief Justice Lafontaine did not rule on the constitutionality of s. 11(10), but he also issued several statements which sought to protect Québec law. First, he noted that some of the words in s. 11(10) of the *Bankruptcy Act* were unknown in Québec's legal language. Lafontaine C.J.A. asserted that this was a "dangerous" matter since one could not "with impunity" transplant the legal language of one country and seek to impose it on the legal institutions of another country that had an entirely different legal system.[209] Second, he sought to preserve the rights of the Bank under the *Civil Code*. He opposed any interpretation which would allow the *Bankruptcy Act* to have retroactive effect such that a creditor would lose "earned rights under civil law."[210] The cancellation of a judicial hypothec had "nothing to do with the operation of bankruptcy law."[211] While the two lower courts had decided the case through interpretation of the *Bankruptcy Act*, both justices indicated that the law would have been unconstitutional if it had encroached upon the rights of creditors holding hypothecs.[212]

The Supreme Court of Canada upheld the trustee's decision, thereby disallowing the Bank's claim of the judicial hypothec as a privilege in the bankruptcy.[213] The majority decision, delivered by Justice Newcombe, upheld s. 11(10) of the *Bankruptcy Act* as coming within the Dominion's power to regulate bankruptcy and insolvency. However, before turning to the majority decision it is important to highlight the dissenting opinion of Justice Rinfret,[214] who adopted

---

207 *Larue* CS, *supra* note 204 at 568.
208 *Larue v Royal Bank of Canada* (1925), [1926] 40 BR 561 (Qc KB).
209 *Ibid* at 564 [translated by author].
210 *Ibid* at 567 [translated by author].
211 *Ibid* [translated by author].
212 *Larue* SCC, *supra* note 206 at 233-34 (Rinfret J, in dissent, summarizing the lower court decisions).
213 *Ibid* at 227-28.
214 One Québec lawyer would later call Rinfret J.'s dissent a "masterpiece of legal argument" (Alexandre Gérin-Lajoie, "Démolisseurs! Pour ne pas dire pire" (1928) 6:8 R du D 449 at 451) [translated by author]. Original French: "la dissidence lumineuse est un chef-d'oeuvre d'argumentation 1égale."

the Bank's position and held that the "destruction of the judicial hypothec" was not part of the bankruptcy and insolvency power.[215] Rinfret J. concluded that the Bank, through its hypothec, had acquired the status of secured creditor under the *Bankruptcy Act*.[216] Secured creditors remained "entirely outside the bankruptcy proceedings."[217] Therefore the bankrupt's property did not include property affected by the hypothec.[218] Rinfret J. was of the view that, once the hypothec had been registered, the Bank acquired a real right in the designated building.[219] Subsection 11(10) of the *Bankruptcy Act* was not intended to "deprive a citizen of a completed and acquired right."[220] If hypothecs were only valid when the debtor was solvent, their protection for creditors would be illusory. Hypothecs only had any real utility to creditors when the debtor became insolvent. If the trustee was correct and the Bank's claim was disallowed, it would effectively remove hypothecs from the *Civil Code*.[221]

Turning to the constitutional question, Rinfret J. concluded that the annulment of a judicial hypothec before the debtor became insolvent did not have an "essential relationship" to the bankruptcy and insolvency power. The federal interference with the hypothec was not a "necessary consequence" of bankruptcy and insolvency. Subsection 11(10) was not "strictly related to the subject" of bankruptcy or insolvency. Nor was the provision ancillary to bankruptcy and insolvency. The federal provision was not necessary for the Dominion Parliament to exercise its bankruptcy power given that it destroyed the Bank's rights.[222] What concerned Rinfret J. was that the Bank had acquired certain rights under provincial law prior to the bankruptcy. He concluded that those parts of s. 11(10) that had the effect of destroying the judicial hypothec were not part of the federal bankruptcy power.[223]

The majority of the Supreme Court of Canada came to the opposite conclusion and held that s. 11 was constitutional. For the majority, Newcombe J. began his constitutional analysis by referring back to the two classic nineteenth-century statements of the broad bankruptcy power found in *Cushing*[224] and the *Voluntary Assignments Case*.[225] In particular, he emphasized Lord Herschell's statement in the *Voluntary Assignments Case* that bankruptcy legislation "require[d]

---

215 *Larue* SCC, *supra* note 206 at 234-35 [translated by author].
216 *Ibid* at 230.
217 *Ibid* [translated by author], citing *Danforth* SCC, *supra* note 33 at 333.
218 *Larue* SCC, *supra* note 206 at 230.
219 *Ibid* at 231.
220 *Ibid* at 233 [translated by author].
221 *Ibid*.
222 *Ibid* at 234-35 [translated by author].
223 *Ibid* at 236.
224 *Supra* note 53 at 415-16, cited in *Larue* SCC, *supra* note 206 at 226.
225 *Supra* note 58 at 200-201, cited in *Larue* SCC, *ibid* at 226.

various ancillary provisions for the purpose of preventing the scheme of the Act from being defeated."[226] Newcombe J. concluded that the *Voluntary Assignments Case* "clearly recognizes the necessity" of including provisions like s. 11(10) within a bankruptcy statute: "[F]ollowing the view expressed by their Lordships, I hold that these enactments belong or have strict relation to the subject of bankruptcy and insolvency, and are therefore, as provisions of the *Bankruptcy Act*, within the paramount authority of Parliament."[227] Newcombe J. allowed the appeal of the trustee and ordered that the trustee's disallowance of the Bank's claim should be restored. The Bank appealed to the Privy Council, and for one Québec author "the very existence of the judicial hypothec in our Civil Code" was at stake.[228] The Attorney General of Québec and the Attorney General of Canada intervened.[229]

The Bank's appeal of the Supreme Court judgment provided the first opportunity for the Privy Council to render a decision on the bankruptcy power in the twentieth century. The Board agreed with the Supreme Court of Canada's conclusion.[230] Viscount Cave, the Lord Chancellor, rendered the decision and he posed two questions: (1) whether on a proper interpretation of the *Bankruptcy Act* a registered judicial hypothec under the *Civil Code* is intended to be postponed to an assignment in bankruptcy; and (2) if such a hypothec is postponed by a provision of the *Bankruptcy Act* whether such provision is "within the legislative authority of the Dominion Parliament."[231] On the first question, the Privy Council concluded that the *Bankruptcy Act* did postpone a judicial hypothec on the real estate of the debtor. It was the intention of the *Bankruptcy Act* that the assignment in bankruptcy should have precedence over all judgments operating as hypothecs.[232]

The Privy Council in *Larue* broadly stated the bankruptcy power and concluded that judgment creditors were reduced to an equality in a bankruptcy:

> [T]heir Lordships are of opinion that the exclusive authority thereby given to the Dominion Parliament to deal with all matters arising within the domain of bankruptcy and insolvency enables that Parliament to determine by legislation the relative priorities of creditors under a bankruptcy or an authorized assignment. A creditor who

226 *Larue* SCC, *ibid* at 227, quoting *Voluntary Assignments Case*, *supra* note 58 at 200.
227 *Larue* SCC, *ibid* at 228.
228 "Hypothèque judiciaire" (1926) 4:9 R du D 571 at 572 [translated by author].
229 LP, "Hypothèque judiciaire" (1928) 6:6 R du D 380 [LP, "Hypothèque judiciaire"].
230 *Larue*, *supra* note 13 at 952.
231 *Ibid* at 946.
232 *Ibid* at 948.

> has obtained judgment for his debt and has issued execution upon the debtor's lands or goods remains a creditor; and it is entirely within the authority of the Dominion Parliament to declare that such a creditor...shall on the occurrence of bankruptcy...be reduced to an equality with the general body of creditors.[233]

The Privy Council went further and stated that there was nothing in the nature of a Québec judicial hypothec which exempted it from the impact of the federal bankruptcy statute:

> No doubt it was within the competence of the provincial Legislature to give to a judicial hypothec the quality of a real right; but if and so soon as that enactment comes into conflict with a Dominion statute duly passed under the authority of sec. 91 of the Act of 1867, then the Dominion statute prevails over the provincial legislation and takes effect according to its tenor.[234]

To support this conclusion, Viscount Cave quoted Lord Herschell's now well-worn passage from the *Voluntary Assignments Case*.[235] According to Viscount Cave, "Lord Herschell's judgment…shows clearly that such an execution [i.e., the judicial hypothec] may lawfully be postponed by Dominion Act."[236] Looking back to the nineteenth century, Viscount Cave effectively entrenched Lord Herschell's once-*obiter* statement as part of Canadian constitutional law. As a result, the Privy Council upheld the trustee's original decision to dismiss the Bank's claim.

The reaction to *Larue* in Québec was not positive.[237] Within weeks of the decision a barrister of the Montreal bar rose in the Québec National Assembly demanding that Parliament amend the *Bankruptcy Act* to allow judicial hypothecs to be recognized in a bankruptcy.[238] In 1928, the *Revue du Droit* published "Démolisseurs!",[239] in which Alexandre Gérin-Lajoie, a Québec lawyer, condemned *Larue* as destructive to Québec civil law: "This disastrous, literally inexplicable decision made one more, broader blow in the barrier of protection that surrounded our provincial law. It was already quite damaged. It

233 *Ibid* at 950.
234 *Ibid* at 951.
235 *Supra* note 58 at 200-201, cited in *Larue*, *supra* note 13 at 950.
236 *Larue*, *ibid* at 951.
237 See e.g. LP, "Hypothèque judiciaire", *supra* note 229 (criticizing the Privy Council for overturning the dissenting judgment of Rinfret J in the Supreme Court of Canada as well as overturning judgments from the Québec Court of Appeal and Québec Superior Court).
238 *Ibid* at 380-81 (reporting that Aléderic Blain raised the matter on February 22, 1928).
239 *Supra* note 214. Démolisseurs translates into demolishers or wreckers.

falls, of course, into ruins and no longer offers any security: how could one place its trust in it?"[240]

However, for British constitutional scholar Arthur Berriedale Keith, the outcome in *Larue* was much more acceptable and perhaps inevitable. The answer to whether the *Bankruptcy Act* could interfere with provincial legislation "[seemed] obviously in the affirmative."[241] The Privy Council had "already…asserted that the Dominion could deal with the effect of an execution on property under a Dominion bankruptcy law"[242] in the *Voluntary Assignments Case*. That answer, however, was not obvious to many prior to 1928, and perhaps to some even after *Larue*.[243]

VII. CONCLUSION

The absence of an established bankruptcy bar challenged a legal community approaching a bankruptcy statute for the first time. But understanding and interpreting the new Act was only part of the problem. In 1919, Parliament reasserted its jurisdiction over bankruptcy after nearly forty years of provincial regulation of debtor-creditor law. The abrupt change to federal law meant that the new legislation would come under attack for interfering with established provincial law. This set the stage for both political opposition and constitutional challenges to the new paradigm of federal bankruptcy law. The political debates reflected a belief that Parliament had not achieved an adequate balance between federal and provincial rights in the *Bankruptcy Act*. Rather than relying upon the new federal law, Saskatchewan and Alberta proceeded to enact their own debtor relief legislation in response to the regional economic crisis in those two provinces. The demand for repeal by the Québec National Assembly and some Québec MPs reflected a strong provincial rights perspective. The *Bankruptcy Act* and the federal bankruptcy power threatened

---

240 *Ibid* at 464 [translated by author]. Original French: "Cette décision néfaste, littéralement inexplicable, fait une brèche de plus, et large, dans la barrière de protection qui entourait notre droit provincial. Celle-ci était déjà assez endommageé pourtant. Elle tombe, évidemment, en ruines et n'offre plus aucune sécurité: comment pourrait-on y mettre sa confiance?"

241 Professor Berriedale Keith, "Notes on Imperial Constitutional Law" (1928) 10:4 J Comparative Legislation & Intl L (3rd) 293 at 308.

242 *Ibid*.

243 Perhaps *Larue* could never bridge the gap between these two views. In Québec, the notion that federal bankruptcy law interfered with the *Civil Code*, continued well after 1928. See Rosalie Jukier & Roderick A Macdonald, "The New Quebec Civil Code and Recent Federal Law Reform Proposals: Rehabilitating Commercial Law in Quebec?" (1992) 20:3 Can Bus LJ 380 (Privy Council's refusal to recognize judicial hypothec in *Larue* demonstrates that the federal *Bankruptcy Act* "has never been particularly sensitive to the intellectual structure of the civil law" at 400, n 89). See also Carignan, *supra* note 63 at 73 (recommending that the provinces should be given jurisdiction over personal bankruptcies).

provincial law, which had been dominant over the preceding forty years. When constitutional litigation arose, early cases illustrated that there was not an overwhelming acceptance of a broad bankruptcy and insolvency power, and the resolution of this constitutional question was not certain as the decade progressed.

The Privy Council's decision in *Larue* ruled in favour of a broad bankruptcy power. *Larue* continued to have influence at the end of the decade.[244] In 1929, the Supreme Court of Canada cited *Larue* and quoted at length from the *Voluntary Assignments Case*.[245] By 1932, the leading bankruptcy text, *Bankruptcy in Canada*, by Lewis Duncan and W.J. Reilley, included *Larue* in the chapter, "Bankruptcy and Insolvency Legislation under the Canadian Federal System," following discussion of *Cushing* and the *Voluntary Assignments Case*.[246] For the authors, there appeared to be a natural progression from the nineteenth-century jurisprudence to *Larue*. Reading that text and its summary of leading appellate cases, one misses the doubt that surrounded the conflict between provincial rights and the federal bankruptcy power in the 1920s.[247]

244 However, the question of the legal relationship between judgment creditors and bankruptcy did not disappear. The Supreme Court of Canada in 1959 revisited this issue in *Canadian Credit Men's Assoc. Ltd. v. Beaver Trucking Ltd.* ([1959] SCR 311, 17 DLR (2d) 161 [*Beaver Trucking* cited to SCR]). The enactment of modern judgment enforcement legislation in some provinces again raises the issue of the status of a registered judgment in a bankruptcy. See Ronald CC Cuming, "Priority Competition between Secured and Unsecured Creditors: The Evolution of Policy" (2015) 30:3 BFLR 457 at 475-76.

245 *Canadian Men's Trust Association v Hoffar Limited*, [1929] SCR 180 at 185, [1929] 2 DLR 106. See also *R v Leach* (1929), 11 CBR 214 at 219 (NBSC (KB Div)) (although the Court did not cite *Larue*, it adopted a broad conception of the bankruptcy power). Since 1929 *Larue* has become part of Canadian constitutional law. The Supreme Court of Canada has referred to *Larue* as a seminal case in two judgments: *Husky Oil Operations Ltd. v. Minister of National Revenue* ([1995] 3 SCR 453 at para 8, 128 DLR (4th) 1); and *Deloitte, Haskins & Sells Ltd. v. Alberta (Workers' Compensation Board)* ([1985] 1 SCR 785 at 800, 19 DLR (4th) 577). *Larue* has also been cited by the Supreme Court of Canada in the *CCAA Reference* (*supra* note 15 at 661); *Produits de Caoutchouc Marquis Inc. v. Trottier* ([1962] SCR 676 at 678, 34 DLR (2d) 751); *Beaver Trucking* (*ibid* at 319). It has also featured in provincial appellate courts. See e.g. *Toronto-Dominion Bank v Phillips*, 2014 ONCA 613 at para 27, 376 DLR (4th) 566; *British Columbia (Director of Employment Standards) v Todd McMahon Inc.*, 2002 BCCA 179 at para 22, [2002] 4 WWR 451; *Re Sklar and Sklar, Seiberling Rubber Co. of Canada Ltd. v. Canadian Credit Men's Trust Association* (1958), 15 DLR (2d) 750 at 753-55, 26 WWR 529 (Sask CA).

246 Lewis Duncan & William John Reilley, *Bankruptcy in Canada*, 2nd ed (Toronto: Canadian Legal Authors, 1937) at 2021.

247 The 1920s demonstrates that there will be an inevitable and ongoing clash between the bankruptcy power and provincial law. See Wood, "Paramountcy Principle", *supra* note 10. Wood discusses *Saskatchewan (Attorney General) v Lemare Lake Logging Ltd.* (2015 SCC 53, [2015] 3 SCR 419); *Alberta (Attorney General) v Moloney* (2015 SCC 51, [2015] 3 SCR 327); and *407 ETR Concession Co. v. Canada (Superintendent of Bankruptcy)* (2015 SCC 52, [2015] 3 SCR 397).