Australian Journal of Legal History

A CANADIAN 'WORLD WITHOUT BANKRUPTCY':[*]

THE FAILURE OF BANKRUPTCY REFORM AT THE END OF THE NINETEENTH CENTURY

THOMAS G W TELFER[**]

In the nineteenth century, Canadian bankruptcy legislation was not widely accepted as a means to provide debtors with a fresh start or as a way to distribute assets to creditors. Both of these central goals of bankruptcy law proved to be controversial. After Confederation, the federal Parliament exercised its constitutional jurisdiction over bankruptcy and insolvency law and passed the *Insolvent Act of* 1869[1]followed by the *Insolvent Act of* 1875.[2] However, opponents of bankruptcy law began to call for repeal shortly after the Act of 1869 came into effect. In 1880, Parliament repealed the *Insolvent Act of*1875 and abandoned its jurisdiction over bankruptcy and insolvency law. It was not until 1919 that the Canadian Parliament again passed a national bankruptcy law.[3]

Despite Parliament's repeal of the bankruptcy statute in 1880, the matter did not lie dormant. Between 1880 and 1903, Parliament debated 20 bankruptcy law reform bills including a major

government initiative in 1894 and 1895. However, all federal bills failed and after 1903 bankruptcy law disappeared from the Parliamentary agenda until shortly before 1919. Why federal reform initiatives failed during this period is the focus of this paper.

Canada's late acceptance of bankruptcy law as an essential commercial law statute stands in contrast to developments in England and the United States. The long period of continual revision of nineteenth century English bankruptcy law culminated with the passage of the landmark reforms of 1883.[4] This landmark English bankruptcy statute of 1883 would ultimately influence the shape of Canadian reforms but not until 1919. Like Canada, the United States also experienced periods of national legislation followed by repeal. However, in 1898 the US Congress finally settled on a new Act that provided the basis of US bankruptcy law for much of the twentieth century.[5]

Possible explanations for the particular pattern of legislation might focus on the conflict of values over the morality of the discharge or the distinct divergence of interests between local and distant creditors over the merits of a *pro rata* distribution scheme required by bankruptcy law. This clash of ideas and interests took place within a changing economy that was beginning to show signs of emerging from its local and rural base.

Tying legislative developments to the nature of the economy is one possible source of inquiry to explain legislative change. For example, Peter Coleman's study suggests that several structural or economic changes made a national bankruptcy law in the United States more acceptable in 1898:

[A]s American life in general and debtor-creditor relations in particular became inexorably commercialized, depersonalized, and channeled through the corporate, legalistic, and institutionalized structure of commercial finance, the need for bankruptcy systems became imperative.[6]

The triumph of the American *Bankruptcy Act* of 1898, which closed out a near century of various short-lived national bankruptcy acts, another author explains, represented the maturation of American capitalism.[7] The predominantly rural Canadian economy at the end of the century thus offers a contrast and a possible explanation for the continued rejection of national bankruptcy law in the nineteenth century north of the border.

The strong opposition to the discharge in rural Canada and the defeat of various urban Boards of Trade and foreign creditors that advocated a national uniform bankruptcy law between 1880 and 1903 suggests that a national economy had not yet emerged. Repeal and the failure of national reform efforts might be linked to the success of local and rural interests over distant and foreign creditors that traded across Canada. Thus a national bankruptcy law might have been premature in nineteenth century Canada.

However, repeal and the near forty-year absence of a national bankruptcy law cannot be explained entirely by the clash of ideas and interest and the evolution of the Canadian economy. By linking legislative change exclusively to economic development, there is a danger in viewing the evolution of the law as somewhat inevitable or some form of natural progression with reform coinciding with the evolution of society and commerce.[8] One might conclude that the Canadian economy had not been developed sufficiently to the point where a national bankruptcy law was required and that uniformity was not essential. However, the efforts of urban Boards of Trade and English creditor groups that demanded a national Act illustrate that many were thinking along more national lines. This raises the question of whether there were any other possible impediments to national reform.

One legal historian suggests that one should not always focus on the issue of 'change and innovation'. Rather the important question to ask is:

why a legal change did not occur when society changed, or when perceptions about the quality of the law change. Why, one must always ask, did the legal change not occur before?[9]

In this light it becomes important not only to understand the introduction of a new Canadian regime in 1919 as a significant innovation, but also to examine why such reforms were delayed for a lengthy period.

While it is clear that the nature of the economy had an impact on the shifting fortunes of local and distant creditors and the evolving attitudes towards debt, other factors constrained reform even after the Canadian economy began to move in a national direction. The paper examines institutional factors that affected policy direction.[10] Two areas of institutional concern are explored. First, the relative strength or weakness of the state bureaucracy in proposing and implementing policy change[11] is considered by a review of the papers of the Department of Justice and the records of various Boards of Trade and commercial organizations. The absence of a strong government department and bureaucracy inhibited the implementation of stable and lasting legislation. In the period of 1880 to 1903 the federal government showed little interest in bankruptcy reform. Interest groups generated most reform proposals. In 1919, bankruptcy reform coincided with an unprecedented growth of federal regulation that emerged during World War I.

Second, federalism[12] and the possibility of provincial reform ultimately impeded and inhibited efforts to pass a national bankruptcy law.[13] Although the constitution granted the federal Parliament jurisdiction over the field of bankruptcy and insolvency, provincial jurisdiction over 'property and civil rights' became the more important field to regulate debtor-creditor matters in this era.

The decision of the Privy Council in 1894,[14] which upheld the validity of the Ontario *Assignments and Preferences Act*, contributed to the growth of provincial regulation and removed the immediate need for federal legislation until after the turn of the century. Provincial

law became entrenched as the primary means of regulating debtor-creditor matters. It was not until after World War I that bankruptcy law again became a national issue. Federalism played a key role in the legislative history of Canadian bankruptcy law.

Part I of the paper examines the constitutional framework of the *British North America Act* and provides a brief overview of the legislative history of the period including early federal legislation, its repeal, the provincial response and the several unsuccessful attempts to revive a national law between 1880 and 1903. Part II provides an overview of the bankruptcy law debates and Parliament's inability to reach a consensus on the merits of a statutory discharge and an equitable distribution of the debtor's assets. Part III examines the impact of such institutional factors as the absence of a regulatory state and federalism on the pattern of legislation during this era.

I THE CONSTITUTIONAL AND LEGISLATIVE FRAMEWORK

A *Constitutional Framework*

As this paper considers institutional factors an important part of the story, it is significant to begin with a brief outline of the constitutional division of powers. One of the objectives of Confederation[15] was to create a strong central government while at the same time permitting the provinces to regulate their local affairs.[16] Section 91 of the *British North America Act* ('*BNA Act*') granted to Parliament a general power for 'the Peace, Order and Good Government' of Canada 'in relation to all Matters not coming within the Classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces'. '[F]or greater certainty' s 91 also listed several specific subjects over which the federal government had jurisdiction. 'Bankruptcy and insolvency' was included in the long list of economic powers.[17]

The *BNA Act* granted jurisdiction over local matters, including regulation over 'property and civil rights' to the provinces. The division of powers created the possibility of some overlap in relation to the regulation of debtors. While the grant of jurisdiction over bankruptcy and insolvency was exclusive, the provinces retained the right to regulate debtor-creditor matters generally.[18] How far that provincial jurisdiction extended became a source of constitutional controversy once the federal government withdrew from the bankruptcy field in 1880. As discussed below in Part III B, the Judicial Committee of the Privy Council would ultimately resolve this constitutional question in 1894. The resolution of this constitutional question was anything but certain during the 1880s and early 1890s. The constitutional uncertainty inhibited reform at the federal level.

B *Legislative History: Repeal and the Provincial Response*

Before examining the legislative framework of early Canadian bankruptcy law and provincial efforts to fill the void left by the federal repeal, it is important to understand the general goals or aims of the legislation. Bankruptcy law interferes with the ordinary relations between debtors and creditors.[19] Two fundamental goals lie at the heart of all bankruptcy statutes.[20] First, bankruptcy law enables a debtor to obtain a release of his or her debts by the order of discharge. Second, bankruptcy legislation also ensures that the debtor's assets are distributed equally among all unsecured creditors. The equal treatment of creditors is supported by a statutory power that enables the court to set aside a pre-bankruptcy preferential payment to a favoured creditor.

These two policies dramatically alter the relationship between debtors and creditors. Under the common law, creditors who obtain the first execution against the debtor are not required to share the benefits of execution with subsequent creditors.[21] Bankruptcy law therefore ends the common law scramble for the debtor's assets by imposing a stay of proceedings upon unsecured creditors and requiring such creditors to await the distribution of the debtor's estate in a *pro rata* manner. The collective nature of the bankruptcy regime prohibits unsecured creditors from continuing to pursue the debtor once bankruptcy has begun. The bankruptcy discharge also intervenes by releasing debtors from prior obligations.

After Confederation, Parliament proceeded cautiously by passing the *Insolvent Act* of 1869. This original Act was passed as a temporary measure and was limited in scope to traders.[22] The legislation contained an involuntary proceeding that permitted creditors to force a debtor into bankruptcy upon proof of an 'Act of Bankruptcy'. In addition, it permitted debtors to voluntarily file for bankruptcy. One author suggested that the inclusion of voluntary proceedings was in accordance with the spirit of modern bankruptcy law.[23] However, this was an overly optimistic view as voluntary proceedings proved to be contentious after 1869. The *Insolvent Act* of 1869 also contained provisions that enabled the Official Assignee to set aside fraudulent preferences. As the general policy of bankruptcy law is to treat all creditors on an equal basis, the ability to claw back preferential transfers ensured that creditors did not receive more than their fair share of the *pro rata* distribution.[24]

The 1869 Act sought to control access to the discharge. Debtors required creditor consent and subsequent court approval in order to obtain a discharge.[25] The legislation permitted the court to issue a second-class discharge. Both a first and second-class discharge released a bankrupt from his debts. However, the classification of discharges represented an official statement as to the moral trustworthiness of a debtor.

There was a consensus that the Act of 1869 had not gone far enough to protect creditors, who required further means of discovering and punishing fraud.[26] This led Parliament to replace the 1869 Act with the *Insolvent Act* of 1875. The '"poor creditor" proposes now to take his innings, the "poor debtor" having had ... a good time of it for many years past'.[27] Although the 1869

legislation had contained many provisions favourable to creditors, the 'object of the [1875] bill was to give the creditors greater control of the estate'.[28]

The decision to abolish voluntary assignments was the most significant policy change in 1875.[29] The *Insolvent Act* of 1875 only allowed creditors to initiate proceedings.[30] The discharge provisions further restricted the eligibility of debtors to obtain a release of their debts.[31] Debtors required both creditor consent and the approval of a court in order to obtain a discharge that might be of first or second-class. Further, under s 58, a judge had the discretion to suspend or refuse the discharge altogether if the dividend from the estate did not pay 33 cents in the dollar.

The 33 cents in the dollar restriction was ineffective as courts refused to exercise their discretion and deny a discharge even when dividends did not meet the minimum level. Critics pointed to the discretionary power of the judge being exercised in a 'compassionate spirit'.[32] When a creditor forced a debtor into bankruptcy, the dividend rarely reached the 33 cents level.[33] In 1877, Parliament amended the Act and imposed a requirement of a dividend level of 50 cents in the dollar before a debtor could obtain a discharge.

The amendments that made it more difficult to obtain a discharge, however, did not satisfy the Members of Parliament calling for repeal. Indeed, the continued opposition to the legislation in the late 1870s suggests that, although it contained only an involuntary proceeding, debtors may have been able to invoke the proceeding with the co-operation of friendly creditors.[34] In 1878[35] and 1879 the government faced several private member Bills calling for the repeal of all insolvency legislation.[36] The repeal movement, which had been brewing since the original 1869 Act came into effect, culminated with the repeal of the *Insolvent Act* of 1875 on 1 April 1880.[37]

The federal withdrawal from the field had a profound impact on debtor-creditor relations. Debtors were unable to receive a discharge through the operation of statute. More importantly, the policy of equal treatment of creditors was jettisoned with the repeal of the federal legislation. Preferential payments to a local or a related creditor and a scramble for the debtor's assets became the order of the day. If the federal government was unwilling to enact legislation, attention turned to what could be done at the provincial level within the provincial power of 'property and civil rights'.

In what appeared to be an immediate solution for creditors, Ontario passed *An Act to Abolish Priority of and Amongst Execution Creditors* in 1880 the day after the federal repeal Bill received third reading.[38] The Act, which became known as the *Creditors' Relief Act,* abolished priority among execution creditors and provided for a rateable distribution of the proceeds held by the Sheriff.[39]However, it did not come into effect until a date that was to be fixed by proclamation.[40] In fact, it did not come into force until 25 March 1884.[41] Soon after its passage, the *Monetary Times,* impatient with the failure of the province to proclaim the act, gave

up hope that it would ever be proclaimed.[42] The paper speculated that the Ontario government was waiting to see if the federal government would re-enact a national law.[43] 'The result is that we are now enjoying a sort of interregnum, during which the old rule of "first come first served", is applicable'.[44]

Other provinces did not immediately follow the Ontario legislation. It was not until 1903 that the then existing provinces enacted legislation providing for the *pro rata* distribution of the debtors' assets.[45]Between 1880 and 1903, creditors faced the prospect of the common law race to the debtors' assets in a number of different regions.[46]

Both the *Monetary Times* and the *Journal of Commerce* criticized the *Creditors' Relief Act* for its expense and its failure to deal with the major problem of preferences.[47] The practice of transferring assets on the eve of insolvency led to calls for the abolition of preferences at the provincial level. In order to remedy the problem of preferences, Ontario enacted *An Act Respecting Assignments for the Benefit of Creditors* in 1885.[48] The 1885 Act improved upon an earlier pre-Confederation Ontario statute.[49] In addition to prohibiting preferences, the Act permitted a debtor to make an assignment of his or her assets to an authorized trustee for distribution to creditors.[50] Under s 9, an assignment under the Act took precedence over all judgments and incomplete executions. The legislation did not include a discharge. Further, a debtor could not be compelled to make an assignment.[51]

Only Manitoba followed Ontario's lead in 1885. Other provinces were much slower to enact legislation that prohibited preferences.[52] New Brunswick did not enact similar legislation until 1895 and Nova Scotia followed in 1898.[53] The *Journal of Commerce* referred to the slow progress of provincial reform as 'feeble inefficient tinkerings of Provincial parliaments'.[54] While provincial law provided for the distribution of a debtor's assets and enabled preferential transfers to be set aside, it did not contain any provision which released debts by a statutory discharge.

C *The Federal Reform Bills*

At the same time as the provinces sought to pass legislation to ameliorate the effects of the absence of a federal bankruptcy law, Parliament debated the merits of reviving a national act. Despite Parliament's rejection of bankruptcy law in 1880, numerous private members' bills were introduced between 1880-1903.[55] The commercial community was not satisfied with the slow evolution of provincial law and began to demand new federal legislation.[56] The federal reform proposals ranged from distribution schemes that did not include a discharge to bills that proposed to introduce a federal bankruptcy discharge while relying on provincial legislation to distribute the debtors' assets. In all, Parliament debated 20 bills proposing some form of national bankruptcy regime between 1880 and 1903. Only two bills bore the imprint of government policy and every bill failed to garner sufficient votes in Parliament.[57] After 1903, bankruptcy law disappeared from the federal Parliamentary agenda until just before 1919. The details of

these bills are discussed below in Parts II and III, which address more specifically why federal reform efforts failed.

II THE FOCUS OF THE BANKRUPTCY LAW DEBATES

Before examining the central premise of this paper and the role of institutional factors, it is important to acknowledge that the two essential aspects of bankruptcy law, the discharge and the equitable distribution of the debtor's assets, proved to be the most controversial aspects of the bankruptcy law debates during this era. Failure of reform efforts in the period from 1880 to 1903 can in part be explained by the inability to reach a consensus on the appropriate form of a bankruptcy law discharge. There was an equally divisive split over the desirability of national legislation that provided for an equitable distribution of the debtor's assets and prohibited preferential payments.

The discharge provisions often dominated the Parliamentary debates with two distinct positions being advocated.[58] Forgiveness was pitted against individual responsibility. On the one hand, debtors required a fresh start and it was unjust to burden a person with debt for life. Honest but unfortunate debtors deserved a discharge and the opportunity to start again. Forgiveness of debt was advocated for those who had been subject to the uncertainties of the market or who suffered from sickness or other mishap.[59]

Notions of forgiveness, however, competed unsuccessfully with the idea that all debts had to be honoured. The common claim heard in Parliament from the 1870s through to the end of the century was that bankruptcy law encouraged commercial immorality. The link between commercial immorality and bankruptcy law was derived from the fundamental obligation to repay debts. Bankruptcy law interfered with this higher value. No law should lead a debtor to betray one's duty to one's fellow men. Debt was a private matter to be worked out between the parties. Members of Parliament, leading business newspapers and even the courts recognized a debtor's moral obligation to his creditors.[60]

The division over the discharge shaped the nature of the bankruptcy reform bills. A number of federal bills introduced between 1880 and 1885 proposed a compulsory bankruptcy regime without providing for a discharge.[61] Each bill provided for a mechanism to liquidate and distribute the debtor's assets and prohibited preferential payments.[62] The distribution and discharge functions thus came to be viewed as separate issues with most bills seeking to exclude or to limit the discharge. Many viewed the discharge as an entirely separate issue that need not be included in a bankruptcy bill.[63]

The other aspect of bankruptcy law, the distribution of the debtor's assets in a fair and equitable manner, provided an additional source of controversy. Local creditors benefited from repeal while those trading beyond local markets urged a national law.[64] Creditors that traded across regional boundaries focused on the other goal of bankruptcy law, first to prevent repeal and later

to call for its reinstatement. Bankruptcy law offered a major advantage over the common law as it provided a distribution of the debtor's assets to all creditors on a *pro rata* basis. By way of contrast, the common law system of 'first come first served' rewarded creditors who acted quickly. Creditors that traded at a distance were disadvantaged by such a regime. Distant creditors favoured a national bankruptcy law and its equitable distribution policy, which prevented local creditors from seizing all of the debtor's assets. Bankruptcy law, by abolishing the common law race to the debtor's assets, and by enabling preferential payments to local or friendly creditors to be set aside, reduced risks for foreign creditors and destroyed local creditor advantage. Distant creditors were disadvantaged by preferential payments to family or local friendly creditors.[65]

English merchants who believed they were dealing with their 'own kindred on similar principles of mercantile morality as are legalized in the United Kingdom', soon discovered that the state of provincial law operated to their detriment.[66] As early as 1881, English merchants submitted a petition to Prime Minister Macdonald indicating that, 'creditors, especially at a distance are practically at the mercy of the dishonest debtor ...'[67] Thus, foreign merchants and Canadian wholesalers were 'unable to protect their own claims against the scheming and rascality of dishonest debtors'.[68]

Between 1880 and 1903 there was significant English interest in the state of Canadian bankruptcy law. Prime Ministers Macdonald and Laurier received pleas from English merchants.[69] Despite petitions, resolutions of English and Canadian associations,[70] articles in English journals[71] and direct meetings with politicians,[72] little headway was made in enacting a federal law. In particular, English creditors complained about preferential payments to local creditors.[73]

The continued failure of reform at the national level despite the strong lobbying efforts of foreign and national merchants is significant. One might conclude that the absence of a federal law simply reflected the absence of a national economy. However, the extensive lobbying efforts by Boards of Trade and foreign merchants in favour of a uniform law should not be too easily dismissed. Their collective failure might be better explained by examining other factors beyond the discharge and the distribution of the debtor's assets. Bankruptcy law was also debated within the institutional framework of a weak regulatory state and federalism.

III THE ROLE OF INSTITUTIONS

A *The Weak Government Commitment to Bankruptcy Reform*

The capacity of the political system can constitute 'formidable limiting conditions on public policy'. Political capacity can be measured not only with respect to fiscal matters and issues of jurisdiction, but 'the professionalism and expertise of the legislators and public administrators' is also a crucial factor.[74] In the nineteenth century there was little sense that bankruptcy law was

part of a larger regulatory state. Bankruptcy law was rarely proposed as a government reform measure and there was no specialized government department responsible for the legislation. As a regulatory measure, bankruptcy law had no institutional backing. While the Department of Justice had broad responsibility for the legislation, there was little support for the law as a public policy measure.

Most of the correspondence in the Department of Justice files during the 1870s concerned minor administrative matters rather than larger policy issues. As there was no government bankruptcy office, those who had a particular concern wrote directly to the Minister of Justice or to the Prime Minister. The correspondence included, for example: an appeal for legal advice from a bankrupt, requests for copies of legislation, requests for legal advice from Official Assignees and requests for legal advice from other departments involved in bankruptcy claims. No policy memorandum or papers dealing with federal bankruptcy reform options could be located in the Justice files. By 1899, as discussed below, the federal government's attention turned to assessing the adequacy of provincial measures as a viable alternative to reform at the federal level.

After repeal most governments refused to endorse any bankruptcy bill and, among the 20 reform bills debated during the period of 1880 to 1903, only two bore the imprint of government policy. All other bills were private members' bills usually introduced at the request of various boards of trade. It became apparent quite early after the repeal of the federal *Insolvent Act* of 1875 that the government was not going to take an active role in initiating any new Bills. In 1883 a Member of Parliament, frustrated with the lack of the government's role, stated:

... it is about time the Government of the day took some share in the management of this extremely important trade question .... . They are, therefore, without excuse in not trying to direct the deliberations of the House on this important matter. They allowed the old law to be repealed three years ago without taking sides upon it; they now permit any member who pleases to bring in Bills and pass them to the second reading without affording an indication of their views ... .[75]

A *Canada Law Journal* article suggested several reasons why bankruptcy law generally did not attract government support. Bankruptcy law was sufficiently controversial to deprive it of the support of influential members of the government party. The success of the Bill, therefore, depended upon opposition votes. 'No government, whether Liberal or Tory, will willingly expose itself to the risks of such a situation'.[76]

In a dramatic shift in policy, the federal government announced in the Throne Speech of 19 March 1894 that it would be supporting the introduction of a bankruptcy bill.[77] Expectations were raised even further when the Senate passed the Bill. However, the House of Commons did not even debate the matter.[78] In 1895, the government reintroduced the Bill in the Senate but did not press the matter.[79] As discussed below, the landmark decision of the Privy Council,

which upheld the validity of the Ontario *Assignments and Preferences Act*, removed the initiative to proceed.

Despite the design of a strong central government set out by the *BNA Act*, federal bankruptcy policy was ambivalent and weak. In the absence of government leadership, bankruptcy policy was generated by the private sector. Boards of Trade and foreign creditors demanded reform and often supplied reform proposals, but often there was disagreement on essential aspects of the Bill. In Canada, there was no institutional support for the development of a public interest rationale. By way of contrast, the English reforms of 1883 were initiated and implemented by a government with a strong policy direction. Senior civil servants formulated much of the policy expressed in the 1883 *Bankruptcy Act*. The English civil servants accepted that the state had a supervisory role to play. In England, a separate bankruptcy department was created and it grew to become one of the largest departments in the civil service at the end of the nineteenth century. Bankruptcy law, in this new vision, was not just the concern of creditors but it affected the wider society.[80] The Canadian regulatory state did not emerge until after the turn of the century.[81] The passage of the Canadian *Bankruptcy Act* 1919 coincided with an unprecedented growth of federal regulation during World War I.

B *Federalism*

Federalism also had a significant effect upon the legislative history of Canadian bankruptcy law. The *BNA Act* provided the possibility that provinces might ameliorate the effects of federal repeal by providing their own distribution scheme under their jurisdiction over ‘property and civil rights’. If all the common law provinces could be convinced to enact such legislation, a federal bankruptcy law would no longer be required. The existence of a possible provincial solution provided the federal government a strong reason not to push for the reform of a controversial subject matter at the national level.

In the late 1880s and early 1890s, the federal government came under increasing pressure to exercise its jurisdiction over bankruptcy and insolvency.[82] The *Journal of Commerce*, for example, pointed out that at Confederation a great deal of emphasis had been placed on the need to abolish local customary laws. In an 1899 editorial, the *Journal* commented on the state of provincial legislation:

Recent legislation in insolvency matters in different sections of the Dominion has, we regret to say, developed traces of Provincial jealousy subversive to the principles of right and justice and directly at variance with the true spirit of confederation. Almost every Province in the Dominion has been cutting and patching at the various insolvent acts in such a way as to cause irritation and soreness and keep the country backward and divided. Instead of this, these petty inter-provincial business jealousies should be thrown to the wind and the general good of the country considered.[83]

Proponents of a uniform law pointed to the explicit wording in the *BNA Act* granting the federal government jurisdiction over bankruptcy and insolvency. By way of contrast, provincial laws regulating insolvency were 'enacted by an authority which is hampered by limitations and doubts'.[84]

It is worse than useless to leave the matter to be dealt with by the Local Legislatures, since their action is hampered alike by lack of sufficient powers and the absence of all precedents.[85]

Why were there national customs, insurance, banking and railway statutes while insolvency matters had been abandoned to the provinces?

[The] underlying principle actuating the framers of our constitution was that all matters of general interest should be confided to our legislative power here, and surely there is no matter of such general interest as the subject of legislation in respect to insolvency.[86]

In a circular distributed to Members of the federal Parliament, the President of the Toronto Board of Trade urged the federal government to assume its jurisdiction over bankruptcy and insolvency. Until national legislation was in place, he argued:

the estates of debtors are liable constantly to be swallowed up in a contestation involving appeals to the Privy Council to determine where the powers of local legislatures in dealing with civil rights end.[87]

The period under study in this paper coincided with the growing constitutional conflicts between the provincial and the federal governments on the limits of their respective constitutional grants of power. This conflict was personified in the contrasting positions taken by Oliver Mowat, Liberal Premier of Ontario, and the Conservative Prime Minister John A Macdonald. These numerous constitutional disputes have been well documented by a number of scholars. However, in contrast to the numerous other areas where federal and provincial interests clashed, Macdonald showed little interest in the federal bankruptcy power and often referred to the existence of provincial legislation as a possible solution to the problem of insolvent debtors.

Despite pleas for federal action on the subject of bankruptcy law, Prime Minister Macdonald used provincial jurisdiction as a reason to delay federal reform. In 1882, in private correspondence, Macdonald questioned whether a federal bill, which provided only for the distribution of an insolvent's estate, was 'within the competence of the Federal Parliament'.[88] In the House of Commons, Macdonald questioned whether or not an 1883 Bill was an 'interference with property and civil rights?'[89]

Macdonald also used the constitutional question as a means of deflecting foreign pressure for federal reform. In 1884, he told a deputation from the London (England) Chamber of Commerce that 'special difficulties were found to exist in Canada, owing to the concurrent powers of the

Dominion and Local Legislatures'.[90] Macdonald pointed out that the federal Parliament had no right to interfere with provincial law affecting contracts save for the exception of the federal power over bankruptcy and insolvency. As Parliament had no power to deal with preferences other than in a bankruptcy law, there was little action that it could take to address the growing problem of preferential payments. Therefore, preferences were to be left to the provinces to regulate. The federal government was 'powerless to deal with the subject unless by the enactment of a general law of bankruptcy or insolvency'.[91]

Macdonald was aware of developments at the provincial level but chose not to use the disallowance power.[92] The government was content to allow the judicial system to rule on the constitutional issue. For example, in 1886, the federal Minister of Justice recommended against the use of disallowance with respect to the Ontario *Assignments Act*. It was 'more than doubtful whether it is within the legislative authority of the provincial legislature'. However, as the issue was pending before the courts, the question could 'be more conveniently settled in that way than in any other'.[93] Macdonald similarly refused to disallow other provincial statutes passed in Manitoba, Quebec and Nova Scotia despite the fact that there was 'great doubt as to the authority of a legislature to enact such laws as these, as they are in the nature of Insolvent Acts'.[94]

It was not long before several Ontario courts began to rule on the validity of the *Act Respecting Assignments and Preferences by Insolvent Persons*.[95] Early decisions upheld the constitutionality of the statute.[96] In 1888, the Ontario Court of Appeal agreed to hear argument on four separate cases. The outcome of the cases attracted national interest. While the Court of Appeal hearing was pending, Members of Parliament noted that the outcome could affect the efficacy of the 1887 Bill which relied on the provincial distribution schemes.[97]

On 20 March 1888, the Ontario Court of Appeal added to the uncertainty by issuing a split decision on the four concurrent appeals (referred to below as *Clarkson et al*).[98] All four cases dealt with the validity of *An Act Respecting Assignments for the Benefit of Creditors*.[99] In each of the appeals, an insolvent debtor had made a preferential transfer to a creditor prior to making an assignment for the benefit of creditors. The assignees as plaintiffs challenged the preferences under the Ontario statute. The defendants, the recipients of the preference, argued that the Ontario legislation was ultra vires. The four Justices of the Court of Appeal were 'equally divided on the point'.[100]

While the country waited for a final resolution of the matter by a higher court, the interim was a 'chaotic state of affairs, which assuming the Act to be ultra vires, allows the first-comer among claimants to be first served'.[101] The Ontario Court of Appeal's 1888 decision created, according to the *Journal of Commerce*, 'a state of chaos' and was a 'grave scandal'.[102] E D Armour, a Toronto lawyer and an editor of the *Canadian Law Times*, concluded that:

[i]n Ontario the law is in an unsatisfactory state. The leading decision [*Clarkson et al*] shows such a difference, such a variety, of opinion that it seems hopeless to reduce the different expressions of opinion to any definite form.[103]

The *Journal of Commerce* also expressed concern. While the constitutional 'deadlock exists it is futile to make any appeal to Parliament to pass a general *Insolvent Act* for the whole Dominion'.[104]

Even after the split decision in *Clarkson et al,* in 1888 the Minister of Justice concluded that disallowance ought not to be used. Despite the fact that two Justices had upheld the validity of the provincial statute and that further appeals might confirm this view, the Minister of Justice declined to act. He concluded that the Act was 'undergoing discussion before the courts of Ontario, and pending a decision' he did not advise the government to utilize the disallowance power.[105]

In 1891, the Ontario Court of Appeal added to the confusion by declaring s 9 of the Ontario Act ultra vires in *Union Bank v Neville*.[106] The *Journal of Commerce* reported that the decision made 'confusion worse confounded'[107] while the *Monetary Times* advised that after the decision 'it will be unsafe for insolvents to rely on the provisions of that statute'.[108]

To clarify the matter, the Ontario government referred the following question to the Court of Appeal:

Had the Legislature of Ontario jurisdiction to enact the 9th section of the Revised Statutes of Ontario, c 124, and entitled, 'An Act Respecting Assignments and Preferences by Insolvent Persons'.[109]

In the reference case, the Court of Appeal concluded that s 9 was ultra vires.[110] But the Court of Appeal decision did not settle the matter. The *Canadian Law Times* indicated that '[n]o doubt the case will not end here'. Many anticipated an appeal to the Privy Council.[111] The *Canadian Law Times* optimistically predicted that the *Assignment and Preferences Act* as well as the *Creditors' Relief Act*would be struck down.[112] The files of the Department of Justice on the appeal to the Privy Council illustrate not only a confused state of affairs but also a desperate sense of urgency to end the constitutional uncertainty.

Three days after the Court of Appeal issued its ruling in the reference case the Ontario Attorney-General wrote to the Minister of Justice indicating that the provincial government was under pressure and needed a quick resolution of the matter.[113] A letter to the Department of Justice asked that the solicitors representing the federal government in England request an immediate hearing and decision in the case.[114] However, by November of 1893 the matter still had not been resolved and the Ontario Attorney-General explained why they wanted a quick resolution:

... it is of great public importance to get a decision of the Privy Council at the earliest possible day. I understand that merchants and persons in business are looking very anxiously for it, and are in perplexity from the doubts which exist. I understand that the profession are also expressing like anxiety, because in the present unsettled condition of the question involved, they do not know how to advise their clients.[115]

Oliver Mowat, the premier of Ontario, was of the view that the Privy Council would appreciate the importance of the appeal if informed that the Ontario Act was the only effective substitute for a bankruptcy law that existed in the province given the inability of the federal government to agree on a new reform measure.[116] According to constitutional law scholar A H F Lefroy: '[p]erhaps no decision of the Judicial Committee has been awaited with more interest, at all events in the profession'.[117] The Privy Council agreed to hear the matter in December 1893 and its subsequent decision ended the long period of constitutional uncertainty by upholding the validity of the provincial provision.

Lord Herschell concluded that assignments for the benefit of creditors had long been known under the common law and were independent of any system of bankruptcy and insolvency legislation. The validity of an assignment under the provincial law did not depend on the insolvency of the assignor. Further, having found that compulsory proceedings were an essential element of a bankruptcy and insolvency, the provisions of the provincial statute, 'relating as they do to assignments purely voluntary, do not infringe upon the exclusive legislative power conferred upon the Dominion Parliament'.[118]

In the judgment, the Privy Council also ruled that the federal bankruptcy and insolvency power might necessarily include the regulation of matters within the provincial jurisdiction:

They would observe that a system of bankruptcy legislation may frequently require various ancillary provisions for the purpose of preventing the scheme of the Act from being defeated ... Their Lordships do not doubt that it would be open to the Dominion Parliament to deal with such matters as part of 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.[119]

However, the Privy Council recognized that in the matter before them, there was no federal bankruptcy law. The absence of federal legislation clearly influenced the decision of the Privy Council:[120]

But it does not follow that such subjects, as might properly be treated as ancillary to such a law and therefore within the powers of the Dominion Parliament, are excluded from the legislative authority of the provincial legislature when there is no bankruptcy or insolvency legislation of the Dominion Parliament in existence.[121]

For constitutional scholars, the importance of the ruling was the clear statement that the federal government, in exercising its bankruptcy power, might deal with matters that would otherwise be within the competence of the provinces. Writing in 1894, Lefroy argued that in this aspect of the ruling the Privy Council had carried out 'the intention of the framers of the [British North America] Act]'.[122] The case according to Lefroy was one of the 'first instances of the Dominion Parliament "scoring" before the Privy Council'.[123] However, what mattered more to creditors was the fact that the Privy Council had not invalidated the provision of the Ontario statute. The decision enabled the provinces to continue on the path of provincial reform and removed the immediate need for federal reform.

The decision actually preceded the introduction of the 1894 federal reform Bill. On the first reading of the Bill, the government admitted in reply to a question that it had not yet received an official copy of the decision and did not have any further information than the brief press reports.[124] By the next time the Bill came up for debate, Members of Parliament quoted lengthy passages from the decision.[125] Once the tenor of the decision became known, it spelled the end for the federal Bill. It was urged that federal reforms be delayed for at least another 12 months to allow provinces to enact legislation in accordance with the decision of the Privy Council.[126]

After the *Voluntary Assignments Case*,[127] attention in Parliament shifted to the ability of the provinces to regulate the matter. The special needs,[128] or 'the peculiar circumstances which may locally exist' could be accommodated by provincial legislation.[129] The interests of all were best served by the provinces exercising their jurisdiction over property and civil rights.[130] In 1895, a Senator relied upon the Privy Council decision to oppose the re-introduction of a national bankruptcy Bill in the Senate on the basis that the provincial reform path should be allowed to continue.[131] Charles Tupper, Canada's High Commissioner to England and later the Prime Minister who led the Tories to defeat in 1896, told the British Empire League on 4 December 1895 that 'the recent decision of the Privy Council ... seems to have had the effect of stimulating local legislation on insolvency'.[132] New Brunswick enacted preference legislation in 1895 followed by Nova Scotia in 1898.[133]

The election of the Laurier government in 1896 further strengthened the provincial cause. Laurier restored the tradition of federal non-involvement and allowed provincial reforms to take their natural course. By 1899 Laurier's government was systematically tracking the evolution of provincial legislation.[134] The Laurier administration was determined to prove that provincial legislation was adequate. In 1902, W S Fielding, the Minister of Finance, wrote to Charles Fitzpatrick, the Minister of Justice, and inquired as to the state of provincial law. In his letter, Fielding referred to prior British complaints about cases where English creditors had 'suffered severely' in the Maritime provinces:

Since that time, Provincial legislation respecting preferential assignments, &c, has, I think, largely, if not wholly, removed the difficulty. My impression is that the Provincial laws now cover the ground pretty fully.[135]

Laurier used the pending reforms in the provinces as the reason for bowing out of the field.[136] In 1898, in response to the introduction of another private members' bankruptcy Bill, Laurier referred to the superior state of Quebec provincial law respecting insolvency. He argued that if other provinces followed, then there would be no need for the federal government to legislate in the area.[137] By 1903, with provincial reforms firmly entrenched, there was no reason to press on with endless debates at the federal level. Laurier ended the debate on the 1903 Bill with a statement that left the matter clearly to the provinces:

but since the matter has been brought to the attention of the House, most of the provinces have amended their laws with regard to insolvent estates and I understand that these are now pretty satisfactory except in one or two provinces. It is to be hoped that the provinces themselves will attend to this kind of legislation, and adopt laws of such a character as to be acceptable.[138]

The ruling in *Voluntary Assignments* did not preclude federal action. Conversely, it clearly stated the wide ambit of the federal bankruptcy and insolvency power. The decision, however, did offer the federal government a choice. By upholding the validity of the Ontario statute and enabling the provinces to regulate debtor-creditor matters in the absence of federal bankruptcy law, the ruling permitted the federal government to maintain the status quo of non-involvement. After 1903, no further bankruptcy reform Bills were debated at the federal level until 1918.

IV CONCLUSION

Although the drafters of the *British North America Act* included bankruptcy and insolvency as a federal power, efforts to enact a permanent national bankruptcy regime after Confederation ended in failure with the repeal of the *Insolvent Act* in 1880. The failure of Parliament to reinstate a national bankruptcy law until after World War I is perhaps hardly surprising. The overwhelming negative reaction to the two*Insolvent Acts* of 1869 and 1875 most likely 'poisoned the legislative well for years'.[139] The inability to agree on the general principle of whether to have a bankruptcy law at all continued to plague Parliament during this era. Indeed, the variety of federal proposals (which ranged from (i) a bankruptcy law without a discharge; (ii) a bankruptcy law relying upon provincial legislation to distribute assets; or (iii) no bankruptcy law) made a stable outcome unlikely. David Skeel's recent work on the history of US Bankruptcy law demonstrates that where lawmakers hold a multiplicity of views on a single subject, irrational or unstable outcomes are likely.[140] However, this raises the questions of why multiple views existed and why did the no bankruptcy option prevail for such a long period?

The continued absence of a Canadian bankruptcy statute during this period contrasts with the landmark reforms in England in 1883 and the United States in 1898. The much smaller and

lesser-developed Canadian economy might explain the lack of a national bankruptcy law during this period. On the other hand, it was clear that many were thinking along the lines of a more national economic vision. The pleas of foreign creditors and urban Boards of Trade must have provided Parliament with compelling reasons to enact a national and uniform bankruptcy law. If there were signs of creditors with a more national economic vision, other factors impeded reform. Broad economic factors and trends, such as the rate of economic growth are certainly part of the explanation but they do little to explain why legislation was repealed or enacted at a particular time.[141]

It is important to acknowledge the significance of institutions as having an influence on policy direction. The debates over the future of bankruptcy reform took place within the important institutional context of Canadian federalism and an emerging regulatory state. Both of these factors had an independent effect upon the legislative history. First, the absence of a strong government department and bureaucracy inhibited the implementation of uniform legislation. Unlike England, which had a civil service and new government department to support the 1883 *Bankruptcy Act*, bankruptcy law did not interest the Canadian Department of Justice and most reform initiatives came from the private sector. By the time the federal government actually put forward a bill in 1894, the constitutional ruling of the Privy Council removed the need to proceed further.

Constitutional law therefore played an additional role in the evolution of bankruptcy and insolvency law between 1880 and 1903. Despite the clear constitutional grant of power over bankruptcy and insolvency to the federal Parliament, between 1880 and 1903 it was not certain whether federal or provincial legislation would prevail in the regulation of insolvent debtors. After repeal of the *Insolvent Act* Parliament continued to debate a series of reform bills. Similarly the provinces also began to introduce legislation, which attempted to ameliorate the effects of repeal. However, provincial legislation was slow to emerge and many regions tolerated preferences until the end of the century. The inadequacy of provincial legislation in many respects kept pressure on Parliament to re-enter the field. Indeed, until the Privy Council ruled in 1894, many doubted the validity of the provincial legislation that had been enacted to fill the void after Parliament repealed the *Insolvent Act.* Boards of trade continued to draft reform bills throughout this period in the absence of government interest.

The ability of the provinces to pass debtor-creditor legislation provided the federal government with a valid excuse not to proceed with federal legislation. Constitutional uncertainty, particularly between 1886 and 1894, inhibited reforms both at the federal and provincial level. Once the Privy Council ruled in 1894, it was open for the remaining provinces to put reforms in place. In 1903, when Prime Minister Laurier shut the door on further federal reform initiatives, his decision to do so was justified on the basis that many of the provinces had legislation that adequately dealt with insolvent estates. The possibility of a provincial solution removed the immediate need for reform during this period. After 1903, no further bankruptcy Bills were debated in Parliament until 1918. The defects in the provincial law and the limits of provincial

jurisdiction would ultimately revive the debate over bankruptcy law during WWI. By that time, new powerful interest groups, such as the Canadian Bar Association and the Canadian Credit Men's Trust Association emerged to take up the cause for reform and convinced an expanding federal government to regulate this important subject matter on a national basis.[142]

Appendix 1

Federal Reform Bills 1880-1903

1880 (2nd Sess 4th Parl)

Bill 101 *To provide for the Distribution of the Assets of Insolvent Debtors*

1882 (4th Sess 4th Parl)

Bill C-136 *To Provide for the Equitable Distribution of Insolvent Estates*

Bill C-137 *For the Discharge of Past Insolvents*

1883 (1st Sess 5th Parl)

Bill C-8 *To Provide for the Discharge of Past Insolvents*

Bill C-9 *For the Equitable Distribution of Insolvents' Estates*

Bill C-99 *To Provide for the Distribution of the Assets of Insolvent Traders*

1884 (2nd Sess 5th Parl)

Bill C-71 *To Provide for the Distribution of the Assets of Insolvent Debtors*

Bill C-79 *For the Equitable Distribution of Insolvents' Estates*

1885 (3rd Sess 5th Parl)

Bill C-4 *To Provide for the Distribution of Assets of Insolvent Debtors*

Bill C-32 *Respecting Insolvency*

Bill C-33 *For the Equitable Distribution of Insolvent Estates*

Bill C-34 *For the Discharge of Past Insolvents*

1886 (4th Sess 5th Parl)

Bill C-93 *To Provide for the Distribution of the Assets of Insolvent Debtors*

Bill C-71 *For the Discharge of Insolvent Debtors whose Estates have been Distributed Ratably Among their Creditors*

1887 (1st Sess 6th Parl)

Bill C-9 *For the Discharge of Insolvent Debtors whose Estates have been Distributed Ratably Among their Creditors*

1894 (4th Sess 7th Parl)

Bill S-C *Respecting Insolvency*,

Bill C-152 *Respecting Insolvency*

1895 (5th Sess 7th Parl)

Bill S-A *Respecting Insolvency*

1898 (3rd Sess 8th Parl)

Bill C-84 *Respecting Insolvency*

1903 (3rd Sess 9th Parl)

Bill C-53 *Respecting Insolvency*

---

[*] See: Douglas G Baird, 'A World without Bankruptcy' (1987) 50 *Law and Contemporary Problems* 173.

[**] Associate Professor of Law, University of Western Ontario. An earlier version of this paper was presented at the Annual Conference of the Australian and New Zealand Law & History Society: Law's Enterprise, Law and the Economy in History, Katoomba, New South Wales, 11-13 July 2002. I would like to acknowledge the research assistance provided by Katharine Ho.

[1] *Insolvent Act of* 1869, SC 1869, c 16.

[2] *Insolvent Act of* 1875, SC 1875, c 16.

[3] *An Act to Repeal the Acts Respecting Insolvency Now in Force in Canada,* SC 1880, c 1. In 1919, Parliament passed the *Bankruptcy Act*, SC 1919, c 36. See: Thomas G W Telfer, 'The Canadian Bankruptcy Act of 1919: Public Legislation or Private Interest?' (1994-95) 24 *Canadian Business Law Journal* 357.

[4] See: V Markham Lester, *Victorian Insolvency: Bankruptcy, Imprisonment for Debt, and Company Winding-Up in Nineteenth-Century England* (1995).

[5] See, eg,: Charles Warren, *Bankruptcy in United States History* (1935); Peter J Coleman, *Debtors and Creditors in America: Insolvency, Imprisonment for Debt, and Bankruptcy, 1607-1900*(1974); David A Skeel, *Debt's Dominion: A History of Bankruptcy Law in America* (2001). Australia also provides an interesting contrast. The Commonwealth Parliament first exercised its jurisdiction over bankruptcy and insolvency in 1928. Previously, New South Wales, Victoria, Western Australia and South Australia had enacted legislation based upon the English *Bankruptcy Act* of 1883 while Queensland and Tasmania had legislation based upon the English *Bankruptcy Act* of 1869. See: D Rose, *Australian Bankruptcy Law* (10th ed, 1994) 17-18.

[6] Coleman, above n 5, 248.

[7] Richard C Sauer, 'Bankruptcy Law and the Maturing of American Capitalism' (1994) 55 *Ohio State Law Journal* 291, 330-335.

[8] See: H H Shelton, 'Bankruptcy Law, Its History and Purpose' (1910) 44 *American Law Review* 394; Nicholas A Aminoff, 'The Development of American and English Bankruptcy Legislation – From a Common Source to a Shared Goal' (1989) 10 *Statute Law Review* 124; Robert C Clark, 'The Interdisciplinary Study of Legal Evolution' (1981) 90 *Yale Law Journal* 1238; Sauer, above n 7, 291. The role of interest groups under public choice theory is emphasised by Skeel's text. See: Skeel, above n 5, 14.

[9] Alan Watson, 'Legal Change: Sources of Law and Legal Culture' (1983) 131 *University of Pennsylvania Law Review* 1121, 1123.

[10] See, eg,: R Kent Weaver and Bert A Rockman (eds), *Do Institutions Matter?: Government Capabilities in the United States and Abroad* (1993). For an overview of historical literature in this area, see: D Ernst, 'Law and American Political Development 1877-1938' (1998) 26 *Review in American History* 205. See also Bradley Hansen, 'Commercial Associations and the Creation of a National Economy: The Demand for Federal Bankruptcy Law' (1998) 72 *Business History Review* 86.

[11] On the capacity of the political system, see David Brian Robertson, 'Politics and the Past: History, Behavioralism, and the Return to Institutionalism in American Political Science' in Eric

H Monkkonen (ed), *Engaging the Past: The Uses of History Across the Social Sciences* (1994) 113. On the importance of state expertise, see: Kent R Weaver and Bert A Rockman 'Assessing the Effects of Institutions' above n 10, 32.

[12] Leslie A Pal, 'Missed Opportunities or Comparative Advantage? Canadian Contributions to the Study of Public Policy' in Laurent Dobuzinskis, Michael Howlett and David Laycock (eds), *Policy Studies in Canada: the State of the Art* (1996) 359, 367 (on the importance of federalism).

[13] Federalism also affected the evolution of American bankruptcy law. See: F Regis Noel, *A History of the Bankruptcy Clause of the Constitution of the United States of America* (1918); Douglass G Boshkoff, 'Limited, Conditional, and Suspended Discharges in Anglo-American Bankruptcy Proceedings' (1982) 131 *University of Pennsylvania Law Review* 69, 111; Thomas E Plank, 'The Constitutional Limits of Bankruptcy' (1996) 63 *Tennessee Law Review* 487. David Skeel argues that in the United States federalism magnified the influence of local and agrarian movements. See: Skeel, above n 5, 39.

[14] *Ontario (AG) v Canada (AG)* [1894] AC 189 (Privy Council).

[15] There are two works devoted exclusively to bankruptcy and the constitution. Albert Bohémier, *La Faillite en Droit Constitutionnel Canadien* (1972); Pierre Carignan, 'La Competence Législative en Matière de Faillite et d' Insolvabilité' (1979) 57 *Canadian Bar Review* 47.

[16] Richard Risk and Robert C Vipond, 'Rights Talk in Canada in the Late Nineteenth Century: "The Good Sense and Right Feeling of the People"' (1996) 14 *Law & History Review* 1, 4; Robert C Vipond, *Liberty & Community: Canadian Federalism and the Failure of the Constitution* (1991) 6-10, 15-45; G Blaine Baker, 'The Province of Post-Confederation Rights' (1995) 45 *University of Toronto Law Journal* 77.

[17] *Constitution Act, 1867* (UK) 30 & 31 Vict, c 3, s 91(21), reprinted in RSC 1985, App II, No 5 [*British North America Act*].

[18] Ibid ss 92(13), 92(16).

[19] See, eg,: *Shields v Peek* (1883) 8 SCR 579; Lester, above n 4, 8.

[20] Lester, above n 4, 37-38.

[21] See, eg,: *Beekman v Jarvis* (1847) 3 UCR 280 (Queen's Bench); *Topping v Joseph* (1859) 1 UCE & A 292; *Rowe v Jarvis* (1863) 13 UCCP 495; *Bank of Montreal v Munro* (1864) 23 UCR 414 (Queen's Bench). See: Lyman Robinson, 'Distribution of Proceeds of Execution: An

Examination of the Common Law, Creditors' Relief Legislation, Modern Judgment Enforcement Statutes and Proposals for Reform' (2003) 66 *Saskatchewan Law Review* 309, 310. For an illustration of the 'race of diligence' in the United States see: Edward J Balleisen, *Navigating Failure: Bankruptcy and Commercial Society in Antebellum America* (2001) 82.

[22] Section 155 provided that it was to only remain in force for four years. The law was extended in 1873 and again in 1874: SC 1873, c 42; SC 1874, c 46. The brief overview of the 1869 and 1875 Acts is drawn from Thomas G W Telfer, 'Access to the Discharge in Canadian Bankruptcy Law and the New Role of Surplus Income: A Historical Perspective' in Charles E F Rickett and Thomas G W Telfer (eds), *International Perspectives on Consumers' Access to Justice* (2003) 231.

[23] James D Edgar, *The Insolvent Act of 1869: with Tariff Notes, Forms, and a Full Index* (1869) 38.

[24] See: *Insolvent Act* of 1869, SC 1869, c 16, ss 86-93. These provisions were carried forward into the 1875 Act. See: *Insolvent Act* of 1875, SC 1875, c 16, ss 130-137.

[25] *Insolvent Act* of 1869, SC 1869, c 16, ss 94, 98, 101. See: *Austin v Gordon* (1872) 32 UCR 621 (Queen's Bench).

[26] C Beausoleil, *La Loi de Faillite* (1877) 2.

[27] Hugh MacMahon, *The Insolvent Act of 1875* (1875) reviewed in (1875) 11 *Canada Law Journal (New Series)* 259.

[28] Canada, *House of Commons Debates*, 19 February 1875, 239; Canada, *House of Commons Debates*, 10 March 1875; Canada, *House of Commons Debates*, 25 March 1875.

[29] Ivan Wotherspoon and C H Stephens, *The Insolvent Act of 1875: with the Rules of Practice and Tariffs of Fees in Force in the Different Provinces of the Dominion* (1875) vi.

[30] *Insolvent Act* of 1875, SC 1875, c 16, ss 3, 4, 9.

[31] Wotherspoon and Stephens, above n 29, vii.

[32] Canada, *House of Commons Debates*, 26 February 1877, 292.

[33] Ibid 293. See: 'Some Provisions of the New Insolvent Act' *Monetary Times* (3 September 1875) 265.

[34] On the amendments see: *Insolvent Act* of 1877, SC 1877, c 41, ss 14, 15. Bruce Mann's new work has demonstrated that the US *Bankruptcy Act* of 1800, which on its face provided for only

an involuntary regime, 'created, in practice if not in law a voluntary bankruptcy system'. Bruce Mann, *Republic of Debtors: Bankruptcy in the Age of American Independence* (2002) 228.

[35] In 1878, another repeal Bill was introduced but did not pass: Canada, *House of Commons Debates*, 18 February 1878, 349.

[36] See: Bills presented on 19, 20 February 1879, and 3, 4 March 1879: Canada, *House of Commons Debates* 19, 20 February 1879 and 3, 4 March 1879, 41, 48, 107, 126.

[37] See: Canada, *Debates of the Senate*, 11 March 1880, 152 (Hon Mr Dickey). The Senate voted 47-17 in favour of repeal. Canada, *Debates of the Senate*, 1 April 1880, 219 (royal assent). See: *An Act to Repeal the Acts Respecting Insolvency Now in Force in Canada*, SC 1880, c 1.

[38] SO 1880, c 10. Canada, *Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation* (1970) 14 (commenting on the timing of the Ontario legislation with the repeal of the federal law) ['*Study Committee Report'*]. On the origins of the Creditors Relief Acts see: Robinson, above n 21, 316 (noting the coincidence between the passing of the Ontario statute and the repeal of the federal *Insolvent Act* of 1875).

[39] See: *In Re Assignments and Preferences Act, Section 9* (1893) 20 OAR 489, 501 (MacLennan J). See: 'Creditors Relief Act' *Monetary Times*, 27 February 1880, 1019; 'Creditors Relief Act'*Monetary Times*, 26 March 1880, 1144 for further details of procedural aspects of this act.

[40] 'Creditors' Relief Act' *Monetary Times*, 19 March 1880, 1111.

[41] Canada, *House of Commons Debates*, 5 May 1887, 283 (Mr Edgar). See: *Administration of Justice Act, 1884* SO 1884, c 10, s 3 (Assented to 25 March 1884).

[42] 'Without a Bankruptcy Law' *Monetary Times*, 16 July 1880, 67.

[43] 'What Law Instead of the Insolvent Act?' *Monetary Times*, 9 April 1880, 1201.

[44] Ibid.

[45] Quebec law was not in need of reform as existing civil law provided for a distribution of the debtors' assets. See: Lewis Duncan, *The Law and Practice of Bankruptcy in Canada* (1922) 20; Canada,*House of Commons Journals* 'Third Report of the Select Committee on Bankruptcy and Insolvency' (17 April 1868) 8. See also: D E Thomson, 'Bankruptcy Legislation in Canada' (1902) 1 *Canadian Law Review* 173, 176. PEI has never enacted a Creditors' Relief Act. See: Robinson, above n 21, 317.

[46] Manitoba: *The Queen's Bench Act, 1895*, SM 1895, c 6; British Columbia: *Creditors' Relief Act*, SBC 1902, c 17; Nova Scotia: *Creditors' Relief Act*, SNS 1903 c 14; New Brunswick: *Creditors' Relief Act,* SNB 1902, c 3; Saskatchewan: *The Creditors' Relief Act,* RSS 1909, c 63; Alberta: *Creditors' Relief Act*, SA 1910 (2nd Sess) c 4; North West Territories, SNWT 1893, Ord No 25. See: Ontario Law Reform Commission, *Report on the Enforcement of Judgment Debts and Related Matters* (Part V, 1983) 7.

[47] 'Bankruptcy Legislation' *Monetary Times*, 24 April 1880, 1199. See also: 'Distribution of Insolvent Estates' (2 May 1884) *Journal of Commerce* 600 for further criticisms of the Ontario *Creditors' Relief Act*.

[48] SO 1885, c 26. The Act was amended by SO 1886, c 25; SO 1887, c 19, and consolidated as RSO 1887, c 124. See also: *Report of the Study Committee*, above n 38, 15; Duncan, above n 45, 21.

[49] Prior legislation was enacted by the Province of Canada in 1858. Bohémier, above n 15, 110.

[50] *Report of the Study Committee*, above n 38, 15-16; 'Bankruptcy Legislation' above n 47, 1199.

[51] Duncan, above n 45, 21-22.

[52] *An Act Respecting Assignments For the Benefit of Creditors*, SO 1885, c 26; SM 1886, c 45; SNWT 1888, No 49; SBC 1890, c 12; SNB 1895, c 6; SNS 1898, c 11; SPEI 1898, c 4; SS 1906, c 25; SA 1907, c 6. See: Duncan, above n 45.

[53] D E Thomson, 'The Proposed Bankruptcy Bill' (1883) 3 *Canadian Law Times* 559, 560.

[54] 'Insolvency Legislation' *Journal of Commerce* (13 May 1887) 1060.

[55] See Appendix.

[56] S W Jacobs, 'A Canadian *Bankruptcy Act* – Is it a Necessity?' (1917) 37 *Canadian Law Times* 604, 605, 606.

[57] See Appendix .

[58] For a more detailed review of this debate, see: Telfer, above n 22.

[59] E R C Clarkson, *Bankruptcy Legislation* (1885) 8, 14; T G McMaster, 'A Dominion *Insolvency Act*' (1899-1900) 7 *Journal of the Canadian Bankers' Association* 129,

133. See also: Canada,*House of Commons Debates*, 18 May 1903, 3250 (Mr T S Sproule, East Grey); 'Bankruptcy Legislation' (23 December 1892) *Journal of Commerce* 985.

[60] See, eg,: Thomas Ritchie, *The Fallacy of Insolvency Laws and Their Baneful Effects* (1885). Two Ontario courts accepted that moral obligation was sufficient consideration to support a reaffirmation agreement after the discharge. See: *Austin v Gordon* (1872) 32 UCR 621 (Queen's Bench); *Adams v Woodland* (1878) 3 OAR 213.

[61] Between 1880 and 1885, 11 Bills were introduced into the House of Commons. Of the 11, six Bills did not contain a discharge provision. Letter from E B Greenshields, President of Montreal Board of Trade to Editor of *Journal of Commerce*, 11 January 1893, in 'Bankruptcy Legislation' (20 January 1893) *Journal of Commerce* 101.

[62] Thomson, above n 53. For further details of the United Board of Trade Bill, see: 'The Proposed Bankruptcy Bill' (1883) 3 *Canadian Law Times* 572; 'The Proposed Bankruptcy Bill' (1884) 4*Canadian Law Times* 62.

[63] 'Insolvency' *Monetary Times*, 12 January 1882, 767. For a supportive reply to this editorial, see Letter from Creditor to Editor of *Monetary Times* in *Monetary Times*, 19 January 1882, 801. See also: 'Bankruptcy Laws' *Monetary Times*, 31 March 1882, 1206; Circular from Henry Darling, President of Toronto Board of Trade to Members of Parliament, reprinted in 'Insolvency Legislation' (11 May 1885) *Journal of Commerce* 645.

[64] The conflict between local and distant creditors is explored in US literature. See: Tony A Freyer, *Producers versus Capitalists: Constitutional Conflict in Antebellum America* (1994) 9, 11, 21, 38, 85-87 (exploring the conflict between the local 'associational economy' and corporate and mercantile enterprises tied more directly into the national market).

[65] For a discussion of the US experience and the problem of preferential payments to local and family creditors, see: Balleisen, above n 21, 90-94; Charle J Tabb, 'A Century of Regress or Progress? A Political History of Bankruptcy Legislation in 1898 and 1998' (1999) 15 *Bankruptcy Developments Journal* 343, 357 (national law neutralized advantages of creditors receiving preferential payments); Skeel, above n 5, 36; Mann, above n 34, 48-49.

[66] 'Reform in Bankruptcy Laws' *Monetary Times*, 12 November 1897, 637. See: R T Naylor, *The History of Canadian Business* (1867-1914) (1975) vol I, 82 (Naylor argues that British wholesale houses lost large sums after the repeal of the federal legislation.); 'Interesting Paper on the Subject of Insolvency' *Toronto Mail* (Toronto) 23 April 1881, 10 in *Macdonald Papers* (Ontario Archives) MG 335, Reel 10, No 11059.

[67] Petition, 22 June 1881, in *Macdonald Papers*, Public Archives of Canada [hereinafter PAC] MG 26A, Reel c-1497, No 11056. See also: Reel c-1568 No 66364-66369 and *Monetary Times* 8

July 1881, 42. For other relevant English correspondence, see Thomas G W Telfer, *Reconstructing Bankruptcy Law in Canada: 1867-1919, From an Evil to a Commercial Necessity* (SJD thesis, University of Toronto, 1999) 283-285.

[68] 'Proposed Canadian Insolvency Legislation' *Monetary Times* 4 July 1902, 15; 'That creditors and especially those at a distance are practically at the mercy of the debtor, experience having shown that there is no available means of preventing debtors from disposing of all their assets by preferential payments or otherwise favoured Canadian Creditors.' Memorial from Trade Association of Manchester to Prime Minister Macdonald, 16 May 1884, in *Macdonald Papers* PAC MG 26A, Reel c-1497, No 11004 and 11005.

[69] See, eg,: Letter from European Exporters' Association of Toronto to Prime Minister Laurier, 17 May 1899. The Association was formed to protect the interests of British Exporters doing business with Canada: *Laurier Papers* PAC MG 26, Reel c-765, No 33672. See letter from The Corporation of Colonial and General Agencies to Laurier, 4 July 1902, in *Laurier Papers* PAC MG 26, Reel c-794, No 66354.

[70] Resolution of British Empire League, requesting a law abolishing preferences and providing for a *pro rata* distribution. The British Empire League, *Canadian Insolvency Legislation: Report of Meeting of the League held on Wednesday, December 4th, 1895 – including a Statement by the Hon Sir Charles Tupper* (1895) 10. 'Canadian Insolvency Legislation' *Monetary Times*, 17 January 1896, 916.

[71] 'Without an Insolvency Act' *Monetary Times*, 23 May 1884, 1314. See also: letter from the Montreal Board of Trade to Prime Minister Laurier 10 March 1899, in *Laurier Papers* PAC MG 26, Reel c-752, No 18597.

[72] *Monetary Times*, 8 July 1881, 42. Canada, *House of Commons Debates*, 6 February 1885, 47 (Sir John A Macdonald, Prime Minister). See also 'Insolvency Legislation' (18 February 1898) *Journal of Commerce* 242 (outlining the various efforts of English merchants).

[73] Canada, *House of Commons Debates*, 6 February 1885, 47 (Sir John A Macdonald, Prime Minister).

[74] Robertson, above n 11, 113. For full references to the Department of Justice correspondence referred to below see: Telfer, above n 67, 218-220. On the 1899 memo tracking provincial legislation, see:*Department of Justice Papers* PAC RG 13, Vol 2310, File 23/1902.

[75] Canada, *House of Commons Debates*, 6 March 1883, 121 (Mr Casey). See also: 'Insolvent Estates' (15 October 1880) *Journal of Commerce* 276 (urging the government to have its own policy rather than allow private members to introduce bills).

[76] B Russell, 'Provisions of the British North America Act for Uniformity of Provincial Laws' (1898) 34 *Canada Law Journal* 513, 525.

[77] Canada, *Debates of the Senate*, 15 March 1894, 4.

[78] Bill C-152, *Respecting Insolvency*, 4th Sess, 7th Parl, 1898; See also: G H Stanford, *To Serve the Community: The Story of Toronto's Board of Trade* (1974) 62; Jacobs, above n 56, 606. See also: British Empire League, above n 70, 5.

[79] The 1895 Bill was introduced 29 April 1895 in the Senate as Bill S-A, *Respecting Insolvency*, 5th Sess, 7th Parl, 1895.

[80] See Lester, above n 4, 207-213, 221, 304 (discussing the role of the civil service).

[81] See R C B Risk, 'Lawyers, Courts, and the Rise of the Regulatory State' (1984) 9 *Dalhousie Law Journal* 31, 33.

[82] 'Bankruptcy' (14 March 1890) *Journal of Commerce* 592: 'The Dominion government has practically abandoned one of its chief prerogatives to the provinces.'

[83] 'Faulty Insolvency Legislation' (19 April 1899) *Journal of Commerce* 655; 'Faulty Insolvency Legislation II' (26 April 1899) *Journal of Commerce* 693. See also: 'Federal Insolvency Legislation'*Monetary Times*, 6 October 1905, 429-30.

[84] 'Federal Insolvency Legislation' above n 83.

[85] 'Bankrupt Laws' *Monetary Times*, 3 December 1880, 640.

[86] Canada, *House of Commons Debates*, 17 March 1898, 2024 (Mr Monk); 'Insolvency' *Monetary Times*, 19 January 1883, 795.

[87] Darling, above n 63; 'Bankruptcy Legislation' *Monetary Times*, 20 March 1885, 1058; 'Insolvencies in Canada' *Monetary Times*, 2 July 1885, 13-14.

[88] Letter from John A Macdonald to W J Patterson, Montreal Board of Trade, 24 February 1882, in *Macdonald Papers* PAC MG 26A, Vol 21, Reel c-33, No 664-666.

[89] Canada, *House of Commons Debates*, 6 March 1883, 119 (Sir John A Macdonald, Prime Minister).

[90] See a report of the meeting in 'Insolvency Legislation' (29 August 1884) *Journal of Commerce* 308.

[91] 'Sir John A Macdonald on Canadian Commercial Relations' *The Times* (London, UK) undated, in *Macdonald Papers* PAC MG 26A, Vol 165, No 67380-67381 file dated 28 November 1885.

[92] Under the *BNA Act*, disallowance is, in the words of Vipond, 'a sweeping veto power which gives the federal government the unqualified right to strike down or nullify any act of a provincial legislature within one year of its passage'; Vipond, *Liberty & Community,* above n 16, 114.

[93] John S D Thompson, 'Report of the Honourable Minister of Justice, approved by His Excellency the Governor-General in Council on the 6th March, 1886' in W E Hodgins, *Correspondence, Reports of the Minister of Justice and Orders in Council upon the subject of Dominion and Provincial Legislation: 1867-1895* (1896) 199.

[94] In W E Hodgins, above n 93, see: Thompson, above n 93 15th March, 312; A Campbell, 'Report of the Honourable Minister of Justice, approved by His Excellency the Governor-General in Council on the 4th April, 1885', 522; Thompson, 'Report of the Honourable Minister of Justice, approved by His Excellency the Governor-General in Council on the 25th April, 1887' above n 93, 854.

[95] See, eg,: *Clarkson v Ontario Bank* [1887] 13 OR 666.

[96] A H F Lefroy, 'The Privy Council on Bankruptcy' (1894) 30 *Canadian Law Times* 182, 186.

[97] See Canada, *House of Commons Debates*, 4 May 1887, 272-73.

[98] *Clarkson v Ontario Bank* [1888] 15 OAR 167; *Edgar v Central Bank of Canada* [1888] 15 OAR 193; *Kennedy v Freeman* [1888] 15 OAR 216; *Hunter v Drummond* [1888] 15 OAR 232. For a discussion of these cases, see: 'Is the Act Respecting Assignments for Creditors Constitutional?' *Monetary Times*, 30 March 1888, 1221.

[99] *Edgar v Central Bank of Canada* [1888] 15 OAR 193, 204.

[100] 'Is the Act Respecting Assignments for Creditors Constitutional?' above n 98.

[101] 'The Creditors' Relief Act' *Monetary Times*, 4 May 1888, 1365. See also: 'The Creditors' Relief Act − Is it Constitutional?' *Monetary Times*, 7 May 1880, 1321.

[102] 'A General Insolvency Act' (3 July 1891) *Journal of Commerce* 17, 18.

[103] E D Armour, 'The Constitution of Canada: Part II' (1891) 11 *Canadian Law Times* 233, 244.

[104] Ibid.

[105] 'Report of the Honourable Minister of Justice, approved by His Excellency the Governor General in Council on the 7th June, 1888' above n 93, 205. The constitutionality of provincial legislation was also being tested in Manitoba where the Manitoba Court of Appeal upheld the validity of the Manitoba assignments legislation: *Stephens v McArthur* [1890] 6 Man LR 496; Bohémier, above n 15, 111.

[106] *Union Bank v Neville* [1891] 21 OR 152.

[107] 'A General Insolvency Act' (3 July 1891) *Journal of Commerce* 17; Bohémier, above n 15, 113.

[108] 'Assignments for the Benefit of Creditors' *Monetary Times*, 25 August 1893.

[109] *In Re Assignments and Preferences Act, Section 9* (1893) 20 OAR 489, 489. For a brief reaction to this case, see: 'The Assignments Act' (1893) 13 *Canadian Law Times* 125.

[110] *In Re Assignments and Preferences Act,* above n 109, 498.

[111] 'The *Assignments* Act' above n 109.

[112] Ibid.

[113] Letter, 12 May 1893, in *Department of Justice Files* PAC RG13, Vol 2374, File 198/1893.

[114] Ibid 20 May 1893.

[115] Ibid letter from the Attorney-General of Ontario to Mr Christopher Robinson, 3 November 1893.

[116] See: John T Saywell, *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism* (2002) 130.

[117] Lefroy, above n 96, 182.

[118] *AG of Ontario v AG for Canada* [1894] AC 189, 200 (Privy Council).

[119] Ibid 200-201.

[120] Hogg argues that the Privy Council was 'explicitly influenced by the absence of any federal legislation': Peter W Hogg, *Constitutional Law of Canada* (loose-leaf ed,) 25-13. See also: Saywell, above n 116, 130: Privy Council 'undoubtedly influenced by the absence of federal legislation'.

[121] *AG of Ontario v AG for Canada* [1894] AC 189, 201.

[122] Lefroy, above n 96, 190.

[123] Ibid 193.

[124] Canada, *Debates of the Senate*, 3 April 1894, 97 (Hon Mr Bowell in response to Hon Mr Gowan).

[125] Canada, *Debates of the Senate*, 17 April 1894, 246-247.

[126] Ibid 233 (Hon Mr Dickey).

[127] *AG of Ontario v AG for Canada* [1894] AC 189 (Privy Council).

[128] British Empire League, above n 70, 5.

[129] Canada, *Debates of the Senate*, 3 April 1894, 239 (Hon Mr McClelan).

[130] Ibid.

[131] See Canada, *Debates of the Senate*, 29 May 1895, 151 (Hon Mr McClelan).

[132] British Empire League, above n 70, 5.

[133] See above n 53 and accompanying text.

[134] *Department of Justice Papers*, above n 74.

[135] Letter from W S Fielding to Charles Fitzpatrick, 19 February 1902 in *Department of Justice Papers* PAC RG 13, Vol 2311, File 117/1902.

[136] 'Address of the President of the Canadian Bankers' Association – Delivered at the Eighth Annual Meeting of the Association' (1899-1900) 7 *Journal Of the Canadian Bankers' Association* 109, 112.

[137] Canada, *House of Commons Debates*, 17 March 1898 2032 (Sir Wilfred Laurier, Prime Minister). See Canada, *House of Commons Debates*, 1 April 1898 2928 (Sir Richard Cartwright,

Minister of Trade and Commerce). In 1899, Laurier refused to move on federal reform as progress had been made in Nova Scotia and New Brunswick. See: Canada, *House of Commons Debates*, 17 May 1899 3253 (Sir Wilfred Laurier, Prime Minister).

[138] Canada, *House of Commons Debates*, 18 May 1903 3256. The House of Commons voted 74-42 against the reform Bill.

[139] Charles J Tabb, 'A Century of Regress or Progress? A Political History of Bankruptcy Legislation in 1898 and 1998' (1999) 15 *Bankruptcy Developments Journal* 343, 354 (describing a similar failure of the United States to enact a national bankruptcy law after the repeal of the *Bankruptcy Act* of 1867).

[140] Skeel, above n 5, 28.

[141] D Skeel, 'The Genius of the 1898 Bankruptcy Act' (1999) 15 *Bankruptcy Developments Journal* 321, 325 (economic factors tell us little about how expanding commerce translated into a permanent act).

[142] Telfer above n 3. On the importance of the bankruptcy bar to the lasting success of the US 1898 Act see: Skeel, above n 5.
